Book Review by Ken I. Kersch

A Friend to the Union

John Marshall: Writings, edited by Charles F. Hobson.
Library of America, 950 pages, $40

Casual, warm, confiding, earthy, self-effacing, and funny, John Marshall was probably the most companionable of the founding generation's patriot-statesmen. Esteemed as the greatest justice in the U.S. Supreme Court's history (he served from 1801 to 1835), Marshall's public life was long, varied, and eventful.

As a young soldier in the Continental Army, he saw action at Brandywine, Germantown, and Monmouth, and spent the brutal winter of 1777–78 at Valley Forge. Elected in 1782 to the House of Delegates in his home state of Virginia, Marshall was subsequently elected to the state's constitutional ratifying convention, where he sparred with the Anti-Federalist Patrick Henry in the ratification debates. At the behest of President John Adams, he joined Charles Cotesworth Pinckney and Elbridge Gerry in the diplomatic mission to France which culminated in the XYZ Affair: the French insisted upon bribes as a precondition to negotiation, enraging the young nation. Though he would have preferred to continue his Richmond law practice, Marshall succumbed to President Washington's entreaties and served in Congress. He was subsequently tapped as Adams's secretary of state, before becoming one of the president's "midnight" appointments in the final hours of his administration, when Adams named Marshall the nation's fourth Chief Justice.

The Library of America's new collection of Marshall's writings includes the full text of some of his most celebrated opinions, including *Marbury v. Madison* (1803), declaring the power of the federal courts to void laws as unconstitutional; *McCulloch v. Maryland* (1819), upholding the constitutionality of the Bank of the United States; *Fletcher v. Peck* (1810) and *Dartmouth College v. Woodward* (1819), both affirming constitutional protection for rights of property and contract; and *Gibbons v. Ogden* (1824), reading the Constitution as conferring upon Congress broad powers to regulate interstate commerce. But Charles Hobson, the editor of the Marshall Papers and of this collection, wisely includes a generous selection of personal correspondence, the issue of a long, engaged life lived largely on the road. At the time, Supreme Court Justices were required to "ride circuit," sitting with lower federal court judges in an assigned geographic region to form regional federal courts of appeal. This meant that Marshall's discussions with his fellow justices—chiefly Bushrod Washington (the president's nephew) and Justice Joseph Story—were frequently epistolary, as was his relationship with his wife, Polly, whom he ministered to tenderly and missed dearly.

Marshall was a Federalist, and, in many respects, a conservative. But his temperament was mild, and his inclinations pragmatic. He preferred men "unconnected with party and unstained by faction, who can have no object but the public good, no interest distinct from that of the community." "No man regrets more than I do," he explained in 1800, "that intolerant & persecuting spirit which allows of no worth out of its own pale, & breaks off all social intercourse as a penalty on an honest avowal of honest opinions." A man of deep and genuine feeling, he was nevertheless a critic of emotional excess in politics, and repeatedly lambasted the prominence of zeal, excitement, turbulence, and ferment in the public life of his day. He believed in "well-regulated democracy," and thought that the Constitution provided an exemplary framework for its practice.

Marshall's distaste for zeal informed his intense, life-long dislike for his second cousin Thomas Jefferson. The feelings were mutual, and theirs was one of the founding era's most pronounced antagonisms. Marshall tartly reminded Henry Lee, who made the mistake of praising Jefferson in correspondence, that "I have never thought him a particularly wise, sound, and practical statesman." Transported by radicalism and romanticism (Marshall elsewhere referred to him sarcastically as "the great Lama of the mountains"), Jefferson was enthralled by the soon-to-turn-homicidal French Revolution, to the level-headed Marshall's lasting disgust.

If Marshall's opinion of Jefferson was low, his estimation of Jefferson's partisans was subterranean. On the eve of the third president's inauguration in 1801, Marshall opined that

> the democrats are divided into speculative theorists & absolute terrorists: With the latter I am not disposd to class Mr. Jefferson. If he arranges himself with them it is not difficult to foresee that much calamity is in store for our country—if he does not they will soon become his enemies & calumniators.

Marshall was a vigorous defender of the power and dignity of the federal judiciary—the scourge of Jefferson and the Jeffersonians. (Chief Justice John Roberts's recent defense of the Supreme Court against President Obama's criticism in his State of the Union Address was eminently Marshallian; Roberts is known to be a fervent admirer of his predecessor.) Marshall wrote that Jefferson's "ranting declamation, this rash impeachment of the integrity, as well as opinions of all those who have successively filled the judicial department," bothered him considerably. "I find myself more stimulated on this subject than on any other," he wrote to Bushrod Washington in *McCulloch*'s aftermath, "because I beleive the design to be to injure the Judges & inpair the constitution." To Justice Story, Marshall explained:

> For Mr. Jeffersons opinion as respects this department, it is not difficult to assign the cause. He is among the most ambitious, & I suspect among the most unforgiving of men. His great power is over the mass of the people & this power is chiefly acquired by professions of democracy. Every check on the wild impulse of the moment is a check on his own power, & he is unfriendly to the source from which it flows.

Marshall was particularly galled by the Jeffersonians' distrust of the national government, and their enthusiasm for "state rights," which he understood as a revival of the Anti-Federalists' anti-constitutional sentiments. Though he is best known today for *Marbury v. Madison*, Marshall's most significant decision, and the one that occasioned the sharpest public reaction in his own time, was the ringingly nationalist *McCulloch v. Maryland*. There, giving a broad interpretation to Congress's Article I, Section 8 power "[t]o make all Laws which shall be necessary and proper for carrying into execution the foregoing [enumerated] powers," the Court upheld the power of Congress to charter the Second Bank of the United States. "Let the end be legitimate," Marshall wrote in his eloquent opinion for the Court, "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 consistent with the letter and spirit of the constitution, are constitutional." Against those who argued that they could find no express power to charter a bank in the document's enumeration of congressional powers, Marshall answered that, unlike an ordinary statute, the Constitution was necessarily written in broad and general terms, "intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."

When *McCulloch* was handed down, Marshall privately warned Bushrod Washington that "[w]e shall be denounced bitterly in the papers & as not a word will be said on the other side we shall undoubtedly be condemned as a pack of consolidating aristocratics." He was right. To "excite this ferment the [Court's] opinion has been grossly misrepresented," he observed, "and where its argument has been truely stated it has been met by principles one would think too palpably absurd for inteligent men. But prejudice will swallow anything." So Marshall decided to counter the prejudice in favor of state rights by presenting in the public prints his own defense of *McCulloch*.

His pseudonymous defense of the *McCulloch* opinion—recognized by scholars only in recent years, and making a worthy addendum to *The Federalist*—was published in the Philadelphia *Union* in two parts. In April 1819 Marshall wrote as "A Friend to the Union" in response to the editorials of "Amphyction." Two months later, he appeared in the *Alexandria Gazette* as "A Friend of the Constitution" responding in nine parts to "Hampden," a pseudonym sported by Virginia Court of Appeals Justice Spencer Roane, the judge the Marshall Court had checkmated in *Martin v. Hunter's Lessee* (1816). In his essays, Marshall argued at length that the theories advanced by the stinging editorials of Amphyction and Hampden in Marshall's hometown paper, the Richmond *Enquirer*, "would essentially change the constitution, render the government of the Union incompetent to the objects for which it was instituted, and place all its powers under the control of the state legislatures. It would, in great measure, reinstate the old confederation." "[O]ur constitution is not a league," Marshall insisted: "It is a government." "Our constitution is not a compact. It is the act of a single party. It is the act of people of the United States, assembling in their respective states, and adopting a government for the whole nation." "All arguments founded on leagues and compacts," he wrote, were rooted

in "an unaccountable delusion." "Let Hampden succeed," Marshall argued, "and that instrument will be radically changed. The government of the whole will be prostrated at the feet of its members; and that grand effort of wisdom, virtue, and patriotism, which produced it, will be totally defeated." "The question is of real importance to the people of the United States," he insisted: "If the rule contended for would not absolutely arrest the progress of the government, it would certainly deny to those who administer it the means of executing its acknowledged powers in the manner most advantageous to those for whose benefit they were conferred."

Marshall firmly rejected the proposition that the national government possessed only the power to undertake those tasks necessary to its preservation. He defended instead the view that the national government was granted full power to provide for the nation's "happiness, its convenience, its interest, [and] its power." He reminded his critics that "[t]he equipoise... established [by the Constitution] is as much disturbed by taking weights out of the scale containing the powers of the government, as by putting weights into it." These views were the natural consequence of neither liberal nor strict interpretation but rather "fair construction," consistent, he explained, with his understanding that constitutional provisions should be interpreted to "promote the objects for which they were made."

In subsequent years, Marshall anxiously followed the progression of the states' rights cause. He condemned South Carolina's 1832 Proclamation of Nullification as a "mad and wicked measure" and he insisted that "[w]e are now gathering the bitter fruits of the tree even before that time planted by Mr. Jefferson, and so industriously and perseveringly cultivated by Virginia." He found Jefferson's Jacksonian (Democratic) successors to be "a hungry and vindictive party," and worried about the Union's fate under their stewardship. Upon receiving a copy of Joseph Story's masterly *Commentaries on the Constitution* (1833) as a gift from the author, Marshall told Story that he

> greatly fear[ed] that, south of the Potomack, where it is most wanted, it will be least used. It is a Mohomedan rule, I understand, "never to dispute with the ignorant," and we of the true faith in the South abjure the contamination of infidel political works. It would give our orthodox Nullifyer a fever to read the heresies of your commentaries. A whole school might be infected by a single copy should it be placed on one of the shelves of a book case.

The same year, he told his cousin Humphrey Marshall that "[t]he time is arrived when these truths must be more generally spoken or our union is at an end. The idea of complete sovereignty in the states converts our government into a league, and if carried into practice, dissolves the union." Alas, he lamented to Story, it seems that "the word 'State Rights'...has a charm against which all reasoning is vain."

Slavery, of course, only compounded the problem. Marshall believed "that nothing portends more calamity & mischief to the Southern states than their slave population." "Yet," he observed, "they seem to cherish the evil and to view with immovable prejudice & dislike every thing which may tend to diminish it." Although he did not live to see it, no one would have been less surprised at the outbreak of the Civil War than John Marshall, and few more satisfied with the nationalization of the country's constitutional politics in its aftermath.

Throughout his busy life, Marshall yearned for the domestic comforts of hearth and home, and looked forward to long days passed in gentle companionship with his wife. He hoped for a retirement in which he would "read nothing but novels and poetry" (Jane Austen was a special favorite). Perhaps inevitably, given his irrepressible enthusiasm for political debate, and his heartfelt patriotism, such a retirement was never to be. In an autobiographical sketch prepared at Joseph Story's behest, he recalled that he had

> grown up at a time when a love of Union and resistance to the claims of Great Britain were the inseparable inmates of the same bosom; when patriotism and a strong fellow feeling with our suffering fellow citizens of Boston were identical; when the maxim "United we stand, divided we fall" was the maxim of every orthodox American.

As fundamental questions of the nature and the future of the Union assumed increasing prominence, Marshall remained active, and on stage, dying in office in 1835. His exposition of the political theory of the American Union remains among the most eloquent and compelling ever written. This collection provides a worthy tour of the mind, and an intimate and endearing portrait of the character, of this down-to-earth yet extraordinary man.

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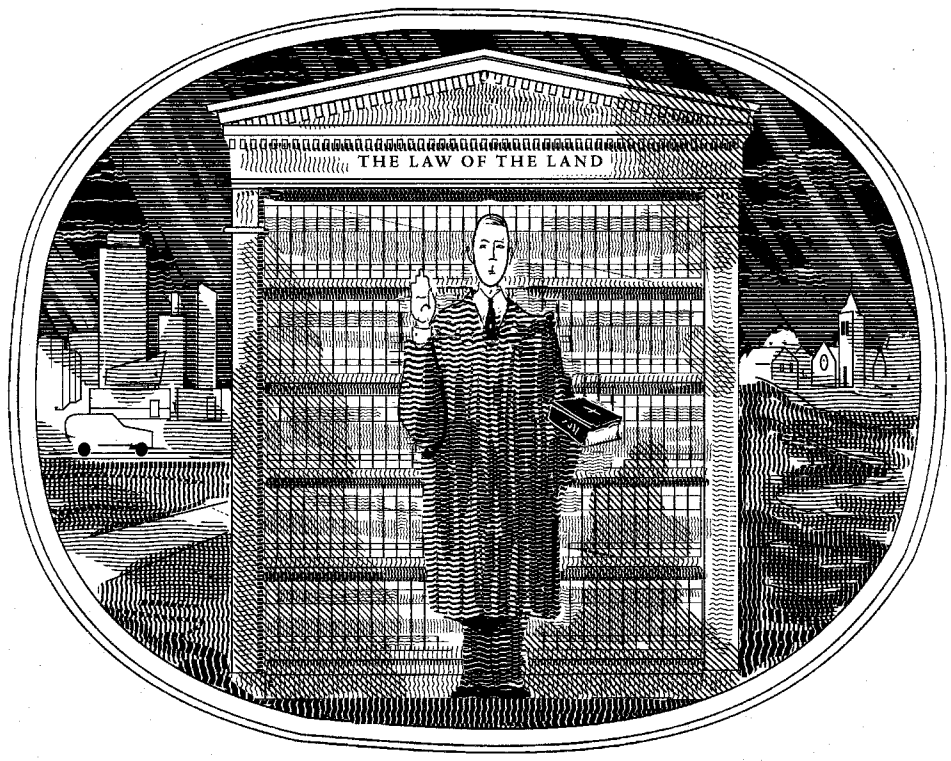
Book Review by James R. Stoner, Jr.

Neither Force Nor Will

Law and Judicial Duty, by Philip Hamburger. Harvard University Press, 704 pages, $49.95

Judges and Unjust Laws: Common Law Constitutionalism and the Foundations of Judicial Review, by Douglas Edlin. University of Michigan Press, 336 pages, $65

I Do Solemnly Swear: The Moral Obligation of Legal Officials, by Steve Sheppard. Cambridge University Press, 304 pages, $88.99 (cloth), $29.99 (paper)



If, under the Constitution, no one can be convicted of treason without two witnesses to the same overt act, how many are needed to prove fidelity? That's a trick question, of course, for between innocence and guilt there is asymmetry. Innocence is presumed in accusations in part because it is impossible to prove.

How many scholars, then, working independently, must make the same discovery before a longstanding presumption in constitutional matters is reversed? Three books have recently appeared, published at major presses by scholars across the political spectrum, all challenging the standard understanding of judicial review. These books do not deny that judges can legitimately set aside unconstitutional acts; what they deny is that this practice is best understood as a *power* vested in courts. The authors argue that most of the problems concerning judicial review—how it is exercised by courts and viewed by other political actors, and how legitimate it seems to the public at large—would be mitigated, if not outright eliminated, if the practice were understood not as a political power but as a judicial *duty*. This, they claim, is precisely how constitutional review was originally understood by the common-law judges who initiated it.

The most thorough, and most historically based, statement of this case is Philip Hamburger's *Law and Judicial Duty*. Already well known for his revisionist classic, *Separation of Church and State* (2002), Hamburger takes the story back to early modern England, then forward to the pre-*Marbury v. Madison* cases thought to have established judicial review in the newly independent United States. He shows that the idea that it is a judge's duty to decide cases according to the law runs throughout the judicial oaths of the common-law courts in England and America. He contrasts academic law and common law: the former was anchored in philosophy, theology, and civilian jurisprudence (i.e., civil law); the latter was constituted by the practice of courts and the reports of cases. In the 16th and 17th centuries, the English judge was bound only by the common law; what was lost in theoretical elegance was gained in practical effect, for the common-law judge ranged widely through the legal materials available to him, beginning from the relevant precedents but considering evidence from other sources as it was raised. When in the 18th-century academic sources were no longer seen as a threat to the ascendancy of common law, writers such as William Blackstone and judges such as Lord Mansfield could begin to incorporate natural-law arguments into common-law jurisprudence. But on the whole the common-law judges preferred to work with precise, circumscribed legal rules, not abstract, sweeping principles of justice. Their discretion was formed by law and exercised not freely or arbitrarily but according to the law. There was an art or skill of deciding cases, and it had nothing to do with political strategy: it involved the independent exercise of judgment, particular to the case but not creative, at once drawing from and contributing to the vast record of decisions that formed the law.

When the American constitutions appeared on the scene as authoritative, written expressions of the will of the people, they were assimilated into the common lawyers' approach to the law. While taking into account the whole array of rules and