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Comments in Reply

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COMMENTS IN REPLY

HERBERT A. JOHNSON*

At the outset I cannot refrain from saying how very gratifying it is to read such a generous group of eulogies, from kind and long-term friends who know me well enough to have their doubts. It was particularly heart-warming to receive such praise before going through the inconvenience of having died first. Each of these papers served a slightly different purpose. Professor Tony Freyer accepted the challenging task of summarizing my career to date, and did so with great skill and grace. Professor W. Hamilton Bryson focused upon my work as a historical editor, while Professor R. Kent Newmyer launched us into a very fruitful discussion over the nature of Chief Justice John Marshall's achievements, and perhaps his frustrations, while on the Supreme Court bench.

Tony Freyer's paper deftly examines how I have walked the narrow path between the legal histories of Richard B. Morris and Julius Goebel, Jr. He is correct that while I have tried to respect the formalism and institutional distinctiveness of the law and its practitioners, my writings have also exhibited a sensitivity to those non-professional forces, which shape both law and its social impact. Yet as the piece suggests, and as I have noted in a book review,[1] the value of melding the Goebel and Morris approaches into a coherent "law and society" framework, has really been more the achievement of a generation of younger legal historians who represent the best hope for the discipline's future.

As a distinguished scholar of Virginia's legal history, Professor Bryson has focused attention upon the degree to which the editing and publication of John Marshall's papers has advanced the study of early Virginia law. One of the great achievements of the second half of the twentieth century was the publication of statesmen's papers in definitive editions. The dispersion and scarcity of Chief Justice Marshall's papers delayed the commencement of that project until 1966; at the same time the lack of any prior edition made the endeavor one of great urgency. It was my pleasure to serve on the Marshall Papers' staff at the time the initial surveys were being accomplished, and for this work the training and methodology of a legal historian was particularly valuable. Like many historians, I have always taken great joy in locating a useful document among a vast array of archival materials or personal papers,[2] and this phase of work on the Marshall Papers was sheer delight. Fortunately, historical editing is a collective enterprise, and while it was my good fortune to do some of the final editorial work on the first two volumes of the edition, it has been the skills and tenacity of Dr. Charles Hobson and his associates which has brought the documentary evidence we collected into its most useful scholarly form. In doing so, they have opened the way to other scholars who

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1. Herbert A. Johnson, Book Review, 110 VA. MAG. HIST. & BIOGRAPHY 491–93 (2002) (reviewing THE MANY LEGALITIES OF EARLY AMERICA (Christopher L. Tomlins & Bruce H. Mann eds., 2001).

2. Herbert A. Johnson, Opportunities and Challenges in Editing Legal and Judicial Papers, Address at the Center for Textual and Editorial Studies in Humanistic Sources, University of Virginia (May 4, 1971); Herbert A. Johnson, Doubloons on the Beach: The Treasures of American Legal History, Paper at the annual meeting of the South Carolina Historical Association, Furman University (*ca.* April 1976).

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may wish to study more comprehensively the legal history of the Old Dominion.[3] To serve the profession in this way is both the privilege and the reward of the historical editor. I am proud to have played a small part in that endeavor.

Professor Newmyer's piece sparks a bit of controversy,[4] but as always, his work triggers thoughtful scholarly responses in his listeners and readers. In his paper, Professor Newmyer suggests that Marshall's primary function was to defend Federalist constitutionalism against the onslaught of Jeffersonian democracy. The Chief Justice's efforts in this regard were, by the end of his life, apparently unsuccessful. In his last days, Marshall was aware that states' rights constitutionalism was undermining nationalism, even as the institution of slavery had begun to generate sectional disunion. Taking a broader view of American history, Newmyer asserts that Marshall's major decisions have today become mere verbal springboards from which the nationalistic innovations of a new age pilfer their legitimacy, even as they pervert the Chief Justice's meaning and intention. As an aside in his oral presentation at the conference in Austin, Professor Newmyer suggested Marshall's opinions retain validity today more as works of art than as precedents.

Some things need to be considered in response to this view of Chief Justice Marshall and his achievements. The first is to observe that law and its institutions, and particularly constitutional courts in the American limited government systems, serve as a defense against majority-based and democratic initiatives. The Federal Constitution, and virtually all the original state institutions, strengthened the power of the judicial branches of government. This strengthening was done with the conscious intention of "balancing" or "buffering" a majoritarian, and perhaps tyrannical, legislative branch. In the eighteenth-century this equilibrium between the branches of government was frequently seen as protecting property rights against confiscation by a democratic majority. It was for this reason that written constitutions were established, and courts of justice were rendered independent of direct political control and influence.[5] Coupled with political justifications for judicial power, the American republic badly needed the economic foundations of fiscal responsibility and stability in trade and property ownership. The Marshall Court, in its ground-breaking cases dealing with the contract and commerce clauses,

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3. THE PAPERS OF JOHN MARSHALL (Herbert A. Johnson et al. eds., 1974–2002). This brings the series to 1827–1830 with an additional volume, including a comprehensive index, projected to complete the publication.

4. In my oral comments during the session in Austin, I suggested that Professor Newmyer's recent highly-acclaimed biography of the Chief Justice might perhaps be graced with a new sub-title, "The Cowardly Age of the Supreme Court." Professor Sandra Van Burkleo protested that this was not accurate: It did not reflect what Professor Newmyer said; nor did it follow that Marshall's behavior as described was not heroic. I stand corrected: The Spartan troops at Thermopylae were heroic, even though they lost. My argument, having read Professor Newmyer's paper, is that Marshall, despite the appearances and despite his assessment during his final years, did not lose.

5. Concerns for private property rights, the stability of commercial relationships, and the defense of private property and individual rights against legislative majorities appear in THE FEDERALIST, THE FEDERALIST NO. 44, at 302 (James Madison) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 78, at 526, 527–28, NO. 85, at 588 (Alexander Hamilton). On Marshall's view of property rights and governmental power, see CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 17–19, 52 (1996), and ROBERT KENNETH FAULKNER, THE JURISPRUDENCE OF JOHN MARSHALL 22–30, 118–22, 131–32 (1968).

did much to encourage needed foreign investment in the United States and to facilitate both interstate and foreign trade.[6]

Did Marshall fail in his defense of national power? Professor Newmyer is quite correct that by Marshall's death in 1835, states' rights seemed triumphant, and indeed throughout Marshall's chief justiceship, there were frequent attempts to undermine the power and jurisdiction of the Supreme Court. Yet both Jeffersonians and Jacksonians were capable of adopting and utilizing the very national power which, in large part, rested on Marshall Court opinions. Marshall and his colleagues found themselves giving approval to the excessive use of national power (and invasive co-option of state officials) to which Jeffersonians resorted in enforcing embargo measures upon an unwilling population.[7] Jefferson and his diplomats did not hesitate to apply loose constitutional construction when they perceived a "good deal" in the 1803 Louisiana Purchase.[8] Andrew Jackson's forceful response to South Carolina's Nullification Proclamation was far removed from a states' rights position.[9] After Marshall's day, federal constitutional power *existed*; it was a matter of political judgment *whether or not to use it.*

Another point made by Professor Newmyer is that Marshall's opinions have been demonstrably used in a variety of ways and circumstances that could not have been anticipated by the great Chief Justice. While we owe a great deal to scholars who have shown that judicial review as practiced today is not Marshall's creation,[10] we also need to recognize what would seem to be a basic principle of intellectual history. Ideas and words change over the course of time. Historians must be extremely careful to determine exactly what the contemporary meaning and understanding of any idea or phrase was. Just as language changes and theories metamorphose, so too is law subject to constant legislative and judicial modification. Turning to Marshall's jurisprudence, we undoubtedly find a certain sacredness and authoritative aura attaching to his judicial opinions; this makes them strongly supportive of modern legal argumentation. This may well be why they can be denoted "works of art," and why they retain currency in the twenty-first century

6. Professor Newmyer argues that John Marshall's great decisions in *M'Culloch*, *Gibbons* and *Dartmouth College* were productive not of a national state, but of a national market. Moreover, this market was to be shaped by individual initiative and private property rights, rather than a regulatory government, either state or federal. Professor Newmyer also stresses Marshall's confidence in the regular administration of international law in assessing the United States role in world affairs. R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 271, 275–78, 315, 316–21 (2001). In this regard we are in substantial agreement. However, I suspect Marshall's classical liberal approach to economic issues may not have prevented him from resort to a modest use of governmental regulations if conditions required. The Chief Justice's pragmatism in these matters emerges in his comments that government must be "effective." *See* HOBSON, *supra* note 5, at 19–20, 123.

7. GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-15, at 296–311, 415–32 (1981); *accord*, DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 216–18 (1991).

8. MAYER, *supra* note 7, at 213, 215–16, 244–51.

9. HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL 83–84 (1997).

10. CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM CONSTITUTIONAL INTERPRETATION TO JUDGE-MADE LAW (1986); ROBERT L. CLINTON, *MARBURY V. MADISON* AND JUDICIAL REVIEW (1989).

despite their declining validity as binding precedent.[11] On the other hand, can any serious scholar or lawyer assert that the Constitution has not been seriously altered by the enactment of its post-Civil War amendments, and the New Deal Court's enunciation of the famous footnote 4 in *Carolene Products*?[12] Today Marshall's opinions provide us with an eloquent and familiar constitutionalism of principled government; today's lawyers and judges, as in the past, prefer the latest precedents to those which are historically remote, however attractive the verbiage.

Even if we are willing to concede Chief Justice Marshall's contribution having diminished to being mere legend in American constitutional development, there is a need to look at his achievements beyond substantive constitutional law, the scope of American constitutional law, and the establishment of a rule of law. These achievements may be divided into two categories: (1) the institutional establishment of the central place and power of the United States Supreme Court, and; (2) the establishment of a collective style that continues to mark the work and ethos of the Court.

Among all other accomplishments, Chief Justice Marshall was preeminent in erecting the structure upon which the Court's future greatness would depend. *Marbury* supplied a reasoned basis upon which judicial review would be developed; it also introduced the "Opinion of the Court" as a strong instrument for gaining greater authority for the Court's decisions and great collegiality among its members.[13] *Cohens v. Virginia*[14] defended the appellate authority of the Court over state tribunals, and it also clarified the ambiguities presented by the Eleventh Amendment's apparent restrictions on Supreme Court jurisdiction. The Marshall Court's work on regularizing the negotiable instruments law of the District of Columbia, along with its diligence in expounding federal land law in the western territories, established the Court's role as the highest tribunal in the federal court system.[15] The Court's work in admiralty, prize law, and marine insurance cases, established it as a primary source for the enunciation of an American law of international law and commerce.[16] When a Supreme Court justice sat in the United States Circuit Courts, certificates of division became a useful way to bring major issues to the Supreme Court *en banc,* without resort to the normal appellate

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11. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 49 (1921), points out that new cases "extract the essence" from old precedents. Faced with the question of how far an existing rule shall extend, judges "must let the welfare of society fix the path." *Id.* at 67. Of necessity greater freedom of choice must prevail in constitutional construction, for constitutional generalities must be made to accord with conditions existing at the time a case is decided. *Id.* at 71, 82–83. Justice (then Judge) Cardozo ends with an interesting point about the impact of judicial preferences in decision making. These matters should be resolved through reference "not [to] my own aspirations and convictions and philosophies but [to] the aspirations and convictions and philosophies of the men and women of my time." *Id.* at 173. There is an interesting comment on the relative lack of precedential authority in U.S. constitutional law in RUPERT CROSS, PRECEDENT IN ENGLISH LAW 15–16 (2d ed. 1968).

12. United States v. Carolene Products Co., 304 U.S. 144, 152–53 n.4 (1938).

13. PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA 103–33 (1997).

14. 19 U.S. (6 Wheat.) 265 (1821).

15. HASKINS & JOHNSON, *supra* note 7, at 560–66, 604–11.

16. *Cohens*, 19 U.S. (Wheat.) at 407–73.

procedures.[17] We should also note that it was the Marshall Court, after 1821, which began to insist upon the submission of formal briefs in support of arguments made orally before the Court, and by 1833 cases could be submitted by printed briefs without oral argument.[18]

Chief Justice Marshall was also responsible for introducing a new style to the Supreme Court's place in American law and politics. Professor Newmyer may be correct that Marshall's decision in *M'Culloch* was marked by cautious concern about states' rights sentiment. All of our greatest chief justices—Marshall, Taft, Hughes, and Warren—carried political experience onto the Supreme Court bench.[19] A background of governmental experience and political wisdom would seem to be an essential ingredient for preeminence in this office. However, the dignity of the judicial branch, and its effectiveness as an icon of the rule of law, depends upon the style and ethos of the Supreme Court justices. It fell to Marshall to move away from the Federalist dominated courts under Jay and Ellsworth, and to introduce a Court which impartially reasoned its way through politically sensitive cases.[20] At the same time, the Marshall Court stood firm when its understanding of constitutional law conflicted both with the political branches of government and with that of the general public. This was a solid foundation upon which to build an effective and respected judicial branch for the federal government.

17. HASKINS & JOHNSON, *supra* note 7, at 628. This procedure was also called "certified questions."

18. JOHNSON, *supra* note 9, at 107–08.

19. Marshall was John Adams' last Secretary of State and was actively involved in the overall operation of the government during the President's long summer absences from the capital; Taft was a former President; Hughes and Warren were former state governors; Hughes was a defeated candidate for the presidency in 1912; Warren lost the vice-presidential race in 1948.

20. JOHNSON, *supra* note 9, at 53–57. *See also* HASKINS & JOHNSON, *supra* note 7, 206, 224–25, 395–406.