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Abstract

Although Thomas Jefferson and John Marshall despised one-another personally and were unrepentant political rivals, those differences enabled Marshall as Chief Justice to set the foundation upon which the modern theory of executive authority has been built. Without Jefferson and the Republicans, Marshall would not have had reason to articulate his view that the powers of the Executive are broader than those expressed in the Constitution. Marshall asserted during the case of Jonathan Robbins that the Executive was the “sole organ” in conducting the foreign affairs of the nation. Congress was swayed by this argument and refused to censure President Adams. More than 170 years later, the United States Supreme Court returned to Marshall’s opinions on executive authority as it relates to executing treaty obligations. This time, however, the president’s actions were not upheld. Chief Justice John Roberts’ opinion in Medellín v. Texas demonstrates that Marshall’s views of executive authority, specifically regarding treaty situations and foreign affairs, remain the foundation of executive authority theory, but when applied today, the result aligns more with Jefferson’s view of limits on executive authority.

Approved by: [Signature]

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In 1975, historian Lawrence D. Cress revisited the case of Jonathan Robbins.¹ Robbins, alias, Thomas Nash, was caught up in an international treaty dispute that eventually resulted in his hanging by the British military. Cress notes that historians have generally considered this incident “only to illustrate Republican campaign tactics during the election of 1800.”² Instead, Cress argues that the Robbins case be re-examined to demonstrate the “long-range effect on the development of extradition procedures and treaties and the establishment of the presidential prerogative in foreign affairs.” It is this latter “effect” that deserves greater attention today. President Adams’ actions in the Robbins case provides insight into President George W. Bush’s actions in the recent case, Medellín v. Texas.³

The Robbins case sets some early parameters by which we can understand how founding members of the United States, like Thomas Jefferson and John Marshall, viewed executive authority during the infant years of the Constitution. Later instances like Jefferson’s Louisiana Purchase and Jackson’s end to the Nullification Crisis demonstrate pragmatic uses of executive power that lie outside the textual confines of the Constitution, but are later given judicial approval. The United States Supreme Court’s


² Ibid., 99. Two recent books that consider the Robbins case, What Kind of Nation by James F. Simon (2002), and John Marshall by Jean Edward Smith (1996), both place the incident in the context of political in-fighting between the Republicans and Federalists at the cusp of the 1800 election.

decision in *Medellín* strikes against increased executive authority and reflects a convergence of once diametrically-opposed views on the power of the presidency.

On 28 February 2005, President George W. Bush issued a “Memorandum for the Attorney General” that directed the State of Texas to “give effect” to the International Court of Justice’s (ICJ) decision in the *Case Concerning Avena and Other Mexican Nationals (Avena).* The President “determined,” under *Avena,* that the United States must “discharge its international obligations … in accordance with general principles of comity.” In *Avena,* the ICJ held that 51 named Mexican nationals were entitled to habeas corpus review of their U.S. state-court convictions and sentences under the Vienna Convention. José Ernesto Medellín was one of the 51 Mexican nationals. Originally, Medellín filed a habeas petition in federal court. Based on the *Avena* decision and President Bush’s Memorandum, Medellín filed a second application for habeas relief in state court. The State of Texas, nonetheless, dismissed Medellín’s habeas claim as an abuse of the writ. The Texas court held that federal law did not pre-empt Section 5 of the Texas Code of Criminal Procedure, which set particular requirements for filing successive habeas applications. Medellín appealed to the United States Supreme

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5 Ibid.


8 Ibid.

9 Ibid., 503-04 (citing *Ex Parte Medellín,* 223 S.W.3d 315, 322-23 (Tex. Crim. App. 2006)).

Court.\textsuperscript{11}

Ultimately for review by the U.S. Supreme Court was “whether the \textit{Avena} judgment has automatic \textit{domestic} legal effect such that the judgment of its own force applies in state and federal courts.”\textsuperscript{12} In other words, was the President’s determination and direction through his Memorandum a proper execution of the law? The Court has confronted the question of “self-executing” treaties before, but never in the context of the President’s direct enforcement or execution of a particular treaty provision.\textsuperscript{13} Chief Justice John G. Roberts analyzed early Supreme Court jurisprudence for direction in \textit{Medellín}. Roberts cited Chief Justice John Marshall in \textit{Foster v. Neilson} for the Court’s foundational understanding of self-executing treaties.\textsuperscript{14} Marshall’s opinion in \textit{Foster}, in many respects, relies upon his direct engagement as a Congressman in the debate that arose from the Robbins case.\textsuperscript{15}

The debate that consumed the House of Representatives between 4 February to 10 March 1800, “hinged” on the question of whether the Judiciary or the Executive was the proper body for carrying out provisions of a treaty.\textsuperscript{16} A federal judge asked to make a

\begin{footnotesize}
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\item \textsuperscript{11} \textit{Medellín v. Texas}, Petition for Writ of Certiorari, 2007 WL 119139.
\item \textsuperscript{12} \textit{Medellín v. Texas}, 552 U.S. 491, 504 (2008) (emphasis in original).
\item \textsuperscript{14} \textit{Medellín v. Texas}, 552 U.S. 491, 504-05 (2008) (citing \textit{Foster v. Neilson}, 27 U.S. 253 (1829)).
\end{itemize}
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determination on whether a detained man—whose citizenship was in dispute—should be kept and tried for murder in a U.S. federal court, or, pursuant to the Jay Treaty, be extradited to British authorities for the same. Judge Thomas Bee’s ultimate decision to extradite Robbins and President Adams’ intervention into the matter raised two important questions. First, under Article III of the Constitution, are federal judges vested with the power to handle “matters relating to treaties?” Second, was it instead the prerogative of the President to answer questions and respond to petitions between foreign nations? Congressional and public debate attempted to answer those questions, but at the heart of the controversy was independence of the Judiciary. The Robbins case and the Medellín case both illustrate that inherent to the issue of judicial independence and treaty execution is the question of executive authority.

John Marshall confronted the issue of judicial independence throughout his tenure as Chief Justice of the United States. Thomas Jefferson, until his death in 1826, bemoaned Marshall and his court in various letters to friends and political allies. Jefferson predicted a long “continuance of [the] government,” but only “if the three powers maintain their mutual independence on each other” and do not “assume the

17 U.S. v. Robbins, Bee 266, 27 F.Cas. 825, 833 (1799).
18 Cress, 110. See also Marshall Writings, 181.
19 Cress, 110. See also Marshall Writings, 181.
authorities of the other.”\textsuperscript{22} Jefferson’s view of strict independence of the branches was much different than Marshall’s view that a federal judiciary could act with great authority.\textsuperscript{23} Marshall’s influence helped build a reputation of the Court “as a deliberative judicial body worthy of enhanced national stature because of the force of its judgment.”\textsuperscript{24} That reputation was up for judgment itself when the French aristocrat Alexis de Tocqueville visited the United States.

The thesis of this inquiry is that de Tocqueville’s observations and Jackson’s actions during the nullification crisis are evidence of a fully developed doctrine of the Executive’s role and that the political and personal relationship of Jefferson and Marshall generated that doctrine. In other words, Jefferson’s actions as President and Marshall’s decisions as Chief Justice were the foundation of a particular doctrine of executive authority that would influence future presidents, including: Jackson during the nullification crisis, Lincoln during the Civil War, and Bush and Obama during the post-9/11 terrorist attack era. This thesis examines how Marshall’s and Jefferson’s personal and political animosity toward each other had an impact on the development of executive authority over the history of the United States. Additionally, this thesis analyzes one particular case in contemporary jurisprudence—\textit{Medellin v. Texas}—that emphasizes the doctrine that developed from the Marshall-Jefferson dynamic.

This work further focuses on two events that occurred in close proximity: The


\textsuperscript{24} Simon, 157.

The second event involves the federal government’s use of treaties to acquire additional territory. The most famous land acquisition occurred in 1803 when Thomas Jefferson purchased Louisiana from France. Jefferson, along with his political opposition, questioned whether the Constitution provided authority for the President to acquire new territory. From 1805 to 1829, the Marshall Court examined numerous federal land acquisitions under various contexts and through various mechanisms. Marshall and Jefferson were largely in agreement that the Constitution was explicitly silent on the issue of land acquisition. Where they drastically diverged was on the notion that such executive actions were implicitly vested in the Executive's powers and, therefore, constitutional. Marshall's conclusions in the land acquisition cases conformed to his interpretation of broad executive authority in the Constitution, thus

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affirming that Jefferson's acquisition of Louisiana was constitutional.

Ultimately, the advancement of time and a president’s necessity to act reveals a convergence of the views of Jefferson and Marshall. Blending Jefferson and Marshall during his second inaugural, President Jackson expressed a “respect for the essential rights of the states,” but balanced that respect “with a devotion to the cause of the Union.”29 Jackson’s actions as president illustrate a pragmatic reality that executive authority was not as black and white as Jefferson and Marshall thought it to be. Taken together, the Robbins Affair, the Louisiana Purchase, and the Nullification Crisis exhibit an evolving agreement of Jefferson and Marshall’s philosophies. Medellín v. Texas, however, represents a contemporary application of Jefferson and Marshall’s convergent views.

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For nearly twenty days in February and March of 1800, the U.S. House of Representatives debated whether President John Adams’ involvement in the case of Jonathan Robbins was such a violation of the Constitution that it demanded censure. Representative Edward Livingston, a New York Republican, proposed a resolution to censure the president for his “dangerous interference of the Executive with judicial decisions.” President Adams’ actions in the Robbins case, Livingston resolved, “sacrifice[d] … the Constitutional independence of the Judicial power.” The Republicans who supported the censure motion grounded their belief in the tenet that “the preservation of liberty” required the three branches of government “be separate and distinct.” The Federalist John Marshall, however, would argue during the House debate that there were exceptions to the rule.

In 1790, Thomas Jefferson wrote: “The transaction of business with foreign nations is Executive altogether. It belongs then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.” Ten years later, standing on the floor of the House, Representative

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1 10 Annals of Congress 531-629.
2 Ibid., 533.
3 Ibid.
John Marshall said: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” On its face these two statements appear agreeable—that in matters between the United States and foreign nations the President is the chief representative. Yet, in 1800, Jefferson believed that Marshall was greatly misguided, and especially wrong with respects to the Case of Jonathan Robbins, to which Marshall’s statement was related.7

The United States Supreme Court and presidents alike have used repeatedly Marshall’s “sole organ” statement as rationale and justification for “unlimited (and illimitable) executive power.”8 Yet, Marshall’s speech on 7 March 1800 supporting President Adams focuses narrowly on the issue of extradition under treaty obligations and the Executive’s authority to enforce such provisions. Nonetheless, at its heart, the Case of Jonathan Robbins tests the unchartered boundaries of executive power under the new U.S. Constitution.

The Robbins case began in Charleston, South Carolina, when an eighteen year old American sailor, William Portlock, overheard a shipmate boast about his complicity in the mutiny of the British frigate Hermione.9 Portlock reported what he heard to

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9 U.S. v. Robbins, Bee 266, 27 F.Cas. 825. See also Cress, 100.
Benjamin Moodie, a British consul general, on 20 February 1797. Moodie reviewed a list of men who were said to have taken part in the *Hermoine* mutiny. The description of the man Portlock named as Jonathan Robbins matched the description of an Irishman on the list named Thomas Nash. Moodie arrested Robbins on the suspicion of his involvement in the murder of officers in the mutiny of the *Hermoine*.\(^\text{10}\)

Upon his arrest, Robbins claimed to be a native of the state of Connecticut, and in 1797, was a crewman aboard the American brig *Betsey*. That year, according to Robbins, members of the crew of the British frigate *Hermoine* captured and pressed him into service for the British.\(^\text{11}\) On 22 September 1797, the crew of the *Hermoine* mutinied and overthrew the captain. During the attack numerous crew members were killed. It was claimed by surviving crew members that Robbins was a principle involved in one of the killings.\(^\text{12}\) Robbins, and others from the *Hermoine*, wound up in the American merchant marine and were not heard from until Portlock heard the tale and identified Robbins to the British consul general.\(^\text{13}\)

With Robbins arrested and detained, the British sought to have him extradited under the Article 27 of the Jay Treaty.\(^\text{14}\) Article 27 stated, in part, that Great Britain and the United States agreed to “deliver up to justice all persons, who being charged with murder or forgery, committed within the jurisdiction of either.”\(^\text{15}\) The case, grounded on a habeas corpus petition, went before federal district judge Thomas Bee, who was

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\(^{10}\) Ibid.

\(^{11}\) Ibid.

\(^{12}\) Simon, 92-93.

\(^{13}\) Smith, 259. Cress, 100.

\(^{14}\) Simon, 93.

\(^{15}\) *U.S. v. Robbins*, Bee, 266, 27 F.Cas. 825 (1799).
uncertain if he had the authority to extradite a prisoner based solely on the language provided in Article 27. Article 27 is ambiguous as to exactly which part of the government executes an extradition. Judge Bee wondered whether that authority rested solely with the Executive and his officers or with federal judges under Article III, Section 2 of the U.S. Constitution.

Before acting, Judge Bee wanted advice from the Executive Branch and sought direction from Secretary of State Timothy Pickering. Simultaneously, British officials engaged in diplomatic communications with President Adams requesting the extradition of Robbins. On the advice of Pickering, President Adams “advise[d]” Judge Bee to “deliver up the offender,” but Adams admitted he was not certain just “[h]ow far the President of the United States could be justifiable in directing the judge” to act on the Executive's behalf. Furthermore, it is uncertain whether Pickering and Adams fully knew of Robbins’ claim of being an American citizen. Following precedent of extraditing non-citizens under treaty obligations, President Adams instructed Judge Bee as he did.

16 Ibid., 831-33.
17 “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made.” U.S. Constitution, art. 3, sec. 2.
20 U.S. v. Robbins, Bee 266, 27 F.Cas. 825, 843. See also Simon, 93. President Adams’ letter to Secretary of State Pickering reads in whole:

Your favour of the 15th is received. I have no doubt that an offence committed on board a public ship of war, on the high seas, is committed within the jurisdiction of the nation to which the ship belongs. How far the president of the United States would be justifiable in directing the judge to deliver up the offender, is not clear. I have no objection to advise and request him to do it.

21 Cress, 101-102.
Judge Bee moved forward with a probable cause hearing following instruction from President Adams. Bee found it “somewhat remarkable” that an American citizen would continue on board a British frigate for some time and under another name, and later, take another name “and lay in jail here five or six months” without much of a demand to be heard. Bee ruled that Article III of the U.S. Constitution and Article 27 of the Jay Treaty gave him authority to deliver Robbins—or Nash—to British authorities. The British court-martial of Robbins began on 15 August 1799 in Jamaica. Robbins faced testimony from four other crew-members of the *Hermione* who witnessed Robbins kill one of the *Hermione* officers. Robbins did not put on a defense. He was found guilty, and one week later, executed.\(^\text{22}\)

News of Judge Bee’s decision and Robbins’ extradition “spread rapidly.”\(^\text{23}\) Almost immediately, the Republicans were in the papers levying the charge that Adams had acted against the Constitutional boundaries of his office; but more importantly, extradited an American citizen.\(^\text{24}\) Republicans Albert Gallatin and Charles Pinckney led the assault against Adams. It was their view that the President had a duty to execute the laws—including treaties—but the President did not have the power to fill gaps or “defects” in the law.\(^\text{25}\) Senator Pinckney publicly argued in his “Letters of a South Carolina Planter” that both Adams and Bee acted outside boundaries of their constitutionally defined offices. Pinckney claimed that “no possible construction” of

\(^{22}\) *U.S. v. Robbins*, Bee 266, 27 F.Cas. 825 (1799). See also Simon, 94. See also Cress, 103-106.


\(^{24}\) Cress, 108-10.

\(^{25}\) Cress, 108-110. See also Parry, 1297.
Article III of the Constitution justified jurisdiction by Judge Bee because the “boundaries of [federal court jurisdiction are] to be ascertained by Congress.” Pinckney found the ambiguousness of portions of the Jay Treaty to be problematic, and called on Congress to fix the provisions relating to extradition.\textsuperscript{26}

The political turbulence created by the Republican rhetoric about the Robbins Affair demonstrated the closeness between the Federalists and Great Britain.\textsuperscript{27} Vice President Thomas Jefferson uniformly agreed with Pinckney’s strict view of executive power and congratulated him on his strong arguments against Adams' and Bee's unlawful actions.\textsuperscript{28} Jefferson echoed the exaggerated rhetoric when he wrote to Pinckney that “no one circumstance since the establishment of our government has affected the popular mind more.”\textsuperscript{29}

The Federalists did not allow their President to be devoured in the papers and on the floor of Congress. Federalist John Marshall first took to the \textit{Virginia Federalist} to address the principles behind the powers of each federal department. Marshall's argument was simple: the treaty-making power was conferred upon the Executive, with advice and consent from the Senate. Once a treaty was signed by the President, it became “one of the supreme laws of the land.” It was, thus, the President’s “duty” to execute that law. According to Marshall, President Adams was keeping with his authority under Article II of the Constitution.\textsuperscript{30}

\textsuperscript{26} Parry, 1298.
\textsuperscript{27} Cress, 106. See also Van Alstine, 113.
\textsuperscript{28} Jefferson to Pinckney, 29 October 1799, \textit{Writings of T. J.}, 9:87.
\textsuperscript{29} Ibid.
\textsuperscript{30} \textit{U.S. v. Robbins}, Bee 266, 27 F.Cas. 825, 833-835.
Edward Livingston followed Pinckney’s suggestion. On 4 February 1799, Livingston introduced two resolutions relating to the case of Jonathan Robbins. The first sought to have Congress give legislative effect to Article 27 of the Jay Treaty. The second sought the “requisition” of papers from President Adams relating to the Robbins case. Livingston’s resolutions on 4 February were essentially a shot across the bow. After a few speeches and attempts to requisition the papers from the President, Adams complied within a few days and transmitted copies of the documents relating to the Robbins case on 7 February. Despite the Executive’s cooperation, the House of Representatives daily consideration of the Robbins Affair nearly stalled all business in that chamber for the next twenty days.

On 20 February 1800, Edward Livingston returned to the floor of the House and moved to censure Adams for his actions in the case. Livingston’s charge was that Adams violated the separation of powers doctrine and infringed on the authority of the Judiciary. Members on both sides of the issue delivered speeches on the Robbins controversy and the motion to censure President Adams. Albert Gallatin led the Republicans. His speech is not fully recorded but he spoke for two hours. The essence of Gallatin’s argument, as recorded, was that without the letters and papers from Adams relating to the Robbins case, a proper determination of the facts on Robbins’ citizenship could not be made, and therefore, extradition under Article 27 of the Jay Treaty was

31 10 Annals Congress 511.
32 Ibid., 515.
33 Simon, 96.
34 Smith, 259. See also 10 Annals Congress 532-33.
35 Smith, 260.
The Republican’s view was that extradition hinged on citizenship. But Gallatin also argued, as Livingston proposed, that executive action could not cure a “defect” in the law, but instead, the House of Representatives should be charged with fixing the defect. Gallatin recognized the President’s constitutional authority “to take care that the laws are faithfully executed.” In the Robbins case, however, President Adams interfered with a proper function of the Judiciary under Article III; that is, questions of jurisdiction and offense are “in their nature properly points of law.”

While the Republicans focused on evidentiary issues, citizenship, and defects in the Jay Treaty, John Marshall and the Federalists extolled the virtues of the separate branches of government much differently than Gallatin had argued. On 7 March 1800, Marshall delivered a three-hour argument that hinged on a distinction between the Executive's “external relations” and his power to act domestically based on the nature of a ratified treaty. To the Executive’s duties in foreign affairs, Marshall famously stated: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” To the Executive’s related domestic duties, Marshall succinctly stated: “He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty, where he and he alone possess the means of

37 1 Ibid., 541-60. See also Van Alstine, 118.
39 Wedgwood, 336.
40 Wedgwood, 336-37.
executing it.”

The whole of Marshall’s statement holds generally that a ratified treaty is self-executing. As such, the Executive has the power to enforce the provisions of the treaty regardless of whether the House of Representatives have enacted legislation giving domestic effect to any treaty provisions that may have domestic implication. It is this subsequent domestic legislative necessity that Chief Justice Roberts found problematic for President Bush’s Memorandum in *Medellín v. Texas*.44

John Marshall was successful in articulating two nuanced views of executive prerogative. The first argument was textual, the second argument was structural. First, Marshall demonstrated that federal judicial authority extends to “all cases in law and equity” arising under the Constitution, treaties, and the laws of the United States. Article III judicial authority did not extend to “all questions” or “controversies” arising under the Constitution and all other sources of law.45 Marshall argued that “[a] case in law or equity proper for judicial decision may arise under a treaty, where the rights of the individuals acquired or secured by a treaty are to asserted or defended in court.”46 The Jay Treaty, Marshall maintained, did not secure individual rights or provide for judicial decision with respects to the delivery of a murderer. The Jay Treaty was a “political compact,” to which “Judicial power cannot extend.”47 Therefore, the extradition provision under Article 27 of the Jay Treaty did not create a case that an individual could

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43 Ibid.
44 The problem of enforcing international law domestically as analyzed by Chief Justice Roberts in *Medellín* is discussed infra Part VI.
45 Wedgwood, 345.
bring before a federal court.

Marshall’s conclusion that extradition is not a case to which judicial authority extends prefaces his second, more structural argument that the President’s duty extends beyond mere execution of the laws. When a foreign nation makes a demand of the U.S., any refusal of that demand may present consequences of force or threat by the foreign nation, upon which, it is the sole duty of the Executive to administer the proper response.48 The British demanded the delivery of Robbins. That demand was made to President Adams. Marshall argued to the House that when “[t]he parties [a]re two nations[,] [t]hey cannot come into court to litigate their claims, nor can a court decide on them.” Simply, “the demand is not a case for judicial cognizance.”49 Under this rationale, Marshall stated, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him.”50 Therefore, both textually and structurally, President Adams properly acted within his authority to answer Great Britain’s demand and “advise” Judge Bee to deliver Jonathan Robbins.

Following Marshall’s speech, Republican members of the House urged Gallatin to offer a rebuttal. Gallatin had presented the best argument supporting censure, but he rejected the challenge from his allies, replying: “Gentlemen answer it yourselves; for my part I think it unanswerable.” Marshall’s argument seemed to settle the Robbins

48 Wedgwood, 347.
50 Ibid (emphasis added).
Throughout the “agitation” of the Robbins’ affair, Jefferson was in Philadelphia and reported the events of the Congress to Madison. Prior to Marshall’s speech, Jefferson wrote to Madison noting Livingston’s “able speech.” Jefferson predicted on 4 March that the Republicans “may be able to repel Livingston’s motion of censure,” but with confidence, Jefferson believed the Federalists could not carry a counter-measure to vindicate Adams’ actions. Republicans offered valiant and meritorious arguments in favor of censure, but the “triumph of the contest” fell to Marshall’s speech. When a vote was taken of the full House the day after Marshall’s speech, the measure to censure President Adams was defeated, 61-35.

Jefferson again wrote to Madison reporting the defeat, but stating that “Livingston, Nicholas, and Gallatin distinguished themselves on one side, and J. Marshall greatly on the other.” Marshall’s biographer, Albert Beveridge, describes Jefferson’s account of the debate and its result as “curt.” Beveridge further writes:

And this grudging tribute of the Republican chieftain is higher praise of Marshall’s efforts than the flood of eulogy which poured in upon him; Jefferson’s virulence toward an enemy, and especially toward Marshall, was such that the could not see, except on rare occasions, and this was one, any merit whatever in an opponent, much less express it.

Despite recognizing Marshall’s strong argument, Jefferson summed up his
disagreement with Marshall on the back of a printed copy of Marshall’s speech:

1. It was Pyracy by the law of nations, & therefore cognisable by our courts. 2. if alleged to be a murder also, then whether he was an impressed American was an essential enquiry. 3. tho' the President as a party subordinate to the court might enter a Nolle pros, a requisition in the style of a Superior was a violation of the Constitutional independency of the Judiciary.57

Still, Jefferson predicted to Madison that the Federalist’s attempt to exonerate Adams would fail.58 On 10 March, Federalist James Bayard presented a motion “approbating the conduct the President.”59 The measure passed with a similar majority of the censure vote, 62-35.60 Thus, the House approved Adams’ executive acts on the grounds presented by Marshall; grounds Marshall would utilize in later Supreme Court decisions.

57 Wedgwood, 354. Wedgwood cites the source of Jefferson’s inscription in note 477:

Handwritten inscription by Jefferson on verso of last page of printed pamphlet SPEECH OF HON. JOHN MARSHALL, DELIVERED IN THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES ON THE RESOLUTIONS OF THE HON. EDWARD LIVINGSTON, RELATIVE TO THOMAS NASH, ALIAS JONATHAN ROBBINS (Virginia Historical Society, Political Pamphlets, I, no. 7), in 4 THE PAPERS OF JOHN MARSHALL, supra note 421, at 109 n.1. (Jefferson’s inscription includes the crossed-out phrases “he could not countrol the court as” and “by requisition”).


59 10 Annals of Congress 621.

60 Ibid.
DOMESTIC ENTANGLEMENT: The Sage and the Chief

Thomas Jefferson was inextricably tied to Virginia in both life and in death. The man from Monticello held his native state in the highest regard, going so far as calling Virginia “the first of the nations of the earth.” According to Jefferson, Virginia stood as America’s crowning political achievement, which was due in part to Jefferson’s influence upon the fundamental laws that made up the state’s legal and governmental framework. Jefferson reveled in the security of Virginia's polity, but Jefferson’s true joy was the sublime nature that “spread so rich” below the majestic pedestal upon which Monticello rested. The splendid beauty and tranquility of Virginia constantly tugged at Jefferson's being, never more strongly than during the last years of his presidency.

For Jefferson, Virginia meant family. Jefferson's father, Peter, settled in Albermarle County at Shadwell in 1737. Upon his father's death in 1757, Jefferson inherited the land of his father's lifelong home, including the estate that would eventually become home to Monticello and later Poplar Forest. When Jefferson returned to Monticello following the end of his presidency in 1809, many members of Jefferson's family had taken up residence at Monticello or were about to in the coming years.

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1 Jefferson to Major John Cartwright, 5 June 1824, *Thomas Jefferson: Writings*, ed. Merrill D. Peterson (New York, Library of America, 1984), 492. “Virginia, of which I am myself a native and resident, was not only the first of the States, but I believe I may say, the first of the nations of the earth, which assembled its wise men peaceably together to form a fundamental constitution, to commit it to writing, and place it among their archives, where every one should be free to appeal to its text.”


Jefferson's daughter, Martha Randolph, and her children resided at Monticello until he
died on 4 July 1826. This familial companionship, along with the agrarian lifestyle
Jefferson preached as “virtuous,” was precisely what Jefferson longed to enjoy once he
retired from public life. The homes of Monticello and Poplar Forest were the means to
provide “the greater part of [his] family” with a lasting comfortable residence.

Slavery, in many respects, made Jefferson’s residence as comfortable as it was. As Jefferson saw it, he was bound by the chains of an economy that relied on slave
labor. Even though Jefferson owned slaves all his life, he made efforts to end the
practice, suggesting the gradual emancipation of slaves in 1776 while a member of the
Virginia House of Delegates.

Jefferson and Marshall rarely agreed on an issue. Their few agreements were
seldom, if ever, connected publicly. The abomination of slavery was an issue upon which
they agreed. Like Jefferson, Marshall owned slaves. Marshall’s slaves performed
household duties and personal tasks, unlike Jefferson’s mostly agricultural use of
slaves. As Chief Justice, Marshall never heard a case directly on the issue of slavery,

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7 Crawford, 72.

8 Ibid.

9 J. Ellis, 171-180.


11 Crawford, 21. Crawford carefully summarizes Jefferson’s personal and philosophical entanglement with the slavery issue: “it is a truism that Jefferson believed in human progress, but his was not a naïve belief that man’s moral improvement over time was inevitable, or that it could be rushed. Jefferson believed that mankind progressed … through the shared experience of the group as it inched its way toward a more enlightened society. Moral refinement advances by degrees, over time, and in response to specific historical circumstances.” Crawford, 106.

12 Smith, 162.
but in the Antelope case and in Boyce v. Anderson, Marshall applied “the mandate of the law” and common sense to reach two pragmatic and careful results. On the one hand, the U.S. capture of a slave ship was illegal when the ship’s country of origin recognizes the slave trade. On the other, Marshall ruled that that a slave was a person and not an article of merchandise.

Unlike Jefferson, John Marshall remained in public life until his death in 1835. Marshall died as the sitting Chief Justice of the United States on 6 July 1835. Similar to Jefferson, Marshall's Virginia lineage was one part frontiersman, one part aristocratic. Jefferson and Marshall were both the beneficiaries of hard working fathers. Peter Jefferson was a successful planter and land surveyor. Thomas Marshall was a self-described carpenter. Their mothers, on the other hand, both descended from Virginia's most prominent family, the Randophs. Jefferson's mother and Marshall's grandmother were first cousins. Put another way, Jefferson was the great-grandson and Marshall the great-great-grandson of William Randolph and Mary Isham.

Jefferson and Marshall reluctantly accepted their shared bloodline. Neither man spoke or wrote at any length about their familial connection, despite their volumes of

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13 Smith, 488 (citing The Antelope, 23 U.S. 66 (1825) and Boyce v. Anderson, 27 U.S. 150 (1829)). Smith notes: “Marshall’s decision in the Antelope reflects the approach he often took in highly contentious cases. The principle enunciated went in one direction, but the pragmatic application of that principle allowed the Court to arrive at a decision more in conformity with the natural justice of the case.” Smith, 488. On this point, see Marshall’s opinion in Marbury v. Madison, 5 U.S. 137 (1803).

14 The Antelope, 23 U.S. 66, 118 (1825). See also Smith, 487.

15 Smith, 488. Marshall stated in Boyce v. Anderson: “A slave has volition, and has feelings which cannot be entirely disregarded. He cannot be stowed away as a common package. In the nature of things, and in his character, he resembles a passenger, not a package of goods.” 27 U.S. 150, 155 (1829).

16 J. Ellis, 30.

17 Beveridge, 1: 14.

18 Simon, 24.

19 Beveridge, 1:10.
writings. Historians are left with the task of speculating where the root of their animus began. Jean Edward Smith, professor of political science and Marshall biographer, surmises that the shared bloodline resulted in unfriendly encounters while both men were young.\textsuperscript{20} Smith also notes two other possible reasons. First, the Randolph family disowned Mary Randolph Keith, who was Marshall's grandmother.\textsuperscript{21} Conversely, Jefferson's family remained in good standing with the Randolphs. Second, Rebecca Burwell Ambler, Jefferson's first fiancé, and later Marshall's mother-in-law, spoke freely with her family, including Marshall, “of Jefferson's foibles.”\textsuperscript{22} This early ancestral strife is most likely the root of what became a “cordially reciprocated … long-standing aversion” to one another.\textsuperscript{23} Whatever the cause of Jefferson's and Marshall's shared animosity, their ardent political opposition created or contributed to an environment that put the infant Constitution to work, particularly after each man reached the position of President and Chief Justice, respectively.

The presidential succession from John Adams to Thomas Jefferson is often depicted as a crucial moment dripping with drama. In 1799, the Federalists controlled much of the federal government. What was worse for the Republicans, was that the federalist persuasion had prevailed since the beginning of George Washington’s presidency. The Federalists simply believed that a strong central government had to flow from the Constitution in order to protect the new nation from devolving into the chaos the Articles of Confederation had created. The Republicans, on the other hand, believed that

\textsuperscript{20} Smith, 11.
\textsuperscript{21} Ibid.
\textsuperscript{22} Ibid.
\textsuperscript{23} Ibid.
the Constitution established just enough central authority to keep the states united or in
“harmony” and the federal government properly limited.\(^{24}\) The federal elections of 1798
through 1800 resulted in an unprecedented clash between these two political rivals,
largely due to Republican disagreement over the Alien and Sedition Acts. Party leaders
called upon John Marshall and Thomas Jefferson to stay true to their affiliations, their
principles, and their country.

George Washington, the recently retired president, called upon John Marshall in
August 1798. Marshall had just returned from Paris as a hero following his dealings in
the XYZ affair.\(^{25}\) The lawyer and member of the Virginia House of Delegates hoped to
return to his family and practice of law, however, Washington had other plans for the
forty-year old Marshall.\(^{26}\) Marshall recalled receiving an invitation to speak with
Washington at Mount Vernon. It was there that the former president played Federalist
“party man.”\(^{27}\) Washington urged both Bushrod Washington, his nephew, and Marshall to
run for seats in the U.S. House of Representatives. Bushrod “acquiesced” almost
immediately.\(^{28}\) Marshall, however, held out as long as Washington would permit him.
On the third day at Mount Vernon, Washington expressed his opinion that there were
“crises in national affairs.” Marshall succumbed to Washington’s nationalist plea that the
“best interests of [the] country depended on the character of the ensuing Congress.”\(^{29}\) In


\(^{25}\) Smith, 235.


\(^{27}\) Smith, 240.

\(^{28}\) Ibid.

other words, only intellectually superior Federalists like John Marshall could stop the Republicans from unraveling the strong federal government built during the Washington presidency.

Marshall’s opponent was John Clopton, a two-term incumbent Republican. Like Marshall, Clopton’s Virginia ties and prominence ran deep.\(^{30}\) Also like Marshall, Clopton had strong Federalist support in the newspapers. As the campaign ramped up, the thorny issues were narrowed down to the Alien and Sedition Acts and foreign affairs. A Federalist Congress enacted the Alien and Sedition Acts, yet Marshall in private correspondence thought them to be “unwarranted by the constitution.”\(^{31}\) In public, Marshall took a slightly softer and more acceptable position to the Federalists. If Marshall were in Congress at the time, he “certainly would have opposed [the acts],” only because they were “useless” and struck up unnecessary “jealousies at a time when our very existence, as a nation, may depend on our union.”\(^{32}\) The Alien and Sedition Acts would be the fulcrum upon which Marshall and Clopton would balance their diametrically opposed views.

Jefferson’s views were injected into the Marshall-Clopton race when the Kentucky and Virginia Resolutions were adopted by each state. The Resolutions were anonymously drafted by Jefferson and Madison in protest against the Alien and Sedition

\(^{30}\) Smith, 242.

\(^{31}\) Marshall to Timothy Pickering, 11 August 1798, Marshall: Writings, 145.

\(^{32}\) Marshall, To a Freeholder; as published in the Virginia Herald, 2 October 1798, in Marshall: Writings, 149.
Acts. Their primary purpose was to declare the Alien and Sedition acts unconstitutional and to reserve power to the states to make such declarations. Jefferson advocated that states could not only declare federal laws unconstitutional but could determine which federal laws were also “void.” Madison’s position was much less extreme but still strongly in favor of a state’s prerogative to assert its rights under the social compact.

The enforcement of the Alien and Sedition Acts presented an interesting question for Jefferson and Madison. Both men had previously argued against the constitutionality of the Bank of the United States. This time, however, their arguments against the constitutionality of the Alien and Sedition Acts were given mostly in private and the Resolutions were written separately and anonymously. Jefferson’s version of the Kentucky Resolution pushed a stronger states’ rights position. Jefferson avoided use of the term “nullification,” but wrote in personal correspondence that, “For the present, I should be for resolving the alien & sedition laws to be against the constitution & merely void.” In that vein, Jefferson’s opening section of the Kentucky Resolution maintained that if the federal government exercised “undelegated powers,” the State could consider such actions as “unauthoritative, void, and of no force.” Madison’s Virginia Resolution,

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36 Smith, 247.
however, was “gentler” and more “moderate” than Jefferson’s Kentucky text.\textsuperscript{40}

Jefferson presented the most radical Republican stance against the Alien and Sedition Acts.\textsuperscript{41} Clopton clearly opposed the Acts but he could not ascribe to outright nullification. Marshall on the other hand, could not strongly support the Federalist position because he firmly believed in the individual’s right to free speech and liberty. Madison, often the voice of reason between he and Jefferson, presented the moderate view that Virginia adopted. Marshall’s unwillingness to alienate those voters that believed in individual rights and liberty helped secure his victory against Clopton. Marshall’s independence put him in position to lead the Federalists in the Robbins case, and later, become a trusted confidant of President Adams and future leader of the federal Judiciary.\textsuperscript{42}

\textsuperscript{40} Burstein & Isenberg, 340. See also Malone, 3: 407-08. Burstein & Isenberg, Malone, and others recognize Madison’s rejection of the word “null” for the word “interpose.” Madison did not believe like Jefferson “that a single state legislature could render an act of Congress null and void by saying so.”

\textsuperscript{41} Privately, Jefferson suggested further that the Alien & Sedition Acts were a Federalist “experiment on the American mind, to see how far it will bear an avowed violation of the Constitution.” If permitted to stand, Jefferson surmised, “we shall immediately see attempted another act of Congress declaring that the President shall continue in office during life, reserving to another occasion the transfer of the succession to his heirs, and the establishment of the Senate for life.” Jefferson to Stephens Thompson Mason, 11 October 1798, \textit{Writings of T.J.}, 10: 61. See also Simon, 73.

\textsuperscript{42} Beveridge, 484. Beveridge describes the praise of Marshall’s colleagues during his brief six months in Congress:

His ‘convivial habits, strongly fixed,” his great good nature, his personal lovableness, were noted by his associates in the National House of Representatives quite as much as by his fellow members in the Virginia Legislature and by his friends and neighbors in Richmond.

The public qualities which his work in Congress again revealed in brilliant light were his extraordinary independence of thought and action, his utter fearlessness, and his commanding mental power. But his persona character and daily manners applied a soothing ointment to any irritation which his official attitude and conduct on public questions created in the feelings of his associates.
In barely more than a year, John Marshall served in each of the three branches of government. Marshall won his election against Clopton on 24 April 1799 and began his term in the House of Representatives on 2 December 1799. Marshall’s successful defense of President Adams in the Robbins Affair may have influenced President Adams’ choice of Marshall as Secretary of War in May 1800. 1 The promotion was a surprise to Marshall and he asked Adams to “withdraw the nomination.” Adams refused and the Senate easily confirmed Marshall on 9 May 1800. 2 

At the time, Marshall was returning to Richmond with the hope of reviving his law practice. However, President Adams had other plans for his newest cabinet member. On 12 May, two days after Adams asked Secretary of State Timothy Pickering to resign, Adams sent Marshall’s name to the Senate as Pickering’s replacement. The Senate unanimously confirmed Marshall as Secretary of State the next day. 3 Again, Marshall did not want the position. 4 Nonetheless, Marshall was now a “political man” and his law practice was altogether “lost.” He was, therefore, “determined to accept [President Adams’] offer.” 5

Marshall would accept one more unwanted offer from President Adams—Chief

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1 Smith, 265-66. See also Beveridge, 488-90.
2 Smith, 266.
3 Ibid.
4 Beveridge, 491. Marshall “pondered over the President’s offer” for a couple weeks, finding the position of Secretary of State “not inviting.”
5 Marshall, Autobiographical Sketch to Joseph Story, July 1827, in Marshall: Writings, 690.
Justice of the United States. Marshall was nominated on 20 January 1801, confirmed by the Senate on 27 January, and he accepted Adams’ nomination on 31 January.

When John Marshall transitioned from his post as Secretary of State and assumed the duties of Chief Justice of the United States in early 1801, numerous cases were being tried in the lower courts that the Supreme Court would eventually hear. Marshall’s early opinions would serve as some of the most fundamental expressions of American constitutional law. Today, an intense debate is being waged over the powers the Constitution confers to the separate branches, but especially whether it allows for judicial review. This debate, both directly and indirectly, taps into the separate sentiments of Jefferson and Marshall. The contemporary narrative that utilizes Jefferson and Marshall individually, however, constructs the greater argument more from the doctrine that coalesced from the Jefferson-Marshall divide. The personal disdain the two men held for one another never dissipates from the Jefferson and Marshall story, but what often gets lost in the historical reconstruction of that relationship is the connection to contemporary policy-making and jurisprudence.

John Adams just lost the 1800 election for the presidency to his former friend, now political rival, Thomas Jefferson. Faced with the fear of turning over the government to Jefferson and the Republicans, Adams began to shore-up areas of the federal government with loyal Federalists willing to take on the rabble rousing

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6 Beveridge, 557. “Marshall himself, it appears, was none to eager to accept the position which Ellsworth had resigned and Jay refused…”
7 Beveridge, 556-58.
9 See Smith, John Marshall: Definer of a Nation; Simon, What Kind of Nation; J. Ellis, American Sphinx.
Republicans. Unfortunately for Adams, some chose not to take on the fight.

In January 1801, Chief Justice Oliver Ellsworth resigned his post on the Supreme Court. Adams' first choice to fill the seat was the Court's first Chief Justice, John Jay. Adams nominated Jay and the Senate quickly confirmed him, but Jay declined the position and finished out his term as Governor of New York. Adams learned of Jay's rejection from his dutiful Secretary of State, John Marshall. Adams asked Marshall, “Who shall I nominate now?” Marshall suggested Justice William Paterson, but Adams objected to Paterson despite the Federalist’s preference. Marshall then remembered Adams saying, “I believe I must nominate you.” Adams nominated Marshall the next day. Judge Paterson’s friends led the Federalist-filled Senate in a brief filibusterer against the nomination, largely out of respect for their top choice. Nonetheless, Marshall’s appointment to the helm of the Supreme Court was approved, easing Adams’ fears of an imminent Republican take-over of the government.

Marshall, of course, had been a loyal subordinate to Adams during the Virginian’s tenure as Secretary of State. Although the Federalists briefly hesitated with their support of Marshall as the next Chief Justice, the Republican protests were a whimper when compared to the venomous protests the partisan press was capable of waging.

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10 Smith, 8-9.
12 Beveridge, 554-55.
13 Marshall, Autobiographical Sketch to Joseph Story, July 1827, in Marshall: Writings, 691.
14 Beveridge, 555.
15 Johnson, 12.
16 Ibid., 10.
17 Beveridge, 555.
Marshall’s swift ascent to the chief justiceship would prove to be the calm before the storm.\textsuperscript{18} If the Federalists’ political animosity was not enough to keep Jefferson and the Republicans in check, Marshall's personal disgust for the new President might.\textsuperscript{19}

In the waning days of Adams’ presidency, not only did Adams catapult Marshall, a Federalist stalwart, to the Supreme Court, but Adams also appointed dozens more Federalist partisans to federal judicial posts. These “midnight appointments” led to the seminal case of \textit{Marbury v. Madison}.\textsuperscript{20} Marshall's opinion in \textit{Marbury} balanced the political reality of the day: the Jeffersonian argument that Adams' judicial appointments were not valid given the unknowns of the Judiciary's role under the Constitution.

The former Chief Justice, John Jay, called into question the Judiciary's relevance in his letter to Adams declining the appointment the Supreme Court.\textsuperscript{21} As Jay explained, he left the Court “perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government.”\textsuperscript{22} Jay lamented the fact that the Court, in his opinion, could not “acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.”\textsuperscript{23} Jefferson’s consummate idealism permitted him to


\textsuperscript{19} Granted, there are numerous statements, written or spoken, by Marshall that could support his “disgust” for Jefferson. A particular statement that stands above the rest, however, is Marshall's response to Henry Lee after “perusing” Jefferson's published correspondence following Jefferson's death. Of these “selected” papers, Marshall read with “astonishment and deep felt disgust.” Marshall's astonishment went so far as to pit those who would dare entertain Jefferson's opinions and theories of governance as being against the good administration of General Washington. See Marshall to Henry Lee, 25 October 1830, \textit{Marshall: Writings}, 726-27.

\textsuperscript{20} 5 U.S. 137 (1803).


\textsuperscript{22} Ibid.

\textsuperscript{23} Ibid.
conclude that a Court occupied by great minds would be the beneficiary of the public confidence. On this point, Marshall was aligned with Jefferson.

Marshall was a great mind, most would agree, but Jefferson would never fully concede as much. Marshall put his impeccable, yet partisan mind to work as soon as he took over the Court. Although *Marbury v. Madison* is the case most often presented as evidence of Marshall’s legal and judicial deftness, other earlier cases were instrumental in helping establish greater confidence in the third branch of the federal government.

Marshall’s pronouncement of judicial review had not yet been made at the time of the Kentucky and Virginia Resolutions. Jefferson and Madison were establishing the premise later harnessed by Calhoun and the South Carolina legislature that the States have a say, not in determining what the law is, but at least to say that a law acts against the nature of the compact with the states. Judicial review was well-established when Alexis de Tocqueville toured the United States in the early 1830’s and commented on America's constitutional arrangement, as is discussed below. De Tocqueville's expansive understanding of federal judicial power allowed him to recognize that by the end of Marshall's time on the bench, the Judicial Branch was no longer the weakest of the three branches; the Court was now firmly part of the checks and balances interplay amongst the Executive, Legislative, and Judicial departments. If the Constitution were to operate otherwise, the “mutability of democracy” would overcome the American political

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25 See *supra* notes 55 and 56, Part II, 18-19.
Like Jefferson, de Tocqueville believed that if the Supreme Court could remain devoid of “rash or corrupt men,” then the threats against the dissolution of the Union could not come to fruition. Writing to James Madison in 1789, Jefferson advised for the necessity of an independent judiciary. The people's confidence would swell with a department composed of great “learning & integrity.” Jefferson suggested the judiciary be composed of men such as “Wythe, Blair & Pendleton,” for then, “the civium ardor prava jubentium would make no impression.” Jefferson may have been naive to believe that reasoned and intelligent men could otherwise not do wrong and succumb to the frenzy or rage that overpowered his fellow citizens.

Nonetheless, it appears that Jefferson's naïveté was fleeting when he wrote to Madison, because Jefferson understood that the American constitutional system was designed to combat the potential errors of those it entrusted with power, i.e., the elected and appointed officials. Just as the political process would correct the erroneous selection of representatives, so too must judges be removed “whose erroneous biases … lead us to dissolution.” Impeachment of judges “may indeed injure them in fame or in fortune,” Jefferson said, “but it saves the republic, which is the first and supreme law.” The latter portion of Jefferson's advice appears to indirectly take a swipe at Marshall's

27 De Tocqueville, 258.
28 De Tocqueville, 151.
29 Jefferson to Madison, 15 March 1789, Writings of T.J., 7: 309. “This is a body, if rendered independent & kept strictly to their own department merits great confidence for their learning & Integrity.”
30 Ibid. “… the frenzy of … fellow-citizens bidding what is wrong.”
32 Ibid.
assertion that it is “emphatically the province and duty of the judicial department to say what the law is.”

The Talbot and Schooner Peggy cases, however, were a prelude to Marshall’s ultimate statement regarding federal judicial authority in Marbury v. Madison. In Talbot, like many of the early Supreme Court cases, the Court was faced with the seizure of a foreign merchant ship—in this case, the Amelia was a Prussian-owned merchant ship flying the French flag and seized by the U.S. frigate Constitution. Marshall’s Court had to decide whether the American condemnation of the Amelia, belonging to a neutral country not involved in the Quasi-War with France and the U.S., produced substantial danger permitting U.S. seizure and a request for salvage compensation from Captain Talbot.

The Court analyzed a law Congress enacted in 1799. Marshall stated that the federal law was consistent with the Constitution’s grant of war powers authority to Congress. Therefore, Captain Talbot’s actions were permissible under the law. Although Talbot won on the first issue, he essentially lost on the second. Marshall found that Talbot’s actions could not justify the enormous size of the reward he was seeking.

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33 Marbury v. Madison, 5 U.S. 137, 177 (1803).
35 Talbot v. Seeman, 5 U.S. 1, 2-4 (1801).
36 Ibid., 18.
37 Ibid., 28. “The whole powers of war being by the constitution of the United States, vested in congress, the acts of that body can alone be restored to as our guides in this enquiry.”
38 Ibid., 36. “It is then the opinion of the court on a consideration of the acts of congress, and of the circumstances of the case, that the re-capture of the Amelia was lawful, and that, if the claim to salvage be in other respects well founded, there is nothing to defeat it in the character of the original taking.”
39 Ibid., 21.
The reward was severely reduced.\textsuperscript{40} The Court’s decision was important because of the politics involved in the Quasi-War. The capture was upheld, therefore the Federalists’ Quasi-War was legitimized.\textsuperscript{41} The final opinion was important because it showed a strong judicial voice.\textsuperscript{42} Not only did the Court conduct statutory interpretation of a congressional act, but the Court delivered its first unanimous opinion.\textsuperscript{43}

Four months later, the Marshall Court heard \textit{U.S. v. Schooner Peggy}.\textsuperscript{44} The Court in the \textit{Talbot} case analyzed the construction of a congressional act. In \textit{Schooner Peggy}, the Court analyzed the construction (and execution) of a treaty. At issue was President Jefferson’s actions under the Convention of Mortefontaine. The convention provided in part that, “Property captured, and not yet \textit{definitively} condemned, or which may be captured before the exchange of ratifications, (contraband goods destined to an enemy's port excepted) shall be mutually restored.”\textsuperscript{45} The American ship \textit{Trumbull} captured the armed French merchant ship \textit{Peggy} in April 1800 off the shore of Port-au-Prince, Haiti.\textsuperscript{46} The \textit{Peggy} was condemned a lawful prize by the U.S. Circuit Court for Connecticut, but subsequently, the convention was signed with France.\textsuperscript{47} President Jefferson then ordered the clerk of the Circuit Court to release the proceeds of the ships sale to the French owners. Because the court had not executed the judgment at the time the convention was

\begin{thebibliography}{9}
\bibitem{40} Simon, 156-57.
\bibitem{41} Ibid., 157.
\bibitem{42} Ibid., 156.
\bibitem{43} Ibid., 156-57.
\bibitem{44} 5 U.S. 103 (1803).
\bibitem{45} Ibid., 107 (emphasis in original).
\bibitem{46} Ibid., 105.
\bibitem{47} Smith, 297. See also Simon, 159.
\end{thebibliography}
signed, under the convention, the *Peggy* was not “definitively condemned.”

Appeals followed.

The legal question before the Court was an easy one for Marshall. Politics and the relation between the Executive and the Judiciary complicated the issue. The facts surrounding the treaty were undisputed. The treaty was ratified by President Adams with the advice and consent of the Senate. One article of the treaty was excepted from ratification. Like the Republicans in the Robbins Affair, the Federalists argued that President Jefferson acted outside his authority because the entire treaty had not been ratified into federal law. Chief Justice Marshall, however, agreed with the President, using the same rationale that supported his “sole organ” doctrine. Marshall wrote:

“The constitution of the United States declares a treaty to be the supreme law of the land. Of consequence its obligation on the courts of the United States must be admitted. It is certainly true that the execution of a contract between nations is to be demanded from, and, in the general, superintended by the executive of each nation. […] But yet where a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of congress”

In a single paragraph—of a four paragraph opinion—Marshall confirmed the authority of the President to act in the nation’s foreign affairs. He made clear that treaties enjoy the same legal status as congressional acts and are the “supreme law of the land.” He further articulated that the execution of treaty provisions are not for the court’s

48 Smith, 297.
49 Simon, 160.
50 Ibid. See also Smith 297-98.
province.\textsuperscript{52}

Marshall could now work through \textit{Marbury v. Madison} armed with the precedent of \textit{Talbot} and \textit{Schooner Peggy} that established a strong judicial voice. Confronted with Adams' appointment of William Marbury to a federal judicial post, Marshall first identified the problems with the Judiciary Act and then proceeded to assert the strength of the Judiciary.\textsuperscript{53} The former appeased Jefferson's concerns with Adams' ill-advised appointments. The latter caused Jefferson to quip to Madison that Marshall's “\textit{twistifications of the law … shew how dexterously he can reconcile law to his personal biases.}”\textsuperscript{54}

With \textit{Marbury}, Marshall addressed Jay's concerns about an ineffective Judiciary by holding that it is “\textit{emphatically the province of the judicial department to say what the law is.}”\textsuperscript{55} Marshall crafted his opinion in \textit{Marbury} in such a way that it simultaneously affirmed that the Supreme Court determines what is and is not constitutional, establishing judicial review; and gave Jefferson and the Republicans a victory by voiding Adams' last minute judicial appointments.\textsuperscript{56} Jefferson received the same judicial treatment as did Talbot—essentially winning the battle but losing the war. Marshall's legal dexterity would prove to be his legendary judicial strength throughout his thirty-four years as Chief Justice. Furthermore, Marshall's judicial flexibility when defining the parameters of the

\textsuperscript{52} See Simon, 161. On the last point, Marshall stated, “\textit{[I]f the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation.}” \textit{U.S. v. Schooner Peggy}, 5 U.S. 103, 109 (1801). As will be demonstrated infra Part VI, Marshall later refined his belief about when the Judiciary may act in cases involving treaties.

\textsuperscript{53} \textit{Marbury v. Madison}, 5 U.S. 137 (1803).


\textsuperscript{55} \textit{Marbury v. Madison}, 5 U.S. 137, 177 (1803).

\textsuperscript{56} Simon, 187-190.
Executive underscores this important constitutional ability.  

Jefferson and Marshall each expressed an understanding of executive authority under the Constitution for uniquely different reasons.  Twelve years into its existence, the Constitution and political realities placed these two relatives and rivals on the same stage. Chief Justice of the United States John Marshall administered the oath of office to Jefferson. Marshall’s biographer Jean Edward Smith wrote that “[t]he tension between Marshall and Jefferson yielded to the needs of the nation.”

Both men considered the crossing of their paths on the scheduled inauguration of 4 March 1801; Marshall, seemingly more so than Jefferson. While Jefferson pondered the workings of the Executive Office in the days and hours leading to his “qualification” of the office, Marshall lamented Jefferson’s pending presidency in both foreign and domestic affairs. Marshall was concerned with Jefferson’s future conduct in foreign affairs, especially with respect to Great Britain. Jefferson’s “foreign prejudices,” Marshall wrote to Hamilton, “seem to me totally to unfit him for the chief magistracy of a nation which cannot indulge those prejudices without sustaining deep & permanent injury.”

Domestically, however, Marshall feared Jefferson’s allegiance to the House of

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57 Although the Marbury decision establishes Marshall’s ability to be politically judicious and demonstrates his philosophical positioning against Jefferson, other cases decided by Marshall evidence more specific statements regarding an early nineteenth century understanding of executive authority.


59 Smith, 18.


Representatives. “By weakening the office of President,” wrote Marshall, Jefferson “will increase his personal power. He will diminish his responsability, sap the fundamental principles of the government & become the leader of that party which is about to constitute the majority of the legislature.” Marshall also feared Jefferson’s desire to “strengthen the state governments at the expence [sic] of that of the Union.” It is not likely that Marshall knew of Jefferson’s authorship of the Kentucky Resolution at this time, but the Republican’s campaign for both the Kentucky and Virginia Resolutions would have been enough to categorize Jefferson as Marshall did.

On the morning of the inauguration, Marshall expressed very little hope for Jefferson’s presidency. Marshall desired that “the public prosperity & happiness may sustain no diminution under the democratic guidance.” He observed, though, that the “democrats are divided into speculative theorists & absolute terrorists: With the latter I am not disposed to class Mr. Jefferson.” In other words, Jefferson was intellectually adept, but not a full blown tyrant. Regardless of which faction Jefferson aligned himself, Marshall believed that calamity would be in store for the country or for Jefferson. Jefferson’s potential choices for cabinet members led Marshall to conclude that the future of the United States would be dire with Jefferson alone, but with the collection of men that Marshall suspected Jefferson would commission to make up his administration, the future of the United States would be much worse.

As the “new order of things [began],” John Adams could not stand to watch the

63 Ibid.
64 Marshall to King, 26 February 1801, Marshall: Writings, 218.
transition. According to Marshall, Adams “left the city at 4 OClock in the morning.” By 4 p.m. in the afternoon, Marshall was back to his letter to Pinckney describing Jefferson’s inauguration speech as “generally well judgd [sic] & conciliatory” and “strongly characteristic of the general cast of his political theory.”\textsuperscript{67} Marshall was ready for Jefferson and the Republicans.

Until Jefferson’s presidency, the Supreme Court rarely addressed the issue of executive authority. Much later, as the power of the presidency grew or was more strongly asserted, the Court was increasingly asked to say what the law was.\textsuperscript{68} On the few occasions when the Marshall Court confronted the issue, including \textit{Marbury v. Madison}, each decision expanded the scope of the powers the Constitution granted to the Executive. This is not to infer that John Marshall, the Supreme Court, and the many elected officials in the new government were simply creating executive power theory out of thin air. The dimensions of the Executive Branch and its trusted Chief Magistrate were roundly debated during the Constitutional Convention, in \textit{The Federalist Papers}, in letters between Jefferson and Madison, and most intensely in the debates between Alexander Hamilton and Madison following George Washington’s Neutrality Proclamation of 1793.\textsuperscript{69}

Morton Frisch, a professor of history of political philosophy, recognized the incompleteness of the Constitution in the title of his edition of the Pacificus-Helvidius

\textsuperscript{67} Marshall to Pinckney, 4 March 1801, \textit{Marshall: Writings}, 219.


debates, *Toward the Completion of the American Founding*. A primary focus of the Hamilton-Madison debates was the powers of the Executive and Legislative Branches with respects to foreign affairs. Yet, Article II contains more than just the Treaty Making Clause of Sec. 2, Cl. 2. First and foremost, Art. 2, Sec. 1 states: “The executive Power shall be vested in a President of the United States of America.” The Vesting Clause is where the unitary theory of executive power resides. Justice Antonin Scalia's dissent in *Morrison v. Olson* asserts that the president possesses “all” the executive power under the Constitution.

Scalia’s reading of executive power is incredibly broad, but in line with Marshall, and in part, Hamilton. Marshall continued beyond his “sole organ” statement to assert that the president “possesses the whole executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.” Hamilton was a bit more cautious in his support of broad executive authority, especially with respects to treaty making. Hamilton argued in *Federalist No. 75*:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of a magistrate, created and

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70 Ibid.
71 U.S. Constitution, art. 2, sec. 2, cl. 2. “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties...”
72 U.S. Constitution, art. 2, sec. 1.
74 Calabresi and Yoo, 1486. This view is satisfied if viewed narrowly with respect to Marshall's “sole organ” assertion in his address to Congress on the Robbins Affair in 1800.
75 10 *Annals Congress* 613 (emphasis added).
circumstanced, as would be a president of the United States.\textsuperscript{76}

The idea that the President would act as the “sole organ” for conducting matters of foreign affairs was not newly expressed in 1800 when Marshall stood on the floor of the House of Representatives. Following Washington's Neutrality Proclamation and in the lead-up to the Jay Treaty, Alexander Hamilton and James Madison returned to their roles of constitutional interpreters in what is known as the Pacificus-Helvidius Debate. In Hamilton's first statement, he argued that the Executive Branch was the proper “organ of intercourse between the Nation and foreign Nations.”\textsuperscript{77} For Hamilton, the Legislature was not the proper organ for conducting matters of foreign affairs, as that body “is charged neither with making nor interpreting Treaties.”\textsuperscript{78} Hamilton further recognized that the Judiciary is “charged with the interpretation of treaties,” but this organ only operates with litigated cases “where contending parties bring before it a specific controversy.”\textsuperscript{79} Ultimately, with regards to the operative functioning of the Executive, “the Executive Power of the Nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument.”\textsuperscript{80}

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\item \textsuperscript{76} Federalist No. 75, The Library of Congress: THOMAS, http://thomas.loc.gov/home/histdox/fed_75.html. See also Fisher, 2.
\item \textsuperscript{77} Pacificus Number 1, The Pacificus-Helvidius Debates of 1793-1794, 11.
\item \textsuperscript{78} Hamilton continued: “It is therefore not naturally that Organ of the Government which is to pronounce the existing condition of the Nation, with regard to foreign Powers, or to admonish the Citizens of the obligations and duties as founded upon that condition of things. Still less is it charged with enforcing the execution and observance of these obligations and those duties.” Pacificus Number 1, The Pacificus-Helvidius Debates, 11.
\item \textsuperscript{79} Ibid., 11.
\item \textsuperscript{80} Ibid.
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and grant letters of marque and reprisal,” “the issue of a proclamation of neutrality is merely an Executive Act.”

Madison took issue with Hamilton's interpretation that the decision to judge for the country its state of war or peace with the rest of the world was held concurrently between the Executive and Legislative Branches. Both Hamilton and Madison in the *Federalist Papers* propositioned this “intermixture” of power, as noted above. Madison's ultimate argument against Hamilton was that even if there existed some overlapping of powers, it was the vested power of the Legislature to judge the causes of war and the Executive's role to present information to the Legislature when questions over war arose.

Despite the contrasting interpretations in the Pacificus-Helvidius Debates, neutrality was President Washington's policy, which Congress fully supported. Given this fact and Hamilton's notion of concurrent powers, Madison still feared an Executive Branch with too much power. Washington, however, attempted to alleviate such concerns by telling Congress that they possess the “wisdom … to correct, improve or enforce this plan of procedure.” In effect, Washington demonstrated the greater force the Legislature held over the Executive in this concurrent power scheme, asserting that each and every action, whether constitutional, unconstitutional, or merely politically unwise, could be re-evaluated by either body, and if necessary, Congress would undo it.

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81 Ibid., 13.
83 Ibid., 113-14.
84 Ibid., 115-16.
The duty-based theory of executive power is the contemporary opposition to the broad unitary view. Duty-based theory of executive power rests upon the foundation of the Take Care Clause, which requires that the President “shall take Care that the Laws be faithfully executed.” Simply put, the President has a duty, or an “allegiance to the law.” David Driesen, Professor of Law at Syracuse University, argues that Congress makes the laws and controls the policy of those laws, whereas the President, as the “Chief Magistrate,” is “the principle officer who must obey and properly carry out the law.” The President is required to perform the duties the Constitution confers upon his Office.

Arguably, Jefferson’s early views on executive power align with the duty-based theory. David Gray Adler, professor of political science at Idaho State University, notes the “meager scope of authority granted to state executives” following the break from the British Crown. Adler cites Jefferson’s framing of the Executive in his “Draft of a Fundamental Constitution for Virginia.” In 1783, Jefferson stated: “By Executive powers, we mean no reference to those power exercised under our former government by the Crown as of its prerogative …. We give them these powers only, which are necessary to execute the laws (and administer the government).” For Jefferson, the powers of the Executive are only those stated or enumerated. However, the phrase in parentheses suggests that Jefferson might endorse a limited view of a unified Executive Department.

86 U.S. Constitution, art. 2, sec. 3.
88 Ibid., 82.
90 Ibid. 96 (emphasis added).
The unitary executive theory is a “hierarchical” model that flows from the Vesting Clause of Article II, which provides, “The executive Power shall be vested in a President of the United States of America.” Unlike the concurrent view and the duty-based theories of executive power addressed above, which rely on the Legislative Branch, under the unitary executive view, “the President alone possesses all of the executive power.” Thus, the President can “direct, control, and supervise inferior officers or agencies who seek to exercise discretionary executive power.”

The views noted above address the Executive and Legislative Branches with very little commentary on the Judicial Branch. The common conclusion by 1800, however, was that the Judicial Branch was the weakest of the three branches of government. Many expected the Judiciary to remain constrained so long as the body was “rendered independent & kept strictly to their own department.” Supporters of the Judiciary Act of 1789 sought to change that expectation by establishing in the Supreme Court, inter alia, exclusive original jurisdiction over civil actions between states. Despite Madison’s early agreement with Jefferson at the outset of the Constitution that the Judiciary had a limited role, by 1800 Madison recognized the Judiciary as the court of “last resort” and that its power included annulment of laws contrary to the Constitution.

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92 Calabresi and Rhodes, 1165.
93 Calabresi and Rhodes, 1165.
94 Alexander Hamilton, *Federalist no. 78*, in *Alexander Hamilton: Writings*, ed. Joanne B. Freeman (New York: Library of America, 2001), 484. “[T]he judiciary is beyond comparison the weakest of the three departments of power.” See also “[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution.” Hamilton, 483.
CONVERGENCE: Presidents Jefferson and Jackson

Until the day Thomas Jefferson became President of the United States, he argued that the Constitution set limits upon the actions of the three branches of the federal government. With both the Bank of the United States in 1791 and the Alien and Sedition Acts of 1798, Jefferson argued that powers not delegated to the federal government are left to the states; therefore, neither action by the federal government was permitted. For Jefferson, the Tenth Amendment was a bedrock principle protecting the liberty of state governments.¹

The uncertain realities of Louisiana, however, faced Jefferson in 1803. Control of the Mississippi River was vital to the commercial well-being of the west. Jefferson was concerned when Spain retroceded Louisiana and the Floridas back to France. Robert Livingston and James Monroe were U.S. envoys in France at the time.² Jefferson instructed them, at the least, to acquire New Orleans. Without that acquisition, Jefferson supposed, “the right of navigation is impracticable.”³ Talleyrand offered to the U.S. envoys the whole of Louisiana for a price of $15 million. The control of the Mississippi River and the doubling of the size of the United States were important to Jefferson, but the power to acquire new territory did not appear to Jefferson powers to be delegated to

² Ibid., 245.
³ Jefferson to Livingston, 3 February 1803, State Papers and Correspondence Bearing Upon the Purchase of the Territory of Louisiana (Washington: Government Printing Office, 1903), 96. See also Mayer, 245.
the Executive.\textsuperscript{4}

In August of 1803, Jefferson contemplated what, if any, powers outside those specified in Art. II of the Constitution, the Executive might possess. Jefferson wondered whether the “chains of the Constitution” bound the Executive, or could executive action be taken “beyond the constitution” and be “sanction[ed] [as] an act done for its great good?”\textsuperscript{5} Ordinarily, Jefferson and the Republicans would say no, but Jefferson understood his “duty” as President to secure the “important adjacent territory” for the good of the country.\textsuperscript{6} As Jefferson saw it, the Federalists were concerned with the creation of a new confederacy that could prove to be hostile to the Atlantic states.\textsuperscript{7} Jefferson did not view Louisiana as being a place for immediate refuge, but as a placeholder for future expansion once the “eastern side” of the Mississippi “shall be full.”\textsuperscript{8} Jefferson “was unquestionably the chief architect of this superb new vision,” yet he had reservations about his actions.\textsuperscript{9}

In Jefferson’s mind, the remedy for his extra-constitutional actions was two-fold. First, the treaty acquiring Louisiana must “be laid before both Houses, because both have important functions to exercise respecting it.”\textsuperscript{10} Jefferson appealed to Congress’s “duty to their county in ratifying and paying for it, so as to secure a good which would

\textsuperscript{4} Mayer, 245.
\textsuperscript{5} Mayer, 245 (referencing Jefferson to Dickinson, 9 August 1803). This is the theory of retroactivity contemplated by Jefferson.
\textsuperscript{7} Ibid., 10: 409.
\textsuperscript{8} Ibid., 10: 410.
\textsuperscript{10} Jefferson to Breckinridge, 12 August 1803, \textit{Writings of T.J.}, 10: 410.
otherwise probably be never again in their power.”

Second, Jefferson believed that a proposed amendment was necessary to cure the gap in the Constitution wherein no provision permitted the acquisition or holding of territory. Note that Jefferson supported, and the Republicans argued, this idea of fixing a defect or filling a gap in the Constitution through Congressional action during the Robbins Affair.

There does not appear to be any existing personal statement from Marshall regarding Jefferson’s Louisiana Purchase. That is not to say that the Federalists did not have an opinion on the matter; Marshall, however, was hearing and deciding one of the most seminal Supreme Court cases ever in 1803: *Marbury v. Madison.* That Marshall did not comment does not appear alarming. Albert Beveridge’s heavily biased but insightful biography of Marshall’s life provides the Federalist reaction. Beveridge notes that Jefferson, the “high priest of popular rights” was conflicted. The President was forced to act without the consent of the governed, a principle Jefferson relied under his compact theory of state sovereignty. Jefferson, of course, “admitted that he ‘had stretched the Constitution until it cracked,’ and wondered if he would be impeached

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11 Ibid., 10: 410-11 (emphasis added). Note that Jefferson uses the word “ratifying” to describe the action Congress must take with respect to the treaty and his extra-constitutional action. Likely, this is a loose use of the word, it terms of the enumerated powers of the Constitution. Essentially, Jefferson was seeking retroactive consent or approval of his actions. The treaty, itself would be subject to the “advice and consent” of the Senate, upon which, Jefferson as the Executive would sign into law. Jefferson may have corrected his vocabulary slip later in the same paragraph. After suggestion an “additional article” to the Constitution “approving and confirming an act which the nation had not previously authorized,”—no provision for “holding foreign territory” or “incorporating foreign nations into our Union”—Jefferson declared: “I thought it my duty to risk myself for you. But we shall not be disavowed by the nation, and their act of indemnity will confirm and not weaken the Constitution, by more strongly marking out its lines.”

12 Mayer, 247-49.

13 5 U.S. 137 (1803).

14 Beveridge, 3: 148.
because his treaty-making powers did not specify the acquisition of territory.” Jefferson anticipated a much greater political struggle from the Federalists, but in the end, the Senate quickly approved the treaty and Jefferson’s question of constitutionality became moot. Although the Senate approved Jefferson's unilateral purchase of Louisiana and the House of Representatives voted in favor of the necessary funds, the Judiciary, per Marshall’s pronouncement, had yet to say what the law was in this respect.

Regarding Jefferson’s constitutional dilemma, Beveridge further quipped that “[n]o such legal mistiness dimmed the eyes of John Marshall.” Beveridge correctly continues that Marshall would “in time … announce as the decision of the Supreme Court that the Republic could acquire territory with as much right as any monarchical government.” In the 1828 case of The American Insurance Company v. 356 Bales of Cotton, the Court declared that the “Constitution of the United States confers, absolutely, on the government of the Union … the power of acquiring territory by conquest or by treaty.” The question before Marshall’s court in 356 Bales of Cotton was whether the territorial legislature of Florida properly erected a court subject to the laws of the Constitution. The case essentially turned on when Spain ceded Florida to the United States and whether or not a case arising within that territory could properly be heard in a court created by the territorial legislature had created.

Marshall, under his own doctrine of judicial review, decided whether Jefferson

15 Cerami, 220.
17 Beveridge, 3: 148.
18 26 U.S. 511, 542 (1828).
acted with proper accord to his executive power duty. In *American Ins. Co. v 356 Bales of Cotton*, the Marshall Court was faced with an admiralty suit out of the Territory of Florida. The question was whether the courts of the Territory of Florida were properly established and authorized to make judgment on a case. The United States acquired Florida from Spain in a treaty of 1819; much the same way Louisiana was acquired. Marshall held that land ceded by treaty and ratified by the Senate, “becomes a part of the nation to which it is annexed,” and thus a competent jurisdiction. Consequently, Marshall stated that any decree by the circuit courts of Florida were thereby valid.20

Earlier, in the Robbins case, Marshall spoke on the distinction between a question of law and a political question. In cases involving a question of law, the Judiciary is the proper department for its hearing. In cases such as the Robbins case, there was a question of political law; thus, it is only proper that the political branches, i.e., the Executive or Legislative Branches decide the matter.21 Marshall's argument implied that in the execution of the laws, necessary interpretation of the laws “will present themselves,” but at every turn, the Executive cannot, and is not, required to obtain a decision on the matter from the courts.22 Although that might be the case when treaties are at issue, what authority does the Executive have when Congress confers certain powers upon the Executive?

In the case of *Little v. Barreme*, such a question was before the Court.23 Congress enacted a law making it lawful for the President to give instructions to the commanders

20 Ibid., 511.
21 10 *Annals of Congress* 613.
22 Ibid.
of U.S. ships to “stop and examine any ship or vessel of the United States,” which may be suspected of “sailing to any port or place within the territory of the French republic,” thus violating the Nonintercourse Act. President Adams gave such instructions, but on 2 December 1799, the Danish brigantine *Flying Fish* was captured. Unfortunately for Captain Little of the American frigate *Boston*, the *Flying Fish* was not an American vessel, nor was it on a voyage to a French port, but on a voyage from a French port.

The ultimate issue for Marshall was whether Captain Little may be held liable for damages when in obeying and executing an order from the President. Marshall held that despite Captain Little acting in the capacity of a military officer, if the act is illegal, then the individual actor must be answerable in damages for those actions. Similarly, presidential action was further defined in 1818 in an opinion Justice Joseph Story authored. In *Gelston v. Hoyt*, the Court ruled that illegal actions committed upon the orders of the President cannot be justified. An illegal act is still committed when the President or his men commits the act. Although Justice Story does not cite *Little*, the logic is continued fourteen years later.

Marshall's initial ruling in *Little* is important on its own, but inherent in this decision is the idea that when Congress has conferred certain powers of action upon the Executive, the President's discretion is limited. Conversely, when acting unitarily under the Commander-in-Chief power, the Executive may entertain discretion when acting in

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24 Ibid., 171.
25 Ibid., 176.
26 Ibid., 179.
27 16 U.S. 246 (1818).
28 2 Cranch 170 (1804).
29 Smith, 340.
times of emergency. Jefferson was faced with such an emergency in 1803 with the opportunity to purchase Louisiana from France. Unable to dictate the whims of the French or the Spanish, Jefferson believed it was his duty to act outside the prescribed confines of the Constitution to secure a parcel of land that could “so much advance the good of the country.”

Jefferson's letters during the time of the Louisiana Purchase reflect his awareness of the “historical forces” acting upon him. To not act, thus keeping to his belief of constitutional limitations, Jefferson would likely endanger the very existence of the Union he and so many others fought to create.

Nevertheless, Jefferson was torn over his actions. On the one hand, Jefferson's actions would be that of a “guardian, investing money of his ward in purchasing an important adjacent territory; & saying to him when of age, I did this for your own good.” On the other hand, if determined to be so objectionable to the Constitution, Jefferson would accept the just punishment. Joseph Ellis eloquently captures Jefferson's conflict:

He violated his most cherished political principles several times over in order to guarantee the most expansive version of the “noble bargain,” and he temporarily made himself into just the kind of monarchical chief magistrate he had warned against. “It is incumbent on those who accept great charges,” he explained afterward, “to risk themselves on great occasions,” adding that “to lose our country by scrupulous adherence to written laws, would be to lose the law itself.”

Ironically, John Marshall would eventually agree.

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31 J. Ellis, 247.
33 Ibid.
34 J. Ellis, 247. See also Jefferson to John B. Colvin, 20 September 1810, *T.J.: Writings*, 1231-34.
Jefferson's concern over political fallout was misplaced. The treaty with France to purchase Louisiana was put before the Senate and approved along party lines. The Republicans unequivocally backed their president's actions, while the Federalists perceived Jefferson's actions as beyond the scope of the office. As Jean Edward Smith notes, the Republicans and the Federalists had essentially “changed sides.” If the parties remained true to their political principles, the Federalists would have applauded Jefferson for seeing outside the strict text of the Constitution and exercising discretion that is clearly implied under the Treaty Making Clause. Republicans on the other hand, should have admonished Jefferson for violating the strict constructionist view of the executive's powers.35 Jefferson’s action coincides with David Driesen's duty-based theory of executive power.36 Despite Driesen's repeated citations to Alexander Hamilton's expressed philosophy on executive power, it was Jefferson who faced a situation as President and exercised his duty as the Constitution defined it.

Marshall's opinion in *American Ins. Co. v 356 Bales of Cotton* judicially affirms Jefferson's treaty with France and purchase of Louisiana.37 Under Marshall's interpretation of the Treaty-Making Clause in Art. III, “[t]he Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.”38 Simply put, within the power to make treaties, the Constitution implies other duties and powers to the Executive in order to carry out this

35 Smith, 334-35.
36 Driesen, 71.
38 Ibid., 542.
expressed role of the Office.

However, it should be noted that Marshall may have given judicial blessing of the Louisiana Purchase five years earlier in *Johnson v. M’Intosh*. In establishing the legal basis for the U.S. acquisition of and claim of land over the Indians in the New World, Marshall wrote:

The magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country, would be considered as an aggression which would justify war.

*Our late acquisitions from Spain are of the same character*; and the negotiations which preceded those acquisitions, recognise and elucidate the principle which has been received as the foundation of all European title in America.

Subsequently, in 1829, the Marshall Court heard *Foster v. Neilson*. Again, the Territory of Florida was under review; specifically, the precise boundaries of the western portion of the territory. Marshall reiterated that the treaties were proper, but when a “controversy between two nations concerning national boundar[ies]” arises and “[t]here being no common tribunal to decide between them,” … “[t]he judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided.” Marshall returned to his speech in 1800 on the Robbins Affair to explain a distinction between a legal question, which is proper for the Judiciary, and a political question, which is proper for the Executive and Legislative Branches. Marshall

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39 21 U.S. 543 (1823).
40 *Johnson v. M’Intosh*, 21 U.S. 543, 587 (emphasis added). Note that most reporters, including Westlaw, reflect the spelling of M’Intosh used here as opposed to the contemporary spelling of the name as McIntosh.
42 Ibid., 253.
concluded:

[I]f the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question; and in its discussion, the courts of every country must respect the pronounced will of the legislature.\textsuperscript{43}

Once again, Marshall carefully maneuvered the Judiciary into what he believed the Court's proper role should be, regardless of whether Jefferson and the Republicans opposed the outcome.

While visiting the United States, Alexis de Tocqueville observed that the United States Supreme Court was the “sole and unique tribunal of the nation” and was entrusted with maintaining “[t]he peace, prosperity, and very existence of the Union.”\textsuperscript{44} De Tocqueville concluded that the “Constitution would be a dead letter” if it were not for the Supreme Court.\textsuperscript{45} The French aristocrat based his conclusion on his understanding of the U.S. Constitution in its written form and in its application by the federal government. The Supreme Court and its inferior courts mitigated the potential abuses the Executive and Legislative Branches could exact upon each other.\textsuperscript{46} In other words, the checks and balances system only operated as such because of the Article III courts, according to de Tocqueville. In this respect, de Tocqueville argued in favor of a strong independent federal judiciary; an argument Chief Justice John Marshall would have applauded and Thomas Jefferson would have found appalling.\textsuperscript{47} The Supreme Court's “immense”

\begin{thebibliography}{9}
\bibitem{footnote43} Ibid., 309.
\bibitem{footnote44} De Tocqueville, 150.
\bibitem{footnote45} Ibid.
\bibitem{footnote46} Ibid.
\bibitem{footnote47} Jefferson favored an independent judiciary, but a judiciary with limits; not the type envisioned and developed by Chief Justice Marshall during his tenure on the Supreme Court.
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power, however, could only hold sway “so long as the people consent to obey the law.”

When the people “scorn” the law, the Court is then rendered powerless.48

De Tocqueville's visit to America in 1831 came when a fractured political environment was testing the great republican experiment. Public and political opinion was divided over the rights of the states versus the powers of the federal government. The United States was not unaccustomed to such public and political divisiveness, given that the country itself and the Constitution were both born out of extreme disagreement. This interplay between the federal government, its three branches, and its people, i.e., the states, intrigued de Tocqueville.49

What set the country ablaze during de Tocqueville's visit was John Calhoun's push for nullification in South Carolina. The leaders of South Carolina thought the federal government exceeded its constitutional authority by enacting progressive tariffs, a taxing mechanism the Constitution did not directly recognize.50 Thomas Jefferson and James Madison earlier argued in 1798 that the states had a right to “declare” what federal laws usurped the power and authority of the states.51 Calhoun grounded his belief that South Carolina could “nullify” any Congressional act under the principles of the Kentucky and Virginia Resolutions, although, neither Resolution in its final form used the words “nullify” or “nullification.”52

48 Ibid.
49 Ibid., 390-91.
De Tocqueville witnessed this constitutional struggle first-hand and recognized the threat that such a doctrine of nullification could have on the young republic.53 “It is clear,” de Tocqueville wrote, nullification “would in principle destroy the federal bond and actually bring back that anarchy from which the Constitution of 1789 delivered the Americans.”54 The Republicans feared that continued Federalist control and governing in “the old practice of despots” was “not the natural state.”55 The Kentucky and Virginia Resolutions, with “[a] little patience,” Jefferson said, would cease the “reign of witches.”56 Jefferson’s presidential victory in the election of 1800 would begin to subdue the Republican fears, and the natural state could be restored.57 Both factions, however, remained on guard following the country’s first peaceful transfer of political power.58

Jefferson, nonetheless, began establishing his Republican administration very soon after taking office in March 1801.59 Marshall and the Federalists, conversely, were not content with the few Federalist retentions in the Jefferson Administration; thus, the Chief Justice’s dictate in *Marbury v. Madison* that it is “emphatically the province and duty of the judicial department to say what the law is,” is not so surprising given this cursory political context.60

54 De Tocqueville, 390-91.
56 Ibid., 1050.
57 Burstein & Isenberg, 369 (quoting Samuel Adams to Jefferson, 24 April 1801; “With you, I hope we shall once more see harmony restored; but after so severe and long a storm, it will take a proportionate time to still the raging of the waves.”).
58 Ibid., 366 (citing Philadelphia’s *Gazette of the United States*, 11 March 1801).
59 Ibid.
60 5 U.S. 137, 177 (1803).
The nullification crisis activated a debate over the powers of the Constitution that had not been waged since the Federalist Papers. The nullification debate involved more than the states rights question, but also included the role of the Executive and its relationship with the Legislature and the States. De Tocqueville noted that President Andrew Jackson favored a relatively passive executive policy during the nullification crisis. “General Jackson,” de Tocqueville boldly asserted, “is the majority's slave.”

Jackson “yields to its intentions, desires, and half-revealed instincts, or rather he anticipates and forestalls them.” De Tocqueville's observation that President Jackson chose to “bow before the majority to gain its favor,” suggests more than a political reality, but possibly a constitutional reality.

Why, as de Tocqueville suggests, did President Jackson “yield” as he did during such a time of constitutional struggle? Jon Meacham, a journalist and Jackson’s most recent biographer, argues that Jackson did not give into the majority, but instead made a political calculation based on his deeply held trust in the people. “[T]he great body of the citizens,” declared Jackson, will “commit mistakes … under the temporary excitement or misguided opinions” of some, “but in a community so enlightened and patriotic as the people of the United States argument will soon make them sensible of their errors, and when convinced they will be ready to repair them.” Despite Jackson's ideological assumptions and lofty wishes, he was willing to draw a line in the sand.

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61 De Tocqueville, 393.
62 Ibid.
63 Meacham, 134.
64 Ibid.
between himself and Calhoun.\textsuperscript{65} What de Tocqueville failed to acknowledge is that Jackson went beyond a mere philosophical debate with the nullifiers.

In 1833, Jackson introduced the Force Bill to Congress. If Jackson gave in to the South and reduced the tariff, the states to the North would act in a way he could not predict. Simply maintaining the status quo would continue to foster the South's drive towards nullification, if not secession; thus, Jackson told Van Buren that he had to “look at both ends of the union to preserve it.”\textsuperscript{66} Jackson's solution to preserve the union was the Force Bill, a measure that would give the president the power to use the military and state militias to carry out federal law. If Jackson could not stabilize the nullification issue peacefully, then he would use force; \textit{General} Jackson “ruled nothing out.”\textsuperscript{67}

Meacham points out that Jackson did not need the Force Bill.\textsuperscript{68} Jackson's proposal was strictly a political calculation. Even more, Presidents Washington and Jefferson were both beneficiaries of similar Congressional acts. The Insurrection Act of 1807 aided Jefferson in particular.\textsuperscript{69} Jackson's predecessors paved the way for him to extract every ounce of power for the President the Congress and the Constitution could possibly muster. The southern nullification crisis required Jackson to stretch the limits of the Constitution in order to save the principles upon which it was drafted. Jackson’s receipt of prior approval to use military force, if necessary, to defend federal interests

\textsuperscript{65} Ibid., 135-36. Meacham recounts Jackson and Calhoun's presence at a dinner in 1830 to commemorate Jefferson's birthday. Just as the nullification crisis was rising to its crescendo, the divide between the president and vice president became more intense and clear. Jackson spoke of a Union that must be “preserved,” whereas Calhoun extolled the virtues of preservation by “respecting the rights of the states.”

\textsuperscript{66} Ibid., 238.

\textsuperscript{67} Ibid., 239.

\textsuperscript{68} Ibid., 241.

\textsuperscript{69} 2 Stat. 443. See also Meacham, 240-41.
within a state gave him significant leverage in persuading the nullifiers to change course and thus preserve the Union. Congressional action in response to similar requests from his predecessors set a precedent for Congress to support him in his dealings with the government of South Carolina.\textsuperscript{70}

De Tocqueville was in America at a very important time. He observed the merging of two philosophies of executive power that once stood as the line of demarcation between the Federalists and Republicans. Jefferson and Marshall could not agree on anything, political, legal, or otherwise.\textsuperscript{71} By the time Jackson put the Executive's muscles to work against the nullifiers, the ends of the theoretical spectrum on executive authority that Jefferson and Marshall occupied, had shifted. Calhoun was the new left and Jackson the new right.

The Jacksonian philosophy, though, was not simply a shift in American political and constitutional thought based on the circumstances of the time. Yes, nullification created a political and constitutional firestorm that undoubtedly resulted in a dramatic change in the philosophical landscape; however, President Jackson was the ultimate beneficiary of Jefferson and Marshall's philosophical duel. That is, Jefferson and Marshall's sixty-five year battle established an interpretation of executive authority that exceeded the scope of the \textit{Federalist Papers}.\textsuperscript{72}

\textsuperscript{70} Meacham, 242-47.

\textsuperscript{71} Jefferson and Marshall were able to agree on one aspect of the Constitution. Neither quarreled with the Constitution's requirement that the newly elected President was to take the oath of office from the Chief Justice of the Supreme Court. They dutifully fulfilled that requirement twice, despite the jointly held animosity for one another. See Jefferson to Marshall, 2 March 1801, \textit{Writings of T.J.}, 10:215. See also Marshall to Jefferson, 2 March 1801, \textit{The Papers of John Marshall}, ed. Charles F. Hobson (Chapel Hill: The University of North Carolina Press, 1990), 6: 86-87.

\textsuperscript{72} See generally \textit{The Federalist Papers No. 67-77} (accessed online at: http://thomas.loc.gov/home/histdox/fedpapers.html).
LASTING IMPACT: Medellín v. Texas

In the instance of the Louisiana Purchase, there was not a properly ratified treaty upon which Jefferson acted. In an absolutely classic sense, Jefferson acted unilaterally. There was no domestic law in force that Jefferson could invoke. Jefferson sought retroactive approval of his actions. Likewise, although Jackson was confronted with a domestic issue in nullification, he had no domestic law in force that would allow the Executive Branch to engage against a State that acted contrary to the Constitution and the federal laws enacted. Jackson, nonetheless, established domestic law in the Force Bill to permit potential future actions of the president.

Conversely, in the Robbins case, President Adams was acting in connection to the Jay Treaty. The question, to use the language of Chief Justice John Roberts in Medellín v. Texas, was whether or not the Jay Treaty was “binding federal law.” John Marshall and the Federalists argued that Article 27 was binding and that President Adams was faithfully executing the laws, pursuant to Art. II, Sect. 3 of the Constitution. Adams’ actions were subsequently sanctioned by the House of Representatives. In 2005, President George W. Bush appeared to act in a similar fashion as President Adams. Although Marshall’s analysis as Congressman would win the day for Adams, Marshall’s analysis as Chief Justice would work against President Bush in the Medellín case.

On 24 June 1993, Jose Ernesto Medellín, a Mexican national who had lived in the

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1 Mayer, 245-49. Jefferson’s retroactive approval would come through a negotiated treaty with France, upon which, the Senate advised and consented, and President Jefferson signed, or ratified.
U.S. since preschool, murdered a young girl in Houston. Medellín was tried, convicted of capital murder, and sentenced to death. On appeal, Medellín argued that local law enforcement officers failed to inform him of his rights under the Vienna Convention.  

Relying on the International Court of Justice's (ICJ) decision in the *Case Concerning Avena and Other Mexican Nationals* and a Presidential Memorandum, Medellín argued that *Avena* was “binding” federal law “by virtue of the Supremacy Clause,” and thus, the treaty requirements under the Vienna Convention are “already the Law of the Land by which all state and federal courts in this country are bound.” Medellín was simply seeking a hearing on his state habeas petition, but the Texas Court of Criminal Appeals dismissed Medellín’s second state habeas application as an abuse of the writ and in violation of state law.

Chief Justice John Roberts, writing for the Court, disagreed with Medellín’s position and held that the “*Avena* judgment is *not* automatically binding domestic law.” The Take Care power authorizes the President “to execute the laws, not make them.” Thus, the President could not direct the courts of Texas to “give effect to the *Avena* decision in accordance with general principles of comity” in cases involving Mexican nationals such as Medellín. In holding against President Bush and Medellín, Roberts relied on John Marshall’s opinion in *Foster v. Neilson*, “which held that a treaty is equivalent to an act of the legislature, and hence self-executing, when it operates of itself.”

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3 Ibid., 504 (2008).
4 Ibid.
5 Ibid., 506 (emphasis added).
6 Ibid., 532
7 Ibid., 503
without the aid of any legislative provision.” In contrast, Roberts states, when treaties are not self-executing, as is the case with the Vienna Convention and the ICJ decision in *Avena*, only an Act of Congress can “carry them into effect.” In essence, Roberts used the same logic Marshall used to argue his case before the House of Representatives in the Robbins Affair; logic that resurfaced in Marshall’s decision in the *Foster* case.

Medellín previously petitioned the Supreme Court when his original habeas appeal ran its course through the federal courts. The Supreme Court granted certiorari, but before oral arguments could be heard, President Bush issued his Memorandum, which provided in whole:

The United States is a party to the Vienna Convention on Consular Relations (the "Convention") and the Convention’s Optional Protocol Concerning the Compulsory Settlement of Disputes (Optional Protocol), which gives the International Court of Justice (ICJ) jurisdiction to decide disputes concerning the "interpretation and application" of the Convention.

I have determined, pursuant to the authority vested in me as President by the Constitution and the laws of the United States of America, that the United States will discharge its inter-national obligations under the decision of the International Court of Justice in the Case Concerning *Avena* and Other Mexican Nationals (Mexico v. United States of America) (*Avena*), 2004 ICJ 12 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.

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8 Ibid., 504 (quoting *Foster v. Neilson*, 27 U.S. 253, 315 (1829) (internal quotations removed)).
9 Ibid., 505.
10 Ibid., 502-03.
In effect, the President’s Memorandum attempted to “take care” that the laws of the United States were executed, including those established through treaty.¹² In this case, the United States is a signatory to the Optional Protocol, part of the United Nations Charter. Under the Optional Protocol, “the United States agreed to submit disputes arising out of the Vienna Convention to the ICJ.”¹³ Specifically, signatories agreed that disputes “arising out of … the Vienna Convention shall lie within the compulsory jurisdiction of the International Court of Justice.”¹⁴ Chief Justice Roberts noted that “submitting to jurisdiction and agreeing to be bound are two different things.” Therefore, Roberts asked whether the United States ratified the U.N. Charter with the understanding that it was bound to such ICJ judgments.

Chief Justice Roberts looked to Article 94 of the U.N. Charter that established that each signing member “undertakes to comply with the decision of the ICJ.” The United States interpreted this article not to establish “immediate legal effect” but rather “a commitment on the part of U.N. members to take future action through their political branches to comply with an ICJ decision.”¹⁵ The United States argued that this was exactly what President Bush was committing to in his 2005 Memorandum. However, the determining factor for Chief Justice Roberts was that Article 94 “is not a directive to domestic courts.” The Article does not provide that the U.S. “shall” or “must” enforce ICJ judgments. More importantly for Roberts, nor does Article 94 “indicate that the Senate that ratified the U.N. Charter intended to vest ICJ decisions with immediate legal

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¹² U.S. Constitution. art. 2, sec. 3. The Executive “shall take care that the law be faithfully executed.”
¹⁴ Ibid., 507.
¹⁵ Ibid., 508 (emphasis in original).
effect in domestic courts,” especially when the Article “call[s] upon governments to take certain action.”\textsuperscript{16} For the majority of the Court and Chief Justice Roberts, it seemed that the President and Senate would not have signed up for the potentiality that an international criminal court decision would have automatic binding domestic effect.\textsuperscript{17}

Unlike the “sole organ” doctrine of Marshall, it is argued that “because the Constitution specifically allocated some executive powers to Congress and required that others be shared with the Senate, the President's executive power over foreign affairs is \textit{residual in nature}.”\textsuperscript{18} Under this residual theory, the Executive retains “unilateral control only of those executive foreign affairs powers that are not otherwise allocated or shared.”\textsuperscript{19} In this respect, both Thomas Jefferson and John Marshall were in agreement. Jefferson articulated that “[t]he transaction of business with foreign nations is Executive altogether.”\textsuperscript{20} Marshall, on the other hand, famously said, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”\textsuperscript{21} Therefore, under some circumstances, the Executive and the Legislative bodies must work together in treaty making before certain treaty provisions become binding domestic law.

Ruth Wedgwood, professor of international law and diplomacy at Johns Hopkins University, has provided the most recent and most extensive examination of the Robbins

\textsuperscript{16} Ibid., 508 (emphasis added). Note that Chief Justice Roberts loosely states that the Senate \textit{ratifies} treaties.

\textsuperscript{17} Ibid., 511.


\textsuperscript{19} Ibid., 1593.

\textsuperscript{20} See Jefferson, \textit{supra} note 5, Part II.

\textsuperscript{21} 10 \textit{Annals of Congress} 613.
Wedgwood’s focus was on Marshall’s claim that the Executive owned the execution of a treaty outside implementing legislation. She fully explains the constitutional implication of Marshall’s “sole organ” doctrine:

Marshall is sketching a potentially radical refocusing of constitutional power-permitting the Executive and treaty power magistracy to make legal determinations and to affect the dearest of domestic entitlements, to detain persons who may happen to be citizens and deliver them into the custody of foreign governments. If one took this truncated view of Article III powers, and allowed some sort of moonlighting magistracy to act in execution of Executive determinations, without any implementing statute or jurisdictional legislation, Congress’ control of the Executive would seem much more fragile.

Such was the issue that Chief Justice Marshall confronted in *Foster v. Neilson*. In *Foster*, Marshall clearly established the principle of “self-executing” treaties. Marshall further explained—and Chief Justice Roberts restated—that a non-self-executing treaty “address itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.”

On this point, Marshall was correct. President Bush, like Congressman Marshall, however, desired the treaty to be self-executing because that fit more with their unitary theory of executive authority.

The United States argued to the Supreme Court in *Medellín*, that because the relevant treaties “create an obligation to comply with *Avena* they implicitly give the President authority to implement that treaty-based obligation.” The State of Texas countered on the grounds that the President’s actions “impermissibly intruded upon the

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22 Wedgwood, 336.
23 Ibid., 350.
24 Ibid., 351.
authority of Congress.” Texas’ argument appears eerily similar to Jefferson’s and the Republicans’ during the Robbins Affair, with the slight difference that the Republicans were concerned with President Adams’ intrusion into the prerogative of the Judiciary. The Court agreed with the State of Texas in Medellín. Roberts stated:

> The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them. The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.  

The constitutional extent of the Executive’s treaty authority, the Court continued, permits the President only to “make” a treaty. Chief Justice Roberts then clarified the power prerogatives. If a ratified treaty lacks provisions establishing domestic effect, “such effect is governed by the fundamental constitutional principle that ‘“[t]he power to make the necessary laws is in Congress; the power to execute in the President.”’

The State of Texas claimed that if President Bush’s Memorandum was a valid execution of treaty law, “any future President, in the interest of international comity, could order the state courts to set aside any state laws inconsistent with our international obligation.” The result in Medellín was precisely the result the Republicans sought in the Robbins case. Livingston, Gallatin, and Jefferson ultimately wanted a state court to conduct a probable cause hearing that could adequately review the evidence pertaining

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30 Ibid., 526.

31 Ibid., 526 (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006)).

32 Cruz, 32.
both to Robbins culpability in the *Hermoine* mutiny and murder and to his citizenship. *Medellín* clarifies the President’s authority in treaty execution on the foundation of Marshall’s judicial decisions with Jefferson’s theory of executive prerogative.
CONCLUSION

The Jay Treaty, much like the U.N. Charter and many other international agreements the United States has agreed to, was meant to formalize friendly working relationships between nations. Although the Framers of the Constitution established authority in the Executive to conduct the foreign affairs of the U.S., execution of those formal agreements was not so clear. The case of Jonathan Robbins demonstrates the disagreements over how a ratified treaty operates as law within the U.S. and how the president effectuates his authority to “take care that the laws are faithfully executed.” Representative John Marshall led the Federalists in the debate over the Robbins case. Marshall’s argument that the Executive Branch possesses all the authority in conducting affairs with foreign nations won the day. Therefore, since the British presented the extradition question to President John Adams, the Executive possessed the authority to direct Judge Bee to deliver up Robbins to the British.

Thomas Jefferson ardently fought against Adams’ attempts to expand the authority of the federal government. However, once president, Jefferson sought ways to increase the authority of the Executive when he thought it was necessary for the good of the nation. Ultimately, Jefferson believed that the “proper scope of presidential authority must be left to reason.” Marshall, like many Supreme Court justices after him, occasionally ruled to keep that expanding authority in check, despite a general

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philosophy favoring a strong federal government.

President Andrew Jackson found that Jefferson’s actions as President and Marshall’s decisions as Chief Justice established the foundation for how modern presidents would exercise their *constitutional* authority. Jackson, like Jefferson, understood that he could not, in all instances, act unilaterally as president. During the Nullification Crisis, Jackson desired to use the nation’s military might to force the southern states into compliance with federal law. Instead, Jackson went to Congress and acquired the ability to use the national military and state militias to carry out federal law. Jackson’s Force Bill demonstrates how the theoretical ends of executive authority once occupied by Marshall and Jefferson began to merge.

Like Jackson before him, President George W. Bush utilized presidential precedent when acting in the *Medellín* case. President Bush was acting under the same assumption as Adams when directing a Texas state court to discharge the United States’ international obligations. Like Adams, Bush followed Marshall’s assertion that a ratified treaty automatically and in whole becomes the supreme law of the land. Thus, a president has full authority within his office to execute the provisions of that treaty. This is precisely the view Marshall stated in his Robbins speech and later held in *U.S. v. Schooner Peggy*. However, in *Foster v. Neilson*, Marshall announced that some treaty provisions need Congressional action to make the provision binding federal law. Without such Congressional action, the treaty provision is non-self-executing; again, a refined distinction Marshall made in *Foster* but not in the earlier *Schooner Peggy* case.

In *Medellín v. Texas*, two hundred and eight years after the Robbins case, Chief

In many respects, Chief Justice Robert’s opinion in *Medellín* is as nuanced as Marshall’s opinions in *Marbury v. Madison*, *Talbot v. Seeman*, and *U.S. v. Schooner Peggy*. Chief Justice Marshall increasingly asserted judicial authority in each of those cases. In both *Marbury* and *Talbot*, individual victories were had, but ultimately, the Court increased its power of judicial review. In *Schooner Peggy*, although Jefferson’s actions were affirmed by Marshall, the Court demonstrated its authority to review treaties. Marshall continued the Court’s review of treaty provisions in *Foster*.

Chief Justice Roberts analyzed the three treaty agreements at issue in *Medellín*, using the precedent set by Marshall. Roberts’ analysis concluded that Article 94 of the U.N. Charter was a non-self-executing provision, which need further action from Congress to make it binding domestic law. Given that conclusion, President Bush’s actions were contrary to his executive powers as defined by the Constitution. Robert’s opinion in *Medellín* asserts a strong judicial stance respecting judicial interpretation of international agreements. President Bush, a political alley to Roberts, may have lost the battle, but like Marshall in *Marbury*, the Judicial Branch won the war.

The *Medellín* decision brought Marshall’s arguments in the Robbins case full
circle with the Jefferson-Republican position. Although Marshall maintained that the
Executive is the “sole organ” in the conduct of foreign affairs when announcing the
opinion in *Foster*, his technical distinction proved to be the nuance needed by Chief
Justice Roberts in *Medellín*. The *Medellín* case demonstrates that the boundary between
the proper execution of treaty obligations and an extra-constitutional act may depend on
an historical understanding of the long relationship between the Executive and Judiciary.
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