BOOK REVIEWS

MARSHALL AND THE "CAMPAIGN OF HISTORY"

FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15. By George L. Haskins and Herbert A. Johnson. New York: Macmillan Publishing Company, 1981. Pp. xiv, 687. Price $60.00.

LOUIS H. POLLAK†

On April 20, 1982, the University of Pennsylvania Law School's Chapter of the Order of the Coif conferred on George Lee Haskins its award for distinguished legal scholarship. The award to the very senior member of the law faculty did double service. It paid tribute to a corpus of legal writing—more than four decades' worth—which has established Professor Haskins as one of the nation's leading legal historians. It also celebrated the publication of the most recent and most noteworthy entry in Haskins' bibliography.

This newest work—*Foundations of Power: John Marshall, 1801-15*,[1] written in collaboration with Professor Herbert A. Johnson of the University of South Carolina—is volume two of the *Oliver Wendell Holmes Devise History of the Supreme Court.* Volume one—Julius Goebel Jr.'s magisterial *Antecedents and Beginnings to 1801*[2]—canvassed the Court's prerevolutionary origins and its constitutional underpinnings, and then traced the Court's formative years in New York and Philadelphia under Chief Justices Jay and Ellsworth. The Haskins-Johnson volume begins in February of 1801, when the Court opened for business in Washington under the new Chief Justice, John Marshall, just one month before Marshall swore in his kinsman, Thomas Jefferson, as President. Haskins and Johnson cover the first fourteen years of Marshall's unparallelled tenure in the center chair. Marshall's last twenty years—from the closing years of Madison's presidency to the closing years of Jackson's—will be the subject-matter of a volume by Professor G. Edward White of the University of Virginia.[3]

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† District Judge, United States District Court for the Eastern District of Pennsylvania. A.B. 1943, Harvard University; LL.B. 1948, Yale University.

[1] G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15 (2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES) (1981) [hereinafter cited as FOUNDATIONS].

[2] J. GOEBEL JR., ANTECEDENTS AND BEGINNINGS TO 1801 (1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES) (1971).

[3] The forthcoming volume will be based on the research of Professor White and Professor

i

Of the "great" cases of the Marshall era—the four cases which comprise the structural foundation of our system of judicially enforced constitutional law—only *Marbury v. Madison*[4] falls within the Haskins-Johnson purview. *Martin v. Hunter's Lessee*,[5] *McCulloch v. Maryland*,[6] and *Gibbons v. Ogden*[7] will be grist for Professor White's mill. With Haskins and Johnson thus confined to the more storied but, arguably at least, less substantive aspects of Marshall's jurisprudence, there was ground for concern that they would find themselves so hemmed in by the myths surrounding Marshall's early judicial years that they would be unable to add much to previous treatments of "The Mandamus Case" and of those contemporaneous happenings—most notably the impeachment trial of Samuel Chase and the treason trial of Aaron Burr—which also played important parts in the bitter struggle between the third Chief Justice and the third President for the constitutional soul of the new republic. The impressive fact, however, is that Haskins and Johnson have very largely freed themselves from the yoke of past historiography. They have managed this in two ways.

The obvious way was to explore facets of the Marshall Court neglected in earlier scholarship. This task—committed to Johnson as Part II of the volume—was to examine the day-to-day "business of the Court," the ordinary civil cases generated by seemingly routine transactions devoid, at least when entered into, of significant political implication. In articulating the rationale for this undertaking, Johnson observes that

> [d]espite the political whirlwind that raised major philosophical and constitutional objections to the exercise of judicial power, the Supreme Court conducted its ordinary judicial business with a calm attention to its primary, though not its only, function—the objective and impartial resolution of disputes brought before its Bench by private litigants.[8]

With these words as predicate, Johnson performs valuable service

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Gerald Gunther of Stanford University.

[4] 5 U.S. (1 Cranch) 137 (1803).

[5] 14 U.S. (1 Wheat.) 304 (1816).

[6] 17 U.S. (4 Wheat.) 316 (1819).

[7] 22 U.S. (9 Wheat.) 1 (1824).

[8] FOUNDATIONS, *supra* note 1, at 374. One of the reasons the Marshall Court had so substantial a private litigation docket was the emergence of the District of Columbia as a new and litigious federal enclave. In 1801-15, 35% of the Court's appellate cases came from the District of Columbia Circuit. *Id.* at 378. The Court's arbitrament of these cases was made more complex by the overlay of residual Virginia law in Alexandria County and residual Maryland law in Washington County. *Id.* at 560.

in exploring "non-constitutional" and "non-political" matters—most particularly, cases in the fields of admiralty, commercial law, the law of citizenship, international law and real property law—which seem "for the most part to have escaped the attention of legal and constitutional historians."[9]

The harder way of breaking new ground was to find new things to say about *Marbury* and the other heroics cast in bronze early in this century in Albert Beveridge's four-volume *Life of John Marshall*[10] and Charles Warren's two-volume *The Supreme Court in United States History*.[11] This task Haskins took to himself. Haskins' method (pursued in Part I of the Haskins-Johnson volume) was to follow the structure established by his predecessors[12] but substantially to enrich the content. Thus, Beveridge's and Warren's narratives of (1) the Jefferson Administration's dismantling of the Federalist court reforms of 1801, (2) *Marbury*, and (3) the Chase and Burr sagas, become, in Haskins' hands, not only consummate reconstructions of complex events but penetrating critical essays. The difference illustrates the process, recently described by C. Vann Woodward, by which in the last half century professional historians have reclaimed American history from gifted amateurs.[13]

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[9] *Id.* at 374. Not infrequently, of course, the claims of "private litigants" gave rise to cases of major political and constitutional consequence. *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116 (1812); *cf.* United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805).

[10] A. BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919).

[11] C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY (rev. ed. 1926).

[12] The respective chapter headings are as follows:

BEVERIDGE:
- II. THE ASSAULT ON THE JUDICIARY
- III. MARBURY VERSUS MADISON
- IV. IMPEACHMENT
- VI. THE BURR CONSPIRACY

WARREN:
- IV. MARSHALL, JEFFERSON, AND THE JUDICIARY
- VI. IMPEACHMENT AND TREASON
- VII. JUDGE JOHNSON AND THE EMBARGO
- VIII. PENNSYLVANIA AND GEORGIA AGAINST THE COURT

HASKINS:
- V. JEFFERSON'S ATTACK ON THE FEDERAL JUDICIARY
- VI. *MARBURY V. MADISON*
- VII. IMPEACHMENT
- VIII. HABEAS CORPUS, TREASON, AND THE TRIAL OF AARON BURR
- IX. EXECUTIVE POWER AND THE JUDICIARY: THE EMBARGO
- X. STATES' RIGHTS AND THE NATIONAL JUDICIARY

[13] See Woodward, *A Short History of American History*, N.Y. Times, Aug. 8, 1982, § 7 (Book Review) at 3, 14.

ii

Haskins' capacity to improve on the prior art of Beveridge and Warren is well illustrated by his treatment of *Marbury* and of matters transpiring shortly before and shortly after.

What precipitated litigation in *Marbury* was, as we all remember, a dispute of very minor dimension—namely, William Marbury's claim that President Jefferson, by withholding Marbury's signed and sealed commission, was wrongfully preventing him from assuming one of the forty-odd Justiceships of the Peace of the District of Columbia to which President Adams, with the consent of the Senate, had appointed Marbury and other deserving Federalists just before Adams left office. Marbury's claim generated legal issues of magnitude when Charles Lee, Marbury's attorney, concluded that the only available remedy was a suit in the Supreme Court. The decisive issue before that Court—so the Court ultimately determined—was whether the Court could, consistently with the language of article III of the Constitution defining the Court's jurisdiction, entertain a mandamus action, bottomed on a seemingly pertinent clause of section 13 of the Judiciary Act of 1789,[14] to compel Secretary of State Madison to furnish Marbury the original or an official copy of his commission. In resolving the jurisdictional issue,

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[14] Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80-81. The first sentence of § 13 defined the Supreme Court's "exclusive jurisdiction" over "controversies of a civil nature, where a state is a party." The second sentence defined the Supreme Court's exclusive jurisdiction of "suits . . . against ambassadors, or other public ministers" and its nonexclusive jurisdiction over suits *by* such persons. The third sentence provided for jury trial of all issues of fact in Supreme Court "actions at law against citizens of the United States." The final sentence of § 13 provided as follows:

> The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

Id. at 81.

The pertinent language of article III is:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2.

Marbury was begun in 1801, the Court granting Lee's unopposed (Madison did not appear by counsel or in person) motion for an order to show cause. FOUNDATIONS, *supra* note 1, at 192-93. Madison never responded to the Court's order, the mere issuance of which was regarded by Jefferson's partisans as an outrageous intrusion upon executive authority. *Id.* at 183-86. *Marbury* was not decided until 1803 because Jefferson's Congress, apprehensive that the Court might undertake to invalidate the statutes passed in the spring of 1802 repealing the Federalists' 1801 judicial reforms, *see infra* text following note 17, enacted a statute revising the Supreme Court's terms of court in such a way as to prevent the Court from sitting at all in 1802.

the Court, in the opinion Marshall delivered on February 24, 1803, not only announced but exercised a power to invalidate a congressional enactment not in harmony with the Constitution—a power contemplated by the principal architects of the Constitution but not *in haec verba* described in the document. Taken together, the Court's judgment and Marshall's opinion explaining the judgment fixed the principle of judicial review—the fulcrum of the American constitutional system—beyond recall.

On March 2, 1803, six days after *Marbury* was decided, the Court in *Stuart v. Laird*[15] dealt with statutes of less antiquity but far greater consequence than section 13. Once again Charles Lee was of counsel. This time, Lee called on the Court to invalidate legislation. Once again he lost. The statutes vainly challenged by Lee in 1803 had been enacted in 1802.[16] The 1802 statutes sought to achieve two important Jeffersonian objectives.

The first objective was to repeal judicial reform legislation passed by the Federalist Congress in 1801. That legislation[17] had created a new species of circuit courts—staffed by a new species of (Federalist) "circuit" judges—in lieu of the circuit courts staffed by Supreme Court Justices and district judges that had been established by the 1789 Judiciary Act.[18] The second objective was to replace the short-lived 1801 circuit courts and the short-tenured 1801 circuit judges with circuit courts reorganized in general conformity with the 1789 model.[19] The questions raised by the 1802 statutes were (1) whether Congress can, by abolishing the courts on which they sit, terminate the tenure of judges whose status is protected by the "good behavior" proviso of article III, and (2) whether judges commissioned to sit as members of the Supreme Court can be empowered and directed to sit on circuit courts conducting trials in cases not falling within the categories of original jurisdiction assigned by article III to the Supreme Court.[20] These questions were presented in *Stuart v. Laird* because it was Lee's contention—as counsel for defendants against whom a judgment had been entered by a circuit court that had been established by the 1802 legislation and that consisted of the Chief Justice and a district judge—that the 1802 circuit courts were improperly constituted. One of these flawed 1802 circuit courts could not, in Lee's submission, validly exercise jurisdiction over a case originally filed in an 1801 circuit

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[15] 5 U.S. (1 Cranch) 299 (1803).
[16] Act of Mar. 8, 1802, ch. 8, 2 Stat. 132; Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.
[17] Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.
[18] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.
[19] Act of Mar. 8, 1802, ch. 8, sec. 3, 2 Stat. 132.
[20] *See* Stuart v. Laird 5 U.S. (1 Cranch) at 303-05.

court—a court which, so Lee went on to argue, Congress was powerless to disestablish, "if thereby they deprive a judge of his office."[21]

Although Lee may not have been entirely surprised that the Justices were not easily persuaded that their Chief erred in sitting in a circuit court, Lee may be forgiven for feeling (if he did) that, given Marshall's rejection in *Marbury* of Lee's argument that Congress could confer on the Supreme Court categories of original jurisdiction additional to those specified in article III, Lee's argument in *Stuart v. Laird* that a Justice sitting on a circuit court could not exercise the far broader "original jurisdiction Congress had conferred on that court received remarkably short shrift. Lee's arguments had developed in the following way:

On February 12, in his argument on Marbury's behalf in support of the jurisdiction to entertain mandamus actions apparently conferred on the Supreme Court by section 13, Lee had contended that mandamus actions are "appellate" within the meaning of article III's division of the Supreme Court's authority between cases in the "original" and cases in the "appellate" jurisdiction. But recognizing the possibility that the Court would not characterize as appellate an action to mandamus a cabinet official, as distinct from a lower court judge, Lee had pressed the alternative contention that "Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the [C]onstitution."[22] On February 24, in his opinion in *Marbury*, Marshall had found no merit in either contention.

Lee's argument in *Stuart v. Laird* began on February 23, the day before *Marbury* was decided, and concluded on February 24, the very day of the decision.[23] Mr. Cranch's report does not tell us how Lee divided his two days of argument, but it seems a fair assumption that Lee's contention that a Supreme Court Justice could not be empowered to exercise the spacious original jurisdiction of a circuit court was advanced on the second day, *after* he had heard Marshall announce in *Marbury* that article III sets not only a floor but a ceiling on the Supreme Court's original jurisdiction. Lee put the matter as follows:

> But the laws are also unconstitutional, because they im-

[21] *Id.* at 303.

[22] *Marbury*, 5 U.S. (1 Cranch) at 148.

[23] This reviewer's reconstruction of the events of February 23-24—announcement of *Marbury* followed by conclusion of argument in *Stuart v. Laird*—rests on an examination of the Minutes of the Court which lists the *Marbury* judgment as the first order of judicial business on February 24. *See* Minutes of the Supreme Court of the United States, Feb. 23-24, 1803. (For their helpfulness in making the Minutes available for inspection, this reviewer is much indebted to Maeva Marcus and James Buchanan, members of the dedicated staff of historians at the Supreme Court Historical Society who are working on the Court's archives.)

> pose new duties upon the judges of the supreme court, and thereby infringe their independence; and because they are a legislative instead of an executive appointment of judges to certain courts. By the constitution all civil officers of the United States, including judges, are to be nominated and appointed by the president, by and with the advice and consent of the senate, and are to be commissioned by the president.
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> The act of 29th April, 1802, appoints the "*present Chief Justice of the supreme court,*" a judge of the court thereby established [the fifth circuit]. He might as well have been appointed a judge of the circuit court of the district of Columbia, or the Mississippi territory. Besides, *as judge of the supreme court*, he could not exercise the duties or jurisdiction assigned to the court of the fifth circuit, because, by the constitution of the United States, the supreme court has *only appellate* jurisdiction; except in the two cases where a state or a foreign minister shall be a party. The jurisdiction of the supreme court, therefore, being *appellate only*, no judge of that court, *as such*, is authorized to hold a court of original jurisdiction. No act of congress can extend the original jurisdiction of the supreme court beyond the bounds limited by the constitution.[24]

Justice Paterson's cursory rejection of Lee's contentions hardly seems responsive:

> Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or, in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.[25]

Lee probably surmised at the time *Stuart v. Laird* was decided what readers of the Court's opinion were later told by Reporter

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[24] Stuart v. Laird, 5 U.S. (1 Cranch) at 304-05 (emphasis in 1812 ed.).
[25] *Id.* at 308-09.

Cranch: that delivery of the opinion devolved on Justice Paterson because (1) "The *Chief Justice*, having tried the cause in the court below, declined giving an opinion" and (2) Justice William Cushing—the only Associate Justice senior to Paterson—was "absent on account of ill health."[26] Lee may even have surmised that Paterson and his brethren had their minds made up on the validity of the 1802 statutes before they heard argument in *Stuart v. Laird*. But what Lee could not have surmised was the scope and intensity of the intra-Court debate which had addressed and resolved these momentous constitutional issues—issues which framed the Justices' obligation *vel non* to ride circuit in 1802—almost before the ink was dry on the 1802 statutes. Beveridge was to offer an oblique hint of this debate—"Marshall proposes to his colleagues on the bench that they refuse to sit as Circuit Judges—They reject his proposal"[27]— but curiously, did not document it.[28] Warren was to say more—enough to make it clear that the course of noncompliance with the 1802 legislation which the Chief Justice tentatively urged in a letter to his brethren was endorsed by Justice Samuel Chase but disapproved by Justices Cushing, Paterson, Bushrod Washington and Alfred Moore.

But it remained for Haskins to report the debate in full. Most particularly, we are indebted to Haskins for publishing verbatim a letter to Marshall containing the powerful, albeit unavailing, argument of Chase—a major constitutional paper which has hitherto languished in

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[26] *Id.* at 308. One cannot tell from Cranch's report or from the Journal of the Court whether Marshall simply absented himself from rendering an opinion or entirely recused himself. See, in this connection, Lee's contention in *Stuart v. Laird* that the participation of a Justice in circuit court proceedings made for special difficulties when the judgment of the circuit court came before the Supreme Court for review:

> A party in this court has a right to have his cause tried by six judges. He has a right to an unbiased court, whether the whole six sit or not. A judge, having tried the cause in the court below, and given judgment, must be, in some measure, committed; he feels an anxiety that his judgment should be affirmed. The case of *Clark and Nightengale*, [Clark v. Russell, 3 U.S. (3 Dall.) 415 (1799)] will illustrate this principle. The suit was first tried before Chief Justice Ellsworth, whose opinion upon the merits was in favor of the plaintiff. A writ of error was brought, and the judgment reversed for error in pleading, and the cause remanded to be again tried. Judge Cushing held the court in the second trial, and his opinion also was in favour of the plaintiff upon the merits. A second writ of error was brought and tried in the supreme court before Chief Justice Ellsworth, Judges Cushing, Paterson, Washington, and Chase, and the judgment was reversed by the three last-mentioned judges, who made a majority of the court.

5 U.S. (1 Cranch) at 305. Cranch's notation in *Stuart v. Laird*, and clues in certain other cases, have led Professor Johnson to the important conclusion that Marshall's near monopoly on Court opinions in his first decade as Chief Justice traces to a convention that the senior participating Justice would speak for the Court even though the opinion delivered may not have been that Justice's handiwork. *See* FOUNDATIONS, *supra* note 1, at 382-89.

[27] 3 A. BEVERIDGE, *supra* note 10, at xii (table of contents summary of ch. II).

[28] 2 A. BEVERIDGE, *supra* note 10, ch. II.

obscurity.[29] Chase's argument is of interest as an elaborate examination of the issues so summarily disposed of by Paterson in *Stuart v. Laird.* And Chase's argument has a separate aspect which commands enduring attention. It states forcefully, and in terms which anticipate the *Marbury* opinion ten months later, the rationale of judicial review:

> The Constitution of the United States is certainly a *limited* Constitution; because (in Art. I. § 9) it expressly *prohibits* Congress from making certain *enumerated Laws*; and also from doing certain specified Acts, in many cases; and it is very evident that these restrictions on the *Legislative power* of Congress would be entirely nugatory, and merely waste paper, if there exists no power under the Constitution, to declare Acts made, contrary to these *express prohibitions*, null and void. It is equally clear that the *limitations* of the power of Congress can only be preserved by the Judicial power. There can be no other rational, peaceable and secure barrier against violations of the Constitution by the Legislature, or against encroachments by it, on the Executive or on the Judiciary branches of our government. The House of Representatives, from their wealth and numbers, have *now* more influence than the Senate; and it will rapidly increase; while the power of the Senate must forever remain almost stationary. These two bodies united, will always controul [sic] the Executive alone; and even if supported by the Judiciary: The Judicial power is most feeble indeed; and if the Legislative and Executive unite, to impair or to destroy its Constitution Rights, they must be irresistible; unless the great body of the people take the alarm and give their aid. It is provided by the Constitution that the Constitution of the United States shall be the *Supreme* Law of the Land; and by the Oath of Office prescribed by the Statute (22 September 1789) all Judges engage to discharge, and perform all their duties, as Judges, *agreeably to the Constitution.* Further, all Judges, by the Constitution (Art. 6 § 6) are required to bind themselves, by oath, to support the Constitution of the United States. This engagement, in my judgement, obliges every Judge (or other taker thereof) not to do any affirmative act to contravene, or render ineffectual, any of the provisions in the Constitution. It has been the uniform opinion (until

[29] Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *reprinted in* FOUNDATIONS, *supra* note 1, at 172 n.182.

> very lately) that the Supreme Court possess the power, and that they are in *Duty* bound, to declare acts of Congress or of any of the States, contrary to the Constitution of the United States, *void*; and the Judges of the Supreme Court have *separately* given such opinion. If the Supreme Court possess this power, the Inferior Courts must also have the *same* power; and of course ought to be as independent of Congress as the Supreme Court. . . .[30]

Clearly, Marshall and Chase's colleagues did not disagree with the proposition that judges were empowered (indeed obligated) to disregard unconstitutional statutes. So it is substantial evidence of the intellectual independence of those other Justices that they not only rejected Chase's constitutional argument—to which Marshall was sympathetic—on its merits but also turned down Chase's proposal that the Court assemble in Washington to confer on the matter.[31] The episode helps to make a point that is central to the entire Haskins-Johnson volume: contrary to the prevailing mythology, the early Marshall Court was not a one-judge show.[32]

iii

The group portrait painted by Haskins and Johnson adds greatly to prior works because it brings the early Marshall Court alive as a *court*—not just Marshall and anonymous associates but a collectivity of judges—achieving institutional identity against the prevailing Jeffersonian grain.[33] The group portrait would have taken on added dimension had it also included (in the background, but not simply in silhouette) depictions of at least a few of the leaders of the professional community from which the judges came and with which they interacted—the emerging American bar. It is not that there is no mention of the lawyers involved in the cases discussed; it is rather that there is insufficient scrutiny of the mode, extent and impact of their participation in the nascent judicial enterprise. To be sure, Haskins makes some use of Charles Lee's *Marbury* argument in exploring the content and struc-

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[30] Id. at 174 n.182.

[31] *See* FOUNDATIONS, *supra* note 1, at 171-77.

[32] Of central significance is Johnson's thesis that Marshall's apparently transcendent position is largely to be explained by a convention in force during the first decade of Marshall's tenure, pursuant to which the Court routinely spoke through the senior participating Justice. *See supra* note 26.

[33] Some historians of the Jefferson period are likely to read Haskins' unflagging criticism of the President as undue hostility; whether Jefferson was really as far off base as much of the time as Haskins contends is a question—or, really a congeries of questions—so large as not to be amenable to systematic examination within the confines of this book review.

ture of Marshall's opinion. But one would also welcome discussion of the training, professional role and intellectual outlook of this lawyer who is only a name to us but who was in his own time one of America's leading lawyers. (Lee in the Federalist years had been Marshall's close political ally and cabinet colleague; in the opening years of Marshall's Chief Justiceship, Lee not only argued *Marbury* and *Stuart v. Laird* but also was of counsel for Burr (and for Burr's associates, Samuel Swartwout and Dr. Justus Bollman) and for Chase; later, Lee represented the Fairfax interests when that endless litigation finally reached the Court.[34]) Similarly, one would like to know a lot more about Luther Martin, William Wirt, George Hay, and a number of others.

The gap here identified is one of which Haskins and Johnson are well aware. It appears from Haskins' *Preface* that editorial economies required the excision of several items, matters, this one among them.[35] Perhaps Professor White's volume will have some room for lawyers and lawyering. Martin and Wirt, both of whom figure importantly in the major cases of the later Marshall years, would be particularly apt candidates for such treatment. Another apt candidate would be a lawyer who was too young to play any role in the early Marshall years—Daniel Webster.[36]

iv

When John Marshall of Virginia succeeded Oliver Ellsworth of Connecticut as Chief Justice in 1801, his new brethren were five in number: Associate Justices Cushing of Massachusetts, Paterson of New Jersey, Chase of Maryland, Washington of Virginia and Moore of North Carolina.[37] By 1815, only Marshall and Washington remained:

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[34] Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813). Lee was not of counsel in the reprise, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). Marshall, who was in-all-but name a party in interest in the *Fairfax* litigation, participated in neither decision.

Lee's cabinet service was as the nation's third Attorney General. He was appointed by Washington in 1795 and retained by Adams. When first appointed Lee had been a member of the (Pennsylvania) bar for a scant seventeen months. 11 DICTIONARY OF AMERICAN BIOGRAPHY 101 (D. Malone ed. 1933).

If ever lawyer and law suit meshed, it was in *Stuart v. Laird*, in which Lee challenged Congress's power to abolish the Federalist circuit judgeships, for Lee was one of Adams' "midnight judges"—but one who (as Haskins notes, FOUNDATIONS, *supra* note 1, at 131, and some other scholars do not, *see, e.g.*, 11 DICTIONARY OF AMERICAN BIOGRAPHY, at 101) declined the appointment.

[35] "It is a source of regret that in the ultimate structure of the book it was necessary to omit special chapters on Marshall, Story, the federal Bar, and legal education." FOUNDATIONS, *supra* note 1, at 10.

[36] For some of Webster's leading cases see Pollak, *Thurgood Marshall: Lawyer and Justice*, 40 MD. L. REV. 405, 405 & nn.1-9 (1981).

[37] FOUNDATIONS, *supra* note 1, at 84.

Moore had been succeeded by William Johnson of South Carolina in 1805; Paterson by Brockholst Livingston of New York in 1807; Chase by Gabriel Duvall of Maryland in 1811; and Cushing by Joseph Story of Massachusetts in 1811. Thomas Todd of Kentucky was appointed to the newly created western seat in 1808.[38]

Foundations of Power is a study of the Court between 1801 and 1815, that is to say, the judicial business transacted by the Chief Justice and the ten Associate Justices with whom he served during those fourteen years. The book is a group portrait, but the magnifying focus is on the incumbent of the center chair. Marshall was and is the brooding omnipresence. The received view is that articulated by Holmes, on behalf of the Supreme Judicial Court of Massachusetts, when, on February 4, 1901, speaking from his own center chair, he granted the motion of the bar to adjourn in honor of the centenary of Marshall's accession to the Chief Justiceship:

> If I were to think of John Marshall simply by number and measure in the abstract, I might hesitate in my superlatives, just as I should hesitate over the battle of the Brandywine if I thought of it apart from its place in the line of historic cause. But such thinking is empty in the same proportion that it is abstract. It is most idle to take a man apart from the circumstances which, in fact, were his. To be sure, it is easier in fancy to separate a person from his riches than from his character. But it is just as futile. Remove a square inch of mucous membrane, and the tenor will sing no more. Remove a little cube from the brain, and the orator will be speechless; or another, and the brave, generous and profound spirit becomes a timid and querulous trifler. A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of his greatness consists in his being *there*. I no more can separate John Marshall from the fortunate circumstance that the appointment of Chief Justice fell to John Adams, instead of to Jefferson a month later, and so gave it to a Federalist and loose constructionist to start the working of the Constitution, than I can separate the black line through which he sent his electric fire at Fort Wagner from Colonel Shaw. When we celebrate Marshall we celebrate at the same time and indivisibly the inevitable fact that the oneness of the nation and the supremacy of the national Consti-

[38] *Id.* at 389-92.

> tution were declared to govern the dealings of man with man by the judgments and decrees of the most august of courts.
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> . . . .
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> The Federalist, when I read it many years ago, seemed to me a truly original and wonderful production for the time. I do not trust even that judgment unrevised when I remember that The Federalist and its authors struck a distinguished English friend of mine as finite; and I should feel a greater doubt whether, after Hamilton and the Constitution itself, Marshall's work proved more than a strong intellect, a good style, personal ascendancy in his court, courage, justice and the convictions of his party. My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law. The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind.
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> But what I have said does not mean that I shall join in this celebration or in granting the motion before the court in any half-hearted way. Not only do I recur to what I said in the beginning, and remembering that you cannot separate a man from his place, remember also that there fell to Marshall perhaps the greatest place that ever was filled by a judge; but when I consider his might, his justice, and his wisdom, I do fully believe that if American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be but one alone, and that one, John Marshall.[39]

The received view is not the only possible view. We are cogently reminded of this by Jennifer Nedelsky's thoughtful essay in which she reviews *Foundations of Power* and the late Herbert Storing's *The Complete Anti-Federalist.*[40] As Professor Nedelsky shows, persons not persuaded of the validity of the Federalist principles of Hamilton and

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[39] O. W. HOLMES, SPEECHES 88-90 (1934).

[40] Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340 (1982).

Madison would not be likely to admire Marshall's vast jurisprudential edifice. Marshall's greatness is a direct function of the enduring ascendancy of Federalist principles in the "campaign of history."[41] Haskins and Johnson have admirably chronicled early days in that triumphant campaign.

[41] Most readers probably regard Holmes' assessment of Marshall as strongly favorable. It is notable, however, that the fact that Holmes was more impressed by Marshall's place in the historical continuum than by his individually heroic stature so troubled President Theodore Roosevelt that the President for a time was uncertain whether he should select Holmes (whom, the Marshall speech apart, he greatly admired) to succeed Justice Gray on the latter's death in 1902. But, happily, the President overcame those misgivings. *See* M. LERNER, THE MIND AND FAITH OF JUSTICE HOLMES xxxi-xxxii (1948).

EMULATING THE MARSHALL COURT: THE APPLICABILITY OF THE RULE OF LAW TO CONTEMPORARY CONSTITUTIONAL ADJUDICATION

FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15. By George L. Haskins and Herbert A. Johnson. New York: Macmillan Publishing Company, 1981. Pp. xiv, 687. Price $60.00.

WILLIAM E. NELSON†

In *Foundations of Power: John Marshall, 1801-15*,[1] George L. Haskins and Herbert A. Johnson argue that John Marshall's great accomplishment as Chief Justice was to establish the rule of law as the basis of the Supreme Court's jurisprudence. They describe how the Court, which was "[a] relatively feeble institution during the 1790's, . . . acquired in only a few years' time, and largely under the guiding hand of John Marshall, more power than even the framers of the Constitution may have anticipated." It acquired this power by becoming "a bulwark of an identifiable rule of law as distinct from the accommodations of politics."[2]

Eighteenth-century courts "were viewed as an arm of the administration" which, like the executive branch, engaged in political as well as strictly legal activities.[3] In England, for example, Lord Mansfield was a central figure in the King's government during most of his time on the bench,[4] while in pre-Revolutionary Massachusetts Thomas Hutchinson served simultaneously as Lieutenant Governor and Chief Justice before being promoted to the Governorship.[5] Similarly, in colonial New York the courts aided the executive in the prosecution of John Peter Zenger.[6] "Harmony among the three branches was not only

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† Professor of Law, New York University. A.B., 1962, Hamilton College; L.L.B., 1965, New York University; Ph.D., 1971, Harvard University. The author is indebted to Steven A. Reiss for his comments and criticisms and to the Law Center Foundation of New York University for research support.

[1] G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15 (2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES) (1981) [hereinafter cited as FOUNDATIONS].

[2] *Id.* at 7; *see also id.* at 648-49.

[3] *Id.* at 206.

[4] Lord Mansfield held positions as a cabinet member and Speaker of the House of Lords in addition to his post as Chief Justice of the King's Bench. *See* C. FIFOOT, LORD MANSFIELD 36-46 (1936).

[5] *See* B. BAILYN, THE ORDEAL OF THOMAS HUTCHINSON 39-54 (1974).

[6] *See* L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 126-34 (1960).

expected, but had existed to a substantial extent during the administrations of George Washington and John Adams."[7] The Supreme Court in its early, pre-Marshall years behaved in accordance with the eighteenth-century pattern. For example, the Justices riding circuit provided partisan aid to the Adams Administration in proceedings against political enemies under the Alien and Sedition Acts.[8]

Marshall, however, "extricate[d] the Court from partisan politics"[9] and enabled it "to settle down to its judicial business as a recognized independent segment of the government."[10] In Part I of the volume, Professor Haskins presents substantial evidence in support of this thesis about the Marshall Court and the rule of law through an examination of leading cases and other constitutional events of the early Marshall years. He notes, for example, how in *Marbury v. Madison*,[11] "Marshall was able to make two crucial points, which are explicitly stated in the decision: (1) 'The province of the court is, solely, to decide on the rights of individuals . . .' and (2) 'Questions, in their nature political, . . . can never be made in this court.' "[12] He shows in detail how the Justices weathered Jefferson's effort to impeach Justice Samuel Chase in part by becoming more cautious and less political in their grand jury charges.[13] He reads Marshall's opinion in *Ex parte Bollmann*[14] as an effort "to define treason so that the rights of individuals would be secured by the rule of law" and so that charges of treason could not be brought forward by the government "in an ex post facto fashion to fit the actions of particular dissenting citizens."[15] He suggests that the response of the federal judiciary to cases arising by virtue of the Embargo of 1807 can best be explained not by assuming that Federalist judges were hostile to the embargo but by recognizing that the judges were simply enforcing statutes as Congress had written them.[16] In Part II of the volume, Professor Johnson pursues the same theme by examining the everyday "business of the Court."[17] There he describes in detail how the Marshall Court withdrew from politics and greatly expanded its legal functions through the "impartial resolution of dis-

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[7] FOUNDATIONS, *supra* note 1, at 206.

[8] *See* L. LEVY, *supra* note 6, at 198; J. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 97-98, 265-68, 271 (1956).

[9] FOUNDATIONS, *supra* note 1, at 365.

[10] *Id.* at 245.

[11] 5 U.S. (1 Cranch) 137 (1803).

[12] FOUNDATIONS, *supra* note 1, at 204 (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

[13] *Id.* at 245.

[14] 8 U.S. (4 Cranch) 75 (1807).

[15] FOUNDATIONS, *supra* note 1, at 260.

[16] *Id.* at 309-10.

[17] *Id.* at 373.

putes brought before its Bench by private litigants."[18] He analyzes a series of comparatively unknown nonconstitutional cases—*Schooner Exchange v. McFaddon*,[19] *United States v. Fisher*,[20] *United States v. Brigantine Mars*,[21] and *United States v. 1960 Bags of Coffee*[22]—to show that establishment of a line between law and politics was always "present in the minds of the judges and influential in their decisions."[23] He concludes:

> In a sense the Court under Marshall had accepted a sharply diminished role in politics, but in so limiting its activities it had secured a better control of law, the jurisdiction to which it had undoubted entitlement. Removing itself from partisan politics, it entrenched itself as the constitutional guardian of individual rights against the excesses and vagaries of popular government in a disturbingly new egalitarian age. In beating a strategic retreat before the armies of Jeffersonian legislators, the judges arrived at a delineation of judicial power such that even their detractors were forced to concede the validity of their pretensions, and Republican judges found incumbent Federalist judges to be of one mind with them. Upon this consensus was built the foundations of the Supreme Court of the United States as we know it today.[24]

The extensive evidence presented in *Foundations of Power* makes it a persuasive account of the early Marshall years. Historians can plausibly understand that John Marshall transformed the Supreme Court from a political into a more purely legal institution and that he established as the Court's most basic task the application to adjudication of the rule of law. *Foundations of Power* has significance, however, not only as a portrait of the past but also as a guide for the present. Haskins and Johnson portray Marshall as a great judge whom modern judges should admire and emulate.

Their monumental work of history does not, however, endeavor to answer three questions that analysts of the modern Court might ask in determining whether today's Supreme Court should strive to emulate the Marshall Court. First, at a purely theoretical level, why should the modern Court act as a nonpolitical body that merely applies and elabo-

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[18] *Id.* at 374.
[19] 11 U.S. (7 Cranch) 116 (1812).
[20] 6 U.S. (2 Cranch) 358 (1804).
[21] 12 U.S. (8 Cranch) 417 (1814).
[22] 12 U.S. (8 Cranch) 398 (1814).
[23] FOUNDATIONS, *supra* note 1, at 405.
[24] *Id.* at 406.

rates the rule of law? Second, if the modern Court were to decide to emulate the Marshall Court, how could it carve out for itself a legal function distinct from more political functions which it might and which other institutions do perform; that is, how might the Court give meaning to the concept of the rule of law? Third, what obstacles exist to today's Court assuming a nonpolitical role similar to that of the Marshall Court? This essay will address these questions in a tentative fashion and suggest some directions that future thinking and research might take.

I. THE RULE OF LAW AND THE PROTECTION OF INDIVIDUAL RIGHTS

Why should the Supreme Court today emulate the Marshall Court and act as a nonpolitical body whose function is the application and elaboration of the rule of law? One argument is that individual rights can be protected in the United States today only through law administered nonpolitically by the courts.

A distinct historical connection exists between the determination of the Marshall Court to act as protector of individual rights and its contemporaneous decision to bind itself by the rule of law. Both steps were announced in *Marbury v. Madison* and put into practice over the next two decades. The Chief Justice wrote in *Marbury*: "The very essence of civil liberty certainly consists in the right of every individual to claim . . . protection . . . whenever he receives an injury . . . [in the nature of a] violation of a vested legal right."[25] Marshall then tied the protection of individual rights to application of the rule of law:

> 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. . . .
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> . . . [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive professes a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and *individual rights* depend upon the performance of that duty, it seems equally clear, that the individual who

[25] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

> considers himself injured, has a right to resort to the laws of his country for a remedy.[26]

During the next two decades, the Marshall Court continued to draw the line between matters of law and matters of politics in cases like *Fletcher v. Peck*,[27] where individual claims of constitutional rights were vindicated, and cases like *Gibbons v. Ogden*,[28] where political bodies were given free rein to make policy determinations.

The relation between judicial protection of individual rights and judicial adherence to the rule of law may not, however, be merely a matter of historical accident. Further analysis is needed to determine whether the Supreme Court can serve as the protector of individual or minority rights without some conception of the Court as the expounder of the rule of law. Some scholars think it cannot. Ronald Dworkin, for one, suggests that rights are the antithesis of political power; they "are political trumps held by individuals" for use "when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do."[29] Rights, Dworkin continues, are established by "appeal[s] to principle . . . . A claim of right presupposes a moral argument and can be established in no other way."[30] Rights are based on principles fundamental to a society which are unassailable by mere majoritarian will. An individual or a minority resorts to some concept of rights when an institution of government amenable and often responding to the political will of the community poses a threat that cannot be met in a political manner. In such a situation, the individual or minority appeals to some force independent of the political forces of the community and makes an argument grounded in values other than political ones. Protection of rights, according to this argument, requires access to an institution free from political influence. In the United States today, the institution to which a nonpolitical appeal lies is the courts, which are alone capable of interposing nonpolitical values—or law—in the path of the nation's political institutions. Only by adhering to the rule of law can the Court fulfill the institutional role of protector of rights from majoritarian assault.

If a connection between protection of rights and the rule of law can be established, then the issue whether John Marshall should be admired for making elaboration of the rule of law the preeminent function of the Supreme Court and the issue whether today's Court should

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[26] *Id.* at 165-66 (emphasis added).
[27] 10 U.S. (6 Cranch) 87 (1810).
[28] 22 U.S. (9 Wheat.) 1 (1824).
[29] R. DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977).
[30] *Id.* at 147.

emulate the Marshall Court will depend upon a deeper issue: whether individuals and minorities should be accorded rights providing them with protection against the will and power of the nation's dominant political forces. If a contemporary constitutional theorist, consistently with longstanding American constitutional tradition,[31] distrusts the power of dominant political groups, he will want to invest individuals and minorities with rights based on law—rights that will provide protection against the untrammeled will of dominant groups. Most contemporary theorists,[32] and, I believe, most Justices now sitting on the Court, are committed to the protection of rights and arguably should be committed as well to some vision of the rule of law.[33] Many who are committed to the protection of rights doubt, however, whether the concept of the rule of law can be given meaningful content that will enable the Supreme Court to act in a purely legal as distinguished from a political manner.[34] It is to this doubt that we must next turn.

II. PUTTING CONTENT INTO THE RULE OF LAW

Three different sources for rights—and hence three different versions of the rule of law—have commanded the attention of American constitutional scholars in the past three decades. One group of scholars, including Raoul Berger and Robert H. Bork,[35] has sought to ground individual and minority rights in the text of the Constitution and in

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[31] *See* W. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900 at 156-61 (1982).

[32] *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980); R. DWORKIN, *supra* note 29; J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY (1982).

[33] A few justices and theorists, however, of whom Justice Rehnquist is the most notable, apparently believe that dominant political forces should possess untrammelled political power and hence do not want the Supreme Court to interpose law in the form of rights as an obstacle to those forces attaining their political objectives. These justices and theorists, of course, do not understand the Court to be totally without power to declare legislative acts of the dominant forces unconstitutional, for they recognize that political power in the United States has been divided among many different institutions and that the Court must serve as an umpire policing the jurisdiction of each of those institutions. Such an umpireal role is appropriate for a court in a democratic society in which no one institution of government possesses ultimate sovereignty: some organ of government must police the jurisdictional bounds of the other institutions. For the most recent argument along these lines, see Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982). Such an umpireal role does not, however, bind the Court to the rule of law since the Court could act as umpire on the basis of pragmatic judgments about how the American political system as a whole will best function. In contrast, a Supreme Court committed to the protection of individual rights must be bound by the rule of law.

[34] *See, e.g.*, Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 804-05 (1982).

[35] R. BERGER, GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT ch. 15 (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

specific Supreme Court precedents. A second group of scholars, ranging from Alexander M. Bickel to John H. Ely,[36] has striven to ground rights in the processes and structures of American political institutions. A third group has focused attention on natural law and natural rights arguments as the foundation on which to construct the edifice of constitutional rights.[37]

The Marshall Court did not find law in past precedent, for it had no real precedents with which to address the constitutional issues it faced. Despite its protestations in *Marbury v. Madison*,[38] the Marshall Court likewise did not find its constitutional doctrines in the text of the Constitution itself—a text that speaks with the same imprecision and ambiguity as most texts.[39] Nor did the Marshall Court find law in the established structures and procedures of American government; rather the Court was engaged in the process of establishing those structures and procedures and giving meaning to a new system of governance.[40]

A. Natural Rights as the Historical Basis of the Rule of Law

In *Foundations of Power*, Professors Haskins and Johnson argue that the Marshall Court based its constitutionalism on the third of the traditions noted above—the natural-law/natural-rights tradition. Haskins writes that "Marshall recognized certain ideas of natural rights as great or fundamental principles anterior to government and legislation."[41] The preeminent natural right enforced by the Marshall Court was, of course, the right to property.[42]

For Americans of the early nineteenth century, the Marshall Court's emphasis on natural rights sufficed to justify the Court's enforcement of constitutional rights, especially the right of property. Natural rights arguments still have force for some American constitutional theorists. But most twentieth-century Americans do not believe that labelling a right "natural" confers upon it a quality transcending ordinary human discourse and analysis. Many contemporary theorists de-

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[36] *See* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962); J. ELY, *supra* note 32.

[37] *See* M. PERRY, *supra* note 32; *see generally* D. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION (1982); D. RICHARDS, THE MORAL CRITICISM OF LAW (1977).

[38] 5 U.S. (1 Cranch) 137 (1803).

[39] *See* FOUNDATIONS, *supra* note 1, at 200-02.

[40] *Id.* at 201-05, 375-77. *But see* Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340 (1982) (asserting that the Marshall Court's vision of the rule of law evolved from the federalist conception of the structure of the new American government).

[41] FOUNDATIONS, *supra* note 1, at 11.

[42] *Id.* at 336-53.

mand some other justification before an alleged right is elevated to constitutional stature and thereby rendered enforcible by the Supreme Court. The mere label of natural rights does not suffice, and a history of the Marshall Court written in the language of natural rights does not provide a strong contemporary justification for judicial review. If the modern Court is to learn from history, that history must be written in a language that, although not anachronistic, has greater contemporary analytical force than the language of natural rights. Today's theorist, that is, demands to know in a language usable in contemporary normative argument why the Marshall Court enforced particular rights as constitutional ones.

B. Consensus as the Historical Basis of the Rule of Law

As I have argued elsewhere,[43] the Court focused on the rights it did, especially the right to property, because a consensus existed that those rights were the important ones meriting enforcement against legislative and executive usurpation. John Marshall, I believe, understood law to be different from politics in that the political process resolved questions pursuant to the will of an electoral majority, whereas the legal process resolved issues as it had in the eighteenth century, according to a widely shared consensus of values. The constitutional practices of Marshall and his contemporary judges must be understood against the eighteenth-century background from which they had scarcely emerged, not from a twentieth-century perspective. This is especially true of the concept of the rule of law. If we are to understand what the rule of law meant to Marshall, we must understand how courts functioned in the eighteenth century.

What was law to an eighteenth-century court? Law was not simply the command of some sovereign legislature. The concept of legislative sovereignty was scarcely, if at all, developed.[44] Nor did eighteenth-century judges visualize law as a body of doctrine derived from precedent through professional study and analysis.[45] Nor did every eighteenth-century legal thinker believe in natural law, although some, of course, did.

All eighteenth-century American judges, however, faced a common institutional reality: that juries had power in nearly every case tried in

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[43] *See* Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893 (1978).

[44] *Cf.* FOUNDATIONS, *supra* note 1, at 65-67 (describing Jefferson's view that the national government should be weak).

[45] *See* Nelson, *supra* note 43, at 904.

court to determine the law of the case as well as the facts.[46] And that institutional reality gave meaning to the concept of law. Law was not, as a practical matter, what God, the legislature or the legal profession declared it to be; law was what the jury said it was. And what would a jury, drawn on a random basis from different portions of the community and required to render a unanimous verdict, declare to be law? A jury would elevate into law those values, generally of a customary sort, that were widely accepted by different groups within the community. Law found by a jury would be, in short, a mirror of the consensus of the community.[47]

Thus, when Marshall declared in *Marbury v. Madison* that courts should decide cases on the basis of legal principle, not political will, I understand that he was distinguishing values and principles that virtually all Americans relied on as basic to their social order from values and principles that were subject to partisan controversy. Of course, the values and principles enforced by the Marshall Court were thought by many of his contemporaries to possess a special or even a transcendent quality and were accordingly often termed natural rights. For those of us, however, who do not appreciate how law can transcend ordinary human discourse and activity, the special, legal character of Marshall's constitutional principles must be attributed to the social consensus underlying them.[48]

In the positivist legal culture that twentieth-century Americans inhabit, duly authorized bodies, like constitutional conventions and legislatures, can, of course, make law. It is also possible within the positivist tradition to understand that courts can declare to be law that which is grounded in a consensus either of past practice or of current social values. But it is difficult to understand how a judicial decision which is not grounded either in enacted law or in consensus can be understood as anything but a reflection of the personal political values of the judge.

The decisions of the early Marshall Court did not simply reflect the political values of the Chief Justice. As Professors Haskins and Johnson have shown, members of the opposition party, most notably those appointed to the Court by Presidents Jefferson and Madison, also accepted Marshall's jurisprudence.[49] In practice, the rights enforced by the Marshall Court during the first two decades of the nineteenth century rested upon a fundamental consensus about the centrality of pri-

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[46] *See generally id.* at 904-17.
[47] *Id.*
[48] *Id.* at 932-47.
[49] FOUNDATIONS, *supra* note 1, at 300, 389-95.

vate property to the nation's economic and social order.[50]

C. Consensus as the Philosophical Basis of the Rule of Law

Do Americans today share any consensus, like that of John Marshall's generation, which can be enforced as law? If they do, then it may make some sense to distinguish law from politics by inquiring whether a particular value is shared widely by Americans or shared only by a distinct political group. The existence of a widely shared consensus would provide the Supreme Court with a basis to reaffirm the rule of law and thereby protect the rights of individuals.

Of course, if contemporary Americans do not widely share values, then a Supreme Court dedicated to protecting rights through the rule of law must develop some alternative conception of the source of rights. Most contemporary constitutional thinkers, I believe, doubt that constitutional principles can be found in any widely shared consensus. My suggestion that principles be sought in a consensus is not an original one: others, indeed, have suggested it,[51] and their suggestions have not been well received.[52]

Nonetheless it may be premature to abandon the search for principles in a consensus. Before the search can fairly be labelled fruitless, more attention should be paid by constitutional theorists to a philosophical argument appearing in European literature which supports the proposition that an underlying consensus of some sort exists in American society today. Let me sketch the argument in outline form here.

Two of the century's leading Western philosophers, Ludwig Wittgenstein and Jurgen Habermas, have written that, even when people claim they have very different aesthetic, ideological and moral val-

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[50] After 1820, the consensus that had been enforced by the Marshall Court began to break down, and, as it did, the Court lost much of its effectiveness. *See* Nelson, *supra* note 43, at 955-56. Marshall and his fellow Justices could no longer claim with as much plausibility as they once had that protection of property was a matter of legal obligation rather than political judgment. Marshall's inability to enforce as law that which no longer commanded a popular consensus surfaced both in growing divisions among the justices themselves, most notably in the 1827 case of Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827)—the first constitutional case in Marshall's career in which he found himself in dissent—and in the growing difficulties the Court faced in enforcing its mandates, especially in the Cherokee removal cases. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). *See also* Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500 (1969). For other instances of difficulty in enforcing Supreme Court mandates, see Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821); Dennie v. Harris, 26 Mass. (9 Pick.) 364 (1830). *See generally* Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States — A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161 (1913).

[51] *See, e.g.*, A. BICKEL, *supra* note 36, at 239; Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976).

[52] *See, e.g.*, J. ELY, *supra* note 32, at 63-69; M. PERRY, *supra* note 32, at 79-83.

ues, they are able to live in a society together because of the existence of a shared consensus. The process of socialization—of living together—promotes development in individuals of certain communal values and shared meanings that allow agreement, at least implicitly, upon the fundamental rules of a society and give its members a common capacity to communicate with each other. When people take up practical discourse or engage in practical activities together, they give testimony to a common heritage without which discourse and joint activities would be impossible; they give this testimony even when they are unconscious of any shared heritage.

Wittgenstein, in particular, has elaborated a thesis which holds that a language consists, in essence, of an agreement among its speakers that certain sounds have particular meaning. While the correlation between sound and meaning is often far from perfect, that correlation is sufficient so that a person who hears an utterance will understand, at least in general terms, what the person making the utterance means.[53] Habermas has advanced the thesis by arguing that people become socialized in a community—that they develop and internalize the moral values of the community—through "structures of linguistic intersubjectivity."[54] According to Habermas, an ethical system has "no need of principles" other than the "fundamental norms of rational speech that we must always presuppose if we discourse at all."[55] Through a society's participation in its common speech, "the common establishment of . . . moral principles" emerges.[56] Political and social systems, according to Habermas, rest on such "*community or shared meaning.*"[57]

This philosophical perspective may provide a basis for the Court to apply a rule of law based on consensus. Consider, for example, the possibilities inherent in language. Legal and constitutional analysis rest in part, of course, upon language: constitutional law and much other law, for example, is often derived from a text. While that text frequently lacks precise meaning, it is not entirely without meaning at its core—meaning that courts engaged in constitutional adjudication could and sometimes do exploit. Most American laymen and lawyers, for example, probably understand the concept of "due process" to mean something about fundamental fairness in legal procedures. At the same time, I doubt whether the concept has much meaning to laymen or lawyers in the context of a woman's right to an abortion. A court com-

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[53] *See* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 198-208, 239-242 (G. Anscombe trans. 3d ed. 1958). *See also* R. FOGELIN, WITTGENSTEIN 144-49 (1976).

[54] J. HABERMAS, LEGITIMATION CRISIS 43 (T. McCarthy trans. 1975).

[55] *Id.* at 110.

[56] *Id.* (quoting O. SCHWEMMER, PHILOSOPHIE DER PRAXIS).

[57] *Id.* at 10.

mitted to the rule of law, which understands, in turn, that adherence to law requires it to ground decisions in some widespread consensus, should pay heed to the possibilities inherent in and simultaneously to the limits of language.

D. Consensus as the Doctrinal Basis of the Rule of Law

Could a Supreme Court committed to a rule of law based on consensus exploit any common heritage and common values which most Americans, except at the political extremes, may still share? Could it translate such a consensus into practical results? These questions, of course, demand intensive analysis far beyond the scope of an essay reviewing a book. But let me illustrate how the Court might translate consensus into results by focusing on three of the leading cases of recent decades:[58] *Brown v. Board of Education*,[59] *Regents of the University of California v. Bakke*,[60] and *Roe v. Wade*.[61]

Analysis of *Brown* must begin by focusing on the reason why racial segregation was practiced uniformly throughout the South in the first half of the twentieth century: to stigmatize blacks as inferior to and unfit to associate with whites. Virtually all Americans—black and white, North and South—understood why segregation was being practiced. At the time the Court had first declared segregation legitimate in 1896 in *Plessy v. Ferguson*,[62] most Americans were not troubled by a practice that labelled blacks as inferior since the neo-Darwinian ideology prevalent at the time placed all groups in hierarchic order, from Anglo-Saxons at the top to blacks at the bottom. Social changes occurring between 1900 and 1950, however, made *Plessy* indefensible by mid-century. By the time of *Brown*, a black middle class had come into existence—a middle class that visibly demanded equal treatment and that provided logistic support for a litigation campaign designed to make equality real. At the same time, Catholic and Jewish ethnic groups, which as recent immigrants in 1900 had fallen well below Anglo-Saxons in the Darwinian hierarchy, had attained a level of social and economic equality; they found it difficult to insist upon equality before the law for themselves without supporting like demands of others. The new independence of third world nations also undercut the plausibility of *Plessy* by raising American blacks' consciousness that

[58] Needless to say, the consensus we look for must be abstracted from and broader than the disputed issues in a particular case. For example, if a case involves the prosecution of communists for publishing their ideas, the consensus we must look for is not that such ideas are worth publishing; rather, it is that, in general, our society is best served by allowing freedom of speech.

[59] 347 U.S. 483 (1954).

[60] 438 U.S. 265 (1978).

[61] 410 U.S. 113 (1973).

[62] 163 U.S. 537 (1896).

white racism could be overcome and by creating new potential international allies for the United States.

These real changes in racial and ethnic relations were complemented by parallel changes in ideas. During World War II Americans were repelled by the excesses of Nazi racism and perceived themselves as offering an alternative social vision to the world—a vision of a society in which all are equal. Perhaps in response to Nazism, the neo-Darwinian, hierarchic conception of the relationship between the world's racial and ethnic groups simply collapsed in mid-century, to be replaced with an understanding that all groups and all people are equal.[63]

Judicial examination of *Brown* in the context of these new social realities and ideas could lead to only one result: the invalidation of racial segregation. During the course of oral argument Thurgood Marshall, then counsel for the NAACP Legal Defense Fund, pointed out to the Court what everyone knew—that segregation rested upon an assertion that blacks are inferior to whites—and asked the Court whether it judged itself able to make such a public assertion.[64] I am convinced that *Brown*'s core holding that statutes mandating racial segregation are unconstitutional has become uncontroversial because most Americans today believe that racist declarations about black inferiority cannot be legitimately made by governmental bodies. Perhaps the Court could have written a stronger opinion in *Brown* if it had emphasized that institutional impossibility when the case was handed down.

It is necessary to distinguish, of course, between the public's general acceptance of *Brown*'s underlying principle of no segregation and the political discord that still exists over the question of that principle's enforcement in the context of school busing. Plainly no consensus exists concerning the propriety of busing as a remedy to eliminate school segregation, but the reason for that may be that neither the Court nor the commentators have attempted to articulate one. *Brown*'s core principle of no segregation does not, in and of itself, require a busing remedy; two further issues must be analyzed before one can conclude that the correct remedy for school segregation is busing.

The first issue is whether courts have a duty to bring about effective practical enforcement of all terms of the Constitution or whether symbolic enforcement will suffice for at least some constitutional provisions. This issue does not have any obviously correct resolution. Consti-

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[63] *See* R. KLUGER, SIMPLE JUSTICE: THE HISTORY OF *Brown v. Board of Education* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 391-92, 492-94, 690, 761 (1975); Brief for the United States as Amicus Curiae in *Brown v. Board of Education*, 4-8.

[64] *See* R. KLUGER, *supra* note 63, at 674.

tutional rights that exist in theory are not always fully enforced in practice; some are more significant for their symbolic rather than practical effect. *Miranda v. Arizona*[65] is one constitutional decision of great symbolic significance that has been compromised in practice.[66] Another right that is of symbolic rather than practical meaning in much of the nation today is the right of children in public schools not to participate in prayer ceremonies.[67] Even in the nineteenth century, some constitutional rights were not effectively enforced: antislavery agitators travelling in the South, for example, did not receive the privileges and immunities to which they felt entitled under article 4, section 2.[68]

The fact that constituitonal rights are not always effectively enforced does not, of course, mean that they should not be enforced. Neither the Court nor the commentators, however, have analyzed whether as a general matter symbolic assertion of rights without effective enforcement is ever appropriate, and arguments can be made in both directions.[69] Moreover, the rationale underlying *Brown* does not demand that its no segregation principle always be effectively enforced. *Brown* can be understood to hold only that a court may not declare blacks inferior, but a court that did not enforce *Brown* effectively would not have compromised that holding; nonenforcement could be the result of inertia, high administrative costs involved in enforcement, or recognition of the high costs that effective desegregation imposes on school children.[70]

Even if we were to conclude that *Brown* must be effectively enforced, it is not obvious that busing is the only or the most appropriate remedy. Other remedies may exist, but, again, neither the Court nor the commentators have explored systematically what the best remedies for achieving school desegregation may be. In the absence of such analysis, there is no reason why the public should be convinced that fidelity to *Brown* demands busing of school children. Americans' shared consensus condemning institutional racism is general in nature. It may not extend to a consensus concerning the structure of a racially equal society. To the extent, however, that busing could be linked conceptually as

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[65] 384 U.S. 436 (1966).

[66] *See generally* Note, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519 (1967).

[67] *See* Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976); Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 U.C.L.A. L. REV. 1000 (1981). New Jersey recently passed a law requiring teachers to allow students a "one minute period of silence" at the start of each school day. Act of Dec. 17, 1982, ch. 205, 1982 N.J. Sess. Law Serv. 883 (West).

[68] *See* J. TENBROEK, EQUAL UNDER LAW 94-115 (1965).

[69] *But cf.* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 82, 180-81 (1982).

[70] For illustrations of the costs, see J. BASS, UNLIKELY HEROES (1981).

a necessary attribute for erasing institutional racism, it might find widespread acceptance.

Some might think, of course, that school busing has aroused controversy because of its social significance and because of the real social dislocations to which it leads. It might be thought that when a serious social problem exists, no effort at constructing an intellectual consensus can have much impact on its resolution. Such a derogatory attitude toward the power of ideas might, on the other hand, be wrong.

Regents of the University of California v. Bakke,[71] indeed, seems to demonstrate how the thoughtful construction and elaboration of a legal argument capable of commanding broad public assent can defuse a controversial social issue. Throughout the mid-1970's, affirmative action, which involves a core socio-economic issue whether some portion of the nation's wealth will be channeled to members of minority groups, generated substantial controversy.[72] Since *Bakke*, however, affirmative action has become a less divisive issue.[73] Unlike school busing, for example, affirmative action has not been a target of congressional conservatives' attacks on the work of the Supreme Court.

Why not? The answer, I think, is that beginning with *Washington v. Davis*,[74] on which *Bakke* rested, and ending with *Fullilove v. Klutznick*,[75] to which *Bakke* led, the Court articulated a legal position with which it is difficult to disagree. At the core of *Bakke* is the holding of *Washington v. Davis* that legislation with the purpose of promoting the well-being of society as a whole is constitutional, but that legislation which without reason singles out a particular class whether for special advantages or disadvantages is invalid.[76] The strength of the *Washington v. Davis* principle lies in its endorsement of two classical liberal values which few Americans even today are prepared to question: the utilitarian value of maximizing social welfare and the equalitarian value of treating similar people in the same manner.[77] The weakness of the principle, of course, lies in its amorphous quality, which renders it difficult of specific, dispositive application in particular cases.[78]

What *Bakke* accomplished was the application of this unchallenge-

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[71] 438 U.S. 265 (1978).

[72] *See, e.g.*, the scholarly commentary cited in *Bakke*, 438 U.S. at 288 n.25, and in Bell, Bakke, *Minority Admissions and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 4 n.2 (1979).

[73] *See, e.g.*, Calabresi, Bakke *as Pseudo-Tragedy*, 28 CATH. L. REV. 427 (1979).

[74] 426 U.S. 229 (1976).

[75] 448 U.S. 448 (1980).

[76] 426 U.S. at 238-48.

[77] For a philosophical analysis of what he calls the principle of equal concern and respect, see R. DWORKIN, *supra* note 29, at 272-78.

[78] *See* Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

able principle in a specific manner that itself is difficult to challenge. The controlling opinion in the case, which provided the fifth vote necessary to sustain the practice of affirmative action, was written by Justice Powell.[79] Insofar as it sustained affirmative action when practiced by an educational institution, Powell's opinion held that a university or other school may admit racial minorities under a different academic standard than white students if the purpose in doing so is the attainment of diversity within the student body. Powell thereby analogized affirmative action to the common practice among academic institutions of admitting athletes, musicians, people from geographic locations underrepresented in the student body and many other special groups under a lowered academic standard. Such admissions and the diversity among students that results therefrom are widely thought to broaden the educational opportunity of all. It would be difficult to argue that the admission of black students does not have the same educational impact as the admission of students from—to give an example—North Dakota. Therefore, if a school has authority to lower its admission standards to admit more Dakotans, it cannot be denied similar authority to admit blacks. Since many people have a vested interest in upholding programs that give special preferences to certain categories of students, the practical result of Powell's opinion was to build a consensus in support of the practice.

Dictum in Powell's opinion, moveover, suggested a broader ground on which affirmative action could be sustained. California had argued in the *Bakke* case that its affirmative action program was justified as a device for ameliorating the effects of past discrimination against racial minorities. Powell rejected that argument because the only body that made such a judgment in *Bakke* was the faculty of the Davis medical school and, in Powell's view, the faculty lacked capacity to make that judgment. Powell indicated, however, that if a body with the capability to make such a judgment did, in fact, establish in the record that an affirmative action program was a response to identified discrimination, then such a program might be valid.[80] Shortly after *Bakke*, this dictum became law in *Fullilove v. Klutznick*.[81]

Fullilove was a case challenging the constitutionality of an affirmative action program adopted by Congress providing that at least ten percent of federal grants for local public works projects be expended for minority business enterprises. The Court, in a series of plurality opinions written by Chief Justice Burger and Justices Marshall and Powell

[79] 438 U.S. at 269.
[80] *Id.* at 307-10.
[81] 448 U.S. 448 (1980).

sustained the congressional program. Despite difficulties with the congressional program (perceptively noted by Justice Stevens in dissent), the Court could do little else. The federal courts themselves have often made findings of racial discrimination and granted remedies to victims of that discrimination. If the equal protection clause of the fourteenth amendment is to be given substance, the federal courts must have such power.

To deny similar remedial power to Congress would have been untenable. Section five of the fourteenth amendment gives Congress power to remedy racial discrimination.[82] Further, the federal courts have a strong interest in encouraging other appropriate institutions, state and federal, to remedy discrimination before litigation is necessary for that purpose. Unless one were to argue that only federal judges have power to make the sensitive judgments needed to determine whether discrimination has occurred and to provide a remedy, or that not even judges possess such power, it is difficult to see how the program sustained in *Fullilove* or, at least, some similar program carefully drafted to meet the objections identified by Justice Stevens can be held unconstitutional. In short, the past practice of the judiciary in remedying the wrong of discrimination, and the consensus surrounding that practice, provided a basis for legitimizing the congressional action questioned in *Fullilove*.

In the line of cases from *Washington v. Davis* through *Regents of the University of California v. Bakke* to *Fullilove v. Klutznick*, the Court generated an argument that left opponents of affirmative action with only irrational, demagogic arguments in return. The lack of a rational legal position has, in turn, reduced the political power of affirmative action's opponents. While affirmative action has not been accepted by all Americans, the lack of arguments with which the Court has left opponents has begun to bring forth from the collective unconscious a consensus at least in the public rhetoric about the subject.

The present rhetorical stance on the subject of affirmative action is vastly different, however, from the stance on the subject of abortion. The Court's failure to articulate a persuasive rationale for its result in *Roe v. Wade*[83] is, I suggest, in no small part responsible for the difference.

Given its result, permitting abortions essentially on demand, *Roe v. Wade* poses only moral and intellectual but not social problems: no identifiable group in society suffers as a result of the Court's decision in *Roe*. But at the same time the Court's decision provides little in the

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[82] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

[83] 410 U.S. 113 (1973).

way of a reasoned argument about why or when an existing or potential human life may be taken. And the absence of that reasoned argument has facilitated vehement dispute about what is, in essence, an intellectual or moral issue, as political leaders on both sides of the question have been able to adopt reasoned arguments to which the Court and the legal profession lack a coherent answer.

The Court could have written a more persuasive opinion in support of its *Roe v. Wade* holding if it had anticipated the principle enunciated three years later in *Washington v. Davis*.[84] The Court thereby could have avoided an issue to which only result-oriented people have a clear answer: the issue of whose right—the right of a fetus to life or the right of a woman to bodily autonomy—should take priority when the two come into conflict. The debate over abortion rages today because there appears to be no answer to this question in the sources from which American law is normally drawn. By addressing the question without providing a coherent answer, the Court merely fueled the debate.

The Court, however, could have found a basis for deciding *Roe* in the principle of *Washington v. Davis*: legislation must point toward a broad social good and must not arbitrarily impose special advantages or disadvantages on individuals or groups. The Court in 1973 confronted a crazy-quilt pattern of state legislation that permitted women to obtain abortions outside the United States as well as in several American jurisdictions, notably New York. Even in some states having statutes prohibiting abortions, women could obtain safe, legal ones if they knew the right doctor; otherwise, they could get an illegal abortion.[85] In the context of 1973, the law served no identifiable purpose in its random and arbitrary prohibition of abortion. Because of this arbitrariness, the Court, without taking a stand on the moral issues that abortion involves, might have invalidated all pro- and anti-abortion legislation existing in 1973 and thereby called upon legislatures to clarify or to compromise their moral values and to enact statutes serving some articulable social or moral goal.

Such a judgment in *Roe v. Wade*, of course, would not have resolved the moral issue inherent in the abortion dilemma, but would merely have passed those issues off to legislatures. That strategy, however, might have served all of us well and surely would have avoided much criticism aimed at the Court. There have been times when the Court's failure to resolve an issue definitively and the transfer of con-

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[84] 426 U.S. 229 (1976).

[85] *See* Shapiro & Weaver, *Sex Discrimination*, 1972/73 ANN. SURV. AM. L. 73, 83-105 (1972).

troversy to a legislative forum have resulted in the resolution of controversy. For instance, when the Court failed in *Oregon v. Mitchell*[86] to resolve definitively whether the fourteenth amendment gave eighteen-year-olds the right to vote, legislative bodies responded by enacting a constitutional amendment that put the controversy to rest.[87] Likewise the withdrawal of the Court from economic regulation after 1937 allowed the emergence of at least some consensus about the ultimate responsibility of the federal government for the nation's economic well-being. Even when legislatures have failed to resolve in a definitively acceptable manner a controversial constitutional issue handed to them by the Court, as has been true with the issue of the death penalty, the Court by not attempting final resolution of the issue has reduced political pressure on itself.

Whether or not a different opinion in *Roe* would have been more persuasive, it seems clear that the opinion the Court did write must be regarded as one of its great failures. Declining the opportunity to rest its judgment on a consensus that may have been emerging in 1973 about the arbitrariness of existing abortion legislation, the Court failed to articulate any connection between its holding in *Roe* and any past, present or emerging consensus. Effective articulation of some consensus might have diffused anti-abortion political forces in much the same way the *Bakke* decision appears to have diffused the anti-affirmative action forces. What seems clear is that *Roe v. Wade*, as written, did not resolve the divisive moral issue of abortion by enacting one side's view of the matter into law.

III. Obstacles to Emulating the Marshall Court

The analysis of *Brown v. Board of Education*, *Regents of the University of California v. Bakke* and *Roe v. Wade* in which we have just engaged suggests that George L. Haskins and Herbert A. Johnson's *Foundations of Power* can, perhaps, assist contemporary constitutional scholars to understand how the modern Court can better perform its role. By delineating persuasively how the Marshall Court established its institutional stature upon the concept of the rule of law—a concept grounded, in turn, upon a consensus about the values that law protects—Professors Haskins and Johnson provide a model suggesting how the contemporary Court can operate succcessfully.

But is the present court, with its existing personnel and institutional practices, likely to emulate the Marshall Court by striving to

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[86] 400 U.S. 112 (1970).
[87] U.S. CONST. amend. XXVI.

protect individual rights through a rule of law grounded in a shared consensus? Probably not. Some of the Justices now on the high bench have shown less than total commitment to the rule of law at various times in their careers. Moreover, several institutional practices that have developed over the past half century tend to divide the Court rather than to unite it behind a singleminded vision of the law. Taken together, the anti-legalist habits of some of the Justices and the divisive institutional practices of the Court constitute substantial obstacles to the Court's binding itself to the protection of rights through law.

A. The Justices and the Rule of Law

Reflecting a view held by many Americans, some of the Justices, at least on some occasions, appear to view the Court's process as a political rather than a legal one. This is true of two different sorts of Justice, one of which is typified by Justice William H. Rehnquist and the other by Justice William J. Brennan. Since the departures that these two Justices make from the concept of the rule of law are quite different, each must be considered separately.

Justice Rehnquist, it appears, does not believe that the Court should play any role in the protection of individual and minority rights. In what is now a career spanning a decade on the Court, Rehnquist has authored no major opinion protecting a personal right against government infringement—a statement that cannot be made about other appointees, labelled conservative at the time of their appointments, such as Justices Blackmun or Powell or even Chief Justice Burger. Rehnquist also is willing to play fast and loose with the law when it stands in the way of his reaching a desired result. He does not, for example, feel strongly bound by precedent, as is illustrated by *National League of Cities v. Usery*,[88] where he wrote an opinion for the Court overruling one case[89] and declaring dicta in another "simply wrong."[90] He is equally willing to ignore legislative history as he did two terms ago in *Rostker v. Goldberg*,[91] where he upheld congressional legislation subjecting males but not females to draft registration.

The work of Professors Haskins and Johnson makes it possible to see a consistency in Justice Rehnquist's jurisprudential approach of which even the Justice himself may not be fully aware. Haskins and Johnson demonstrate a temporal connection betweeen the Marshall

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[88] 426 U.S. 833 (1976).
[89] The case that *Usery* overruled was Maryland v. Wirtz, 392 U.S. 183 (1968).
[90] 426 U.S. at 852-53.
[91] 453 U.S. 57 (1981).

Court's undertaking to protect individual rights and its emphasis upon the Court as expounder of law. They show, moreover, that the connection was not accidental: that the Marshall Court was able to protect individual rights only because it protected them through law.[92] Indeed, as I have argued earlier in this essay, it is impossible for a Court to protect individual or minority rights against legislative encroachment except through reliance on the concept of the rule of law in some form.[93] Thus, Justice Rehnquist's jurisprudence should not be seen as either careless or inconsistent. His attitude toward law and his lack of concern for personal rights are part of a consistent perception of the Supreme Court as an essentially political institution that should defer to other more democratic political bodies unless it is called upon to act as umpire in a dispute between them.[94] By his cavalier attitude toward law, Rehnquist will help to undermine the ideal of the rule of law; the devitalization of that ideal, in turn, will tend to undermine the capacity of the Court to protect rights. Justice Rehnquist must simply be seen as an intelligent and philosophically consistent judge whose presence on the Supreme Court raises significant obstacles to viewing the Court as an organ of the rule of law and a protector of individual rights.

At the opposite extreme from Justice Rehnquist in his concern for protection of personal rights is Justice William J. Brennan. Like Rehnquist, however, Brennan, particularly on the subject of criminal procedure, has at times declined to follow precedent and ignored the directives of legislative history.[95]

Obviously Justice Brennan has not been striving in his long career to undermine the Court's ability to protect rights. But why, then, has his career, like that of Justice Rehnquist, been detrimental to the Supreme Court's adherence to the rule of law? The answer, I think, lies in comprehending the ideologies that dominated thinking about the role and function of the Supreme Court during the 1950's and 1960's, when Justice Brennan first came to the Court and achieved his greatest successes.

There were, in essence, two ideologies. One ideology directed a judge to commit his soul to moral truths and to use his judicial power to lead the nation as a whole on a path toward moral progress.[96]

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[92] *See* FOUNDATIONS, *supra* note 1, at 348-50.

[93] *See supra* text accompanying notes 29-30.

[94] *See supra* note 33. Rehnquist would probably agree with the statement of Chief Justice Waite, who sat on the Court a century earlier, that "[f]or protection against abuses by legislatures, the people must resort to the polls, not to the courts." FOUNDATIONS, *supra* note 1, at 349 (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

[95] *See, e.g.*, Fay v. Noia, 372 U.S. 391, 434-35, 439 n.44 (Brennan, J.) (1963); *id.* at 452-53 (Harlan, J., dissenting).

[96] *See, e.g.*, THE GREAT RIGHTS (E. Cahn ed.) 9-12 (1963). For an unsympathetic presenta-

Brown v. Board of Education[97] provided a seeming paradigm of how judges should act: in *Brown*, it was suggested, the Court through its moral leadership had rescued the nation from the moral abyss of segregation. The Supreme Court was urged to seek out other moral failures on the part of American government and society and to uplift the nation onto a higher moral plateau.[98] Advocates of this ideology expressed little concern over whether the Supreme Court could legitimately exercise such vast power or whether as a practical matter the Court could enforce judgments issued in its pursuit. Although advocates of such judicial activism were aware of those concerns, it seemed clear two decades ago that progress itself would render the concerns moot.

The alternative ideal of the judicial role in the 1950's and 1960's focused instead on the impropriety and impracticality of the Supreme Court's exercise of vast power. Advocates of this second ideology viewed the Court as a fragile institution which had neither the authority nor the capacity to remake American society.[99] Hence, they urged the Court to play a minimal role in the American political order. But, just as advocates of the first ideology were aware of the limited nature of judicial power, so too were advocates of this second ideology attracted to the image of moral progress.

The dilemma posed for those who accepted either ideology was poignantly articulated by Herbert Wechsler who, after admitting that the Court had come to the right decision in *Brown*, argued that the decision could not be justified and might not be capable of enforcement.[100] The dilemma resulted from the fact that both ideologies failed to suggest how the Court could reconcile its obligation to provide moral leadership to the nation with its limited power and authority to do so. The ideologies thus required that a choice be made between the judiciary's provision of moral leadership and recognition of the courts' institutional fragility. Intellectuals like Herbert Wechsler had the luxury of observing how difficult such a choice would be. But Justices like William J. Brennan had no such luxury; they had to choose. I do not in the least condemn Brennan for choosing the nation's moral well-being over the Court's institutional health, but I do mean to condemn the ideologies that posed the choice to him in that form.

The ideologies of mid-century need to be condemned because they

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tion of the position, see A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 11-42 (1970).

[97] 347 U.S. 483 (1954).

[98] *See* C. BLACK, DECISION ACCORDING TO LAW 33 (1981); M. PERRY, *supra* note 32, at 167 n.8.

[99] *See, e.g.*, A. BICKEL, *supra* note 36, at 127-74 (1962).

[100] Wechsler, *Toward Neutral Principles of Constitutonal Law*, 73 HARV. L. REV. 1 (1959).

assumed that moral progress could come about only by repudiating the rule of law, not, as John Marshall would have assumed, by fidelity to law. The ideologies led the Warren Court, in its efforts to protect rights, to undermine the Court's capacity over the long run to do so.[101] Those ideologies have left a legacy that must be disavowed in order to rehabilitate the Court's capacity to protect the individual from government.

B. The Court's Institutional Practices as an Obstacle to the Rule of Law

1. The Court's Choice of Cases

Even if all nine Justices believed the primary duty of the Court to be protection of rights and further believed that rights could be protected only through fidelity to law, other institutional practices would still remain as obstacles to the Court's adherence to the rule of law. One such obstacle arises out of the practices the Court has developed in the past half century in determining the cases that will receive plenary consideration. A court committed to the elaboration of law might choose to hear and write opinions mainly in cases where doctrine needed clarification or could be extended slightly to cover issues on the margins of existing law. The Supreme Court, however, has adopted a different practice. It frequently hears cases that raise precisely those issues for which existing law offers no clear answers and over which American society is most sharply divided; the Court, in contrast, routinely denies certiorari or dismisses appeals in cases that are legally less ambiguous or socially less divisive. This practice, it will be noted, is squarely opposite to the practice of the Marshall Court, which yielded to legislative resolution of socially divisive issues and imposed constitutional solutions only when they could command widespread public acquiesence.[102] The Marshall practice is arguably linked to judicial adherence to the rule of law not only historically but analytically as well.

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[101] With this statement I do not mean to deny to the Warren Court its moral triumphs. Especially in the one-man, one-vote cases, where the Court seemed animated by a vision not of consensus but of progress, *see* A. BICKEL, *supra* note 96, at 173-74, the vision has now been successfully translated into a reality for which there is substantial public support. The same, of course, might be said of *Brown v. Board of Education.*

[102] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (relying on the general consensus that no court could give effect to a law inconsistent with the "supreme law" of the Constitution). *But cf.* FOUNDATIONS, *supra* note 1, at 203-04 (suggesting that in that case Marshall unnecessarily reached that issue, albeit to further the rule of law).

2. The Inconsistency of the Court's Results

A second obstacle to the Court's adherence to the rule of law stems from the fact that various conceptions of the rule of law all tend to demand a quality that has been notably scarce in the Court's opinions in the past two decades—consistency.[103] Consistency is at the heart of the variants of the rule of law that call for adherence to precedent. Most conceptions of natural law and natural rights also rest on notions that what is natural is, on the whole, unchanging. Law which rests on consensus or on the structure and processes of institutions can, of course, change as the society's consensus changes and as institutions take on different roles in government. But a society's fundamental shared consensus and its institutions of government change quite gradually, and accordingly a rule of law based either on consensus or on institutional structures requires consistency in judicial results.

Rapid change in judicial results, or highly visible inconsistency, thus seems at odds with the rule of law. Rapid change and visible inconsistency has, however, been precisely what we have come to expect from the Supreme Court since the 1960's.

Changed results can be achieved only gradually by a Court committed to the rule of law. *Brown v. Board of Education*,[104] the cases which led up to it, and its aftermath—a process of change which lasted for more than thirty years—provide a classic illustration. The success of this gradual change must be attributed to the advocates of integration —most notably the NAACP Legal Defense Fund—who deliberately selected and litigated a series of cases in an effort to provide a line of precedent to support the concept of complete integration established in *Brown*. The first in the line of cases leading to *Brown* was *Missouri ex rel. Gaines v. Canada*,[105] a 1938 case in which the Court ordered Missouri to provide a legal education to Gaines, a black applicant to its law school, on the same terms that it provided such education to white applicants—that is, at a school within the state "substantially equal" to the law school for whites. Otherwise, Missouri was ordered to admit the black to the state-operated law school. Ten years later the Court reaffirmed this holding in *Sipuel v. Oklahoma*.[106] Then, in 1950, the Court decided *Sweatt v. Painter*[107] and *McLaurin v. Oklahoma State*

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[103] For a recent criticism of consistency as a standard for evaluating the Court's performance, see Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

[104] 347 U.S. 483 (1954).

[105] 305 U.S. 337 (1938).

[106] 332 U.S. 631 (1948).

[107] 339 U.S. 629 (1950).

Regents.[108] In *Sweatt*, the Court found that the law school which the state of Texas had established for blacks was not and could not be made equal to the University of Texas Law School, which it had established for whites; the Court therefore ordered that blacks be admitted to the previously all-white school. In *McLaurin*, the Court directed that a black graduate student who had been admitted to the University of Oklahoma could not be made to sit separately from whites but had to be integrated fully with white students. *Brown I*, decided in 1954, extended the integration principle from the graduate level to all levels of public schooling, but *Brown II*,[109] decided the next year, did not require that states comply immediately with the extension. Southern states, of course, did not comply, and it was not until *Green v. County School Board*[110] in 1968 that widespread desegregation began to occur in the rural South and not until *Swann v. Charlotte-Mecklenburg Board of Education*[111] in 1971 that urban areas began to comply with the *Brown* mandate. In all, the process of desegregating Southern public schools took more than three decades. Indeed, some would argue that the process is not yet complete.

All this suggests that if individual and minority rights are to be protected under the rule of law, a somewhat stable list of those rights is needed. New constitutional rights, like the right of a woman to obtain an abortion, can not continually spring up out of nothing in the space of a few years. A Court bent on preserving the rule of law and, through it, individual and minority rights must adhere to old law, protect existing rights and ignore claims of new sorts of rights until it is capable of articulating a basis for those rights consistent with its vision of law.

3. The Idiosyncratic Views of Individual Justices

Even a Court filled with Justices committed to the rule of law would have to overcome one further obstacle. The obstacle arises from the fact that there are several articulable visions of the rule of law—visions grounded in precedent, in natural rights, in consensus, in institutional structures. As a result, the Supreme Court bench is likely to be populated by individuals who have several different visions or who have no single clear vision but are attracted to several of them simultaneously. New appointments to the Court, moreover, will bring new visions to the bench.

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[108] 339 U.S. 637 (1950).
[109] Brown v. Board of Education, 349 U.S. 294 (1955).
[110] 391 U.S. 430 (1968).
[111] 402 U.S. 1 (1971).

When nine Justices are committed to the rule of law in different ways, fluctuating combinations will occur, with a resulting inconsistency in results and a seeming abandonment of law by the Court as an institution. Few doubt Hugo Black's intense commitment to a vision of law and to the overall consistency of that vision. Yet, the manner in which Justice Black's one vote came into combination with the votes of other Justices did much to make the Court appear as an institution lacking in any continuous vision of the law. The career of a Justice so devoted to a vision of law thus became synonymous with constitutional revolution. In short, the ways in which different individuals with differing visions of the rule of law combine to produce a shifting majority on the Court can transform the Court from a government of laws into a government of men—it can make results seem to depend on the personnel of the bench rather than on some continuous vision of law preserved and elaborated by the Court as an institution.[112]

The Court can cure the inconsistency in its work resulting from fluctuating voting combinations only if individual Justices subordinate their personal views to an overarching institutional stance maintained by the Court as an entity. As Professors Haskins and Johnson show in *Foundations of Power*, the Justices on the Marshall Court, including the Chief Justice himself, frequently subordinated their own idiosyncratic views and thereby enabled the Court to adhere to a consistent vision of the rule of law.[113] Early in this century, Justices like Holmes and Brandeis similarly refrained in the interest of unity from publishing dissents and separate concurrences.[114] But, since Franklin Roosevelt appointed a series of strong-willed individualists to the Court in the late 1930's, that restraint has disappeared.[115] And no signs exist suggesting that the current members of the Court are likely to subordinate their deeply held views for the sake of unity.

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[112] Arguably, however, a Court which governs in a somewhat haphazard fashion that depends upon how nine Justices imbued with the ideal of the rule of law coalesce into a majority is something other than a government of men. The results handed down by such a Court will not depend upon the political will of the Justices or of any other body; the results will be a product of the manner in which legal ideas combine under pressure of circumstances. *Cf.* Easterbrook, *supra* note 103. Since the process by which Justices are appointed to the Court affects Court majorities and is sometimes highly political in character, a Court cannot be completely autonomous of politics. But neither will it be entirely political as long as the principal impetus behind the decision-making of each Justice is some vision of the rule of law.

[113] FOUNDATIONS, *supra* note 1, at 7-10, 203, 365, 649-50; *cf.* P. JACKSON, DISSENT IN THE SUPREME COURT: A CHRONOLOGY 20-37 (1969) (describing individuality of modern Justices).

[114] *See* P. JACKSON, *supra* note 113, at 17-19, 98-170.

[115] *See* Harrison, The Breakup of the Roosevelt Supreme Court: The Contribution of History and Biography 19, 21 (1982) (unpublished paper on file at the *University of Pennsylvania Law Review*).

IV. CONCLUSION

As a theoretical matter, adherence to the rule of law may be possible. Professors Haskins and Johnson demonstrate persuasively that the Marshall Court abided by the rule of law in a philosophically sensible form. Other forms of the rule of law also may be capable of application by a court. But, as a practical matter, we are far from a legal system in which a Supreme Court fulfills its tasks in accordance with the rule of law. Justices come to the Court with different ideas about their constitutional tasks, and some even view their task in an essentially political way. This will not change, for as long as different ideas about the role of the Court exist in the nation, several of those ideas are likely to find representation on the Court. Thus, it seems improbable that we shall in the foreseeable future have a Court dedicated, as the Marshall Court was, to the enforcement of some singleminded vision of the rule of law.

To the extent that protection of individual and minority rights depends upon some such singleminded vision, those who believe that rights should be protected and that they can be protected only by law have reason for concern. Institutional realities at the Supreme Court and in American society at large almost certainly will preclude the emergence at the Court of any single-minded vision of and dedication to the rule of law. But the ideal should not lightly be abandoned. It is important that those who value protection of their rights think and write about the rule of law, about its relation to individual rights, and about ways to make the concept meaningful. In reminding us so felicitously of the place of the rule of law in the legacy of the Marshall Court, Professors Haskins and Johnson have contributed significantly to what, I hope, will be a growing body of scholarship.