

February 2001

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Repository Citation

David E. Marion, *The State of the Canon in Constitutional Law: Lessons from the Jurisprudence of John Marshall*, 9 Wm. & Mary Bill Rts. J. 385 (2001), <https://scholarship.law.wm.edu/wmborj/vol9/iss2/4>

THE STATE OF THE CANON IN CONSTITUTIONAL LAW: LESSONS FROM THE JURISPRUDENCE OF JOHN MARSHALL

David E. Marion*

Constitutional law has been an active battlefield as competing groups within the academy seek to deconstruct, reconstruct, and/or relegitimize the teaching and practice of law in the United States. Much of the rhetoric of the debate is couched in the language of rights. There is a danger that diminished attention to powers in the rhetoric and teaching of constitutional law may compromise sober and moderate constitutional reasoning. By reinvigorating reflection on powers-related issues, the legal profession can do its part to promote sobriety, and hence an added dose of prudence, in constitutional reflection and discourse by a democratic citizenry whose natural impulse is to make self-serving demands in the name of individual freedom and autonomy. In the constitutional reasoning and jurisprudence of John Marshall can be found considerable support for striking a balance between attention to powers and rights.

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INTRODUCTION

A veritable bull market in constitutional theory, or constitutional theorizing, has been raging for several decades. This has occurred at the same time as our popular culture has become increasingly “legalized.” It would be naive to think that the conjunction of heightened academic and journalistic/media interest in constitutional history and legal theory is merely a coincidence. A better explanation is available. The modern perception of the judiciary as a vehicle for regime-transformation is a major reason why philosophy professors and literary criticism scholars have joined more traditional students of the law in debating the means and ends of constitutional decision-making. For some scholars and practitioners, victory means reconstructing a legal system that is seen as oppressive and alienating; witness the arguments associated with the Critical Legal Studies movement.¹ Not all the major players in this on-going debate, however, are advocates of radical reform. Some participants propose new ways (e.g., application of efficiency theory) of legitimizing something

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¹ A useful review of the Critical Legal Studies (CLS) “project” appears in Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1526 (1991). CLS assumes the inseparability of law and politics. *Id.* at 1517.

close to the status quo. The “no holds barred” match that has engaged so many scholars is of considerable significance to the rest of us. If the “combatants” are right about the stakes of this exercise, the victor will enjoy considerable influence over the evolution, including the objectives and operations, of the republic that James Madison “fathered” and that John Marshall so carefully nurtured.

The extent to which the rhetoric of “reconstructors” and “relegitimizers” is infused with references to individual rights or freedoms and personal autonomy is especially striking. It was approximately a quarter century ago when Ronald Dworkin declared that “the language of rights now dominates political debate in the United States.”² The Civil Rights Movement, Warren Court decisions in First and Fourteenth Amendment cases, and the publication of books such as John Rawls’ *Theory of Justice* all contributed to the situation described by Dworkin.³ Significantly, the largely rights-sensitive match going on within the academy, represented in what is being taught and published, has its counterpart outside academic institutions in both subtle and high-profile attempts by academicians to influence judicial decision-making—consider the “philosophers’ brief” in *Washington v. Glucksberg*⁴ (the physician-assisted suicide case) and the anti-impeachment petition circulated by law professors in an effort to influence legislative voting during the Clinton hearings.⁵ Considering the influence the legal profession historically has enjoyed in the United States, the character and implications of the debate centered on the teaching of constitutional law warrant special attention by persons interested in the cultural evolution of America.

The makeup of the “canon,” along with any agenda brought to bear on the way it is taught and applied, inevitably affects conversations and thought about matters that shape our way of life.⁶ In the case of constitutional law, the canon shapes the teaching of students who are drawn in disproportionate numbers into leadership positions, including government positions. It is precisely considerations such as these that lead some reform-minded scholars to justify an anti-foundational, rather than a canonical, approach to the teaching of constitutional law. For all of these

² RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184 (1977).

³ *See id.* There is no reason to believe that circumstances have changed since Dworkin made his claim in 1977. In this connection, see MARY ANN GLENDON, *RIGHTS TALK* x (1991) (declaring that “discourse about rights has become the principal language that we use in public settings to discuss weighty questions of right and wrong”).

⁴ 521 U.S. 702 (1997).

⁵ *See* Cass R. Sunstein, *Professors and Politics*, 148 U. PA. L. REV. 191, 193-94 (1999).

⁶ An account of the “constraints” associated with literary and legal canons can be found in Stanley Fish, *Not of an Age, But for All Time: Canons and Postmodernism*, 43 J. LEGAL EDUC. 11, 12, 16 (1993). An attempt to employ a literary approach to the law without reducing the legal “canon” to the status of a completely “subjective” entity can be found in JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 95-104 (1985) [hereinafter *HERACLES’ BOW*].

reasons, the manner in which constitutional law is taught, as well as what is taught, has important implications for all Americans—it would be irresponsible not to approach this subject as one of fundamental “political” importance.

I. RECONSTRUCTIONISM IN CONTEMPORARY LEGAL THOUGHT

Reflecting recent developments in literary criticism and in American culture and politics since the 1960s, a number of legal scholars have been openly considering whether it makes sense to speak of a constitutional law canon, a set of defining or formative cases that should shape the study and discussion of constitutional law, and whether the language in which legal conversations occur needs to be revised to accommodate the alleged changes in our collective understanding of what makes for a just and decent society. Much of the reform rhetoric is couched in the language of rights and equality. Driving the most significant challenge to the traditional structure of legal study and discourse is the conviction that an important disjunction exists between the aims of post-New Deal America and the legal culture that shapes the teaching and practice of law in the United States. Bruce Ackerman of Yale Law School called on the legal profession in the mid-1980s to “construct a new language of power that does justice to the aspirations for justice of our fellow citizens.”⁷ Appeals for paradigm reforms that accentuate personal liberty and/or principles of individual dignity, equal protection, and efficiency have been characteristic of legal scholarship during the last third of the twentieth century.⁸ Although not an American scholar, Jürgen Habermas has influenced scholarly work in the United States with his call for an epistemic democracy based on discourse theory.⁹ The conditions for such a democracy

⁷ BRUCE A. ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 4 (1984) [hereinafter *RECONSTRUCTING*]. For an example of the historicist claim that canons are socially constructed see Fish, *supra* note 6, at 20. Sanford Levinson of the University of Texas Law School captured Ackerman’s present stature among legal scholars with the declaration that he is “America’s greatest theorist of transition.” Sanford Levinson, *Transitions*, 108 *YALE L.J.* 2215, 2215 (1999). Ackerman presented himself as a trailblazer in a 1999 essay and as a scholar whose arguments were taken seriously by the Clinton White House. See Bruce A. Ackerman, *Revolution on a Human Scale*, 108 *YALE L.J.* 2279, 2344 n.127 (1999) [hereinafter *Revolution*].

⁸ See, e.g., FRANKLIN STRIER, *RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM*; ACKERMAN, *supra* note 7; see also *REFORMING THE LAW* (Gary B. Melton ed.) (1987); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignity Theory*, 61 *B.U. L. REV.* 885 (1981) (appeal by Jerry Mashaw of Yale Law School for the construction of a “dignity theory” of due process). Reconstructive theories in the legal field reflect a trend in social thought generally. See, e.g., ROBERTO MONGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* (1987).

⁹ See, e.g., JÜRGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 1* (Studies in Contemporary German Thought) (Ciaran Cronin trans.,

include using constitutional law to secure for the people "[e]qual opportunities for the political use of communicative freedoms."¹⁰

Bruce Ackerman's labors on behalf of a new democratic order that is capable of mastering "structures of exploitation" are among the most well-known reform efforts of the last quarter century.¹¹ Believing that the United States is "far from being a well-ordered liberal state," Ackerman calls for reforms that will permit a person to "live his own life regardless of what his neighbors may think of him."¹² His announced goal is to assist the country in making good on the promise of a more humane society commonly associated with the New Deal and the Civil Rights era.¹³ In this connection, he sees lawyers as having a special responsibility to move this project along by adopting his model of a polity whose character is defined by an ongoing "[l]iberal conversation" that occurs within a "structure of undominated equality."¹⁴ Ackerman would arm all persons to mount an effective defense of valued personal interests: "Whenever any person finds any of his substantive interests blocked by the legal protection of the interests of competing citizens, he has a prima facie right to demand a hearing at which he is provided with some reason explaining why the law is protecting others at his expense."¹⁵

1993).

¹⁰ JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 127 (Studies in Contemporary German Social Thought) (William Rehg trans., 1997). It should be noted that not all recent reform proposals are driven by a desire to "reconstruct" the constitutional order or legal education based on "high" regime principles. In reaction to "high" theories of reform, some law professors argue that legal education needs to be reconfigured to give greater weight to practical or vocational skills. See Timothy W. Floyd, *Legal Education and the Vision Thing*, 31 GA. L. REV. 853 (1997).

¹¹ BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 375 (1980) [hereinafter *SOCIAL JUSTICE*]. An argument that a new constitutional order already has emerged appears in Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspirations*, 113 HARV. L. REV. 29 (1999).

¹² *SOCIAL JUSTICE*, *supra* note 11, at 375-76.

¹³ *Revolution*, *supra* note 7, at 2349.

¹⁴ *SOCIAL JUSTICE*, *supra* note 11, at 374; *RECONSTRUCTING*, *supra* note 7, at 100. Ackerman freely admits that his labors are not limited to influencing thinking within the academy. He is interested in "[s]peaking [t]ruth to [p]ower" so as to give some direction to the political life of the American people. *Revolution*, *supra* note 7, at 2347-48. See also Robert Post's "public discourse" view of democracy that permits all persons to embrace the government and laws as their own due to their engagement in communicative processes, ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 273, 310-12 (1995). Robert F. Drinan has issued his own call for lawyers to confront injustice as "moral architects" of a social order based on respect for human rights. See Robert F. Drinan, *New Horizons in the Role of Law Schools in Teaching Legal Ethics*, 58 LAW & CONTEMP. PROBS. 347, 354 (1995).

¹⁵ *RECONSTRUCTING*, *supra* note 7, at 98. Jerry Mashaw's reflections on a "dignity theory" of administrative due process point in a "conversational" direction. See Mashaw,

Ackerman's principal target is the "sinful opposition to the triumphant activist state" that he primarily associates with persons who subscribe to the laissez-faire view of government.¹⁶ Hence his attack on the "capitalist ideological hegemony" that he believes prevents us from understanding and defending our true interests.¹⁷ Fifty years after he claims the New Deal occasioned the development of a "new social consciousness in America," Ackerman argues that the existing order continues to suffer from both structural and substantive ills: governing institutions perpetuate the unequal distribution of political and economic "power" at the same time that they fail to promote social justice.¹⁸ Embracing the principle of popular sovereignty as the critical feature of a just democracy, he is left to trust the people to make the choices he would make about the content of public policies or even about the character of the republic.¹⁹ His extensive writings are in the service of promoting just this result. What he can hope for is that as a participant in an ongoing "liberal conversation" he will be successful in getting the people to subscribe to his views on such matters as social welfare policy. His position is similar to that described by Woodrow Wilson in his 1887 essay on administration: the person who desires to reform existing institutions must first shake up the people to get their attention and then instruct them in the ideals that he wishes them to endorse.²⁰ In this connection, Ackerman is looking especially to the legal profession for allies to assist him in carrying out a modern day version of the centennial-era project described by Wilson. As with Wilson, Ackerman is convinced that the stakes involve the very dignity and legitimacy of the United

supra note 8, at 930. Justice William Brennan is closely identified with dignity theory. A concise summary and defense of his jurisprudence of "libertarian dignity" appears in FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* (1999). The "costs" of this jurisprudence are reviewed in DAVID E. MARJON, *THE JURISPRUDENCE OF JUSTICE WILLIAM J. BRENNAN JR.*, 82-88, 126-30, 159-67 (1997). For a discussion of the argument that personal autonomy is critical to our status as fully free and rational persons, see Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225 (1992).

¹⁶ RECONSTRUCTING, *supra* note 7, at 21. Interestingly, Mark Tushnet argues that the New Deal/Great Society order associated with the "activist state" has been replaced by a new "minimalist" constitutional order. See Tushnet, *supra* note 11, at 30-33; see also Tushnet, *supra* note 1, at 1520.

¹⁷ RECONSTRUCTING, *supra* note 7, at 83.

¹⁸ *Id.* at 2, 22, 74, 94, 96-97.

¹⁹ See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 414-17. For Ackerman, the time has come for the people to "retake control of their government." *Id.* at 3.

²⁰ Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. (1887).

States as a democratic nation.²¹

Ackerman is only one of a number of legal scholars who have been actively advancing rights-sensitive "models" of a reconstituted American republic or controversial interpretations of the underlying premises and ends of the constitutional system fashioned at the Federal Convention of 1787. Richard Posner and other members of the so-called "law and economics school" have made considerable progress in securing converts to their argument that efficiency (wealth maximization) explains the operations of our system of law and deserves to be embraced as a desirable guiding principle by members of the legal profession.²² While Posner sees the economic theory of law as "the most promising positive theory of law extant,"²³ he acknowledges that "there is more to notions of justice than a concern with efficiency."²⁴ The latter concession, however, does not lead him to have reservations about the overall utility of the economic approach to law since he believes that "economics can provide value clarification by showing the society what it must give up to achieve a noneconomic ideal of justice."²⁵

Theories that accentuate individual rights and equal protection have an obvious appeal in a republic whose creedal document emphasizes natural equality and inalienable rights. The Declaration of Independence set the terms for the deliberations of the constitution-makers who gathered in Philadelphia. Appeals to efficiency à la Posner's, however, have their own attractiveness in a Lockean-style commercial society that invites people to seek comfortable or commodious preservation. The pursuit of efficiency tends to be presented as a value-neutral enterprise that fits well with the citizen/consumer sovereignty principle associated with democratic government.²⁶ Like Ackerman, Posner makes it clear that he is taking a rights-sensitive stand in his fight to influence the way in which law is taught and practiced.²⁷ Again like Ackerman, Posner believes that much is at stake

²¹ If one Harvard law professor is right, Ackerman should be gratified by the "charge" commonly given to lawyers at professional gatherings: "In the Law Day rhetoric of bar association officials, exhortations to uphold the rule of law increasingly have given way to self-serving portrayals of lawyers as vindicators of an ever-expanding array of claims and rights." MARY ANN GLENDON, *A NATION UNDER LAWYERS* 5 (1994).

²² See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 581-87 (5th ed. 1998); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 6 (1981). Posner dates the serious impact of economic analysis on legal theory to the 1960s. See POSNER, *THE ECONOMICS OF JUSTICE*, *supra*, at 50.

²³ POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra* note 22, at 26.

²⁴ *Id.* at 30.

²⁵ *Id.* at 24, 26.

²⁶ See CASS SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 14 (1997); see also STEVEN E. RHOADS, *THE ECONOMISTS' VIEW THE WORLD: GOVERNMENTS, MARKETS, AND PUBLIC POLICY* (1989).

²⁷ One of the distinctions that Posner makes between economics of law theory and Jeremy Bentham's type of utilitarianism is the greater sensitivity of the former to

in the debate among "high theorists."²⁸ He explained at the end of the 1990s the concerns that motivated him to "flay" the purveyors of much of contemporary moral and constitutional theory: "The answer is that they are influential in the law schools and that their influence is pernicious; it is deflecting academic lawyers from their vital role . . . of generating the knowledge that the judges and other practical professionals require if they are to maximize the social utility of law."²⁹

Another contender for the heart and soul of the legal profession, including instructors as well as practitioners, Ronald Dworkin has gained considerable attention for his defense of a "moral reading" of the Constitution that accentuates principles of personal freedom and equality.³⁰ The aim of his most important scholarship has been to advance "a particular way of reading and enforcing a political constitution," that is, a "moral reading" that "brings political morality into the heart of constitutional law" in a fashion that supports a "community of independent moral agents," the only type of arrangement that satisfies his test of a "genuine political community."³¹ In practice, Dworkin's "genuine political community" would assign considerable weight to individual rights or freedoms and, like Justice Louis Brandeis in *Whitney v. California*,³² impose substantial limits on the government's ability to restrain rights in the name of preserving social order or protecting physical property.³³ In addition to looking for the inclusion of key

rights-based claims that are especially valued within the American democratic system. See POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 22, at 3.

²⁸ RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* (1999) [hereinafter *PROBLEMATICS*].

²⁹ *Id.* at xi. With natural law theorists and proponents of radical egalitarianism and reactionary populism in mind, Posner bluntly summed up the task that he and other scholars should be attending to: "Constitutional scholars would be more helpful to the courts and to society as a whole if they examined constitutional cases and doctrines in relation not to what passes as theory in jurisprudential circles but rather to the social context of constitutional issues, their causes, their costs, and their consequences." *Id.* at x.

³⁰ See RONALD DWORKIN, *FREEDOM'S LAW* 2 (1996). Rogers Smith, Professor of Government at Yale, similarly argues that substantive values are more critically important to political legitimacy than democratic proceduralism. See Rogers M. Smith, *Legitimizing Reconstruction: The Limits of Legalism*, 108 YALE L. J. 2039, 2073-75 (1999).

³¹ DWORKIN, *FREEDOM'S LAW*, *supra* note 30, at 2, 26. Two decades before the appearance of *Freedom's Law*, Dworkin used the phrase "taking rights seriously" to summarize his test for a government that is worthy of respect. DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 204-05 (1977). With such criteria in mind, and perhaps looking to address concerns raised by his own writings, he included in *Freedom's Law* a declaration that Americans should be optimistic about the chances that the United States can satisfy its (and Dworkin's) high moral ideals. DWORKIN, *FREEDOM'S LAW*, *supra* note 30, at 38.

³² 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

³³ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 204. A classic expression of Brandeis's thoughts on the balance to be struck between appeals to First Amendment rights such as speech on the one hand and governmental interests in order on the other,

substantive moral principles in the nation's legal code (e.g., protection for freedom of thought), Dworkin assigns considerable weight to the interpretation given those principles by governmental institutions. He takes special exception to the unwillingness (typically on grounds of democratic legitimacy) of judges, lawyers, and scholars to accept a "moral reading" of the law as both intellectually and politically credible.³⁴ Interestingly, his argument is not that moral reasoning itself is completely anathema to judges. His real quarrel with judges follows from his perception of their unwillingness to admit openly that moral principles can provide a sufficient foundation for judicial decision-making.³⁵ In sharp contrast to Posner, only the open or public use of moral reasoning will satisfy the criteria Dworkin sets for a political order that merits the respect of an enlightened democratic citizenry. True legitimacy for the constitutional order (including its democratic bona fides) rests not on rigid adherence to the principle of popular sovereignty or majoritarian preferences for Dworkin, but on the maintenance of a political culture based on rights principles of personal liberty and equality. Reliance on nonmajoritarian procedures for governance under his "constitutionalist" view of democracy should occasion no "moral regret."³⁶ To the chagrin of restraintists, his "moral reading" of the Constitution leaves the door open to Brennanesque-style judicial activism.³⁷

James Boyd White ranks with Dworkin, Ackerman, and Posner as a major

appears in his concurrence in *Whitney*, 274 U.S. at 372-80 (Brandeis, J., concurring).

³⁴ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 2, at 1-6.

³⁵ See *id.* at 3-4. He laments the "potent grip" that majoritarian premises have had on the "imagination" of practitioners and scholars alike. *Id.* at 18.

³⁶ *Id.* at 17.

³⁷ Dworkin works hard to respond to charges that his approach permits open-ended judicial decision-making, but clearly he does not accept the constraints that Justice Antonin Scalia or Robert Bork would impose on the judiciary. Dworkin summarized his position well in 1996: "We are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases." *Id.* at 10, 11-12. For Dworkin's criticism of Scalia and Bork, see *id.* at 13. Some complementary reflections on Justice Brennan appear at *id.* at 132-33, 213. Compare the reasoning advocated by Dworkin with Richard Posner's claim that "legal issues should not be analyzed with the aid of moral philosophy, but should instead be approached pragmatically." *ECONOMIC ANALYSIS OF LAW*, *supra* note 22, at viii, 98. Posner sees Dworkin's moralistic approach as being in the pursuit of "egalitarian natural justice" *id.* at 151. It should be noted that Posner's separation of pragmatism from moral philosophy is not uncontroversial in itself. For the application of his "ethics of wealth maximization" to the problem of racial discrimination, see POSNER, *THE ECONOMICS OF JUSTICE*, *supra* note 22, at Part IV. James Boyd White of Michigan Law School is one of a number of scholars who believe that economic reasoning is not only limited in its application to human experience but can encourage worrisome policies. See JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 82-86 (1990) [hereinafter *JUSTICE AS TRANSLATION*]. A thoughtful consideration of Brennan's judicial activism appears in MICHELMAN, *supra* note 15.

figure in the contemporary debate on how best to engage in legal reasoning and teach students to think about constitutional law and the legal order. White invites lawyers to view law as a literary activity through which they can "help to create new sets of relations in the present and future."³⁸ Without embracing the position that original intentions are unintelligible or indecipherable, White argues that texts must be approached as having a life of their own.³⁹ White describes his goal as illuminative, not re-constitutive; that is, his self-described purpose is to make lawyers conscious of the nature of the reasoning that he believes is characteristic of American law. At the same time, he sees the method he describes as one that fosters "cultural change" and promotes moral "sympathy."⁴⁰ In keeping with the dominant aim of so much of the "reconstructive" movement, White freely admits that he wishes to be a voice for openness in a society that is too much given to assertiveness and close-mindedness.⁴¹ White's project is decidedly "political" in nature, and he acknowledges as much.⁴² What is common to Ackerman, Posner, Dworkin, and White is the opening that they give courts, lawyers, and/or bureaucrats for shaping the way of life of the American people.⁴³

In sum, Ackerman, Dworkin, White, and Posner are marketing wares that play on important impulses in the psyche of the American people at the same time that they are fighting for the attention and assistance of the legal community. As evidenced by their labors, much of the effort to reconstitute, redefine or rediscover the core legal and governmental principles of the American republic is packaged in the language of rights and includes vigorous affirmations of individual dignity and

³⁸ HERACLES' BOW, *supra* note 6, at xiii; see JUSTICE AS TRANSLATION, *supra* note 37, at 17-19. Law is a "compositional art," that is, a "set of activities by which minds use language to make meaning and establish relations with others." *Id.* at 17.

³⁹ See HERACLES' BOW, *supra* note 6, at 88.

⁴⁰ See *id.* at 104. Additional references to his goal of "bringing to consciousness" the nature of law as a "compositional art" can be found in JUSTICE AS TRANSLATION, *supra* note 37, at 19. It is significant that White's deconstruction of the Declaration of Independence leads him to declare that this is an "inspirational," not an "intellectual," text, a document about "feelings" not "fundamental truths." JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 239 (1984). This devaluation of the "ideational" significance of the Declaration flies in the face of the Lincolnian reading of the document.

⁴¹ See HERACLES' BOW, *supra* note 6, at 21.

⁴² See *id.*

⁴³ While it is a common assumption that "liberal" theorists are comfortable with independent judicial decision-making, Posner, who is not a poster child of liberal jurisprudence, rejects the hard positivist position that judges who issue decisions in the interstices of the law are acting "outside the law." He includes in his "pragmatic" approach to legal decision-making a basis for judicial "civil disobedience" as a device for retarding "destabilizing innovations in public policy by the populist branches." Still, Posner claims not to be a proponent of judges seeking to "remake society." POSNER, THE ECONOMICS OF JUSTICE, *supra* note 22, at 96-97, 107, 143-44.

equality. The stakes in this exercise are considerable for the participants as well as for the American people. Ackerman's efforts to discredit the law and economics movement are informed by the conviction that the "Chicago School" promotes a regime whose members are not guaranteed a "fair share of economic power," a regime with which he is uncomfortable.⁴⁴ For their part, scholars who celebrate the virtues of welfare economics fear the opening to heavy-handed governmental action that accompanies Ackerman's call for a "more liberal power structure" in the service of a "more humane and just society."⁴⁵ The success or failure of an Ackerman or Posner will not only shape the teaching of constitutional law, but governmental operations as well, including the activities of the courts, which in turn will affect our way of life. To borrow from J.M. Balkin and Sanford Levinson's 1998 *Harvard Law Review* essay on the canon debate in constitutional law, "the way in which constitutional law is taught may affect the development of constitutional doctrine."⁴⁶ There is no doubt that most legal scholars, and practitioners with scholarly credentials such as Posner, concur in this assessment.⁴⁷ In a society where laws establish the boundaries of most private and public practices, what material gets taught and how it is presented inevitably will have some effect on the way lawyers think about the constitutional order in its grandest dimensions, including affairs that fall not only in the legal realm, but in the arena of politics as well.

II. GROUND ZERO: CONSTITUTIONAL LAW IN THE CLASSROOM

If constitutional law texts and law school courses traditionally were heavy on structural issues and governmental powers and light on rights and liberties, there is

⁴⁴ Repeated references to the Chicago School can be found in RECONSTRUCTING, *supra* note 7, at 94. Posner's application of economic analysis to legislative decision-making leads him to make declarations that invite the pleas of reformers such as Ackerman that a "reconstruction" of the legal system is in order. Witness Posner's assertion that a "characteristic product" of the legislative process is "the unprincipled redistribution of wealth in favor of politically effective interest groups." ECONOMIC ANALYSIS OF LAW, *supra* note 22, at 586.

⁴⁵ SOCIAL JUSTICE, *supra* note 11, at 376; RECONSTRUCTING, *supra* note 7, at 78.

⁴⁶ J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1001 (1998). Ackerman acknowledged in a *Yale Law Journal* article that appeared in 1999, that his enterprise will be advantaged if he can influence both the teaching of constitutional law and the beliefs of "younger members of the legal academy." The next step is to see that the "new learning trickles into the practical life of the profession, incorporating itself slowly into judicial opinions at various levels of the hierarchy—until at long last, it trickles up to the Supremes." *Revolution*, *supra* note 7, at 2279, 2348-49.

⁴⁷ A provocative and highly critical examination of the contemporary state of the legal profession, and the cultural implications for the country, appears in GLENDON, *supra* note 21.

considerable evidence that this distribution was upset sometime after the 1960s. Law students in the nineteenth century who cut their teeth on Joseph Story's *Commentaries on the Constitution of the United States* would have associated constitutional law with the study of history and governmental powers.⁴⁸ As late as 1970, Gunther and Dowling's heavily-used constitutional law text, which first appeared in 1937, devoted more than half its pages to subjects touching "constitutionalism" and the "structure of the government."⁴⁹ By 1997, the Gunther and Sullivan casebook (the successor to Gunther and Dowling) devoted more than half its pages to rights-related material.⁵⁰ It is the imbalance that seemingly favors rights over powers, and not the dominance of "high theory" over "practical, useful research," that is the subject of the present Essay.⁵¹ Considering the decisions of the Warren Court in First and Fourteenth Amendment areas and the issues highlighted by the Civil Rights Movement of the 1950s and 1960s, the redistribution of space in casebooks between powers and rights perhaps is not surprising.⁵² This is not the same as saying, however, that this development is unimportant or that there is no price to pay for the heavy weighting of rights over powers. There is good reason to worry that the diminished space and time allotted to powers may occasion the emergence of a simplistic and distorted understanding of what is required to maintain a competent and decent republic of rights. In short, what finally may be in the balance is the very preservation of the republic of rights that took form in 1787.

Nineteenth and early twentieth century treatises on constitutional law, as well as casebooks on the subject, devoted considerable space to structural or institutional topics such as separation of powers and the powers of the national government and the states. An examination of early casebooks carried out in the late 1990s by Balkin and Levinson led them to conclude that "[i]n many of these early casebooks, individual rights issues are considered secondary."⁵³ The first treatises and

⁴⁸ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Carolina Academic Press 1987) (1833).

⁴⁹ GERALD GUNTHER & NOEL T. DOWLING, CASES AND MATERIALS ON CONSTITUTIONAL LAW (8th ed. 1970).

⁵⁰ GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (13th ed. 1997).

⁵¹ On the claim that law schools are sacrificing practical instruction to the advancement of the philosophical and political agendas of law professors, see PROBLEMATICS, *supra* note 28, at 281-95.

⁵² The extent to which rights-concerns dominate the law school landscape provoked Balkin and Levinson to suggest that "someone wishing to become a 'player' in the legal academy is well advised to become adept in the jurisprudence of the First and Fourteenth Amendments, rather than to study and write about the power of the President to engage in foreign adventures without prior approval of Congress." Balkin & Levinson, *supra* note 46, at 964, 979 n.55.

⁵³ *Id.* at 1010. They note that James Parker Hall's 1927 casebook, *Illustrative Cases on Constitutional Law*, devoted primary coverage to structural issues. *Id.* at 1010 n.146.

casebooks on the Constitution appear to have reflected the attention leading founders such as James Madison gave to the institutions and powers of the different governments. It is also true that these treatises and casebooks reflected the absence of large numbers of individual rights cases in the Supreme Court's caseload during much of the period from the inauguration of George Washington to the first decades of the twentieth century, but this situation is itself revealing of the judiciary's historical deference to the government's pursuit of self-preservation and the protection of an American way of life.⁵⁴

Joseph Story's handling of the Constitution is particularly revealing considering the influence of his writings on the study of law through the nineteenth century. The 1833 edition of his *Commentaries on the Constitution of the United States* combines a brief history of the United States and a review of the "nature of the Constitution" with extended comments on the institutions and powers of the national government. The dutiful reader of Story's *Commentaries* would be well-versed in the responsibilities of the different departments of the government as well as the powers invested in each. As importantly, Story took pains to establish the connection between effectiveness in government and the enjoyment of the "common liberties, and the common rights of the people."⁵⁵ What might be called the traditional approach to the study of rights created an almost seamless connection between personal or individual liberties and the requirements of competence and effectiveness in government.

James Madison, long recognized as the "father" of the Constitution, reminded his contemporaries that a republic of rights can only succeed if the government is capable of "controlling" the governed.⁵⁶ According to Madison in *Federalist Paper No. 51*, the "first object" or task of the delegates at the Constitutional Convention of 1787 was to craft a government that could effectively "control" the people.⁵⁷ This consideration is well represented in Story's *Commentaries*. The practice of devoting considerable attention in constitutional study and reasoning to institutional or structural elements of the governmental system, including the powers of the different branches of the national government, persisted well into the twentieth

⁵⁴ Consider, for example, the Supreme Court's generous understanding of what the states and the national government might do in the name of protecting a broadly-defined right in *Reynolds v. United States*, 98 U.S. 145 (1878) (holding that polygamy is not protected under First Amendment Free Exercise Clause), and in early twentieth-century cases such as *Whitney v. California*, 274 U.S. 357 (1927) (holding that a state may punish speech proposing Communist principles); *Gitlow v. New York*, 268 U.S. 652 (1925) (holding that a state may punish utterances endangering the government); and *Abrams v. United States*, 250 U.S. 616 (1919) (holding that pamphlets discouraging the draft is not protected by freedom of speech or of the press).

⁵⁵ STORY, *supra* note 48, at 193, 219.

⁵⁶ See THE FEDERALIST No. 51 at 321-22 (James Madison) (Isaac Kramnick ed., 1987).

⁵⁷ See *id.*

century. This practice was reflected in the makeup of casebooks as well as in the traditional division of constitutional law into segments devoted to powers and rights. Until recently when many law schools sought to incorporate more room for electives into the curriculum, a full semester or half-year was devoted to the study of governmental powers. The consideration of powers occurred prior to any substantial review of rights-related material.

While the division between powers and rights is still a fixture in the teaching of constitutional law, there is abundant evidence that case material having a connection with rights-based claims or substantial personal interests occupies considerably more space in casebooks and constitutional law courses than was true only a few decades ago. In many instances, constitutional law is now a one-semester rather than a two-semester offering, which at a minimum compresses the time available for the teaching of both rights and powers. Emory University Law School's on-line catalog for 1999-2000, for example, listed a one-semester first-year course in constitutional law that covered the powers of the national government and states while providing an "introduction to individual rights, with emphasis on the operation of the Fourteenth Amendment due process and equal protection clauses, First Amendment problems, and evolving doctrines of privacy."⁵⁸ A 1999-2000 listing for Constitutional Law 100 at Harvard described a course that combines case material on congressional power, federalism, and separation of powers with Equal Protection Clause cases and some attention to the First Amendment. Columbia Law School's "Foundation Curriculum" includes a basic constitutional law course that again combines attention to institutional and powers-related issues with materials that illuminate "the theory and content of individual rights under the Constitution."⁵⁹

The impression that the combination of powers and rights cases in basic constitutional law offerings reflects a "balanced" treatment of powers and rights in the teaching of constitutional law, however, can be deceptive since many law schools offer "Constitutional Law II" classes devoted entirely to First and/or Fourteenth Amendment rights. Columbia's 1999-2000 internet site lists the First

⁵⁸ Emory Law School Course Catalog, *available at* <http://www.Law.emory.edu/LAW/CATALOG/courses.html>.

⁵⁹ Columbia Law School, Curriculum, *available at* <http://www.Law.columbia.edu/academics/foundation>. Also note the 1999-2000 basic constitutional law listings at the University of Kansas, *available at* <http://www.ukans.edu/academics>; American University, *available at* <http://www.wcl.american.edu/courses>; Franklin Pierce, *available at* <http://www.fplc.edu>, and Case Western Reserve, *available at* <http://www.cwru.edu>. The online description of Constitutional Law I at New York University states that "the goal of this course is to provide a one semester summary coverage of all the major subject matter areas of constitutional law;" *available at* <http://www.law.nyu.edu/recordsregistration/fall00/coursedescription.html>.

and Fourteenth Amendments as customary Constitutional Law II topics.⁶⁰ Constitutional Law II at Emory, an upper division elective class, is described as “a study of individual rights problems,” with “substantial coverage of equal protection, free speech/free press, and civil rights issues.”⁶¹ Constitutional Law I at Cornell Law School covers “structural aspects of the Constitution” as well as “certain rights provisions” while Constitutional Law II focuses on the First Amendment and the “vindication of constitutional rights in civil cases.”⁶² Under “constitutional law,” Boston University School of Law’s internet site for 1999-2000 described a basic constitutional law course that examined traditional structural/institutional issues as well as individual rights followed by a specialized course entitled “Political and Civil Liberties.”⁶³ In short, where the two-semester sequence remains, rights cases often share one semester with powers and then take up much if not all of an entire second semester themselves. A dramatic example of the change that has occurred appeared in Georgetown University Law School’s online curriculum guide for 1999-2000 which identified Constitutional Law II: Individual Rights and Liberties as the “basic” constitutional law course for the “cluster” of courses in the “field of constitutional law and government.”⁶⁴

Since casebooks both determine and mirror what occurs in the classroom, it is not surprising that the expanded treatment of rights that is visible in catalog descriptions of constitutional law courses finds its reflection in the material that makes its way into texts. The thirteenth edition (1997) of what is now the Gunther and Sullivan text devotes more than eleven hundred of its fifteen hundred and fifty pages to rights-related case material.⁶⁵ Where the sections on separation of powers, the commerce power, or the “structure of government” each cover less than one hundred pages, the sections on suspect classifications and freedom of speech cover almost two hundred pages each.⁶⁶ In short, material typically associated with

⁶⁰ Columbia Law School, Curriculum, *available at* http://www.law.columbia.edu/academics/upperclass_curr/constitutional.htm.

⁶¹ Emory University School of Law, Law School Catalog, Course Descriptions, *available at* <http://www.law.emory.edu/LAW/CATALOG/courses.html> (last visited Nov. 8, 2000).

⁶² Cornell Law School, Course Descriptions, *available at* <http://www.lawschool.cornell.edu/admissions/courses9900.htm>.

⁶³ Boston University School of Law, *available at* <http://www.bu.edu/law/jd/curriculum>.

⁶⁴ *Available at* <http://data.law.georgetown.edu/curriculum/tab-clusters>. For examples of sequences that follow the classical division between powers and rights, see the 1999-2000 online catalog or curriculum descriptions for the law schools at Vanderbilt *available at* <http://www.vanderbilt.law.edu/law/courses/home.html>, Indiana University *available at* <http://www.iulaw.indy.indiana.edu>, Northern Illinois University *available at* <http://www.niu.edu/claw.index.htm>, the University of Wisconsin *available at* <http://www.law.wisc.edu> and Samford University’s Cumberland School of Law *available at* <http://www.samford.edu/schools/law/cdmain.htm>.

⁶⁵ See GUNTHER & SULLIVAN, *supra* note 50.

⁶⁶ See *id.*

"powers" accounts for a little more than a third of the text. By contrast, more than fifty percent (781/1453) of the eighth edition (1970) of Gunther and Dowling, the precursor to Gunther and Sullivan, was devoted to material that fell under headings such as "constitutionalism" and "structure of government."⁶⁷ The eighth edition contains only a one page note on "'suspect' distinctions" and combines equal protection material in two sections of one hundred and twenty pages.⁶⁸ The third edition (1999) of Louis Fisher's *American Constitutional Law* devotes less than five hundred pages to cases and reading material on such subjects as federalism, separation of powers, and the jurisdiction of the courts, while material dealing with Bill of Rights and Fourteenth Amendment guarantees fill more than seven hundred pages.⁶⁹ The 1997 edition of Erwin Chemerinsky's constitutional law text devoted roughly three hundred and fifty pages to traditional themes in the powers area and approximately seven hundred pages to rights material. While the sections on legislative and executive powers together cover fewer than one hundred and twenty pages, the section on First Amendment Expression alone covers more than two hundred pages. Religion cases occupy another seventy pages.⁷⁰ A similar division between "powers" and "rights" appears in the seventh edition (2000) of Craig Ducat's *Constitutional Interpretation*, divided into two volumes since its first appearance.⁷¹ Ducat combines five hundred pages of powers-related material in the first volume compared to over fourteen hundred pages of material in the volume devoted to "rights of the individual."⁷² Texts having an undergraduate rather than a law school complexion also tend to assign the majority of the space to material having some connection with rights-related themes. The second edition of Stephens and Scheb's *American Constitutional Law* devotes three hundred and thirty pages to powers-related cases, but five hundred-plus pages are given to subjects such as privacy, equal protection, civil rights, and First Amendment freedom. The 1997 edition of David O'Brien's *Constitutional Law and Politics* offers readers more than eight hundred pages of material on "powers" subjects (Vol. 1), considerably

⁶⁷ See GUNTHER & DOWLING, *supra* note 49.

⁶⁸ See *id.*

⁶⁹ LOUIS FISHER, *AMERICAN CONSTITUTIONAL LAW* (3d ed. 1999). West Group's three-volume *MODERN CONSTITUTIONAL LAW* devotes one volume [III] to traditional rights issues [770 pages] and two volumes to topics generally associated with rights: "The Individual and the Government" [Vol. I, 497 pages] and "Equal Protection" [Vol. II, 814 pages].

⁷⁰ See ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* (1997).

⁷¹ See CRAIG DUCAT, *CONSTITUTIONAL INTERPRETATION* (7th ed. 2000).

⁷² See *id.* Examples of casebooks and supplementary constitutional law texts that reflect similar distributions of space between powers and rights material abound. See DERRICK A. BELL, JR., *CONSTITUTIONAL CONFLICTS I* (1997) (devoting approximately two-thirds of its space to rights-related issues (three hundred and thirty pages out of five hundred)); DONALD LIVELY ET AL., *CONSTITUTIONAL LAW* (2d ed. 2000) (devoting more than nine hundred pages out of roughly fourteen hundred and fifty to material associated with individual rights and equality themes).

more than the standard law school casebook.⁷³ This two-volume set, however, still reflects the dominance of rights in the contemporary field of constitutional law. The civil rights/liberties volume is in excess of fifteen hundred pages. Again with this set, it is easy to imagine instructors in year-long courses wanting to get a head start on the "rights" material during the "powers" semester.⁷⁴

It may be useful to note that nothing in this review of casebooks and course descriptions is intended to suggest that students are not invited to reflect on governmental powers when dissecting rights cases—they are. Nor does this Essay presume to suggest that students only study governmental powers in courses on constitutional law—they do not. But, then, these things always were true. What has changed is the extent of the tilt in the direction of rights that characterizes the study of constitutional law per se. What is important is the effect of this "tilt" or imbalance on the education of an important class of persons in our society.⁷⁵ The struggle going on between Ackerman and Posner for the allegiance and support of the legal community is understandable. Mary Ann Glendon of Harvard Law School has repeatedly invited scholars to reflect on the state of the legal profession precisely because of the disproportionate influence of lawyers and judges, and law professors, on the politics and culture of the country.⁷⁶

The current valuation of rights and powers in constitutional law study and discourse contrasts sharply with the situation that prevailed until rather late in the twentieth century. As scholars like Ackerman and Dworkin are involved in a "political" project, so the case for seeking some balance in the teaching of rights and powers can best be made on fundamental political grounds, that is, with attention to the way of life of the American people. As the next section attempts to demonstrate, by reinvigorating reflection on powers-related issues, the legal profession can do its part to promote sobriety, and hence an added dose of prudence, in constitutional reflection and discourse by a democratic citizenry whose

⁷³ See DAVID M. O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS* (3d ed. 1997).

⁷⁴ The tilt in the direction of rights-related case material is not a 1990s phenomenon. The 1980 edition of Kaupé and Beytagh's casebook *Constitutional Law: Cases and Materials* devoted approximately five hundred and fifty pages to material related to institutional concerns ordinarily associated with the "powers" section of constitutional law and over one thousand pages (457-1598) to themes touching Bill of Rights and Fourteenth Amendment guarantees.

⁷⁵ The perception that the contemporary historical period can legitimately be characterized by the weight being given to rights is reflected in academic book titles such as DEBRA L. DELAET, *U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS* (2000); see also Balkin & Levinson, *supra* note 46, at 1010.

⁷⁶ See, e.g., Mary Ann Glendon, Symposium, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 B.Y.U. L. REV. 385 (1993); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. REV. 519 (1992); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

natural impulse is to make self-serving demands in the name of individual freedom and autonomy. In the constitutional reasoning and jurisprudence of figures such as John Marshall and James Madison can be found considerable support for striking a balance between attention to powers and rights.

III. PRUDENCE AND SOBRIETY IN CONSTITUTIONAL DISCOURSE

As Ackerman, Dworkin, Posner, and White all have in their mind's eye a desirable state of affairs that they would like to see realized in practice, so leading figures of the founding such as George Washington, James Madison, and John Marshall were actively engaged in eliciting popular support for institutions and practices that they believed would yield beneficial results. Of all the Founders or near-Founders, Marshall exerted the greatest influence over constitutional and legal reasoning.⁷⁷ He remains a monumental figure in constitutional history, dwarfing all his predecessors and successors within the judicial department.

While reminders of Marshall's defense of an independent judiciary remain a staple of legal scholarship, what is not so visible is his sober reasoning in matters involving individual rights and liberties. This reasoning, which he considered so essential to the success of the Founders' "experiment" in democratic government, warrants attention even as some scholars declare in the aftermath of the Cold War that the American version of the modern democratic nation state is invincible and represents the culmination of several millennia of political history.⁷⁸ Support for this rather optimistic claim notwithstanding, there is no reason to believe that the United States is free of the challenges, some a product of human nature itself, that led Madison and other delegates at the Constitutional Convention to look for "devices of prudence" to deal with factious impulses and the fallibility of human beings.⁷⁹ Few officials from the extended founding period were forced to reflect on the constitutional dimensions of both the means and ends of the new governmental system more deeply than John Marshall. The fact that he was a self-conscious actor in the unfolding of the new republic adds both to the significance and utility of his legal thought. The shape and destiny of the American republic owes much to his jurisprudence. For all these reasons, recourse to his reflections on the character of a thoughtful constitutional jurisprudence should yield valuable instruction for persons engaged in the current debate on the relative weightings of rights and

⁷⁷ Perhaps no greater compliment was paid to Marshall than by his colleague Justice Joseph Story: "Will you excuse me for saying that your appointment to the Bench has in my judgment more contributed under providence to the preservation of the true principles of the constitution than any other circumstance in our domestic history." Letter from Joseph Story (June 21, 1821), in 3 *THE PAPERS OF JOHN MARSHALL*, at 176 (Charles F. Hobson ed.) (1998) [hereinafter *MARSHALL PAPERS*].

⁷⁸ See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

⁷⁹ *Id.*

powers in the study and practice of constitutional law.

It is commonplace in American law to associate John Marshall with the vindication of individual rights and the defense of an independent judiciary. It is just these themes that get attention in most treatments of his opinion in *Marbury v. Madison*.⁸⁰ His declaration in *Marbury* that the United States will cease to deserve to be called a nation of laws if our laws do not protect rights, along with his defense of an independent judiciary armed with the power to review the constitutionality of the actions of coordinate branches of the government, anticipated by more than a century the role that courts would play in articulating First, Fifth, and Fourteenth Amendment rights and in enforcing limits on governmental power.

Marshall's conviction that the protection of rights and individual liberty by an independent judiciary was a primary test of legitimate government did not suddenly arise with his appointment to the United States Supreme Court. Among his earliest law notes can be found the statement that "for every injury a man shall have an action & for every right he has a remedy."⁸¹ Late in life, he would write that the American Revolution was "a war of principle, against a system hostile to political liberty, from which oppression was to be dreaded, not against actual oppression."⁸² For Marshall, liberty or freedom for the American people, the flip side of which is protection against governmental tyranny, was the animating principle of the whole independence movement. While representing Fauquier County in the House of Delegates in 1783 as a member of the Council of State, Marshall signed his name to an "opinion" declaring that a law giving the executive the power to inquire into certain actions taken by county magistrates was "contrary to the fundamental principles of our constitution."⁸³ The Council's response to the Governor ends with the observation that action against a magistrate should commence in a proceeding before a "Court of Justice."⁸⁴ Another classic example of his attention to judicial protection for the rights of individuals appears in remarks offered on June 10, 1788, during the Virginia Ratifying Convention. Although not reputed to possess Patrick Henry's capacity for stirring oratory, Marshall's reflections on the failure of the confederation system to protect the fundamental procedures of free government

⁸⁰ 5 U.S. (1 Cranch) 137 (1803). Without knowledge of the great stature that Marshall would later acquire due to his opinions in cases like *Marbury*, a resident of Richmond anticipated the reputation that Marshall would enjoy in a remark made at a reception for him on his return from France in 1798: "When future generations persue [sic] the history of America, they will find the name of Marshall on its sacred page as one of the brightest ornaments of the age in which he lived." Editorial Note, in 3 MARSHALL PAPERS, *supra* note 75, at 494 (William C. Stinchcombe and Charles T. Cullen eds.) (1979) (quoting VA. GAZETTE, AND GEN. ADVISOR, Aug. 14, 1798).

⁸¹ Law Notes (June 1780), in 1 *id.* at 51 (Herbert A. Johnson ed.) (1974).

⁸² Letter to Edward Everett (August 2, 1826), in 1 *id.* at 299.

⁸³ Council of State Opinion, February 20, 1783, 1 *id.* at 97.

⁸⁴ 1 *id.* at 97.

combined great passion with legal argumentation that would have resonated with the delegates:

No mischief—no misfortune ought to deter us from a strict observance of justice and public faith. Would to Heaven that these principles had been observed under the present Government! Had this been the case, the friends of liberty would not be so willing now to part with it. Can we boast that our Government is founded on these maxims? Can we pretend to the enjoyment of political freedom, or security, when we are told, that a man has been, by an act of Assembly, struck out of existence, without a trial by jury—without examination—without being confronted with his accusers and witnesses—without the benefits of the law of the land? Where is our safety, when we are told, that this act was justifiable, because the person was not a Socrates? . . . Shall it be a maxim, that a man shall be deprived of his life without the benefit of law? . . . Shall it be a maxim, that Government ought not to be empowered to protect virtue?⁸⁵

Although Marshall was known to worry about abusive uses of personal liberties, he never shied away from acknowledging their fundamental status in a free society. Such was his defense of freedom of speech in a letter to French Foreign Minister Charles Maurice de Talleyrand dated April 3, 1798:

The Genius of the Constitution & the opinions of the people of the United States cannot be overruled by those who administer the government. Among those principles deemed sacred in America, among those precious rights considered as forming the bulwark of their

⁸⁵ Speech (June 10, 1788), in 1; *id.* at 256. Marshall's reflections on jury trials in 1788 anticipated successful action he took as a first-term congressman in 1799 that resulted in requiring that a jury decide the question of bankruptcy and the amount of debt in dispute. See Editorial Note, in 4 *id.* at 34 (Charles T. Cullen ed.) (1984). Marshall, however, understood that juries without the guidance of judges could do mischief:

The trial by jury, which under its present modification we so justly prize, would become dangerous and might possibly destroy itself, if the superintendence and reasonable control of judges were entirely removed. Juries might sometimes be led by the most unlimited prejudices into such extravagant excesses as would render it doubtful, whether the institution should be considered as a blessing or a curse.

Argument (Dec. 4-5, 1790), in 5 *id.* at 497 (Charles F. Hobson ed.) (1987) (argument in *Ross v. Pynes*, 7 Va. 568 (1790)). Interestingly, part of the attack on Marshall's handling of the Burr treason case was based on his refusal to entrust some critical issues to the jury. See Editorial Note, in 7 *id.* at 10 (1993). The Burr case contains Marshall's most revealing reflections on the right to an impartial jury. See Opinion (August 11, 1807), in 7 *id.* at 65-69.

liberties, which the Government contemplates with awful reverence; and would approach only with the most cautious circumspection, there is no one, of which the importance is more deeply impressed on the public mind, than the liberty of the press. That this liberty is often carried to excess, that it has sometimes degenerated into licentiousness, is seen and lamented; but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good to which it is allied, perhaps it is a shoot which cannot be stripped from the stalk, without wounding vitally the plant from which it is torn. However desirable those measures may be, which might correct without enslaving the press, they have never yet been devised in America. No regulations exist which enable the government to suppress whatever calumnies or invectives any individual may chuse to offer to the public eye, or to punish such calumnies and invectives otherwise, than by a legal prosecution in courts, which are alike open to all who consider themselves as injured.⁸⁶

Significantly, on the subject of the Alien and Sedition Acts of 1798 that regulated the press, Marshall noted in a letter issued during his campaign for Congress in 1798 that he considered the legislation "useless" and would have voted against the four acts on the grounds that they are "calculated to create, unnecessarily, discontents and jealousies at a time when our very existence, as a nation, may depend on our union."⁸⁷

While he was a champion of popular causes at the time of the Revolution, Marshall was not a sentimental articulator of populist rhetoric that played on the attachment of the people to their rights. He was a practical and savvy student of political affairs who had been associated before the ratifying convention with efforts to insure that Virginia's governmental system, especially its judiciary, was equal to the needs of the people.⁸⁸ The man who once described "experience" as

⁸⁶ Letter to Talleyrand (Apr. 3, 1798), in 3 *id.* at 447 (William C. Stinchcombe and Charles T. Cullen eds.) (1979). Marshall adds that public officials in the United States are required to endure vicious attacks: "Nothing can be more notorious than the calumnies & invectives with which the wise measures & the most virtuous characters of the United States have been purued and traduced. It is a calamity incident to the nature of liberty." 3 *id.* at 448.

⁸⁷ Letter to a Freeholder (Sept. 20, 1798), in 3 *id.* at 505. Evident in this letter is Marshall's characteristic tendency to place issues, including matters involving rights, in the context of practical political consideration. See 3 *id.* at 503-06. He ends his letter with the observation that he would not vote to extend the life of the Alien and Sedition laws. See 3 *id.* at 505-06.

⁸⁸ Marshall's early interest in judicial reforms that would improve the efficiency of Virginia's courts is evident in his work on a failed legislative bill in the mid-1780s. See Legislative Bill (Dec. 25, 1786), in 1 *id.* at 193-97 (Herbert A. Johnson ed.) (1974).

the "parent of wisdom and the great instructor of nations" knew from events he had witnessed first-hand during the revolutionary periods in America and France that the habits and opinions of the people would determine whether decent and competent democratic government would take root and survive in a society.⁸⁹ With the objective of supporting a citizenry capable of sustaining free government, he joined in 1784 with James Madison, Edmund Randolph, Patrick Henry, and James Monroe, among others, to form the Virginia Constitutional Society for the purpose of providing the people of Virginia with "free and frequent information" on matters affecting their rights and personal interests.⁹⁰ Later, writing under the pen names "Aristides" and "Gracchus," Marshall defended Washington's Neutrality Proclamation on the grounds that it would protect American interests from serious damage during a period of European conflict.⁹¹ In these essays, Marshall urged the people to use good judgment when forming opinions about national policies and noted that no good would come from "disgusting the people with their government."⁹² This exercise in civic education includes a reminder that "[n]o human institution can be free from error, nor can human decisions be uniformly right."⁹³ He added that a "wise and virtuous people" will have sober or realistic political expectations and be capable of resisting the temptations of persons who would attempt to rally them for unwarranted reasons against their government.⁹⁴

⁸⁹ See Address to Congress (Dec. 6, 1799), in 4 *id.* at 43 (Charles T. Cullen ed.) (1984).

⁹⁰ See Virginia Constitutional Society Subscription Paper (Apr. 23, 1785), in 1 *id.* at 141 (Herbert A. Johnson ed.) (1974).

⁹¹ See Letters to Augustine Davis (Nov. 13, 1793 and Nov. 20, 1793), in 2 *id.* at 231-47 (Charles T. Cullen and Herbert A. Johnson eds.) (1977).

⁹² See Letter to Augustine Davis (Nov. 13, 1793), in 1 *id.* at 238. In a speech in the House of Representatives on March 7, 1800, he reminded his colleagues of the importance of "rescuing" public opinion from . . . [bad] prejudices." Speech (Mar. 7, 1800), in 4 *id.* at 82 (Charles T. Cullen ed.) (1984). During the Burr trial, Marshall chided "the gentlemen on both side" for "endeavouring [sic] to excite the prejudices of the people." Opinion (June 13, 1807), in 7 *id.* at 37 (Charles F. Hobson ed.) (1993).

⁹³ Letter to Augustine Davis (Oct. 16, 1793), in 2 *id.* at 221 (Charles T. Cullen and Herbert A. Johnson eds.) (1977).

⁹⁴ See 2 *id.* at 222. Marshall singled out James Monroe for special criticism as a result of his public efforts to turn the people against George Washington's foreign policy. Monroe published under the pseudonym "Agricola." It is clear from letters and journal entries written during his service as an envoy to France in 1797, that Marshall worried about foreign threats to the independence of the United States. See, e.g., Letter to Washington (Sept. 15, 1797), in 3 *id.* at 138-46 (William C. Stinchcombe and Charles T. Cullen eds.) (1979); Journal Entry (Oct. 30, 1797), in 3 *id.* at 178-83; Journal Entry (Feb. 26, 1798) in 3 *id.* at 202-09; Letter to Talleyrand (Jan. 17, 1798), in 3 *id.* at 359; Letter to the Citizens of Richmond (Aug. 11, 1798), in 3 *id.* at 482-83 (observing that he "pray[ed] to Heaven" that America would never lose the "blessings of liberty and national independence"); Letter to Washington, (Jan. 8, 1799), in 4 *id.* at 4 (Charles T. Cullen ed.) (1984) (noting again the critical importance of preserving the new union and American independence). His later efforts to ensure that the

Especially interesting for a commercial society is Marshall's counsel that the people remain vigilant lest they be "seduced by a love of ease" into lowering their guard against threats to the country's independence.⁹⁵ He added that such "carelessness" would be "as criminal as it would be fatal."⁹⁶

Marshall confidently believed that the American constitutional system merited special protection because it could satisfy the reasonable expectations of a "wise and virtuous" citizenry. Indeed, the unrest and discord he witnessed while serving as an American envoy in Paris provoked him to declare in a note to Charles Lee dated October 25, 1797, that "[i]t is in America and America only that human liberty has found an asylum. Let our foreign factions banish her from the United States and this earth affords her no longer a place of refuge."⁹⁷ This defense of the United States extended to the judicial system. In a fairly sharp letter that he drafted to Foreign Minister Talleyrand with the assistance of Charles Pinckney and Eldridge Gerry, Marshall observed that the French minister would have been well served by studying America's courts before lodging complaints about how they handled cases involving deserters: "You would have perceived & admired their purity. You would have perceived that America may repose herself securely on the integrity of her Judges."⁹⁸ The flip side of this high esteem for the American constitutional order was Marshall's belief on the one hand that the national government must be entrusted with sufficient power to preserve the experiment in democratic republicanism contrived by the Framers, and his counsel on the other hand that the people develop habits of law-abidingness and self-restraint.

If Marshall presented himself as a "friend of liberty" and self-government, he made it clear at the Virginia Ratifying Convention that he was an advocate of "well regulated Democracy."⁹⁹ He repeatedly gave public expression to his confidence

United States was capable of defending its interests and his uneasiness with actions that might provoke civil unrest no doubt were strengthened by the events that he witnessed in Europe. An excellent defense of Washington's Neutrality Proclamation was drafted in the form of a communique to Foreign Minister Talleyrand by Marshall while in Paris. *See* Letter to Talleyrand (Jan. 17, 1798), *in* 3 *id.* at 331-81 (William C. Stinchcombe and Charles T. Cullen eds.) (1979).

⁹⁵ Address to Congress (Dec. 6, 1799), *in* 4 *id.* at 43 (Charles T. Cullen ed.) (1984).

⁹⁶ 4 *id.*

⁹⁷ Letter to Charles Lee (Oct. 25, 1797), *in* 3 *id.* at 251 (William C. Stinchcombe and Charles T. Cullen eds.) (1979). In a letter written to the people of Richmond shortly after his return from France in 1798, Marshall counseled that everything should be done to see that liberty was never extinguished in the United States. *See* Letter to Citizens of Richmond (Aug. 11, 1798), *in* 3 *id.* at 483.

⁹⁸ Response to Talleyrand (Apr. 3, 1798), *in* 3 *id.* at 440-41.

⁹⁹ Speech (June 10, 1788), *in* 1 *id.* at 256. Approximately 150 years after Marshall spoke of a "well regulated democracy," Justice Benjamin Cardozo made reference in a much cited Supreme Court decision to the American commitment to "ordered liberty." *See* *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The difference between Marshall's phrase and

in Washington's administration and urged Americans to be careful about embracing rash attacks on the government. He understood well the dangers that might arise if the people vacillated in their allegiance to the new government:

Desirable as is at all times a due confidence in our government, it is peculiarly so in a moment of peril . . . , in a moment when the want of that confidence must impair the means of self defense, must increase a danger already but too great, and furnish, or at least give the appearance of furnishing, to a foreign real enemy, those weapons which have so often been so successfully used.¹⁰⁰

As a member of Congress, he decried the efforts of some persons to promote civil discord: "That any portion of the people of America should permit themselves, amidst such numerous blessings, to be seduced by the arts and misrepresentations of designing men into an open resistance of a law of the United States, cannot be heard without deep and serious regret."¹⁰¹

Marshall's view of human nature supported his fears of civil discord and anarchy. In the same speech that contained his defense of jury trials, he remarked on the "passions of men," their "ambition and avarice," which he believed "stimulated them to avail themselves of the weakness of others."¹⁰² In a revealing observation, he went on to declare that "[a] bare sense of duty, or a regard to propriety is too feeble to induce men to comply with obligations."¹⁰³ He favored a decisive response by the state of Massachusetts to Shays Rebellion that would "impress on the minds of the people a conviction that punishment will surely follow an attempt to subvert the laws & government of the Commonwealth."¹⁰⁴ This

Cardozo's is the facial emphasis given by the former to political considerations, i.e., the demands of a "well regulated democracy."

¹⁰⁰ Letter to the Citizens of Richmond, (Aug. 11, 1798), in 3 MARSHALL PAPERS, 1796-1798 at 484 (William C. Stinchcombe and Charles T. Cullen eds.) (1979).

¹⁰¹ Address to Congress (Dec. 6, 1799), in 4 *id.* at 40 (Charles T. Cullen ed.) (1984). Marshall was given to fears that America would not preserve the gains made during the Revolution and later from the ratification of the Constitution. See Letter to Harrison Gray Otis (Aug. 5, 1800), in 4 *id.* at 205 ("There is a tide in the affairs of nations, of parties, & of individuals. I fear that of real Americanism is on the ebb.").

¹⁰² Speech (June 10, 1788), in 1 *id.* at 261.

¹⁰³ 1 *id.* at 262 (Herbert A. Johnson ed.) (1974). Marshall included a particularly blunt comment on human behavior in a letter of March 27, 1794 to Archibald Stuart: "Seriously the[re] [ap]pears to me every day to be more folly, envy, malice & damned rascality in the world than there was the day before & I do verily begin to think that plain downright honesty & unintriguing integrity will be kicked out of doors." 2 *id.* at 261-62 (Charles T. Cullen and Herbert A. Johnson eds.) (1977).

¹⁰⁴ Letter to Arthur Lee (Mar. 5, 1787), in 1 *id.* at 206 (Herbert A. Johnson ed.) (1974). Marshall also had an opportunity to witness the results of civil discord in France following

advice follows from the belief that true liberty is impossible in the absence of order. Government can be entrusted with real power, but only as long as devices are employed to link the private interests of political officials to their public trusts. Always a realist when it came to human behavior, Marshall's view of human nature became increasingly jaundiced as his ascent to the United States Supreme Court neared. Writing to Charles Cotesworth Pinckney in 1802, he painted an unflattering portrait of human affairs: "There is so much in the political world to wound honest men who have honorable feelings that I am disgusted with it & begin to see things & indeed human nature through a much more gloomy medium than I once thought possible."¹⁰⁵ It would be wrong to conclude from such observations, however, that Marshall believed that human beings have no redeeming values and that experiments in democracy were doomed to fail. He understood from his association with George Washington that honor and public spiritedness could be found in the human soul. If anything, Marshall's sensitivity to the weaknesses and failings of human beings made it all the more important in his view that persons of "virtue" and "wisdom" be selected for public posts and that all officials be held accountable for the "smallest mal-administration."¹⁰⁶ In sum, he believed a well-regulated democracy required that real power be entrusted to officials of fit character who were subjected to careful scrutiny by an informed citizenry.¹⁰⁷ There were, in short, many elements to his vision of a well-functioning republic of rights and, hence, many places for problems to arise.

Marshall's realism or sobriety spilled over into his perception of the proper role of the courts in the new constitutional system. As already noted, he lent support early in his career to the cause of an independent and efficient judiciary, but also a judiciary that is restrained from interfering with effectiveness in the coordinate departments of the government. He understood that any commitment to the protection of rights would only be as good as the country's investment in a properly functioning court system.¹⁰⁸ This conviction, however, did not lead him to argue for

his appointment by Washington as a special envoy to that country in 1797. *See, e.g.,* Letter to Washington (Sept. 15, 1797), in 3 *id.* at 138-46 (William C. Stinchcombe and Charles T. Cullen eds.) (1979).

¹⁰⁵ Letter to Charles Cotesworth Pinckney (Nov. 21, 1802), in 6 *id.* at 125 (Charles F. Hobson ed.) (1990). In the same letter, Marshall spoke critically of what he called "[t]he new doctrine of the perfectability of man," which he believed "begins to exhibit him I think as an animal much less respectable than he has heretofore been thought." 6 *id.*

¹⁰⁶ Speech at Ratification Convention (June 10, 1788), in 1 *id.* at 267 (Herbert A. Johnson ed.) (1974); *cf.* Letter to James Monroe (Jan. 3, 1784), in 1 *id.* at 114; Speech (June 10, 1788), in 1 *id.* at 270 (references to virtue and wisdom in public officials).

¹⁰⁷ *See* 1 *id.* at 270.

¹⁰⁸ Marshall also believed that an "upright judiciary" was the best device for insuring that suspicious nations treat one another's commercial shipping fairly and not engage in improper seizures of cargo. Letter to Rufus King (Sept. 10, 1800), in 4 *id.* at 293 ("Letter to Rufus King—September 20, 1800"). It was a concern for the integrity of the judiciary as much as

a judiciary armed with political power or invested with authority to scrutinize any matter of a constitutional nature. An important pre-*Marbury* statement of his view of judicial power appears in a speech delivered before the House of Representatives on March 7, 1800:

By the constitution, the judicial power of the United States is extended to all *cases in law and equity* arising under the constitution, laws and treaties of the United States; but the resolutions declare the judicial power to extend to *all questions* arising under the constitution, treaties and laws of the United States. If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary. . . . By extending the judicial power to all *cases in law and equity*, the constitution had never been understood, to confer on that department, any political power whatever.¹⁰⁹

This limited view of judicial power represented a major theme of the first segment of Marshall's opinion in *Marbury*. Significantly, it is not the theme that is emphasized in most accounts of that case. What gets emphasized is Marshall's broad defense of the power of judicial review or his claim that the laws must afford remedies for violations of rights if the United States wishes to be viewed as a government of laws and not of men.

Like James Madison, Marshall is best remembered for his statesman-like appreciation of the practical difficulties that had to be addressed for the United States to succeed as a decent and competent democracy. Again like Madison, Marshall's principal achievements were in the field of practical governance and involved reconciling appeals to individual liberties by a rights-oriented people with the real demands of domestic and international politics. It was as an advocate of

for the preservation of a strong national system that led Marshall to publish a series of newspaper essays in defense of his opinion in *McCulloch v. Maryland*. See 4 *id.* at 287-363.

¹⁰⁹ 4 *id.* at 95. He returned to the issue of limits on judicial powers later in the same speech:

The question whether vessels captured within three miles of the American coast, or by privateers fitted out in the American ports, were legally captured or not, and whether the American government was bound to restore them if in its power, were questions of law, but they were questions of political law, proper to be decided and they were decided by the executive and not by the courts.

4 *id.* at 103.

modern natural rights thinking that he called for safeguarding the powers and hence the effectiveness of the national and state governments. His forceful defense of property rights in *Fletcher v. Peck*,¹¹⁰ an 1810 Georgia case arising out of a challenge to state action revoking a land deal on the grounds that it was marred by improprieties on the part of some state legislators, remains one of the great examples of natural rights reasoning in American law.¹¹¹ His *Marbury* opinion contains as crisp a statement on legal protection for rights as appears anywhere in constitutional law: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."¹¹² *Marbury* also stands as the preeminent precedent for the principle that the judiciary has a special responsibility to protect private rights. In one of the most-cited passages in American case law, Marshall announced that "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹¹³ By extension, a constitutional system that invests judges with this high responsibility must extend to them real independence in the discharge of their duties.¹¹⁴

If *Marbury* stands as the great precedent for the principle that independent courts have a special obligation to redress violations of vested rights, it likewise contains an important reminder of the limits of judicial review of governmental action. Immediately following his observation that a government of laws must afford protection for rights, Marshall argued that there are considerations that might properly "exempt [a case] from legal investigation, or exclude the injured party from legal redress."¹¹⁵ By way of example, he turns to the political duties that fall within the discretionary powers of the president: "By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."¹¹⁶ This observation anticipated the "political questions" doctrine that has played an important part in recent malapportionment and separation of powers cases, witness Justice Felix Frankfurter's declaration in *Colegrove v. Green*,¹¹⁷ an Illinois malapportionment case, that the judiciary should beware of venturing into "political thicket[s]."¹¹⁸

¹¹⁰ 10 U.S. 87 (1810).

¹¹¹ *Id.* at 132-36, 139; see also *Dartmouth College v. Woodward*, 17 U.S. 518 (1819); *Sturges v. Crowninshield*, 17 U.S. 122 (1819).

¹¹² *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

¹¹³ *Id.* at 177.

¹¹⁴ See *Cohens v. Virginia*, 19 U.S. 264 (1821).

¹¹⁵ *Marbury*, 5 U.S. at 163.

¹¹⁶ *Id.* at 165.

¹¹⁷ 328 U.S. 549 (1946).

¹¹⁸ *Id.* at 556. A decade and a half after *Colegrove*, it was Frankfurter's argument that the Warren Court had to confront in *Baker v. Carr*, 369 U.S. 186 (1962), the major precedent

Marshall's statesmanship runs through the totality of his jurisprudence. His opinions are filled with evidence of his attentiveness to the political and cultural implications of his reasoning. As already noted, he was a serious and self-conscious participant in the whole founding project. He recognized and embraced the judiciary's power to give shape to the new national system that the Constitution called into being. For Marshall, this power brought with it the responsibility to instruct the people not only in the value of rights but in the importance of preserving competence in government. Here, indeed, were the two great themes of the Aaron Burr treason case.¹¹⁹ Grounding his opinion in a painstaking review of common law principles and the language of the Constitution, Marshall refused to allow public passions to trump principles of due process that afforded Burr protection against the Jefferson Administration. Few passages in American case law rival Marshall's summation in his *Burr* opinion of the high responsibilities that fall to members of the judicial department:

That this court dares not usurp power is most true. That this court dares not shrink from its duty is no less true. No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he have no choice in the case, if there be no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.¹²⁰

This classic defense of political virtue captures Marshall's understanding of statesman-like conduct and helps explain his fondness for George Washington. Marshall's characterization of what is to be expected of courts of law, together with the extensive protection he afforded Burr's rights in the face of extreme political pressure, fits well with much of contemporary rights-oriented jurisprudence. What must also be appreciated, however, is Marshall's acknowledgment that the interests of the government "ought to be treated with respect"¹²¹ and that the privileges of the Chief Executive enjoy constitutional protection alongside protection for personal rights.¹²² In response to the request for a subpoena duces tecum directed to President Jefferson, which he finally consented to issue, Marshall carefully reminded the parties that courts are not "to proceed against the president as against

for the modern political questions doctrine.

¹¹⁹ *United States v. Burr*, 25 F. Cas. 55 (1807).

¹²⁰ *Id.* at 179.

¹²¹ *Id.* at 85.

¹²² *See id.*

an ordinary individual.”¹²³ While Marshall’s careful treatment of governmental interests is important in itself, a good case can be made for highlighting this side of his legal thought which has recently been obscured by the appeal of his defense both of judicial review and of the importance of protecting rights, whether of a *Marbury* or a *Burr*.

There may be no better example of the sort of powers-sensitive reasoning that lends sobriety to constitutional law than Marshall’s opinion in *McCulloch v. Maryland*.¹²⁴ If *McCulloch* represents for many contemporary scholars a vindication of broad national powers that are most ideally used in the service of advancing the protection of individual rights and equality, a careful reading of Marshall’s opinion reveals an intent on insuring that the powers of the central government are equal to all its responsibilities, which include promoting a vigorous economy as well as insuring order and stability. This, indeed, is the point of the famous passage on the scope of the powers of the national government:

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.¹²⁵

This observation is followed by the equally important statement that the “degree of the necessity”¹²⁶ of the means is to be determined by the political departments and for the Court to inquire into such matters “would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.”¹²⁷ Marshall curtly added that “[this] Court disclaims all pretensions to such a power.”¹²⁸ Here is further evidence of his recognition that the judiciary’s powers are limited and must be understood in terms of the overall system of separated and

¹²³ *Id.* at 192. This quote was used to good effect by Chief Justice Warren Burger in *United States v. Nixon*, 418 U.S. 683, 708 (1974) (the Watergate Tapes case). For a recent comment on the Marshall-Jefferson confrontation in the *Burr* case, see Akhil Reed Amar, *Nixon’s Shadow*, 83 MINN. L. REV. 1405, 1408 (1991).

¹²⁴ 17 U.S. (1 Wheat.) 316 (1819).

¹²⁵ *Id.* at 421.

¹²⁶ *Id.* at 423.

¹²⁷ *Id.*

¹²⁸ *Id.*

divided powers and the requisites of effective government. Marshall envisions a judiciary that is prepared to defer to legislative judgments about how best to use its powers to meet Article II responsibilities. Presumably, these judgments would involve efficiency calculations of the type that occasionally are found irksome by rights-oriented jurists.¹²⁹

The events Marshall witnessed during the confederal period, both in the nation at large and within Virginia, convinced him that natural rights are not well-protected if government officials are left with insufficient power or are placed in a situation that discourages reasonable use of delegated power.¹³⁰ His careful insertion of a defense of the discretionary powers of the president in *Marbury* followed from his understanding of the importance of preserving an effective executive and not from any desire to conciliate Jefferson or to soften the effect of his endorsement of a general power of judicial review.

Striking evidence of Marshall's acknowledgment that practical politics has a protected place in the Constitution can be found in the great commerce case of 1824, *Gibbons v. Ogden*.¹³¹ In his opinion for the Court, Marshall went so far as to suggest that the appropriate use of the commerce power is typically to be determined through political, and not judicial, processes.¹³² In words that have received too little attention, he reminded his contemporaries of how the affairs of the people ought to be managed in a representative democracy:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in [the regulation of commerce], as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from abuse. They are the restraints on which the people must often rely solely, in all representative governments.¹³³

This observation stands as both an important concession to governmental and political interests and a significant limitation on judicial review. The contrast with the insistence of some scholars and judges that the judiciary has a moral responsibility *to do* whatever it *can do* to advance aggrieved interests could hardly

¹²⁹ See, e.g., Justice Brennan's objections to government reliance on efficiency calculations in *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) (Brennan, J., dissenting).

¹³⁰ See 3 JOHN MARSHALL, LIFE OF WASHINGTON, 582-84, 588, 590-92 (1804).

¹³¹ 22 U.S. (9 Wheat.) 1, 211 (1824).

¹³² See *id.* at 101.

¹³³ *Id.* at 197. The concerns raised by Marshall in *McCulloch* were resurrected in the debate between Justices Stevens and Powell in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), a commerce clause case that produced a sharp division on the question of judicial review of congressional employment of the commerce power.

be more dramatic.¹³⁴

To appreciate the full grandeur of Marshall's jurisprudence it is necessary to combine his approach to governmental powers with his commitment to protecting rights. His writings remind us that political existence is not unidimensional, and especially not simply defined by individual rights claims. Government must, of necessity, be permitted to exercise legitimate powers and insist on the satisfaction of the duties that march alongside rights. Instructive in this regard is a passage found in his opinion in *Providence Bank v. Billings*: "However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public burdens, and that portion must be determined by the Legislature."¹³⁵ He went on to add that "[legislative power] may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments."¹³⁶ As in *Gibbons*, Marshall noted that the principal check on "unwise" legislation is the "wisdom and justice"¹³⁷ of legislators and their relationship to the people.

Marshall's articulation of the limits of rights-based appeals could almost seem harsh on occasion. Witness in this connection not only his defense of Washington's actions in suppression of the Whiskey Rebellion, but his conviction that persons in the military might not claim the full benefits of the jury trial provision of the Constitution.¹³⁸ His views on the latter issue reflect his understanding of the complexities, what might well be termed the tragic side, of governance. Full extension of the jury trial provision to cases involving members of the military, according to Marshall, "would . . . probably have prostrated the constitution itself, with the liberties and the independence of the nation, before the first disciplined invader who should approach our shores. Necessity would have imperiously demanded the review and amendment of so unwise a provision."¹³⁹ His reference to "necessity" is a reminder that practical political considerations have as important a place in constitutional jurisprudence as appeals to protected individual rights.

IV. DISTILLING LESSONS FROM MARSHALL'S JURISPRUDENCE

John Marshall's attention to practical matters of governance within a framework of natural rights was characteristic of the thinking of many leading Founders. It surely was characteristic of James Madison's political labors. Whether one

¹³⁴ In this connection, consider the dissents of Justices Brennan and Blackmun in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

¹³⁵ 29 U.S. (1 Pet.) 514, 563 (1830).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *supra* note 83 and accompanying text.

¹³⁹ ROBERT K. FAULKNER, *THE JURISPRUDENCE OF JOHN MARSHALL* 79 (1968).

considers the famous "Memorial and Remonstrance" on religious liberty in 1785¹⁴⁰ or the pivotal role he played in shaping the Bill of Rights in 1789,¹⁴¹ Madison understood that to be considered legitimate, according to modern natural rights theory, a republic must respect the rights of the people. He accepted Jefferson's argument that specific guarantees for fundamental rights should be a part of the constituting charter of the republic. The fact that he urged inclusion of a provision that would have restrained state interference with fundamental rights is evidence that he took the protection of rights seriously.¹⁴² He also understood, however, that it is possible to push a good thing too far.¹⁴³ Witness his fears that the addition of rights-oriented amendments to the Constitution could sap the national government of its powers and effectiveness.¹⁴⁴ These fears explain in large part his decision to take a leading role in shaping the content of any new amendments to the Constitution.¹⁴⁵ It is instructive to recall that he lobbied to integrate the new amendments into the body of the Constitution, thereby diminishing the likelihood that they would take on a life of their own. When introducing his amendments to Congress, Madison pointedly warned his colleagues that any additions must be "of such a nature as will not injure the constitution."¹⁴⁶ What he feared were amendments that could damage the capacity of the new national government to oversee the great affairs of a commercial nation.

It was as a friend of rights-oriented government that Madison labored to preserve effectiveness in government. It is revealing of his thinking that when he summarized in *Federalist No. 51* the task faced by the Constitutional Convention, he argued that the first problem was to ensure that the new political system would be capable of controlling the people: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."¹⁴⁷ The principal lesson of the period between 1776 and 1789 for Madison was that weak and inconsistent government is bad for rights and, hence, bad for democracy. Here is the explanation, as well, for his approving observation in the waning days of the Constitutional Convention that the delegates had decided

¹⁴⁰ 8 THE PAPERS OF JAMES MADISON 298-304 (Robert A. Rutland et al. eds., 1973).

¹⁴¹ See RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 289-303 (1990).

¹⁴² See *id.* at 303.

¹⁴³ Evidence that Publius believed it was possible to have an undue concern for rights appears in THE FEDERALIST, NO. 63.

¹⁴⁴ See KETCHAM, *supra* note 141, at 262, 274, 303.

¹⁴⁵ See *id.* at 274-75.

¹⁴⁶ 12 THE PAPERS OF JAMES MADISON, *supra* note 140, at 198. For additional related observations by Madison, see 1 THE DEBATES AND PROCEEDINGS OF THE CONGRESS OF THE UNITED STATES, 432, 746 (1834).

¹⁴⁷ THE FEDERALIST, NO. 51, at 354 (Edward G. Bourne ed. 1937).

to limit the court to reviewing "cases of a Judiciary nature."¹⁴⁸ It would be wrong, however, to treat his support of this vote as evidence of opposition to judicial review. What it highlights is his belief that we should not overlook the practical demands of effective governance, among which is the need to allow the political departments to do their work free of excessive judicial intrusion, even in the name of protecting rights. As with Marshall, Madison understood that a healthy balance had to be maintained between concern for rights and attention to the requirements of competence and vigor in government. Again like Marshall, Madison recognized that it is dangerous to undermine the respect of a rights-oriented people for government because of their natural inclination to endorse curbs on the exercise of political power.

Madison's attention to the practical side of governance is visible in his quarrel with Jefferson's insistence that no generation should be permitted to shift its debts to succeeding generations, thereby limiting their descendants' freedom to control their own destiny. For Madison, such reasoning abstracts from the realities of political life in a way that could leave government helpless in the face of political necessities that might require extraordinary action. Though he understood that deficit spending constrains the freedom of future generations to control their own affairs as they please, such constraints represent part of the cost of equipping the government to protect national interests. Leaving an opening for one generation to bind another represented for Madison a concession to political necessity that is not incompatible with republican principles of government. Embedded in this argument is another important lesson that a nation overlooks at its peril: that society is something greater than the individual members who compose it at any single historical moment.

For both Marshall and Madison, constitutional republicanism should look to achieve reasonable goals by making reasonable demands of the citizen body. Neither Marshall nor Madison associated republican constitutionalism with utopian ends or extraordinary human sacrifice. This is not to suggest that they believed it would be easy either to construct or to maintain a nation state based on republican principles of individual rights, due process of law, and limited government. They did believe that achieving a reasonable balance between protection for rights and effectiveness in government was within the grasp of the American people. As the enjoyment of rights could not come at the expense of having a government capable of controlling the people, so effectiveness in government could not come at the expense of due process of law.

Marshall and Madison gave what might be called a moderate or sober reading to the ends of the modern liberal state and viewed decent and competent democratic government as something that should never be taken for granted. They took

¹⁴⁸ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 430 (Max Farrand ed. 1966).

seriously the teaching that can be traced to Plato and Thucydides that civilized orders are constantly threatened by the forces of barbarism, in the form of either anarchy or tyranny. What is notable about their respective contributions to the founding of the American republic is the ease with which they can be associated with the defense of liberty as well as with arguments for effectiveness in government. They spoke seriously and openly about the high value of individual rights and the importance of entrusting government with sufficient power to control the people. Reflection on their handling of powers and rights lends sobriety and, hence, moderation to constitutional reasoning, the moderation that Marshall believed to be critical to a decent and competent democratic republic. This sobriety is endangered by excessive attention to rights, especially when coupled with the contemporary impulse to take the resiliency and sufficiency of governmental powers for granted—a problem that has been exacerbated with the end of the Cold War. Scholars and practitioners who are doing battle over the proper content and structure of constitutional discourse would do well to revisit the legal and political thought of John Marshall.