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ESSAY

WHY WE HONOR JOHN MARSHALL — A BRIEF RETROSPECTIVE

ARTHUR J. SABIN*

What's in a name? Almost 100 years ago, the Lee family and Edward T. Lee — the first Dean of this law school — adopted the name of John Marshall as the name of this institution for the study of law. There are nine law schools in Illinois. Three have names of people attached to them: DePaul and Loyola involve figures of importance in Catholic church history; one has the name "Kent" hidden in its formal name of Illinois Institute of Technology Chicago Kent College of Law (IIT-Kent).

James Kent was Chancellor Kent of New York, famous for his early 19th Century volumes of commentaries on American law. These commentaries, particularly as they reviewed aspects of equity jurisprudence in the United States, became and are still considered classics of their genre.

Born in 1763, Kent attended Yale where he read law (there was no law school, but one could take law courses); he then became Chancellor of the equity courts in New York, serving there from 1814 to 1823, when he was forced into retirement because under the New York Constitution when he reached the age of sixty, he had to leave the bench. He died in 1847 leaving behind him those four volumes of commentaries on American law; the twelfth edition of those commentaries was edited by Oliver Wendell Holmes, Jr.

Very few read Kent anymore, even in law school. Legal historians, some at least, have called him a bore, stuffy and full of neo-classic rhetoric. Kent wanted to be the American Blackstone and indeed his expositions were clear, demonstrating a grasp of American law and reflecting his own conservatism.

Kent did produce a best-seller on American law and certainly deserves recognition. However, history is cruel to those whose works do not have a lasting impact on the law. Since Kent's works

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are missing from our nation's classrooms and courts he has seemingly become old-fashioned. With his name buried in that law school title, I suspect that most students at IIT-Kent have no idea of who Kent was. Even their latest catalog contains no reference to or explanation concerning Kent.

Not so John Marshall; clearly he was a winner, so that it is not far-fetched to say that so long as there will be the study of law in this country, John Marshall will be a central figure. His Supreme Court work and cases will continue to be read, appreciated and evaluated in terms of their lasting impact. It is unquestionable that his contribution as Chief Justice of the U.S. Supreme Court was so significant, that his place in the legal history of our country is secure.

Two other accredited law schools in this country have John Marshall in their name, but this law school is the only one that carries his name alone, without any geographic distinction or tie to any other person's name. We are the only school that is pure and simply, The John Marshall Law School.

Until Dean Markey, who was Dean before our current Dean Johnston, my assessment is that little importance was attached to the heritage of the name John Marshall at this institution. Dean Markey has been active in and is a Trustee of the Supreme Court Historical Society; he has a profound interest in the history of the Court and John Marshall. One result is that we are now greeted by a handsome portrait of John Marshall in our lobby.

I wonder if you have taken the time to look at that portrait and note the intelligence portrayed in John Marshall's face, as well as noting the document he signed on the table below the portrait. There is also a small portrait done by a former student that hangs on the fourth floor. We now have a special section of the library dedicated to John Marshall with books by and about John Marshall, including Albert Beverage's multi-volume biography of John Marshall and in turn, John Marshall's multi-volume biography of his mentor and hero, George Washington.

Born in 1755 in Virginia, John Marshall was to live for eighty years, an unusually long time for that era; he died in 1835. Justice Holmes called John Marshall "the great Chief Justice" in part because he felt that John Marshall was, by circumstance, simply there in the formative period of the court; but also Holmes felt John Marshall reflected a national ideology, with his personality and legal genius exactly suiting the duties of Chief Justice.

What is generally unrecognized is that John Marshall was of the American Revolutionary generation. The significance of this fact is that if John Marshall chose to attach himself to the revolutionary cause, he was placing himself at great risk. Only a minority of colonists actively favored the cause of independence. Officers of the Continental Army were, in the eyes of the Crown, specifical-

ly guilty of treason. Had the revolutionary effort failed, John Marshall's life would have been in serious jeopardy.

Marshall was commissioned in 1776 as an officer in the Continental Army. He was ordered to duty in 1777 and fought in the war, participating in at least four major battles of the war; he was also at the famous winter encampment of the army at Valley Forge.

John Marshall was one of fifteen Marshall children who were raised in Virginia. His parents were part of the privileged class of the Virginia Colony and later State. He picked up the conservative values of that privileged class, along with what has been termed a democratic demeanor. Indeed, it took a great many commoners as well as American native aristocrats or well-born families to win the Revolutionary War. After the war, he married a woman in 1783 who furthered his entry into Virginia aristocracy. John Marshall had ten children of his own, six of whom lived to maturity.

He had only *two years* of formal education; most of his education was supervised by his father. As he grew to maturity, his education particularly focused on a love of the law. As part of this education, John Marshall was introduced to Blackstone's commentaries of 1765.

The father and son were quite close and both were among the first to enlist in the Revolutionary cause. John Marshall greatly admired George Washington and followed Washington's belief in a strong national union. He wrote that four volume biography of Washington between 1805 and 1807, when he was on the bench as Chief Justice of the Supreme Court.

His legal education, other than that very short formal schooling and that gained from his studies at home, came in the form of attending law lectures at William and Mary College in 1780. That same year he was accepted into the Virginia bar. He was described as having a capacious mind — retentive and quick, with sharp analytical skills. He was able to write quite elegant prose and rose to the top echelon of the Richmond, Virginia bar, specializing in non-criminal appellate cases. He tried one case before the U.S. Supreme Court — and lost.

In order to understand and appreciate John Marshall, you have to understand that politics were very important in the age in which he developed. Those politics were politics of revolution — followed by politics about controlling the governing institutions of the states and national government.

John Marshall was a nationalist and thus he was in the Federalist camp. He spoke in favor of the ratification of the Constitution in 1788, specifically defending federal judicial authority as it was established in the Constitution. He also defended Washington's foreign policy and was a Hamiltonian on domestic

issues.

He had a number of offers for office by the Washington and Adams administrations after the new government under the Constitution was operative in 1789. He was offered the U.S. Attorney Generalship, Minister to France and even Associate Justice of the Supreme Court, all of which he rejected for financial reasons. He did go on one foreign mission at the behest of John Adams. He also was elected to Congress, running at Washington's urging and serving that one term during the Adams Administration. He was also briefly Secretary of State and then was nominated by Adams to be Chief Justice of the U.S. Supreme Court, securing unanimous confirmation in the Senate. In February of 1801, he became the fourth Chief Justice of the United States. The Supreme Court had been functioning for some twelve years prior to his joining the Court. He served in that position to his death thirty-four years later, and thus racked up the longest term of any Chief Justice in the history of the Supreme Court.

One of the interesting aspects, perhaps even curious in terms of history generally, is that in order to have a significant impact as a historical figure, you have to live a long time and remain in an important position for many years. John Marshall certainly met these qualifications when, as noted, he was on the bench for thirty-four years, living well above the usual or average life span for males, which at that time ranged about forty-five years.

In his coming on the bench as Chief Justice, he was also definitely a political figure. He achieved the post because of politics, because he was a follower of Washington and Adams and their view of the country in terms of building a great national entity with centralized powers, and because he was generally conservative in his views on matters of the economy. Most importantly, John Marshall was among those who wanted to develop the supremacy of the national government as against the power of the states.

Thomas Jefferson, leading the Jeffersonian-Republicans as they became known (initially the Anti-Federalists), wanted to limit court powers on the federal level, and instead supported the power of the states. It was Jefferson's aim, when he was elected President in 1800 and took office in 1801, to do what he could to get rid of the federal judges appointed by Washington and Adams. He faced twelve years of these judges appointed during the Washington and Adams administrations. Jefferson's immortal complaint about Supreme Court Justices was that "few died and none resigned" — which already, by 1801 was untrue, but illustrated his frustration.¹

1. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 128 (2nd ed. 1985).

When John Marshall began to shape the Court and strengthen its position, by these acts he made himself particularly obnoxious to Thomas Jefferson, his party and his compatriots.² Jefferson complained that Marshall was "cunning"³ and "crafty."⁴ Jefferson said, "In Marshall's hands the law is nothing more than an ambiguous text to be explained by his sophistry into any meaning which may subserve his personal malice."⁵ Toward the end of Marshall's career, he ran afoul of another President, Andrew Jackson, who is reported to have stated, as to a Marshall Court decision, that "John Marshall has made his decision. Now let him enforce it."⁶

To a significant extent Marshall, his leadership and his Court became the bane of a number of Presidents who did not like what he was doing on the Court and with the Constitution. It should be borne in mind that in the United States, as in England, judges make law. Therefore, *who* was a judge was of major political importance. This is not a matter of our times alone; the politics of Supreme Court appointments go back to Washington's time, when one of Washington's nominees for Supreme Court was defeated in the Senate for political reasons.

Because of lifetime appointments in the federal judiciary, the Jefferson camp wanted to get their people on and the Washington/Adams people off the federal bench. In an attempt to reshape the judiciary, Jefferson employed the impeachment process. Thus, we have the Samuel Chase impeachment in 1805, which involved the first and only case of a Supreme Court Justice being impeached. By a narrow margin the Senate refused to throw Chase off the bench. On the other hand in 1804 the impeachment of Charles Pickering, who held a federal bench appointment, was successful.

Clearly it was more than John Marshall's politics, and more than his long tenure as Chief Justice that makes John Marshall a central figure in our American legal history. John Marshall defined for all time the nature of the Chief Justiceship. He dominated the Court from 1801 to 1811. Marshall's leadership was long-

2. *Id.*

3. Letter from Jefferson to Madison (May, 25, 1810) in *THE REPUBLIC OF LETTERS, THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON* 64 (M. Smith ed., 1995).

4. Vincent M. Bonentre, *New York's Chief Judge Kay: Her Seperate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 *TEMP. L.Q.* 1163, 1167 n.22 (1994).

5. See generally Suzanna Sherry, 1989 *Survey of Books Relating to the Law; IV. Constitutional Law and the Federal Blues: Outlaw Blues*, 87 *MICH. L. REV.* 1418 (1989) (reviewing MARK TUSHNET, *RED WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988)).

6. ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 14 (1987).

lived, according to historian Kermit L. Hall:

From 1811 to 1823, during the Court's most stable and productive period, he increasingly shared power with strong minded colleagues like Joseph Storey and William Johnson, sometimes compromising his doctrinal preferences to maintain unity. While during his last decade on the court he further moderated his style of leadership to fit the new age and the Justices who represented it, he never surrendered his position as leader of the Court, even after the onset of illness in 1831.⁷

Professor Lawrence M. Friedman, the leading legal historian of this current generation, has assessed John Marshall as the greatest of the judges on the Supreme Court.⁸ Marshall, more than anyone else, gave federal judgeship its meaning.⁹ According to Friedman:

It was, of course, conceded that the judiciary made up a coordinate branch of government. They were separate, but were they equal? In *Marbury v. Madison* (1803), John Marshall invented or affirmed [depending on differing views] the power of judicial review over acts of Congress. But the *Marbury* decision was only a single dramatic instance of Marshall's work. His doctrines *made* constitutional law. He personally transformed the function and meaning of the Supreme Court. When he came on the bench in 1801 the Supreme Court was a frail and fledgling institution. In 1789 Robert H. Harrison turned down a position on the Court to become Chancellor of Maryland. John Jay resigned in 1795 to run for governor of New York. In the first years, the Court heard very few cases and made little impact on the nation. By the time Marshall died the Court was powerful and great.¹⁰

Before John Marshall became Chief Justice the judges delivered seriatim (separate) opinions, one after another in the English style.¹¹ Marshall, however, put an end to this practice.¹² The habit of "caucusing opinions" and delivering one unanimous opinion as the "opinion of the court" had been tried by no less an English Jurist and luminary than Lord Mansfield in England.¹³ It was abandoned there, but Marshall revived the practice for use in the Supreme Court.¹⁴ Unanimity became, in most instances, the rule of the court under his persuasive person and leadership.¹⁵

7. KERMIT L. HALL, *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 529 (1992).

8. FRIEDMAN, *supra* note 1, at 133.

9. *Id.*

10. *Id.*

11. *Id.* at 143.

12. *Id.*

13. *Id.* at 134.

14. *Id.*

15. *Id.*

Until William Johnson was appointed by Jefferson in 1804, the unanimity was absolute, with not a single dissenting opinion.¹⁶ Johnson broke this consensus. "Yet, neither Johnson nor any later justices could or would undo Marshall's work. Doctrines changed; personalities and blocs clashed on the Court; power contended with power; but these struggles all took place within the fortress that Marshall had built."¹⁷

Jefferson had hoped that Johnson would enter the lists against Marshall. Yet Johnson more often sided with Marshall, in opposition to Jefferson, his leader and friend. The nature and environment of the Court with its life tenure, and the influence of colleagues loosened Johnson's and other Jurists' allegiances. Presidential frustration with transformed allegiances ". . . was to be a story often told. Joseph Storey betrayed Madison, falling under Marshall's 'spell'; Oliver Wendall Holmes bitterly disappointed Theodore Roosevelt."¹⁸ More recently, the Warren Berger Court was critical in the downfall of Richard Nixon, who put Berger on the bench.

Marshall, through powerful and lasting opinions, institutionalized Federalist notions of a strong centralized government:

The central and most controversial theme in Marshall's decisions concerned federalism, that is, the division in power between the national government and the states, and involved the Court in the effort to brighten the line between and state and nation that was so indistinctly drawn in the constitution. All of his leading constitutional opinions, except *Marbury*, addressed this issue either directly or indirectly and all of them curbed state powers.¹⁹

Here, Marshall emphasized in the *Fletcher*, *Dartmouth*, *McCulloch* and *Gibbons* decisions the Federalist insistence that the people and their national governments and not the states were the higher sovereignties.

Marshall and the Court helped to establish an enduring nation with all of the powers necessary to maintain nationhood, and that the Supreme Court was the mandated authority, from the people themselves, to preserve those powers.

Born before the Revolutionary War, having the scanty formal education and learning of the law that was typical of the age, John Marshall was to rise to the top of the Virginia bar and then to the highest judicial office of the national government. John Marshall was one of the active participants in the Revolutionary generation favoring independence. He was part of the Virginia

16. *Id.*

17. *Id.*

18. *Id.*

19. HALL, *supra* note 7, at 525.

aristocracy and, like his mentor George Washington, was dedicated to the idea of a strong central government as embodied in the constitution of 1787.

His work over that long tenure, his style and decisions, have earned him the enduring recognition of generations of lawyers and legal academics, that he was indeed the great Chief Justice. Thus, it is entirely fitting and appropriate that this law school carry his name. Regardless of disputes over the cases that emanated from his Court, there can be no dispute concerning his greatness in shaping the Supreme Court of the United States into the most powerful court of its nature in the world.