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R. Kent Newmyer

*University of Connecticut School of Law*

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# JOHN MARSHALL AS AN AMERICAN ORIGINAL: SOME THOUGHTS ON PERSONALITY AND JUDICIAL STATESMANSHIP

R. KENT NEWMYER\*

Oliver Wendell Holmes, Jr. adjourned the Massachusetts Supreme Court briefly in 1901 to commemorate the centennial anniversary of John Marshall's ascent to the Supreme Court of the United States. This is a piece of what Holmes said (and it nearly cost him an appointment to the Supreme Court):

If I were to think of John Marshall simply by number and measure in the abstract, I might hesitate in my superlatives. . . . But such thinking is empty in the same proportion that it is abstract. It is most idle to take a man apart from the circumstances which, in fact, were his.<sup>1</sup>

Holmes went on to note that "[a] great man represents a great ganglion in the nerves of society, or, to vary the figure a strategic point in the campaign of history, and part of his greatness consists in his being *there*."<sup>2</sup> Finally, Holmes doubted that "Marshall's work proved more than a strong intellect, a good style, personal ascendancy in his court, courage, justice, and the conviction of his party."<sup>3</sup>

This is vintage Holmes—which is to say, it is slightly irreverent, marvelously heuristic, with just a touch of sour grapes to spice up the brew. Though he spoke of Marshall's "personal ascendancy in his court," he made no mention of the personal qualities which made that ascendancy possible. Ironically, the one thing Marshall's contemporaries commented about most frequently was his personality and, inseparably, his character. With few exceptions—the most well-known being

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\* Professor of Law and History, University of Connecticut School of Law.

1. Oliver Wendell Holmes, *John Marshall*, in COLLECTED LEGAL PAPERS 267 (1920).

2. *Id.* at 267–68.

3. *Id.* at 269.

Thomas Jefferson and Judge Spencer Roane of the Virginia Court of Appeals—his contemporaries agreed that Marshall was a man of outstanding character. Even those who disagreed with his jurisprudence, like John Randolph of Roanoke, or Patrick Henry, found much to praise.

The more I read their consistent accounts of Marshall's admirable personal qualities, the more I am inclined to think of him as *sui generis*: a true American original. His inimitable personal style not only separated him from other statesmen of the founding generation but connected him to the Supreme Court in a special way. Accordingly, I would like to explore briefly the ways in which Marshall the man and Marshall the Chief Justice were related. To do so, I hope, will yield some interesting insights into the development of the Supreme Court as a distinctive American institution. Indeed, both Marshall and the Court as he left it at his death in 1835 were American originals.

There is a remarkable convergence of evidence and witnesses as to Marshall's personal qualities. Take, for example, the resoluteness and humanity he displayed during the brutal winter encampment of Washington's army at Valley Forge—where Captain Marshall suffered alongside his men and, when the weather permitted, out-raced and out-jumped them. Then there were his exploits at the Jockey Club and the Quoit Club in Richmond. Few among the founding fathers had such a joyous good time. Would John Adams or George Washington or James Madison ever have been seen down on all fours measuring a contested quoit with a straw? I cannot imagine it, any more than I can imagine Thomas Jefferson joking about the alluring charms of the women who followed the army (even if he had been there to do so). Or consider the austere republican architecture of Marshall's Richmond house, especially as compared to Washington's stately Mount Vernon and Jefferson's magnificently inventive Monticello. Or take the Lincolnesque folklore surrounding Marshall. In one oft-repeated anecdote, a stranger to Richmond offered the sloppily dressed Chief Justice a small coin to carry a Turkey home from the market, which he obligingly did. Then there was the image of the long-legged Marshall on a short-legged mule headed north out of Richmond to his Chickahominy plantation—with his thumb in a jug of something that wasn't water. Or the jokes he told about himself—as when he found himself on

circuit in North Carolina without trousers (a deficiency which he humorously blamed on his personal servant). No one, that I can recall, loved Jefferson's laugh as Joseph Story loved Marshall's.

Marshall's appointment to the Supreme Court by President John Adams also comes to mind as a revealing episode about his personality. Sometime in October of 1800, President Adams learned that Chief Justice Oliver Ellsworth planned to resign because of ill health. Adams offered the position first to John Jay, who had served on the Court from 1789 to 1795, and who, on that account, would have been acceptable both to the sitting justices and to the Federalists in the Senate. Jay refused, citing the incurable weakness of the Court. Adams then considered Justice William Cushing—more, it would appear, for political than juridical reasons. Marshall, who, as Secretary of State, had Adams's ear, favored William Paterson over either man. What Marshall did not know was that the President had already decided to go outside the Court. To Marshall's great surprise, and the surprise of most everyone else, the President chose him. The exchange, as he recounted it many years later, went like this: "Who shall I nominate now?" asked Adams. Marshall suggested Paterson again and received a decided no. Then Adams said: "I believe I must nominate you." And that, apparently, was the long and the short of it. "Pleased as well as surprised," Marshall recounted, he "bowed in silence" and left.<sup>4</sup> It was a supremely republican moment and a uniquely Marshallian one as well.

Equally revealing of Marshall's personality was the opposition to his appointment levelled by the northern leaders of his own party—the likes of Theodore Sedgwick, George Cabot, Robert Goodloe Harper, and Rufus King. Marshall's ability was not the issue. Several of the group had heard him argue *Ware v. Hylton*<sup>5</sup> before the Supreme Court in 1796 and had been greatly impressed with his legal ability. On the other hand, they were not impressed with his personality. First, there was his stubborn independence from party—as when he refused to defend the Alien and Sedition Acts. Even more

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4. AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL 29 (John Stokes Adams ed., 1937) [hereinafter AN AUTOBIOGRAPHICAL SKETCH]. On the appointment of Marshall, see Kathryn Turner, *The Appointment of Chief Justice Marshall*, 17 WM. & MARY Q. 143 (1960).

5. 3 U.S. (Dallas) 199 (1796).

troubling to the High Federalists were his easy-going nature and his casual dress and manners, all of which raised questions about his resoluteness. On top of this was his demonstrated popularity. How, they wondered, could a man who was so democratic in his demeanor and so popular with "the people" be expected to hold them in check? This is precisely what the Federalists expected the new Chief Justice and his Court to do.<sup>6</sup>

To them, Marshall just did not fit the model of an eighteenth century statesman—or any other model, for that matter. He was a young Virginia aristocrat who behaved like a democrat; he was a conservative who distrusted the people but mingled easily with them. He was a supremely talented lawyer who became a great Justice, but who was also a genuinely modest man. Take, for example, his disregard for the historical record, as compared to almost all the other famous founders. Not only did he not save his personal papers, but appears to have destroyed some of them.

Perhaps nowhere is his modesty more touchingly revealed than in the final years of his life when accolades of various sorts poured in on him. The modesty and humility he displayed throughout his life reminds me of what Thomas Babington Macaulay said of John Hampden: 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>7</sup> What he chose to put on his tombstone (and chose *not* to put on it) tells the same story. Unlike Jefferson, who listed his life's great accomplishments, Marshall listed only his name and dates, and those of his parents, and the most important fact of all, that he was the husband of Mary Willis Ambler.

Probably there is no better way to illustrate Marshall's personal qualities than to show how they clashed with those of Jefferson. On all counts this was one of the most creative hatreds in American constitutional history—and one of the most deep-seated. To capture the personal and intellectual differences between the two men, look at the architecture of

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6. On the reaction of the High Federalists to Marshall's appointment, see Turner, *supra* note 4, at 156–63.

7. 3 THOMAS BABINGTON MACAULAY, CRITICAL AND HISTORICAL ESSAYS 2 (1907).

their houses—Marshall's plain brick house in Richmond and Jefferson's magnificent Monticello. Jefferson was America's preeminent Enlightenment thinker. His genius, like the house he built, and continued to build for much of his life, was experimental, inventive, and speculative. And it was precisely Jefferson's passion for speculation that most irritated Marshall, who once referred to his cousin as the "great llama of the mountain." Jefferson idealized the American people, talked of what they could and should be—which is why we have celebrated him. But he was also a bit like Dostoevsky, who loved the peasants in the abstract, but couldn't stand them face to face.

In contrast, Marshall was not given to declarations or pronouncements, especially idealistic ones. I don't recall that any of his letters so much as mentioned Jefferson's Declaration of Independence.<sup>8</sup> Not only did he not idealize the people, he had strong misgivings about popular government, especially when it was driven by political parties and demagogues (which he accused Jefferson of being).

Jefferson was a grand designer, a man who had a plan for everything: his own house, the nation's capital, and indeed the nation itself. Where Jefferson aspired to make America morally perfect, Marshall settled for a constitutional union which would weather "the various crises of human affairs," as he put it in *McCulloch v. Maryland*.<sup>9</sup> Rather than change human nature, Marshall the conservative realist accepted humankind as it was. One is tempted to say he had a common law personality. As a true common lawyer he started with the facts; he was fearful of abstract thinking, and was positively hostile to metaphysics and theorizing. It is hard to tell whether his personality attracted him to the practice of law; or whether imbibing the "taught tradition"<sup>10</sup> of the common law shaped his personality. Clearly, there was a symbiosis between the man and the law he practiced.

So how does one summarize Marshall the man? He was practical-minded, common-sensical, plainspoken, and modest, with a zest for life, and an infectious sense of humor. He was

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8. See generally 110 THE PAPERS OF JOHN MARSHALL (Herbert A. Johnson et al. eds., 1974).

9. 17 U.S. (4 Wheat.) 316 (1819).

10. See ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 17 (1921).

distrustful of theory (especially that imported from revolutionary France) and appreciative of experience and history. The latter changed him from a citizen of the British empire to an American patriot. He was, I would venture to say, Hector St. John Crèvecoeur's new American—the man “who, leaving behind him all his ancient prejudices and manners, receives new ones from the new mode of life he has embraced, the new government he obeys, and the new rank he holds. He becomes an American by being received in the broad lap of our great Alma Mater.”<sup>11</sup> The American frontier and the American Revolution made an American out of him. He embodied in his personality and character the republican culture of the early Republic.

Jared Sparks (fellow Washington scholar and future president of Harvard) understood this point exactly. Sparks traveled to Richmond in 1826 to pay his respects to the aging chief. He came away in awe of Marshall's republican personality: the blending into a consistent whole, as he put it, of “all things about him—his house, grounds, office, himself,” and how they all “[bore] marks of a primitive simplicity and plainness rarely to be seen combined.”<sup>12</sup> Contemporaries of both parties and all persuasions agreed.

Having ascertained something of Marshall's republican character and personality, we might now inquire: What difference did those qualities make in his public life? In answering this question, we might begin by noting that Marshall himself did not ask it. This is not to say that the easy-going Marshall lacked ambition. But what is striking is his lack of self-consciousness about it. He did not ponder, as did young John Adams, the dangers of ambition gone awry. Nor did he bother to fashion his personal image in order to advance himself—as did young George Washington (who, before the Revolution, aspired to a career in the British army, and who studied the classic rules of etiquette in order to advance himself in colonial high society). Even when it counted most, Marshall let nature take its course—as, for example, at the Christmas Ball in Richmond in 1780. Captain

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11. HECTOR ST. JOHN DE CREVECOEUR, *LETTERS FROM AN AMERICAN FARMER* 43 (1912).

12. Interview with Jared Sparks (Apr. 1, 1826), *in* 10 *THE PAPERS OF JOHN MARSHALL* 283, 283–84 (Charles F. Hobson et al. eds., 2000).



Marshall, on leave from the army, showed up at the Ball so unfashionably dressed that he turned off all the pretty girls who expected to see a dashing war hero—all except his future wife, Polly Ambler, who fell madly in love with him.

Modesty, in Marshall's case, one hastens to say, did not mean self-doubt. This plain-dressing, plain-speaking republican never apologized for his membership in Virginia's privileged class. In 1782, for example, he cashed in on his family connections to secure an appointment to the governor's Council—a place traditionally reserved for established statesmen. (He also quickly resigned under protest.) He was an aggressive and highly successful land speculator who felt perfectly entitled to engrossing a couple hundred thousand acres of the best land in Virginia's Northern Neck. Slavery almost invariably went with land and status in eighteenth century Virginia, and Marshall was no exception to the rule. As did other white residents of Richmond, he and Polly counted on domestic slaves—eleven or twelve in the course of his life. It would appear from his will that slaves also worked the plantations that he willed to his sons, though it is not clear how many slaves he bequeathed to his children. The point is that unassuming John Marshall was also a member of a privileged elite as the age defined it. Social status did not trouble him, nor did the ownership of slaves—this, in contrast to Jefferson, who had tens of dozens of slaves and a slave mistress, and who worried the problems of slavery, freedom, and republican values until the end of his life—with no resolution.

Marshall accepted human nature as it was—and himself as well. Judging from what he did (and from what he did *not* bother to say), there was a remarkable correspondence between Marshall the private man and Marshall the public figure. More to the point, his personal qualities—his character and personality—resonated with the age and enhanced his public influence. He was a republican man in a republican age—which is what Holmes meant when he referred to him as a “great ganglion in the nerves of society.”<sup>13</sup>

To illustrate the manner in which Marshall's republican character enhanced his public career, we might start with his pre-court career: as state legislator in Virginia in the 1780s, as spokesman for the new Constitution at the state ratifying

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13. HOLMES, *supra* note 1, at 267.

convention in 1788, and as a leader of the Virginia Federalists in the 1790s. Take, for example, his election to the Virginia House of Delegates in 1795. He had decided to sit out that election, even though it was a test of Washington's foreign policy in Virginia. Not only had he withdrawn his name as a candidate, but he had come out publicly in support of "an intimate friend" who, as he remembered, was running against "an infuriated politician who thought every resistance to France subserviency to Britain."<sup>14</sup> When he went to vote, however, he was accosted by a supporter who insisted on opening a poll for him. Marshall left, thinking he had dissuaded him from doing so, only to be informed that evening that he had been elected. His reputation for patriotism, honesty, and old-fashioned integrity had a lot to do with his surprise victory. In the deferential political culture of Virginia, character went hand in hand with noblesse oblige, just as personality counted heavily in a society where business, politics, and law operated face-to-face.

Marshall's character also served him and his country well in the larger world of national politics and international diplomacy. Witness his behavior in the notorious XYZ affair in 1798—X, Y, and Z being symbols of the French agents who demanded bribes from Marshall, Elbridge Gerry and C.C. Pinckney. Marshall was first to grasp the significance of French duplicity, and the quickest to respond to the insult to his country's honor. On his return to the United States, he was celebrated as an American hero—the man who showed the tyrants of the old world what republicanism was all about. At the same time, he showed Americans what the new nation stood for.

Among those who understood the point was none other than the great Virginia patriot, Patrick Henry. Henry and Marshall had been political opponents since the 1780s when Marshall first sided with the forces who wanted a stronger national government. As delegate to the Virginia Ratifying Convention in 1788, it was young Marshall who was chosen to answer the states' rights arguments of Henry. During the 1790s Henry and Marshall were the recognized leaders of opposing parties. But when Marshall's personal character was impugned during the congressional election of 1799, it was

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14. AN AUTOBIOGRAPHICAL SKETCH, *supra* note 4, at 24.

none other than Henry who came out publicly in his defense. His letter is a telling document regarding the nature and importance of Marshall's character:

Independently of the high gratification I felt from his public ministry [as minister to France in the XYZ affair], he ever stood high in my esteem as a private citizen. His temper and disposition were always pleasant, his talents and integrity unquestioned. These things were sufficient to place that gentleman far above any competitor in the district for Congress. . . . Tell Marshall I love him, because he felt and acted as a Republican, as an American.<sup>15</sup>

Judging by the way they welcomed Marshall home after his return from Paris, the American people agreed with the venerable Henry.<sup>16</sup>

Marshall not only acted like a republican—in Paris and in Richmond and elsewhere—but he spoke and wrote like one as well. On the republican tone of his legal arguments, for example, we have no less an authority than William Wirt. Wirt was one of the ablest lawyers to argue before the Marshall Court; as Attorney General of the United States after 1817 he laid the foundation of that important department of the federal government. In 1803, however, he was a young Virginia lawyer and an aspiring writer who captured Marshall the lawyer in action, attesting to the correspondence between Marshall's personality and his rhetoric. Wirt wrote:

[Marshall] is, in his person, tall, meager, emaciated; his muscles relaxed, and his joints so loosely connected, as not only to disqualify him, apparently, for any vigorous exertion of body, but to destroy every thing like elegance and harmony in his air and movements. Indeed, in his whole appearance, and demeanour; dress, attitudes, gesture; sitting, standing or walking; he is as far removed from the idolized graces of lord Chesterfield, as any other gentleman on earth.<sup>17</sup>

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15. Congressional Election Campaign, in 3 THE PAPERS OF JOHN MARSHALL 500 (William C. Stinchcombe et al. eds., 1979) (quoting MOSES COIT TYLER, PATRICK HENRY 409–11 (1915)).

16. See 3 THE PAPERS OF JOHN MARSHALL 494 (William C. Stinchcombe et al. eds., 1979).

17. WILLIAM WIRT, THE LETTERS OF THE BRITISH SPY 178–79 (1970).

Which is to say, he was an American republican. As to his republican style of speaking, Wirt continued:

This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of an orator, deserved to be considered as one of the most eloquent men in the world; if eloquence may be said to consist in the power of seizing the attention with irresistible force, and never permitting it to elude the grasp, until the hearer has received the conviction which the speaker intends.<sup>18</sup>

Contrast the legal style of Wirt's Marshall to some of the other great lawyers and judges of the age who relied (for effect) on ornament and adornment. Take George Wythe, for example—Marshall's law teacher and the teacher of many other Virginia statesmen—who never met a Latin quotation he could resist. Or, there were William Pinkney and Daniel Webster. Pinkney, the undisputed leader of the Supreme Court bar until his death in 1822, was known for his way with words, for his sonorous arguments designed not only to impress the justices, but also to please the Washington ladies who came to hear him declaim before the Court. (The great lawyer also resorted to fancy clothes, and was known to use corsets and makeup to enhance the performance.) Daniel Webster was not only a great orator in the grand tradition, but (in sharp contrast to Marshall) was one of the great self-promoters of the age, who, with a little help from his friends, could beat even the devil with his soaring and eloquent lawyer-talk.

In contrast to Wythe, Pinkney and Webster, there was an unadorned directness and naturalness to all of Marshall's legal productions. Perhaps the reason was that he had almost no formal schooling to confuse the matter or invite conceit. To be sure, he found literary inspiration in English literature, which he studied under his father's direction. When he spoke about the Constitution, and for the Court, he drew inspiration and words (sometimes whole paragraphs) from Hamilton, from *The Federalist*,<sup>19</sup> and from Sir William Blackstone's elegant

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18. *Id.*

19. See generally *THE FEDERALIST* (Jacob E. Cooke ed., 1961).

*Commentaries on the Laws of England*<sup>20</sup>—which work he had begun to read even before he set off to fight in the Revolution. In addition, he drew freely in his opinions on long-winded lawyers like Pinkney and Webster who argued before him in the eloquent style of the day.

In the midst of Marshall's eclecticism, however, his own voice remained distinct. What we see is consistent with what we know of his personal qualities—which is to say, his language was straightforward, natural, energetic, unadorned, and rich in common sense and compelling logic. Marshall's rhetoric resembled the house he lived in—its strength lay in its plain republican features. To be sure, Chief Justice Marshall was the master of the “grand style” of opinion writing. At the same time, we also see the maturation of a distinctive American legal plain style, the kind that Wirt described in 1803. Looking at the communicative force of Marshall's opinion in *McCulloch v. Maryland*,<sup>21</sup> for example—or his nine newspaper essays in defense of that opinion<sup>22</sup>—suggests that the Chief Justice aimed to make the complexities of law understandable to ordinary citizens. In this respect his legal rhetoric prefigured the American Renaissance of the 1840s and 1850s, where form and function merged to give American letters their distinctive character.

And what about Marshall's jurisprudence—the substance as well as the rhetoric of his opinions? Did his approach to judging resemble his personality and character, and if so, what is the connection? Such a question is highly speculative, but I would venture to say there was, if not a causal connection, then at least an intriguing parallel between Marshall's republican character and his law. Which is to say that his judicial opinions are earth-bound, fact-oriented, non-speculative, and practical-minded. As Chief Justice, Marshall never lost sight of the fact that the Court's job was to supply working law for the new nation. When we think of the law he and his Court provided, we tend to think of constitutional doctrine—judicial review, implied powers, the supremacy of federal authority

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20. See generally WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (William C. Jones ed., 1916).

21. 17 U.S. (4 Wheat.) 316 (1819).

22. Marshall's essays in defense of *McCulloch* are reprinted along with an introduction to the debate in JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* (Gerald Gunther ed., 1969).

over the states and the like. A closer look, however, reveals a very undoctinaire mind in action. There are clear principles in Marshall's jurisprudence, to be sure. Indeed, principled jurisprudence is one of his hallmarks. But there is also some healthy and realistic play in the joints: though *McCulloch* introduced the doctrine of implied powers into American constitutional law, it did not create an open-ended constitution (contrary to what Marshall's contemporaries, like Jefferson, or modern biographers like Albert Beveridge, have claimed). A close look at *Gibbons v. Ogden*,<sup>23</sup> and the commerce clause decisions from the 1820s that followed in its wake, shows that Marshall resisted a bright-line solution to the allocation of federal commerce power (the bright line being the doctrine of exclusivism). Or consider the doctrinal flexibility Marshall manifested in applying the Court's ruling in *Dartmouth College v. Woodward*,<sup>24</sup> as in *Providence Bank v. Billings*,<sup>25</sup> or in his early position after the first argument in the *Charles River Bridge Case* in 1831.<sup>26</sup>

One must not overemphasize the doctrinal flexibility in Marshall's jurisprudence or ignore the fact that it was partly due to the growing internal divisions on the Court itself. Nor must we forget that Marshall spoke out boldly for constitutional truth as he saw it—witness his dissent in *Ogden v. Saunders*,<sup>27</sup> or his successful battle for principle in *Craig v. Missouri*<sup>28</sup> and the Cherokee Indian cases.<sup>29</sup> Still, the fact remains that he was not a doctrinal purist like his friend Justice Joseph Story. Marshall's instinct was to balance principle and doctrine with down-home practicality—a sense of what the American people needed and what history would allow. In this respect he was like the framers of the Constitution, whose intent he sincerely tried to follow. In this same respect he was *unlike* modern jurisprudes. The kind of theoretical questions raised by O.W. Holmes, Jr., in the later nineteenth century, for example, or by legal academics in our

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23. 22 U.S. (9 Wheat.) 1 (1824).

24. 17 U.S. (4 Wheat.) 518 (1819).

25. 29 U.S. (4 Pet.) 516 (1830).

26. *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837).

27. 25 U.S. (12 Wheat.) 213 (1827).

28. 29 U.S. (4 Pet.) 410 (1830).

29. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

age, did not concern Marshall, or even occur to him. He thought deeply about the law and how it might be made to work for the American people, but he did not have the luxury or the inclination to think about thinking.

Finally, let's consider Marshall's role as Chief Justice—as the leader of the Court. Here is where personality and character counted the most. I am referring to the happy correspondence between Marshall's personal characteristics and the institutional nature of the Supreme Court over which he presided. Thanks to the work of Marshall scholars, we know much more about the way the Justices lived and worked together than we once did. There is unusual agreement that Marshall as Chief Justice was the unifying catalyst. Part of his success, of course, stemmed from his legal genius. When well over ninety percent of the Court's work was connected to the common law, it counted strongly in his favor that he was a superb common lawyer. In an age before printed briefs, when decisions were rendered shortly after oral argument, it was important that he had a gift for cutting quickly to the heart of the matter. When Justices did their own research and wrote their own opinions, it was essential that he was nimble of mind and quick of pen. Marshall's authority as Chief Justice, to put it plainly, rested on demonstrated lawyerly ability. Here—in fact as well as theory—he was first among equals.

As Chief Justice, however, personality and character counted for much—though convincing documentation on the subject is hard to find. Indeed, there is even conflicting evidence as to how Marshall related to his colleagues. On the one hand, we have the testimony of critics like Jefferson and Spencer Roane, who claimed that Marshall bamboozled his weak-minded and weak-kneed colleagues who in turn let him subvert the Constitution by turning the Court into a bully pulpit for nationalism. Marshall vehemently denied the charges in his newspaper duel with Roane over *McCulloch* in 1819, and defended the intellectual integrity of his colleagues as well.<sup>30</sup> But the fact remains he was a resolute nationalist, and he did speak for the majority in nearly all of the constitutional cases during his tenure, and especially the most important ones.

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30. See JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND*, *supra* note 22, at 8082.

This does not mean that Jefferson and Roane were right, however. Indeed, they missed the point entirely. But the question they raised remains: If Marshall didn't dominate his brethren, as the statistics suggest, then how did he lead? Especially, how did he get six, and later seven, Justices to speak in a single majority opinion?

One of the few extant letters which bear on that subject was written by Marshall's future colleague, Joseph Story, in February 1808 during his visit to Washington as lobbyist for the New England Mississippi Land Company. Young Story was captivated by Marshall's uniquely personal style of leadership, and what he observed corresponds closely to what others attest to regarding his personality. The Chief Justice dressed very simply, noted Story, and his language was "chaste, but hardly elegant."<sup>31</sup> He had a genius for examining "the intricacies of a subject with calm and persevering circumspection" and he unraveled the mysteries of the subject in dispute "with irresistible acuteness."<sup>32</sup> While he lacked the "majesty . . . of Dr. Johnson," in "subtle logic" he was right up there with the great David Hume.<sup>33</sup> More to the point, young Story was captivated by Marshall the man. "I love his laugh," he wrote, "it is too hearty for an intriguer,—and his good temper and unwearied patience are equally agreeable on the bench and in the study."<sup>34</sup>

If Story was right, then Jefferson was wrong—as were the High Federalists who predicted that Marshall's relaxed geniality would interfere with his duties as Chief Justice. Clearly he did not try to dominate his colleagues by the sheer force of his intellect. Nor did he stand on the authority of his office. Story tells us that Marshall was the same in his "study" as he was on the "bench"—which is to say he carried his genius lightly, mixing ability with patience, humor, and a sensitivity to the feelings of his colleagues. Marshall *won* respect by not demanding it: if he was first among equals, it was because his brethren conceded him the honor. In the process they also gave up their habit of writing separate opinions in favor of a

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31. See Letter from Joseph Story to Samuel P.P. Fay (Feb. 25, 1808), in 1 THE LIFE AND LETTERS OF JOSEPH STORY, at 166 (William W. Story ed., 1851).

32. *Id.* at 167.

33. See *id.*

34. *Id.*



majority opinion which, in most of the important constitutional cases, was written by Marshall himself.

This shift from seriatim opinions to a majority opinion was the most important institutional change in the Court's history—the essential foundation of the Court's interpretative powers and its claim to equality in the separation of powers system. Seriatim opinion writing, wherein each sitting judge wrote a separate opinion, was the practice of the English courts at the time, and of colonial and early state courts as well, including those of Virginia. It was also the general practice of the Supreme Court under Jay and Ellsworth in the 1790s, though one catches some glimpse of change during that period. The cost of doing business this way was plain to see. As long as the Justices spoke severally, the Court could not realistically claim to be the chief interpreter of the Constitution, much less its chief guardian. This is precisely why Jefferson wanted to reintroduce the practice of separate opinions in the 1820s and why he urged his friend Justice William Johnson to see to it. Both Jefferson and Marshall understood that the kind of interpretative authority claimed in *Marbury v. Madison*<sup>35</sup> could be fully realized only if the Court spoke with a single authoritative voice.<sup>36</sup>

There are undoubtedly complex reasons why the Justices abandoned the practice of seriatim opinions—and why they rallied around Marshall as the spokesman of the Court. Ironically, Jefferson's determination to crush the Court and exterminate the spirit of "Marshallism" was an important factor because it encouraged the justices to "circle the wagons."<sup>37</sup> But Marshall's personality and character were central to the story—particularly because those personal qualities corresponded so neatly to the institutional character of the Court. Recall, first, that the Court was a small institution—only six Justices, including the Chief Justice, when Marshall assumed his duties in 1801. The Court's term

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35. 5 U.S. (1 Cranch) 137 (1803).

36. For an account of Jefferson's efforts to undercut Marshall's authority, see Letter from Thomas Jefferson to Justice William Johnson (Oct. 27, 1822), in 12 THE WORKS OF THOMAS JEFFERSON, at 246–52 (Paul L. Ford ed., Fed. ed. 1905).

37. See Letter from Thomas Jefferson to James Monroe (Apr. 13, 1800), in 19 THE WRITINGS OF THOMAS JEFFERSON, at 120 (Andrew A. Lipscomb & Albert E. Bergh eds., 1905).

during this early period lasted only a couple of months; the remainder of the year was consumed with circuit duties. Justices left their families at home and took up quarters in one of Washington City's several boarding houses. Unlike the modern Supreme Court, there were no separate offices, no secretarial staffs, no law clerks to help research and write opinions, and no access to the printing press (permitting justices to circulate draft opinions and negotiate differences). Business was necessarily conducted informally and consultations among the justices spilled over into the living quarters.

This cheek-by-jowl institutional arrangement provided an ideal environment for Marshall to work his unifying magic. He was a revolutionary hero when that mattered greatly (indeed, it was a qualification for appointment to the Supreme Court under Washington). And his democratic informality, his modesty, his sensitivity to the opinions of his brethren, his patience, and his sense of fairness and openness made him an ideal facilitator in the small group setting of the Court. He spoke for the Justices, to be sure, but his opinions, as he himself admitted, were collective efforts—even during the Court's so-called "golden age." By facilitating a collective decision-making process, Marshall invited his colleagues to think of themselves not as six isolated Justices—which they had been—but as a single entity.

At no time were Marshall's leadership qualities more clearly demonstrated, or more amply documented, than during the circuit court crisis of 1802—a crisis precipitated when the Jeffersonian Republicans who controlled Congress repealed the Federalist Judiciary Act of 1801. Among other things, the Repeal Act restored the circuit-riding duties of the Supreme Court, duties which had been abolished by the Act of 1801. Gone also were the sixteen new circuit judgeships which had been created to take the place of circuit riding—judgeships which had been filled at the last minute by Federalist appointees (one of whom was Marshall's brother James Markham Marshall).

The pressing question facing Marshall and the Court in April 1802 was whether they should ride spring circuit as required by the Repeal Act. To do so would concede the constitutionality of the Act—a precipitous thing to do, since it was being challenged by the newly appointed circuit judges on

the ground that they were being denied office in violation of the life-tenure provisions of Article III of the Constitution. Not to ride circuit as required by the new Act, on the other hand, would put the Court on a collision course with President Jefferson and the Republican majority in Congress. Among those who wanted a showdown was Justice Samuel Chase, the ablest of Marshall's new colleagues and one of the most assertive as well. With principle on one side and practicality on the other, Marshall was in a bind—a bind made all the more difficult because he agreed personally with Chase regarding the unconstitutionality of the Repeal Act.

Marshall's approach to this dilemma reveals much about his character, personality, and leadership. Especially relevant is his letter of April 19, 1802 to Justice William Paterson.<sup>38</sup> Marshall began by stating his belief that the Repeal Act was unconstitutional. After joining Chase on the high ground of principle—and flattering his colleague's vanity in the process—he then began to question the course of radical resistance that the impetuous Chase advised. As he put it delicately to Paterson:

The consequences of refusing to carry the law into effect may be very serious. For myself personally I disregard them, & so I am persuaded does every other Gentleman on the bench when put in competition with what he thinks his duty, but the conviction of duty ought to be very strong before the measure is resolved on. The law having been once executed will detract very much in the public estimation from the merit or opinion of the sincerity of a determination, not now to act under it.<sup>39</sup>

Here is subtle leadership at its most subtle. Indeed, Marshall put into play all of those personal qualities of patience, sensitivity, and humility which contemporaries attributed to him. First, he proceeded on the assumption that the resolution of the circuit question was collective in nature—that the opinions of each Justice had to be taken into account. After having solicited their opinions, he then put his own on

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38. See Letter from John Marshall to William Paterson (Apr. 19, 1802), in 6 THE PAPERS OF JOHN MARSHALL, 1800–1807, at 108–09 (Charles F. Hobson et al. eds., 1990).

39. *Id.*

the line, but without standing on authority and without cajoling. Then came the art of gentle persuasion. Having conceded that principle was on the side of Chase, he could then venture the suggestion that a principled stand might be too costly. And having taken a principled stand himself, he could then show his own willingness to set aside principle for the sake of the Court's survival as an institution—and invite his brethren to do the same. What the principled but practical-minded Chief Justice said without actually saying it was that legal reasoning had to be balanced by a consideration of the political impact which that reasoning might have—on Congress, on the people at large, and on the Court.

Marshall's strategy carried the day. The Justices did agree to ride circuit in 1802, as he intimated they ought to do. And they put their pragmatism into law the following year, in *Stuart v. Laird*,<sup>40</sup> by upholding the constitutionality of the Repeal Act. By acting in unison, the Justices, thanks to Marshall's deft leadership, had taken a giant step toward the abandonment of seriatim opinions. When the Court decided *Marbury v. Madison* the same year, the Justices also spoke in a single voice. In the institutional struggles of the early Republic over constitutional interpretation—between the branches of government and between the federal government and the states—this newfound unity was the *sine qua non* of the Court's authority.

Marshall's personality and character were decisive in this early victory. And all we know indicates that the same style—and the same success—continued to characterize his Chief Justiceship. To put it plainly: he was in the right place at the right time with the right stuff. Even when new Justices with a new tolerance for states' rights took their seats on the Court after 1823, even when they challenged Marshall's constitutional nationalism during the last years of his tenure, he continued to hold a divided Court together by the moderating force of his personality and character.

In conclusion, we might revisit Holmes' statement that part of Marshall's greatness consisted in "his being *there*."<sup>41</sup>

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40. 5 U.S. (1 Cranch) 299 (1803). Because Marshall was involved in the case below, Paterson spoke for the Court, essentially conceding full power to Congress to structure the lower federal courts.

41. See HOLMES, *supra* note 1, at 26768.

While that is undoubtedly true, it was equally important that it was *Marshall* who was there. Looking at the way he infused the Court with his own character, one is inclined to agree with Ralph Waldo Emerson when he said that “institutions are but the lengthened shadow of a man.”<sup>42</sup>

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42. Ralph Waldo Emerson, *Self-Reliance Essays: First Series*, in AMERICAN HERITAGE DICTIONARY OF AMERICAN QUOTATIONS 248 (Margaret Minder & Hugh Rawson eds., 1997).

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