Judicial Impartiality and The Judiciary Act of 1789

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Abstract

That a judge be impartial is the sine qua non ingredient of being a judge.
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That a judge be impartial is the *sine qua non* ingredient of being a judge. A judge who has a personal interest in the outcome of a case has lost an essential element, and in some exemplary cases has been held to have lacked jurisdiction because of this interest. The proceeding before the interested judge was *coram non judice*: he was not a judge at all. Judges, however, move in the stream of common life. As the Declaration of Rights in Massachusetts wisely put it, one is entitled to only as impartial a judge as "the lot of humanity will admit." The requirement of impartiality is absolute; the common lot of humanity, which changes with times and circumstances, makes the exact contours of impartiality vary with custom, law, and experience. I look at how these latter factors affected the Judiciary Act of 1789 and practice under it.

I. The Statutory Safeguards of Impartiality.

The Judiciary Act itself provided two safeguards. The first was institutional. The circuit courts were composed of the combination of one district judge with two Justices of the Supreme Court, but the Act provided in section 4: "no district judge shall give a vote in any case of error or appeal from his own decision." This proviso had been added to the committee draft of the Act at the instance of Senator William Grayson of Virginia, an Anti-federalist opponent of the entire bill. The proviso may be seen as a concession to a criticism.

The statute was applied in 1820 in *United States v. Lancaster,* which vacated a decision in which a district judge had sat on an appeal from his own judgment. Writing for the Court, Chief Justice Marshall

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3. The Judiciary Act of 1789, § 4, 1 Stat. 73, 75 (1789).
4. J J. Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, 301 (1971) [hereinafter Goebel].
5. 18 U.S. (5 Wheat.) 434 (1820).
did not give any explanation of its holding, nor did he cite the statute. Marshall's reticence in reasoning about the issue may reflect an embarrassment whose roots will soon be explored below.

The other safeguard was an oath—an oath required and spelled out in section 8:

I, name, do solemnly swear or affirm, that I will administer justice without respect to persons and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as name, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.

It is easy today to overlook the oath as offering insignificant protection against bias. In his famous indictment of the Supreme Court as the servant of class interest, Gustave Myers gave no weight to the justices' promise to do equal right to the poor and to the rich.16 Julius Goebel in his painstaking history of the Act, had nothing to say on the statute's prescription for swearing. But George Washington understood an oath as a serious undertaking made to a divine being. John Marshall invoked the oath at the climax of Marbury v. Madison. The oath should not be dismissed as perfunctory ritual.

The oath that was prescribed was a short version of the oath taken by the judges of the crown, omitting a specific promise not to take directly or through another "any gift, fee or reward, of gold, silver, or any other thing." The oath incorporated an addition to the royal oath made in Virginia by Chancellor George Wythe. Wythe's addition was the clause "without respect of persons."11

The clause, which sounds quaint in modern English where respect for persons is what is always desired, was an English translation of a biblical phrase that in the original meant "without lifting up of faces." In Deuteronomy 10:16-18, God was said to judge without lifting up faces. The judges of Israel were instructed to follow God's example and to judge without lifting up faces. The Hebrew expression parallels an Akkadian phrase "to lift up the forehead," meaning to go surety for one. The Hebrew means that God does not become a surety—does not identify with the judged. Because God is impartial God does not give weight to the particular person before Him.12

In the same vein, in the gospels, Jesus was said to teach without lifting up faces. In the Epistles, Christians were reminded that God equally judged Jews and Greeks because God did not lift faces. In their treatment of each other, Christians were advised not to be face-lifters, that is, not to treat the rich better than the poor.

The Greek version of the Old Testament and the Greek of the New Testament at these points were rendered in Latin by the phrase acceptio personarum, a phrase that could be translated as either "taking up of persons" or "taking up of masks." God was presented as a judge who did not take up persons or masks. The English of the King James Bible rendered acceptio personarum as "respect for persons." God was presented as one who did not judge with biased regard towards the person judged. Judges were told to act likewise. In today's idiom, God did not discriminate, and judges were not to discriminate. The phrase "without respect for persons" invoked the whole Jewish and Christian tradition and proposed the impartiality of God as the standard to which the judge, upon taking the prescribed oath, promised God to adhere.

II. The Criminal Law.

In April 1790, some months after the enactment of the Judiciary Act, it was made a crime "directly or indirectly" to give a bribe "to obtain or procure the opinion, judgment or decree of any judge or judges of the United States." Several aspects of the statute are notable. First, the word "bribe" was not thought sufficient. It was amplified by the words "present or reward or any promise, contract, obligation, or security." Second, the bribe was criminal if offered for a judgment in a case then pending before the judge. A bribe given after the deci-

7. Gustavus Myers, History of the Supreme Court of the United States (1912).
8. See Gerebel, supra note 4 passim.
9. George Washington, Farewell Address, September 17, 1796, reprinted in Messages and Papers of the Presidents, 1797-1897, 205, 216 (James D. Richardson ed. 1907).
10. 5 U.S. (1 Cranch) 137, 180 (1803).
15. See Deuteronomy 10:17 (King James).
16. § 21, 1 Stat. 117 (1790).
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sion was arguably not covered, nor were more subtle attempts to influence. Third, the statute was directed to both the one who gave the bribe and the judge who "in any way" received it (although the adjective "indirectly" was not applied to the judge). Fourth, the person convicted was forever disqualified from federal office and could also be fined and imprisoned. The amount of the fine and the length of the imprisonment were left completely to the discretion of the court. The indeterminacy of the prescribed sentence could be understood as a deterrent or as an indication that Congress could not say how serious the crime was. No convictions are reported under this law.

III. Recusal.

Roman law provided for a procedure styled recusatio iudicis: a litigant could challenge a biased judge and demand that he disqualify himself. Canon law elaborated the grounds.37 A judge was disqualified for love or hate, favor or favor. The great thirteenth century exposition of English law, Bracton’s De legibus et consuetudinibus Angliae, treated Roman and canon law as good English law as the author deemed appropriate. De legibus adopted the canon law.38 But by the

18. Bracton wrote:

Exceptions Against the Person of the Justice and Reasons for Recusal.
We have spoken about exceptions which may be made against jurisdiction. Now we will see if some exception may be made against the person of the justice. He may be held suspect for some reasons such as fear, hate or love.
And I do not see why he must be recused because he goes on deliberately to judge wrongly he makes the case his own and will be held to make restitution of the damages when he is convicted of this by a higher court; and if he does this through negligence he can be summoned to come and make a record so that those things that do need correction will be corrected and reduced to a proper state. Still it seems better to take action in time rather than to seek a remedy after one’s case has been wound up, so

Nothing is more pleasing to an enemy than to be given judgment over one he seeks to injure. It is a terribly dangerous thing to litigate under a suspect judge, and often a most melancholy result follows. But there is only one reason for recusal: suspicion. Suspicion arises from a multitude of causes, as where the justice is a blood relative of the litigant or is a blood relative of his man or subject, his cousin or his friend, or enemy, his relative, in-law, or a member of his household, or his companion or his counselor or spokesman in that case or another case, etc.

19. Noonan, De legibus IV, 281 (this is my translation of the Latin).
This text was misunderstood by Richardson who unaccountably took the sentence “I see no reason” as “a statement of English Law,” to which Bracton later opposed his own personal opinion. H.G. Richardson, Bracton: The Problem of His Text 86-7 (1965). But Bracton first states his own tentative opinion one way and then corrects it by what he says is the better view. There is absolutely no indication that he believes the better view is other than the law of England. In stating English law in this way, Bracton is in accord with Fleta 6.37 and was so understood by 3 W. Blackstone, Commentaries on the Laws of England, 361 (1765).
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time of the American Revolution, this rule had been rejected. Writing in 1765, Blackstone, who was to furnish the legal bible for Americans, found a vestige of the *recesatio iudicis* in the challenge of jurors for cause. A judge, Blackstone declared, could not be challenged. His reason was remarkable: “For the law will not suppose a possibility of bias or favor in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon the presumption and idea.” The oath was supposed to do the job, a not totally fatuous supposition. But Blackstone’s remedy in the case in which the oath failed and the judge in fact behaved partially was to imagine that the judge “would draw down a heavy censure from those to whom the judge is accountable for his conduct.” Small comfort for the losing litigant, small risk for a judge of the highest court.

This passage, written before Blackstone was himself a judge, is Blackstone at his worst—smug and unresponsive to major flaws in the system. This passage, nonetheless, must have impressed its American readers with its peremptory dismissal of the very idea of questioning the impartiality of a judge. St. George Tucker, who brought out an American version of Blackstone in Virginia in 1803, did not point to any contrary American custom. As late as 1900 editions of Blackstone with American annotations do not mention a different practice.

Blackstone said nothing about a biased judge *sua sponte* recusing himself. Taken at face value, his passage excluded this possibility by resting on the legal presumption that the judge was necessarily impartial. Common experience must have suggested that Blackstone could not read so literally. In any event, in 1799 Chief Justice Oliver Ellsworth did disqualify himself in a case before the Supreme Court. The terms “recusal” or “recuse” were not used; they were apparently associated with a litigant’s challenge and therefore not appropriate. Chief

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19. 3 BLACKSTONE, supra note 18, at 361.
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Justice Ellsworth removed himself from judging in *Fowler v. Lindest* because of "the general interest of Connecticut"—a remarkable recusal because the dispute was between two private individuals, one from Connecticut, one from New York, over a piece of land, and, as the Supreme Court went on to hold, did not affect the state of Connecticut at all. Ellsworth had been a judge in Connecticut, and we may underestimate the feelings between Connecticut and New York that made him not wish to appear as a partisan judge.

In 1804, in *M'Ilvaine v. Cox's Lessee*, Chief Justice Marshall disqualified himself, "having formed," as Cranch reports, "a decided opinion on the principal question, while his interest was concerned." The principal question was whether a British subject could inherit land in the United States. The question related to an issue important to Marshall as a purchaser of the Fairfax estate in Virginia from a British heir. In 1805, in *Lambert's Lessee v. Paine*, Marshall again recused himself, this time for the reason that he had once been counsel to one party to the suit. It is apparent from these examples that recusals were discretionary, depends on disclosures by the justices themselves, and were not compelled by any statute. Although the standard of "appearance of bias" was not articulated by the court, it is a rationale that explains these recusals.

IV. Bias on Appeal from the Circuits.

I turn now to instances where bias was arguably present and, first, to the repeated problem caused by the Judiciary Act itself. The Act had no provision to disqualify a justice of the Supreme Court from hearing an appeal from his decision as a circuit court judge. Two efforts in the Senate to introduce such a disqualification were defeated, despite the Senate's willingness to disqualify a district judge in the analogous case. The reason for the Senate votes is not known. The seriousness of the problem was almost at once evident to the new justices of the Supreme Court.

On April 3, 1790, President Washington invited the justices' comments on the Judiciary Act "as [the justices were] about to commence [their] first circuit, and many things may occur in such an unexplored field which it would be useful should be known." Chief Justice John Jay responded by drafting a collective letter that he circulated to his brethren in 1790. He focused on their dual roles. In passing, he made the point that under the Constitution it was the President's duty to appoint judges; Congress, by the Act, had unconstitutionally appointed the justices as circuit judges without any appointment to this position by the President. But the main problem was "the natural as well as legal incompatibility of ultimate appellate jurisdiction and original jurisdiction." There could not be "that public confidence which is really necessary to render the wisest institutions useful" in a system where a judge judged himself.

In Jay's view the Act was contrary to the Constitution. Article III had vested appellate jurisdiction in the Supreme Court. Congress had no power to fuse this jurisdiction with the trial jurisdiction that the Act gave to the circuit courts. "We are aware," Jay said, "of the distinction between a court and its judges." The justices could be given roles other than that of justices of the Supreme Court if their role as justices was not subverted. But the justices could not be "both the controllers and the controlled."

The constitutional argument was elaborated in terms of the effect on public confidence. A judge judging his own opinion must recognize "predications for individual opinions" and "reluctances to relinquish sentiments publicly, though perhaps too hastily given." Such predications and reluctances had an effect on "the most upright men" and infected them "with some degree of partiality for their official and public acts." Appeals were usually made in doubtful cases with "much appearance of reason on both sides." It would be wrong to have a system in which not only the losing party but others would doubt that the court, in resolving those difficult questions, had been free from this kind of influence.

22. 3 U.S. (3 Dall.) 411 (1799).
23. 6 U.S. (2 Cranch) 280 (1804). It has been suggested that senile Justice William Cushing, to whom the opinion is attributed, was not capable of writing it. Harriss & Johnson, *The History of the United States Supreme Court: II, The Foundations of Power: John Marshall, 1801-1835* (1981). As law clerks were nonexistent, the most likely candidate for authorship is John Marshall himself.
27. *Id.* at 554 (Letter from George Washington to the Chief Justice and Associate Justices of the United States Supreme Court (April 3, 1790)).
28. Letter from Chief Justice John Jay to Justice James Iredell (Sept. 15, 1796) (enclosing the draft), *reprinted in 2 Life and Correspondence of James Iredell* (G. McRee ed. 1858) [hereinafter *Life and Correspondence*].
29. *Id.* at 293-95.
30. *Id.* at 294.
31. *Id.*
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of bias.22

Anticipating the proposal that any individual justice could recuse himself from judging an appeal from his own decision, Jay delicately alluded to the danger of logrolling. If the Act in this unconstitutional provision prevailed, there was “much room” for observers to suspect that on certain occasions “mutual interest had generated mutual civilities and tendernesses injurious to right.”23

This shrewd and penetrating analysis, not made public, had no impact. The brethren did not concur.44 Probably if they had, the letter would have been written off as a cunning attempt to get out of circuit riding—a task that was for the Eastern and Middle Circuits onerous, and for the 1900 mile Southern Circuit crushing; even though the justices had not experienced the burden, they could have anticipated the woes that lay ahead.45 In any event, the Act was not modified to meet the objection. In practice, the justices exercised appellate jurisdiction over the circuit courts of which they had been members and did not regularly recuse themselves.46 They might even elucidate in a Supreme Court opinion what they had had in mind in a circuit decision.47 In 1801, in Stuart v. Laird48 the objection was made by a litigant that the justices had “no right to sit as circuit judges, not being appointed as such.” Justice Patterson for the court replied that “practice and acquiescence” afforded “an irrefutable answer.”49 The strong form of the objection, as set out in Jay’s draft to Washington, was never considered. The institution acquiesced in the bias.

V. Bias by Relationship.

Since the Act specified no ground for disqualification, save that

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affecting a district judge in the circuit court, and since self-recusal was discretionary, the question of what degree of relationship to an interested party would disqualify a judge was left to the judge. That a judge should not have a pecuniary interest in a case was accepted doctrine, well put in 1816 by Chief Justice Isaac Parsons of Massachusetts:

It is very certain, that by the principles of natural justice, of the common law, and of our constitution, no man can lawfully sit as a judge in a cause in which he may have a pecuniary interest. Nor does it make any difference, that the interest appears to be trifling; for the minds of men are so differently affected by the same degrees of interest that it has been found impossible to draw a satisfactory line. Any interest, therefore, however small, has been held sufficient to render a judge incompetent.46

But suppose the interest was that of a near relation?

On April 4, 1817, the Bank of the United States transferred on its books twelve shares of its stock to John Marshall and issued therefore Certificate No. 1076.41 At some time before July 1817, Marshall acquired an additional ten shares which he gave to Jacqueline Harvie, the husband of Marshall’s favorite child, Mary. Harvie understood he was to hold these shares in a kind of informal trust for his mother-in-law Polly, although she possessed no estate of her own, so that Marshall himself had “the legal right” to the property.42 On December 10, 1817, Marshall acquired another five shares represented by Certificate No. 3665. At some time thereafter Marshall acquired Certificate No. 5333 for thirteen shares, taking these shares as the executor of the estate of

41. Certificate of Transfer Clerk A. Summers, Bank of the United States, August 24, 1837; transmitted by Nicholas Biddle, President of the Bank, to Benjamin Watkins Leigh, August 24, 1837. See, The Correspondence of Nicholas Biddle 285 (R.C. McCrane ed.1919) [hereinafter Correspondence]. This certificate was sent by Leigh to the Niles National Register and published in it September 23, 1837 at p. 51. The certificate number of the stock is given in the power of appointment to transfer the stock executed by Marshall on February 5, 1819. A copy of this power of appointment was sent by Leigh to Niles and also published on September 23, 1837, at p. 51.
42. Letter from Benjamin Watkins Leigh to M.S. Watkins (Sept. 11, 1837) accompanied by a letter from Jacqueline Harvie to Watkins confirming Leigh’s account, both letters published in Niles National Register 51 (September 23, 1837). Leigh states that “the legal right” to the property belonged to Marshall himself.
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32. \textit{Id.}
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34. This conclusion is an inference from the fact that there is no evidence that the letter was ever sent to President Washington. \textit{Goreel, supra} note 4, at 556.
35. Letter from James Iredell to Chief Justice John Jay and Justices Cushing and Wilson (Feb. 11, 1791), \textit{reprinted in 2 Life and Correspondence, supra} note 28, at 323.
36. \textit{See The Antelope, 23 U.S. (10 Wheat.) 66 (1825) (Justice Johnson reviews his own decision).}
37. \textit{See Penhallow v. Doane's Adm'r, 3 U.S. (3 Dall.) 54 (1795) (Justice Blair, who had heard the case on circuit in New Hampshire).}
38. \textit{Stuart v. Laird, 5 U.S. (1 Cranch) 299, 309 (1803).}
39. \textit{Id.}

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On April 4, 1817, the Bank of the United States transferred on its books twelve shares of its stock to John Marshall and issued therefore Certificate No. 1076.\textsuperscript{41} At some time before July 1817, Marshall acquired an additional ten shares which he gave to Jacobin Harvie, the husband of Marshall's favorite child, Mary. Harvie understood he was to hold these shares in a kind of informal trust for his mother-in-law Polly, although she possessed no estate of her own, so that Marshall himself had "the legal right" to the property.\textsuperscript{42} On December 10, 1817, Marshall acquired another five shares represented by Certificate No. 3665. At some time thereafter Marshall acquired Certificate No. 5333 for thirteen shares, taking these shares as the executor of the estate of

40. \textit{Pearce v. Atwood, 13 Mass. 324, 340 (1816) (emphasis in original).}
41. \textit{Certificate of Transfer Clerk A. Summers, Bank of the United States, August 24, 1837, transmitted by Nicholas Biddle, President of the Bank, to Benjamin Watkins Leigh, August 24, 1837. See, \textit{The Correspondence of Nicholas Biddle} 285 (R.C. McCrane ed.1919) [hereinafter \textit{Correspondence}]. This certificate was sent by Leigh to the 	extit{Niles National Register} and published in it September 23, 1837 at p. 51. The certificate number of the stock is given in the power of appointment to transfer the stock executed by Marshall on February 5, 1819. A copy of this power of appointment was sent by Leigh to Niles and also published on September 23, 1837, at 51.
42. \textit{Letter from Benjamin Watkins Leigh to M.S. Watkins (Sept. 11, 1837) accompanied by a letter from Jacobin Harvie to Watkins confirming Leigh's account, both letters published in \textit{Niles National Register} 51 (September 23, 1837).} Leigh states that "the legal right" to the property belonged to Marshall himself.
his deceased brother William. As of January 21, 1819, Marshall himself, his wife, and his brother's estate held forty shares of the Bank's stock.

On January 21, 1819, Marshall sold the five shares represented by Certificate No. 3665 to James H. Lynch of Richmond. The transfer did not take place on the Bank's books until March 26, 1819, so that Marshall received a dividend declared on January 23, 1819. But the stock was out of his hands and paid for by January 21.***

On February 8, 1819, in Washington, Marshall transferred Certificate No. 1076 for twelve shares to his son Thomas, as trustee for "the widow and heirs" of Marshall's brother William. He apparently also transferred the thirteen shares which he held as executor to Thomas at the same time. He also wrote to his son-in-law Harvie telling him that the ten shares held by Harvie should now be treated as Harvie's own. On February 11, 1819, in Richmond, Benjamin Watkins Leigh, as co-executor of the estate of George Keith Taylor, acquired thirty shares of the Bank's stock. Leigh's co-executor was Marshall, and the stock was recorded on the Bank's books in their joint names as co-executors.

The Bank had been chartered in 1816 and began business in January 1817. Marshall was on the ground floor, or close to it, when he acquired his stock in 1817 as speculators swarmed to get a piece of the only national bank. The stock was issued at a par of $100 but in 1818 traded at fifty percent above par. In 1818, Maryland subjected the branch of the Bank to a tax professedly designed to destroy the branch.

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In June 1818, the highest state court in Maryland upheld the tax. If other states followed suit, the Bank itself would be destroyed. Hostile legislation was adopted in Georgia, Indiana, Illinois, Kentucky, North Carolina, and Tennessee. By reason of these attacks and other misfortunes the stock by early 1819 fell to par or just below par. On September 18, 1818, the Supreme Court of the United States issued a writ of error to the Court of Appeals of Maryland, taking for review the latter's decision upholding the tax. By this date John Marshall was certain that McCulloch v. Maryland would be argued before him in the February 1819 term.

According to Lynch, the purchaser of the five shares in Richmond, this was the reason Marshall sold to him: "[Lynch] advised Mr. Marshall at the time not to sell his stock, but [Marshall] assigned as his reason for selling it, that he did not choose to remain a stockholder, as questions might be brought before the Supreme Court in which the bank might be concerned." Marshall's son-in-law also revealed that Marshall wrote him that he should keep the stock as his own for the same reason: "there was a suit pending in the Supreme Court in which the bank was interested, and [Marshall] therefore wished to divest himself of all manner of interest in the stock of the bank." As for the thirty shares of stock acquired in Marshall's name as co-executor on February 9, 1819, Leigh later asserted that he, Leigh, made the purchase in Richmond without consulting Marshall, who was already in Washington, and that he did so simply because he thought it a "judicious investment." McCulloch v. Maryland was argued to the Supreme Court from February 16, 1819, to March 3, 1819. Marshall, writing for a unanimous Court, issued his opinion three days after the close of argument.
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52. White, supra note 49, at 543.
53. 4 A. Bouveridge, THE LIFE OF JOHN MARSHALL 207 (1919) [hereinafter Bouveridge].
54. Smith, supra note 51, at 78.
55. White, supra note 49, at 543.
56. According to Bouveridge, "It appears to be reasonably probable that at least the framework of the opinion in McCLulloch v. Maryland was prepared by Marshall when in Richmond during the summer, autumn and winter of 1818-19." 4 Bouveridge, supra note 53, at 290.
57. See note 44 and accompanying text.
58. Letter from Leigh to Watkins, supra note 42.
59. Id.
60. 17 U.S. (4 Wheat.) 316 (1819).
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The significance of the victory for the Bank has been disputed. Gerald Gunther views it as peripheral, since the Bank’s very existence was under attack in the House of Representatives. Nonetheless, the kind of encouragement the Court gave the Bank could not be without repercussions in the House. More importantly, the decision was “a great aid” to the Bank with depositors, “an immense help” in restoring confidence in it. The “turning point” in the market’s rating of the bank’s stock was mid-1819. McCulloch contributed to the turn. In the 1820s, the stock rose well above par.  

At the moment of judgment in McCulloch, Marshall had standing in his own name in five shares of stock, which he had already sold. He held thirty more in his name as co-executor. His son held twenty-five shares in trust for John Marshall’s sister-in-law, and his son-in-law held ten shares outright. John Marshall’s salary as Chief Justice of the United States was $4,000 per annum, raised on February 20, 1819, twenty-five percent to $5,000 per annum. Excluding the stock already sold, the stock in which he had some “manner of interest” was worth $6,500 (65 shares x $100 par value). Excluding the stock held as co-executor, the stock held for the benefit of family members was worth $3,500. Had Marshall met the standard he had expressed to Lynch and to Harvie by giving the stock to a near relative or by his son holding the stock for one?  

The answer from precedent is “No.” As early as 1270, Bracton had warned against the factors by which “the prohit of judgment is bent,” had noted that “the line of straight judgment is curved for the line of blood,” and had explicitly provided for recusal where the judge was suspect because the litigant was an in-law. Coke had held in 1610 that if the sheriff who returned the jury was related to either side by marriage, the sheriff was not impartial and the return was void. In a Connecticut case decided in 1814, a statute required that the appraiser on an execution of a writ be disinterested. The court held that the statute was violated by the justice of the peace appointing an appraiser who was the plaintiff’s nephew-in-law. Chief Justice Zephaniah Swift observed that otherwise there would be room for great fraud, and the justice of the peace could appoint “a father, son, or brother of the parties.”  

In Virginia itself, in 1809, St. George Tucker did not sit in Hunter v. Fairfax’s Devises. Tucker had been active in litigation involving the Fairfax estate and was married to Anne Hunter. The reporter carries the note that he did not sit “through motives of delicacy, being nearly related to a person interested.” This Virginia precedent could not have been unfamiliar to Marshall as he and his brother had a large personal stake in the suit.  

By the standards of past centuries and those of the United States of 1819, the interest of a close relative impaired impartiality. The impairment, in an age of closer family ties than our own age, was obvious. Chief Justice Marshall took a lively interest in his relatives. Chief Justice Marshall did not violate the bribery law by holding stock in a litigant before his court until a week before oral argument, or by transferring some of his stock to his son-in-law and transferring some of his stock to his son for the benefit of his sister-in-law. If in fact he judged impartially he did not violate his oath of office. He did violate the ordinary requirements of law for impartiality by judging in a case in which Jacqueline and Mary Marshall Harvie and Mrs. William Marshall stood to profit by his judgment.  

G. Edward White has called attention to another breach of impartiality by Marshall. In litigation going back to the 1790s, in which he had been counsel, John Marshall had a personal interest in at least 50,000 acres of the Fairfax estate, for which in 1806 he had paid about 4,500 pounds. The Supreme Court of Appeals of Virginia had de-
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cided against him. The Supreme Court of the United States reversed, Marshall not participating. The Supreme Court of Appeals of Virginia refused to cooperate with the decision, handing down a decision to that effect in December 1815. It was necessary to petition the Supreme Court of the United States for a writ of error to review the Virginia court's decision. In his own hand, Marshall wrote the petition for the petitioning party and had it delivered to his colleague, Bushrod Washington. The writ was granted. With amazing speed, the case was docketed in the Supreme Court of the United States and argued in February of 1816. It was decided in Marshall's favor that same month, 1816. Marshall had scrupled only at actually participating in the judgment and at signing the petition, leaving it unsigned by any counsel or by anyone. As White observes, "Marshall had taken no chances that the Supreme Court would not hear Martin v. Hunter's Lessee.

White asks how Marshall's behavior may be explained. He combines two hypotheses: (1) that "Marshall's personal and political stakes in the case . . . . "outweighed" the risk of subsequent disclosure" of his involvement with the petition, and (2) that he and his colleagues believed that "judges did not make law but rather only discovered universal or fundamental principles . . . . These principles were regarded as distinct from the personal biases of judges; they represented the will of the law, not the wills of the judges." With this view of the law, Marshall and his colleagues could view his vigorous interventions to promote his own case as not "clearly outside the limits of judicial propriety."

Does a similar jurisprudential reason explain Marshall's retention of bank stock for the Marshalls while deciding the Bank's case? I do not think so. First, the possible improprieties are different. In Martin v.

Hunter's Lessee, Marshall's involvement was procedural. In McCulloch, it goes to the heart of what a judge is—a decisionmaker without a personal stake in what he is deciding. Second, one could not cite chapter and verse against what Marshall did in Martin. What Marshall did in McCulloch ran against established authority. While some of that authority spoke only to the acts of lesser officials, not judges, in favor of their relatives, there was at least one case on the books of the Supreme Court of Pennsylvania quashing a judgment because of the deciding judges' tenuous financial interest in the case. Close to hand and so well known to Marshall was the example of Tucker feeling bound to recuse himself in Marshall's own case. Judicial precedent and practice did not countenance the proposition that a judge with financially interested relatives was merely finding the law, not furthering his own interest.

Third, the accusation that Marshall himself owned bank stock at the time of McCulloch was treated by Benjamin Watkins Leigh, Marshall's friend and lawyer, as a grave impeachment of Marshall's integrity. The accusation, made 1837 by William Smith, a United States senator from South Carolina on the authority of a United States senator from Virginia, was intended to weaken Marshall's authority on the point of constitutional law involved. The effect of the charge of bias was, in short, exactly what it would be today: an undermining of confidence in the biased decision. The view that judges' bias did not affect the law did not hold when the bias was financial.

Leigh, informed of Senator Smith's attack, came to Marshall's defense, attributing Smith's reproach to misinformation and to envy of a greater man, or to partisan political motives. Leigh drew support from Nicholas Biddle, the Bank's president, who cooperated by making the transfer records of the Bank available to him in order "to perform the sacred duty of defending the character of an honest man from the reptiles who avenge themselves for his superiority while he was alive, by crawling on his dead body."
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79. White, supra note 49, at 167-68.
81. Id. at 362.
82. White, supra note 49, at 168.
83. Id. at 168.
84. Id. at 171.
85. Id. at 196.
86. Id. at 172.

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87. Supra notes 67-78 and accompanying text.
89. Hunter, 15 Va. (1 Munf.) at 226.
90. Letter from Leigh to Watkins, supra note 42.
91. Letter from Leigh to Biddle (August 21, 1837) reprinted in CORRESPONDENCE, supra note 41, at 285.
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The astonishing result of their joint efforts was Leigh's publication in *Niles*, the *Time* magazine of the day, of the records showing that not John Marshall personally, but the Marshall family had a substantial interest in the Bank. How is Leigh's action to be explained? By naivete, I suggest. Leigh had a very high regard for Marshall. He could not believe he would be influenced by his family's interest in the Bank. He was anxious to refute Senator Smith. Single-mindedly he did so, unconscious of what he was disclosing. The naivete is manifest in his declaration in *Niles* that he bought bank stock as "a judicious investment" for himself and Marshall as co-executors. To have imagined that this purchase did not involve Marshall—at the very moment hearing the case—was remarkably naive. Not to have informed Marshall of his purchase was also so. And Leigh left open the question of how he, the close associate of John Marshall, got the idea in February 1819 that the Bank was a judicious investment. Parenthetically it may be observed that Leigh's own sense of judicial propriety was more limited than Marshall's since Leigh did not hesitate to buy and register bank stock in Marshall's name at the very moment Marshall was hearing the bank's argument.

Naive though it was, Leigh's answer sufficed in a political battle that went on to other issues besides the integrity of John Marshall. Subsequent biographers of Marshall have ignored Leigh's disclosures. The inference may be drawn that they have ignored them because Leigh's disclosures so seriously affected the image of Marshall they wished to convey. The prime example is Albert Beveridge, Marshall's most famous biographer, who wrote of him: "Above all other influences upon his associates on the bench and, indeed, upon everybody who knew him, was the sense of trustworthiness, honor, and uprightness he inspired. Perhaps no public man ever stood higher in the esteem of his contemporaries for noble personal qualities than John Marshall." Beveridge added: "Even Jefferson, in his bitterest attacks, never intimated anything against Marshall's integrity; and Spencer Roane, when assailing with great violence the opinion of the Chief Justice in *McCulloch v. Maryland* paid a high tribute to the purity of his per-

95. *Id.* at 90 n.2.
96. *Id.* at 219.
97. *Id.* at 318.
98. *Id.* at 290.
99. Beveridge had been informed of the Leigh-Biddle correspondence by McCrane, then an assistant professor of history at Cincinnati University. *Id.* at 318 n.2. McCrane's edition of the letters, citing to *Niles*, appeared in 1919. Beveridge published volume 4 of his life of Marshall in the same year, referring to the pages in McCrane's book that deal with the correspondence, but not to *Niles*.
100. A BEVERIDGE, supra note 53, at 524 n.3.
101. *See* id. at 290.
102. Where the facts are against him, Beveridge blusters. See, e.g., 3 BEVERIDGE, supra note 53 at 395-96 (his treatment of the bias exhibited by Marshall in the trial of Aaron Burr). Contrary to the statement of Beveridge in the text, Thomas Jefferson did impugn Marshall's integrity. Jefferson, as Beveridge reported elsewhere, said Marshall was guilty of "the profoundest hypocrisy." 2 BEVERIDGE, supra note 53, at
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For Beveridge, *McCulloch v. Maryland* is "among the very first of the great judicial utterances of all times."96 It was intolerable for him that there should be a cloud over it. Accordingly, Beveridge wrote, "As soon as he learned that the suit had been brought which, of a certainty, must come before him, the Chief Justice disposed of his holdings."97 Beveridge wrote these lines believing that Marshall had begun work on *McCulloch* in the summer of 181898 and knowing that Marshall had received dividends from the bank in January 1819.99 Beveridge took a second step to cover Marshall. He knew of the Bank stock held for Polly Marshall, the Chief Justice's wife. He chose to refer to that stock in these terms: "Mrs. Marshall had a modest fortune of her own, bequeathed to her by her uncle. She invested this quite independently of her husband."100 The footnote supplying this statement is a letter from Leigh to Biddle referring to the Bank stock transferred by Marshall to Harvie. Beveridge does not point out that Polly Marshall did not hold legal title, nor does he mention that the property included stock in the Bank of the United States.

Beveridge performed a third operation to protect his hero. Beveridge had been in correspondence with Reginald C. McGrane, the editor of Biddle's correspondence.101 McGrane had drawn Beveridge's attention to the Leigh-Biddle exchange. McGrane had also published the correct references to Leigh's letters in *Niles* where Marshall's holdings were documented. Beveridge suppressed all reference to *Niles*. It is not an unreasonable inference that Beveridge believed that Marshall could not be defended if the facts were known.102

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94. [Footnote text]
95. [Footnote text]
96. [Footnote text]
97. [Footnote text]
98. [Footnote text]
99. [Footnote text]
100. [Footnote text]
101. [Footnote text]
102. [Footnote text]
In a different generation we have, I believe, come to the realization that our heroes cannot be spotless. The greatest have flaws. The flaws qualify, but do not destroy the greatness. Facing the facts regarding McCulloch, I would suggest an explanation other than jurisprudential. As White has pointed out, apropos Marshall's move in Martin v. Hunter's Lessee, part of the explanation of that action lies in Marshall's personal and political interests getting the better of his prudence. The same may be said of Marshall's actions regarding McCulloch. Politically, Marshall was committed to the cause of a national bank. Personally, a family investment was at issue. He did not want to abandon either the cause or the investment; so he did not recuse himself and he did not effectively dispose of the interest. Believing that the political cause rightly affected his views, strongly conscious of inner rectitude, and knowing that there was no power on earth to call him to account, he would not have hesitated to believe that he could judge fairly on the merits.

What Marshall did do, of course, revealed an awareness that he would be terribly criticized if it were known that he owned Bank stock. He did not take refuge in the sophisms of a later Lord Chancellor in deciding a case involving a company in which he owned stock. He


A landowner attempted to prevent a canal company from using navigable water he claimed to own. The company brought suit in Chancery to enjoin him from interfering with navigation. The Vice Chancellor granted the injunction and Lord Cottenham affirmed the injunction in 1838 and 1848. The landowner was arrested for contempt.

In 1849, his counsel discovered that Cottenham held 92 shares in the company, partly in his own right and partly as a trustee for others. The shares were worth several thousand pounds and counsel describes the Chancellor as "a large shareholder" in the company. On discovery of these facts the landowner moved to have the injunction dissolved. The Master of the Rolls advised the Lord Chancellor that his decrees were valid because he had acted on the ground of necessity as the highest appellate judge and as he was not a party of record to the case.

The House of Lords held that the Chancellor's order was voidable, but not void and that the Vice Chancellor, not being merely the Chancellor's deputy, had been quite simply fraudulently misled in issuing the order. In passing, Lord Campbell observed, "No
In a different generation we have, I believe, come to the realization that our heroes cannot be spotless. The greatest have flaws. The flaws qualify, but do not destroy the greatness. Facing the facts regarding McCulloch, I would suggest an explanation other than jurisprudential. As White has pointed out, apropos Marshall’s move in Martin v. Hunter’s Lessee, part of the explanation of that action lies in Marshall’s personal and political interests getting the better of his prudence.139 The same may be said of Marshall’s actions regarding McCulloch. Politically, Marshall was committed to the cause of a national bank. Personally, a family investment was at issue. He did not want to abandon either the cause or the investment; so he did not recuse himself and he did not effectively dispose of the interest. Believing that the political cause rightly affected his views, strongly conscious of inner rectitude, and knowing that there was no power on earth to call him to account, he would not have hesitated to believe that he could judge fairly on the merits.

What Marshall did do, of course, revealed an awareness that he would be terribly criticized if it were known that he owned Bank stock. He did not take refuge in the sophisms of a later Lord Chancellor in deciding a case involving a company in which he owned stock.140 He took cosmetic steps. He did not dispose of the stock he held personally at the time during which it seems probable he was preparing the opinion before the argument. He waited till the very last minute—so late that he was still listed as the legal owner on the Bank’s books when he did decide. He made a point of letting Harvie and Lynch know that he was getting rid of his Bank stock; he could assume that they would spread the word. If their later affidavits are to be believed, he was not entirely candid with them in stating that he was disposing of “all manner of interest” in the Bank. He did not in fact get rid of the Bank stock held for or by his close relations. When the great decision was well past, he took back some of the Bank stock he held in trust for the family, permitting the inference that he had parked it with his son Thomas.141 These actions, taken together, show both a consciousness of impropriety in the appearance, at the time of judgment, that either he or Polly owned bank stock, and an unwillingness to acknowledge that the property of his son-in-law and his sister-in-law, by precedent and practice, was not differentiated from his own.

To return to the Judiciary Act of 1789: The Act took minimal steps to assure the sine qua non of impartiality. The sua sponte efforts one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern.” Lord Campbell’s comments are all too typical of judicial responses to challenges on the basis of prejudice. Id. at 315.

105. Letter from Leigh to Watkins, supra note 42. In a will executed by Marshall in April 1826 and confirmed by various codicils, the last of which is dated July 3, 1835, he states that his wife requested me while living to hold in trust for our daughter 100 Bank shares, to pay the dividends to her during my life, and to secure the same to her and her children, when providence shall call me also from this world. In compliance with the will of her whose sanctified spirit has fled from the sufferings inflicted on her in this life, I give to my nephew, Thomas M. Ambler 100 Bank shares, which are separated from my other stock, enclosed in the piece of paper having my daughter’s name endorsed on it, in trust that the dividends shall be regularly paid to my daughter for her separate use. . . . my daughter will never forget that this is the gift of the best and most affectionate mothers.

It is not clear what Bank stock was being referred to. It is notable that Marshall lays great emphasis on the stock belonging to his wife, being held in trust by him and being a gift from his wife.

The account of Marshall’s estate by his brother, James K. Marshall, shows the sale of stock in the Farmers Bank of Virginia and in the Bank of Virginia. As the bank stock for Mary was being held in trust, it would not appear in this account.

The same will notes that he is the creditor of the estate of his brother, William, for which of course he had purchased Bank of the United States stock.
of the justices to remove themselves where their impartiality might reasonably be doubted were sporadic. The justices failed to recuse themselves in the common case of institutional bias in hearing appeals from their own judgments. In one famous case, Chief Justice Marshall failed to remove himself although a relative's financial interest would have caused an observer who knew the facts to suspect bias. The requirement of impartiality is absolute, but the judges in their humanity permitted the contours of that impartiality to vary considerably. The Judiciary Act of 1789 offered little resistance.

Panel Discussion — Judge John Noonan's Presentation*

JOHN SANCHEZ: Good afternoon. Before turning to the panelists for their observations and questions, in addition to questions from the floor, I have one rather short question. This relates to an earlier part of Judge Noonan's presentation. Judge Noonan stated that there was evidence of bias with Supreme Court Justices sitting on their own appeal. Do we have a present-day equivalent of that bias on the Circuit Courts of Appeal, when a panel delivers a decision and then sits on review en banc on the same decision?

JUDGE JOHN NOONAN JR.: Well, in the interest of candor, if not of impartiality, I should reveal that Professor Sanchez and I discussed this last night, so I am not totally unprepared. But understand the practice of a panel of a circuit court: three judges hear a case, decide one way or the other, then the losing party appeals to the whole court en banc. Those three panel members will then sit again—in some circuits, they will always sit, in the Ninth Circuit they will sit if they are chosen by lot, because we do not have the whole court hear the appeal. But in either event, the circuit provides that on the hearing by the full court, the same judges who originally sat on the panel appeal are not disqualified from hearing the appeal to the full court. So it is a very good question. Is this not the same problem? If you look on the appeal to the full court as a new chance for appeal—there is always oral argument and there are often new briefings—it seems something of a sham to allow people who have already judged the case to then sit on the appeal.

Now, it is true that in the old Supreme Court practice, once in a great while a judge changed his mind. It is also true in the circuit; I have seen it happen exactly once, when a judge had decided one way then changed his mind, and went the other way. Actually was great. Everybody admired it, that he was able to change his mind and to write

* The panelists included John Sanchez, Associate Professor of Law, Nova Center for the Study of Law; Michael M. Burns, Professor of Law, Nova Law Center; Janet Mann, Associate Attorney, Steel, Hector, Davis, Miami, Florida, and John Flackett, Professor of Law, Boston College Law School; Judge John Noonan, Jr., Judge, United States Court of Appeals for the Ninth Circuit.