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Federalist or Friends of Adams: The Marshall Court and Party Politics

At the end of his first year in office, President Thomas Jefferson complained bitterly to a political supporter that "the Federalists have retired into the judiciary as a stronghold." "There," he feared, "the remains of federalism are to be preserved . . . and from that battery all the works of republicanism are to be beaten down and erased."[1] Subsequent Democratic-Republican political efforts to oust the Federalists from this high ground by impeaching hostile justices, appointing friendlier justices, and publicly pressuring the Marshall Court apparently failed. "After twenty years' confirmation of the federated system by the voice of the nation, declared through the medium of elections," Jefferson bemoaned in 1819, "the judiciary on every occasion [is] still driving us into consolidation."[2] The sage of Monticello in his last years repeatedly warned his correspondents that "those who formerly usurped the *name* of federalists" were "almost to a man . . . in possession of [the judicial] branch of the government."[3]

1. Jefferson to John Dickinson, December 19, 1801, *The Writings of Thomas Jefferson,* ed. Andrew A. Lipscomb (Washington, D.C.: Thomas Jefferson Memorial Association, 1903), 10:302. See Jefferson to Joel Barlow, March 14, 1801, *Writings of Jefferson,* 10:223. Jefferson's chief lieutenant in the Senate, William Branch Giles, had six months earlier informed his commander that "[t]he Revolution [Republican success in 1800] is incomplete so long as that strong fortress [the Judiciary] is in possession of the enemy." Giles to Jefferson, June 1, 1801, quoted in Albert J. Beveridge, *The Life of John Marshall* (Boston: Houghton Mifflin Company, 1919), 3:22. See James Monroe to Thomas Jefferson, March 3, 1801, *The Writings of James Monroe,* ed. Stanislaus Murray Hamilton (New York: HMS Press, 1969), 3:263–64; Charles Warren, *The Supreme Court in United States History* (Boston: Little, Brown, and Company, 1947), 1:192–94.

2. Jefferson to Judge Spencer Roane, September 6, 1819, *Writings of Jefferson,* 15:212. See Jefferson to James Bowdoin, April 2, 1807, *Writings of Jefferson,* 11:186; Jefferson to Caesar Rodney, September 25, 1810, *Writings of Jefferson,* 12:245; Jefferson to Albert Gallatin, September 27, 1810, *Writings of Jefferson,* 12:425; Jefferson to James Madison, October 15, 1810, *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776–1826,* ed. James Morton Smith (New York: W.W. Norton & Company, 1995) 3:1646–47.

3. Jefferson to Robert Garnett, February 14, 1824, *Writings of Jefferson,* 16:14. See Jefferson

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Prominent twentieth century commentators also treat the Marshall Court as the judicial auxiliary of the Federalist Party. Charles Grove Haines insisted that "from 1789 until well on to the end of Marshall's career, the Supreme Court was definitively lined up with the Federal party or point of view."[4] Marshall Court decisions, Vernon Parrington wrote, "embodied every principle of the dogmatic tie-wig school of New England Federalists."[5] The Marshall Court remained Federalist, inherited wisdom proclaims, even when a majority of the justices on that bench were nominally Jeffersonian Republicans. Henry Abraham asserts that "the many years of Jeffersonianism, whatever its success at the nonjudicial policy-making level proved to be, did not reverse the Federalist doctrines of the Marshall Court."[6] "The six men appointed by Jefferson, Madison, and Monroe – all loyal Democratic-Republicans," his seminal study of the judicial confirmation process declares, "entered nary a dissent to the key Federalist rulings of the Marshall Court."[7]

The Marshall Court's major opinions do reiterate themes previously advanced by Alexander Hamilton. *Marbury v. Madison*[8] makes arguments simi-

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to Albert Gallatin, August 2, 1823, *The Works of Thomas Jefferson,* ed. Paul Leicester Ford (New York: G.P. Putnam's Sons, 1905), 12:299–300; Jefferson to Samuel Smith, August 2, 1823, *Works of Jefferson,* 12:301; Jefferson to William Johnson, March 4, 1823, *Works of Jefferson,* 12:279; Jefferson to Henry Dearborn, October 31, 1822, *Works of Jefferson,* 12:264–65. Other Old Republicans voiced similar concerns. See "Somers," "Examination of the Opinion of the Supreme Court in the case of *Cohens vs. the State of Virginia,*" *Richmond Enquirer,* May 15, 1821; Spencer Roane, "'Hampden' Essays," *John Marshall's Defense of McCulloch v. Maryland,* ed. Gerald Gunther (Stanford: Stanford University Press, 1969), 151. See also, Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court,* 3rd ed. (New York: Oxford University Press, 1992), 87; George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801–1815* (New York: MacMillan Publishing Co., Inc., 1981), 312–13; G. Edward White, *The Marshall Court and Cultural Change 1815–1835* (New York: Oxford University Press, 1991), 774–77.

4. Charles Grove Haines, "Histories of the Supreme Court of the United States Written From the Federalist Point of View," *Southwestern Political and Social Science Quarterly* 4 (1923):1, 27. See Haines, "Histories," 20–21, 24–29; Charles Grove Haines, *The Role of the Supreme Court in American Government and Politics* (Berkeley: University of California Press, 1944), 1:42–43, 80, 185, 329–31.

5. Vernon L. Parrington, *Main Currents in American Thought: The Romantic Revolution in America 1800–1860* (New York: Harcourt, Brace & World, Inc., 1927), 2:20. See Marshall Smelser, *The Democratic Republic 1801–1815* (New York: Harper & Row, Publishers, 1968), 18 (John Marshall was "the most important Federalist in the decades" after the election of 1800); Oliver Wendell Holmes, "John Marshall," *James Bradley Thayer, Oliver Wendell Holmes, and Felix Frankfurter on John Marshall* (Chicago: University of Chicago Press, 1967), 132; Haskins and Johnson, *Foundations,* 51, 72–73, 147–48.

6. Abraham, *Justices and Presidents,* 84.

7. Ibid. See Donald M. Roper, "Judicial Unanimity and the Marshall Court – A Road to Reappraisal," *American Journal of Legal History* 9 (April 1965):118, 120; Warren, *Supreme Court,* 1:21–22; Holmes, "John Marshall," 132; Haines, "Histories," 14, 20. See generally, White, *Marshall Court,* 671–80.

G. Edward White argues that the Marshall Court ought to be understood as a republican tribunal. White, *Marshall Court.* White, however, makes no effort to associate what he believes are republican principles with any of the coalitions that struggled for political power during the first third of the nineteenth century.

8. 5 U.S. (1 Cranch) 137 (1803).

lar to those found in *Federalist 78*.[9] *McCulloch v. Maryland*[10] repeats the central theses of Hamilton's defense of the national bank.[11] *Fletcher v. Peck*[12] endorses the theory of the contract clause that Hamilton set out in his defense of the Yazoo land purchase.[13] To the extent that federalism is identified with these Hamiltonian principles, the Marshall Court was a Federalist tribunal. Nothing in this essay challenges the view that Marshall and his colleagues offered constitutional interpretations similar to those Hamilton advanced from 1788 to 1800.

Marshall Court commentators, however, insist that the Marshall Court was federalist both philosophically and politically. Some scholars explicitly assert that the Supreme Court from 1801 to 1835 was consistently aligned with the "Federal party."[14] Others maintain that Marshall consistently opposed the governing Jeffersonian regime.[15] Most commonly, perhaps, scholars casually describe the Marshall Court as "federalist" in ways that indiscriminately identify the court with both a philosophical orientation and a partisan coalition. Such assertions as "the Federalists' continuing dominance of the judiciary, particularly the Supreme Court, did not restrain Jeffersonian policies"[16] assume that American judicial politics during the Jeffersonian era was structured by inherited antagonism between Federalists and Republicans, with the Marshall Court firmly on the side of inherited Federalist principles and the Federalist party.

These explicit or implicit characterizations of the Marshall Court as a Federalist tribunal support conventional claims that judicial review provides an important check on government power. Judicial review presents the so-called "countermajoritarian difficulty," Alexander Bickel famously declared, because "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it."[17] Marshall Court practice apparently provides an exceptionally clear example of this fundamental opposition between judicial review and democratic major-

9. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961), 464–72.

10. 17 U.S. (4 Wheat.) 316 (1819).

11. Alexander Hamilton, "Opinion on the Constitutionality of an Act to Establish a Bank," *The Papers of Alexander Hamilton,* ed. Harold C. Syrett (New York: Columbia University Press, 1965), 8:63–134.

12. 10 U.S. (6 Cranch) 87 (1810).

13. Alexander Hamilton, "Alexander Hamilton's Opinion on the Georgia Repeal Act," in C. Peter Magrath, *Yazoo: Law and Politics in the New Republic: The Case of Fletcher v. Peck* (New York: W.W. Norton & Company Inc., 1966), 149–50.

14. Haines, "Histories," 4. See Parrington, *Main Currents,* 22.

15. See H. Jefferson Powell, "Joseph Story's Commentaries on the Constitution: A Belated Review," *Yale Law Journal* 94 (1985):1285, 1293; Sotirios A. Barber, *The Constitution of Judicial Power* (Baltimore: Johns Hopkins University Press, 1993), 76.

16. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (New Haven: Yale University Press, 1997), 190. See sources cited in nn.4–7, above.

17. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill Company, Inc., 1962), 16.

itarianism. What could be more countermajoritarian than a practice identified with a chief justice who was appointed by a lame duck president, a chief justice who belonged to a party that never came close to winning another national election and disappeared as a viable political force halfway through his term of office?[18] Not surprisingly, populist opponents of judicial review regard the Marshall Court as epitomizing everything wrong with the Supreme Court's power to declare laws unconstitutional. "America," Vernon Parrington wrote,

> had made a definite choice between the Federalist and Republican theories of government. . . . But to this mandate of the supposedly sovereign people Marshall declined to yield. Defeated at the polls, no longer in control of the executive and legislative branches of the government, Federalism found itself reintrenched in the prejudices of John Marshall.[19]

Proponents of judicial review, by contrast, celebrate what they perceive to be the countermajoritarian tendencies of the Marshall Court. "Marshall," Sotirios Barber writes, "had his own understanding of the principles of the regime, and he acted on that understanding, refusing to defer to the dominant political sentiment of his era."[20]

This essay challenges both the identification of the Marshall Court with the Federalist party and the perception of judicial review implicit in that understanding of judicial decisionmaking during the first third of the nineteenth century. Twentieth-century legal commentators forge too tight a link between the Marshall Court and the Federalist Party because they fail to acknowledge how the American political universe disintegrated and was reconstituted during the Jefferson, Madison, and Monroe administrations. The Marshall Court may have adopted Hamiltonian policies and principles, but Hamilton's children did not distinguish themselves in support of that tribunal. Leading Federalists abandoned nationalistic principles during the Embargo of 1807 and the War of 1812. As a result, those who called themselves Federalists from 1809 to 1828 were no more likely than others to approve major Marshall Court decisions.

The leading supporters of the Marshall Court throughout its tenure were associated with those moderate Republican factions that eventually coalesced into the National Republican and Whig Parties during the 1830s. This coalition was composed of three groups: Jeffersonians who became reconciled to commercial policies by 1815, former Adams Federalists who increasingly saw the Democratic-Republican party as the better vehicle for their nationalistic and political ambitions, and westerners who were eager to gain national support for an extensive program of internal improvements. Such political leaders as John Quincy Adams, John C. Calhoun (in his nationalist phase), Henry Clay, and, to a lesser but important extent,

18. See Powell, "Joseph Story's Commentaries," 1293 (discussing "the nationalistic interpretation of the Constitution that the Marshall Court had been upholding often in isolation, during these decades of Republican rule").

19. Parrington, *Main Currents,* 22. See Haines, "Histories," 19–21.

20. Barber, *The Constitution,* 76.

James Madison promoted the federal judiciary as the final arbiter of constitutional debates both because they supported judicial review in general and because they usually favored the specific policies that Marshall Court rulings furthered.

The ebbs and flows of judicial power during the early nineteenth century reflected this close affinity between the justices and moderate Republicanism. The Marshall Court was quite docile during Jefferson's presidency, a period in which major political conflicts still took place between Federalists and Democratic-Republicans. That tribunal enjoyed a golden age from 1809 until 1828 when moderate Republicans controlled either the executive or legislative branches of the national government. When moderate Republicans fell from power in 1828, the Marshall Court pulled in its reins. Virtually all of that tribunal's decisions favoring state power were handed down after Andrew Jackson became the president.

The close relationship between the Marshall Court and moderate Republicanism belies the common perception of judicial review as countermajoritarian from its birth.[21] With one or two important exceptions, Marshall Court decisions did not run counter to the "mandate of the supposedly sovereign people." The practice of judicial review was established in the United States, in part, because the dominant national coalition or crucial members of the dominant national coalition supported the key doctrines of the Marshall Court. Marshall Court opinions typically contained language that many political elites found too extreme. Still, in the vast majority of politically salient cases, that Court ruled in favor of the most politically powerful force interested in the decision.

Describing Marshall Court decisions as majoritarian is almost as mistaken as the countermajoritarian label. Neither Republican nationalists who favored a strong federal judiciary nor Old Republican opponents of broad national power established durable legislative majorities during the second and third decades of the nineteenth century. Their electoral standoff prevented the national government from deciding whether to adopt wholeheartedly the economic programs favored by the Clay/Calhoun/Adams wing of the Democratic-Republic party and the justices sitting on the Marshall Court. The most important judicial rulings handed down between 1809 to 1828 are best understood as efforts to resolve the conflicts that divided members of the dominant national coalition, and not as efforts to revisit the conflicts that divided the governing majority from the political minority. Seen from their proper political perspective, Marshall Court decisions present the nonmajoritarian problem, the problem

21. Even if not countermajoritarian, judicial review may be undemocratic. Justices who serve life terms are not politically accountable to the electorate. Still, both attacks and defenses of judicial review typically emphasize alleged judicial capacities to strike down policies preferred by present majorities, the "representatives of the people of the here and now." Bickel, *Least Dangerous Branch,* 16. This paper demonstrates that the Marshall Court was not countermajoritarian in that sense and that judicial review as a practice was supported by most prominent politicians during the first third of the nineteenth century. Whether judicial review as practiced by John Marshall met other democratic standards is a subject for another essay.

of what judges should do when elected officials cannot decide on the appropriate policy.[22] Nonmajoritarian problems raise tough issues for democratic theorists and constitutionalists, but those issues are different from those discussed in most contemporary discussions of constitutional theory.

Nevertheless, the Marshall Court experience does suggest one important sense in which judicial review is majoritarian. Popularly elected officials played as significant a role in establishing that practice as supposedly unaccountable federal justices. Presidents and legislative majorities during the first third of the nineteenth century helped establish judicial review by actively urging and supporting judicial decisions that struck down state laws inconsistent with desired nationalistic policies, increasing the perks of judicial office,[23] providing courts with the expanded jurisdiction necessary to declare other state laws unconstitutional[24] (while beating back efforts to limit that jurisdiction),[25] and securing the appointment and confirmation of federal justices committed to the continued use of the judicial power to declare laws unconstitutional. The staffing of the Supreme Court is particularly significant. As the availability of jurists on record as opposing most exercises of judicial power, such as Spencer Roane and John Bannister Gibson, indicates, no shortage of candidates for the federal bench existed during John Marshall's tenure as Chief Justice. In short, had electoral majorities wanted to abandon judicial review, judicial review would have been abandoned. Judicial review survived and thrived between 1801 and 1835 (and afterwards) because that practice, as opposed to individual decisions, almost always enjoyed broad majoritarian support. Most political elites supported the judicial power to declare laws unconstitutional in the abstract, and would continue supporting actual exercises of that power as long as the Court did not hand down decisions that significantly constrained the power of popular national majorities.[26] A similar distinction between judicial decisions and judicial review as a practice continues to exist. Many politicians at the dawn of the twenty-first century rail against judicial rulings in particular cases, but no prominent political leader urges the immediate abandonment of judicial review or the appointment to the federal bench of jurists committed to never declaring a law unconstitutional.

In Part I of this essay, I describe the changes that took place in the American political universe when the Marshall Court was sitting, with particular emphasis on the fate of Federalists and Federalism after 1808. In Part II, I place Marshall Court decisions in their partisan contexts. With the

22. Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7 (1993):35, 37.

23. See 3 *U.S. Stat.* 106, 110. 24. See 4 *U.S. Stat.* 632.

25. See Charles Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States – A History of the Twenty-Fifth Section of the Judiciary Act" *American Law Review* 47 (1913):1.

26. See Maeva Marcus, "Judicial Review in the Early Republic," *Launching the "Extended Republic": The Federalist Era,* ed. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1996); Jack N. Rakove, "The Origins of Judicial Review: A Plea for New Contexts," *Stanford Law Review* 49 (1997):1031, 1040–41.

exception of the Burr trial and *Worcester v. Georgia*[27] (which may have resulted from political miscalculations), that section points out that Marshall almost always produced results, though not necessarily opinions, that were congenial to the incumbent administration or legislative majority. Finally, I indicate in Part III how thinking of the Marshall Court as dedicated to the vision of the American polity favored by the "friends of Adams" will advance scholarly understandings of that tribunal and the development of judicial power in the United States.

Most political historians are well aware of the conflicts between Democratic-Republican factions that structured American politics during the first third of the nineteenth century. Richard Ellis, in particular, has documented how moderate Republicans after 1800 increasingly enlisted former Adams Federalists in their struggles against more radical Jeffersonians.[28] Still, owing perhaps to the too rigid segmentation between academic disciplines, fields, and subfields, contemporary students of public law have not yet integrated studies of early American partisan development into their writings on the origin and evolution of judicial review in the United States. If nothing else, I hope to demonstrate that much may be learned about American legal institutions from an old-fashioned study of political parties and political history.

I. THE STRUCTURE OF AMERICAN PARTY POLITICS 1800–1835

A. The Continuity Thesis

Commentators who identify the Marshall Court with the Federalist party implicitly endorse the continuity thesis of nineteenth-century American party politics. This thesis, first promulgated by prominent Jacksonian political publicists, treats antebellum American politics as structured by a struggle between two enduring political coalitions. Martin Van Buren, the leading champion of this position, insisted to his dying day that

> [t]he two great parties of this country with occasional changes in their names only, have, for the principal part of a century, occupied antagonist positions upon all important political questions. They have maintained an unbroken succession, and have, throughout, been composed respectively of men agreeing in their party passion, and preferences, and entertaining, with rare exceptions, similar general views on the subject of government and its administration.[29]

From this perspective, Jeffersonians give birth to Jacksonians, and the proto-Whigs who supported John Quincy Adams in 1824 and 1828 are the direct political descendants of the Federalists who supported John Adams in 1796 and 1800. Given the Marshall Court's affinity for proto-Whig princi-

27. 31 U.S. (6 Peters) 515 (1832).

28. See Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: W.W. Norton & Company, Inc., 1971).

29. Martin Van Buren, *Inquiry into the Origin and Course of Political Parties in the United States* (New York: Hurd and Houghton, 1867), 7.

ples, the link between that Court and its clear Federalist party origins seems obvious.[30]

History supports some elements of Van Buren's conception of American partisan development. The Federalist and Whig parties consistently fared better in New England than in the South; Jeffersonian Republicans and Jacksonian Democrats consistently fared better in the South than in New England. The precise distribution of electoral votes by state in 1828 between Andrew Jackson and John Quincy Adams was almost identical to the distribution of electoral votes in 1800 between Thomas Jefferson and John Adams.[31] Programmatic links also exist between the coalitions that dominated American politics before the Civil War. Both Jefferson and Jackson fought against the expansion of national power and believed the national bank unconstitutional. The American System that Henry Clay made the centerpiece of the Whig program in the 1830s resembled the Hamiltonian program that united Federalists in the 1790s.

Studies of the Marshall Court that work within the continuity thesis, however, rarely examine the details of American political history.[32] Tarring Whigs and proto-Whigs with the Federalist label was a common electoral tactic during the 1820s, 1830s, and 1840s, but Whig leaders vigorously challenged the Jacksonian characterization of their heritage.[33] "The Whigs of 1840," Henry Clay stated in a campaign speech, "stand where the Republicans of 1798 stood."[34] Joseph Story declared that "I seem to myself to have stood still in my political belief, while parties have revolved about me; so that although of the same opinions now as ever, I find my name has changed from Democrat to Whig."[35] The changing alliances among early nineteenth-century political elites supports these ancestral claims. Leading Whigs were as likely to have been Democratic Republicans as Federalists

30. See Robert G. McCloskey, *The American Supreme Court,* 2nd ed. rev. (Chicago: University of Chicago Press, 1994), 55; Haines, "Histories," 21.

31. A. James Reichley, *The Life of the Parties: A History of American Political Parties* (New York: Free Press, 1992), 59, 86–87.

32. The two massive Holmes Devise analyses of the Marshall Court (White, *Marshall Court*; Haskins and Johnson, *Foundations*) in almost 2,000 pages of exegesis only give cursory attention to the development of American party politics during the first third of the eighteenth century. But see Paul A. Freund, "Editor's Foreword," *Foundations of Power: John Marshall, 1801–1815* (New York: MacMillan Publishing Co., Inc., 1981), xiii (noting that "the Federalist and the Jeffersonian Republicans were each riven by internal divisions reflecting sectional and personal attachments"); Haskins and Johnson, *Foundations,* 58–63.

33. See Joel H. Silbey, *The American Political Nation, 1838–1893* (Stanford: Stanford University Press, 1991), 94–104; James Roger Sharp, *American Politics in the Early Republic: The New Nation in Crisis* (New Haven: Yale University Press, 1993), 287.

34. Henry Clay, "Against the Growing Power of the Executive," *The Annals of America* (Chicago: Encyclopedia Britannica, Inc., 1968), 6:568. See Daniel Walker Howe, *The Political Culture of the American Whigs* (Chicago: University of Chicago Press, 1979), 90 ("[b]oth Whigs and Democrats claimed to be heirs of the Republican party of Jefferson"); Powell, "Joseph Story's Commentaries," 1293 n.52, 1300.

35. William W. Story, *Life and Letters of Joseph Story* (Boston: Charles C. Little and James Brown, 1851), 1:540. See Morgan D. Dowd, "Justice Joseph Story and the Politics of Appointment," *American Journal of Legal History* 9 (October 1965):265, 284.

during the Jefferson, Madison, and Monroe administrations. Prominent Federalists in the 1820s were as likely to support Andrew Jackson as John Quincy Adams.[36]

Students of American judicial history will better understand the place of the Marshall Court in American party politics by focusing on the internal divisions within the Democratic-Republican and Federalist coalitions at the time when John Marshall sat on the bench. Richard Ellis has identified four distinct factions, led by Hamilton, Adams, Madison, and Jefferson, respectively, that sought to influence early American national politics.[37] The western factions led by Clay and Jackson that begin to influence national politics during the 1810s must also be included in this list. Once the interplay between these factions is properly appreciated, the Marshall Court seems best identified with the coalition that eventually developed between the supporters of Adams, Madison, and Clay than with the Federalism of Hamilton and Adams.

B. Federalism in 1800

The common association between Marshall and the Federalist party was problematic even in 1801, the year the Chief Justice's thirty-five year reign began. The first problem is institutional. Political historians question whether the coalitions that began to form in Congress during the late eighteenth century are best described as "political parties." Paul Goodman notes that "the early parties were not autonomous institutions, but hastily formed, loose alliances of individuals and groups."[38] The Federalists, in particular, lacked the institutions which characterize a modern political party. Their loss in 1800 and consistent electoral failures thereafter resulted in part from the superior capacity of Jeffersonians to develop and master such embryonic forms of party machinery as party newspapers, party canvassing, and party loyalty.[39]

The Federalist failure in 1800 was also a consequence of the severe split that developed between the Adams and Hamilton wings of that coalition.[40]

36. See nn.93–96, below, and the relevant text.

37. Ellis, *The Jeffersonian Crisis,* 19–25, 53–57.

38. Paul Goodman, "The First American Party System," *The American Party Systems: Stages of Political Development,* ed. William Nisbet Chambers and Walter Dean Burnham (New York: Oxford University Press, 1967), 86. See Goodman, "First American Party System," 57; Gordon S. Wood, *The Radicalism of the American Revolution* (New York: Alfred A. Knopf, 1992), 298; Reichley, *Life of the Parties,* 85; Sharp, *American Politics,* 8–9, 33–34; David Hackett Fischer, *The Revolution of American Conservatism: The Federalist Party in the Era of Jeffersonian Democracy* (New York: Harper & Row, Publishers, 1965), 50–51; Formisano, "Federalists and Republicans," 33–35, 66.

39. See Shaw Livermore, Jr., *The Twilight of Federalism: The Disintegration of the Federalist Party 1815–1830* (Princeton, N.J.: Princeton University Press, 1962), 8–9, 29–30; Reichley, *Life of the Parties,* 55, 85.

40. Linda K. Kerber, *Federalists in Dissent: Imagery and Ideology in Jeffersonian America* (Ithaca: Cornell University Press, 1970), 135; Albert J. Beveridge, *The Life of John Marshall* (Volume II: Politician, Diplomatist, Statesman, 1789–1801) (Houghton Mifflin Company: Boston, 1919),

Sharp divisions emerged during the Adams administration between Federalist politicians who were primarily concerned with promoting business enterprise and Federalist politicians who were more concerned with the needs of commercial agriculture.[41] These fissures burst into fierce struggles for partisan control in 1799 when President Adams defied Hamiltonian calls for war by sending a second diplomatic mission to France in an effort to keep the peace.[42] The next year, many "high" Federalists attempted to substitute Charles Pinckney of South Carolina for John Adams in the presidential election.[43] During the ensuing campaign, Linda Kerber observes, "at least two parties . . . denounced John Adams with equal venom."[44] Manning Dauer describes the 1800 election as "a Donnybrook fair with the two wings of the [Federalist] party more bitter in their denunciation of each other than even of the Republicans."[45] Hamilton bluntly informed several correspondents that he preferred Jefferson to Adams. The New York Federalist in October of 1800 even circulated a letter, "Concerning the Public Conduct and Character of John Adams," that criticized the president's policy decisions and attacked "the disgusting egotism, the distempered jealousy, and the ungovernable indiscretion of Mr. Adams's temper."[46] "I will never be responsible for [Adams] by my direct support," Hamilton told Theodore Sedgwick.[47] Adams reciprocated those feelings. Hamilton, he declared, was "a bastard brat" who "hated every man young or old who stood in his way."[48]

These Federalist divisions influenced early American judicial politics. Marshall is routinely identified as a Hamiltonian in legal commentary,[49] but

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487–88; R. Ellis, *Jeffersonian Crisis,* 53–55; Haskins and Johnson, *Foundations,* 58–63; Joseph J. Ellis, *Passionate Sage: The Character and Legacy of John Adams* (New York: W.W. Norton & Company, 1993), 27–28; Sharp, *American Politics,* 210.

41. Manning J. Dauer, *The Adams Federalists* (Baltimore: Johns Hopkins University Press, 1968). See Fischer, *Revolution of American Conservatism,* 17–19.

42. See Francis N. Stites, *John Marshall: Defender of the Constitution* (Boston: Little, Brown and Company, 1981), 71–72; Sharp, *American Politics,* 211.

43. Stanley Elkins and Eric McKitrick, *The Age of Federalism: The Early American Republic, 1788–1800* (New York: Oxford University Press, 1993), 732–39; Dauer, *Adams Federalists,* 246.

44. Kerber, *Federalists in Dissent,* 135.

45. Dauer, *Adams Federalists,* 251. See Sharp, *American Politics,* 229, 237.

46. R. Troup to R. King, December 4, 1800, *The Life and Correspondence of Rufus King,* ed. Charles R. King (G.P. Putnam's Sons: New York, 1897), 3:340 ("General Hamilton makes no secret of his opinion that Jefferson should be preferred to Adams"); Alexander Hamilton, *The Papers of Alexander Hamilton,* ed. Harold C. Syrett (New York: Columbia University Press, 1977), 25:196. See Hamilton, *Papers of Alexander Hamilton,* 15:186 ("there are great and intrinsic defects in his character, which unfit him for the office of Chief Magistrate"). See also, J. Ellis, *Passionate Sage,* 34; Sharp, *American Politics,* 237, 240.

47. Dauer, *Adams Federalists,* 252; Elkins and McKitrick, *Age of Federalism,* 737–40.

48. Adams to Benjamin Rush, August 7, 1809. See Adams to Benjamin Rush, August 23, 1805, *The Spur of Fame: Dialogues of John Adams and Benjamin Rush, 1805–1813,* ed. John A. Schultz and Douglas Adair (San Marino, Calif.: Huntington Library, 1966), 34–36; Adams to James Lloyd, April 5, 1815, *The Works of John Adams,* ed. Charles Francis Adams (Boston: Little Brown and Company, 1856), 10:155–56. See also, J. Ellis, *Passionate Sage,* 21–33, 62–63, 116; Dauer, *Adams Federalists,* 254; Elkins and McKitrick, *Age of Federalism,* 692.

49. See Holmes, "John Marshall," 132–34: Parrington, *Main Currents,* 20, 25.

during the Adams administration he "was a leading member of the moderate Adams faction."[50] Writing to St. George Tucker, Marshall declared that he "wish[ed]" Hamilton's letter "had never been seen by any person" and implied that the former secretary of the treasury was subject to prosecution under the Alien and Sedition Act.[51] From the very beginning of his career in national politics, Marshall was probably closer to his fellow Virginian, James Madison, than to Federalist extremists. His most recent biographer, Jean Smith, maintains that Marshall and John Adams were committed to "ending the bitter ideological struggle between the radical Republicans and the High Federalists by building a strong centrist coalition."[52]

Hamilton's supporters were well aware of Marshall's partisan predispositions and were not pleased by his nomination to be Chief Justice.[53] Senator Dayton of New Jersey, a Hamilton ally, reacted to that announcement "with grief, astonishment & almost indignation . . . contrary to the hopes and expectations of all of us." A Senatorial effort to stall confirmation was aborted after a week when high Federalists realized that further delay would either result in Jefferson appointing the next Chief Justice or Adams nominating "some other character more improper & more disgusting."[54] Senate Republicans, by comparison, raised no objection to Marshall's nomination.[55]

Federalists did unite temporarily after the election of Jefferson to oppose Republican attacks on the federal judiciary. The votes on the repeal of the Judiciary Act of 1801, the abolition of the Court's term in 1802, and the John Pickering impeachment were almost entirely along party lines.[56] By the second Jefferson administration, however, the most salient struggles in American politics were increasingly taking place between Old Republicans

50. Arthur N. Holcombe, "John Marshall as Politician and Political Theorist," *Chief Justice John Marshall: A Reappraisal,* ed. W. Melville Jones (Ithaca: Cornell University Press, 1956), 36. See Holcombe, "John Marshall," 30–36; Smith, *John Marshall,* 8, 235, 252–53, 263; Stites, *John Marshall,* 72 (in Congress, "Marshall distinguished himself as a vigorous, even decisive, champion of Adams against Federalist and Republican challengers"); Dauer, *Adams Federalists,* 36–37.

51. Marshall to St. George Tucker, November 18, 1800, *The Papers of John Marshall,* ed. Charles F. Hobson (Chapel Hill: University of North Carolina Press, 1987), 14–15.

52. Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company, 1996), 267.

53. See Fisher Ames to Christopher Gore, December 18, 1798, *Works of Fisher Ames,* ed. Seth Ames (Boston: Little, Brown and Company, 1854), 244–47; Richard E. Welch, Jr., *Theodore Sedgwick, Federalist: A Political Portrait* (Middletown, Conn.: Wesleyan University Press, 1965), 196–97 (quoting Sedgwick to Timothy Pickering, October 23, 1798); T. Sedgwick to R. King, May 11, 1800, *Rufus King,* 3:237; T. Sedgwick to R. King, July 26, 1799, *Rufus King,* 3:69. See also, Smith, *John Marshall,* 6, 244–45; Myron F. Wehtje, "The Congressional Elections of 1799 in Virginia," *West Virginia History* 29 (1968):251, 263–64; Kathryn Turner, "The Appointment of Chief Justice Marshall," *William and Mary Quarterly* 17 (1960):143, 156–67.

54. Turner, "Appointment," 160 (quoting Jonathan Dayton to William Paterson, January 1, 1801). See Turner, "Appointment," 156–60; Stites, *John Marshall,* 80; Smith, *John Marshall,* 15; Warren, *Supreme Court,* 1: 178–80; Ellis, *Jeffersonian Crisis,* 56–57.

55. Smith, *John Marshall,* 15.

56. See James M. O'Fallon, "*Marbury,*" Stanford Law Review 44 (1992):223–27, 238–39; Haskins and Johnson, *Foundations,* 164, 184; Ellis, *Jeffersonian Crisis,* 74.

and more moderate Jeffersonians.[57] Adams Federalists began voting with Madison and Albert Gallatin to defeat the more extreme state rights vision of John Randolph and Spencer Roane. Hamiltonians after the Embargo of 1807 began sounding more and more like the Republicans of 1798.

C. Federalism in 1815

The Federalist party label during the Madison administration had little explanatory power as a means of classifying Marshall Court or legislative policy-making. "By 1815," Goodman points out, "Federalism and Republicanism no longer divided the nation into rival political formations. Party organizations decayed, ideological and programmatic differences were blurred, and many Federalists in search of office joined their erstwhile enemies."[58] The moderate mercantilist policies adopted by both Jefferson and Madison explain much of this decline in partisan differences.[59] Jefferson's rhetoric may have been radical, particularly after he retired, but he governed as a moderate.[60] His cabinet was dominated by such Republican nationalists as Madison and Albert Gallatin.[61] After the Chase impeachment, a moderate coalition clearly controlled the Congress.[62]

The increased nationalism of Jefferson's political allies weaned many Adams Federalists from the Hamiltonian fold. That influx of former Adams Federalists, in turn, further strengthened the more nationalist wing of the Democratic-Republic coalition.[63] Republican presidents "destroyed the

57. Ellis, *Jeffersonian Crisis,* 19, 275 ("the most important political battles of the first decades of the nineteenth century took place between the moderate and radical wings of the Republican party").

58. Goodman, "First American Party System," 85. See Livermore, *Twilight,* 265 ("[b]y 1816 observers found it difficult to distinguish a consistent party position on any important facet of public policy"); Stites, *John Marshall,* 97 ("[f]aced with the responsibilities of power, the Republicans now became the party of nationalism. The Federalists, demoralized after their defeat in 1804, lapsed into New England parochialism, and talked of states' rights").

59. See George Dangerfield, *The Awakening of American Nationalism* (New York: Harper & Row, 1965), 268. See Jessup, *Reaction and Accommodation,* 59–61; Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (New York: W.W. Norton & Company, 1980), 188, 215, 238, 245–48. Jefferson by the end of his administration reluctantly recognized the need for "a due balance between agriculture, manufactures and commerce." Jefferson to Thomas Leiper, January 21, 1809, *Writings of Jefferson,* 12:238. See Jefferson to Benjamin Austin, January 9, 1816, *Writings of Jefferson,* 14:392 ("experience has taught me that manufactures are now as necessary to our independence as to our comfort"); Richard K. Matthews, *The Radical Politics of Thomas Jefferson: A Revisionist View* (Lawrence: University Press of Kansas, 1984), 48–50. But see McCoy, *Elusive Republic,* 248 ("Jefferson's post-embargo acceptance of manufacturing . . . is too often exaggerated").

60. See Ellis, *Jeffersonian Crisis,* 234.

61. Ellis, *Jeffersonian Crisis,* 159; Charles Sellers, *The Market Revolution: Jacksonian America, 1815–46* (New York: Oxford University Press, 1991), 59, 62.

62. Ellis, *Jeffersonian Crisis,* 103, 165, 236.

63. See Dauer, *Adams Federalists,* 109–10, 260–63; Marshall Smelser, *Democratic Republic,* 191, 248, 288; Sharp, *American Politics,* 283; Ellis, *Jeffersonian Crisis,* 277–78 ("[t]he real meaning of Jeffersonian Democracy . . . is to be found in the political triumph of the moderate Republicans and their eventual amalgamation with the moderate wing of the Federalist party"); Haines, *Supreme Court,* 543.

Federalist party," a survivor suggested, "by the adoption of its principles."[64] More conservative Jeffersonians agreed. Richard Stanford complained to Congress that "Republicans after a very new fashion" were "actually taking a somerset over the heads of the Federalists and running on far beyond them."[65] Similar partisan blurring occurred locally. "In states with rapidly growing economies," Charles Sellers notes, "government aid to enterprise became as much a Republican as a Federalist policy."[66]

President James Madison bears most of the responsibility for the increasing ideological amalgamation of the two parties. The fourth president had always been the Republican most favored by Federalists and he had little enthusiasm for Jefferson's agrarian utopia. Americans, Madison thought, "must plough less and manufacture more."[67] Richard Matthews suggests that "ideologically, [Madison] stood closer to Alexander Hamilton than to Thomas Jefferson."[68] While in office, Madison pushed the economic program favored by moderates in both coalitions. In the wake of the War of 1812, he asked Congress to adopt such traditional Federalist policies as strengthening the armed forces of the nation, chartering a national bank (substantially larger than its Federalist prototype),[69] enacting a protective tariff, and increasing national spending on internal improvements.[70] When accused of straying from Jeffersonian orthodoxy, Madison lamely replied that Republicans had become "reconciled to certain measures and arrangements which may be as proper now as they were premature or suspicious when urged by the champions of Federalism."[71]

During his presidency, James Monroe exhibited similar nationalistic proclivities. Monroe thought a constitutional amendment was necessary for federal aid to internal improvements, but he supported both the national

64. Carl Brent Swisher, *Roger B. Taney* (Hamden, Conn.: Archon Books, 1961), 119. (quoting Robert Goodloe Harper). See Richard H. Brown, "The Missouri Crisis, Slavery, and the Politics of Jacksonianism," *South Atlantic Quarterly* 65 (1966):55, 57.

65. *Annals of Congress,* 14th Cong., 1 Sess., 864–66. See Sellers, *Market Revolution,* 101.

66. Sellers, *Market Revolution,* 40, 43, 58–59.

67. Madison to Richard Rush, May 10, 1819, *Letters and Other Writings of James Madison* (New York: R. Worthington, 1884), 3:129. See McCoy, *Last of the Fathers,* 183–89.

68. Matthews, *Radical Politics,* 17. See Matthews, *Radical Politics,* 23–24, 97–118, 120–22; Smelser, *Democratic Republic,* 189; Abraham, *Justices and Presidents,* 89; Ellis, *Jeffersonian Crisis,* 31, 236.

69. Sellers, *Market Revolution,* 34.

70. James Madison, "Seventh Annual Message," *A Compilation of Messages and Papers of the Presidents,* ed. James D. Richardson (Washington: Government Printing Office, 1896) 1:562–69. See Madison to Joshua Gilpin, March 11, 1822, *Letters of Madison,* 3:262; Madison to Matthew Carey, May 12, 1825, *Letters of Madison,* 3:489–90. See also Ronald P. Formisano, "Federalists and Republicans: Parties, Yes – System, No," *The Evolution of American Electoral Systems* (Westport, Conn.: Greenwood Press, 1981), 41–42; Livermore, *Twilight of Federalism,* 14–15, 19; McCloskey, *American Supreme Court,* 36; McCoy, *Last of the Fathers,* 81, 93.

71. Madison to William Eustis, May 23, 1823, *Letters of Madison,* 3:318. See Sellers, *Market Revolution,* 101; Madison to Joseph C. Cabell, March 22, 1827, *Works of Madison,* 3:286–87; Livermore, *Twilight of Federalism,* 103. Henry Clay explicitly recanted his previous constitutional opposition to the national bank and other broad exercises of federal power. *Annals of Congress,* 18th Cong., 1 Sess., 1311.

bank and high tariff policies.[72] Influential Republicans such as Henry Clay and John C. Calhoun demanded even more extensive national participation in the commercial and military life of the nation.[73] Clay, the leading congressional proponent of internal improvements, informed fellow Republicans that "[a] new world has come into being since the Constitution was adopted." "Are the narrow limited necessities of the old thirteen states," he asked, "as they existed at the formation of the present Constitution forever to remain the rule of interpretations?"[74] A Congress controlled by moderate Republicans from 1816 to 1824 passed numerous measures designed to promote commercial enterprise.[75] In 1824, the national government enacted a general survey bill that seemed a prelude to a massive program of federal aid to internal improvements.[76]

Republican moderates were particularly successful in their efforts to control the judiciary. "All of the judges whom Jefferson and Madison appointed to the Supreme Court," Ellis documents, "came from the moderate wing of the party and had already proven themselves to be able lawyers and friends of a strong, active, and independent judiciary."[77] Joseph Story is only the most obvious example of a Republican appointee whose nationalist tendencies were known before his nomination. William Johnson, Thomas Todd, Brockholst Livingston, William Johnson, and Gabriel Duvall were all politicians closely associated with the more nationalistic wing of the Republican party.[78] When in 1823 the first opening in twelve years occurred on the Supreme Court, Monroe strongly considered selecting James Kent, a jurist whose Federalist credentials exceeded those of Marshall's. Instead, the president appointed Smith Thompson, a Kent protégé.[79] Moderate Republicans in the states also often appointed former Federalists to the bench. Kent, for example, was appointed to the state supreme court by the Republican governor of New York.[80]

Prominent Federalists who signed up with the Democratic-Republicans were typically rewarded with high offices, even when no evidence existed that they had changed their nationalistic views on any major domestic policy issue. Such former Federalists as Samuel Dexter, William Plumer,

72. Dangerfield, *Awakening of American Nationalism,* 192; Sellers, *Market Revolution,* 80–81, 150; Livermore, *Twilight of Federalism,* 103.

73. See Sellers, *Market Revolution,* 59–69. For Clay's nationalism, see Henry Clay, *The Papers of Henry Clay,* ed. James F. Hopkins (Lexington, KY: University of Kentucky Press, 1961), 2:446–65, 467–91. For Calhoun's nationalism in the years between 1809 and 1828, see John C. Calhoun, *The Papers of John C. Calhoun,* ed. Robert L. Meriwether (Columbia, S.C.: University of South Carolina Press, 1959), 1:398–409. John Quincy Adams in 1821 described Calhoun as "above all sectional and factious prejudices more than any other statesman of this Union." John Quincy Adams, *Memoirs of John Quincy Adams,* ed. Charles Francis Adams (Freeport, N.Y.: Books for Library Press, 1969), 5:361.

74. *Annals of Congress,* 18th Cong., 1 Sess., 1315.

75. See Sellers, *Market Revolution,* 69–75, 78, 149–51.

76. 4 *U.S. Statutes at Large* 22 (1824). See Dangerfield, *Awakening of American Nationalism,* 199–207.

77. Ellis, *Jeffersonian Crisis,* 238. See Smith, *John Marshall,* 341, 351.

78. See Ellis, *Jeffersonian Crisis,* 237–42. See Smelser, *Democratic Republic,* 71.

79. Warren, 1 *Supreme Court,* 588–91. 80. Ellis, *Jeffersonian Crisis,* 249.

William Pinkney, and James Bayard played major roles in Republican politics during the 1810s.[81] After witnessing "the successful perversion of the principles of the Federal party, to purposes diametrically opposed to those of its Founders," Oliver Wolcott, one of the midnight justices Adams appointed to the ill-fated circuit courts in 1801, put together a coalition of religious dissenters and Jeffersonian Republicans and was elected governor of Connecticut in 1815.[82] Wolcott's actions permanently broke the power of Federalism in the Nutmeg State.[83] During the 1820s, such Jeffersonian strongholds as Virginia, Kentucky, and Georgia each sent a former Federalist to the Senate.[84]

The most famous Federalist "convert," John Quincy Adams, was immediately rewarded for his apostasy by being named minister to Russia in 1809. The younger Adams spent the next sixteen years in increasingly prominent government positions and was elected to the Presidency in 1824.[85] Although Adams's switch was motivated in part by the increasing sectional response of New England to the Embargo, his primary motivation seems simply to be his recognition that he would never obtain high public office as a Federalist.[86] Certainly, Jefferson was never under any illusions as to the second Adams's political orthodoxy. Although proclaiming neutrality in the 1824 presidential election, Jefferson repeatedly warned his associates that Adams was a "consolidationist" whose "prejudices [are] not in our favor."[87] Adams did little to assuage Jefferson's fears. His first annual message to Congress called for a vast series of internal improvements and numerous other programs that stretched national power to the hilt.[88] Executive policy rarely wavered for the next four years. "John Quincy Adams," Richard Ellis notes, "guided his whole administration . . . on a . . . platform of the American System, a loose interpretation of the Constitution and the need for a strong and active federal government.[89]

The more nationalistic proposals of the Madison, Monroe, and Adams administrations were criticized as much by remaining Federalists as by Republicans. Some Federalists did cheer the increased nationalist orientation of many Jeffersonians. Alexander Hanson of Maryland praised those

81. See Fischer, *Revolution of American Conservatism* (New York: Harper & Row Publishers, 1965), 259–61, 332, 350.

82. Livermore, *Twilight of Federalism,* 40 (quoting Oliver Wolcott to Matthew Carey, December 16, 1814).

83. Livermore, *Twilight of Federalism,* 40–41. For similar coalitions in other states, see Formisano, "Federalists and Republicans," 49, 54, 56.

84. Livermore, *Twilight of Federalism,* 134.

85. Before appointing Adams, Monroe apparently asked Joseph Story to vouch for his friend's political reliability. Livermore, *Twilight of Federalism,* 137.

86. Fischer, *Revolution of Conservatism,* 44, 46.

87. Jefferson to Henry Dearborn, October 31, 1822, *Works of Jefferson,* 12:245; Jefferson to William Johnson, March 4, 1823, *Works of Jefferson,* 12:278.

88. John Quincy Adams, "First Annual Message," *Messages and Papers,* 2:316. See Dangerfield, *Awakening of American Nationalism,* 231; Sellers, *Market Revolution,* 270.

89. Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights and the Nullification Crisis* (New York: Oxford University Press, 1987), 13–14. See Sellers, *Market Revolution,* 290.

Jeffersonians who "not only profess themselves converts to the principles of Washington and federalism, but to [his] great joy . . . are engaged in reducing them to practice."[90] Others expressed more traditional Jeffersonian concerns. Gouverneur Morris declared that "the Party now in Power seems to do all that federal men ever wished and will, I fear, do more than is good to strengthen and consolidate the federal government."[91] The same Rhode Island Federalists who vigorously rejected the compact theory of the constitution in 1799, endorsed that states' rights doctrine when opposing the Embargo in 1809.[92] When the national bank came up for renewal during the 1810s, Federalists were more inclined to oppose that institution than Republicans.[93] After 1815, Federalists also seemed less enamored of tariffs and internal improvements than their political rivals.[94] The leading study of Federalist party activity after 1800 concludes that as Madison's reign came to an end, Federalists had apparently "come to terms with every major argument of the Jeffersonians – majoritarianism, individuality, the ever-broadening concept of equality, states' rights, even agrarianism and Anglophobia."[95] "Federalists who remained true to the faith" during the Monroe administration, Shaw Livermore notes, "were hard pressed to set off a body of fixed views on major issues that were distinctly Federalist."[96] "Federalism by 1815," another commentator notes, "could hardly be recognized externally as the child of the Federalism of the 1790s."[97]

The increasing failure of inherited labels to describe party principles did not escape the notice of the two combatants in the presidential election of 1800. "Our two great parties," John Adams observed, "have crossed over the valley, and taken possession of each other's mountain."[98] Disturbed by the "sordid Avarice" of "the Oligarchs who now rule the Federal Party," Adams

90. *Annals of Congress,* 14th Cong., 1 Sess., 910. See Livermore, *Twilight of Federalism,* 15, 18, 56.

91. Livermore, *Twilight of Federalism,* 15–16 (quoting Gouverneur Morris to Rufus King, January 6, 1816). See R. King to C. Gore, March 22, 1825, *Rufus King,* 6:600; R. King to C. Gore, February 1, 1824, *Rufus King,* 6:549–50 (describing "internal improvements" as a "questionable scheme").

92. "The State of Rhode Island and Providence Plantations to Virginia," *State Documents on Federal Relations,* ed. Herman V. Ames (New York: Da Capo Press, 1970), 17; "Report and Resolutions of Rhode Island on the Embargo," *State Documents,* 43–44. See *State Documents,* 26–36, 38–42, 54–65, 69–85; H. Jefferson Powell, "The Principles of '98: An Essay in Historical Retrieval," *Virginia Law Review* 80 (April 1994):689, 695; Haines, *Supreme Court,* 297–30; Warren, *Supreme Court,* 1:341–43, 363–64; Beveridge, *John Marshall,* 4:16–17; Jessup, *Reaction and Accommodation,* 58–59.

93. See Livermore, *Twilight of Federalism,* 17–18, 64–65.

94. Ibid., 16–18, 65, 126 (with respect to both "the protection of domestic manufacturers and national sponsorship of internal improvements . . . there [was no] clear-cut Federalist 'position' ").

95. Fischer, *Revolution of American Conservatism,* 153, 170–75. See Smelser, *Democratic Republic,* 314, 320. See also, Elkins and McKitrick, *Age of Federalism,* 261 (suggesting that "a nineteenth century Hamilton would in all likelihood have been a free trader").

96. Livermore, *Twilight of Federalism,* 126–128.

97. Smelser, *Democratic Republic,* 322.

98. John Adams to William Plumer, January 10, 1813, *Life of William Plumer,* ed. A. P. Peabody (New York: Da Capo Press, 1969), 403. See Fischer, *Revolution of American Conservatism,* 172; McCloskey, *American Supreme Court,* 36.

by the beginning of Madison's administration thought, "it was time for a Protestant separation."[99] Several years later the senior Adams told Jefferson that the fourth president had "acquired more glory, and established more Union, than all three of his predecessors put together."[100] Jefferson's letters in the 1820s noted similar changes in the shape of the American political landscape. The former president consistently complained that the new breed of Republican had "nothing in them of the feelings or principles of '76." "Federalism has changed its name and hidden itself among us," he warned Albert Gallatin.[101]

Moderate Republicans never totally controlled the national government during the years before Jackson. Madison and Monroe expressed constitutional qualms about important features of Henry Clay's American plan, and used their veto power to block internal improvements.[102] John Quincy Adams would have signed similar measures, but congressional enthusiasm for grand projects had diminished by the mid-1820s. Still, although moderate Republicans lacked the power to enact their favored policies from 1810 to 1828, no political faction had more influence on national policymaking during that period than the nationalist wing of the Republican party. When the Marshall Court was handing down its most important decisions, the justices knew that their rulings would be backed by important members of the dominant national coalition. Jefferson never approved Marshall Court policymaking, but during his final years the third president recognized that all branches of the federal government were fairly united on common principles. "You see so many of these new republicans maintaining in Congress the rankest doctrines of the old federalists," he told Henry Dearborn. "The judges *aid* in their old way as sappers and miners" (emphasis added).[103] In Jefferson's view, *all* the institutions of the national government were "in combination to strip their colleagues, the State authorities, of the powers reserved to them."[104]

99. Adams to Benjamin Rush, December 27, 1810, *Spur of Fame,* 174; Adams to Benjamin Rush, August 7, 1809. See Adams to Joseph Lyman, April 20, 1809, *The Works of John Adams,* ed. Charles Francis Adams (Boston: Little, Brown and Company, 1854); John R. Howe, Jr., *The Changing Political Thought of John Adams* (Princeton, N.J.: Princeton University Press, 1966), 230–43; Ellis, *Passionate Sage,* 146, 62–63.

100. Adams to Jefferson, February 2, 1817, *The Adams-Jefferson Letters,* ed. Lester J. Cappon (Chapel Hill: University of North Carolina Press, 1959), 2:508. See John Adams to Thomas McKean, July 6, 1815, *Works of Adams,* 10:167–68. The junior Adams and Joseph Story also admired the Madison presidency. See John Quincy Adams, *Eulogy on the Life and Character of James Madison* (Boston: American Stationers' Company, 1836), 74–81; Story to Ezekiel Bacon, April 4, 1842, *Life of Story,* 2:420. See also, Drew R. McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (Cambridge: Cambridge University Press, 1989), 16–17, 32–33.

101. Sellers, *Market Revolution,* 106 (quoting Jefferson); Jefferson to Albert Gallatin, August 2, 1823, *Works of Jefferson,* 12:299. For similar complaints, see Sellers, *Market Revolution,* 106–7, 124 (quoting William Duane); Livermore, *Twilight of Federalism,* 65–66.

102. James Madison, "Veto Message," *Messages and Papers,* 1:584–85; James Monroe, "Veto Message," *Messages and Papers,* 2:142–43.

103. Jefferson to Henry Dearborn, *Writings of Jefferson,* 12:265.

104. Sellers, *Market Revolution,* 151 (quoting Jefferson).

D. Federalism in 1828

By 1828, "Federalist" described neither political beliefs nor political activity. The term survived only as a vague expression of opprobrium that was used in the same indiscriminate manner as "socialist" (or "liberal") is often used in contemporary American political rhetoric. John Quincy Adams proved to be the final victim of Federalism's demise when Jacksonians successfully tarred the sixth president with that epithet.[105] Nevertheless, many former Federalists joined the Jacksonian crusade against Adams. "Jacksonians," Livermore observes, "smothered Adams in a Federalist blanket at the same time they adeptly gathered their own legion of Federalist auxiliaries."[106] Studies of voting in New Jersey, Pennsylvania, Delaware, Maryland, and North Carolina confirm that Jackson was supported by at least half of the persons who considered themselves to be Federalists in 1828.[107] Old New England Federalists, Harrison Gray Otis, in particular, cast their lot for Jackson against Adams. Jackson's most fervent supporters in New York were Alexander Hamilton's son, James, and the *New York Evening Post,* the paper William Coleman originally founded as an organ for Hamiltonian Federalism.[108] James Buchanan was another former Federalist who became an ardent Jacksonian.[109]

Jackson garnered this substantial Federalist support because the political cleavages that developed after the Era of Good Feelings were not rooted in the factions that fought the election of 1800.[110] The differences between the emerging "Friends of Adams" and "Friends of Jackson" coalitions more reflected the differences between moderate and old Republicans that began to be clearly delineated at the end of the Jefferson administration than the divisions that splintered Washington's cabinet.[111] As George Dangerfield notes, "there were Adams Republicans and Jackson Republicans; Adams Federalists and Jackson Federalists."[112] Although numerous exceptions existed, most prominent national Republicans found themselves drifting into the nascent Whig coalition, while leading Old Republicans typically came to terms with Jacksonian Democracy.[113] Much Jacksonian politics consisted of a struggle between old and new elites for national and regional supremacy. This new cleavage was most evident during the Virginia Constitutional Convention of 1829, when John Marshall, James Madison, James Monroe, and John Randolph of Roanoke joined forces to repel the assault of insurgent political forces intent on democratizing politics in the Old Dominion.[114]

105. See Livermore, *Twilight of Federalism,* 196–97; Sharp, *American Politics,* 285, 287.

106. Livermore, *Twilight of Federalism,* 197.

107. See ibid., x, 239–40; Fischer, *Revolution of American Conservatism,* 394. See generally, Livermore, *Twilight of Federalism,* 156, 159–60, 223, 240–41, 273.

108. Livermore, *Twilight of Federalism,* 156, 159–60, 203–5, 230, 235; Dangerfield, *Awakening of American Nationalism,* 271; Fischer, *The Revolution of American Conservatism,* 269, 314, 319, 336–37, 345–47, 353, 356, 368–69, 406.

109. Livermore, *Twilight of Federalism,* 238. 110. See ibid., 260.

111. Dangerfield, *Awakening of American Nationalism,* 289. 112. Ibid., 298–99.

113. Ellis, *Jeffersonian Crisis,* 283–84.

114. See Alison Goodyear Freehling, *Drift Toward Dissolution: The Virginia Slavery Debate of*

Jackson, not John Quincy Adams, abandoned the previous Republican proscription on appointing members of the Federalist party to national office. Upon taking office, Jackson immediately nominated a Georgia Federalist, John Berrien, to be his attorney general, and a Delaware Federalist, Louis McLane, to be his ambassador to England. Numerous other Jackson appointees also had Federalist connections.[115] Of most significance for present purposes are Jackson's Supreme Court nominations. His second judicial appointee, Henry Baldwin, had been a leader of Pittsburgh Federalism during the 1820s. When John Marshall died in 1835, Jackson selected Roger Taney, a longstanding member of the Federalist party in Maryland. Although Taney's service to that coalition in the years before his appointment to the court was quite extensive, no one ever describes the Taney Court as a Federalist institution.[116] "The great and good Marshall was a Federalist, say they, and we could not support him," complained the *New York Daily Advertiser.* "The notorious Taney is a Federalist," the editorial continued, "and this is recommendation to office."[117]

II. THE MARSHALL COURT AND PARTY POLITICS

Commentators who blithely describe the Marshall Court as "Federalist" without saying more present a misleading picture of American judicial politics during the first third of the nineteenth century. That label describes the Marshall Court philosophically (though "nationalist" may be the better characterization), but not politically. Members of the Federalist party in 1815 were no more likely than Republicans to support Marshall Court policies. Federalists by 1828 lacked any distinct policy or candidate preferences. Hence, the Marshall Court in its heyday was not making policies preferred by the losing political coalition. Bedeviled by the word "Federalist," scholars do not adequately appreciate the extent to which Marshall Court policymaking coincided with national Republican policies on important issues.

Thus, instead of focusing on the Marshall Court's relationship with the moribund Federalist coalition, scholars ought to explore that tribunal's relationships with the moderate faction of the Republican party that began to coalesce during Jefferson's second term. These "young" or "national" Republicans supported Henry Clay's American System and Marshall Court decisions that interpreted federal powers consistently with that nationalistic program. The Marshall Court's influence on national politics waxed and waned with the power of these moderate Jeffersonians. When Henry Clay

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1831–32 (Baton Rouge: Louisiana State University Press, 1982), 36–81; Sellers, *Market Revolution,* 278; Dangerfield, *Awakening of American Nationalism,* 298 n.21 (quoting Levi Woodbury to Martin Van Buren, July 1, 1828) ("our opponents . . . include almost all the old leaders of both parties"); Stites, *John Marshall,* 153. Even Jefferson seems to have disliked Andrew Jackson. See McCoy, *Last of the Fathers,* 29.

115. See Livermore, *Twilight of Federalism,* 245–47. The bank war did result in some former Federalists leaving the Jackson coalition. See ibid., 250.

116. Taney remained a Federalist until he became a Jackson Democrat sometime after 1824. For Taney's career as a Federalist, see Swisher, *Taney,* 35–38, 45–81, 119–23.

117. Charles Warren, *Supreme Court* 2:10 n.1.

and John Quincy Adams were part of the dominant national coalition, the Supreme Court played a major role in American politics. When those politicians fell into disfavor, the Marshall Court retreated.

The fluctuating political fortunes of moderate Republicans during the first third of the nineteenth century suggest a somewhat different approach to periodizing policymaking during the Marshall Court years. The golden age of the Marshall Court is generally thought to have occurred between 1812 and 1823.[118] During these twelve years, the justices handed down many of their major decisions, court membership was unchanged, and the justices were able to maintain the appearance of unanimity, both in their professional output and living arrangements. This dating, however, leaves out several important Marshall Court opinions, most notably, *Fletcher v. Peck* (1810) and *Gibbons v. Ogden* (1824). Instead of focusing on the stable composition of the federal judiciary, scholars might better explain Supreme Court politics from 1801 to 1835 by examining the changing composition of the other two branches of government. These political changes certainly affected the support Supreme Court justices could expect to enjoy after making controversial decisions. From 1801 until 1808, the national executive and legislature were dominated by Jefferson and Jeffersonians both personally and ideologically hostile to what they perceived as the Federalist goals of the Marshall Court. During the next twenty years, politicians sympathetic to the nationalist ends of the Marshall Court either controlled or strongly competed for control of both Congress and the presidency. After 1828, the Marshall Court again confronted an administration hostile to the justices' institutional and nationalistic ambitions. John Marshall and his fellow justices are sometimes said to have been indifferent to these electoral swings, but Marshall Court practice mirrored early nineteenth-century political developments. That tribunal was quite active when its moderate Republican friends influenced the other branches of government and far more passive when its Jeffersonian and Jacksonian enemies controlled the national executive and legislature.

The following close examination of the Marshall Court's relationships with other branches of government belies commentary that sees that Court's separation of law and politics as the key to the establishment of judicial power in the United States.[119] The historical record suggests that judicial sensitivity to potential political support played a crucial role in the gradual development of the judicial power to declare laws unconstitutional. The cause of judicial review advanced during the first third of the nineteenth century only when the justices felt confident that their decisions were not countermajoritarian. The foundations for judicial power in

118. White, *Marshall Court,* 9; Stites, *John Marshall,* 116.

119. See Freund, "Editor's Note," 10; Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996), xiii, 43, 52, 170; Haskins and Johnson, *Foundations,* 10, 196, 286, 406; Alfange, "*Marbury,*" 339–40; Maeva Marcus, "Judicial Review in the Early Republic," *Launching the "Extended Republic": The Federalist Era,* ed. Ronald Hoffman and Peter J. Albert (Charlottesville: University Press of Virginia, 1966), 51.

the United States were laid by judicial decisions that supported national authority against local opposition rather than by court rulings that defended powerless individuals against governmental oppression.

A. Deferring to Jefferson: 1801–1808

Anticipating Mr. Dooley's famous dictum by more than a century, Federalist justices at the turn of the nineteenth century followed the election returns. Ellsworth Court justices from 1796 to 1800 consistently reached conclusions congenial to Federalist party interests. Marshall Court justices from 1801 to 1805 consistently reached conclusions congenial to Democratic-Republican party interests. During Jefferson's first term, the justices always unanimously reached the outcome Jefferson favored, even though until 1804 no Jeffersonian sat on the Supreme Court. This support for administration policies in deed (if not usually in word) explains why in 1804 Jeffersonian radicals could not gain the moderate support necessary to impeach Supreme Court justices. "The charge that the judiciary was tyrannical imposing a Federalist will on a Republican nation," Robert McCloskey correctly points out, "did not square with the immediate facts of political behavior."[120]

The Supreme Court Marshall joined had been a bastion of Federalism. The federal bench during the Adams administration confronted four major issues that divided the major factions of the era: "neutrality, Federal common law criminal jurisdiction, the right of expatriation, [and] the constitutionality of the Alien and Sedition laws."[121] In each instance, the justices resolved the controversy by taking the position favored by the Federalist party. Federal justices riding circuit found the Alien and Sedition Acts constitutional, upheld Federal common law jurisdiction, and refused to find a legal right to expatriation.[122] In *Bas v. Tingy,*[123] the Supreme Court ruled that the "limited, partial war" existing between the United States and France justified naval crews receiving salvage for French ships they captured on the high seas.[124] William Casto's excellent study of these and other late eighteenth-century federal court cases concluded by noting "a unique harmony of interest between the early Supreme Court and the political branches that was never to be repeated in the next two hundred years."[125]

120. McCloskey, *American Supreme Court,* 30. See Ellis, *Jeffersonian Crisis,* 102; Smith, *John Marshall,* 346.

121. Warren, *Supreme Court,* 1:159.

122. Warren, *Supreme Court,* 1:156–67. See William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* (Columbia, SC: University of South Carolina Press, 1995), 116, 126–28, 149; Haskins and Johnson, *Foundations of Power,* 159; Dean Alfange, Jr., "*Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom," *1993: The Supreme Court Review,* ed. Dennis J. Hutchinson, David A. Strauss, and Geoffrey R. Stone (Chicago: University of Chicago Press, 1994), 350. Justice Samuel Chase was the only Jay or Ellsworth Court justice who rejected federal common law jurisdiction. See *United States v. Worrall,* 2 U.S. (2 Dallas) 384 (1798) (Chase, J.).

123. 4 U.S. 37 (1800). 124. *Bas,* at 43. See Warren, *Supreme Court,* 1:157.

125. Casto, *Supreme Court,* 249.

Those who evaluate judicial decisions primarily in terms of votes might well insist that this "unique harmony of interest" was not disturbed when Marshall became Chief Justice and Jefferson was elected president.[126] The Marshall Court in every politically salient case decided during Jefferson's first term of office reached the result favored by the incumbent administration. Libelled ships were returned to France,[127] Marbury did not get his commission,[128] and the justices passed on at least three opportunities to declare unconstitutional the Judiciary Act of 1802.[129] The justices were particularly deferential to majority party concerns in cases affecting foreign relations. In *Talbot v. Seeman,*[130] *Murray v. Schooner Charming Betsy,*[131] and *Little v. Barreme*[132] the Marshall Court rejected or modified plausible salvage claims that might have compromised the Jefferson administration's maritime policies.[133] The justices did in *Little* rule that the President had acted illegally. The President in question, however, was John Adams, not Thomas Jefferson.[134]

This stream of pro-executive results was hardly compelled by existing constitutional, statutory, or common law standards. Virtually all contemporary commentators agree that Marshall in *Marbury* twisted legal doctrine when declaring unconstitutional Section 13 of the Judiciary Act of 1789.[135] Much evidence exists that Marshall in other cases similarly manipulated the law in order to avoid potential conflicts with the Jefferson administration. In *United States v. Schooner Peggy,* Marshall reversed a lower court ruling that had antagonized Jefferson by interpreting a treaty with France in a way that even Jefferson's Attorney General regarded as nonsense.[136] Early Marshall

126. See Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge University Press, 1993), xv.

127. *United States v. Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801).

128. *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803).

129. *Marbury; Stuart v. Laird,* 5 U.S. (1 Cranch) 299 (1803); *More v. United States,* 7 U.S. (3 Cranch) 159 (1805). See O'Fallon, "*Marbury,*" 240–41.

130. 5 U.S. (1 Cranch) 1 (1801). 131. 6 U.S. (2 Cranch) 64 (1804).

132. 6 U.S. (2 Cranch) 170 (1804).

133. See *Talbot v. Seeman,* 5 U.S. (1 Cranch) 1 (1801); *Murray v. Schooner Charming Betsy,* 6 U.S. (2 Cranch) 64 (1804); *Little v. Barreme,* 6 U.S. (2 Cranch) 170 (1804). The Marshall Court continued to defer to Republican foreign policy concerns throughout its tenure. See Hobson, *Great Chief Justice,* 152; Warren, *Supreme Court,* 424–25.

134. *Little,* 177–78.

135. See William W. Van Alstyne, "A Critical Guide to *Marbury v. Madison,*" 1969 *Duke Law Journal* (1969); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years 1789–1888* (Chicago: University of Chicago Press, 1985), 67–69; George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801–1815* (New York: MacMillan Publishing Co., Inc., 1981), 199–201.

136. Levi Lincoln, "Restoration Under Treaty with France," *Opinions of the Attorney General* 1 (1802):114, 118–19; Levi Lincoln, "Restitution Under Treaty with France," *Opinions of the Attorney General* 1 (1802):119, 120. See Mark A. Graber, "Establishing Judicial Review?" *Schooner Peggy* and the Early Marshall Court" *Political Research Quarterly* 51 (1998):221. See also David E. Engdahl, "John Marshall's Jeffersonian Concept of Judicial Review," *Duke Law Journal* 42 (1992):279, 315 (describing Marshall's opinion as "bizarre" and "ridiculous"). Jean Smith points out that Marshall in *Schooner Charming Betsy* avoided discussing expatriation by inventing the notion of foreign commercial domicile, and that Marshall in *Talbot* manipulated the law of salvage to reduce by more than two-thirds the cost to the party favored by Jefferson. Smith, *John Marshall,* 291–95, 338–39. See *Schooner Charming Betsy,* at 120–21; *Talbot,* 43–45.

opinions contained language that justices in the future would use to support judicial independence, but the Marshall Court from 1801 until 1805 was almost as much an arm of the incumbent administration as were the previous Ellsworth and Jay Courts.[137]

Marshall did declare in *Marbury v. Madison* that the Supreme Court was vested with the power to declare national laws unconstitutional. That point, however, was endorsed by most Democratic-Republicans, among them, at least in 1803, Thomas Jefferson.[138] What is more interesting about *Marbury* is the law the Court declared unconstitutional. Contemporaries thought that the justices would use *Marbury* or some related case to expound on the merits of the Judiciary Act of 1802. Almost to a person, Federalists believed that the repeal of the Judiciary Act of 1801 was unconstitutional. In their view, the 1802 legislation deprived circuit court justices appointed in 1801 of their offices in ways not prescribed by Article III of the Constitution and unconstitutionally forced Supreme Court justices to ride circuit. This extremely onerous duty required members of the Supreme Court to decide appeals from cases that they had previously adjudicated.[139] Several justices, John Marshall and Samuel Chase in particular, privately shared these constitutional qualms.[140] Nevertheless, the Marshall Court declared parts of the Judiciary Act of 1802 constitutional and managed to avoid taking any position on other parts of that bill in subsequent cases.[141] Indeed, the justices in *Marbury* only obliquely discussed any of the issues raised by the Judiciary Act of 1802.[142]

Marshall in *Marbury* focused his gaze on what might have been the most innocuous provision of the federal code, a provision of the Judiciary Act of 1789 that could be read as giving the Supreme Court the right to issue writs of mandamus in cases of original jurisdiction. No evidence exists that any

137. See McCloskey, *American Supreme Court,* 25; Donald G. Morgan, "Marshall, the Marshall Court, and the Constitution," *Chief Justice John Marshall: A Reappraisal,* ed. W. Melville Jones (Ithaca: Cornell University Press, 1956), 171–72; Sellers, *Market Revolution,* 56.

138. See Warren, *Supreme Court,* 1:72–74, 215, 218, 222, 225–26, 248–49, 254–67; Haines, "Histories," 2–25 n.33 (pointing out that "historical evidence shows rather conclusively that a major portion of the people actively interested in affairs of government in the United States from 1780 to 1820 supported the general idea of judicial review of legislation"); James M. O'Fallon, "*Marbury,*" 219; Ellis, *Jeffersonian Crisis,* 26; Haskins and Johnson, *Foundations,* 188–90; Jack N. Rakove, "The Origins of Judicial Review," 1040–41; Marcus, "Judicial Review," 28–29, 33–36, 40–48, 52.

139. Warren, *Supreme Court,* 1:206–14.

140. Marshall to William Paterson, April 6, 1802, *Papers of Marshall* 6:106; Marshall to William Cushing, April 19, 1802, *Papers of Marshall,* 6:108; Marshall to William Paterson, April 19, 1802, *Papers of Marshall,* 6:108–9; Samuel Chase to Marshall, April 24, 1802, *Papers of Marshall,* 6:109–16; Ruth Wedgwood, "Cousin Humphrey," *Constitutional Commentary* 14 (1997):247, 268–70 (quoting Marshall to Henry Clay, December 22, 1823). See O'Fallon, "*Marbury,*" 224–27, 239–40, 253 n.119; Alfange, "*Marbury,*" 361; Hobson, *Great Chief Justice,* 50–51.

141. See cases cited in n.122, above; Alfange, "*Marbury,*" 363–64, 386–87, 390–97; O'Fallon, "*Marbury,*" 241 n.72; James M. O'Fallon, "The Case of Benjamin More: A Lost Episode in the Struggle over Repeal of the 1801 Judiciary Act," *Law and History Review* 11 (1993):43.

142. See O'Fallon, "*Marbury,*" 243, 247 (noting how Marshall's opinion in *Marbury* implied that the circuit court justices had a right to their salaries).

politically active person in 1803 thought that the difference between the Supreme Court's appellate and original jurisdiction was a matter of political importance. As Dean Alfange observes, "[h]ere was a law no one cared about."[143] By declaring that provision of the federal code unconstitutional, Marshall and his brethren managed to establish a major judicial precedent supporting judicial power in theory while avoiding a test of judicial power in practice. Had the justices required the secretary of state to deliver a judicial commission to William Marbury, their order would have been hotly debated and probably disobeyed.[144]

The treason trial of Aaron Burr and his associates was the only matter of public importance during the Jefferson administration in which Marshall Court rulings directly challenged Jeffersonian practice.[145] Marshall's prodefense orders in several cases helped prevent convictions. His attempt to subpoena President Jefferson did little to soothe tense executive-judicial relationships. Still, Marshall's actions were not entirely hostile to the incumbent electoral regime. His decision in *Ex Parte Bollman* granting a writ of habeas corpus to two of Burr's associates may have disappointed Jefferson, but not Congress.[146] The House of Representatives defeated by a 9 to 1 margin a Jeffersonian proposal to suspend habeas corpus for three months, a proposal directed specifically at the result in *Bollman*.[147] Perhaps anticipating similar support during the actual Burr trial, Marshall's charge to the jury set out a narrow definition of treason that virtually directed an acquittal of the former vice president. This ruling seriously offended both Jefferson and the Congress. The President demanded an investigation of Marshall's conduct. Republicans from the radical William Giles to John Quincy Adams were glad to oblige.[148] A powerful removal effort might have been organized had the nation's attention not been distracted by a foreign crisis and the election of a president who did not believe in impeaching Supreme Court justices.[149]

B. Supporting Republican Nationalism: 1809–1828

The Marshall Court shifted into high gear after James Madison, a committed proponent of judicial review, took office in 1809.[150] The fourth presi-

143. Alfange, "*Marbury,*" 367. See Rakove, "Origins," 1039.

144. See McCloskey, *American Supreme Court,* 26–27 (noting that Jefferson "cared very little how the Court went about justifying a hands off policy so long as that policy was followed"); Alfange, "*Marbury,*" 365–67; Marcus, "Judicial Review," 50–51.

145. McCloskey, *American Supreme Court,* 30 (describing the Burr trial as Marshall's only real clash with Jefferson's administration").

146. 8 U.S. (4 Cranch) 75 (1807).

147. Haskins and Johnson, *Foundations,* 256, 261; Smelser, *Democratic Republic,* 119; Smith, *John Marshall,* 355–57; Warren, *Supreme Court,* 1:274–75, 307. See Robert K. Faulkner, "John Marshall and the Burr Trial," *Journal of American History* 53 (1966):247, 256 (noting that Marshall's effort to subpoena President Jefferson "evoked little or no adverse criticism, even from Republicans").

148. Thomas Jefferson, "Seventh Annual Message," 1:429; Haskins and Johnson, *Foundations,* 289–91.

149. Haskins and Johnson, *Foundations,* 291; Smelser, *American Nationalism,* 122–23.

150. See Smith, *John Marshall,* 374 ("[u]nder Madison, a rapprochement between the

dent had barely settled into the White House when the justices handed down two major decisions, *United States v. Peters* and *Fletcher v. Peck.*[151] Both advanced policies favored by the national executive. After the War of 1812, the Marshall Court handed down a series of major decisions articulating basic constitutional principles shared by leading Republican nationalists.[152] Congress demonstrated their appreciation for these nationalistic rulings by increasing judicial salaries and perks of office.[153] The main organ of the Madison administration described the Supreme Court as "a branch of Government which it is important to hold in due veneration."[154] James Monroe and John Quincy Adams continued Madison's strong support for federal judicial power. Monroe even proposed a judicial reorganization bill similar to the Judiciary Act of 1801.[155] Marshall did have some constitutional differences with both Madison and Monroe concerning federal power over internal improvements,[156] but "[i]nstitutional rivalry between the Court and the executive branch" during the Madison, Monroe, and Adams administrations, Dwight Jessup notes, "was virtually nonexistent."[157]

United States v. Peters may be a better candidate than *Marbury* for the case that first established judicial power. The justices in *Peters* issued a writ of mandamus ordering a district judge to enforce a federal admiralty decision dating from the Articles of Confederation that awarded salvage rights for the capture of a British ship to Gideon Olmstead, a minor Revolutionary War hero.[158] The governor of Pennsylvania responded to that verdict by calling on the state militia to prevent compliance with the court's ruling. Resistance was quickly abandoned when President Madison, the Congress, the local federal attorney, and eleven state legislatures all supported the authority of the Marshall Court.[159] Even the *Aurora,* a leading Jeffersonian newspaper, insisted that "the decree of the Court must be obeyed."[160] For the first time, a Marshall Court decision significantly influenced the out-

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executive and the judiciary was quickly achieved"); Jessup, *Reaction and Accommodation,* 58, 412 ("the Supreme Court could not significantly increase its power and prestige until after the Jefferson threat no longer occupied the White House"). For Madison's defense of judicial review, see Madison to Thomas Jefferson, June 27, 1823, *The Writings of James Madison,* ed. Gaillard Hunt (New York: G. P. Putnam's Sons, 1910), 9:140–43; Madison to Spencer Roane, June 29, 1821, *Writings of Madison,* 9:66; Madison to Edward Everett, August 28, 1830, *Writings of Madison,* 9:388–98. See also, McCoy, *Last of the Fathers,* 70, 102, 135.

151. 9 U.S. (5 Cranch) 115 (1809).

152. See *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824); *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821); *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

153. 3 *U.S. Stat.* 106, 110 (1814); Sellers, *Market Revolution,* 84–85.

154. "The Supreme Court," *Daily National Intelligencer,* February 24, 1814. See Smith, *John Marshall,* 419.

155. James Monroe, "Eighth Annual Message," 2:260–61. Madison had proposed similar legislation. See James Madison, "Eighth Annual Message," 1:577.

156. See nn.89, 228. 157. Jessup, *Reaction and Accommodation,* 410, 430–31.

158. For a colorful account of Gideon Olmstead's travails, see Kenneth W. Treacy, "The Olmstead Case, 1778–1809," *Western Political Quarterly* 10 (September 1957):675. This paragraph relies heavily on Professor Treacy's article.

159. See Treacy, "Olmstead," 686–90.

160. Smith, *John Marshall,* 151 (quoting *Aurora,* April 20, 1809). See Haskins and Johnson, *Foundations,* 327–330.

come of a major political controversy. Unlike William Marbury, Gideon Olmstead received compensation for a government wrong in part because the Supreme Court declared that he had a legal right to a remedy.

Peters was a popular decision outside of Pennsylvania because by the early 1810s most prominent Americans endorsed judicial review of state practices. "Important representatives of both political parties," Jessup observes, recognized "the enforceability of federal law over conflicting state law."[161] Madison informed correspondents that "[o]n the abstract question whether the federal or the State decisions ought to prevail, the sounder policy would yield to the claims of the former."[162] No one but Spencer Roane seemed upset when in a case of limited political significance, the Supreme Court in *Martin v. Hunter's Lessee*[163] officially asserted that the justices had the power to overrule state supreme court rulings.[164]

Fletcher v. Peck demonstrates how the evolution of partisan dynamics during the early nineteenth century created openings for the Marshall Court to influence national policymaking. During the 1790s, the political and constitutional issues stemming from the Yazoo land sale sharply divided Federalists from Democratic-Republicans. Led by Alexander Hamilton, Federalists contended that Georgia was constitutionally disabled from repealing a grant of land that its legislature had been bribed to grant, at least as against "innocent" third parties. Jeffersonians saw the repeal of a corrupt legislature's grant by their successors as perfectly legitimate.[165] Matters changed rapidly in the following years when political alliances shifted. C. Peter Magrath's thorough study of the Yazoo land controversy points out that

> as Federalist strength in New England declined and that of the Republicans grew, the Jeffersonians inherited the region's pro-Yazooist interest along with their new constituents. And this in turn led to a severe tension between the party's northern and southern wings, compelling its national leadership to concern itself with at least partially satisfying the demands of the Yazoo claimants.[166]

These internecine struggles over the Georgia repeal almost immediately came before the national legislature. Congress had long debated whether to obtain Georgia's western regions, which included the Yazoo territory. When that purchase was finally made in 1802, the United States acquired sovereignty over the contested tracts. Several members of Jefferson's cabi-

161. William E. Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review* 76 (1978):893, 896. See Warren, *Supreme Court,* 1:443–44; Luce, *Cohens,* 237–39.

162. Madison to Roane, June 29, 1821, *Writings of Madison,* 9:66.

163. 14 U.S. (1 Wheat.) 304 (1816).

164. White, *Marshall Court,* 743–44; Luce, *Cohens,* 25. Virginians did become significantly more concerned several years later when they thought the Court in *Cohens* might strike down a Virginia *law.* See Luce, *Cohens,* 100–01.

165. C. Peter Magrath, *Yazoo: Law and Politics in the New Republic: The Case of Fletcher v. Peck* (New York: W.W. Norton & Company, Inc., 1966), 24–31.

166. Magrath, *Yazoo,* 30–31. See also, Freund, "Editor's Forward," xiii; White, *Marshall Court,* 343; Ellis, *Jeffersonian Crisis,* 87–96.

net, most notably James Madison and Postmaster General Gideon Granger, openly lobbied for national legislation supporting the Yazoo claimants.[167] One house of Congress occasionally passed a compensation measure, but neither the proponents or opponents of the Yazoo land sale were able to obtain favorable legislation before *Fletcher* was heard by the Supreme Court.[168]

The Supreme Court's decision declaring the Georgia repeal unconstitutional was, thus, neither Federalist politically nor a check on regime power. *Fletcher* supported the presidential and northern wing of the Democratic-Republicans against the southern wing of that coalition.[169] National elites seemed particularly pleased when the court ruled that state land grants were subject to contract clause restrictions. Marshall's decision in *Fletcher,* Peter Magrath notes, "was in nearly perfect harmony with the attitudes and values of most politically conscious Americans."[170] Significantly, the judicial declaration that the Georgia repeal was unconstitutional did not force Georgia officials to take any unwanted step. As noted above, by the time *Fletcher* was decided, Georgia no longer had jurisdiction over the lands in controversy. The Marshall Court's decision, at most, influenced a later congressional decision to give partial reimbursement to the Yazoo interests.[171]

The most interesting feature of *Fletcher* concerns a step Marshall might have taken to ensure that the Court decision on the Yazoo lands would enjoy significant political support. A year before the actual ruling was handed down, the chief justice informed the parties that, although the justices favored the cause of the Yazoo claimants, procedural barriers prevented the justices from adjudicating their case.[172] Magrath suggests that Marshall delayed the decision on the merits in order to have the final decision handed down by a full court (two justices missed the 1809 term).[173] Had this been his primary goal, however, Marshall would not have intimated that the justices were inclined to declare the Georgia repeal unconstitutional. Doing so would suggest that the decision was actually reached when the court was shorthanded. Instead, the chief justice may

167. See Magrath, *Yazoo,* 47–50, 58; Warren, *Supreme Court,* 1:437–40; Haskins and Johnson, *Foundations,* 640.

168. Magrath, *Yazoo,* 43–46, 58–59, 87.

169. See Magrath, *Yazoo,* 47, 97; Max Lerner, "John Marshall and the Campaign of History," *Columbia Law Review* 39 (1939):396, 412 (suggesting that "Madison wanted the ruling that Marshall favored"); Smith, *John Marshall,* 392.

170. Magrath, *Yazoo,* 113–14. See Smith, *John Marshall,* 394; Nelson, "Eighteenth-Century Background," 943–44.

171. Magrath, *Yazoo,* 97; Smith, *John Marshall,* 392; Haines, *Supreme Court,* 322. The next occasion when the Court declared that a state law violated the contract clause also occurred with respect to land that, before litigation commenced, had been ceded to the United States. See *Terrett v. Taylor,* 13 U.S. (9 Cranch) 43 (1815). Hence, the Marshall Court in both *Fletcher* and *Terrett* could declare local laws unconstitutional confident of federal support and no hostile state opposition. See Nelson. "Eighteenth-Century Background," 950 n.312 (explaining why *Terrett* was a "trivial importance").

172. John Quincy Adams, *Memoirs,* 1:547; Magrath, *Yazoo,* 65–66.

173. Magrath, *Yazoo,* 66.

have sent a trial balloon, testing whether political forces would acquiesce in an eventual judicial ruling favoring the Yazoo claimants. When no politically influential forces moved to block the impending judicial action (as was the case when the Justices in 1801 began considering *Marbury*), Marshall expedited efforts to put *Fletcher* back on the judicial calendar.[174] The justices then handed down the expected decision on the merits during their next term.[175]

The Marshall Court enjoyed similarly strong national support when the justices in 1812 unanimously held that common law crimes could not be prosecuted in federal courts. *United States v. Hudson & Goodwin*[176] cheered Republicans, who had campaigned against such actions for the last fifteen years. Indeed, *Hudson* occurred only because a local federal prosecutor was not aware that Jefferson had ordered United States attorneys to drop all common law prosecutions. Remaining Federalists seemed reconciled to this restriction on federal executive and judicial power. By the time *Hudson* was decided, G. Edward White concludes, "both political parties . . . appear to have been of much the same opinion in their opposition to indictments in federal courts for common law crimes."[177]

Marshall Court policymaking accelerated when in the years following 1815 increasing numbers of persons who identified themselves as Democratic-Republicans favored broader exercises of national powers and more limitations on the state.[178] "Around the policies of the Fourteenth Congress, the Monroe administration, and the Marshall Court," Charles Sellers observes, "a new national consensus had emerged."[179] *McCulloch v. Maryland* highlighted this increasingly supportive relationship between the judicial and elected branches of government. Virtually all influential national politicians in 1819 agreed that the Democratic-Republican chartered Bank of the United States was constitutional and not subject to discriminatory state taxation. An effort to shut down the bank while *McCulloch* was pending was defeated in Congress by a large margin, and the official organ of the Monroe administration immediately endorsed the Marshall Court's decision.[180] H. Jefferson Powell notes "striking similarities between Marshall's reasoning and rhetoric and a series of brilliant speeches by Republican congressmen in 1817 and 1818 that defended a broad view of federal

174. See 2 *U.S. Stat.* 156 (1802); Warren, *Supreme Court,* 1:222–23.

175. Magrath, *Yazoo,* 67–68. 176. 11 U.S. (7 Cranch) 32 (1812).

177. White, *Marshall Court,* 354–55. See Haskins and Johnson, *Foundations,* 640; Warren, *Supreme Court,* 1:437–40; Haines, *Supreme Court,* 307–8.

178. See Haskins and Johnson, *Foundations,* 649.

179. Sellers, *Market Revolution,* 101. See Jessup, *Reaction and Accommodation,* 448 ("the great nationalist decisions of the Marshall Court moved in harmony with the spirit of the new age"); Smith, *John Marshall,* 430–31; Haines, *Supreme Court,* 308.

180. See *Daily National Intelligencer,* March 13, 1819; Smith, *John Marshall,* 446; Warren, *Supreme Court,* 1:509–10; Beveridge, *John Marshall,* 4:289; Stites, *John Marshall,* 131 ("the incorporation of the Second bank of the United States in 1816 showed that even Republicans had abandoned their constitutional scruples on that issue"); Nelson, "Eighteenth-Century Background," 953–54.

power."[181] Madison disagreed with some language the Court used, but he had no doubt that the Supreme Court correctly decided that the state law at issue in *McCulloch* was unconstitutional.[182]

The other two major cases handed down during the Supreme Court's remarkable 1819 term, *Dartmouth College v. Woodward*[183] and *Sturges v. Crowninshield*[184] demonstrate the Marshall Court's willingness to strike down state laws when no national consensus on appropriate policy existed. *Dartmouth College* had significant repercussions in American history,[185] but during the Era of Good Feelings the judicial decision that corporate charters were subject to contract clause restrictions attracted little public attention.[186] Bankruptcy attracted a good deal of attention during the 1810s, but no majority formed on any policy question. Many state legislators insisted that the national legislature pass a uniform bankruptcy law. Many national legislators thought state legislatures should pass local bankruptcy laws. Legislators who agreed that their legislature should make bankruptcy policy could not agree on any specific law.[187] As a result, the Marshall Court's ruling that state bankruptcy laws could not govern contracts made previous to the legislative enactment is best described as nonmajoritarian rather than countermajoritarian or majoritarian. Contrary to Bickel's supposition, *Sturges* did not "thwart[] the representatives of the people of the here and now."[188] The statute the justices declared unconstitutional had been repealed six years earlier by the New York legislature.[189]

The golden age of the Marshall Court supposedly ended in 1823,[190] but the next year witnessed *Gibbons v. Ogden* and *Osborn v. Bank of the United States.*[191] *Brown v. Maryland* followed in 1827.[192] This was hardly the output

181. Powell, "Essay in Retrieval," 731. See H. Jefferson Powell, ed., *Languages of Power: A Sourcebook of Early American Constitutional History* (Durham, N.C.: Carolina Academic Press, 1991), 311–12, 315–23 (excerpting speeches by John C. Calhoun, Henry St. George Tucker and Henry Clay). See also H. Jefferson Powell, "The Political Grammar of Early Constitutional Law," *North Carolina Law Review* 71 (1993):949, 959–60; Haines, *Supreme Court,* 339.

182. See Madison to Spencer Roane, September 2, 1819, *Writings of Madison,* 8:447–53; McCoy, *Last of the Fathers,* 99–103; Warren, *Supreme Court,* 1:517–18.

183. 17 U.S. (4 Wheat.) 518 (1819). 184. 17 U.S. (4 Wheat.) 122 (1819).

185. See Beveridge, *John Marshall,* 4:276–77.

186. See Francis S. Stites, *Private Interest and Public Gain* (Amherst: University of Massachusetts Press, 1972), 101, 164; Nelson, "Eighteenth-Century Background," 944; Warren, *Supreme Court,* 1:475. See also Haines, *Supreme Court,* 415 ("no one could have realized the extent to which the decision in this case would affect the growth of American law").

187. See Peter J. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607–1900* (Madison: State Historical Society of Wisconsin, 1974), 18, 21–22, 34–36.

188. Bickel, *Least Dangerous Branch,* 16.

189. Coleman, *Debtors,* 127. Justice Washington on circuit in 1814 struck down a similar law that had also been repealed by the state legislature. See *Golden v. Prince,* 10 F. Cas. 542 (D. Pennsylvania, 1814). See Coleman, *Debtors,* 153. The editorial on *Sturges* in the *Daily National* indicates probable administrative support for that decision. "State Insolvency Laws," *Daily National Intelligencer,* March 16, 1819.

190. See White, *Marshall Court,* 9; Haskins and Johnson, *Foundations,* 649; Stites, *John Marshall,* 116.

191. 22 U.S. (9 Wheat.) 738 (1824). 192. 25 U.S. (12 Wheat.) 419 (1827).

of a weakened court. *Gibbons* is universally understood to be the most popular decision the Marshall Court handed down.[193] The justices in *Osborn* with the support of national majorities continued defending the national bank against local attack.[194] *Brown* advanced the broad understanding of the federal commerce power shared by the Adams administration (and Baltimore business interests).[195] Reflecting in 1830 on these and other decisions, Madison pointed out that the Marshall Court rarely foisted unwanted policies on a hostile populace. "With few exceptions," the former president commented, "the course of the judiciary has been hitherto sustained by the predominant sense of the nation."[196]

Popular opposition to Marshall Court policymaking increased during the middle 1820s, but judicial power was never seriously threatened during the Adams administration. Numerous proposals to limit judicial power were made in the national legislature, but none passed.[197] States continued to resist and condemn federal judicial decisions when local oxen were gored. Still, as Leslie Goldstein points out, "[o]n occasions when one or two states purported to nullify federal law a greater number of states issued statements of condemnation of the would-be nullifiers."[198] Significantly, many former opponents of the Court openly praised judicial independence.[199] The only serious evidence of judicial decline during the administration of the younger Adams was the increasing number of nonunanimous decisions and *Ogden v. Saunders*.[200] *Ogden* was the only constitutional decision John Marshall dissented from while on the Supreme Court. Still, the 4 to 3 vote upholding the power of states to pass bankruptcy laws governing contracts made subsequent to the legislative enactment was as much a reflection of differences between Adams Federalists as a harbinger of the Jacksonian Court to come. Bushrod Washington, a Virginia Federalist and John Adams appointee, had ruled in 1814 that states had the power to regulate prospective contracts.[201] Another crucial vote in *Ogden* came from Smith Thompson, a protégé of Chief Justice James Kent of New York. Kent is conventionally regarded as being as Federalist as Marshall, yet he upheld the constitutionality of the New York law at issue in *Ogden* when it came before the New York Council of Revision.[202]

193. See Beveridge, *John Marshall,* 4:445; Warren, *Supreme Court,* 1:598 (noting that Attorney General William Wirt in his private capacity argued against the steamship monopoly), 611–14; Jessup, *Reaction and Accommodation,* 291–92 ("the *Gibbons* decision proved generally popular even in New York"). Even John Randolph did not object to the result in *Gibbons.* Warren, *Supreme Court,* 611–12 (quoting Randolph to Brockenbrough, March 3, 1824).

194. Warren, *Supreme Court,* 1:531–38.

195. See Jessup, *Reaction and Accommodation,* 321–23.

196. Madison to Edward Everett, August 28, 1830, *Writings of Madison,* 9:397.

197. See Charles Warren, "Legislative and Judicial Attacks," 11:12–14.

198. Leslie Friedman Goldstein, "State Resistance to Authority in Federal Unions: The Early United States (1790–1860) and the European Community (1958–1994)," *Studies in American Political Development* 11 (1997):149, 185. See Goldstein, "State Resistance," 151, 155–66.

199. Smith, *John Marshall,* 490–91. 200. 25 U.S. (12 Wheat.) 213 (1827).

201. *Golden,* 544. See Roper, "Judicial Unanimity," 126.

202. See Roper, "Judicial Unanimity," 132.

The Marshall Court during the 1820s did defer to politically powerful local forces in cases where national support for striking down a state law was lacking.[203] Marshall in *Cohens v. Virginia* issued a bold opinion defending in the abstract federal power to overturn state criminal convictions that moderate Republicans endorsed enthusiastically,[204] but he ruled on dubious grounds that Congress had not intended to prevent states from barring sales of federally authorized lotteries.[205] The Chief Justice proved even more circumspect when confronted with slavery. While on circuit Marshall refused to discuss the constitutionality of laws barring free black sailors from entering southern ports. "[A]s I am not fond of butting against a wall in sport," he told Story, "I escaped on the construction of the act."[206] This unwillingness to "butt[] against a wall in sport" foreshadowed later Marshall Court practice when, after John Quincy Adams and his moderate Republican supporters fell from power, the justices became considerably more supportive of state policies.

C. Retreating from Jackson: 1829–1835

Marshall Court policymaking ended abruptly in 1829 with the election of Andrew Jackson and the installation of a hostile Democratic party regime in the national government. Virtually all the major decisions in which that tribunal ruled in favor of a state against either a claim of individual right or national preemption were handed down during the Jackson presidency.[207] Whether such cases as *Barron v. Mayor & City Council of Baltimore*[208] (first ten amendments to the Constitution do not limit state power), *Providence Bank v. Billings*[209] (court will not imply immunity from taxation in state corporate charters) or *Willson v. Black Bird Creek Marsh Co.*[210] (commerce

203. See Wedgwood, "Cousin Humphrey," 266 (noting that "attacks upon the Supreme Court in the 1820s never led to any radical restriction of the Court's jurisdiction, in part because the Court acquiesced in the party's disobedience"). The justices were willing to declare state laws unconstitutional in the absence of strong national support when influential states were known to support such judicial action. Thus, in *Green v. Biddle,* 21 U.S. (8 Wheat.) 1 (1823), the Supreme Court with powerful backing from absentee Virginia interests declared Kentucky's land policies unconstitutional. See Stites, *John Marshall,* 138; Paul W. Gates, "Tenants of the Log Cabin," *Mississippi Valley Historical Review* 49 (1962):3, 19, 21.

204. See Smith, *John Marshall,* 463. See Luce, *Cohens,* 237–39.

205. See Mark A. Graber, "The Passive-Aggressive Virtues: *Cohens v. Virginia* and the Problematic Establishment of Judicial Power," *Constitutional Commentary* 12 (1995):67.

206. Warren, *Supreme Court,* 1:626 (quoting Marshall to Joseph Story, September 26, 1823). The case in question is *The Wilson v. United States,* 30 F. Cas. 239 (1820). See Warren, *Supreme Court,* 1:623–26; White, *Marshall Court,* 623–24. Several years later in the *Antelope* cases (25 U.S. [12 Wheat.] 546 [1827]; 23 U.S. [10 Wheat.] 66 [1825]), Marshall again sought to "achieve[] . . . a politic disposition of . . . sensitive issues" by ruling that some but not all of the slaves captured from a Spanish slaver were free. White, *Marshall Court,* 698. See Smith, *John Marshall,* 488.

207. See Jessup, *Reaction and Accommodation,* 284, 326, 405–6, 433–35; Haines, *Supreme Court,* 579–80, 610; Hobson, *Great Chief Justice,* 11 ("whether by coincidence or for reasons of political expediency, the Supreme Court began to render decisions more favorable to state power"); Morgan, "Marshall," 180–83.

208. 32 U.S. (7 Peters) 243 (1833). 209. 29 U.S. (4 Peters) 514 (1830).

210. 27 U.S. (2 Peters) 245 (1929).

clause does not forbid states from damming up navigable rivers when they do so to promote health) were consistent with the precedents established by the Marshall Court prior to 1828 is beyond the scope of this essay. The point is simply that, right or wrong, the Marshall Court tended to declare state laws unconstitutional only during time periods when that court was supported by the national executive and powerful figures (if not majorities) in Congress. The one major state law that the justices did declare unconstitutional after 1829, the Missouri loan certificate program struck down in *Missouri v. Craig,*[211] had already been declared unconstitutional by Missouri courts and repealed by the state legislature.[212]

The one occasion from 1828 to 1835 when the Marshall Court clearly challenged national policymaking highlighted the relative impotence of the federal judiciary during those years. Both the Monroe and Adams administrations sought to encourage Indian tribes living in Georgia to emigrate west of the Mississippi. Those administrations, however, rejected coercive state efforts to pursue that removal policy.[213] Jackson favored all state efforts at removal, voluntary or otherwise. His first annual message explicitly endorsed state demands that Indian tribes abandon sovereignty over territories given to them in earlier treaties.[214] When the justices attempted to enforce the older, Whig policy on their own by ruling against state jurisdictional claims over Indian land, the result was a judicial disaster. Georgia executed George Tassels despite a writ of error issued on his behalf by the Supreme Court[215] and refused to free two missionaries despite the Supreme Court's declaration in *Worcester v. Georgia*[216] that the Georgia statute under which those men were imprisoned violated federal law.[217] The missionaries were eventually pardoned, but judicial efforts to forestall the forcible removal of the Creek and Cherokees were miserable failures.[218]

The Marshall Court in the Cherokee cases did seem more sensitive to the political climate than its decisions superficially suggest. In a manner reminiscent of *Marbury* (or *Fletcher*),[219] Marshall in *Cherokee Nation v. Georgia* (1831) announced sympathy for the Cherokee's legal claims when denying the jurisdiction necessary to resolve the case.[220] Marshall encouraged Justices Thompson and Story to issue a lengthy dissent that explicitly con-

211. 29 U.S. (4 Peters) 514 (1830).

212. See Jessup, *Reaction and Accommodation,* 342–43.

213. Joseph C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality, *Stanford Law Review* 21 (1969):500, 504; Sellers, *Market Revolution,* 279.

214. Andrew Jackson, "First Annual Message," *Messages and Papers,* 2:456–59; Ellis, *Union at Risk,* 26–27; White, *Marshall Court,* 711–12; Jessup, *Reaction and Accommodation,* 360–61.

215. See "Resolutions of the Legislature Relative to the Case of George Tassels," *State Documents,* 127–28.

216. 31 U.S. (6 Peters) 515 (1832).

217. Burke, "Cherokee Cases," 512–13, 520, 527; Beveridge, *John Marshall,* 4:543–45; White, *Marshall Court,* 719; Jessup, *Reaction and Accommodation,* 368.

218. See Burke, "Cherokee Cases," 530; Stites, *John Marshall,* 162–64.

219. See nn.165–68.

220. *Cherokee Nation v. Georgia,* 30 U.S. (5 Peters) 1, 15 (1831). See Burke, "Cherokee Cases," 514–15; Hobson, *Great Chief Justice,* 174–76.

demned the Georgia policy at issue.[221] In order to rally political support for future action, Marshall helped the court reporter publicize that dissent and other legal material favoring the Cherokee cause.[222] Marshall continued to leave his options open the next year when handing down *Worcester v. Georgia*. Georgia might refuse to obey the judicial decree in that case, but President Jackson could not. Under existing law, the justices could order the president to enforce a judicial mandate only when clear evidence existed that the state court had refused to comply with the federal court ruling. By "coincidence," the Marshall Court scheduled the Cherokee cases so the justices could not consider ordering the president to enforce any judicial ruling until after the 1832 presidential election. As Joseph Burke notes, because the Supreme Court's 1832 term ended before Georgia could respond to *Worcester,* "its decree could not be enforced until its 1833 term."[223] Had anti-Jackson forces won the fall election, Marshall could have then called on a sympathetic president to enforce the judicial mandate.[224] Had Jackson won and the issue not been mooted, a strong possibility existed that the justices might have ruled that the Judiciary Act of 1789 did not authorize federal courts to issue writs of habeas corpus for state prisoners being held in violation of federal law.[225] Thus, Marshall may have structured the Cherokee cases so that Andrew Jackson would never be directly confronted with a Court order he had no intention of obeying.

With the exception of these Indian removal cases and the Burr impeachment, the historical record demonstrates how poorly a simple countermajoritarian or Federalist party label fits the Marshall Court. Marshall and his fellow justices never declared unconstitutional a federal law of any significance and hardly ever handed down a ruling in a state case that challenged national policy. The justices during the first third of the nineteenth century declared state laws unconstitutional only when such rulings were supported by either the federal government or by other, more powerful, states. "Marshall," William Nelson correctly observes, "would not interpose judicial power in the path of a majority's will unless he felt confident . . . that such a legal disposition of a case could command wide public support" or had reason to believe that the issue could be "decided with little public disputation."[226] Marshall's early judicial opinions did contain much language that aggravated his opponents and later played significant roles in American political development. *Marbury,* in particular, proved to be a

221. *Cherokee Nation,* at 69–80 (Thompson, J., dissenting).

222. Burke, "Cherokee Cases," 516–18; Jessup, *Reaction and Accommodation,* 365–66; Stites, *John Marshall,* 162–63; Hobson, *Great Chief Justice,* 176.

223. Burke, "Cherokee Cases," 525. See Ellis, *Union at Risk,* 31; Jessup, *Reaction and Accommodation,* 370.

224. Anti-Jacksonians campaigned in part on their opposition to Jackson's Indian policies. See Burke, "Cherokee Cases," 528; Ellis, *Union at Risk,* 28, 115; White, *Marshall Court,* 715–17; Jessup, *Reaction and Accommodation,* 368.

225. See Burke, "Cherokee Cases," 525–27; Ellis, *Union at Risk,* 31. Significantly, in the wake of the nullification crisis, Jackson proposed and Congress passed a bill which would have authorized the president to enforce such a judicial order. 4 *U.S. Stat.* 632, 633–35 (1833). See Burke, "Cherokee Cases," 531.

226. Nelson, "Eighteenth-Century Background," 947, 953–54.

precedent of the highest importance. Still, the language in *Marbury* bore fruit only when the political climate became more sympathetic to judicial review and the justices' particular favored policies. Marshall may have highlighted the judicial power to challenge elected officials in his opinions, but the more popular the law under judicial consideration, the less likely the Marshall Court was to declare that law unconstitutional.

III. RELABELLING THE MARSHALL COURT

Existing commentary explains in many ways Marshall's ability to resist Jeffersonian pressures. Some works regard Marshall as a political genius able to dominate the other justices on the court through the force of his intellect and personality.[227] Others suggest that Marshall was frequently forced to compromise his Federalist principles to gain the votes of his fellow justices;[228] William Winslow Crosskey maintains that in order to maintain a united front Marshall gave away the entire Federalist store.[229] Yet another line of commentary points out that the War of 1812 inspired a nationalist revival. This change in the political climate, Robert McCloskey notes, gave "Marshall his opportunity to use the judicial instruments he had been preparing" for the advancement of national and judicial power.[230] All these observations contain much truth, particularly the last. Nevertheless, scholars will not fully understand how the Marshall Court resisted the Jeffersonian tide until they are weaned from their facile characterization of that tribunal as the last outpost of the Federalist party.

The Federalist party label does not provide an adequate basis for understanding either Marshall Court decisions or that tribunal's relationships with other political forces during the first third of the nineteenth century. With some clarifications, the Federalist label may describe the partisan orientations of the judicial majority during the Jefferson presidency. The Court, however, was generally inactive from 1801 through 1808. The golden age of the Marshall Court took place from 1809 to 1828, years in which the ideological significance of the distinction between Federalists and Democratic-Republicans broke down. The justices during this time period enjoyed the political space necessary to make the decisions for which the Marshall Court is now renown because those rulings were supported by major elements of the dominant national coalition. Marshall Court policymaking came to an abrupt halt after 1828 when an unfriendly Jacksonian coalition gained control of the national executive. Many Jacksonians had formerly been Federalists, but those former Federalists did not support Marshall Court policymaking.

227. See Jefferson to Madison, May 25, 1810, *Republic of Letters,* 3:1631; Lerner," John Marshall," 396; Haines, *Supreme Court,* 331–33; Beveridge, *John Marshall,* 4:61; Holmes, "John Marshall," 132; Parrington, *Main Currents,* 21. See generally, White, *Marshall Court,* 671–77.

228. Roper, "Judicial Unanimity," 120.

229. William Winslow Crosskey, "John Marshall and the Constitution," *University of Chicago Law Review* 23 (1956):377.

230. McCloskey, *American Supreme Court,* 36.

One could still identify the Marshall Court as Federalist, if not the judicial auxiliary of the Federalist party, if one regards Marshall's views as "true federalism." This position overlooks the internal debates as to what "true federalism" demanded that wreaked the Federalist party even before Marshall was appointed Chief Justice. Those Federalists who made their way into the Democratic-Republican party after 1805 claimed that the party had changed, not them. Those Federalists who remained insisted that they were upholding the banner of Washington and Hamilton, if not Adams. Even if Marshall was the true Federalist and Taney, James Hamilton, and the *New York Evening Post* were mere Jacksonian apostates, describing the court as Federalist without saying more presents a misleading picture of the place the federal bench occupied in the political struggles that took place during this period.

Proto-Whig is the better label for the Marshall Court or, as proto-Whigs called themselves in the mid-1820s, "Friends of Adams."[231] Certainly, John Quincy Adams was a friend of the Court. John Marshall's appointment, the sixth president maintained, was "one of the most important services rendered by [the first President Adams] to his country." "Marshall," the younger Adams continued,

> by the ascendancy of his genius, by the amenity of his department, and by the imperturbable command of his temper, has given a permanent and systemic character to the decisions of the Court, and settled many great constitutional questions favorably to the continuance of the Union. Marshall has cemented the Union which the crafty and quixotic democracy of Jefferson had a perpetual tendency to dissolve.[232]

The Marshall Court reciprocated this friendship. One of the last acts the justices performed (almost) in unison was their campaign for Adams during the 1828 presidential election. Joseph Story, Bushrod Washington, and Smith Thompson all worked to secure the President's reelection.[233] When newspapers publicized some sharp comments Marshall made criticizing Jackson, the chief justice objected only "to being represented in the character of a furious partisan." That Marshall strongly supported a second term for Adams was not a matter that he objected to being made public.[234]

Treating John Marshall and his fellow justices as proto-Whigs or as "Friends of Adams" offers both a reasonable description of the Marshall Court's understanding of the constitution and that tribunal's relationship with the external political forces of its day.[235] The central demands of the rising nationalist forces during the heyday of the Marshall Court were

231. See Dangerfield, *Awakening of American Nationalism,* 289; Robert Kenneth Faulkner, *The Jurisprudence of John Marshall* (Princeton, N.J.: Princeton University Press, 1968), 166.

232. John Quincy Adams, *Memoirs,* 9:243, 250–51.

233. Stites, *John Marshall,* 152; Jessup, *Reaction and Accommodation,* 68–69; Joseph Story to Hon. Ezekiel Bacon, August 3, 1828, *Life of Joseph Story,* 1:538 ("I am sincerely anxious for the reelection of Mr. Adams").

234. Marshall to John H. Pleasants, *Niles Register,* April 12, 1828, 108; Smith, *John Marshall,* 501 (quoting Marshall to Story, May 1, 1828). See Stites, *John Marshall,* 152; Beveridge, *John Marshall,* 4:462–65.

235. For a discussion of similar affinities between Marshall and Madison, see Hobson, *Great Chief Justice,* 208–12; Ellis, *Jacksonian Crisis,* 57.

contained in Henry Clay's American System, a system of internal improvements, tariffs, and central banking, all sponsored by the federal government. The Marshall Court only specifically considered the constitutionality of the national bank, but the Court's opinions in *McCulloch* and *Gibbons* clearly indicated that the national government had the power to implement all the schemes that Henry Clay and his allies proposed in Congress during the years following the War of 1812. Indeed, Justice Johnson wrote President Monroe that he was "instructed" by "his Brother Justices" to inform the President that "the decision on the Bank question completely commits [the justices] on the subject of internal improvements."[236] Proto-Whigs and "Friends of Adams" echoed Marshall's sentiments in their political speeches and writings. John Quincy Adams declared in his first message to Congress, "[T]he power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . and to make all laws which shall be necessary and proper for carrying these powers into execution . . . [must] be effectually brought into action by laws promoting the improvement of agriculture, commerce, and manufacturers, the cultivation and encouragement of the mechanic and of the elegant arts, the advancement of literature, and the progress of the sciences, ornamental and profound."[237]

The constitutional philosophies of Henry Clay and the younger Adams demonstrate that the Marshall Court was neither Federalist nor countermajoritarian politically. During that tribunal's heyday from 1809 to 1828, the justices' major rulings and general constitutional philosophy were supported by prominent elements of the dominant national Democratic-Republican coalition and by moderate Republican justices on both the federal and state bench.[238] This political support, not some mysterious removal of law from politics, best explains how the Marshall Court was able to establish the foundations of judicial power in the United States.[239] The Supreme Court did not establish the power to declare laws unconstitution-

236. Warren, *Supreme Court,* 1:595 (quoting Johnson to Monroe, n.d.). See Smith, *John Marshall,* 468–69; Jessup, *Reaction and Accommodation,* 98–99.

237. Adams, "First Annual Message," 316. See sources cited in n.175.

238. See Nelson, "Eighteenth-Century Background," 900 (early nineteenth-century doctrines quite similar to Marshall's [were] elaborated by local and state court judges, not all of whom were Federalists").

239. See sources cited in n.115. Claims that the Marshall Court separated law from politics sometimes reach absurd heights. Haskins and Johnson conclude a long section on admiralty law in which in every case the Marshall Court reaches the decision desired by either the President or Congress by asserting that

> [a]t the same time [the court] made it patently clear that the constitutional limitations imposed by the American republican form of government required that the implementation of public policy should not disregard the rights and privileges of American citizens. The judiciary alone stood between the individual citizen and the excessive zeal of majority rule. (Haskins and Johnson, *Foundations,* 452–53)

Nowhere do Haskins and Johnson ponder the point at which elected officials and citizens begin discounting judicial assertions of power in theory when that power is never exercised in practice.

al merely by uttering such declaratory sentences as "it is emphatically the province and duty of the judicial department to say what the law is."[240] Nor is it the case that Marshall was able to establish the judicial power to declare laws unconstitutional despite the lack of political support for his preferred policies. Marshall and his brethren were able to establish the power of judicial review because, with very few exceptions, they made controversial policies only when they had strong backing in the executive or legislative branches of government.[241] Marshall was able to establish a degree of judicial independence, in other words, precisely because he was able to recognize the degree to which the judiciary was not independent.

Students of judicial history must remember that judicial review had to be established both legally and politically. Supreme Court justices could influence the course of American politics only when influential members of the incumbent regime supported judicial review. This political support depended in the long run on the extent to which judicial decisions advanced the policies that influential members of the political regime favored. While justices could frequently make decisions on matters that divided the dominant national coalition and even hand down an occasional countermajoritarian ruling, the general tenor of judicial rulings have to be sufficiently congruent with the sentiments of most leading political actors to maintain the general consensus in favor of judicial review that has existed throughout American history.

John Marshall's opinions played a central role in the process by which the federal judiciary acquired and solidified the legal and political power to declare laws unconstitutional. Still, scholars must pay equally close attention to the political forces that threatened, tolerated, and sometimes facilitated Marshall's institutional pretensions. The status of judicial review in 1789, 1801, 1835, or 1997 can be determined only by examining beliefs and behaviors throughout the American political system, and not solely by reference to selected judicial writings. James Madison, John Quincy Adams, Henry Clay, and even Thomas Jefferson may have done as much to establish judicial review as John Marshall, Joseph Story, and other proto-Whig jurists.

Scholars looking for the key to Marshall's role in establishing federal judicial power might consider his eighteenth-century reputation as a politician rather than his twentieth-century reputation as a jurist. Marshall the diplomat, candidate for political office, member of Congress, and executive branch official was known for his political sensitivity. He opposed the Alien and Sedition Acts in part because he believed those measures were political losers.[242] His poor standing among Hamiltonians was partly a consequence of their sense that Marshall was "disposed on all popular

240. *Marbury v. Madison,* 5 U.S. 137, 177 (1803).

241. State court justices relied on similar practices. Nelson points out that "early nineteenth-century judges gave effect to express constitutional restrictions and various kinds of rights only when they sensed, however, vaguely, that such action would be supported by a widespread consensus" (Nelson, "Eighteenth-Century Background," 935).

242. Smith, *John Marshall,* 239.

subjects to feel the public pulse."[243] Marshall's recent biographer suggests that "the political skills of compromise and accommodation" distinguished the future chief justice from the New England Federalists.[244] "He was always the prudent politician," Robert Faulkner similarly notes.[245] Thus, judicial review may have survived and sometimes thrived during the first third of the nineteenth century because the Supreme Court was led by a particularly astute politician, and not because Marshall always placed principle above politics. Marshall was able to achieve many of his long term principles, it seems, because he was particularly responsive to short term political considerations.

243. T. Sedgwick to R. King, *Rufus King,* 3:237. See Smith, *John Marshall,* 250–53, 265.

244. Smith, *John Marshall,* 252–53.

245. Faulkner, *Marshall,* 161–178. See Elkins and McKitrick, *Age of Federalism,* 728–32; Fischer, *Revolution of Conservatism,* 381.