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SOME THOUGHTS ON HERB JOHNSON'S FAVORITE COURT

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I appreciate the opportunity to pay tribute to Herb and his many accomplishments. I will try not to go on too long (always a winner), nor embarrass Herb by laying it on too thick. Maybe, since the other authors speak to his scholarship, I could talk on a substantive theme in which Herb is interested (which gives me a huge range of choices) and about which I know something (which narrows the choices embarrassingly). I did not check with Herb to verify that the Marshall Court is really his favorite Court or John Marshall his favorite Chief Justice, but no one knows more about them both than he does. So permit me to ruminate a bit about studying John Marshall (and his Court), with an eye on some questions for Herb.

Now is a good time to philosophize about Marshall and his Court—to take stock. The volumes in the Holmes Devisee History on the Marshall Court have presented us with an incredibly rich source of information about every aspect of Marshall's Court. The Marshall Papers, thanks to the dedicated scholarship of Chuck Hobson, are nearing completion. The Papers have made several new studies of the Chief Justice possible, one of which is Herb's. Bicentennial celebrations of the Constitution, of Marshall's ascent to the Court, and most recently of *Marbury v. Madison*[1] generated a burst of fine scholarship. It seems unlikely that a new cache of information will emerge that will alter the database, if you will. So I'd like to speculate about assigning meaning to what we know—locating, and assessing the significance of, Marshall and his Court in the larger sweep of American history. And to do that we have to first locate him in his own time; to quote Holmes, in "the circumstances which, in fact, were his."[2]

There are many ways to take the plunge back in time that might get us into Marshall's mindset—his view of history. We might acknowledge, for example, that Marshall was a slaveholder; from that we might realize the extent to which the great nationalist was a Virginian, and the struggle between states' rights and nationalism was, to a large degree, an argument among Virginians—indeed between cousins John and Tom, who happened to be the Chief Justice and President of the United States. These arguments were about the nature of the Union, the meaning of the Revolution, and the proper interpretation of the Constitution, and above all, who gets to do the interpreting. What is perhaps most important to grasp about this ongoing cultural war over the Constitution was that Marshall lost or at least he thought he lost. As a young soldier in Washington's Continental Line as a champion of the new Constitution at the Virginia ratifying convention, he was on the cutting edge of history. In the final years of his life, however, he found himself on the margin, perhaps on the losing side, at fundamental odds with the new democratic age.

Marshall came to believe that his Court had also been marginalized. John Adams made him Chief Justice in 1801 with the understanding that he would make the court a bulwark against the democratic, states' rights radicalism of the

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1. 5 U.S. (1 crouch) 137 (1803).

2. Oliver Wendell Holmes, *John Marshall*, *in* COLLECTED LEGAL PAPERS 266, 267 (1920).

Jeffersonian Republicans. Marshall promised not to "disappoint [his] friends,"[3] but he did, at least by his reckoning.

Marshall's tenure was tough at the beginning and got progressively worse. In the face of the virulent anti-court movement of the 1820s (which Marshall blamed on Jefferson), the question was not whether the Court could save the republic, but whether it could save itself. Marshall certainly had reason to think that the prospects of the Court's survival were bleak. Open state defiance of the Court's decisions—a tradition that went back to the 1790s—to *Chisholm v. Georgia*[4] and the Virginia and Kentucky Resolutions of 1798—was more widespread and threatening than ever during the 1820s. For a decade, Congress buzzed with various measures to curb the Court. John C. Calhoun's theory of nullification, introduced in 1828 and implemented in South Carolina in 1832 (and by the secessionist states in 1861), was a direct attack on the Supreme Court's powers of review. As Calhoun put it in his letter to Virgil Maxy in 1831 on the eve of nullification in South Carolina, the whole issue was between the Supreme Court and the American people (by which he meant the people of the sovereign states). Jackson's refusal to back the Court's decision in the Cherokee Indian case of *Worcester v. Georgia*,[5] and the people's support of Jackson's action in the election of 1832, was the next to the last straw.

The last straw—the one that broke Marshall's heart if not his will—was the realization that the president's new appointees, as he put it to Story, were "revolutionizing" the Court from the inside. Jacksonian Democracy taught Marshall to see that the electorate, if mobilized by constitutional issues, can elect presidents who will change the Court so that the Court can change the Constitution. The Marshall Court's view of the Constitution—or the view of any court for that matter—was not chiseled in granite. Marshall did not live to see how the Taney Court transformed his constitutional legacy to fit the new age, but he witnessed the first wave of adjustment. Marshall saw that a resurgent states' rights localism had captured not just the political branches of national government, but the Court as well (something even Jefferson could not do).

In short, Marshall understood what de Tocqueville observed: that the main direction of antebellum history was not toward nationalism but states rights. Centrifugal forces, not centrism, ruled the day. As Marshall wrote to Story in September 1832: "I yield slowly and reluctantly to the conviction that our constitution cannot last."[6] He added in conclusion: "The union has been prolonged thus far by miracles, I [believe] they cannot continue."[7] Marshall died in 1835, thinking that his life's work of nation-building had been for naught.

What difference does it make to our understanding of the Marshall Court and Marshall's legacy if we believe that Marshall understood he was fighting a rear guard action against the nineteenth century? What if Marshall's strategy as Chief Justice was essentially defensive? In pondering these questions, a statement attributed to Leon Edel, great biographer of Henry James, comes to mind: For every man and woman there is one thing, which if we knew, every other piece of the puzzle would fall into place. I don't claim anything so grandiose. I do believe,

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3. LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 359 (1974).

4. 2 U.S. 419 (2 Call.) (1793).

5. 31 U.S. (6 Pet.) 515 (1832).

6. Letter from John Marshall to Joseph Story (Sept. 22, 1832), *reprinted in* R. KENT NEWMEYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 386 (2001).

7. *Id.*

however, that seeing Marshall as he saw himself and by considering that his and de Tocqueville's view of antebellum history may have been at least partly correct shows us things about Marshall's jurisprudence that we had previously not noticed. By emphasizing things we previously downplayed, we might well evaluate Marshall's contributions, and even his reputation, somewhat differently.

If we join Marshall on the dark side, we put ourselves at odds with the dominant narrative epic shaped by such great scholars as Albert Beveridge and Charles Warren. Their view of American history is Whiggish: history is progress, the good guys win as we witness the steady ascent of constitutional nationalism. In this grand epic, Marshall and his Court are not only on the victorious side, but also contribute significantly to the victory. If you read just the words of the great opinions (especially the blurbs in history textbooks or the excerpts in casebooks), if you teach constitutional law as doctrine, if you count the thousands of times each of Marshall's great opinions have been cited, the triumphant view is hard to resist. Not only does the Chief Justice become larger than the history of his own age, but Marshall's jurisprudence becomes relevant to our own age. Probably no one expressed this view more unconsciously, and therefore more convincingly, than Solicitor General (later Justice) Robert Jackson. I don't know whether Jackson read Beveridge or not, but I do recall what he wrote after the Roosevelt Court rewrote the Constitution in order to underwrite the New Deal corporate welfare state: The Roosevelt Court had at last returned to the true understanding of the Constitution as established by Marshall and his Court.

But what if Beveridge and Jackson and company were wrong—which many scholars now think they were? Could we get it more correct if we approached Marshall's constitutional legacy using Marshall's view of antebellum history? What if we assumed that Marshall's goal for the Court was survival and not aggrandizement? In short, how would our interpretation of Marshall and his Court differ if we marched through the first thirty-five years of the 19th century in his moccasins? The answer would be multifaceted, but let me toss out two or three ideas to illustrate my argument.

Let us begin with Marshall's opinion in *Marbury v. Madison*.[8] The great Edward Corwin saw this opinion as a prime example of judicial usurpation (a position advocated in varying degrees by dozens of scholars over the years). If we assume Marshall was guided by a hard-headed assessment of the historical moment and saw the dangers, as well as the potential, of the case, we might better appreciate the importance of Marshall's conscious lack of originality in expounding the doctrine of judicial review. We might pay attention to what he did *not* say, and attempt to explain why Marshall did not claim that the Court's view of the Constitution was binding on Congress. Marshall neither claimed that the Court had a monopoly on constitutional interpretation nor did he address the question of enforcement.

If judicial review was widely accepted, which it was, we should also be skeptical of the traditional interpretation of the decision which says that Marshall played free and easy with the facts and the law in order to expound on judicial review. His political awareness, along with his concern for avoiding retribution from the political branches, takes on new *un-sinister* meaning when we realize that Marshall recognized the Court's vulnerabilities and that perhaps it was the *timing*

8. 5 U.S. (1 Cranch) 137 (1803).

of the opinion, not its doctrine, that has counted most in the long run, or the fact that it was delivered as the opinion of the whole court.

In short, Marshall's exquisite sense of what history would—and would not allow is the most striking feature of *Marbury*. Looking at the ongoing battle between Marshall and the states' rights party of Jefferson, we might be inclined to see the Court's timely victory in *Marbury* as only conditional and we might be better prepared to recognize what scholars like James Bradley Thayer, Christopher Wolfe, and Paul Kahn have taught us: that judicial review as it emerged full blown in the late nineteenth century, and as it has often been employed in the twentieth, had only a faint resemblance to the original concept thereof.

McCulloch v. Maryland[9] presents an interesting variation of my hypothesis that Marshall, even in his most nationalist opinion, wrote strategically with his states' rights foes in mind and that he and his Court were at odds with the dominant direction of American history. Ironically, it was *McCulloch* more than any other case that put him in this position.

Marshall received news about the attack on *McCulloch* on his way to Richmond, Virginia, in 1819. He was not only dismayed, but surprised because he assumed that he had handed down a decision that was finely attuned to the realities of history. After all, the Bank, in its first and second manifestation, had the support of both political parties; implied powers had been debated and accepted; Virginians liked the Bank; and even stockholders in the Bank of Virginia liked it. If ever Marshall had reason to think history supported him, it was in 1819.

Moreover, as became clear in his defense of *McCulloch*—and is clear from the opinion itself—Marshall set forth a balanced theory of federalism that closely resembled Madison's Federalist 39[10] in that it divided the power to govern between the states and the nation, each sovereign in its own sphere. Marshall's nationalism that recognized the need to concede to the states that which they already possessed, while at the same time giving Congress the power it needed to govern. Far from being a decision that took charge of history, *McCulloch* was carefully calculated to do what the moment allowed.

As it turned out, Marshall underestimated his enemies. Not only was *McCulloch* not an example of triumphant nationalism, it was not even triumphant. What *McCulloch* produced was not law of the Constitution chiseled in granite for all times (Beveridge's take), so much as the law of unintended consequences. Marshall hoped to lay to rest the union-busting arguments of counsel from Maryland but instead his powerful opinion galvanized states' rights opposition to his Court, and plunged it into electoral politics, paving the way for Jackson's election and the states' rights court of Roger Taney. Andrew Jackson proceeded to destroy the Bank that *McCulloch* constitutionalized. Indeed, the small-government Jacksonian Democrats put implied powers on the shelf for the remainder of the antebellum period. It is ironic that *McCulloch* might have somehow led to *Dred Scott*; that the Taney Court put a constitutional footing under slavery to eliminate the possibility that a northern majority in Congress might use implied powers to weaken the institution of slavery.

Finally, one must consider the place of Marshall and his Court in the sweep of history. Judging by the burgeoning interest in the Marshall Court and Marshall himself and by the prominent place given Marshall Court decisions in our

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

10. THE FEDERALIST No. 39 (James Madison).

casebooks, in constitutional law classes and history courses, and considering the continued pattern of citation of Marshall's opinions by judges in all jurisdictions, it seems clear that the Court and its Chief Justice are still considered relevant, and are established benchmarks from which we continue to reason about the Constitution and the Court.

Why this is so, however, is not clear. What is the purpose of citing *McCulloch* to support the New Deal if we have to misread the opinion in order to do so and wrest it from its context? Would the New Deal have come without it being cited at all, or without citations to *Gibbons*? Are great opinions, then, like great works of art in that their meaning is in the eyes of the viewer rather than the intent of the artist? Are they merely rhetorical adornments, like quoting Shakespeare? Are citations simply ways of lending legitimacy to decisions, or ways of disguising the essential political nature of judging? Has it ever been different?

What of the Old Chief himself? I suspect most of us would agree with Holmes' remarks at the Centennial celebration of Marshall's ascent to the Court when he said if any one person were chosen to represent American law, that person could only be John Marshall. But how can this be true when his opinions have been wrested from the history that informed them, when these opinions are used to create a world Marshall would have found abhorrent? Why do we celebrate Marshall's ideas about judicial review when they differ so fundamentally from modern practice? In short, why is it that the further we get from Marshall's world, the more we cherish him?

James Bradley Thayer anticipated these questions at the turn of the last century when he observed that "we seem to be living in a different world from Marshall's."[11] This question brings me to my final rumination: What exactly was so different about the world in which Marshall lived and worked, the world that defined the issues Marshall faced on the Court? Consider the unique, once-only, circumstance that Marshall was able to exploit because of who he was and because of his unique qualities of mind and character.

Consider the predominantly oral nature of the Court's operating procedures. There were no printed briefs during Marshall's time, and lawyers had virtually unlimited time to present their cases to the Court. Note that as a result, there was a quick turn-around time between argument and decision. Consider too, the as-yet unformed structure of the Court and the fact that Supreme Court justices (with final appellate authority) were also trial judges on circuit dealing with juries and cases of first instance. All these factors point to a period markedly different than that in which modern courts have operated.

Even more importantly, the Marshall justices, for the most part wrote on a blank slate, making precedents rather than following them. In Marshall's age every judge was trained in the common law, most likely in the tradition of Blackstone. Common law litigation still constituted most of the Supreme Court's work; not surprisingly, common law hermeneutics and common law language infused constitutional law.

The legal community in Marshall's time shared the same legal universe. It was a legal world that played to Marshall's personal and intellectual strengths: his

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11. G. Edward White, *The Constitutional Journey of* Marbury v. Madison, 89 VA. L. REV. 1463, 1526 (2003) (quoting James Bradley Thayer, Address on the One-Hundredth Anniversary of Marshall's Elevation to the Supreme Court (Feb. 4, 1901), *in* JOHN MARSHALL: THE TRIBUTE OF MASSACHUSETTS 64 (Marquis F. Dickinson ed., 1901).

personal charm worked magic in the boarding house setting; his ability to listen and remember; to prioritize and sort out what he heard; his mastery of the common law idiom and his gift for getting work out the door. All of these character traits fit the pre-modern characteristics of the Court, so that it was not surprising that Marshall was able to mass the court, lead it, and shape it in a lasting way.

What really marked the Marshall period, and set it apart from our own age, was the unique nature of the constitutional duties it was called on by history to perform. The Constitution was a miracle in many ways, not the least of which was that the Framers were able to seize what was surely a limited window of opportunity to create one government out of thirteen. Ten years before 1787 no one would have conceived of such a government; ten years after 1787, such a government would have never been ratified.

But it was a tentative victory at best, a "roof without walls," as John Murrin correctly observed.[12] Marshall understood and operated his defensive strategy on this fundamental premise.

Looking at his jurisprudence as a whole, Marshall's strategy was to preserve the nationalism embodied in the Constitution while waiting for the American people to realize that their economic self-interest lay in a national government and a national market. It was a jurisprudence that was both conservative and radical. Marshall's jurisprudence looked to the eighteenth century for the wisdom with which to guide the American people. The Marshall Court's role was, in every way, unique to his age (and distant from ours).

Nothing separates Marshall's age from ours more clearly than does Marshall's belief that the intent of the Framers was a viable rule of interpretation. Thus, his constant emphasis on the *written* Constitution and his belief that the words of the document, together with the help of common law hermeneutics and the memory of the Articles of Confederation, could convey intent. Looking at the modern Court's rather desperate effort to apply the 14th Amendment to the complexities of modern life, it is hard for us to take original intent seriously or to believe that Marshall did either. What made intent viable in Marshall's age—which is not true with 14th Amendment litigation today—is the fact that the Court addressed the same issues as did the Framers, thereby occupying the same legal universe as they did.

In this coherent, interconnected trans-generational legal system, the idea of a Constitution made "to endure for ages to come," one capable of being "adapted to the various crises of human affairs" was more than rhetoric.[13] Marshall did indeed believe that the Constitution was designed to meet the "various crises of human affairs." The Court's role as he saw it, was not to change the principles of the Constitution to fit the times, however, but rather to preserve the principles of 1787 so they could be applied. The function of the Court was to maintain, not redefine, the Constitution. This is what Marshall believed he was doing, and nothing separates his age from ours more than his belief that it was possible to do so.

Let me end with one more question for Herb: If Marshall's view of the judicial function was unique to his age, if he did not envisage the modern regulatory state, if his style of leadership was uniquely suited to a unique age, then why does he remain the representative American jurist of all time? Or to rephrase the question:

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12. John M. Murrin, *A Roof Without Walls: The Dilemma of American National Identity, in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 333–48 (Richard Beeman et al. eds., 1987).

13. McCullock v. Maryland, 17 U.S. (4 Wheat) 316, 415 (1819).

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