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# A Judge for All Seasons

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## A JUDGE FOR ALL SEASONS

R. KENT NEWMYER\*

[Marshall] has done more to establish the Constitution of the United States on sound construction than any other man living.

John Quincy Adams<sup>1</sup>

He would have been deemed a great man in any age, and of all ages.

Joseph Story<sup>2</sup>

[I]f American law were to be represented by a single figure, sceptic [sic] and worshipper alike would agree without dispute that the figure could be but one alone, and that one, John Marshall.

Oliver Wendell Holmes Jr.<sup>3</sup>

Holmes was right—The evidence that John Marshall is *the* representative figure of American law is overwhelming. What was true in 1901 remains true today. There is a paradox involved, however, the kind Holmes himself loved to ponder as something that “would take the scum off your mind.”<sup>4</sup> The paradox is that Marshall’s reputation for greatness appears to exceed the scope of

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\* Professor of Law and History, University of Connecticut. This work appeared originally as the epilogue to Prof. Newmyer’s recent Marshall biography, *John Marshall and the Heroic Age of the Constitution*.

1. 8 JOHN QUINCY ADAMS, MEMOIRS OF JOHN QUINCY ADAMS 315 (Books for Libraries Press 1969) (Charles F. Hobson ed., 1877).

2. Joseph Story, *Life, Character, and Services of Chief Justice Marshall* (Oct. 15, 1835), in 3 JOHN MARSHALL: LIFE, CHARACTER AND JUDICIAL SERVICES 369 (John F. Dillon ed., 1903).

3. Oliver Wendell Holmes, *John Marshall: In Answer to a Motion that the Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day on which Marshall Took His Seat as Chief Justice*, in COLLECTED LEGAL PAPERS 270 (1920).

4. Letter from Oliver Wendell Holmes to Harold J. Laski (Dec. 22, 1921), in 1 HOLMES-LASKI LETTERS 302 (Atheneum 1963) (Mark De Wolfe Howe ed., 1953).

his juridical accomplishments. "If I were to think of John Marshall simply by numbers and measure in the abstract," Holmes opined, "I might hesitate in my superlatives."<sup>5</sup> He had a point. Concede that Marshall was a workhorse for the Court, that he spoke for the majority in forty-nine percent of all the cases heard during his tenure, in fifty-nine percent of all the constitutional law decisions, and in almost all of the leading ones.<sup>6</sup> The fact remains that only a handful of these opinions were truly memorable. As Holmes put it, "Remove a square inch of mucous membrane, and the tenor will sing no more."<sup>7</sup> Take away any three of Marshall's great opinions—say *Marbury*,<sup>8</sup> *McCulloch*,<sup>9</sup> and *Gibbons*<sup>10</sup>—and it would be difficult to argue that he was *the* constitutional lawgiver of all time. Keep in mind, also, that his circuit opinions, though competent, were not notable for pioneering new doctrine, as, for example, were those of Story on the New England circuit. Beyond Marshall's opinions, there is mainly the massive biography of George Washington in its various editions. Although it is better history than once was thought, it is remembered, when it is, more for what it reveals about Marshall than about Washington. In any case, the biography has little bearing on Marshall's legal reputation. Unlike other famous statesmen of the early Republic, Marshall's extant correspondence is decidedly minimalist, more like Lincoln's slender opus than that of Jefferson, Adams, Madison, Hamilton, or Washington. Nor was Marshall a legal educator as was his teacher George Wythe, or David Hoffman of Maryland, or his colleague Story. This leaves only the eleven polemical essays written in defense of *McCulloch*. Brilliant and revealing of Marshall's legal acuity as they are, they do not warrant comparison in terms of legal learning to St. George Tucker's edition of Blackstone's *Commentaries*, James Kent's four-volume *Commentaries on American Law*, or Story's dozen volumes of legal and constitutional commentaries. Even in the area of constitutional law, there was some measure of truth in Holmes's

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5. Holmes, *supra* note 3, at 267.

6. Robert G. Seddig, *John Marshall and the Origins of Supreme Court Leadership*, 36 U. PITT. L. REV. 805 (1975).

7. Holmes, *supra* note 3, at 267.

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

9. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

10. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

assessment that "after Hamilton and the Constitution itself," Marshall had little truly original to offer and not much beyond "a strong intellect, a good style, personal ascendancy in his court, courage, justice and convictions of his party."<sup>11</sup>

Beyond this grudging concession, Holmes offered little to resolve the paradox of Marshall's greatness, except for one keen heuristic insight: that like other great men, Marshall "represented a great ganglion in the nerves of society" and was "a strategic point in the campaign of history, and part of his greatness consists in his being *there*."<sup>12</sup> Like others of the founding generation, Marshall was fortunate to have lived in an age that not only permitted but invited bold and creative statesmanship. Like Erick Erickson's young man Luther, however, Marshall was not only energized by the remarkable age in which he lived but modified its rich legacy, and, to steal a phrase from Benjamin Cardozo, he molded it creatively "in the fire of his own intense convictions."<sup>13</sup> Contrary to his own modest assessments of his career, what Marshall created has to a remarkable degree withstood the ravages of time. Not only has his reputation for greatness survived, but it has, if anything, taken on mythical proportions. It is the myth of Marshall's greatness that now needs to be explicated, if it can be.

#### JOHN MARSHALL ON JOHN MARSHALL

The Chief Justice died in Philadelphia July 6, 1835, a few months short of eighty years of age, brought down by an ailment that had plagued him for several years. Present during the final hours were his sons, except for Thomas, who, unbeknownst to his father, died in a freak accident on his way to join his brothers. Marshall's death was not a surprise. Though he continued to perform his duties on the Court, it was clear to family and friends and to Marshall himself that the end was approaching. He had long since put his affairs in order, with an eye as always to providing for his family. On April 9, 1832, after the death of his wife, he revised his earlier will, which had come down hard on James for his improvident ways. John

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11. Holmes, *supra* note 3, at 269.

12. *Id.* at 267-68.

13. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 170 (1921).

Marshall bequeathed the family place at Oak Hill, plus other lands, to Thomas. Other extensive holdings, including "the slaves on the land," were parceled out fairly to Jaquelin, James Keith, and Edward Carrington. The Chickahominy plantation, "with all the slaves stock, and plantation utensils, thereon," and his Richmond properties, along with "slaves and household furniture," went in trust to his daughter Mary and her children, "so as to protect her and them from distress, whatever casualties may happen." Smaller bequests, including bank stock and land, went to various nephews and grandchildren, including 1000 acres "to each of my grandson's [sic] named John." To his "faithful servant Robin," Marshall bequeathed emancipation "if he chuses [sic] to conform to the laws on that subject requiring that he should leave the state, or if permission can be obtained for his continuing, to reside in it." If Robin chose Liberia, he was to receive a hundred dollars; if he chose to remain a slave, he could choose his master from among the Marshall children.<sup>14</sup>

With his family generously provided for, Marshall was free to continue his work on the Court and grapple with his own illness, which he did without complaint and, according to Story, with a stubborn disregard of his doctor's orders. Throughout his waning years, as throughout his life, he remained casual about his reputation.<sup>15</sup> He labored to complete the two-volume edition of the Washington biography and even began to plan for a one-volume student edition, but he seemed less concerned about his reputation as a biographer than about spreading the word of Washington's relevance to the new age. One slight vanity was his quaint and touching wish that at least one of his grandsons should be named John. Friend and foe alike, however, attested to his modesty, his "plain and unpretending" manner, and his republican simplicity.

This is not to suggest he doubted his own ability. He could not have sallied forth so valiantly in defense of his version of constitutional truth and justice, or stayed the course so long, had he

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14. Marshall's revised "last will and testament" (Apr. 9, 1832), in 11 *THE PAPERS OF JOHN MARSHALL* (forthcoming 2002). For a brief history of *The Marshall Papers* project, see S. Dean Olson, *A Collection After All These Years*, WM. & MARY MAG., Fall 1997, at 28-31.

15. Letter from Joseph Story to Richard Peters (May 20, 1835), in 2 *LIFE AND LETTERS OF JOSEPH STORY*, at 194 (William W. Story ed., 1851).

been plagued with self-doubt. The substance and tone of his opinions bespoke his conviction and his determination to educate posterity to republican verities, to leave future generations a Constitution that was adequate to the "various crises of human affairs."<sup>16</sup> But his opinions, though they bore the imprint of his genius, were also, as he acknowledged, collective efforts. He was determined to shun "paltry vanity," as he once put it, and made no effort to save his papers, doubting whether the written record of his life was "worth communication or preserving." True to his word, he pored over his "old papers" in the spring of 1833 "to determine how many of them were worthy of being committed to the flames."<sup>17</sup> The letters that survived, found mostly in the papers of others, are devoid of puffery and self-justification, or even self-explanation. There are a couple brief autobiographical letters, plus a somewhat fuller one to Story, written at his request. There are the impressive journals Marshall kept while he was in Paris, relating mainly to the XYZ negotiations. But there is no personal diary, no memoir or journal, like those kept by Washington, John Adams, and John Quincy Adams, recording his thoughts or explaining himself to posterity. Unlike Webster, he did not quest for fame. Jefferson listed his greatest accomplishments on his tombstone; Marshall wanted only his name and dates, those of his parents, and, no doubt most important to him, the fact that he was the husband of Mary Willis Ambler. At his request, he was buried beside her in the "New Burying Ground" on Shockoe Hills.

Marshall's self-abnegation, so apparent in all he did and said, stemmed from a quality rare among the great men of the early Republic: he was a genuinely modest man. The more famous he became, the more modest he grew. What Thomas Babington Macaulay said of John Hampden fits Marshall exactly: He was "an almost solitary instance of a great man who neither sought nor shunned greatness, who found glory only because glory lay in the plain path of duty."<sup>18</sup> Nowhere is this more apparent than in the final years of his correspondence. As the end of his life approached,

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16. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

17. Letter from John Marshall to Joseph Story (Apr. 24, 1833), in 11 *THE PAPERS OF JOHN MARSHALL*, *supra* note 14.

18. 3 THOMAS BABINGTON MACAULAY, *CRITICAL AND HISTORICAL ESSAYS* 2 (1907).

letters of admiration from old friends and admirers poured in; honors of all sorts, too numerous to list, were bestowed in recognition of his life's work. For him, it was a period of introspection and retrospection. There were tender and solicitous letters to Polly, and on the anniversary of her death in 1832, the heart-wrenching "Eulogy for Mary W. Marshall," celebrating the remembrance of their love and their life together.<sup>19</sup> Old friendships assumed a new meaning—witness his generous words of praise to his political opponent James Monroe for a life lived in honorable service to his country.<sup>20</sup> With Lafayette, another veteran of the American Revolution, Marshall shared his thoughts on slavery, emancipation, and the American Colonization Society. The irascible Timothy Dickering wrote to pay his respects and, characteristically, to pass judgment on American society past and present. Marshall responded kindly, though he did not hesitate to express his "real veneration & respect for Mr. [John] Adams," whom Dickering continued to savage.<sup>21</sup> Past disagreements were forgotten and forgiven, no doubt, when Dickering praised "the Supreme Federal Judiciary" as "the high Controlling *Authority*, the *Moral Scepter*, of the Nation."<sup>22</sup> Marshall also went out of his way to make peace with another Salem resident, Samuel P. P. Fay, whom he had written under the mistaken notion that his son Edward had become engaged to Fay's daughter. Reading Marshall's delicate and diplomatic apology, one can understand why he succeeded so brilliantly in the XYZ mission.<sup>23</sup>

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19. Marshall's correspondence to his wife is printed in FRANCES NORTON MASON, *MY DEAREST POLLY: LETTERS OF CHIEF JUSTICE JOHN MARSHALL TO HIS WIFE, WITH THEIR BACKGROUND, POLITICAL AND DOMESTIC* (1961). It will also be available in 11 *THE PAPERS OF JOHN MARSHALL*, *supra* note 14. His "Eulogy" of Dec. 25, 1832 appears on 324-44 of Mason's book, and will also be available in 11 *THE PAPERS OF JOHN MARSHALL*, *supra* note 14.

20. Letter from John Marshall to James Monroe (Mar. 7, 1825), in 10 *THE PAPERS OF JOHN MARSHALL* 134-35 (Charles F. Hobson ed., 2000); Letter from John Marshall to James Monroe (Dec. 13, 1824), *id.* at 151.

21. Letter from John Marshall to Timothy Pickering (May 31, 1824), in 10 *PAPERS OF JOHN MARSHALL*, *supra* note 20, at 90.

22. Letter from Timothy Pickering to John Marshall (Jan. 2, 1828) (misdated 1827 by Pickering), in 11 *THE PAPERS OF JOHN MARSHALL*, *supra* note 14.

23. Letter from John Marshall to Samuel Fay (Sept. 15, 1826), in 10 *THE PAPERS OF JOHN MARSHALL*, *supra* note 20, at 302-03; Letter from John Marshall to Samuel Fay, (Oct. 15, 1826), *id.* at 309-11.



Marshall also responded patiently to the inquiries of friends and strangers and to the various materials sent him, ranging from Horace Binney's eulogy of Chief Justice Tilghman to Alexander Smyth's proposal to limit the term of president to one term, which in light of Andrew Jackson, Marshall thought might be worth a try. Everyone wanted the great man's blessing, which he seemed so willing to bestow. Marshall wrote as a "Virginian" in response to James M. Garnett's address to the Agricultural Society at Fredericksburg about the "causes & remedies" of Virginia's "present discontents." It is not clear what Garnett liked most, agricultural reform or female education, but Marshall liked both causes.<sup>24</sup> He sat for several portraits by well-known painters such as Rembrandt Peale, John Wesley Jarvis, Chester Harding, and Henry Inman.<sup>25</sup> He received fellow Washington scholar and future president of Harvard Jared Sparks, who came away in awe of Marshall's republican personality, the blending into a consistent whole, as Sparks put it, of "all things about him, his house, grounds, office, himself," and how they all "bear marks of a primitive simplicity and plainness rarely to be seen combined."<sup>26</sup>

And on it went. What the correspondence reveals is what Sparks described, a humble great man at peace with himself and with those around him. One of Marshall's last letters, to John Marshall Jr., distilled a life experience for the edification of his grandson:

Happiness is pursued by all; though too many mistake the road by which this greatest good is to be successfully followed. Its abode is not always in the palace or the cottage. Its residence is the human heart, and its inseparable companion is a quiet conscience. Of this Religion is the surest and safest foundation.<sup>27</sup>

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24. Letter from John Marshall to Horace Binney (Nov. 19, 1827), in 11 PAPERS OF JOHN MARSHALL, *supra* note 14; Letter from John Marshall to James M. Garnett (Dec. 17, 1830), 11 PAPERS OF JOHN MARSHALL, *supra* note 14; Letter from John Marshall to Thomas W. White (Nov. 29, 1824), in 10 PAPERS OF JOHN MARSHALL, *supra* note 20, at 124-25.

25. ANDREW OLIVER, THE PORTRAITS OF JOHN MARSHALL 48-53, 54-62, 63-82, 134-62 (1977).

26. Interview by John Marshall with Jared Sparks, Richmond, Va. (Apr. 1, 1826), in 10 PAPERS OF JOHN MARSHALL, *supra* note 20, at 283-84.

27. Letter from John Marshall to John Marshall, Jr. (Nov. 7, 1834), in 11 PAPERS OF JOHN MARSHALL, *supra* note 14.

If Marshall's conscience was quiet in the assurance he had done his best, it also troubled him deeply that it was not enough to save the country he loved so much. Indeed, behind his disregard of reputation was his sincere belief that his life's work was a failure, that the Court was weakened beyond repair and that without the Court to defend it, the Constitution itself was doomed. Fame goes to history's winners, and Marshall saw himself on the losing side as the American people repudiated his conservative version of the Revolution in their mad embrace of political democracy. The more he feared the irrationality of the electorate and the demagogic excess of politicians north and south of the Mason-Dixon Line, the closer he clung to the conservative wisdom of the eighteenth century. His law-and-order Revolution had turned radical. What was once the "revolutionary center" was fast becoming the revolutionary fringe, and that is where Marshall placed himself. For the most part, his view was accurate.

What was true of politics was also true of constitutional law. Increasingly the "sovereign people" of the states, armed with "local knowledge" and urged into action by political parties, called the shots. With the help of Martin Van Buren's organizing genius, Jeffersonian-Jacksonian democracy had prevailed over Marshallian conservatism. The Court, which in Marshall's scheme of things was supposed to curb popular democracy, had been "revolutionized" by it. During his last years in office, he experienced the beginning of the transformation of constitutional law the Taney Court would carry to completion. Increasingly he feared the civil war that finally came. In one important respect, the war itself was the final blow to Marshall's dream of a law-abiding, Court-obeying republic.

Perhaps there is no sadder or more telling symbol of the failure than one of Alexander Gardner's photographs: the shallow grave of a soldier at the foot of a battle-shattered tree, the tree silhouetted against the sky. Beneath the tree's fractured branches stand several soldiers, leaning battle weary on their rifles or standing strangely at attention. The photograph was taken after Antietam's bloody work was done. The dead soldier, from the Twenty-eighth Pennsylvania Volunteers, was Private John Marshall. The unfortunate soldier was not a namesake, but in an age famous for remembering famous men, he easily could have been. In any case, the image conveys a sad truth: What Marshall had feared, what he

had worked to avoid, had come to pass. The rule of law as a rational way of settling disputes had given way, first to emotion and ideological extremism in the North and South, then to the lord of battles. The Union he hoped to preserve by adhering to the Constitution had gone to war over its meaning. His own state, indeed his own grandchildren, fought against the nation he had fought to create. Out of the bloody conflict would come a new birth of freedom, to be sure, and the Union, stronger for having endured the stress of civil war, would endure. But the new age was light-years removed from Marshall's world and hostile to much that was dear to him. Ironically, it was this pulsating, chaotic age that bestowed on him its highest honors and the fame he doubted would be his.<sup>28</sup>

### THE MARSHALL MYTH AND THE MODERN NATION-STATE

Marshall died thinking he had become marginalized, and judging by the course of antebellum history and law, in some ways he had. Ironically, however, it was during this period that the myth of his greatness began to take shape. Admittedly, the mythmakers had much to work with. Such qualities as decency, modesty, kindness, patriotism, and genius count immensely, and friend and foe alike agreed that he had all of them in abundance. It would be difficult to find another statesman of his period who was so universally loved as a person and equally difficult to identify another statesman whose personal qualities so neatly meshed with the transitional age in which he lived. Marshall was a born aristocrat, whose democratic demeanor fit the democratic age he disliked so much. He was an American who loved Virginia, a southerner celebrated by the North. He was a genuinely great man who was genuinely modest, a combination that was "irresistibly winning," as even his old foes at the *Richmond Enquirer* conceded in their touching eulogy.<sup>29</sup> The

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28. The photograph of Marshall's grave appears in Michael Kernan's *The Pictures That Stunned the North*, CIVILIZATION, Mar./Apr. 1995, at 70-71. The John Marshall in the picture was a fifty year-old Irish immigrant who enlisted in July 1861. For more on the photograph, see WILLIAM A. FRASSANATO, ANTIETAM: THE PHOTOGRAPHIC LEGACY OF AMERICA'S BLOODIEST DAY 171-74 (1978). Mason noted in *My Dearest Polly* that of the five sons of Marshall's son James, four "served in the army that marched to oppose the military invasion of the State of Virginia." MASON, *supra* note 19, at 320.

29. For the eulogy printed in the *Richmond Enquirer* on July 10, 1835, see 4 ALBERT J.

Americans who lined the roads to celebrate his triumphant return from France and the XYZ mission got the point early on: In a country still unsure of itself or its destiny, one that was moving from a traditional social order to a new egalitarian one, he was a natural-born American hero. The more he refused the accolade, the more he was revered. This is not yet to mention his life's work on the Supreme Court and the mysterious way he blended his republican personality with the institution over which he presided for thirty-four years. Less than two weeks after his death, the outpouring of grief and praise in all sections of the country over his death prompted the *National Gazette of Philadelphia* to conclude the whole nation held its dead Chief Justice "in almost universal veneration." Even as the political debate heated up about who should replace him, evidence was pouring in that "the fame of a good man" would be impervious to "censure." Marshall was on his way to becoming not just a national hero but a national institution, in both respects, according to some, second only to Washington. For Americans inclined to think in providential terms, it must have seemed entirely appropriate that the famed Liberty Bell, which once tolled independence, cracked while tolling Marshall's death and went entirely silent sixteen years later ringing the anniversary of Washington's birth.<sup>30</sup>

In reading the many eulogies praising Marshall's work, one might forget that his jurisprudence, in contrast to his character, was not universally admired. Indeed, in the months and years following his death, periodicals and newspapers across the nation hotly debated key aspects of his constitutional legacy. Ironically, however, even the Chief Justice's detractors contributed to the myth of his greatness, none more so than Thomas Jefferson and other Virginia states' rightists who opposed Marshall every step of the way. The point they made publicly and privately, year after year from his appointment in 1801 on, was that he had single-handedly and single-mindedly made the Supreme Court over in his own image and

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BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 589 (1919).

30. Julian P. Boyd, *Liberty Bell*, in 3 *DICTIONARY OF AMERICAN HISTORY* 271 (James Truslow Adams ed., 2d rev. ed. 1942); see also John Baer Stoudt, *The Liberty Bells of Pennsylvania*, 37 *THE PENNSYLVANIA GERMAN SOCIETY: PROCEEDINGS AND ADDRESSES AT PHILADELPHIA, OCTOBER 8, 1926* (1930); Franklin Institute, Report of the Committee for the Preservation of the Liberty Bell (1962).

used it to create a consolidated, that is to say, a Hamiltonian, nation-state with a judge-made Constitution to match. Marshall mythmakers such as Beveridge had only to praise the qualities in Marshall that contemporary critics condemned.<sup>31</sup>

Southern critics also contributed to the Marshall mythology by calling forth the commercial interests north of the Mason-Dixon Line to defend him and, in the process, put their own gloss on his jurisprudence and his reputation. Take, for example, the great commercial city of Philadelphia, whose populace first welcomed back the conquering hero of XYZ and whose lawyers dominated the Supreme Court bar for many years. No professional group was more distinguished or better placed to know Marshall and none more ardent in his praise. The great men and distinguished lawyers of the city gathered in the county courtroom for the memorial service presided over by Stephen DuPonceau, Philadelphia's legal scholar-in-residence. Leading the chorus of mournful praise were Horace Binney and John Sergeant, two of the city's most influential lawyers. Members of the bar association turned out to pay their final respects as Marshall's body was transported to the boat that would carry it home to Richmond. The conservative press, which praised the honest republican lawyer for putting Talleyrand in his place, now praised the dead Chief Justice for rescuing the nation and making it safe for capitalism. So did the legal profession and the commercial press of New York City. James Kent, the "American Blackstone," said it all when he journeyed to Richmond in May to pay his final respects. Kent wrote to Jeremiah Smith, one of New England's most formidable common lawyers, about the experience, and Smith spoke for both men and no doubt for most northern lawyers. Marshall's views of national affairs and national law were "perfectly just in themselves," he declared, and "now come to us confirmed by the dying attestation of the greatest and best of

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31. Less than two weeks after Marshall's death, the Whiggish *National Gazette* blasted the Democratic *New York Evening Post* for its criticism of Marshall's jurisprudence and its call for a Democratic Chief Justice. One of the most interesting evaluations of the shift in jurisprudence after 1837 is found at 46 N. AM. REV. 126-56 (Jan. 1838). For the debate over the Marshall legacy and the future of the Court, see chapter 21 of 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (rev. ed. 1937).

men."<sup>32</sup> Where commerce, industry, and capitalism flourished, it would seem, so did the memory and reputation of John Marshall.

Nowhere was the celebratory prose more lavish or the mythmaking machinery better oiled than in New England. The more Virginia criticized Marshall, the more New England loved him. Massachusetts led the way and with much reason. After all, it was native son John Adams who appointed Marshall to the Court and who considered it one of the most important accomplishments of his accomplished life. John Quincy Adams shared his father's views, praising and defending Marshall whenever he got the chance, which happened often in the 1820s. New England capitalists such as the Cabots and Lowells—and the Appletons, Lees, and Jacksons—paid Marshall the ultimate compliment by putting his ideas about corporations into practice in the Merrimack Valley. The formidable intellectual establishment of Massachusetts chimed in, too, especially in the 1820s, when New England conservatives mobilized to stamp out the Jeffersonian democratic states' rights heresy. In this conservative, countercultural revolution, Marshall and his nationalist law figured prominently. Articles and reviews praising him were regular features of the influential *North American Review*, the voice of New England conservatism, after the journal's creation in 1815.<sup>33</sup> Leading intellectuals, such as Jared Sparks, and religious leaders, such as William Ellery Charming, joined the chorus of praise.

Primarily, however, it was the legal community of New England and Massachusetts that canonized Marshall. Its partiality is not surprising, given the fact that its members contributed significantly to his opinions in such cases as *Fletcher*,<sup>34</sup> *Dartmouth College*,<sup>35</sup> *McCulloch*,<sup>36</sup> and *Gibbons*,<sup>37</sup> to mention only some. Webster provided grist for Marshall's mill in the latter three opinions, and in *Gibbons*, he shared nearly equal billing. Mainly, however, it was Joseph Story

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32. BEVERIDGE, *supra* note 29, at 586-87.

33. See HARLOW W. SHEIDLEY, SECTIONAL NATIONALISM: MASSACHUSETTS CONSERVATIVE LEADERS AND THE TRANSFORMATION OF AMERICA (1815-1836) 97-117 (1998) (discussing the editorial goals and impact of the *North American Review*); see also R. KENT NEWMYER, JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 155-95 (1985).

34. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

35. *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

36. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

37. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

who took charge of Marshall's reputation. Story did not live to complete the full biography of Marshall he hoped to write, but while he lived, he spread the word of Marshall's good works; and as New England's leading jurist, as the dominant figure on the New England judicial circuit, as Dane Professor at Harvard Law School, and as part of the elite junto that ran Harvard University, Story was in a position to be heard. Story was a big talker, but he was also a careful listener, and he paid attention when Marshall shared information about his life. It was Story who persuaded Marshall to write an autobiographical letter in 1827, the most extensive personal account that exists.<sup>38</sup> Story used the information in a review of Marshall's *A History of the Colonies*,<sup>39</sup> which appeared in the *North American Review* as *Chief Justice Marshall's Public Life and Services* and which plugged Marshall more than his history.<sup>40</sup> Throughout the 1820s, Story used his influence on and off the Court to defend and praise Marshall. It is impossible to reconstruct Story's innumerable conversations during this period or his lectures to Harvard Law School students, but it is certain they were fulsome in Marshall's praise. Story's eulogy on Marshall's death, delivered before the Suffolk Bar on October 15, 1835, was the most touching and informative of all the many memorials past and present. Widely circulated in pamphlet form, it was reprinted in William W. Story's *The Miscellaneous Writings of Joseph Story*<sup>41</sup> and again in John Dillon's three-volume collection of essays celebrating the centennial of Marshall's ascension to the Court in 1901.<sup>42</sup>

More important in furthering Marshall's fame was Story's three-volume *Commentaries on the Constitution*,<sup>43</sup> written to refute his states' rights critics. Story dedicated the work to Marshall in a long, heartfelt letter of praise, predicting, "[p]osterity will assuredly

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38. Marshall's letter to Story is printed as AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL (John Stokes Adams ed., 1937). Adams traces the provenance of the letter in his introduction.

39. JOHN MARSHALL, *A HISTORY OF THE COLONIES* (1824).

40. Joseph Story, *Chief Justice Marshall's Public Life and Services*, 16 N. AM. REV. 1 (1928).

41. *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* (The Lawbook Exchange, Ltd. 2000) (William W. Story ed., 1852).

42. 3 JOHN MARSHALL: LIFE CHARACTER AND JUDICIAL SERVICES, *supra* note 2, at 327-80.

43. JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION* (Carolina Academic Press 1987) (1833) (abridged by the author).

confirm, by its deliberate award, what the present age has approved as an act of undisputed justice."<sup>44</sup> Marshall was the epic hero of this epic work. Story cited his opinions often and at length, no small advantage to lawyers who did not have access to the Supreme Court Reports. Marshall's opinions also figured prominently in Story's nineteen rules of construction,<sup>45</sup> which were designed to keep the Court in harmony with the intent of the Framers and guarantee its nonpolitical legal character. Story's interpretation of the Court as the salvation of the Republic put Marshall's lifetime work into words. In its various editions, including ones for students and lay adults, Story's *Commentaries* remained the leading text on the Constitution well into the twentieth century. Readers over the years came away believing that Marshall's name was synonymous with constitutional wisdom. Thus when one aspiring Philadelphia lawyer named Henry B. Pearson set out in 1840 to "render" the great truths of the Constitution "plain and easy" to the youth of America, he planned his book as an intimate dialogue between the benevolent and all-wise Chief Justice and his fictional "son in law Horace."<sup>46</sup> Indeed, in the years from 1815 to 1860 no fewer than five popular textbooks for students celebrated Marshall as the model judicial statesman.<sup>47</sup> Adults got the same romantic message in Henry Flanders's *Lives of the Chief Justices of the Supreme Court of the United States*, which portrayed Marshall as judge of Olympian wisdom who stood above the partisan struggles of the age.<sup>48</sup>

By fusing Marshall with the Supreme Court and the Court with the Constitution, Story and other antebellum mythmakers laid the foundation of his enduring fame. In the grand sweep of things, however, it was the Civil War that clinched the matter. Marshall sought desperately to avoid just such a war, but it was natural to argue that the man who fought and judged for the new nation would

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44. *Id.* at iii.

45. *Id.* §§ 178-215.

46. The eight-page prospectus of Pearson's unpublished books is in the Rare Book Department of the Free Library of Philadelphia. Thanks to Morris Cohen of Yale Law School for the reference.

47. MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY (1776-1876)* at 157-58 (1976) (discussing Marshall's popularity and his symbolic importance to lawyers who were trying to upgrade the image of the legal profession).

48. 1 HENRY FLANDERS, *THE LIVES OF THE CHIEF JUSTICES OF THE SUPREME COURT* (William S. Hein & Co. 1971) (1881).



have supported a war to preserve it. Beveridge made the connection when he noted the similarities between Lincoln and Marshall.<sup>49</sup> Lincoln worked to preserve what Marshall proclaimed in his opinions. When Lincoln's Chief Justice Salmon P. Chase declared in *Texas v. White*<sup>50</sup> that the Union and the states that composed it were indestructible,<sup>51</sup> he vindicated not just Marshall's constitutional principles but his life's work. Harvard Law School's James Bradley Thayer made the point in his *John Marshall*, published in 1901.<sup>52</sup> "It was Marshall's strong constitutional doctrine," declared Thayer, "explained in detail, elaborated, powerfully argued, over and over again, with unsurpassable earnestness and force, [and] placed permanently in our judicial records . . . that saved the country from succumbing, in the great struggle of forty years ago, and kept our political fabric from going to pieces."<sup>53</sup> An attachment to states' rights and a deep commitment to federalism had not disappeared, of course, but secession and the threat of it was dead. On the wane, too, was southern resistance to the market culture of the newly united United States. Increasingly, the New South replaced the Old South and set out to beat the industrial North at its own game. Southern history was becoming American history, and both were catching up with John Marshall and sweeping him along to posthumous greatness.

With the cultural rapprochement between North and South, Marshall's reputation became truly national—Holmes's undisputed "representative figure of American law." Even the defeated South joined the chorus of praise. This is not to say that southerners abandoned states' rights or even the constitutional ideas of John C. Calhoun, which inspire serious discussion to this day. There were southerners immediately after the war who saw the irony of praising Marshall the lawgiver after four years of law-defying war. One such was Innes Randolph, who wrote the following poem in 1869 about the dedication of Marshall's statue in Richmond, the capital of the defeated confederacy:

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49. BEVERIDGE, *supra* note 29, at 91-93, 344 (1919). *But see* JOHN BRAEMAN, ALBERT J. BEVERIDGE 304-07 (1971) (discussing Beveridge's criticism of Lincoln).

50. 74 U.S. (7 Wall.) 700 (1868).

51. *Id.* at 724-26.

52. JAMES BRADLEY THAYER, JOHN MARSHALL (photo. reprint 1974) (1901).

53. *Id.* at 58-59.

We are glad to see you, John Marshall, my boy,  
So fresh from the chisel of Rodgers;  
Go take your stand on the monument there,  
Along with the other old codgers;  
With Washington, Jefferson, Henry, and such,  
Who sinned with a great transgression  
In their old-fashioned notions of freedom and right  
And their hatred of wrong and oppression.  
You come rather late to your pedestal, John,  
And sooner you ought to have been here,  
For the volume you hold is no longer the law,  
And this is no longer Virginia.  
The old Marshall law you expounded of yore  
Is now not at all to the purpose,  
And the Martial Law of the Brigadier  
Is stronger than habeas corpus.  
So keep you the volume shut with care  
For the days of the law are over;  
And it needs all your *brass* to be holding it there  
With "Justice" inscribed on the cover.  
Could life awaken the limb of bronze  
And blaze in the burnished eye,  
What would you do with your moment of life?  
Ye men of the days gone by!  
Would ye chide us or pity us? blush or weep?  
Ye men of the days gone by!  
Would Jefferson roll up the scroll he holds  
Which time has proven a lie?  
Would Marshall close the volume of law  
And lay it down with a sigh?<sup>54</sup>

The main point, however, is not that Randolph sneered at Marshall's faith in the rule of law, but that a statue to him was erected in the former capital of the Confederacy. Richmond was Marshall's home, and even when it was the intellectual capital of states' rights, he was always loved. But a cursory sampling of the literature suggests that Marshall was invited into the pantheon of

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54. OLIVER, *supra* note 25, at 183-85 (quoting Randolph's poem).

legal giants only gradually by southerners. During 1820s and 1830s, southern theorists of all persuasions jumped on the anti-Marshall bandwagon. Indeed, three years after Marshall's death, a writer in the *Southern Literary Messenger* listed Virginia's legal greats without even mentioning his name. After the Civil War, legal reformers continued to attack the "moldy monstrosities" of his procorporate, procapitalist opinions. By the time Alexander Stephens published his *A Constitutional View of the Late War Between the States*,<sup>55</sup> however, things were changing. Since Stephens was mainly interested in refuting Unionist constitutional theory, he could hardly have praised the Marshall Court; indeed, he hardly mentioned the Supreme Court. Nevertheless, the old Chief Justice did make a cameo appearance—as a champion of moderate federalism who deserved a place of eminence alongside Roger Taney. Judging by Henry St. George Tucker's attack on the General Welfare Clause doctrine in the *American Bar Association Journal* in 1927, southern theorists preferred to target Story rather than Marshall,<sup>56</sup> perhaps because it was mainly Story's *Commentaries* that kept Marshall's ideas current. In any case, by that time, if not long before, the Chief Justice had joined Washington and Madison on Virginia's all-star team of national heroes.<sup>57</sup>

If the Civil War settled the federalism issue in Marshall's favor, postwar economic history did the same for his law-based economic preferences. Again he looked prophetic. The growth of a national railroad system free from state interference was bolstered by resuscitating the national market potential of *Gibbons v. Ogden*, just as *Dartmouth College* was frequently cited to defeat state economic regulation. Marshall and his Court also contributed subtly to the rise of substantive due process by building the assumption into American public law that the private business corporation was just another enterprising individual whose property needed protection from the encroachment of the state. Marshall's Contract Clause decisions, though less important after the transformation of

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55. 2 ALEXANDER STEPHENS, *A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES; ITS CAUSES, CHARACTER, CONDUCT, AND RESULTS* 261 (1870).

56. Henry St. George Tucker, *Judge Story's Position on the So-Called General Welfare Clause*, 13 A.B.A. J. 363, 363-68, 465-69 (1927).

57. RICHARD B. DAVIS, *INTELLECTUAL LIFE IN JEFFERSON'S VIRGINIA, 1790-1830*, at 363 (1972).

the Due Process Clause of the Fourteenth Amendment than before, remained relevant until the *Blaisdell*<sup>58</sup> decision in 1934, when the Court bent Article 1, Section 10, to the necessities of the Great Depression. Though *Lockner v. New York*<sup>59</sup> turned on the Due Process Clause of the Fourteenth Amendment, its contract preferences were clearly those of Marshall.

Marshall's incorporation into the conservative constitutional construct of the late nineteenth century helped consolidate his mythic status. But it also produced a growing body of criticism, which would not so much detract from his reputation as it would alter it. As Paul W. Kahn has shown, the main thrust of constitutional theory after the Civil War was away from Marshall's "maintenance theory" of constitutional law that the role of the Court was to preserve the Constitution of 1787 against all comers by adhering to the intent of the Framers as expressed in the text of the document.<sup>60</sup> After the Civil War, under the intellectual impact of Darwinian science and the practical consequences of business consolidation, the Constitution was increasingly looked upon as a work in process; the process according to some was, or should be, communal and democratic in nature, not judicial. Like Holmes, Thayer saw Marshall as a man of his own age; Thayer was also among the first to acknowledge that "we seem to be living in a different world from Marshall's."<sup>61</sup> The Court under Marshall aimed its nationalist decisions at the Union-busting implications of states' rights radicalism, while the late nineteenth-century Court aimed to destroy the legislative will of the people, which aimed to curb corporate excess. While Thayer did not criticize Marshall and, indeed, found much to praise, he vigorously opposed the judicial excesses of the late nineteenth-century Court done in Marshall's name.<sup>62</sup> Like Holmes and Frankfurter after him—and John Bannister Gibson earlier, whose critique of Marshall Thayer cited

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58. *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 409-15 (1934).

59. 198 U.S. 45 (1905).

60. PAUL W. KAHN, *LEGITIMACY AND HISTORY: SELF GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY* 85-89 (1992).

61. JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES, AND FELIX FRANKFURTER ON JOHN MARSHALL 83 (1967).

62. *Id.* at 84-88.

with approval—Thayer argued that the Court worked best when it restrained itself.<sup>63</sup>

Other less moderate critics of Marshall soon chimed in. One such was Gustavus Myers, whose socialist *History of the Supreme Court*<sup>64</sup> depicted the Marshall Court as part of the economic class struggle. More influential was Charles Beard's *An Economic Interpretation of the Constitution*,<sup>65</sup> which claimed that the Constitution was largely the creation of a consolidated capitalist class.<sup>66</sup> It followed logically that if Marshall adhered to the intent of the Framers as he claimed to do, then he was also part of the capitalist conspiracy. In fact, Beard argued exactly that position in *The Supreme Court and the Constitution*,<sup>67</sup> which appeared one year before *Economic Interpretation*. Moreover, judicial review itself was part of the Framers' intent, put in place, Beard argued, to implement capitalist policy objectives he believed permeated the Constitution itself.<sup>68</sup> Edward Corwin, soon to become the nation's leading authority on the Court, appeared to agree. By arguing that Marshall deliberately went out of his way in *Marbury* to declare section 13 unconstitutional, Corwin suggested, as Jefferson had claimed earlier, that Marshall had taken personal charge of American constitutional history.<sup>69</sup> Corwin also claimed that Marshall's decision in the Burr treason trial was politically motivated.<sup>70</sup> The Jeffersonian overtones of Corwin's scholarship became explicit, and less scholarly, in Vernon Parrington's *Main Currents in American Thought*.<sup>71</sup> Parrington viewed all of American history as the unfolding of Jeffersonian democracy and accordingly dismissed Marshall as a politically motivated judge whose main legacy was to

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63. *Id.*

64. GUSTAVUS MYERS, *HISTORY OF THE SUPREME COURT* 228-354 (Charles H. Kerr & Co. 1925) (1912).

65. CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1913).

66. *Id.* at 149-51.

67. CHARLES BEARD, *THE SUPREME COURT AND THE CONSTITUTION* 119-27 (Prentice-Hall Inc. 1962) (rev. ed. 1938). For a discussion of Beard's work, see *id.* at 1-34 (introduction by Alan F. Westin).

68. *Id.* at 74-101.

69. Edward S. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 292-94 (1910).

70. EDWARD S. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION* 86-120 (1919).

71. 2 VERNON LOUIS PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT: AN INTERPRETATION OF AMERICAN LITERATURE FROM THE BEGINNING TO 1920*, at 20-27 (1927).

give lawyers a monopoly on constitutional interpretation and fix a Hamiltonian Constitution on an unwilling populace.<sup>72</sup> This was also the main thrust of two major studies of the Supreme Court, one by Louis B. Boudin in 1932 and the second by Charles Grove Haines in 1960—both written from a Jeffersonian point of view.<sup>73</sup>

Despite many keen insights and some needed perspective on Marshall and his Court, these latter-day Jeffersonians did not carry the day. One might even argue that the more irrelevant Marshall appeared to the modern age, the more mythical he became. Thus, at the very time Thayer of Harvard was attempting to put Marshall back in his own age, John Fiske of Yale was elevating him to mythical status. Fiske, like Thayer, believed in evolution. His grand theme was Anglo-Saxon liberty under law, which he saw as the end product of a process that began in the Teutonic forests of northern Germany and climaxed in America, from whence it would presumably conquer the world. The determining moment in this great drama, as Fiske explained in his *Critical Period in American History*,<sup>74</sup> was the framing and ratification of the Constitution. Marshall was too young to figure as a central character in this happening, though he makes his debut at that time as a young patriot marked for destiny. But as Chief Justice, according to Fiske, Marshall was the original genius who melded the theories of Jefferson and Hamilton into "a new form of political organization,"<sup>75</sup> with judicial review as its foundation. By the time of his death in 1901, Fiske had concluded, in the words of his biographer, that Marshall's contributions "were not inferior in value, to those of Washington, in giving birth to the nation itself."<sup>76</sup> This appeared to be the unanimous conclusion of the legal luminaries who celebrated the centennial anniversary of Marshall's ascension to the Court in 1901. The published edition of these memorial speeches, which include earlier eulogies by Story, Horace Binney, and others, marks

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72. *Id.*

73. See LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* 213-33 (1932) (challenging the pro-Marshall works by Charles Warren and Albert Beveridge); CHARLES GROVES HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS* 245-58 (1960) (same).

74. JOHN FISKE, *CRITICAL PERIOD IN AMERICAN HISTORY* 300-05 (Houghton Mifflin 1916) (1888).

75. 2 JOHN SPENCER CLARK, *THE LIFE AND LETTERS OF JOHN FISKE* 492 (1917).

76. *Id.* at 492-93.

the end of one century of hagiography and the beginning of another.<sup>77</sup>

The dominant figure in the second century of Marshall studies was Albert Beveridge, whose four-volume life-and-times biography appeared in 1919.<sup>78</sup> The character of Beveridge, as well as the quality of his scholarship, helps explain the commanding authority his larger-than-life view of Marshall came to have. As a young man growing up in hardscrabble times in Illinois, Beveridge came to view Marshall—along with Lincoln—as the embodiment of his personal values and those of America as well. Like Marshall and Lincoln, Beveridge was both a lawyer and a politician. As Senator from Illinois, he blended the ideals of democratic reform—first, as a reform-minded Republican, then, after 1912, as a member of the Progressive Party—with ideas of racial supremacy, which spilled over into an aggressive America-first imperialism. When he lost the congressional election of 1912, he became a full-time biographer of Marshall. The project became the focus of his life—a surrogate profession, as well as a vindication of the progressive, nationalist, imperialist values that had gone down in defeat at the polls, as had Marshall's. In Beveridge's skilled hands, Marshall became the embodiment of a triumphant but beleaguered Anglo-American culture. With Marshall's "martial blood," his preference for English culture, and American law and order, the fit seemed perfect.<sup>79</sup>

Despite his bias (perhaps because of it), Beveridge was a force to reckon with. He was a dogged researcher, who set out to write the "definitive" biography, based on the demanding standards of the new "scientific history." Before he was finished, he had consulted not only an impressive corpus of Marshall materials but many of the leading political scientists and historians of the age as well. James Franklin Jameson, the acknowledged leader of the profession and champion of the "New History," was one of the first to lend his support. Among others who critiqued Beveridge's work and celebrated it upon publication were Charles Beard, Edward Corwin, and Max Farrand of Yale, who had just published *The Framing of the Constitution*<sup>80</sup> and would go on to edit Madison's *The Records of*

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77. 1 JOHN MARSHALL, *supra* note 2 (collection of centenary and memorial addresses).

78. See generally 1-4 BEVERIDGE, *supra* note 29.

79. 4 *id.* at 1-58 (discussing Marshall's background).

80. MAX FARRAND, *THE FRAMING OF THE CONSTITUTION* (Yale Univ. Press 1962) (1911).

*the Federal Convention of 1787*.<sup>81</sup> Samuel Eliot Morison at Harvard, already on his way to professional prominence, lent his name to the project, as did the ubiquitous Harold Laski. Even William E. Dodd, whose assessment of Marshall was conditioned by a strong liking for Jefferson, got on board.<sup>82</sup> With backers such as these, it is not surprising that Beveridge's *Life of John Marshall* was awarded the Pulitzer Prize for biography in 1920.

Though never without its critics, Beveridge's biography commanded the field of Marshall scholarship for much of the twentieth century. According to Beveridge's dramatic rendering, Marshall was as relevant to the modern age as he had been to his own. Marshall was a nationalist and internationalist; so were Theodore Roosevelt and Woodrow Wilson. The production miracle of modern America, as well as the laissez-faire capitalism of J.P. Morgan and J.D. Rockefeller, appeared to rest on the legal foundation laid by Marshall. For those who looked to an activist Court to strike down "socialist" regulation of property at both the state and national level, Marshall showed the way in *Marbury*, *Cohens*,<sup>83</sup> and his Contract Clause opinions. Marshall's love of English culture resonated with an age in which England and America reaffirmed their cultural affinity. The martial side of Marshall's career—as a soldier, as a champion of military preparedness, as a frank defender of American sovereignty and American interests—also assumed a new relevance as the United States joined Great Britain in a great war against Germany, which happened precisely when Beveridge was putting the finishing touches on volumes three and four of the biography. It did not hurt either, in an age that saw the reunification of the North and South, that Marshall the southerner should be harnessed to the chariot of twentieth-century national and international greatness Beveridge saw as the manifest destiny of America.

Beveridge's Marshall was a ready-made symbol for what many modern Americans wanted to see in their lawmakers, perhaps in themselves. The less they actually saw of John Marshall's world, it seemed, the more they admired John Marshall. The evidence of his

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81. JAMES MADISON, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Max Farrand ed., 1937).

82. BRAEMAN, *supra* note 49, at 254-69.

83. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).



mythic status cannot be easily catalogued, but the common themes of the tributes to him, combined with their scope and diversity, is telling. The streets, schools, and towns named after him are too numerous to mention, and there is at least one hotel. There is Franklin and Marshall College in Lancaster, Pennsylvania, and Marshall University in Huntington, West Virginia, named in his honor, it would appear, more for his conservative role in the Virginia constitutional convention of 1829-1830 than for his constitutional nationalism. There is the John Marshall School of Law in Chicago, the Cleveland-Marshall College of Law in Cleveland, Ohio, and William and Mary's Marshall-Wythe School of Law in Williamsburg, Virginia. Numerous clubs, scholarships, fellowships, and honorary distinctions of various sorts bear his name. His portraits, painted by the great painters of the age, as well as countless imitators, are everywhere: in the beautiful East Room of the Supreme Court Building, at various other places of prominence in the nation's capital, and almost invariably in the country's leading law schools. Marshall's likenesses in marble and bronze appear in almost every size and shape, from larger-than-life statues to affordable desk-size replicas. There is a much-admired, and much-imitated, bust by Hiram Powers. On a grander scale is William Wetmore Story's great figure of Marshall the lawgiver, once located on the front lawn of the Capitol and now resting in a place of honor in the Supreme Court Building. A recent larger-than-life bronze by William Bahrens adorns the central campus of Marshall University. The list goes on, from the commemorative John Marshall silver spoon, to the giant stained-glass window in Saint John the Divine's Cathedral in New York City (where Marshall joins Hammurabi, Solon, and Joseph Story), to the modern commemorative postage stamps. After two centuries, it seems clear Marshall belongs to the American people, in whose name he so often spoke.

Leading political scientists, historians, and legal scholars—beginning with Roscoe Pound's 1936 list of great American judges<sup>84</sup>—have unanimously agreed with Beveridge, and with Holmes before him and Story before him, that Marshall was the greatest of the

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84. For various listings of great American judges, see John V. Orth, *John Marshall and the Rule of Law*, 49 S.C. L. REV. 633, 633-49 (1998).

great, a judge for all ages. Scholars attending the bicentennial of Marshall's birth in 1955, sponsored by the College of William and Mary, reaffirmed his greatness even while gaining critical perspective on it.<sup>85</sup> The recent outpouring of scholarship—starting first and foremost with the publication of *The Papers of John Marshall* at the College of William and Mary and ranging from dozens of learned articles to superb short studies of his jurisprudence, major biographies, and monumental volumes about his Court—is a tribute to his stature and importance. The coming bicentennial of his ascension to the Court will almost certainly consolidate his reputation further by making it more generally known.

Given the tendency of scholars to revise, reconsider, and debunk, it is remarkable that Marshall's reputation, unlike that of some of his contemporaries, seems largely impervious to criticism. Nor have changing times taken a toll. Consider the remarkable irony, for example, that Marshall should have been so universally celebrated in the late 1930s, exactly at the time the Supreme Court, often citing his opinions in *Gibbons* and *McCulloch* for authority, was fundamentally altering the nonregulatory, property-loving, individualistic society he valued. Taken out of context, Marshall's memorable statement in *McCulloch* that the Constitution was intended to meet the "varied crises of human affairs"<sup>86</sup> became the hallmark of the new open-ended approach to constitutional interpretation he would surely have opposed. What he would have thought about the New Deal and the New Deal Court had he actually lived to see them cannot be determined. But the historical Marshall was closer to the "four horsemen of the Apocalypse" than the post-1937 Court, which put a constitutional foundation under the liberal, regulatory welfare state. Marshall feared undue legislative meddling in economic matters; believed in the sanctity of contract; in balanced, perhaps even dual, federalism; in stare decisis; and in the meaning of language, which allowed him to understand the intent of the Framers. None of these things he took for granted as the foundation blocks of constitutional law had much meaning after 1937. About the only point of real continuity between

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85. The papers presented at the 1955 conference, with an introduction by Chief Justice Earl Warren praising Marshall, are published in *CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL* (W. Melville Jones ed., 1956).

86. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

his age and the modern one, it would seem, was that the Supreme Court was still at the center of the constitutional process—and the constitutional storm.

WHERE MYTH AND REALITY INTERSECT: THE “GREAT CHIEF JUSTICE” AND THE SUPREME COURT

No one would argue that the American Revolution, either in its origins or conclusion, was monolithically constitutional in nature, but recent scholarship shows that constitutional ideas permeated every aspect of it, even the fighting. Among the world's great revolutions, none was more productive of legal ideas and institutions. Marshall tapped into the legal-constitutional dimension of the Revolution in several ways—as a soldier, a lawyer-legislator in Virginia, a ratifier of the Constitution, and then in the 1790s as a Federalist defender of Revolutionary truth as he saw it. In that turbulent partisan decade, he concluded that only constitutional law and legal institutions could save the Republic from party-based, states' rights radicalism. His jurisprudence rested on a Burkean foundation, but unlike Burke, Marshall had to create legal institutions rather than preserve them. Chance, contingency, and the friendship of John Adams gave him the opportunity to do so. As Chief Justice, he brought the republican and conservative legal legacy of the Revolution to bear on the institutional development of the Supreme Court. Never in American history was Emerson's statement more apt, that “an institution is the lengthened shadow of one man.”<sup>87</sup>

Despite the impression conveyed by worshipful biographers and the allegations of his enemies, Marshall did not create the Supreme Court singlehandedly any more than he originated judicial review. Wisely, he built on the English common tradition of rule of law. More specifically, he consulted the Framers themselves—building on the logic of Article 3, which put a constitutional foundation under the Court and connected it directly to the sovereign people, and of Article 6, which made the Constitution supreme law of the land. He drew heavily on the Judiciary Act of 1789, which explicitly gave the

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87. Ralph Waldo Emerson, *Self-Reliance*, in *ESSAYS: FIRST SERIES* (1841), as quoted in *AMERICAN HERITAGE DICTIONARY OF AMERICAN QUOTATIONS* 248 (1997).

Court the authority to review state judicial decisions regarding federal questions, and on the Process Acts of the 1790s, which outlined the Court's mode of operation. More directly, he built on the formative labors of the Jay and Ellsworth Courts, which bequeathed to him a functioning institution of great potential. *Marbury* is a case in point. The genius of that opinion was the fact that it was *not* boldly original or doctrinally conclusive. Rather, Marshall built from existing materials, seized the appropriate moment to act, and stated only so much as the moment allowed and no more. For all of its political savvy, the decision promised that the Court would be a legal, not a political, institution. Probably no modern scholar would insist that Marshall was entirely immune from the politics that swirled around him in that case or in others. Often, to reach the law, he had to think and behave politically, if for no other reason than to fend off his enemies. But even in its most "political moments"—*Marbury* comes to mind, as does *McCulloch*, and the Georgia Cherokee cases<sup>88</sup>—the Court's "politics" differed fundamentally from those of Congress and the Executive Branch. More than any other institution that competed for power and the respect of the American people during the early Republic, the Court under Marshall embodied the first principle of republican government—that law, not men, should rule. It was a principle associated unavoidably with the intent of the Framers.

It is a bit heretical these days to argue that there was a time when the Framers' intent had real meaning, but there was such a time, and the phrase did have such. Marshall referred to intent in his opinions; he believed what he said, and what he said and believed was grounded in the history of the period. It is the historical reality of intent, more even than his unique concept of nationalism or his concept of balanced federalism, that locates Marshall in his own age and distinguishes his jurisprudence from ours. Modern constitutional relativism is part of a pervasive cultural cynicism that looks skeptically on systems of moral values and doubts the "meaning of meaning," to quote the title of the 1923 work that helped launch linguistic indeterminacy in modern legal

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88. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

theory.<sup>89</sup> More important than indeterminacy in language, physics, ethics, and philosophy in producing legal relativism, however, has been the constantly shifting meaning given to the Constitution by a constantly shifting and highly politicized Supreme Court. It is hard to believe that the words of the Constitution reveal one true meaning when they have been cited to support such diverse things as laissez-faire capitalism, the New Deal corporate welfare state, and the modern revolution in civil rights. The changing Court that molded the same Constitution to such changing policy goals cannot persuasively claim to be above politics. The fact that Marshall is seemingly cited on both sides of every question—and sometimes, as in *United States v. Lopez*,<sup>90</sup> in the same case—seems to implicate him in our indeterminate and highly politicized legal culture, especially since the charge of politics was leveled against him during his own age.<sup>91</sup>

While those allegations cannot be entirely disregarded, it is instructive to recall that the lawyers, jurists, and politicians of Marshall's age, even those who accused him of being political, believed that the Constitution had a true meaning. For them, one interpretation of the Constitution was not as good as the next. This is not to say Marshall and his contemporaries believed the Founding Fathers spoke with absolute clarity about everything. He was not a constitutional literalist. But he did believe a single constitutional meaning could be derived from the text, even when it was not immediately clear what meaning the Framers intended. Two interrelated things help account for his faith in the possibility of an objective interpretation of constitutional language. The first was the common-law tradition of statutory interpretation he shared with other lawyers and judges of the period. The second was a natural-law interpretive tradition that was deeply rooted in Western history, one that included and informed the thinking of continental and English jurists of the seventeenth and eighteenth centuries

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89. C.K. OGDEN & I.A. RICHARDS, *THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM* (1923).

90. 514 U.S. 549 (1995).

91. For some of the best current scholarship on the problem of original intent, see *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* (Jack N. Rakove ed., 1990). For the sharp disagreement among the Justices over Marshall's opinion in *Gibbons*, see *Lopez*, 514 U.S. at 553-619.

such as Grotius, Vattel, Rutherford, and Blackstone. Marshall appeared to accept without question, and without careful examination, their collective belief that law had an objective existence and that its meaning could be ascertained by time-tested rules of interpretation, the same point Story extracted from Marshall's opinions in his *Commentaries on the Constitution*.<sup>92</sup> Marshall's use of *intent* in his opinions was not a smoke screen designed to hide his policy preferences or the lawmaking implications of his opinions but rather emanated from his belief in the fundamental assumptions of the early national legal culture.<sup>93</sup>

This is not to say Marshall claimed to have read the minds of the Framers; he did not. Nor could he have, since the records of the Philadelphia Convention and the state ratifying conventions were not available to him. What he did have—and it was basic to the meaning of *intent*, as he used the concept—was a consanguinity to the Framers. Belonging to the first generation of interpreters, “being there” at the beginning, had advantages other than getting to write on a clean slate. One of the greatest was that Marshall and his colleagues were asked to supply constitutional answers to the same questions addressed by the Framers. No axiom of constitutional interpretation was more decisive for Marshall than reference to the deficiencies of the Articles of Confederation, the same that the Constitution was designed to correct. Marshall not only shared a common interpretive tradition with the Framers, then, he shared the political history from which the Constitution was fashioned. To understand what this meant, and how it separates his age from ours, one has only to compare the effort of the Marshall Court to settle matters concerning contracts, paper money, slavery, and the emerging national market with those of the modern Court asked to find authority for desegregation, abortion rights, gay rights, and equal voting rights in the Fourteenth Amendment of 1868, which was designed primarily to grant a modicum of civil equality to newly freed slaves.

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92. STORY, *supra* note 43.

93. The common-law tradition of interpretation is discussed brilliantly by H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885-948 (1985), reprinted in *INTERPRETING THE CONSTITUTION*, *supra* note 91, at 53-116. Robert Lowry Clinton explores the broader natural-law interpretive tradition in ROBERT LOWRY CLINTON, *GOD AND MAN IN THE LAW: THE FOUNDATIONS OF ANGLO-AMERICAN CONSTITUTIONALISM* (1997).

Marshall not only consolidated the power of the Court to interpret the Constitution (the real meaning of judicial review), then, but he did so when it was possible to ascertain with some assurance what the words of the Constitution meant. One cannot claim Marshall was omniscient or that everything he did was equally circumscribed by the text of the Constitution. Least confining was international law, which permitted Marshall and the Court to fashion a body of law that blended market-oriented policy with the natural-law tradition of the continental jurists, the same he consulted for rules of interpretation. The constitutional text did not define Native American "nations" either, which led Marshall to forge doctrine from experience, custom, and history, the same things the Framers consulted. What is striking, even in Marshall's most creative moments, is how closely his view of federalism followed the contours laid down in the Constitution. Who except the radical states' rightists could deny that the Constitution was a document meant to "energize" the national government, to give it the powers governments of a sovereign nation ordinarily have. This meant curbing state power to issue paper money, to destroy contracts, and, in general, to obstruct the growth of a national market. The Framers took on state sovereignty, as the ratifying debates conclusively show, and Marshall followed their lead. His jurisprudence, like theirs, also recognized the historical limits of nationalism, leaving a large reservoir of traditional power in the hands of the states, including control over the institution of slavery. His concept of federalism, like that of Madison and the other Framers, was not a perfectly tidy arrangement, but neither was early national history.<sup>94</sup>

Recognizing Marshall's deep affinity with the Framers helps locate him in the sweep of American history. His lack of originality, which troubled Holmes, is not a problem but a virtue. What Marshall did was to work creatively within the framework provided by the Framers. By expounding, legitimating, and maintaining their ideas, his opinions and their Constitution came to be perceived as one and the same. Great symbolic advantage accrued in this fact for both Marshall and the Court, but there was a problem. The problem

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94. Jack N. Rakove does justice to the historical complexities of constitution making, including Madison's federalism, in his *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* (1996).

was that the Framers' Constitution, which he approached legally, was also partly political. It was the supreme law of the land, as Article 6 proclaims, *and* a bundle of political compromises—between large states and small, between the free states and the slave states, and, indeed, between Federalists and Anti-Federalists. Marshall made his constitutional debut in *Marbury* by casting the Court as a legal institution, and he expanded and justified its powers building on that premise. But the political features of the Constitution could not be readily legalized, especially the compromise between states' rights and nationalism that permeated so much of it. It was that part of the Constitution the political branches claimed as their domain; it was that part the parties of Jefferson and Jackson were bent on privileging. Having lost in the battle for ratification, the defenders of states' rights and localism retreated to fight over interpretation. They had some considerable history on their side. One might even argue that local culture, which lay at the basis of states' rights theory, was always dominant; that the nationalism of the Constitution was a creation of a handful of bold visionaries who seized the brief window of opportunity created by Revolution. It was not just that the Constitution was "a roof without walls" but that it was superimposed on a culture that was essentially local and would remain so for decades. Marshall understood the problem but hoped that the memory of the Revolution and the growing economic advantages of national union and national market would forge permanent bonds for the Union. Ironically, it was the growth of a national market and national capitalism located mainly in the North that fueled the southern states' rights movement, leading to the Civil War and putting Marshall on the losing side of antebellum history.

To recognize that Marshall was somehow an accomplice in his own undoing is to acknowledge that he was not a status quo conservative. To be sure, his belief in the intent of the Framers puts him back in the Revolutionary War period. But the Revolution was not simply the conservative law-abiding event Marshall thought it was, nor was the Constitution that completed the Revolution exclusively conservative in its meaning and operation. The document that laid the conservative foundations of judicial review also contained the seeds of popular democracy, without the benefit of amendment, just as the Revolution set in motion the egalitarian



transformation of American society. Likewise, the growth of national commerce, which the Constitution promoted, transformed the way Americans lived. Also the sovereign people continued to play an active role in constitution making. Marshall approved of them and cited them copiously when they created the Constitution of 1787. When they took charge of constitutional change in the 1820s, however, it was another matter; when they took over the Court, through the appointment process, it looked to Marshall like the beginning of the end.

What this popular shift in constitutional law meant, among other things—what Marshall witnessed in his last years and what the Taney Court completed—was that the Supreme Court did not have a monopoly on constitutional interpretation. Doctrines change over time and sometimes disappear, even Marshall's. As modern scholars have shown, it is not always the Court that initiates the changes. The bitter lesson Jefferson and Jackson taught Marshall was that the Court does not have the final word on the Constitution. Understandably, he concluded that a changed Court was no Court at all. What he did not fully appreciate was that the Court as an institution did not have to be final to remain at the center of American constitutional government. More than any other man, Marshall put it there—by associating it with the Revolution, through his person; with the Constitution, through the intent of the Framers; and by making it work as an institution. Holmes put the matter in words:

When we celebrate Marshall we celebrate at the same time and indivisibly the inevitable fact that the oneness of the nation and the supremacy of the national Constitution were declared to govern the dealings of man with man by judgments and decrees of the most august of courts.<sup>95</sup>

The great Chief Justice put his stamp on the Court as an institution, and when the Court goes about its work, it keeps his fame alive. No other institution of government is so well-equipped to perform this chore. To be sure, the other branches celebrate themselves, too. Presidents occasionally cite other presidents, and

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95. Holmes, *supra* note 3, at 268.

political parties search for presidential forebears. The Senate and the House are mindful of their own heroes and their own traditions. But *stare decisis*, along with Westlaw and Lexis-Nexis, makes John Marshall uniquely relevant. Over its long history, the Supreme Court has cited Marshall's great opinions thousands of times. Sometimes the opinions cited have been misunderstood, and sometimes they have been cited to further policy goals that would have made the old Chief Justice cringe. But his name and his ideas still command attention in the actual work of the Court as it serves the American nation he loved.