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MARSHALL MISCONSTRUED: ACTIVIST? PARTISAN? REACTIONARY?

JEAN EDWARD SMITH*

It is a distinct privilege to conclude the symposium of the John Marshall Law School on the Life and Jurisprudence of Chief Justice John Marshall. The papers presented ranged widely over Marshall's judicial career, and illustrate the unparalleled contribution of the great Chief Justice to American jurisprudence. Perhaps, in that context, I might remind you of some of the characteristics Marshall brought to the bench when he was appointed Chief Justice of the United States in 1801. Namely:

- A total lack of judicial experience;
- A widely circulated reputation for indolence; and,
- An unquenchable thirst for Madeira.

Of course, he also brought to the Court what Senator Rufus King of New York called "the best organized mind of his generation."¹ He had experience at the highest levels of both the executive and legislative branches of government, serving as Secretary of State at the time of his appointment, and before that as the floor leader of the Adams Federalists in the House of Representatives. He had already carved out a career as the most successful appellate lawyer in Virginia—then the most populous state in the Union— frequently working in tandem with Patrick Henry in some of the most important cases of the era. He was the personal attorney of George Washington and George Mason, and served as the principal lawyer for most Virginians (including Thomas Jefferson) in the British debt cases of the early 1790s. He had distinguished himself in a trying diplomatic mission to Paris, besting French foreign minister Talleyrand in the famous XYZ affair, thereby setting the stage for the Convention of Mortefontaine, terminating the naval war with France, and

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1. Letter from Rufus King to Charles Cotesworth Pinckney (Oct. 17, 1797), in 2 THE LIFE AND CORRESPONDENCE OF RUFUS KING, at 234-235, (Charles R. King, ed., New York, G.P. Putnam's Sons 1894). King's comment was made after listening to Marshall present Virginia's unsuccessful appeal to the Supreme Court in the British debts case. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1797). This was the only case Marshall argued before the Supreme Court.

restoring the fortunes of the Federalist party in the United States.

As for the reputation for lassitude (a reputation Marshall carefully cultivated), House Speaker Theodore Sedgwick put it best when he said Marshall was “attached to pleasures, with convivial habits strongly fixed. He [was] indolent, therefore, but when aroused, he [had] strong reasoning powers. They [were] indeed almost unequalled.”²

Two other personal characteristics, if I may, that often go unnoticed. Marshall was the eldest of fifteen siblings. Riding herd on a fractious band of brothers and sisters on the Virginia frontier was not the worst experience he might have had when it came to dealing with a contentious set of colleagues like William Johnson, Joseph Story, and Brockholst Livingston —whom I believe is the only Associate Justice to have killed a man in a duel.

The other point I would like to make is that Marshall brought to the bench a modesty and self-deprecation that was as unusual as it was captivating. “The first impression of a stranger,” Justice Story wrote,

Was generally one of disappointment. It hardly seemed credible that such simplicity should be the accompaniment of such acknowledge greatness. Meet him on a stagecoach, as a stranger, and travel with him a whole day, and you would only be stuck by his readiness to administer to the accommodation of others, and his anxiety to appropriate the least to himself. Be with him, the unknown guest at an inn, and he seemed adjusted to the very scene, resigning himself without complaint to the meanest arrangement. You would never suspect, in either case, that he was a great man; far less that he was the Chief Justice of the United States.³

It would be presumptuous of me to speak to an audience of Marshall scholars about the Chief Justice’s jurisprudence. What I would like to do is to address some of the misconceptions that have grown up around Marshall over the years, and to return to primary sources in appraising his tenure. Let me simply title my remarks, “Marshall Misconstrued.” Was he a judicial activist? Was he a political partisan on the bench? Was he an economic and social reactionary?

Whenever I speak about Marshall, especially in a law school setting, I am always afraid there will be a host of people in the audience who know more about the Chief Justice than I do. I recall the time, a few years ago, when Sir Isaiah Berlin was visiting Toronto. We were speaking over dinner about giving

2. Letter from Theodore Sedgwick to Rufus King (May 11, 1800), in 3 *THE LIFE AND CORRESPONDENCE OF RUFUS KING*, at 235-238 (Charles R. King, Ed., 1894).

3. Eulogy from Justice Story for John Marshall to the Suffolk County [Massachusetts] Bar, (Oct. 15, 1835), in 3 *JOHN MARSHALL: LIFE, CHARACTER, AND JUDICIAL SERVICES* 363-364 (John F. Dillon, ed. 1903).

formal lectures, and Sir Isaiah said, "Jean, don't worry about it. There will always be someone in the audience who knows more about the subject than you do."

Well, I would like to ask that person to leave.

Perceptions of Marshall have varied substantially over the years. At the time of his death in 1835, and into the 1840s and '50s, he was the revered Chief Justice who had converted a weak and fragmented Supreme Court into the custodian of constitutional legitimacy. During the latter half of the nineteenth century and into the early twentieth century, he was the venerated statesman who arrested the centrifugal force of states' rights and provided the constitutional underpinning for national unity. Memories of the Civil War were fresh, and Marshall was correctly appreciated for having changed the way the Constitution was viewed: from a compact among the states to an agreement arising from the people.

Revisionism set in just before the First World War. This was a time of progressivism in American historiography. Jefferson's image was gilded, and Marshall underwent eclipse. The Chief Justice was portrayed as a committed political partisan on the bench, a judicial activist, and a reactionary. The three writers most responsible for these portrayals were, in my view, Albert Beveridge, Edward S. Corwin, and Benjamin Wright. Senator Beveridge, a prominent progressive historian in the tradition of Theodore Roosevelt and Henry Cabot Lodge, was also a highly partisan two-term Republican senator from Indiana who hated Thomas Jefferson with an incredible passion. His four-volume biography of Marshall (which won the Pulitzer Prize in 1920) recast the Chief Justice in his own image of Republican partisanship.⁴ Every action Marshall took, every decision he wrote, was rendered by Beveridge as a blow against Jeffersonian democracy. It is not unusual for biographers to read their own prejudices into their subject. And in Beveridge's case, Marshall became a political activist: a judge who converted the Court into a bastion of Federalism.

Beveridge was abetted by Professor Edward S. Corwin of Princeton. Considered by many to have been the dean of constitutional law scholars, Corwin was a true friend of executive power and a super-patriot who was luke-warm, if not contemptuous, of civil liberty.⁵ Writing in the aftermath of World

4. See generally 1-4 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1903).

5. See generally Edward S. Corwin, *Freedom of Speech and Press Under the First Amendment: A Resume*, 30 *YALE L.J.* 48 (1920-21); Edward S. Corwin, *Constitutional Law in 1919-1920*, 14 *AM. POL. SCI. REV.* 656 (1920); Edward S. Corwin, *The Supreme Court's Interpretation of the Self-Incrimination Clause*, 29 *MICH. L. REV.* 191, 205-206 (1930) (illustrating

War I, he condemned Marshall's handling of the Burr trial as motivated by partisanship and the Chief Justice's contempt for Thomas Jefferson. As Corwin would have it, Marshall simply didn't understand the law of treason—and by that, he meant the common law concept of constructive treason—and he was timid about bringing a traitor to justice. In Corwin's view, Marshall's emphasis on the constitutional definition of treason—namely, an overt act testified to by two witnesses in open court—made it impossible to convict anyone.⁶

Professor Benjamin Wright of Harvard, a prominent progressive and a committed Jeffersonian, took Marshall to task for stretching the Contract Clause far beyond the intent of the Framers when he applied it to the State of Georgia in *Fletcher v. Peck*, the great Yazoo lands case in 1810.⁷ Like Beveridge and Corwin, Wright saw Marshall's decision as motivated by partisanship, and that interpretation has become standard fare in the textbooks of Con Law students for three generations. The fact that Wright tailored his analysis from whole cloth is beside the point.

For concreteness, let me address a number of specific misconceptions about Marshall that have influenced the way we view the Chief Justice. Some trace to Beveridge, others to Corwin and Wright, and some are common to all three. All seem to be grounded in the perception that Marshall was a fine politician but a poor lawyer; that he possessed, at best, a shoddy legal education and was unfamiliar with the precedents of common law.⁸

Corwin's critique of latitudinarian interpretations of the Bill of Rights).

6. See EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 98-111 (1919). But see ROBERT K. FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 272-277 (1968) (criticizing Corwin's stance).

7. See BENJAMIN F. WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION 28-34 (1938). But see Wallace Mendelson, *B.F. Wright on the Contract Clause: A Progressive Misreading of the Marshall-Taney Era*, 38 W. POL. Q. 262-275 (1985); Nathan Issacs, *John Marshall on Contracts: A Study in Early American Judicial Theory*, 7 VA. L. REV. 413-418 (1921) (criticizing Wright's interpretation).

8. 2 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 178-180 (1916-1919). The argument that Marshall was unfamiliar with common law precedent was first made by Albert Beveridge, who, for whatever reason, sought to emphasize Marshall's political sagacity and downplay his legal talent. *Id.* Beveridge cited no evidence other than a 1841 law review article by Gustavus Schmidt. See Gustavus Schmidt, *Reminiscences of the Late Chief Justice Marshall*, 1 LA. L. J. 80 (1841). In fact, Beveridge miscited Schmidt. What Schmidt said was:

The extent of Mr. Marshalls [*sic*] legal attainments is sufficiently attested by his decisions. . . which on account of the familiar acquaintance they display with the principles of international, public, and common law, and the perspicuity and elegance of their style, as well as the convincing force of their reasoning must be viewed as models of judicial eloquence. And yet, Mr. Marshall can hardly be regarded as a

The fact is, Marshall possessed a superb legal education for the time. In 1780, he attended the second series of lectures given by Chancellor George Wythe at William & Mary. This was the first formal program in legal education offered in the United States. Aside from the Hume, Montesquieu and Blackstone, the curriculum included moot courts and extensive legal writing. Marshall's law notebook, a 238-page restatement of the law in Virginia at the time, is the only source material that survives documenting the nature of legal education in the United States between the Revolution and the formation of the Union under the Constitution.⁹

Within ten years of completing his studies at William & Mary, Marshall was the pre-eminent appellate lawyer in Virginia. In 1786 he represented the heirs of Lord Fairfax, testing the validity of the original royal grant to the vast acreage between the Potomac and the Rappahanock.¹⁰ After listening to Marshall plead, William Nelson wrote Jefferson's secretary that Marshall stood "at the head of the practice" in the state.¹¹ In the early 1790s, Marshall assumed the leading role defending pre-war Virginia debtors against English creditors.¹² Teaming with Patrick

learned lawyer, in the sense in which this word is often employed; as his acquaintance with the roman jurisprudence, as well as with the laws of foreign counties, was not very extensive. He was what is called a *common law lawyer*, in the best and noblest acceptation of the term. He was educated for the bar at a period, when Digests, abridgments and all the numerous facilities, which now smooth the path of the law student were unknown. . . It was thus no easy task to become an able lawyer, and it required no common share of industry and perseverance to amass sufficient knowledge of the law, to make even a decent appearance in the forum. . . Mr. Marshall succeeded, in a comparatively short time, to master the elements of the common law, and to place himself at the head of the profession in Virginia, on a level with a Randolph, a Pendleton and a Wythe, names which will forever remain illustrious in the legal profession. That this was not achieved without great labor will readily be believed; and it affords convincing proof both of the energy of character, which Mr. M. possessed, and of his aptitude for study and reflection. . .

Id.

9. William F. Swindler, *John Marshall's Preparation for the Bar - Some Observations on His Law Notes*, 11 AM. J. LEGAL HIST. 207, 207-213 (1967); Charles T. Cullen, *New Light on John Marshall's Legal Education and Admission to the Bar*, 16 AM. J. LEGAL HIST. 345, 345-351 (1972); See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 75-81 (1996) (illustrating Marshall's education in the context of the time).

10. *Hite v. Fairfax*, 8 Va. (4 Call) 42 (1786).

11. Letter from William Nelson to William Short (Jan. 11, 1787) (on file with William Short Papers, Library of Congress.).

12. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). The circuit court opinion is in the same reporter. 3 U.S. (3 Dall.) 256 (1796). Chief Justice Jay's dissenting opinion is mislabeled as *Jones v. Walker*, 13 Fed. Cas. 1060 (1796). See Argument in the Circuit Court (May 29-30, 1793), in 5 THE PAPERS OF JOHN

Henry to argue the case of *Ware v. Hylton* on circuit, Marshall won a two-to-one decision that let the Virginians off the hook, Article IV of the Treaty of Paris to the contrary notwithstanding. Afterwards, John Nicholas wrote John Breckinridge in Kentucky that all of the lawyers “acquitted themselves well, but most of all our friend Marshall, it was acknowledged on all hands, excelled himself in *sound sense and argument*.”¹³ Justice Iredell, who heard the case on circuit, said, “I shall always remember the arguments I have heard on this case. They have discovered an ingenuity and power of reasoning fully equal to anything I have ever heard.”¹⁴

The fact that Marshall eventually lost the case did not affect his standing at the bar. By the mid-1790s his professional income was double that of the governor of Virginia, and he repeatedly declined federal appointments that would have curtailed his practice. Washington offered to appoint him United States attorney for Virginia in 1790; he tendered the attorney generalship to him in 1795; and the ministry to France when Monroe was relieved in 1796 – all of which Marshall declined.¹⁵ Marshall also turned down John Adams’ offer to succeed James Wilson as an Associate Justice on the Supreme Court in 1798.¹⁶

An even better gauge of Marshall’s appellate ability is the great manumission case of *Pleasants v. Pleasants* in 1799, involving the potential freedom of over 400 slaves. This is the largest manumission case in American history.¹⁷ Marshall argued on behalf of the testator, who wished to free his slaves if private manumission should ever become legal in Virginia. That eventually occurred, and Marshall convinced the Virginia Supreme Court of Appeals to set aside that hallowed precept of property

MARSHALL, 300 (Charles F. Hobson, ed. 1987) (outlining Marshall’s argument); see also Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Courts of Virginia, 1790 to 1793*, 92 VA. MAG. HIST. BIO., 176-200 (1984) (describing the details of the case).

13. Letter from John Nicholas to John Breckinridge (June 9, 1793) (on file with Breckinridge Family Papers, Library of Congress) (Original emphasis).

14. 3 U.S. (Dall.) 199, 256-280 (1796).

15. Offer from George Washington to John Marshall (Sept. 30, 1789), in 2 THE PAPERS OF JOHN MARSHALL 41-42 (Charles T. Cullen and Herbert A. Johnson, eds., 1977); Decline offer from Marshall to Washington (Oct. 14, 1789), in 2 THE PAPERS OF JOHN MARSHALL 42-43; Offer from Washington to Marshall (Aug. 26, 1795), in 2 THE PAPERS OF JOHN MARSHALL 319; Decline of offer from Marshall to Washington (Aug. 31, 1795), in 2 THE PAPERS OF JOHN MARSHALL 320; Offer from Washington to Marshall (July 8, 1796), in 2 THE PAPERS OF JOHN MARSHALL 31; Decline of offer from Marshall to Washington (July 11, 1796), in 2 THE PAPERS OF JOHN MARSHALL 32-33.

16. Letter from John Adams to Pickering (Sept. 13, 1798), in 8 THE WORKS OF JOHN ADAMS 595 (Charles Francis Adams, ed. 1854); Letter from Pickering to John Marshall (Sept. 20, 1798), in 3 THE WORKS OF JOHN ADAMS. at 5-6; Letter from Marshall to Pickering (Sept. 28, 1798), in 3 THE WORKS OF JOHN ADAMS. at 507.

17. *Pleasants v. Pleasants*, 6 Va. (2 Call) 319 (1798).

law, the rule against perpetuities, to allow the manumission to take place. To set 400 slaves free in Virginia in 1799 while swimming upstream against one of the most sacred canons of property law is scarcely the accomplishment of a mediocre solicitor. And if that is not convincing, consider the litigation over the residue of the Fairfax estate during the 1790s in which Marshall prevailed repeatedly over the State of Virginia.¹⁸

Let me also take issue with the perception that Marshall was an intensely partisan Federalist who used the Court to thwart Mr. Jefferson. The fact is Marshall was among the most moderate of Federalists. He was a political conciliator and consensus builder who worked easily with the Republicans in the House of Representatives, and with whom he voted repeatedly in 1800 to repeal the Sedition Act.¹⁹ His nomination later that year to be Secretary of State was confirmed unanimously.²⁰ When Adams appointed him Chief Justice in 1801, it was the High Federalists who objected, not the Republicans.²¹ (In 1795 the Senate had refused to confirm Washington's nomination of John Rutledge to be Chief Justice, largely because of Rutledge's stance on the Jay Treaty. If Marshall had been significantly out of step with prevailing sentiment, or had been seen as the threat to the incoming administration, there is no doubt but that a bitter fight would have been waged in the Senate. Do not forget that Mr. Jefferson was not only the president-elect, but the presiding officer of the Senate as well.)

Once on the bench, Marshall worked assiduously to remove the Court from politics. In *Talbot v. Seeman*, the first case to come before the Marshall court,²² a highly charged prize case involving the constitutionality of the quasi-war with France, Marshall steered adroitly between Federalists supporting the war and Republicans who were opposed. He brought the Justices to a

18. SMITH, *supra* note 9, at 164-168; Letter from John Marshall to Charles Lee (Sept. 22, 1797), in 3 THE PAPERS OF JOHN MARSHALL 147-49 (William Stinchcombe & Charles T. Cullen, eds., 1979).

19. 10 ANNALS OF CONGRESS 619, 621, 709-710, 713.

20. U.S. Senate, Resolution of Consent, May 13, 1800, Entry 342, Senate Confirmation of Executive Appointments, RG59 (on file with National Archives).

21. When Oliver Ellsworth stepped down as Chief Justice and John Jay declined the post, most Federalists assumed the nod would go to William Cushing, the senior associate Justice or to the next senior Justice, William Paterson of New Jersey. Instead, Adams chose Marshall. The nomination was a bitter pill to the High Federalists, who delayed confirmation for over a week. Senator Jonathan Dayton of New Jersey wrote with dismay that Marshall's nomination had been greeted by true Federalists "with grief, astonishment, and almost indignation." Letter from Jonathon Dayton to William Paterson (January 20, 1801) (on file with William Paterson Papers, New Jersey Historical Society.)

22. 5 U.S. (1 Cranch) 1 (1801).

unanimous decision, and struck a balance that won immediate approval from all sides.²³ *Talbot v. Seeman* is also the first case in which there is a clearly labeled "Opinion of the Court," and the decision represented a massive step toward establishing the legitimacy of the Court as the authoritative interpreter of the Constitution.

Even more compelling is the case of the *United States v. Schooner Peggy*, an equally contentious prize case that placed the Jefferson administration squarely at odds with the judiciary.²⁴ The issue involved the seizure of the *Peggy*, an armed French merchant vessel, during the latter days of the quasi-war. The ship was taken into port, condemned as a prize in United States circuit court, and ordered sold. One week after the court order, the Convention of Mortfontaine was signed in Paris ending the quasi-war with France.²⁵ Under the terms of the Convention, vessels that had been captured but "not yet definitively condemned" should be restored to their original owners. Since the court judgment had not been executed when the Convention was signed, Jefferson believed the *Peggy* was protected and ordered the proceeds of the sale turned over to the French owners. The court clerk refused to comply, and was sustained by Justice Cushing, sitting on circuit, who held the President's order to be invalid.²⁶ One of the principal difficulties facing the Supreme Court was that the Convention of Mortfontaine had not been transmitted to the Senate by Mr. Jefferson and was not yet part of the supreme law of the land. Marshall went far out of his way to accommodate Jefferson. Rather than take the opportunity to embarrass the President, the Chief Justice allowed argument in the case to proceed leisurely for well over a week, giving Jefferson time to submit the treaty and obtain the Senate's advice and consent. Argument in the case ended December 17; the Senate acted on December 19;²⁷ Mr. Jefferson promulgated the Convention the

23. The Philadelphia AURORA, the most outspoken of Republican journals, applauded Marshall for examining "at length the arguments urged on each side." The NATIONAL INTELLIGENCER, the organ of Mr. Jefferson's party in Washington, reprinted the entire text of the decision, explaining to readers its importance. AURORA, Aug. 17, 1801; NATIONAL INTELLIGENCER, Aug. 17, 1801 (both on file with author).

24. 5 U.S. (1 Cranch) 103 (1801).

25. Treaty with France (Sept. 30, 1800), in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 457 (Hunter Miller, ed. 1931) [hereinafter TREATIES OF THE U.S.].

26. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 198-199 (1926).

27. Transmission from Jefferson to the Senate of the Convention of Mortfontaine (Dec. 11, 1801), in 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS 345 (Walter Lowrie and Matthew St. Clair Clarke, eds. 1832). See also The Senate Resolution, in 2 AMERICAN STATE PAPERS: FOREIGN RELATIONS 345 (ratifying the convention).

morning of December 21;²⁸ and Marshall delivered the opinion of the Court that afternoon, sustaining Jefferson's view based on the treaty. Rather than make Jefferson look bad, Marshall delayed the court's decision until the President could put the Convention of Mortfontaine into effect.

If you look at *Marbury v. Madison*,²⁹ or at what at the time was a far more important case, *Stuart v. Laird*,³⁰ you will see that Marshall once again went far out of his way to avoid a confrontation with Mr. Jefferson or the Republicans in Congress. The High Federalists had intentionally maneuvered *Marbury* to put the Court and the Executive on a collision course. If Marshall had wanted to play that game, he would have issued the writ of mandamus and all hell would have broken loose. Instead, he artfully avoided the problem. And permit me to observe in passing, that the great contribution of Marshall in *Marbury* was not to find Section 13 of the Judiciary Act of 1789 unconstitutional, but to hold that the Constitution was law, and that as a legal document it was justiciable before the courts. Many contemporary scholars, taking their cues from Beveridge and Corwin, do not wish to accept that Marshall struck a conciliatory stance at *Marbury*, but I hold out to you the fact that the three principal Republican journals of the period, the *Aurora*, the *National Intelligencer*, and the *New York Spectator* waxed eloquent in praise of Marshall's decision, each paper devoting at least two entire issues to the holding.³¹

Stuart v. Laird illustrates even more clearly Marshall's determination to avoid friction. As you know, the case involved the constitutionality of the repeal of the Federalist-passed Judiciary Act of 1801,³² by the Republican Congress in 1802.³³ The effect of the repeal, among other things, was to vacate the appointments of the sixteen circuit court judges (the famous "midnight judges") who Adams had named during the waning days of his term. The Federalists insisted the repeal violated Article III, Section 1, of the Constitution that specifies "Judges. . . shall hold their Offices during good behavior." Alexander Hamilton urged that the repealing act be tested before the Supreme Court, and a flood of litigation from deposed Federal judges ensued. Marshall took the view that the authority given Congress under

28. Jefferson's proclamation ratifying the Convention, in 2 TREATIES OF THE U.S., *supra* note 25, at 486-87.

29. 5 U.S. (1 Cranch) 137 (1803).

30. 5 U.S. (1 Cranch) 299 (1803).

31. AURORA, Mar. 23, 1803; AURORA, Mar. 26, 1803; NAT. INTELLIGENCER, Mar. 18, 1803; NAT. INTELLIGENCER, Mar. 21, 1803; NAT. INTELLIGENCER, Mar. 24, 1803; N.Y. SPECTATOR, Mar. 30 1803; N.Y. SPECTATOR, Apr. 2, 1803 (all on file with author).

32. Act of February 13, 1801, 2 UNITED STATES STATUTES AT LARGE 89.

33. Act of March 8, 1802, 2 UNITED STATES STATUTES AT LARGE 132.

Article III to determine the organization of the federal court system was paramount, and that as a result the abolition of the circuit court judgeships was valid.³⁴ Here again, if Marshall wanted a fight, he could have found one. Instead, he advised his old friend, Congressman James Bayard of Delaware, not to pursue the matter.³⁵ When the test case, *Stuart v. Laird*, came before him on circuit, Marshall sustained the repealing act.³⁶ And the week following the decision in *Marbury*, the Supreme Court, speaking through Justice Paterson, unanimously upheld Marshall's judgment.³⁷

The Burr trial, Albert Beveridge and Edward S. Corwin to the contrary notwithstanding, was John Marshall's finest hour.³⁸ Senator Beveridge and Professor Corwin were not only skeptical of civil liberty, but both assumed Aaron Burr was guilty. The fact that Marshall rejected the common law doctrine of constructive treason—the idea that conspiracy alone is sufficient to convict—and that he hewed to the text of the Constitution, was dismaying to both. Americans routinely believe that the Bill of Rights is merely a restatement of the principles of the common law. Having lived in Canada for thirty-five years, where the English common law continues to flourish, let me assure you that the Bill of Rights deliberately and intentionally goes far beyond the protection afforded the individual at common law. Just as the Framers rejected common law concepts of prior restraint and seditious libel in adopting the First Amendment, so too did they reject the doctrine of constructive treason.³⁹ As defined by Article III,

34. Article III, Section 1, states that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time establish. . . ." U.S. CONST. Art III, § 1.

35. Letter from James Bayard to Richard Bassett (Apr. 19, 1802), in *Papers of James A. Bayard, 1796-1815*, (Elizabeth Donnan, ed.), in ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1913, at 153 (1915). See also Letter from James Bayard to Alexander Hamilton (April 25, 1802), in THE PAPERS OF ALEXANDER HAMILTON 613-614, (Harold C. Syrett, ed. 1987); Diary of Gouverneur Morris (April 24, 1802) (on file with the Library of Congress) (detailing the events surrounding *Marbury v. Madison*).

36. There is no published record of Marshall's circuit court decision, although the details are reported in the headnotes of the Supreme Court case *Stuart v. Laird*, 5 U.S. (1 Cranch) 298, 301-302 (1803).

37. *Id.*

38. *U. S. v. Burr*, (CCD, Va. 1807).

39. The premise of the common law doctrine of constructive treason, as stated by Sir Edward Coke, is that "in treason all the *participes criminis* are principals; there being. . .no accessories to the crime; and that every act, which in the case of a felony, would render a man an accessory, will, in case of treason, make him a principal." The origins of the rule are traced authoritatively in St. George Tucker's edition of Blackstone's *Commentaries*, a work cited repeatedly during the proceedings against Burr. 4 BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE UNITED STATES. . .Appendix, Note b, "Concerning Treason," 41-47

“Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” There must be an overt act, testified to by two witnesses in open court.

Marshall, who had not yet broken irrevocably with Jefferson—that would come in 1811 over the litigation launched by Edward Livingston against the former president⁴⁰—saw the Administration’s determination to hang Burr as a rerun of the political justice he had witnessed in Paris under the Directory in 1797-98. Presiding over circuit court in Richmond, he withstood what amounted to a lynch mob. The Constitution, he instructed the jury, required an overt act, testified to by two witnesses. The prosecution, said Marshall, had not produced a single witness.⁴¹ Acquittal followed in due course.

The Burr episode provides several additional examples of Marshall’s commitment to civil liberty. Aside from the subpoena issued for papers in Mr. Jefferson’s possession (“the president, unlike the King of England, is not above the law”),⁴² Marshall overturned the long-standing prosecutorial practice of fictitious indictments. The Sixth Amendment to the Constitution, he said, required that in “all criminal prosecutions the accused should. . . be informed of the nature and cause of the accusations” against him. A defendant could not defend himself, said the Chief Justice, unless he knew accurately what he was charged with.⁴³ Equally important, in the preliminary case of *Ex Parte Bollman and Ex Parte Swartwout*,⁴⁴ the Supreme Court, speaking through Marshall, rejected the government’s attempt to try the defendants in Washington rather than in the venue where the crime was committed. That, too, said Marshall, was a violation of the Sixth Amendment.⁴⁵ With these holdings, Marshall breathed life into two hitherto dormant provisions of the Bill of Rights.

Professor Benjamin Wright, whom I suggest was more partisan than Marshall, claimed the Chief Justice stretched the

(1803).

Tucker, a stout-hearted Republican, maintained that the Framers intentionally defined treason in the Constitution to preclude adoption of constructive treason, and that they emphasized their determination by stating that “Treason. . . shall consist ONLY in levying war against [the United States], or in adhering to their enemies.” Tucker said the ONLY was explicit and he capitalized it to help make his point. The entire note is devoted to rejecting the idea of constructive treason.

40. *Livingston v. Jefferson*, 15 Fed. Cas. 660 (C.C.D.Va. 1811).

41. Marshall’s charge to jury (Aug. 31, 1807), in 7 *THE PAPERS OF JOHN MARSHALL* 74-116 (Charles F. Hobson, ed. 1993).

42. 7 *THE PAPERS OF JOHN MARSHALL* 37-50 (Charles F. Hobson, ed. 1993).

43. *Id.*

44. *Ex Parte Bollman and Ex Parte Swartwout*, 8 U.S. (4 Cranch) 76 (1807).

45. *Id.* at 101.

Contract Clause for blatantly political purposes in the Yazoo case, *Fletcher v. Peck*, in 1810.⁴⁶ The issue, as you will recall, involved the sale by a corrupt Georgia legislature of the land between the Chattahoochee and the Mississippi: effectively, the states of Alabama and Mississippi, some 35 million acres, to four New England land companies for a penny-and-a-half an acre.⁴⁷ The sale was repealed by a subsequent legislature,⁴⁸ and the Supreme Court, speaking through Marshall, overturned that revocation, holding the State of Georgia bound by the Contract Clause of the Constitution.⁴⁹

Professor Wright, looking at *Fletcher v. Peck* in the 1930s — the high tide of Jeffersonianism— asserted that Marshall ignored the Framers' intent by applying the Contract Clause to the State of Georgia, severely restricting state sovereignty and the power of political majorities in the process.⁵⁰ Unfortunately, there is not one shred of documentary evidence to support Wright's contention. The Northwest Ordinance, enacted by Congress in July 1787, unlike the Contract Clause of the Constitution, provided that no law should be enacted in the territory "that shall in any manner whatever interfere with *private* contracts. . . previously formed."⁵¹ In other words, Congress made it explicit in the Northwest Ordinance that they were dealing only with private contracts. At the Constitutional Convention six weeks later (August 28, 1787), Rufus King moved to include a similar ban concerning private contracts in the Constitution. The Committee of Style (Gouverneur Morris, Dr. Johnson, King, Hamilton, and Madison), which reported September 14, deleted the qualifying word "private" and referred simply to contracts. If the Framers had wanted the

46. 10 U.S. (6 Cranch) 87 (1810).

47. The State of Georgia's title to the Yazoo territory was far from clear. The land was occupied by the great Indian tribes of the Southeast Confederacy (Creeks, Cherokees, Choctaws, and Chickasaws), whose title had not been extinguished. It was also claimed by Spain and the federal government. As one historian has written, "No one could say what was the value of Georgia's title, but however good the title might be, the State would have been fortunate to make it a free gift to any authority strong enough to deal with the Creeks and Cherokees alone." 1 HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA 303 (1889).

48. See 1 AMERICAN STATE PAPERS: PUBLIC LANDS 156-158 (Walter Lowrie and Matthew St. Clair Clarke, eds. 1832).

49. Article I, § 10. "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. CONST. Art. I, § 10. See MAX FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION 440ff. (1911) (for the debate in the Federal Convention pertaining to the Contract Clause.)

50. WRIGHT, *supra* note 7, at 15-18, 28-34.

51. ORDINANCE OF THE NORTHWEST TERRITORY art. II (1787).

clause to apply merely to private contracts, they could easily have left the word in.⁵²

Similarly, in the *Federalist Papers*, Madison in No. 44, and Hamilton in No. 81, discuss the Contract Clause in general, all-inclusive terms.⁵³ Justice James Wilson, who played an equally prominent role at the Convention, asked rhetorically in his opinion in *Chisholm v. Georgia*, "What good purpose could this constitutional provision secure if a state might pass a law impairing the obligations of its own contracts, and be amenable, for such a violation of right, to no controlling judiciary power?"⁵⁴ Justice William Paterson, author of the "New Jersey Plan" at the Convention, was even more explicit in *Van Horn's Lessee v. Dorrance* when he held that the State of Pennsylvania could not impair its own contractual obligations.⁵⁵ In other words, aside from the clear text of the Constitution itself, the fact that Hamilton, Madison, Wilson, and Paterson all spoke of the Contract Clause in general terms and did not restrict it to private contracts appears to be conclusive.

Certainly Dean Roscoe Pound of the Harvard Law School, whom many consider to have been the pre-eminent American legal scholar of the twentieth century, thought the Contract Clause was all-inclusive. Writing four years after Benjamin Wright's book appeared, Dean Pound, speaking of Marshall's usage, wrote:

Contract was then used, and was used as late as Parsons on Contracts in 1853, to mean what the French now call *acte juridique*. It might be called "legal transaction." Not merely contract as we now understand it, but trust, will, conveyance, and grant of a franchise are included. . . The writers on natural law considered that there was a natural legal duty not to derogate from one's grant. . . This is the explanation of *Fletcher v. Peck* and no doubt is what the [Contract Clause] meant to those who wrote it into the Constitution. God and the devil and the king were bound to contract and *a fortiori* the Commonwealth.⁵⁶

Theophilus Parsons, whom Dean Pound cited, is absolutely clear. He began his highly regarded book on the *Law of Contracts* with these words:

The law of contracts in its widest extent may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society.

52. 2 FARRAND, *supra* note 49, at 597.

53. THE FEDERALIST; A COLLECTION OF ESSAYS, WRITTEN IN FAVOUR OF THE NEW CONSTITUTION, AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787 (Philadelphia, John and Archibald McLean, 1788).

54. 2 U.S. (2 Dall.) 419, 464 (1793).

55. 4 U.S. (4 Dall.) 14 (1800).

56. Roscoe Pound, *The Charles River Bridge Case*, 27 MASS. L. Q. num. 4, 17, 19-20 (1942).

All social life presumes it, and rests upon it; for out of contracts, expressed or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of human life implies, or, rather is, the continual fulfillment of contracts.⁵⁷

I leave it with you. Was Marshall the partisan who stretched the Contract Clause for political purposes, or was it Wright, the committed Jeffersonian, who bent the record to denigrate the great Chief Justice?

The fact is, despite Professor Wright and the progressive historians, Marshall was neither a judicial activist nor a political partisan on the bench. As he himself expressed it:

The Constitution was not intended to furnish the corrective to every abuse of power which may be committed by state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally.⁵⁸

Was Marshall a reactionary? He believed fervently in the doctrine of unalienable rights including the right to acquire and possess property, but he was equally dedicated to the protection of the individual from tyrannical government. His position on a free press and free speech, expressed most vigorously in a memorial to French Foreign Minister Talleyrand in 1798, and later in his staunch opposition to the Sedition Act, to say nothing of his service on the committee of the Virginia ratification convention that drafted the Bill of Rights and put him in the vanguard of the defenders of individual liberty.⁵⁹ But let me talk about three areas that place Marshall far ahead of most of his contemporaries: his attitude toward women, toward Native Americans, and toward African Americans. Marshall believed deeply in female equality, advocated their admission to higher education, and, on the domestic scene, he was the very model of a modern husband. The Chief Justice of the United States did all the household marketing in Richmond, supervised the cleaning and cooking, and eased the burden for his invalid wife in every way possible. Stories are rife from the Richmond of that era of persons calling at the Marshall home and being greeted at the door by the Chief Justice with a broom in one hand and a dustpan in the other.⁶⁰ But I believe it was Harriett Martineau, the famous English feminist, who said it best. Martineau knew Marshall well, and in 1838, three years

57. 1 THEOPHILUS PARSONS, *THE LAW OF CONTRACTS* 3 (1853).

58. *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514 (1830).

59. Letter from John Marshall to Talleyrand (April 3, 1798) in 3 *THE PAPERS OF JOHN MARSHALL* 428-459.

60. SMITH, *supra* note 9, at 376.

after his death, she wrote that the Chief Justice:

maintained through life and carried to his grave a reverence for women, as rare in its kind as in its degree. He brought not only the love and pity. . . which they excite in the minds of the pure, but the steady conviction of their intellectual equality with men, and with this a deep sense of their social injuries. Throughout life he so invariably sustained their cause that no indulgent libertine dared to flatter and humour, no skeptic. . . dared to scoff at the claims of women in the presence of Marshall.⁶¹

The symposium has considered Marshall's attitude toward Native Americans at length. I will not replough that ground, except to mention two points. First, as a member of the Virginia legislature in 1784, Marshall joined with Patrick Henry to sponsor legislation to encourage the intermarriage of whites and Native Americans.⁶² After the bill was defeated, Marshall wrote his friend James Monroe that he and Henry believed the measure "would be good for this country," but "our prejudices oppose themselves to our interest and operate too powerfully for them."⁶³ The second point relates to an incident at Marshall University two years ago. The University was dedicating an elegant statue of John Marshall (the only standing statue of Marshall extant), and the speaker that afternoon was Chief Joe Bird, the principal chief of the Cherokee Nation. Chief Bird flew to Marshall at his own expense (and in his own private jet) to be present at the dedication because of the great and continuing affection of the Cherokee Nation for John Marshall.

As for African Americans, the issue of slavery as such never

61. See 1 HARRIETT MARTINEAAU, *RETROSPECT OF WESTERN TRAVEL* 150 (1838); see generally HARRIETT MARTINEAU, *HARRIETT MARTINEAU'S AUTOBIOGRAPHY* (Maria Weston Chapman, ed. 1877) (containing favorable references to the great Chief Justice); HARRIET MARTINEAU, *SOCIETY IN AMERICA* (1962).

62. Both Henry and Marshall believed that the intermarriage of whites and Indians would not only improve relations between the two but would lead to "a better race of human beings." Henry's bill provided that every white man who married an Indian woman should be paid 10 pounds in hard currency plus an additional 5 pounds for each child – a substantial sum in 1784. If a white woman should marry an Indian man, the bill provided that 10 pounds would be deposited with the county court, which would be used to buy livestock for them, that the couple should receive an additional 3 pounds annually for clothes, and that every child born to the couple should be educated at state expense between the ages of ten and twenty-one. The bill survived first and second readings, but failed final passage because Henry had been elected governor in the interim and thus was unable to lead the debate in the House. See WILLIAM WIRT, *SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY* 170-174 (1848); see also 2 WILLIAM WIRT HENRY, *PATRICK HENRY: LIFE, CORRESPONDENCE, AND SPEECHES* 218-219 (1891); 2 ROBERT DOUTHAT MEADE, *PATRICK HENRY: PRACTICAL REVOLUTIONARY* 264-265 (1969).

63. Letter from John Marshall to James Monroe (Dec. 2, 1784), in 1 *THE PAPERS OF JOHN MARSHALL* 131 (Herbert A. Johnson, ed. 1974).

came before the Marshall Court. But throughout his life, Marshall opposed the "institution" and worked quietly for its abolition. He believed that slavery was not only unjust and oppressive to blacks, but pernicious and debilitating for whites. As the leader of the Richmond bar, Marshall, in addition to the great manumission case, *Pleasants v. Pleasants*, undertook numerous pro-bono cases for African Americans and established the precedent before the Virginia Supreme Court of Appeals that the child of a slave father and an Indian mother (reflecting the Native American rule of maternal descent) was a free person and not a slave.⁶⁴ In *The Antelope* in 1825, involving the seizure of a Spanish slave ship, Marshall castigated the slave trade, held it was contrary to natural law, that it could be sustained only by positive law, and then proceeded to set free all but 39 of the 281 Africans at issue. "That every man has a natural right to the fruits of his own labor, is generally admitted. 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."⁶⁵

Four years later in *Boyce v. Anderson*, Marshall addressed one of the most heated questions of the time: was a slave a person or an article of merchandise? Much to the dismay of southern slaveowners, Marshall held a slave was a person. He "has volition, and has feelings which cannot be entirely disregarded. He cannot be stowed away as a common package. In the nature of things, and in his character, he resembles a passenger, not a package of goods."⁶⁶ Repeatedly, Marshall urged that the government use the proceeds from the sale of federal land in the West and buy freedom for the slaves.⁶⁷ When the issue of emancipation came before the Virginia legislature in 1832, Marshall's eldest son, Thomas Marshall, representing Fauquier county, took the lead in pressing its approval. Echoing the sentiments of the Chief Justice, Thomas Marshall told the Virginia legislature that slavery was an "evil that admits no remedy."⁶⁸

64. *Hannah v. Davis*, (1787); see also 1 HELEN TUNNICLIFF CATTERALL, JUDICIAL PAPERS CONCERNING AMERICAN SLAVERY AND THE NEGRO 94-95 (Washington, D.C., Carnegie Institution, 1926); *Hannah v. Davis Notes on Argument in the General Court*, in 1 THE PAPERS OF JOHN MARSHALL 218-220 (Herbert A. Johnson, ed. 1974).

65. 23 U.S. (10 Wheat.) 66, 119-120 (1825).

66. 27 U.S. (2 Pet.) 150, 156 (1829).

67. Writing to his son Edward Carrington Marshall in 1832, the Chief Justice deplored Virginia's unwillingness to accept such federal assistance. "We might do much," he wrote, "if our unfortunate political prejudices did not restrain us from asking the aid of the federal government. As far as I can judge that aid, if asked, could be freely and liberally given." Letter from John Marshall to Edward Carrington Marshall (Feb. 15, 1832) (on file with the Marshall Papers, Williamsburg, Virginia.)

68. VIRGINIA SLAVERY DEBATE 6 (Richmond, Va., Richmond Enquirer, 1832).

In this context it is difficult to picture Marshall as a social and economic reactionary. Indeed, it is simply not credible when one places the accusation along side Marshall's sweeping opinion in *Gibbons v. Ogden*, breaking the steamboat monopoly of Robert Fulton and Robert Livingston, and establishing the basis for that seamless web of commerce that characterizes the American economy.⁶⁹ One of my favorite anecdotes relates to *Gibbons v. Ogden* and Marshall's fascination with industrial development. The decision in *Gibbons* was rendered in March 1824, and the day after the Court adjourned Marshall went to wharf in Washington and boarded a steamboat for his return to Richmond. The Chief Justice had never been on a steamboat before, and he wanted to experience what it was like moving upriver against the powerful current of the James.⁷⁰

There are two other misconceptions of Marshall I would like to take issue with. The first is that the Chief Justice dominated his colleagues and dictated their opinions. David Currie, in a not entirely tongue-in-cheek article in the *University of Chicago Law Review*, referred to the Marshall Court as "John Marshall and the six dwarfs."⁷¹ The fact is that throughout his career Marshall believed it was more important for the Court to speak with one voice than to have his own way. Only once in thirty-five years did Marshall dissent on a constitutional issue,⁷² and there is abundant evidence that Marshall often modified his own views in conference to attain unanimity. In *Little v. Barreme*, for example, the great war powers case, Marshall, who wrote the Opinion of Court, explicitly stated that he was yielding to his colleagues. After setting forth his own views, Marshall said, "I acquiesce in [the opinion] of my brethren. . . that the instructions [of the President] cannot change the nature of the transaction, or legalize an act which without those instructions would have been plain trespass."⁷³

Let me suggest that rather than John Marshall and the six dwarfs, a more accurate image would be Shakespeare's "band of brothers": the phrase used by Henry V at Agincourt, and the term

69. 22 U.S. (9 Wheaton) 1 (1824).

70. Letter from John Marshall to Mary W. Marshall (Mar. 23, 1824), in 10 THE PAPERS OF JOHN MARSHALL 87 (Charles F. Hobson, ed. 2000).

71. David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. CHI. L. REV. 466, 469 (1983); see also Frank H. Easterbrook, *The Most Insignificant Justice: Further Evidence*, 50 U. CHI. L. REV., 481-501 (1983); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY, AND WHITE 5 (1937) "Marshall himself, hard headed as he was and free from obvious self-deception, would doubtless be greatly amused by the claim that he was the whole of his Court." *Id.*

72. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827).

73. 6 U.S. (2 Cranch) 170, 179 (1804); see also *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 366 (1808).

employed by Lord Nelson after the Battle of the Nile to describe the symbiotic relationship among his captains.⁷⁴ Just as the British victory over a superior French fleet required an instinctive understanding by each captain of the rules of engagement, so the unanimity of the Marshall Court required fundamental agreement among the Justices as to the purposes and meaning of the Constitution. Nelson's captains fought their ships independently, just as the Justices of the Marshall Court arrived at their common conclusions via different routes.

Marshall's colleagues on the bench were men of substantial accomplishment. Let me also point out that except for Bushrod Washington, all were appointed by Republican Presidents. Of the six who served with Marshall from 1812 to 1823, the longest period in which the membership of the Court did not change, four had served on state supreme courts, two (Gabriel Duvall and Thomas Todd) had been Chief Justices, and two (William Johnson and Joseph Story) had been speakers of their state legislatures. Brockholst Livingston was regarded as the nation's leading authority on the new field of commercial law, and Joseph Story, the first Dane Professor of Law at Harvard, a pioneer in the establishment of legal education in the United States, and perhaps the nation's leading legal scholar of the first half of the nineteenth-century.⁷⁵

It is true that the unanimity of the Marshall Court was not accidental. In the thirty-five years Marshall was Chief Justice, the Court rendered approximately 1200 decisions, of which 1104 were unanimous. But in many respects that unanimity was as much attributable to the warmth of Marshall's personality as to the clarity of his intellect. The first thing Marshall did when he was appointed Chief Justice in 1801 was to arrange for the justices to live at the same hotel. They took their meals together, usually walked to and from the Court together, and when they socialized in Washington, they usually did so together. After dinner in the evening, they would clear the table and discuss the cases that had been argued, usually over some of Marshall's fine Madeira.⁷⁶

74. WILLIAM SHAKESPEARE, *HENRY V*, act 4, sc.3. 3 *THE DISPATCHES OF VICE ADMIRAL LORD NELSON IV*, (Sir Nicholas Harris Nicolas, ed. 1840).

75. See generally R. KENT NEWMYER, *SUPREME COURT JUSTICE STORY* (1985).

76. President Josiah Quincy of Harvard, a friend of Story's, once accompanied the Justice to Washington. When Quincy inquired about the city, Story warned him that "I can do very little for you there, as we judges take no part in the society of the place. We dine once a year with the President, and that is all. On other days we take our dinner together, and discuss at table the questions which are argued before us. We are great ascetics, and even deny ourselves wine, except in wet weather."

Quincy reports that Story paused at that point, as if thinking that the act of mortification he had mentioned placed too severe a tax upon human

Today's Friday conference of the Justices traces to those evening discussions, and the Opinion of the Court, that unique American innovation, to them as well.

The final misconception I would like to address is that Marshall and Jackson were implacable enemies, and that the hostility between them poisoned relations between the executive and the judicial branches. Here again, the facts stand to the contrary.⁷⁷ It is true that Jackson was elected on a states rights platform in 1828, but like Marshall, he was a devout believer in the Union. When South Carolina attempted to nullify the Tariff Act in 1832, Jackson not only dispatched federal troops under General Winfield Scott to Charleston, but in his proclamation to the people of South Carolina he quoted approvingly from Marshall's powerful opinions in *McCulloch v. Maryland* and *Cohens v. Virginia*. Jackson said the Supreme Court was the ultimate arbiter of the constitutionality of the nation's laws, and that if the Court held a statute to be constitutional, it must be obeyed.⁷⁸

At the White House dinner given for the Court shortly afterwards, Marshall, in returning the president's toast, compared Jackson's action in South Carolina to Washington's quelling of the Whiskey Rebellion in 1794.⁷⁹ Afterwards, Story wrote his wife: "The Chief Justice and myself have become [Jackson's] warmest supporters, and shall continue so just as long as he maintains the

credulity, and presently added: "What I say about wine, sir, gives you our rule; but it does sometimes happen that the Chief Justice will say to me, when the cloth is removed, 'Brother Story, step to the window and see if it looks like rain.' And if I tell him that the sun is brightly shining, Judge Marshall will sometimes reply, 'All the better, for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere.'" JOSEPH QUINCY, *FIGURES OF THE PAST* 89-90 (Boston, Roberts Brothers, 1883).

77. When Jackson came to Washington prior to his inauguration in March 1829, he and Marshall stayed at the same hotel and apparently enjoyed each other's company. Marshall wrote his wife Polly that the President-elect "feels the loss of Mrs. Jackson very seriously. It would be strange if he did not. A man who at his age [Jackson was sixty-one] loses a good wife loses a friend who cannot be replaced." Letter from John Marshall to Mary W. Marshall (Feb. 1, 1829) (on file with the Marshall Papers, Williamsburg, Va.); see also Sallie E. Marshall Hardy, *John Marshall as Son, Brother, Husband, and Friend*, 8 *THE GREEN BAG* 479 (1896).

78. See 1 *MAJOR PROBLEMS IN AMERICAN CONSTITUTIONAL HISTORY*, 378-386 (Kermit L. Hall, ed. 1992); see also WARREN, *supra* note 26, at 779. Years later, as he lay near death, Jackson said he regretted only two things in his life: that no horse raised by him had ever beaten a Diomedes filly named Haynie's Maria – and that he had not hung John C. Calhoun for treason. SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 501 (1965).

79. Letter from John Marshall to Joseph Story (Dec. 25, 1832) (on file with the Marshall Papers, Williamsburg, Va.).

principles [of his message to the South Carolinians]. Who would have dreamed of such an occurrence?"⁸⁰ Note also that the year was 1832. Nine months before, Marshall had delivered the opinion of the Court in *Worcester v. Georgia*,⁸¹ and if that affected the relationship between Marshall and Jackson, it is certainly not evident. As for Jackson's alleged remark after *Worcester*, "John Marshall has made his decision, now let him enforce it," the statement was put into Jackson's mouth by Horace Greeley in 1864, almost twenty years after Jackson's death.⁸² Not only did Jackson never make the remark, but the Court's decision in *Worcester* required no action whatever by the Executive.⁸³

More to the point, perhaps, during Marshall's tenure as Chief Justice, Jackson had the opportunity to make four appointments to the Court. In each instance he could have appointed a vigorous states rights Republican. Indeed, in several instances they were the odds-on favorite. Yet each time, to the consternation of some of his most ardent supporters, Jackson appointed a judicial moderate.⁸⁴ Historians and others usually overlook the fact that Jackson had been a justice on the Supreme Court of Tennessee for two years, and he had no desire to politicize the Supreme Court of the United States.

Jackson's eulogy to Marshall speaks for itself. "Although I have sometimes dissented from the constitutional expositions of Judge Marshall," said Jackson, "I have always set a high value upon the good he has done for his country. The judicial opinions of John Marshall were expressed with the energy and clearness

80. Letter from Joseph Story to Sarah W. Story (Jan. 27, 1832), in LIFE AND LETTERS OF JOSEPH STORY 119 (William Westmore Story, ed. 1851).

81. 31 U.S. (6 Pet.) 515 (1832).

82. 1 HORACE GREELEY, THE AMERICAN CONFLICT 106 (1864).

83. Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 525-530 (1969); R. Kent Newmyer, *On Assessing the Court in History*, STAN. L. REV. 540, 544-547 (1969).

84. When Robert Trimble of Kentucky died in 1826, Jackson passed over Senator John Rowan, an outspoken opponent of the Court, and nominated the strongly nationalist John McLean of Ohio, who had served as postmaster general under John Quincy Adams. When Bushrod Washington died in 1830, Jackson appointed Henry Baldwin of Pennsylvania, not the chief judge of the Pennsylvania Supreme Court, John Bannister Gibson, whose critique of *Marbury v. Madison* in the state case of *Eakin v. Raub*, 12 Serg. & Rawle 320 (Pa. 1825), is reprinted in virtually every textbook on constitutional law. In 1834, to replace William Johnson of South Carolina, Jackson chose Congressman James M. Wayne of Georgia, another judicial moderate and a strong nationalist. When Gabriel Duvall of Maryland stepped down that same year, Jackson nominated his former Attorney General and Secretary of the Treasury, Roger Brooke Taney. The Senate did not confirm Taney, but Marshall, who respected Taney's ability, wrote to Virginia's senators urging his confirmation. See Marshall to Senator Benjamin Watkins Leigh, quoted in 1 SAMUEL TYLER, A MEMOIR OF ROGER BROOKE TANEY, L.L.D.: CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 63 (1872).

which were peculiar to his strong mind, and gave him a first rank among the greatest men of his age."⁸⁵

I could talk endlessly about John Marshall. But "endless" is a word a closing speaker at an all-day symposium should never use. I am reminded of the World Series in 1992 when the Blue Jays played the Braves. David Wells was pitching for Toronto and was being shelled unmercifully. Cito Gaston, the Blue Jay manager, went to mound to relieve Wells. Wells, who was always mouthy, told Gaston he wasn't tired. Gaston said, "I know, but the outfielders are."

I'm not tired, but I know you must be. Thank you very much.

85. Letter from Andrew Jackson to Horace Binney (Sept. 18, 1835) (on file with the Jackson Papers, Library of Congress).

