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1998

### Review of The Papers of John Marshall, Vol VIII: Correspondence, Papers and Selected Judicial Opinions, March 1814-December 1819, edited by Charles Hobson

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#### Recommended Citation

James L. Kainen, *Review of The Papers of John Marshall, Vol VIII: Correspondence, Papers and Selected Judicial Opinions, March 1814-December 1819, edited by Charles Hobson*, 42 *Am. J. L. Hist.* 196 (1998)  
Available at: [https://ir.lawnet.fordham.edu/faculty\\_scholarship/756](https://ir.lawnet.fordham.edu/faculty_scholarship/756)

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In conclusion, *Law and the Great Plains*, which has provided a glimpse of the law in the region, will greatly stimulate the interest of legal historians. As the editor fully realizes, to ascertain the real nature of law on the Great Plains, we need a larger sampling of various studies on the region, especially during the late nineteenth century. Let's hope that Wunder will organize similar conferences periodically to provide scholars opportunities to thoroughly exploit the area and deepen our understanding of the subject that will highlight the differences (rather than the similarities) between the Great Plains and the rest of the United States.

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CHARLES F. HOBSON, ed., *The Papers of John Marshall*, vol viii: *Correspondence, Papers, and Selected Judicial Opinions, March 1814-December 1819*. Chapel Hill: University of North Carolina Press, 1995. xxxvii, 421 pp. \$50.00.

This volume covers March 1814 until December 1819 of the papers, correspondence and selected judicial opinions of Chief Justice John Marshall. Selected opinions include constitutional cases decided in the Supreme Court and representative nonconstitutional cases adjudicated there and in the Circuit Courts for Virginia and North Carolina. One finds opinions in such constitutional milestones as *Dartmouth College v. Woodward* (1819) and *McCulloch v. Maryland* (1819), opinions (for the Court and in dissent) in two prize cases raising important issues of international law, and opinions in several commercial controversies addressing such eminently practical questions as creditors' priorities and the application of Virginia's recording statute to liens on personal property (here, slaves). Papers include the series of articles Marshall published anonymously in defense of his opinion for the Court in *McCulloch* and litigation documents that Marshall drafted in cases in which he was interested, but from which he had recused himself. Since little of the correspondence survives, it provides only a glimpse of Marshall the man, mostly looking after wayward sons and otherwise attending to his extended family.

The excellent editorial notes provide a nuanced account of the context of the documentary material and break some new interpretive ground. A theme to this volume is that of judicial federalism—controversy about the authority of the Supreme Court over state judiciaries and ultimately the reach of federal law. In *Martin v. Hunter's Lessee* (1816), the Court upheld the constitutionality of Section 25 of the Judiciary Act, providing appellate jurisdiction in the Supreme Court over state judiciaries on matters of federal law. Although recusing himself because of his family's financial interest in the lands whose ownership was in dispute, Marshall drafted the writ appealing the Virginia Supreme Court's finding of unconstitutionality and drafted an argument for use by counsel, a surviving fragment of which is published here for the first time.

The Virginia Supreme Court's holding of unconstitutionality stemmed from its refusal to follow the mandate of an earlier Supreme Court case that upheld Marshall's title by finding that the subject property had not escheated to Virginia before the Jay Treaty of 1794 protected it. Marshall fretted about the basis for the Court's ruling for reasons that became apparent in *Martin*. Since the ruling depended not only on the treaty (federal law) but on whether the lands had escheated before the treaty (state law), Marshall feared that Virginia courts would not perceive themselves bound to follow the Court's judgement. He had hoped that the Court would base its decision on the Treaty of Peace of 1783, rendering irrelevant the interpretation of subsequent state laws.

The battle that Marshall was not anxious to fight—as interested party rather than judge—came to fruition in *Martin*. In the surviving fragment, Marshall argues that the power to decide a case in which construction of a treaty has been called into question “must necessarily constitute the component parts of a case arising *under* a treaty” (p. 122). He asks, “Must not the title of the party at the time the treaty *was* made be examined for the purpose of determining on the *applicability* of the treaty to this case” (p. 122)? Nevertheless, given Marshall's concern about the basis of the Court's original decision, he had to be aware of the problematic character of his answer: “if in the opinion of this court the treaty does protect his title, *then* the state court in deciding otherwise has misconstrued the treaty” (p. 122). Logic alone simply does not compel the conclusion that any error by the state courts must lie in their construction of the treaty rather than in the state law determining title apart from the treaty.

Judicial federalism also informs the discussion of *Dartmouth College*. The central argument in the New Hampshire Supreme Court was whether the college was a public institution whose charter was subject to continuing legislative control or a private institution possessed of vested rights immune from legislative interference. Deciding that the college was essentially public and that its charter had vested no private rights, the court allowed the legislature's substantial amendment of the charter. Appealing the case to the Supreme Court of the United States required finding a federal ground under which the Court might invoke its appellate jurisdiction under Section 25 of the Judiciary Act. By that route, the claim that the charter's amendment violated the contract clause of the Constitution became the legal issue in the Supreme Court, where it had figured only incidentally in the New Hampshire Supreme Court.

Although Daniel Webster based his argument for reversal on the doctrine of vested rights as “a general principle of our government” (p. 220) and on provisions in the New Hampshire Constitution, Justice Story, originally undecided on the merits, regretted “that we were so stinted in jurisdiction in the Supreme Court, that half the argument could not be met and enforced” (p. 220). Counsel to the trustees scrambled to get several cognate suits brought in Story's Circuit Court and certified to the

Supreme Court in time for the anticipated reargument of the main case. In a diversity case appealed from a federal Circuit Court, the decision might legitimately rest on the doctrine of vested rights despite its lack of incorporation into an express federal constitutional provision.

Confounding expectations, Marshall announced the Court's opinion before the expected reargument. While reading the contract clause broadly to protect vested rights in a case that he conceded was not within the immediate contemplation of the framers of that clause, Marshall limited the decision's potential impact. He reversed on the narrower issue of federal law, rather than assert the Court's authority to reverse the state court's interpretation of the vested rights doctrine or its own constitution. *Dartmouth* thus established more limited Supreme Court review of statutes purporting to interfere with private rights when the court exercised its appellate jurisdiction over the state courts.

Marshall also saw *McCulloch* primarily as a case about federal judicial power. The constitutionality of the Second Bank of the United States was largely a foregone conclusion. More contentious than the result was the Court's authority to declare the scope of federal legislative power. Marshall's primary concern was to establish the Court's role in protecting Congress' wide latitude to exercise its enumerated powers. His focus was on assuring that Congress might effectively exercise the powers expressly given it by the Constitution rather than on reading those powers expansively. As the criticism of *McCulloch* focused less on Congress than on the Court, in anticipation of pending battles over internal improvements and slavery in the territories, it moved Marshall to publish his anonymous defense of the opinion. He conceived this defense ultimately as one of the Court itself, challenging his critics to show how one might lawfully sustain the Bank without adopting the Court's reasoning.

The picture that emerges from this volume is of Marshall's primary concern that legislative or judicial power, narrowly construed, would practically amount to no power at all. Just as jurisdiction to apply a treaty required authority to dispose of the case to the extent that the *Court* saw it affected by the treaty, the exercise of enumerated powers required authority to choose means to the extent that *Congress* saw them as necessary to the exercise of those powers. The Court's primary role was to delineate the spheres within which the exercise of power or jurisdiction was absolute, but it did not follow that those spheres were without ascertainable limits. That Marshall was able to enact this practical vision into law—to assimilate essentially political choices touching on highly controversial issues to the familiar judicial role displayed in the more ordinary cases also illustrated in this volume—remains Marshall's most enduring achievement.

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