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PAUSE AT THE RUBICON, JOHN MARSHALL AND EMANCIPATION: REPARATIONS IN THE EARLY NATIONAL PERIOD?

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Professor D. Kent Newmyer recently attributed Chief Justice John Marshall's record on slavery to a combination of "inherent paternalism" and a deep commitment to commercial interests that translated into racism.[1] Newmyer found Marshall's adherence to the law of slavery "painful to observe" and saw it as a product of his Federalism, which required deference to states on the slave issue.[2]

Marshall's involvement in the problem of emancipation in the last years of his life, however, indicates that pragmatism primarily dictated his approach to the problems associated with the "slave population." Marshall's statements, both on and off the bench, reveal that he hated the institution of slavery and considered it demeaning to both slave and slave-owner.[3] While private records disclose that Marshall negotiated his way through the social and economic life of the institution with the ease of a southern slave-owner, his commitment to colonization equally reveals that he, as a Federalist, was above all a pragmatic nationalist. When faced with the question of emancipation, Marshall unhesitantly adopted the idea of national funding for a colonization scheme to gradually end slavery. National funding for colonization was, arguably, the early national equivalent of "forty acres and a mule." Inherent in both concepts is the acceptance of national responsibility for a social evil.

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1. D. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 414-34 (2001).

2. *Id.* at 434. Marshall "truly believed . . . that it was possible to separate morals from law. . . ." *Id.*

3. Like his distant cousin, and fellow Virginian, Thomas Jefferson, with whom Marshall did not often agree, Marshall considered slaveholding an evil. He often discussed the matter in the third person as if to distance himself from it and referred to the southern states' "immovable prejudice & dislike" for any interference with *their* "slave population." Letter from John Marshall to Timothy Pickering (March 20, 1826), *in* 10 THE PAPERS OF JOHN MARSHALL 277 (Charles Hobson ed., 2000).

Marshall's pragmatic record on slavery is seen in his participation in the economic and social life of slaveholding Virginia, in private correspondence and in opinions expressed in cases. But it is most apparent in his association with the American Colonization Society,[4] where he attempted to deal directly with solving the problem of the "slave population" and emancipation.

(a). Participation in the social and economic life of slavery

The realities of Marshall's place in time informed his pragmatism. As a slave-holding southerner, Marshall, throughout his life, held ambivalent ideological positions. He fought in the Revolutionary War to establish a country, the government of which would be based on principles of equality. In June of 1788, as a thirty-two year old delegate to the Virginia ratification convention, he argued for approval of the Constitution, a Constitution that contained clauses of inequality prompting its characterization as a pro-slavery document.[5] In the last decade of his life, he served as a delegate to the Virginia Constitutional Convention that rejected equality by incorporating pro-slavery provisions to determine representation in the state legislature.[6]

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4. *See* P.J. STAUDENRAUS, THE AFRICAN COLONIZATION MOVEMENT 1816-1865 17-30 (1961) (concentrating on the colonization movement in the United States). Discussions of colonization in the early 1800s culminated in the formation in 1817 of the American Society for Colonization of Free People of Colour in the United States on the Coast of Africa ("Colonization Society"). The Reverend Robert Finley of Baskingridge, New Jersey, eventual president of the University of Georgia, adopted colonization as a benevolent cause and published THOUGHTS ON COLONIZATION in 1816. Finley wanted to establish a colony "similar to Sierra Leone" to "meliorate the condition of free Negroes by removing them to Africa." *Id.* at 17. In December of 1816, Finley joined talents with Elias Boudinot Caldwell, Clerk of the Supreme Court, and Francis Scott Key, a prominent Washington lawyer, to establish the Society in Washington in January, 1817. At the first organizational meeting on December 21, 1816, Henry Clay, John Randolph of Roanoke and Daniel Webster were among those who voted to establish a colonization society. The organizers met on December 28, 1816, in the hall of the House of Representatives and adopted a constitution that was signed by some fifty men. Justice Bushrod Washington was elected President. The thirteen vice-presidents included Secretary of the Treasury William Crawford, Speaker of the House Henry Clay, William Phillips of Massachusetts and General Andrew Jackson. *Id.* at 24-30. *See also* C. DUNCAN RICE, THE RISE AND FALL OF BLACK SLAVERY (1975) (providing a general history and discussion of colonization movements). Rice refutes the "assumption that the Colonization Society as a whole was pro-slavery and anti-Negro," and argues that it was a "legitimate agency through which one aspect of the benevolence of America's philanthropic community was channeled." *Id.* at 243.

5. U.S. CONST., art. IV, § 2, cl. 3; U.S. CONST., art. I, § 2, cl. 3. *See* James Oakes, *"The Compromising Expedient": Justifying a Proslavery Constitution*, 17 CARDOZO L. REV. 2023 (1996) (discussing the pro-slavery attitudes of the framers).

6. *See* FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE

When constitutional protection of the slave trade ended in 1808, Congress immediately passed legislation prohibiting importation of slaves into the United States. Thereafter, Virginia became a breeding ground for the thriving interstate slave trade.[7] By the 1830s, the industry would yield approximately twenty million dollars a year.[8] For Marshall, slavery was a pervasive institution in the political, social and economic fabric of his state and nation.

Records reveal that Marshall maintained a small holding of slaves throughout his life, that he received slaves as gifts and that he gave slaves to his sons. In 1783, as a wedding present, his father gave him one slave, named Robin Spurlock, who remained with him until Marshall died on July 6, 1835. At his death, Marshall did not free his slaves, but bequeathed them, all save one. Only his manservant Robin, could, by virtue of Marshall's will, choose freedom.[9] The emancipating provision, contained in an August 13, 1832, codicil to his will of April 9, 1832, incorporated the Virginia law on slavery:

It is my wish to emancipate my faithful servant, Robin, and I direct

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CONSTITUTION (1981) (noting that Marshall was elected as a delegate although he refused to run). Although he did not play a large part in the "debate on representation, "he helped vote a crushing defeat for the democratic reformers" who were trying to base representation on the white population. *Id.* at 152-54.

7. *See* MARSHALL SMELSER, THE DEMOCRATIC REPUBLIC: 1801-1815 63 (1968); FREDERIC BANCROFT, SLAVE TRADING IN THE OLD SOUTH (1931) (providing an excellent history of the United States slave trade). The United States Congress abolished the international slave trade by an act of 1807, but did not attempt to regulate interstate trade. Marshall Smelser noted that the law "benefited no Negro living in the United States. On the contrary, it encouraged slave owners to demoralize their charges by encouraging them to breed under any circumstances." *Id.* at 63.

8. LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 724 (1974). Relying on the 1832 debates in the Virginia legislature, Baker noted, "[e]stimates are that between eight thousand and nine thousand slaves were sold south every year, and that a healthy black male could bring about $ 1,000 on the slave market." *Id.*

9. Last Will and Codicils of John Marshall (Apr. 12 1827-1831) (on file with Henrico, Richmond, Faquier and Warrenton Counties, Virginia). Marshall differed from his friend, George Washington, who had many more slaves and freed them all in his will. Marshall freed one of his slaves during his lifetime. *See infra* note 13. Marshall appears to have managed his slaves paternalistically, purchasing for his father-in-law and giving slaves to his sons. Letter from John Marshall to James K. Marshall (Apr. 12, 1834) (on file with author). We have no records of his participating in extensive slave purchases. *See* the bill of sale from one John B. Johnson to John Marshall (July 3, 1787), *in* 1 THE PAPERS OF JOHN MARSHALL, at 232-33 (Herbert Johnson ed., 1974) (containing evidence that Marshall was not a typical slave owner). The bill of sale contained the following note from John Marshall, "[f]or the within mentioned sum of seventy pounds which I have received I bargain & sell the within mentioned slaves to Jaqueline Ambler Esquire [his father-in-law]." *Id.*

> his 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. In the event of his going to Liberia I give him one hundred dollars, if he does not go thither I give him fifty dollars shuld it be found impracticable to liberate him consistently with law and his own inclination, I desire that he may choose his master among my sons, or if he prefer my daughter that he may be held in trust for her and her family as is the other property bequeathed in trust for her, and that he may be always treated as a faithful meritorious servant.[10]

By another codicil dated November 6, 1834, Marshall gave his cook, Henry, to his son, Thomas. Excepting by name only Henry and Robin, he gave all others not enumerated or named in the body of the will with the "tract of land on Chickahominy, with all slaves stock, and plantation utensils, thereon, and all my real property, slaves and household furniture in the City of Richmond."[11]

When Marshall penned the will provisions, his personal experience as well as the law informed his choices. A Virginia act of 1806 required emancipated slaves to leave the state. Departure could be avoided through petition for legislative permission. Marshall signed a certificate for such a petition on December 5, 1822, for a Jasper Graham who had been freed in John Graham's will. In the certificate, Marshall stated that Jasper was a "proper object for the indulgence of the legislature."[12] Marshall knew that Robin's emancipation was subject to the vagaries of Virginia law as Jasper's had been.

On one other occasion, Marshall emancipated a slave. With the words "I, John Marshall do hereby emancipate Peter a black man purchased by me from Mr. Nathaniel Anthony," he executed a Deed of Emancipation on September 22, 1796.[13] The deed was proved by oath and was filed of record in Henrico County on December 5, 1796.[14] Entries in Marshall's private Account Book also

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10. Report by Mary Douthat Higgins for the Association for the Preservation of Virginia Antiquities (1974) (unpublished manuscript on file at The Virginia Historical Society).

11. Last Will and Codicils of John Marshall (Apr. 12 1827-1831) (on file with Henrico, Richmond, Faquier and Warrenton Counties, Virginia) (containing portions relating to slaveholdings). *See generally* 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 525-26 (1919); STITES, *supra* note 6, at 145-47.

12. Letter from John Marshall to Jasper Graham (Dec. 5, 1822), *in* 9 THE PAPERS OF JOHN MARSHALL, at 377-78 (Charles F. Hobson, 1998). The fate of Jasper Graham's petition illustrates the complicated process attending manumission in Virginia. The petition was "rejected in a committee, eventually . . . approved by the House of Delegates, but a bill for the purpose was evidently not enacted into law". *Id.* at 378.

13. Deed of Emancipation from John Marshall (Sept. 22, 1796), *in* 3 THE PAPERS OF JOHN MARSHALL, at 46 (Charles T. Cullen 1979).

14. *Id.*

show that Marshall participated fully in the life of slavery. Marshall kept regular records of receipts and disbursements during the years, 1783 through 1795.[15] The entries reveal purchases, receipts and expenses associated with slaveholding. On July 1, 1784, Marshall entered a purchase for "Ben" at ninety pounds, four shillings, a price that indicates that Ben was at a "prime work age."[16] Two years later, another entry indicates that Marshall paid one pound, one shilling and four pence in goal fees to get Ben out of jail.[17] On April 12, 1787, Marshall paid fifty-five pounds for "Israel," a slave he kept for five years until February, 1792.[18] Undesignated expenses associated with slaves are entered in June of 1787, "expenses for negroes, [twenty] pounds,"[19] and on April 26, 1788, seven pounds four shillings two pence, disbursements "for negroes."[20] On June 20, 1787, two entries were made for Sam, "linnen" at nine shillings and a coffin at twelve.[21]

Census figures supplied by Marshall for the 1810, 1820 and 1830 census years reflect that his slave ownership was never large and declined overtime from sixteen to fourteen to seven.[22] Irwin S. Rhodes compiled the personal property tax lists filed in Richmond from 1787 to 1835. These records show a fairly constant holding in that city of eight to ten slaves declining to seven in 1828, and to one (presumably Robin) in 1835, the year of John Marshall's death.[23]

(b). Private correspondence

In a letter to Timothy Pickering in 1826, Marshall expressed a sentiment that recurs again and again throughout his personal correspondence:

> I concur with you in thinking that nothing portends more calamity & mischief to the southern states than their slave population; Yet they seem to cherish the evil and to view with immovable prejudice

15. Financial records of John Marshall (May 1788), *in* 1 THE PAPERS OF JOHN MARSHALL, at 289, 411 (Herbert Johnson ed., 1974); Financial records of John Marshall (Dec. 1795), *in* 2 THE PAPERS OF JOHN MARSHALL, at 333, 498 (Herbert Johnson ed., 1974).

16. Financial Records of John Marshall (July 1784), *in* 1 THE PAPERS OF JOHN MARSHALL, at 305, n. 68 (Herbert Johnson ed., 1974).

17. Financial Records of John Marshall (June 1786), *in* 1 THE PAPERS OF JOHN MARSHALL, at 355 (Herbert Johnson ed., 1974).

18. Financial Records of John Marshall (Apr. 1787), *in* 1 THE PAPERS OF JOHN MARSHALL, at 377, n. 89 (Herbert Johnson ed., 1974).

19. Financial Records of John Marshall (June 1787), *in* 1 THE PAPERS OF JOHN MARSHALL, at 385, n. 20 (Herbert Johnson ed., 1974).

20. Financial Records of John Marshall (Apr. 1788), *in* 1 THE PAPERS OF JOHN MARSHALL, at 409 (Herbert Johnson ed., 1974).

21. *See supra* note 19.

22. Higgins, *supra* note 11.

23. Richmond property taxes prepared by Irwin S. Rhodes (1787-1835), *in* 1 THE PAPERS OF JOHN MARSHALL: A DESCRIPTIVE CALENDAR at 65-68 (1969).

> & dislike every thing which may tend to diminish it. I do not wonder that they should resist any attempt should one be made to interfere with the rights of property, but they have a feverish jealousy of measures which may do good without the hazard of harm that is I think very unwise.[24]

Marshall feared that disintegration of the union would come as a result of the south state's "feverish jealousy" and extreme protectionist attitude toward slavery. He expressed this apprehension during the nullification crisis occasioned by southern opposition to the tariff of 1828 in a letter to Joseph Story. As a Federalist, Marshall felt kinship with his colleagues "north of the Potowmack" and spoke of the Virginians who urged cessation in the 1830s as those with "creeds irreconcilable with the constitutional creed of nationalism."[25] Marshall acknowledged this kinship when he congratulated Story on the completion of a "Herculean task" – his treatise on Constitutional law. Marshall assured Story that constitutional law, with its national interpretation, was a subject "on which [they] concur[red] exactly. Our opinions on it, I believe, are identical. Not so with Virginia or the South generally."[26]

Obviously, Marshall's opinions on slavery were not those of Pickering and Story, but his fear of slavery as a threat to union informed his opinions. Given Marshall's political adherence to Federalism, it is natural that he would look to a national solution to solve the problems of emancipation. Slavery posed the threat of disunion. For Marshall, that was the direct threat. In the same letter to Story, Marshall referred to an upcoming debate over resolutions concerning emancipation submitted to the Virginia state legislature:

> You have undoubtedly seen the message of our Governor and the resolutions reported by the committee to whom it was referred,—a message and resolutions which you will think skillfully framed had the object been a civil war. . . . On Thursday, these resolutions are to be taken up, and the debate will, I doubt not, be ardent and tempestuous enough . . . it may conduce to a southern league, —never to a southern government . . . . 'We have fallen on evil times.'[27]

Marshall did not participate in the debates, but his son, Thomas Marshall, argued on January 11, 1832, for emancipation in the following words:

> Wherefore, then, object to slavery? Because it is ruinous to the

24. Letter from John Marshall to Timothy Pickering (Mar. 20, 1826), *in* 10 THE PAPERS OF JOHN MARSHALL, at 277-78 (Charles Hobson ed., 2000).

25. Letter from John Marshall to Joseph Story (Dec. 25, 1832), *in* 14 PROCEEDINGS OF THE MASS. HIST. SOCIETY 352-54 (2d series 1900).

26. *Id.*

27. *Id.*

> whites—retards improvement—roots out an industrious population—banishes the yeoman of the country—deprives the spinner, the weaver, the smith, the shoemaker, the carpenter, of employment and support. The evil admits of no remedy. It is increasing . . . The master has no capital but what is vested in human flesh.[28]

Thomas' argument focused on the evils in society caused by slavery. Marshall did not speak the words and he may not have approved of his son's argument, but he did recognize the argument as at least one valid reason for opposing slavery.[29]

(c). Opinions in cases

Marshall's arguments before the Virginia courts and his decision in *The Antelope* are strong evidence that he attempted to solve legal issues involving slavery by adhering strictly to the mandates of the law. Considered in context, they also portray his personal involvement in finding solutions for the problems presented in the cases.

Professor Jean Edward Smith summarized Marshall's representation of slaves before the Richmond bar in the 1790s, reporting that in the four slave cases he argued, Marshall represented the slave in three and that he received no payment as counsel.[30] Smith speculated that Marshall's servant, Robin Spurlock, suggested the cases to him and that it "is likely that Spurlock had little difficulty persuading [Marshall] to take such cases free of charge."[31] Smith concluded that "Marshall's concern for mistreated slaves and Indians was deeply felt."[32]

As counsel in the 1799 will case, *Pleasants v. Pleasants*,[33] Marshall argued for effectuating the testator's intent to emancipate his slaves. In doing so, he "eschewed the rhetoric of liberty in order to make the case on strict legal grounds."[34] A close reading of Marshall's argument indicates that he argued against a strict application of the rule against perpetuities and for a strict adher-

28. BAKER, *supra* note 8, at 723. *See also* Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 CHIC.-KENT L. REV. 1113 (1993) (comparing the 1830 controversy over emancipation with the 1859 controversy over slavery and Helper's 1859 book).

29. STITES, SUPRA note 6. Francis Stites thought that Thomas Marshall "echoed his father's sentiments." *Id. Accord* Jean Edward Smith, *Marshall Misconstrued: Activist? Partisan? Reactionary?*, 33 J. MARSHALL L. REV. 1109, 1124 (2000).

30. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 162 (1996).

31. *Id.* at 163.

32. *Id.*

33. 2 Call 319, 325-26 (1800).

34. Charles F. Hobson, *Editorial note*, 5 THE PAPERS OF JOHN MARSHALL 543 (Charles F. Hobson ed. 1987) (recounting the history of the case).

ence to following testator intent. The *Pleasants* case has been cited as evidence that Marshall was skilled in appellate advocacy reasoning that arguing against the rule against perpetuities to free slaves was "swimming upstream against one of the most sacred canons of property law."[35] Obviously, the "strict legal grounds" important for Marshall's argument were adherence to the intent of the testator, a time honored rule of will construction. Marshall could conscientiously announce his method, strict application of the law, and argue for manumission.

His decision in the slave trade case, *The Antelope*,[36] announced the same focus espoused in the *Pleasants* manumission case:

> In examining claims of this momentous importance; claims in which the sacred rights of liberty and of property come in conflict with each other; which have drawn from the bar a degree of talent and of eloquence, worthy of the questions that have been discussed; this Court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law.[37]

In considering the issue in *The Antelope*—"whether the slave trade is prohibited by the law of nations . . . ." Marshall began by acknowledging that natural law favored liberty:

> That [the slave trade] is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labour is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.[38]

He reasoned that slavery originated in force, and looked to state positive law to outlaw the practice. Because slavery had not been universally recognized as illegal, Marshall took the position that customary international law illegalizing slavery was evolving.[39] He therefore declined to rule that all the Africans should be delivered up to the United States for return to Africa under the Slave Trade Act of 1819. He recognized Spain's claim because slavery was legal in Spain and ordered that, after precise calculation of the number of Africans due Spain, "all the remaining . . .

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35. Smith, *supra* note 30, at 1114. *See also* Paul Finkelman, *Exploring Southern Legal History*, 64 N.C. L. REV. 77, 92 (1985). Professor Paul Finkelman found the "judge's humanitarian instincts" prompted the decision which "ignored" existing law. The two scholars disagree over the number of slaves involved — whether it was 100 or 400. *Id.*

36. 23 U.S. (10 Wheat.) 66, 113 (1825).

37. *Id.* at 124.

38. *Id.* at .

39. United States v. La Jeune Eugenie, 26 F. Cas 832 (D. Mass. 1822). In this, Marshall differed from Story who had ruled on circuit that slavery was prohibited by international law; i.e., that the customary international law outlawing slavery had involved. *Id.*

[were] to be delivered to the United States, to be disposed of according to law. . . ."[40]

The process of returning the Africans dragged on from the date of the decision on March 15, 1825, until July of 1827 "when some 130 Africans adjudicated to the United States sailed from Savannah for Liberia."[41] Marshall's decision and subsequent actions should be considered in the context of his membership in the Colonization Society. Some months after the March decision, Marshall, as president of the Richmond and Manchester Auxiliary of the American Colonization Society, made the following inquiry of the Secretary of the Navy, Samuel Southard:

> In the case of the Antelope otherwise called The General Ramirez, the Supreme court, at its last term directed a considerable number of Africans to be delivered up to the United States, & I understood that You had ordered a vessel to be in readiness to receive them & transport them to Africa. The papers have given us no information on this subject & I am uncertain whether these Africans have ever been delivered, in conformity with the decree, to the United States. *As the annual meeting of the Auxiliary colonization society at this place approaches some interest will be felt in this augmentation of the colony & I shall be gratified at being enabled to communicate the fact.* [author's emphasis] Will you pardon the trouble I give in asking you to have the goodness to drop me a line giving some information on the subject? With great respect I am Sir your obedient.[42]

Southard replied that a dispute had arisen over allocation of the Africans to the Spanish claimant and that the dispute would be submitted to the Supreme Court[43]. After incessant delays, the remaining Africans set sail for the colony in Liberia under the auspices of the Colonization Society.

Although Federal funding for the Colonization Society's plan was often sought, the advocates were never successful. Monies were, however, appropriated by Congress to fund the 1819 Slave Trade Act, under which Africans captured during enforcement against the trade by the United States were to be returned to the coast of Africa. The Colonization Society had been instrumental in passing this legislation and worked closely with the government in enforcing the Act. Marshall's opinion in *The Antelope* is interesting in this context, not only for the particular ruling in the case,

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40. The Antelope, 23 U.S. 66, 133 (1825).

41. Charles F. Hobson, *Editorial Note*, 10 THE PAPERS OF JOHN MARSHALL 158 (Charles F. Hobson ed., 2000). *See generally* JOHN T. NOONAN, JR., THE ANTELOPE: THE ORDEAL OF THE RECAPTURED AFRICANS IN THE ADMINISTRATIONS OF JAMES MONROE AND JOHN QUINCY ADAMS (1977) (providing a detailed narrative of the seven years between the capture of the slave ship, containing 280 Africans in chains, and its departure.

42. Letter from John Marshall to Samuel L. Southard (January 1, 1826), *in* 10 THE PAPERS OF JOHN MARSHALL, at 262 (Charles F. Hobson ed., 2000).

43. *Id.* at 263.

but also for the implementation of the opinion which drew on federal funds.[44]

(d). Association with the Colonization Society

Marshall was involved with the Colonization Society almost from its beginning in 1817.[45] He sympathized fully with its goal of voluntary emancipation and colonization. In 1819, two years after the Colonization Society was formed, Marshall purchased a life membership for $50.[46] In that same year, he sent the Society's president, Justice Bushrod Washington, $30 "on account" of his subscription, noting that he would have sent it to the Elias Caldwell, Clerk of the Supreme Court who was also secretary of the Colonization Society, but Caldwell was out of town.[47] Marshall became president of the Richmond and Manchester Auxiliary of the Colonization Society in Virginia in November of 1823[48] and remained so until his death. He unstintingly supported the efforts of colonization:

> [Marshall] gave handsome donations to the state and national organizations, privately believing that colonization would strengthen the Union and relieve the country from a danger whose extent can scarcely be estimated. He urged free Negroes seeking his advice to go to Liberia. . . .[49]

In 1834, when the Society's finances were in disarray, Marshall pledged $5,000.[50] The Richmond group, over which he presided, met in the House of Delegates, and was recognized as one of the most prestigious groups within the organization.[51]

Legal scholars and historians have ascribed various motives to the proponents of colonization schemes, noting the obvious racism inherent in such plans. Colonization, after all, was based on the assumption that America could not exist as a biracial society. Richard B. Morris, writing in 1969, thought that the colonization movement was "less important for the minimal results it achieved than for the negative attitude toward racial integration in America which it exemplified."[52] Others have emphasized the evils and

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44. *See* NOONAN, *supra* note 41. *See also* EARLY LEE FOX, THE AMERICAN COLONIZATION SOCIETY 1817-1840 215-26 (photo. reprint 1971) (1919).

45. *See* STAUDENRAUS, *supra* note 4 (discussing the origins of the movement).

46. STAUDENRAUS, *supra* note 4, at 70.

47. Letter from John Marshall to Bushrod Washington (June 28, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL, at 317 (Charles F. Hobson ed., 1995).

48. FRANCES NORTON MASON, MY DEAREST POLLY: LETTERS OF CHIEF JUSTICE MARSHALL TO HIS WIFE 256 (1961).

49. STAUDENRAUS, *supra* note 4, at 107.

50. *Id.* at 224.

51. *Id.* at 107.

52. Richard B. Morris, *Introduction* to MATTHEW T. MELLON, EARLY AMERICAN VIEWS ON NEGRO SLAVERY: FROM THE LETTERS AND PAPERS OF

folly of the plan that the Abolitionists soundly attacked as hypocritical. Literature on the American Colonization Society often concentrates on the conflict between the Abolitionists' proposal for emancipation and that of the Colonizationists. The Abolitionists proposed immediate, unconditional and universal emancipation whereas the Colonizationists proposed gradual, conditional and voluntary emancipation and concentrated on removing the emancipated from white society. The Abolitionists courted civil war. The Colonizationists courted accommodation. [53]

Of Marshall's motives for becoming a Colonizationist, one can only speculate, giving due credit to his view that slavery was contrary to natural law. One finds, however, that the contours of Marshall's support distinguished him from most southern slaveowners: Marshall, with Madison, looked to the federal government for funds to realize a plan of emancipation and colonization. His support for colonization is notable when viewed in connection with the recognition that the national government should be involved in funding the efforts to colonize freed slaves. Most southern Colonizationists opposed national funding of the program.[54] Significantly, Marshall did not. When Lafayette asked Marshall for an opinion about the colonization plan proposed by Benjamin Lundy,[55] Marshall, after thoroughly evaluating the plan, stated that he preferred the funding plan proposed by Senator Rufus King of New York.[56] King had introduced legislation in the Senate

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THE FOUNDERS OF THE REPUBLIC, viii (1969).

53. FOX, *supra* note 44, at 144-45. Fox gives a revealing account of the bitter opposition the Colonizationists faced from the Abolitionists beginning in the 1830s. *See also* STAUDENRAUS, *supra* note 4 (quoting Hermann von Holst of the University of Freiburg on the post-Civil War interpretation of the Colonizationist movement). Von Holst described the movement as a "swindle . . . a vicious, hypocritical plot by the 'slavocracy' to strengthen slavery ridding the United States of free Negroes." *Id.* at vii. Staudenraus' history places the movement in context with its "sister benevolent societies of the nineteenth century," considers it a curiosity from a bygone age, whose adherents, inspired by many motives, had "dreams of an African empire, an all-white America, and a gradual and peaceful obliteration of slavery." *Id.* at 249.

54. *See* FOX, *supra* note 44, at 81-87 (detailing the various petitions the American Colonization Society made to Congress for aid). Fox concludes that the south, particularly the lower south, did not favor federal appropriations. *Id.*

55. Letter from John Marshall to Lafayette (Aug. 26, 1825), *in* 10 THE PAPERS OF JOHN MARSHALL, at 201, n. 1-3 (Charles F. Hobson ed., 2000).

56. Letter from John Marshall to Lafayette (Aug. 26, 1825), *in* 10 THE PAPERS OF JOHN MARSHALL, at 201 (Charles F. Hobson ed., 2000). Thomas Jefferson also supported national funding for colonization. In 1824, Jefferson wrote to Jared Sparks, a friend of the Colonization Society and editor of THE NORTH AMERICAN REVIEW, suggesting that funding could be secured "from . . . the lands which have been ceded by the very States now needing this relief[.]" Letter from Thomas Jefferson to Jared Sparks (Feb. 4, 1824), *in* THOMAS JEFFERSON, WRITINGS 1484-87, at 1486 (Merrill D. Peterson ed., 1984). Jef-

on February 18, 1825, in which he proposed that the "whole of the public land of the United States, with the net proceeds of all future sales thereof" should be:

> inviolably applied to aid the emancipation of such slaves, within any of the United States, and to aid the removal of such slaves, and the removal of such free persons of color, in any of the States, as by the laws of the States respectively may be allowed to be emancipated, or removed to any territory or country within the limits of the United States of America.[57]

King's plan was a version of one proposed in 1819 by Madison in a letter to Robert J. Evans,[58] written two years after the American Colonization Society was formed. Madison's letter is a comprehensive approval of the Society and of colonization, enumerating the prerequisites for a valid emancipation scheme.

"A general emancipation for slaves ought to be 1. gradual. 2. equitable & satisfactory to the individuals immediately concerned. 3. consistent with the existing & durable prejudices of a nation."[59]

Madison believed that the Colonization Society's plan had a due regard for these requirements and he not only supported national funding for the project but also explained why national funding was essential.

"The object, as an object of humanity, appeals alike to all: as a national object, it claims the interposition of the nation. It is the nation which is to reap the benefit. The nation therefore ought to bear the burden."[60]

Madison knew that the funds necessary to "pay for, to transport, and to establish all the slaves in the United States" whose

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ferson, however, questioned whether Africa could provide a satisfactory asylum. He reminded Sparks that when he proposed emancipation and colonization forty-five years earlier in NOTES ON THE STATE OF VIRGINIA, he had not assigned a "particular place of asylum," deeming the revolutionary period not the appropriate time to select a place. In 1824, Jefferson thought that the colony should be established in St. Domingo. Instead of the Society's plan, Jefferson preferred his own plan of "emancipating the after-born, leaving them, on due compensation, with their mothers, until their services are worth their maintenance, and then putting them to industrious occupations, until a proper age for deportation." *Id.* at 1485. Jefferson "followed the Colonization Society's career and privately applauded its aims." STAUDENRAUS, *supra* note 4, at 171. He also traces King's plan to Jefferson's suggestion. However, Madison had proposed the funding plan adopted by King earlier in 1819. The idea of colonization was obviously shared by the two ex-presidents. They agreed that federal funding was desirable, although they did not agree on the source of the funding. *Id.*

57. FOX, *supra* note 44, at 87.

58. Letter from James Madison to Robert J. Evans (June 15, 1819), *in* 1 LOUIS RUCHAMES, RACIAL THOUGHT IN AMERICA: FROM THE PURITANS TO ABRAHAM LINCOLN, at 283-88 (1969).

59. *Id.* at 283.

60. *Id.* at 284.

masters will "part with them" would be "huge." He proposed funding the project with monies realized by the federal government from the sale of the vast unsettled territory. After stating that "if slavery as a national evil is to be abolished, . . . it [is] just that it be done at the national expense," He calculated the math to show how it could be done. Further, he suggested that Congressional legislation should incorporate either the existing Colonization Society or a similar one with proper powers, under the appointment and superintendence of the executive.[61] Madison recognized that any plan requiring national legislation might face a constitutional challenge, which he suggested could be solved by an amendment enlarging Congress' powers, "[I]t can hardly be doubted that the requisite power might readily be procured for attaining the great object in question . . .."[62]

Madison dedicated the bulk of his letter to a discussion of national funding for colonization, as did Marshall when he reviewed and evaluated Benjamin Lundy's *Plan for the Gradual Abolition of Slavery* almost entirely from an economic standpoint. Marshall found Lundy's proposed funding, which essentially required the slave to purchase his freedom, undesirable and unworkable. When Marshall expressed the belief that King's legislative proposal was "the only one which promises to be in any degree adequate to its object," [63] he specifically meant that national funding was necessary.

Marshall rejected the economic assumptions of the Lundy plan, which were predicated on an estimate "that any given number of persons between nine and fifty will by the net produce of their labour replace the purchase money given for them with interest in five years."[64] Marshall noted that "profits of labour in the south are estimated higher than reality will justify . . .,"[65] and he explained fully why the plan would not work in Virginia and Maryland.

> Were the plan to be attempted in those states, A man and woman slave, unincumbered with a family, would require, at a favourable calculation, ten years to replace the money they would cost with interest. But this man and woman would have children, the expense of rearing whom to the age of eleven or twelve years, must be charged on the labour of their parents. Old Negroes too who have humane masters, continue for many years a burthen on their owners. They sometimes nurse their descendants but seldom produce any profit. The slaves too must be employed on land, which must be

61. *Id.* at 285-87.
62. *Id.* at 288.
63. Letter from John Marshall to Lafayette (Aug. 26, 1825), *supra* note 55, at 201.
64. *Id.* at 199.
65. *Id.* at 200.

> fertile to make their labour profitable, and, if fertile, will cost a great deal of money. The effect of these and other causes is such that, in point of fact, the increase of slaves, whom a man divides among his children, and the support of his family, constitute their chief profit. In Maryland and Virginia the net profits of their labour would probably not liberate them as fast as they multiply.[66]

Lundy's plan also required transferring slaves from areas where slave labor was not profitable to southern territory "where lands are cheap and labour profitable." Marshall noted:

> Sufficient allowance is not I think made for the expences of removal and of maintaining the slaves till the lands can be cleared and put in a state for profitable culture. These must be considerable. But the great objection to executing the plan in this mode consists in the invariable fact that distant estates are not profitable to the Proprietor. The managers keep all that is gained, the employers get nothing; consequently there would be nothing to apply towards the liberation of the labourers.[67]

Marshall concluded that the plan would fail "because the profits of labour, modified as [the plan] proposes, can never bear any proportion to the multiplication of slaves, and can consequently never reduce their numbers."[68]

Six years after Marshall endorsed King's plan in his letter to Lafayette, he wrote to Ralph R. Gurley, agent of the Colonization Society and editor of the Colonization Society's journal, AFRICAN REPOSITORY:[69]

> It is undoubtedly of great importance to retain the countenance and protection of the general government . . . . the power of the government to afford this aid is not, I believe, contested. I regret that its power to grant pecuniary aid is not equally free from question. On this subject I have thought and still think that the proposition made by Mr. King in the Senate is the most unexceptionable and the most effective than can be devised.[70]

CONCLUSION

Marshall thought that the solution to emancipation and the end to slavery were to be nationally funded. He considered slavery a national problem, not a state problem, as most of his fellow Virginians insisted. In this he differed from most southerners who

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66. *Id.* at 200.
67. *Id.*
68. *Id.* at 201.
69. *See* STAUDENRAUS, *supra* note 4, at 100, 171 (noting that THE AFRICAN REPOSITORY AND COLONIAL JOURNAL began publication in 1825). As editor of the journal, Gurley plead for "national aid in removing the free Negro population." *Id.*
70. FOX, *supra* note 44, at 87 (quoting a letter from John Marshall to Ralph R. Gurley).

argued that slave matters were state matters and that the nation could involve itself in the institution of slavery only by strictly adhering to the role assigned to it by the Constitution under the three fifths clause and the fugitive slave clause.

The discussion reveals Marshall's serious and pragmatic approach to ending slavery, a problem that was, as he indicated to Lafayette, "attended with such difficulties as to impress despair rather than hope on the minds of those who take a near view of the subject."[71]

The historical significance of Marshall's approval of emancipation and colonization must be seen in connection with Marshall's nationalism. Unlike many southern contemporaries, Marshall viewed emancipation as an entrenched economic problem that could be solved only on a national scale. Realistic emancipation and colonization would require voluntary emancipation or compensation to the slave owner and a stake for the freed slave who would acquire not only the benefits but also the burdens of freedom. The funds to pay for the slaves, to transport the freed slaves and to *establish* all the freed slaves would be, as Madison said, huge.[72] Nonetheless, Marshall believed it could be accomplished if the "countenance and protection of the federal government" could be retained to effectuate King's funding plan.[73]

On August 2, 1832, Marshall wrote to Story:

"Things to the South wear a very serious aspect. If we can trust to appearances the leaders are determined to risk all the consequences of dismemberment. I cannot entirely dismiss the hope that they . . . will pause at the Rubicon."[74]

71. Letter from John Marshall to Lafayette (Aug. 26, 1825), *supra* note 55, at 199.

72. Letter from James Madison to Robert J. Evans (June 15, 1819), *supra* note 58, at 285.

73. Fox, *supra* note 44, at 71..

74. Letter from John Marshall to Joseph Story (Aug. 2, 1832), *in* 14 PROCEEDINGS OF THE MASS. HIST. SOCIETY 352-54 (2d series 1900).