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# THE LIVES OF JOHN MARSHALL

MICHAEL J. GERHARDT\*

## INTRODUCTION

Near the end of John Ford's masterpiece *The Man Who Shot Liberty Valence*,<sup>1</sup> a newspaper reporter observes, "when the legend becomes fact, print the legend."<sup>2</sup> More than a few popular legends about John Marshall have been printed as fact over the years: that he was a zealous partisan committed to striking a blow at Jeffersonian democracy (and of course at Thomas Jefferson himself);<sup>3</sup> that he was a fine politician but a poor lawyer;<sup>4</sup> that he was a judicial activist and reactionary;<sup>5</sup> and that he intellectually

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1. *THE MAN WHO SHOT LIBERTY VALENCE* (Paramount Pictures 1962).

2. *Id.*

3. *See, e.g.*, IV ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 488-89 (1919) (asserting that "[t]he conclusion of his early manhood . . . [was] that the people, left to themselves, are not capable of self-government . . . [and that this view] had hardened, as life advanced, into something like religious convictions"); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 31 (Sanford Levinson rev., 3d ed. 2000) (indicating that in overseeing Aaron Burr's treason trial, Marshall was "provoked by the partisan heat of the moment and by his hatred of Jefferson").

4. *See, e.g.*, II BEVERIDGE, *supra* note 3, at 178-80 (citing contemporary accounts of Marshall's poor technical legal knowledge); *see also infra* notes 107-09 and accompanying text.

5. *See, e.g.*, III BEVERIDGE, *supra* note 3, at 111 (asserting that Marshall was a judicial activist and that in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), he "resolved to make use of . . . unimportant litigation to assert, at the critical hour . . . the power of the Supreme Court"); IV *id.* at 488 ("Marshall was reactionary and employed all his skill to defeat, whenever possible, the plans and purposes of the radicals.").

dominated the other justices with whom he served on the Court.<sup>6</sup> Another popular legend holds that Marshall and Andrew Jackson were implacable enemies, as reflected in Jackson's reputed remark, "John Marshall has made his decision, now let him enforce it."<sup>7</sup> Legend further has it the Liberty Bell cracked upon announcing the news of Marshall's death.<sup>8</sup>

None of these legends is factually correct—the Liberty Bell, for instance, was already cracked when it announced Marshall's death.<sup>9</sup> The proliferation of these and other legends nonetheless is as good a demonstration as there is of Jack Balkin's astute observation that judicial greatness is a function of the future's use of the past.<sup>10</sup> From the moment Marshall died, one could have said of Marshall, as Edwin Stanton said of Lincoln at the moment he succumbed to an assassin's bullet, "now he belongs to the ages."<sup>11</sup>

The objective of this Article is to provide an overview of what the ages have made of John Marshall. My concern is not his life but his image. Hence, I place greater emphasis on how his image has been

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6. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1889*, at 196 (1982) (asserting Marshall "impressed thirty-four years of constitutional decision with his own personality as no one else has ever come close to doing"); BENJAMIN FLETCHER WRIGHT, JR., *THE CONTRACT CLAUSE OF THE CONSTITUTION* 28 (Greenwood Press 1982) (1938) (recognizing Marshall's "personal dominance of the Court"); Richard A. Posner, *The Accidental Jurist*, *THE NEW REPUBLIC*, Dec. 17, 2001, at 36 (reviewing R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001)) (asserting "Marshall dominated the Court").

7. President Jackson's comment supposedly was prompted by the decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). There is, however, no evidence indicating that Jackson ever made the remark first attributed to him by Horace Greely two decades after Jackson's death. See DAVID GETCHES ET AL., *FEDERAL INDIAN LAW: CASES AND MATERIALS* (3d ed. 1993) (citing HORACE GREELY, *AMERICAN CONFLICT* 106 (1864)). Moreover, the Court's decision in *Worcester* required no action whatsoever by the President or the executive branch and therefore, would have required no response or reaction from him. *Worcester*, 31 U.S. at 561-62.

8. Jean Edward Smith nevertheless reports the legend as fact in his otherwise masterful biography of the great Chief Justice. JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 20 (1996). This legend is similarly reported as fact in Palmer's comparative study of the legacies of Marshall and Taney. BEN W. PALMER, *MARSHALL AND TANEY: STATESMEN OF THE LAW* 44 (1939).

9. For the falsity of these other legends, see SMITH, *supra* note 8, at 144-46, 346-47, 394, 400, 500-01.

10. Jack M. Balkin, *The Use That the Future Makes of the Past: John Marshall's Greatness and its Lessons for Today's Supreme Court Justices*, 43 WM. & MARY L. REV. 1321 (2002).

11. DAVID HERBERT DONALD, *LINCOLN* 599 (1995).

manipulated throughout American history than on his actual deeds and accomplishments.<sup>12</sup> My purpose is both to trace Marshall's shifting image(s) from the time of his death through the dawning of the modern era and to test the criteria that Balkin has suggested for measuring judicial greatness. The materials relevant to my inquiry are not so much the Court's official opinions but the public statements and sentiments of national political leaders, Supreme Court justices, and others who have helped to shape public images of Marshall over time.

This Article consists of six sections. The first five sections briefly sketch John Marshall's image in different eras—the Jacksonian, the Civil War and Reconstruction, the Progressive, the New Deal, and the dramatic first few years of the Warren Court. The final section considers some possible lessons that can be derived from this survey regarding Marshall's place in our history, including some relevant criteria for determining judicial greatness. The criteria, which cut across ideological and partisan divisions, include: (1) the longevity of service on the Court; (2) substantial participation in the decisions in some of the Court's most socially and politically significant opinions over time; (3) the basic qualities of a jurist's decisions (including, but not limited to, their relative craftsmanship particularly in terms of a distinctive writing style, creativity, influence, and durability); (4) leadership on and off the Court (including developing strong support from national political leaders and academic elites over time); and (5) distinctive or exemplary judicial temperament. For a jurist to qualify for greatness, he or she should satisfy not some but all of these criteria. John Marshall unquestionably meets all of them and thus easily qualifies as a great justice.

### I. THE JACKSONIAN ERA

It is tempting to think that in the few decades immediately following John Marshall's death there was a distinct image of Marshall that dominated the public consciousness. In fact, there

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12. As used here, image refers to a "concept or impression, created in the minds of the public, of a particular person." VII THE OXFORD ENGLISH DICTIONARY 666 (2d ed. 1989).

was not. Instead, in the few decades immediately following his death, there was more than one salient image of Marshall put forward to the public, depending on the politics of the observers or commentators.

Immediately following Marshall's death on July 9, 1835, there was a notable outpouring of praise that crossed party lines.<sup>13</sup> One eloquent eulogy came from President Jackson, who had led the Democratic movement that had helped to bury Marshall's own Federalist party some years before Marshall's death. In his eulogy, President Jackson acknowledged that although

I sometimes dissented from the constitutional expositions of John Marshall, 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 clarity,] which were peculiar to his strong mind, and give him a rank among the greatest men of his age.<sup>14</sup>

Many prominent Whigs, including their leader Henry Clay, praised Marshall, as did John Quincy Adams, by then a member of the House of Representatives.<sup>15</sup> Throughout this period, a relentless defender of the late Chief Justice's legacy both on and off the Court was his friend and colleague Associate Justice Joseph Story.<sup>16</sup>

At the same time, the partisanship that predominated discourse regarding the Court during Marshall's tenure did not end with his death. Indeed, it persisted, if not intensified. A number of

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13. See 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 807-12 (rev. ed. 1926) (quoting and citing to various newspapers' eulogies and commentaries on Marshall's death); G. EDWARD WHITE, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 774 (abr. ed. 1991) (noting an "outpouring of praise for" Marshall at the time of his death as well as "a revival of charges of partisanship and political aggrandizement that had been reflected in earlier critics").

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

15. See CARL BRENT SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD, 1836-1864*, at 29 (1974) (quoting John Q. Adams' praise of Marshall for having "cemented the Union which the crafty and quixotic democracy of Jefferson had a perpetual tendency to dissolve") (citation omitted).

16. See, e.g., *I LIFE AND LETTERS OF JOSEPH STORY* 521-22 (The Lawbook Exchange, Ltd. 2000) (William W. Story ed., 1851); Letter from Joseph Story to Richard Peters (July 24, 1835), in *II id.* at 200-02.

Democratic newspapers expressed their satisfaction that Marshall's death gave President Jackson a golden opportunity to appoint a successor.<sup>17</sup> In a series of partisan editorials on the significance of Marshall's record, the *New York Evening Post* was perhaps the most openly gloating of the Democratic papers.<sup>18</sup> It frankly labeled Marshall a partisan, who, in its estimation,

distrusted the virtue and intelligence of the people, and was in favor of a strong and vigorous General Government, at the expense of the rights of the States and of the people. His judicial decisions of all questions involving political principles have been uniformly on the side of implied powers and a free construction of the Constitution.<sup>19</sup>

The paper denounced Marshall for having "been, all his life long, a stumbling block and impediment in the way of democrattick [sic] principles ..., and his situation, therefore, at the head of an important tribunal, constituted in utter defiance of the very first principles of democracy, has always been to us ... an occasion of lively regret."<sup>20</sup> It concluded, "[t]hat he is at length removed from that station is a source of satisfaction," and noting that while "we lament the death of a good and exemplary man, we cannot grieve that the cause of aristocracy has lost one of its chief supporters."<sup>21</sup>

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17. See ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 323 (1945); 1 WARREN, *supra* note 13, at 807-12.

18. There were several other leading newspapers that published editorials on the occasion of Marshall's death that condemned the constitutional doctrine he had helped to create. One Ohio newspaper described his opinions as being "of the ultra-federal cast and hav[ing] had a greater tendency to warp that great charter of our rights than the opinions of any other man." 1 WARREN, *supra* note 13, at 811 (citation omitted). Another Ohio newspaper commented that Marshall's decisions "have done more to consolidate this government and destroy the rights of the States than all the wild legislation of Congress." *Id.* (citation omitted). A South Carolina newspaper suggested that it was likely that "a great majority of the American people" entertained different constitutional principles than had Marshall. *Id.* at 812 (citation omitted). A North Carolina paper commented that Marshall had "a spirit of hostility and inflexible opposition to Democracy," while a Maine newspaper frankly admitted his death was "a source of satisfaction" because he remained in office through the efforts of those "opposed in every way to Democrattick [sic] principles." *Id.* (citations omitted).

19. *Id.* at 807-08 (citation omitted).

20. *Id.* at 808 (citation omitted).

21. *Id.* at 807-08 (citation omitted).

These comments sparked extremely sharp condemnation from the Whig newspapers.<sup>22</sup> For instance, the *New York Courier* retorted, "[t]he brutality of the *Evening Post* is meeting bitter rebuke from every quarter of the Union where its infamous notice of the death of Chief Justice Marshall has reached. ... [Its editorial was] an atrocious outpouring of partisan venom."<sup>23</sup> The *Philadelphia National Gazette* responded that the *Evening Post's* editorials were "[an] endeavor to breathe the polluted breath of party upon the spotless ermine. ... What has democracy in federalism or any other party appellation to do with the tribunal of justice?"<sup>24</sup> The *Post* responded that "democracy and federalism ... have *much* to do with that tribunal of justice *to which belongs* the expounding of Constitutional questions," and reiterated its view that "in all ... questions, the decision of which rested wholly on the construction to be given certain clauses of the Constitution, ... Chief Justice Marshall threw the whole weight of his official influence on the aristocratick [sic] side of free construction."<sup>25</sup>

To put these debates in broader perspective, one should recall that, to Marshall's critics, his chief justiceship strengthened the Court as a "fortress of conservatism."<sup>26</sup> Democrats, first under Thomas Jefferson and later under Andrew Jackson, derided Marshall as a conservative, because Marshall and his allies had resisted the changes that Jacksonian democracy promised. Marshall's detractors believed he had been instrumental in reading into the Constitution the policies and philosophy of the Federalist party long after it had ceased to exist.<sup>27</sup> To its critics, the Federalist party was the party of aristocracy (i.e., of those who had power and owned property at and since the time of the Constitution's founding),<sup>28</sup> and so to these critics anything Marshall did to advance his party's cause was construed as promoting aristocracy. As Chief Justice, he joined in upholding broad exercises of federal power at the expense of state sovereignty and in restricting state

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22. See generally *id.* at 808-09.

23. *Id.* (citation omitted).

24. WHITE, *supra* note 13, at 775 (alteration in original).

25. *Id.* (citation omitted).

26. SCHLESINGER, *supra* note 17, at 322.

27. See *id.* at 16.

28. See generally *id.* at 9-17.

interferences with contract and property rights.<sup>29</sup> Whereas Marshall's defenders hailed his opinions for ensuring the viability of the newly formed national government, his critics condemned him for expanding federal power at the expense of the states, for his distrust of democratic institutions and populism, for thwarting state economic and social reforms, and for protecting the privileges and status of the propertied classes.<sup>30</sup>

The obviously sharp partisan differences between those who supported Marshall's vision and those who denounced it were intensified by President Jackson's choice of a successor, Roger Taney. In many respects, Whigs viewed Taney as the antithesis of Marshall. Those sympathetic to Marshall's vision feared that, as one of Jackson's most loyal defenders, Taney would become an integral part of a governmental regime basically opposed to many of the principles for which Marshall stood. Whigs were especially fearful that the Court, under Taney's guidance, would surrender its guardianship of property rights, which it would leave to the mercy of state legislatures dominated by the masses. Whigs further feared Taney, whose nominations for Treasury Secretary and Associate Justice had been previously rejected by the Senate, would be eager to use his powers as Chief Justice to even the score with his political foes. In 1836, a shift in control of the Senate to the Democrats virtually guaranteed Taney's confirmation.<sup>31</sup> The Senate ultimately confirmed Taney, but not before his nomination endured sharp attacks from some Whig senators—particularly for actions he had undertaken while serving as Acting Treasury Secretary to undermine the national bank.<sup>32</sup>

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29. See CARL BRENT SWISHER, ROGER B. TANEY 350-51 (1935). As Professor Swisher observed:

The popularity of John Marshall . . . and the prestige acquired by the Supreme Court during his régime, resulted largely from the fact that he wrote into constitutional law the beliefs and prejudices of a class, the class, incidentally, from whose records and in terms of whose judgments most of the history of the period has been written. Outside that class he and his court were anything but popular . . .

*Id.* at 350.

30. WHITE, *supra* note 13, at 777.

31. SWISHER, *supra* note 15, at 35-36 (detailing the "intricate political maneuvering" involved in nominating Taney).

32. *E.g.*, SAMUEL TYLER, MEMOIR OF ROGER BROOKE TANEY 249 (Da Capo Press 1970) (1872) (recounting Henry Clay's hostility to Taney during the confirmation process).



In sharp contrast to Marshall, Chief Justice Taney joined or authored opinions that construed property rights as being less than absolute,<sup>33</sup> expanded state sovereignty to regulate economic matters under the Dormant Commerce Clause,<sup>34</sup> and expanded the scope of the police powers of localities and the states to act on behalf of the general welfare.<sup>35</sup> If Marshall had been advancing conservatism, Taney and other like-minded jurists were viewed (and even thought of themselves), as one supportive paper observed, "of the most liberal cast."<sup>36</sup> Democrats such as Taney viewed themselves as the rightful heirs to the political revolution begun by Thomas Jefferson;<sup>37</sup> they favored greater state sovereignty generally as well as particularly to reform bankruptcy and commercial laws for the sake of redressing social inequities and discontent that Democrats believed Marshall had helped to foster through his Court's extensive protections of private contract and property rights, limitations on the states' dormant commerce power, and restricted conception of state police power.

Near the end of his tenure, Chief Justice Taney clashed with President Lincoln over the legitimacy of Lincoln's unilateral suspension of habeas corpus. Sitting as a circuit judge, Chief Justice Taney declared Lincoln's actions invalid.<sup>38</sup> Chief Justice

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33. *E.g.*, *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 544 (1837) ("[A]ny ambiguity in the terms of the contract, must operate against the adventurers, and in favour of the public . . .").

34. *E.g.*, *The License Cases*, 46 U.S. (5 How.) 504 (1847); *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837).

35. As Chief Justice, Marshall, in several opinions, asserted the traditional view of the "police power," under which the terms were used to distinguish the functions of the state government from the functions of the federal government. Chief Justice Taney described the "police power" as "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions," that is, "the power to govern men and things." *Thurow v. Massachusetts*, 46 U.S. (6 How.) 504, 583 (1847).

36. SWISHER, *supra* note 29, at 323 (citation omitted).

37. In two terms as President, Jackson appointed six justices to the Court. *See generally* HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 72-78 (rev. 3d ed. 1999) (discussing Jackson's appointments of Justices McLean, Baldwin, Wayne, Taney, Barbour, and Catron).

38. *See Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). Lincoln ignored Taney's order, but the public reaction was such that the President, in his message to Congress of July 4, 1861, asked for specific authorization to suspend the writ. Congress complied almost instantly. On September 24, 1862, Lincoln acted, providing for the military trial of "all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any

Taney believed the lawlessness of Lincoln's actions posed a graver threat to the Constitution and the Republic than the brewing southern rebellion. Taney believed that it was not worth preserving the Union at the price Lincoln was exacting; it would have meant sacrificing the very aspects of the federal system—those that protected the state sovereignty essential for progressive lawmaking—that Taney believed were its saving graces.<sup>39</sup>

It is, however, a mistake to read too much into the sharp ideological differences between Marshall and Taney. To be sure, the rise of Jacksonian democracy, coupled with the collapse and extinction of the Federalist party, left both Marshall and his intellectual ally Joseph Story despondent. Immediately after Andrew Jackson's election to the presidency in 1828, both Marshall and Story could envision only disaster; they believed Jackson's election promised "[t]he reign of King 'Mob.'"<sup>40</sup> Yet, Jackson's staunch opposition to nullification seems to have led both Marshall and Story to have modified their perceptions of Jackson and to have declared themselves as his "warmest supporters ... as long as he maintains the principles contained in [his statements on nullification]."<sup>41</sup> Moreover, Marshall and Taney were friendly

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disloyal practice, affording comfort to the Rebels against the authority of the United States." Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 437 (Roy P. Basler ed., 1953); see also *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863) (holding the Supreme Court does not have power to review proceedings of a military commission); cf. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding military commission's conviction of a civilian invalid). See generally WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998) (examining the clash between needs of a successful war effort and the need to protect civil liberties).

39. SWISHER, *supra* note 15, at 556 (asserting that Taney "felt so differently ... as to prefer the death of the Union to the medicine which the President prescribed as necessary to save it"); Carl Brent Swisher, *Mr. Chief Justice Taney*, in MR. JUSTICE 223-24 (Allison Dunham & Philip B. Kurland eds., 1956) (discussing the *Merryman* case and Taney's views on the Union's foundations).

40. SCHLESINGER, *supra* note 17, at 6 (citation omitted). Time did not necessarily alleviate these fears, as Story declared in an 1835 interview that Marshall was of the opinion that "everything is sinking down into despotism, under the disguise of a democratic government." WARREN, *supra* note 13, at 796 (citation omitted). Marshall echoes these sentiments elsewhere. For instance, in 1828 he wrote Story that the impending presidential election had prompted him to "begin to fear that our Constitution is not doomed to be so long lived as its real friends have hoped." SMITH, *supra* note 8, at 500 (citation omitted).

41. SMITH, *supra* note 8, at 519-20 (citation omitted).

acquaintances, in spite of their political differences.<sup>42</sup> Almost certainly with Taney's knowledge, Marshall had written to Benjamin Watkins Leigh, a senator from Virginia, in support of Taney's ill-fated nomination as an Associate Justice.<sup>43</sup> For his part, Taney seems to have reciprocated in subtle if not arguably imperceptible ways. As Chief Justice, Taney maintained a stony silence about Marshall outside of the pages of the official reports of the Court. Moreover, Taney's chief justiceship not only failed to produce the constitutional revolution most ardent Democrats had desired but actually, to their everlasting regret, expanded federal authority on several notable occasions.<sup>44</sup> Yet nothing Taney did enhanced Marshall's image more than the manner in which Taney ended his chief justiceship. After his disastrous opinion in *Dred Scott v. Sandford*,<sup>45</sup> Taney's reputation never recovered, and though he remained on the Court for almost another decade his most eminent biographer concedes Taney "died in virtual public disgrace."<sup>46</sup> Taney's willingness to stake the Court's and his own reputations on the Court's ability to settle the sectional divisions over slavery ensured that forever after he would pale in any subsequent public comparison with Marshall. None of Marshall's opinions, however mistaken they might have been, could compare with the tragic dimensions of and fallout from *Dred Scott*.

## II. THE CIVIL WAR AND RECONSTRUCTION

During the period extending from the beginning of the Civil War through the end of Reconstruction, John Marshall was not as notable or revered a public figure as many might assume. Neither Lincoln nor any of the six justices whom he appointed tended to defer to Marshall as their model in dealing with the great constitutional issues of their day. Even though Marshall's intellectual ally, Justice Story, proudly declared to Henry Clay in

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42. SWISHER, *supra* note 29, at 313.

43. See TYLER, *supra* note 32, at 240-41.

44. See CURRIE, *supra* note 6, at 277 (asserting that Taney had presided over "a striking expansion of federal judicial authority beyond the boundaries set by the Marshall Court").

45. 60 U.S. (19 How.) 393 (1857).

46. SWISHER, *supra* note 29, at 586. Another illustration of Taney's ignominy is the congressional dispute, subsequent to his death, over funding of a bust of Taney for the Supreme Court chambers. See *id.* at 971-72.

1838, "I am a Whig,"<sup>47</sup> both Lincoln—who began his political career as a Whig—and the justices whom he appointed tended not to view themselves as the intellectual heirs of either Marshall or Story.

At least three developments might explain why Marshall was not a highly revered figure in the political discourse in this period. The first was the series of Supreme Court opinions that favored slave owners. One of the first of these decisions, *Prigg v. Pennsylvania*,<sup>48</sup> was written by none other than Marshall's acolyte, Joseph Story. The Court upheld the constitutionality of the Fugitive Slave Act of 1793,<sup>49</sup> ruling that the Fugitive-Slave Clause of Article IV was self-executing and therefore authorized a slave owner to use self-help in capturing a fugitive slave.<sup>50</sup> The second decision was the most tragic of any made by the Court up until that time (and since)—*Dred Scott v. Sandford*—in which a majority ruled both that African-Americans could never become citizens of the United States and that slaves were property in whom their owners had virtually absolute rights to do as they pleased free from the federal government's interference. It could not have helped Marshall's image that he was cited as an authority in support of the rulings in both *Prigg*<sup>51</sup> and *Dred Scott*.<sup>52</sup> Nor could it have helped that Marshall had been instrumental in fashioning some of the Court's earliest and most fundamental decisions protecting private property rights. Thus, many radical Republicans, interested in constitutional change, were not likely to view Marshall with unquestioning reverence; to them, he was, *inter alia*, a source of some of the constitutional difficulties they were confronting. At the same time, many Democrats viewed Marshall as the embodiment of the constitutional philosophy they opposed and hoped Taney would help to overthrow. Hence, neither party's leaders were disposed to turn to Marshall's image to help their cause.

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47. SCHLESINGER, *supra* note 17, at 323.

48. 41 U.S. (16 Pet.) 539 (1842).

49. Act of Feb. 12, 1793, ch. VIII, 1 Stat. 302.

50. *Prigg*, 41 U.S. at 626.

51. *Id.* at 622 (citing *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819)).

52. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 501 (1857) (Campbell, J., concurring) (citing *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823)); *id.* at 502 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810)); *id.* at 510 (citing 2 JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 75-76 (1804)).

The second development is that the *Dred Scott* decision cemented Lincoln's disenchantment with the Supreme Court. The more time Lincoln spent pondering the decision, the less he liked it. Eventually, as Lincoln's biographer David Herbert Donald suggests, "[s]o blatant was the Chief Justice's misreading of the law, so gross was his distortion of the documents fundamental to American liberty, that Lincoln's faith in an impartial, rational judiciary was shaken; never again did he give deference to the rulings of the Supreme Court."<sup>53</sup> After *Dred Scott*, Lincoln sharpened his unique constitutional vision that purported to read the Constitution in light of the Declaration of Independence. In Lincoln's vision, the Declaration of Independence, for the first time in the nation's history, became a legitimate source of constitutional meaning.<sup>54</sup>

Third, Lincoln, Republican leaders in Congress, and the Cabinet (including Lincoln's first Treasury Secretary and future Supreme Court Chief Justice Salmon Chase) increasingly saw themselves in the 1860s as trying to reinvent—indeed, to reconstruct—both the country and the Constitution.<sup>55</sup> The Union's victory in the Civil War helped to transform the United States, for the first time, into a genuine nation,<sup>56</sup> rather than a loose confederation of states. To fit this new reality, the original Constitution, with which Marshall was so closely identified, had to be overhauled.<sup>57</sup> Lincoln readily agreed with the necessity for the overhaul, but he would not live to lead the Republic through it.

In the debates over Reconstruction that followed Lincoln's assassination, at least two images of Marshall were notable. Perhaps the most popular image of Marshall that emerged in these

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53. DONALD, *supra* note 11, at 201.

54. See generally GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* (2001).

55. Interestingly, in none of the major biographies of Lincoln and Chase is any mention made of public statements by either regarding Marshall. Nor do any of the classic or best-known works on Reconstruction include any references to or reliance on Marshall within the congressional debate on Reconstruction. While I hesitate to infer anything conclusive from these omissions, they raise the possible inference that Marshall did not occupy a prominent place in either Lincoln's or Chase's thinking about how to resolve the great constitutional issues of their day.

56. See generally FLETCHER, *supra* note 54.

57. For overviews, see 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); FLETCHER, *supra* note 54; ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (1988).

debates was as the author of the 1833 opinion in *Barron v. Mayor of Baltimore*,<sup>58</sup> in which the Court held that the Bill of Rights did not apply to the states. For some of the Fourteenth Amendment's Framers (such as Congressman John Bingham), this vision was anachronistic and became a central target of Reconstruction.<sup>59</sup> Even before Reconstruction, some abolitionist lawyers—including future Chief Justice Chase—rejected Marshall's narrow reading of the applicability of the Bill of Rights and defended a contrary reading that would have made them applicable to the states.<sup>60</sup> The other significant image of Marshall from this period is reflected in the Fourteenth Amendment by means of its adoption of Marshall's conception of the source of national power as set forth in *McCulloch v. Maryland*,<sup>61</sup> namely, that the federal government derived its ultimate authority not from the states but rather from the people of the United States.

President Lincoln's assassination helped to deprive the debates over Reconstruction of any clear leadership. Though Reconstruction produced several civil rights statutes and three new constitutional amendments, its promise was short-lived. By 1877, Reconstruction was effectively over;<sup>62</sup> Marshall's image lay dormant outside of the pages of the official reports of the Court until the beginning of the twentieth century, when it would assume unparalleled vitality in the wake of both the centennial of Marshall's appointment as Chief Justice and the fallout from another presidential assassination.

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58. 32 U.S. (7 Pet.) 243 (1833).

59. Cf. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 140-62, 164-65 (1998) (surveying the arguments in the Reconstruction Congress for and against Marshall's construction of the Constitution in *Barron* and explaining the "increasing[] plausibility[] to think the Constitution should be amended to overrule *Barron*"); MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 22-25 (1986) (describing how *Barron* "promoted the stability of the Union at the expense of liberty" and required fixing by constitutional amendment).

60. AMAR, *supra* note 59, at 161-62.

61. 17 U.S. (4 Wheat.) 316 (1819).

62. See generally FONER, *supra* note 57; Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 WM. & MARY L. REV. 1731 (1999) (reviewing 2 ACKERMAN, *supra* note 57).

## III. THE PROGRESSIVE ERA

The conventional wisdom regarding Marshall's image during the Progressive era is that it took a beating.<sup>63</sup> In fact, the conventional wisdom is wrong. To the contrary, it was an era in which there was widespread bipartisan recognition of Marshall's contributions to our constitutional understanding and nationhood, with some notable dissents.

For Marshall, 1901 proved to be a pivotal year, because it marked the centennial of his appointment as Chief Justice. This event helped to initiate a renaissance of Marshall's public image. Indeed, the centennial began dramatically with an unprecedented occasion—the first and only time that a Chief Justice addressed a joint session of Congress. Prior to the Chief Justice's address, Congress passed a concurrent resolution suggested by President William McKinley that marked February 4, 1901, as a "celebrat[ion] throughout the United States as the one hundredth anniversary of the assumption by John Marshall of the office of the Chief Justice of the United States."<sup>64</sup>

After the resolution had been passed and read, Chief Justice Melville W. Fuller addressed both houses of Congress, the President, the Cabinet, and the other members of the Supreme Court. Fuller was a Democrat who had been appointed to the office by Grover Cleveland. He had helped to provoke public controversy by overseeing a Court that had been the first to recognize the doctrine of economic due process, which provided for vigorous judicial scrutiny—under the Fifth and Fourteenth Amendments—of legislation that interfered with private property or economic interests.<sup>65</sup>

The focus of Fuller's remarks was Marshall's contributions to the formation and legitimacy of judicial review. According to Fuller, Marshall's exercise of judicial review helped to formulate "legal rules of construction [whose] application is to be found the basis of the National fabric; the seed of the National growth; [and] the

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63. See Jean Edward Smith, *Marshall Misconstrued: Activist? Partisan? Reactionary?*, 33 J. MARSHALL L. REV. 1109, 1112-22 (2000).

64. Appendix, Centennial of Chief Justice Marshall's Appointment, 180 U.S. 643 (1901).

65. See *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

vindication of a written form of Government.”<sup>66</sup> Fuller explained that in achieving these extraordinary results through his exercise of judicial review, Marshall faced formidable obstacles, including “heated partisan controversy” over proper division of power between the federal and state sovereignties.<sup>67</sup> Fuller observed:

To hold the balance true between these jarring poles; to tread the straight and narrow path marked out by law, regardless of political expediency and party politics on the one hand, and of jealousies of the revising power on the other; to reason out the governing principles in such manner as to leave the mind free to pursue its own course without perplexity, and to commend the conclusions reached to the sober second thought; these demanded that breadth of view; that power of generalization; that clearness of expression; that unerring discretion; that simplicity and strength of character; that indomitable fortitude; which, combined in Marshall, enabled him to disclose the working lines of that great Republic, whose foundations the men of the Revolution laid in the principles of liberty and self-government, lifting up their hearts in the aspiration that they might never be disturbed, and looking to that future when its lofty towers would rise “into the midst of sailing birds and silent air.”<sup>68</sup>

Fuller concluded with a recognition of Marshall’s unique achievement in overcoming the “antagonisms” in the “administration of the law.”<sup>69</sup> Fuller declared:

And so the great Chief Justice, reconciling “the jealousy of freedom with the independence of the judiciary,” for a third of a century, pursued his stately way, establishing, in the accomplishment of the work given him to do, those sure and solid principles of government on which our constitutional system rests.

The Nation has entered into his labors, and may well bear witness, as it does today, to the immortality of the fame of this

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66. Appendix, Centennial of Chief Justice Marshall’s Appointment, 180 U.S. at 648 (Remarks of C.J. Fuller).

67. *Id.*

68. *Id.* (citation omitted in original).

69. *Id.* at 648-49.



"sweet and virtuous soul," whose powers were so admirable and the results of their exercise of such transcendent consequence.<sup>70</sup>

On that same day in Richmond, Virginia, Associate Justice Horace Gray spoke about the life, character, and influence of Marshall.<sup>71</sup> In some detail, Justice Gray reviewed Marshall's comments about his early life in his autobiographical letter written to Justice Story, contemporaneous observations about Marshall's demeanor on the bench, extrajudicial writings on the law by Marshall and Story, choice language from Marshall's most significant opinions, and commentaries on Marshall's greatness from notable authorities, such as Justice Joseph Bradley.<sup>72</sup> In the latter portion of his remarks, Justice Gray explained why his "service of nearly twenty years on the bench of the Supreme Court has confirmed me in th[e] estimate" of Marshall as "[t]he greatest judge in the language."<sup>73</sup> After quoting the eminent Supreme Court advocate Edward Phelps's evaluation of Marshall's greatness,<sup>74</sup> Justice Gray observed, "None other of the great judges of England or of America ever had the great opportunity that fell to the lot of Marshall.... [I]t is his intellect and his character, that have a lasting influence on mankind."<sup>75</sup>

On that same day in Boston,<sup>76</sup> several notable speakers marked the occasion. Principal among them, Oliver Wendell Holmes, then a judge on Massachusetts' highest court, addressed the greatness of Chief Justice Marshall. In his remarks, Holmes initially complained of the difficulty of assessing a person's significance apart from the period in which he lived:

A great man represents a great ganglion in the nerves of society, or, to vary the figure, a strategic point in the campaign of history, and part of [Marshall's] greatness consists in his being

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70. *Id.* at 649 (citation omitted in original).

71. *Id.* at 677 (Address of J. Gray).

72. *Id.* at 700.

73. *Id.* at 703.

74. *Id.* at 703 ("The test of historical greatness—the sort of greatness that becomes important in future history—is not great ability merely. It is a great ability, combined with great opportunity, greatly employed.") (citation omitted in original).

75. *Id.* at 703, 712.

76. For another important speech on the occasion of the centennial of Marshall's appointment as Chief Justice, see J.B. Moore, *John Marshall*, 16 POL. SCI. Q. 393 (1901).

*there. I no more can separate John Marshall from the fortunate circumstance that the appointment of Chief Justice fell to John Adams, instead of to Jefferson a month later, and so gave it to a Federalist and loose constructionist to start the working of the Constitution ....*<sup>77</sup>

He candidly expressed his doubt whether

after Hamilton and the Constitution itself, Marshall's work proved more than a strong intellect, a good style, personal ascendancy in his court, courage, justice and the convictions of his party.... If I were to think of John Marshall simply by number and measure in the abstract, I might hesitate in my superlatives.<sup>78</sup>

Moreover, Holmes explained, "The men whom I should be tempted to commemorate would be the originators of transforming thought. They often are half obscure, because what the world pays for is judgment, not the original mind."<sup>79</sup> Nevertheless, he acknowledged at the end of his remarks:

Not only do I recur to what I said in the beginning, and remembering that you cannot separate a man from his place, remember also that there fell to Marshall perhaps the greatest place that ever was filled by a judge; but when I consider his might, his justice, and his wisdom, I do fully believe that if American law were to be represented by a single figure, sceptic [sic] and worshipper alike would agree without dispute that the figure could be one alone, and that one John Marshall.<sup>80</sup>

Following Holmes, the nation's most eminent constitutional scholar, James Bradley Thayer of Harvard Law School, spoke at length about Marshall's life and accomplishments. Later in the year, he expanded his remarks into a book-length biography of Marshall.<sup>81</sup> Although Thayer had by then made a name for himself as the principal academic proponent of judicial self-restraint, he

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77. THE HOLMES READER 78-79 (Julius J. Mark ed., 2d ed. 1964).

78. *Id.* at 78, 79.

79. *Id.*

80. *Id.*

81. See JAMES BRADLEY THAYER, JOHN MARSHALL (1974).

offered only mild criticisms of Marshall. He suggested that neither *Marbury v. Madison*<sup>82</sup> nor *Dartmouth College v. Woodward*<sup>83</sup> deserved the great praise they often received: "The very common view [of them] is partly attributable to the fallacy which Wordsworth once remarked upon when a friend mentioned 'The Happy Warrior' as being the greatest of his poems. 'No,' said the poet, 'you are mistaken; your judgment is affected by your moral approval of the lines.'"<sup>84</sup> Moreover, in *Marbury*,

there are grave and far-reaching considerations ... which are not touched on by Marshall, and which must have commanded his attention if the subject had been deeply considered and fully expounded according to his later method. His reasoning does not answer the difficulties that troubled [m]any ... strong, learned and thoughtful men, not to mention Jefferson's familiar and often ill-digested objections. It assumes as an essential feature of a written constitution which does not exist in any one of the written constitutions of Europe. It does not remark the grave distinction between the power of disregarding the coordinate department, and the action of a federal court in dealing with the legislation of the local States ....<sup>85</sup>

In spite of these shortcomings and the fact that Marshall "erred sometimes, from interpreting too literally and too narrowly the restraints upon the States,"<sup>86</sup> Thayer concluded that Marshall's most enduring contribution to the nation's welfare lay in "planting the national government on the broadest and strongest foundations."<sup>87</sup> Marshall accomplished this achievement through his "strong constitutional doctrine, explained in detail, elaborated, powerfully argued, over and over again, with unsurpassable earnestness and force, placed permanently in our judicial records, holding its own during the long emergence of a feebler political

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82. 5 U.S. (1 Cranch) 137 (1803).

83. 17 U.S. (4 Wheat.) 518 (1819).

84. THAYER, *supra* note 81, at 84.

85. *Id.* at 97-98.

86. *Id.* at 89.

87. *Id.* at 90.

theory, and showing itself in all its majesty when war and civil dissension came."<sup>88</sup>

By the end of the next year, Holmes's ambivalence about Marshall came back to haunt him by threatening his own appointment to the Supreme Court. At the time Justice Gray spoke about Marshall in 1901, President McKinley was already aware of the possibility of Gray's retirement, and planned to nominate Alfred Hemenway, a prominent Boston attorney, to Gray's seat once Gray formally announced his retirement.<sup>89</sup> Before Gray announced his retirement, President McKinley was shot and killed in September 1901.<sup>90</sup> It was not until a year later that Gray officially announced his intention to resign, at which time the new President was Theodore Roosevelt.<sup>91</sup> Roosevelt did not feel bound to follow McKinley's preferences in filling the seat. He was more interested in nominating the venerable Massachusetts justice Holmes, whom he knew personally. Yet, he had qualms about appointing Holmes to the Court because of the views Holmes had expressed about John Marshall.<sup>92</sup>

President Roosevelt considered John Marshall as the model of the kind of Supreme Court justice he wanted to appoint. Marshall was one of Roosevelt's heroes. As Roosevelt once explained, Marshall "is distinctly among the greatest of the great, and no man, save Washington and Lincoln, alone, deserves heartier homage from us."<sup>93</sup> Marshall's greatness, "like that of Washington and Lincoln, consisted in his acceptance of the duties of 'a statesman of the national type.'"<sup>94</sup> In Roosevelt's view, the counterexample was Marshall's successor, Roger Taney, who "was

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88. *Id.* at 58-59. Six years earlier, Thayer had singled out Marshall as one of a handful of American judges who were

sensible of the true nature of their work and of the large method of treatment which it required, who perceived that our constitutions had made them, in a limited and secondary way, but yet a real one, coadjutors with the other departments in the business of government; but many have fallen short of the requirements of so great a function.

I JAMES BRADLEY, THAYER, CASES ON CONSTITUTIONAL LAW, at v-vi (1895).

89. ABRAHAM, *supra* note 37, at 118.

90. *Id.*

91. *Id.*

92. *Id.* at 119.

93. H.W. BRANDS, T.R.: THE LAST ROMANTIC 440 (1997) (no citation in original).

94. *Id.* (no citation in original).

a curse to our national life because he belonged to the wrong party and faithfully carried out the criminal and foolish views of the party which stood for such a construction of the Constitution as would have rendered it impossible even to preserve the national life."<sup>95</sup> President Roosevelt wanted to appoint someone who would be, like Marshall,

a party man, a constructive statesman, constantly keeping in mind his adherence to the principles and policies under which this nation has been built up and in accordance with which it must go [sic] on; and keeping in mind also his relations with his fellow statesmen who in other branches of the government are striving in cooperation with him to advance the ends of government.<sup>96</sup>

Roosevelt inferred from Holmes's questioning of Marshall's greatness the possibility that Holmes was not as committed as Roosevelt would like for him to have been to his party's principles. Roosevelt explained to his friend and political patron Senator Henry Cabot Lodge: "It may seem to be but it is not really, a small matter that his speech on Marshall should be unworthy of the subject, and above all should show a total incapacity to grasp what Marshall did."<sup>97</sup> Roosevelt confessed that to be more comfortable with nominating Holmes, "I should like to know that Judge Holmes was in entire sympathy with our views."<sup>98</sup> Roosevelt appreciated that Justice Gray had strongly supported progressive governmental action, and recognized he would be "guilty of an irreparable wrong to the nation if [he] should put in [Gray's] place any man who was not absolutely sane and sound on the great national policies for which [they] stand in public life."<sup>99</sup> In other words, Roosevelt wanted someone who, like Marshall, would be committed to the principles of the Republican party as Roosevelt understood them long after Roosevelt left office. Though Roosevelt eventually

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95. *Id.* (no citation in original).

96. *Id.* (no citation in original).

97. *Id.* at 441 (no citation in original).

98. *Id.* (no citation in original).

99. *Id.* (no citation in original).

satisfied his doubts about Holmes, he lost confidence in Holmes's commitment to these principles not long after the appointment.<sup>100</sup>

In spite of the differences in Roosevelt's constitutional philosophy from those of the next two presidents, both of them shared his reverence for Marshall. As President, Roosevelt had steadfastly opposed judicial obstruction of progressive economic reforms for the sake of protecting private property rights and construed his own authority as extending to anything that the Constitution did not expressly prohibit; however, his hand-picked successor, William Howard Taft, as President and later Chief Justice, vigorously defended aggressive judicial protection of private property rights, opposed economic redistribution, and construed his presidential authority as expressly limited to the powers given to him. Nevertheless, Taft biographer Alpheus T. Mason suggests that Taft "respected no[ one] more than Marshall."<sup>101</sup> When asked once whether he would have preferred to have been president or John Marshall, Taft did not hesitate to say, "I would rather have been Marshall than any other American unless it had been Washington, and I am inclined to think I would rather have been Marshall than Washington. He made this country . . . Marshall is certainly the greatest jurist America has ever produced and Hamilton our greatest constructive statesman."<sup>102</sup> Given these sentiments, it should not be surprising that Taft often followed Marshall's reasoning in his opinions as Chief Justice.<sup>103</sup>

Taft's successor as president, Woodrow Wilson, favored a "liberal" interpretation of the Constitution that would have permitted greater social and economic reform legislation, but, like Roosevelt and Taft, greatly admired Marshall. Indeed, Wilson's admiration was longstanding, dating at least as far back as his days as a Princeton politics professor. In his famous treatise on the Constitution, Wilson suggested:

By common consent the most notable and one of the most statesmanlike figures in our whole judicial history is the figure of John Marshall. No other name is comparable with his in fame

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100. *See id.* at 542.

101. ALPHEUS THOMAS MASON, WILLIAM HOWARD TAFT, CHIEF JUSTICE 259 (1965).

102. *Id.* at 260 (citation omitted).

103. *See generally id.* at 260-61.

or honor in this singular field of statesmanlike judicial control—a field of our own marking out and creation, a statesmanship peculiar to our own annals. Marshall may be said to have created for us the principles of interpretation which have governed our national development. He created them like a great lawyer, master of the fundamental conceptions which have enlightened all great lawyers in the administration of law and have made it seem in their hands a system of life, not a mere body of technical rules; he created them also like a great statesman who sees his way as clearly without precedent as with it to those renderings of charter and statute which will vivify their spirit and enlarge their letter without straining a single tissue of the vital stuff of which they are made.<sup>104</sup>

Wilson found wanting the legitimacy of President Jackson's efforts to resist following Marshall's dictates on the meaning of the Constitution:

The two men were at the antipodes from one another both in principle and character; had no common insight into the institutions of the country which they served; represented one the statesmanship of will and the other the statesmanship of control. . . . [Jackson] was the sort of man who might very easily twist and destroy our whole constitutional system, were the courts robbed of their authority and the great balance-wheel of their power shaken from its gearings.<sup>105</sup>

Wilson concluded with a remarkably strong defense of Marshall's approach to constitutional interpretation:

[O]ur courts have stood the test, chiefly because John Marshall presided over their processes during the formative period of our national life. He was of the school and temper of Washington. He read constitutions in search of their spirit and purpose and understood them in the light of conceptions under the influence of which they were framed. He saw in them not mere negations of power, but grants of power, and he reasoned from out the large political experience of the race as to what those grants

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104. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 158-59 (Gaunt 1997) (1907).

105. *Id.* at 160.

meant, what they were intended to accomplish, not as a pedant but as a statesman, rather; and every generation of statesmen since his day have recognized the fact that it was he more than the men in Congress or in the President's chair who gave to our federal government its scope and power. The greatest statesmen are always those who attempt their tasks with imagination, with a large vision of things to come, but with the conscience of the lawyer, also, the knowledge that law must be built, not wrested, to their use and purpose.<sup>106</sup>

Besides Wilson, a number of notable scholars expressed their opinions about Marshall's performance on the bench throughout the Progressive era. One of the most eminent early legal scholars of the era, Roscoe Pound, suggested that American judges' failures in his lifetime to respond to modern economic and social developments compared unfavorably to "Lord Mansfield's development of mercantile law by judicial decision . . . Kent's working out of equity for America from a handful of English decisions, [and] Marshall's work in giving us a living constitution by judicial interpretation."<sup>107</sup> Heavily influenced in his thinking about the law by Pound, Justice Benjamin Cardozo similarly paid homage to Marshall. In 1925, he classified judicial opinions into different styles, of which he most admired the magisterial style, "which eschewed analogy or illustration and spoke from on high," and with which he closely identified Marshall.<sup>108</sup>

The Progressive era did, however, feature some dissenters from the positive images of Marshall otherwise put forward during the period. Two leading academic commentators, Edwin Corwin at Princeton and Benjamin Wright at Harvard, were among Marshall's leading critics. Corwin argued that Marshall was a poor lawyer, who exhibited his lack of understanding of the law of treason in presiding over Burr's trial and who was motivated as Chief Justice largely by his partisanship and contempt for Jefferson.<sup>109</sup> According to Corwin, Marshall had "unstudious habits" and as a judge and

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106. *Id.* at 168.

107. ANDREW L. KAUFMAN, CARDOZO 203 (1998) (quoting Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 614-15 (1908) (alteration in original)).

108. *Id.* at 447.

109. EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT (United States Publishers Ass'n 1977) (1919).



attorney "preferred the quest of broad, underlying principles ... with plenty of time for recuperation from each exertion."<sup>110</sup> Wright similarly tried to demonstrate that partisanship motivated Marshall's opinions.<sup>111</sup> Though harsh, these criticisms did not damage Marshall's image, for they were made at a time when the New Deal was gaining increasing popular and judicial acceptance. With these gains, Marshall's image would assume even greater prominence and complexity.

#### IV. THE NEW DEAL ERA

In the course of setting forth his unique theory of constitutional change, Bruce Ackerman criticizes the "conventional account" of the New Deal.<sup>112</sup> In his view, this account is predicated on how the Supreme Court attempted to reconcile its final acceptance of the constitutional foundations of the New Deal with the original conceptions of the scope of the Commerce Clause as set forth by John Marshall. Believing such reconciliation was possible without amending the Constitution is, in Ackerman's opinion, to accept "the myth of rediscovery"<sup>113</sup> and overlook that the reconciliation was impossible and that instead there was a "constitutional moment,"<sup>114</sup> in which the American people in conjunction with their leaders agreed to make a permanent change in the Constitution without going through the formal amendment process set forth in Article V of the Constitution.

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110. *Id.* at 42.

111. See WRIGHT, *supra* note 6, at 28-34.

112. 2 ACKERMAN, *supra* note 57, at 259. For references to and illustrations of the conventional account from the era, see SAMUEL HENDEL, CHARLES EVANS HUGHES AND THE SUPREME COURT 46 (1968) ("The basic doctrines upon which the Court built, and sometimes altered, were those laid down by Chief Justice Marshall."); WILLIAM LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 231 (1995) (quoting columnist Raymond Clapper's notation in his diary on the day of the supposed Switch in Time that "[t]hese decisions go back to John Marshall's conception of nationalism. They [are] not in line with recent decision but are in line with earlier decisions.") (citation omitted) (second alteration in original); Louis B. Boudin, *John Marshall and Roger B. Taney*, 24 GEO. L.J. 864 (1936); Robert B. Tunstall, *John Marshall: One Hundred Years After*, 21 A.B.A. J. 561 (1935).

113. 2 ACKERMAN, *supra* note 57, at 259.

114. *Id.* at 248, 259. For a critique of Ackerman's theory of constitutional change, see Gerhardt, *supra* note 62, *passim*.

The notion of a "myth of rediscovery," whether purposefully designed or the product of ignorance, is mistaken for at least two reasons. First, the rediscovery of Marshall had occurred at least a few decades before the occurrence of the events that the conventional account of the New Deal purports to explain.<sup>115</sup> Second, the justices who supported the New Deal (and the apparent constitutional changes that made its legitimacy possible) had a more complex and less uniform view of Marshall than the conventional account seems to suggest. In fact, these justices did not uniformly revere Marshall or consider him immune to criticism.

I focus on only three of the latter justices to reflect the diversity, complexity, and lack of uniformity of their thought regarding John Marshall. For instance, Charles Evans Hughes<sup>116</sup> and Hugo Black each had a life-long reverence for Marshall, and each expressed regard for particular aspects of Marshall's constitutional jurisprudence before either had occasion to claim its authorization for his particular construction of the Commerce Clause.<sup>117</sup> Thus, it

115. See *supra* notes 63-111 and accompanying text.

116. Comparisons were made between Hughes and Marshall throughout the era in obvious efforts to elevate Hughes' status. See, e.g., 2 MERLO J. PUSEY, CHARLES EVANS HUGHES 790 (1963) (quoting Attorney General Robert Jackson's statement that, "[t]he bar ranks Chief Justice Hughes in a class with John Marshall"); Francis Biddle, *Foreword*, 41 COLUM. L. REV. 1157 (1941) ("To seek the equal of Hughes among the Chief Justices, the mind turns back to Marshall and Taney, and dwells longer on Marshall as his true predecessor."); Robert H. Jackson, *The Judicial Career of Chief Justice Hughes*, 27 A.B.A. J. 408, 410 (1941) ("Hughes' vigorous championship of federal power under the commerce clause is reminiscent of Marshall."); SPRINGFIELD REPUBLICAN, Feb. 16, 1930 (quoting prominent New York attorney Samuel Untermyer as suggesting, "not since the appointment of Chief Justice Marshall has a man of such outstanding ability, experience and judicial temperament been called to that exalted office").

117. See PUSEY, *supra* note 116, at 692. Pusey quotes Hughes' 1932 address to a Fourth Circuit judicial conference in which Hughes frankly acknowledged that the exercise of judicial review

demands opportunities for experimentation and progress. We must ever keep before our minds the illuminating phrase of Marshall, "that it is a *constitution* we are expounding." That Constitution was made, as Justice Matthews observed, "for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues."

*Id.* (citation omitted in original); see also ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 212 (2d ed. 1997) (quoting then-Senator Black's radio address defending Roosevelt's Court-packing plan in part on the ground that "[a] 'bare majority' of the Court" had been disregarding the original understanding of the Commerce Clause first announced by John Marshall that allowed Congress to regulate "those internal concerns which affect the States generally") (citation omitted in original).

is not fair to assume that either's admiration for Marshall's contributions to constitutional jurisprudence surfaced or began only at pivotal moments of the supposed 1937 revolution.

Harlan Fiske Stone's attitude about Marshall was more complex. While he suggestively named his son "Marshall," he was hardly inclined to allow any reverence for Marshall to lead him to imbue John Marshall with mythical qualities. To the contrary, Stone never hesitated to recognize the limits of Marshall's reasoning on experience. For instance, in 1937 then-Associate Justice Stone dismissed Marshall's approach to the subject of governmental immunities from taxation as overly simplistic:

I have always felt that everything needful would have been accomplished had Marshall merely declared that neither government can adopt a tax which discriminates against the other, and that in the absence of discrimination either government is free to lay such taxes as it pleases regardless of its effect upon the other. The result would be that each government, like everyone else, would have to pay its way without special favors from the other. But to Chief Justice Marshall everything was black and white.<sup>118</sup>

When it came to dealing with the meaning of the Contracts Clause in the *Blaisdell* case,<sup>119</sup> Stone suggested frankly: "We are ... confronted with a problem permeating the economic structure, of which Chief Justice Marshall probably never had any conception ...."<sup>120</sup> After becoming Chief Justice, Stone confessed to Charles Evans Hughes that he felt that both he and Hughes had to "bear ... some burdens which John Marshall did not know."<sup>121</sup>

Yet another prominent architect of the New Deal, Felix Frankfurter, acknowledged Marshall's greatness as Chief Justice repeatedly during Frankfurter's years as a prominent academic and subsequently as a Supreme Court justice. Yet, Frankfurter's reverence, like that of Thayer and Holmes, was not merely reflexive—it included recognition of the limitations of Marshall's

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118. MASON, *supra* note 101, at 503 (citation omitted).

119. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

120. MASON, *supra* note 101, at 364 (citation omitted in original).

121. *Id.* at 574 (citation omitted in original).

reasoning and even its incompatibility with Frankfurter's own principled views regarding judicial self-restraint. For Frankfurter, the challenge in constitutional adjudication (and, for that matter, academic commentary) invariably consisted of trying to balance his respect for Marshall with his own well-known convictions and advocacy for judicial restraint.

To be sure, in the mid-1930s, prior to his appointment to the Court, Frankfurter had a relatively easy time maintaining this balance. In this period, his most extensive disquisition on Marshall occurred in 1936—a little more than two years before his own appointment to the Court—in a series of lectures at the University of North Carolina.<sup>122</sup> In the lectures, he compared the substantive views and methodologies of Chief Justices Marshall, Taney, and Waite in Commerce Clause cases. Frankfurter was especially impressed with the fact that in construing the Commerce Clause, “Marshall had, as it were, the duty of creation to a degree greater than falls to the lot of even most great judges. When he was called upon to apply the [C]ommerce [C]lause, he had available no fund of mature or coherent speculation regarding its implications.”<sup>123</sup> Nevertheless,

[t]emperament, experience and association converged to make it easy for Marshall to use the commerce clause as a curb upon local legislation. . . . The need of a strong central government, as the indispensable bulwark of the solid elements of the nation, was for him the deepest article of his political faith. But while he had rooted principles, he was pragmatic in their application. No less characteristic than the realization of the opportunities presented by the commerce clause to restrain local legislatures from hampering the free play of commerce among the states, was his empiricism in not tying the Court to rigid formulas for accomplishing such restrictions. His mind carried a hardheaded appreciation of the complexities of government, particularly in a federal system.<sup>124</sup>

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122. See Felix Frankfurter, *The Commerce Clause Under Marshall*, in 3 *THE MARSHALL READER: THE LIFE AND CONTRIBUTIONS OF CHIEF JUSTICE JOHN MARSHALL 151-72* (Erwin C. Surrency ed., 1955) [hereinafter *THE MARSHALL READER*].

123. *Id.* at 152.

124. *Id.* at 152-53.

Although Frankfurter regarded Marshall's "opinion" in *Gibbons v. Ogden*<sup>125</sup> as "either unconsciously or calculatedly confused,"<sup>126</sup> Frankfurter believed, "[w]hat Marshall merely adumbrated in *Gibbons v. Ogden* became central to our whole constitutional scheme: the doctrine that the commerce clause, by its own force and without national legislation, puts it into the power of the Court to place limits upon state authority."<sup>127</sup> Frankfurter's review of Marshall's opinions on the Commerce Clause led him further to recognize that "[t]he history of the Commerce Clause, from the pioneer efforts of Marshall to our own day, is the history of imposing artificial patterns upon the play of economic life whereby an accommodation is achieved between the interacting concerns of states and nation."<sup>128</sup> Throughout this history, Frankfurter suggests, Marshall helped to lay the groundwork for the Court's Commerce Clause decisions, which have been, in Frankfurter's view, "exercise[s] in statesmanship hemmed in by the restrictions attending the adjudicatory process. ... [Moreover,] Marshall's commerce clause decisions reflect both his awareness of the problems of statecraft cast into legal issues, and the tentative, experimental adjustments within the legal process whereby adjustments without are made."<sup>129</sup> The fatal mistake made by subsequent justices, in Frankfurter's judgment, was not to appreciate the significance of Marshall's endeavors. "What in Marshall was the beginning of analysis, for lesser judges became tags. Judges throughout the land rested on an uncritical use of the police power, and rendered mechanical decisions in Marshall's name."<sup>130</sup>

In the remainder of his remarks, Frankfurter sought to dispel the most common misconceptions and myths circulating about Marshall. While he conceded, for instance, that some of the arguments employed by Marshall in his Commerce Clause decisions were drawn from some of the great lawyers (especially Daniel Webster) who appeared before him, Frankfurter recognized that

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125. 22 U.S. (9 Wheat.) 1 (1824).

126. Frankfurter, *supra* note 122, at 154.

127. *Id.* at 155.

128. *Id.* at 157.

129. *Id.* at 158.

130. *Id.* at 164.

"not the least distinction of a great judge is his capacity to assimilate, to modify and reject the discursive and subtly partisan arguments of counsel and to transform their raw materials into an enduring opinion."<sup>131</sup> Nor did Marshall merely dominate or assert his views over the protests or ignorance of his colleagues; *Gibbons*, for instance, "was an orchestral and not a solo performance."<sup>132</sup> The same was true of other seminal Commerce Clause opinions authored by Marshall but, as the product of a collegial endeavor, "indulge[d] in observations beyond the necessities of the case and outside the requirement of his own analysis."<sup>133</sup> In agreement with Holmes, Frankfurter concluded that Marshall's great achievement was that

Marshall . . . was *there*. Marshall must have felt it. Certainly he seized every opportunity to educate the country to a spacious view of the Constitution, to accustom the public mind to broad national powers, and to restrict the old assertiveness of the states. He imparted such a momentum to these views that it carried the Court in his general direction beyond his own time. But he had too much of an instinct for the practical to attempt rigidities which could not possibly bind the future. He wished to promote the national power, but he left open the choice of doctrine for the attainment of his purpose. And so his views were often tentative and suggestive; they conveyed cross currents of doctrine and purposed ambiguity.<sup>134</sup>

In short, Marshall's opinions were not "literary documents" but rather "events in American history."<sup>135</sup>

Within a year of Frankfurter's lectures at the University of North Carolina, he was deeply involved in advising President Roosevelt on his Court-packing plan. One important document was Frankfurter's draft of Roosevelt's Constitution Day speech of September 17, 1937,

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131. *Id.* at 170.

132. *Id.* at 171.

133. *Id.* For a more detailed account of the extent to which Marshall modified his views to cultivate unanimous opinions, see William W. Crosskey, *Mr. Chief Justice Marshall*, in *MR. JUSTICE*, *supra* note 39, at 17.

134. Frankfurter, *supra* note 122, at 171-72.

135. *Id.* at 172.

in which the President defended the plan. In one revealing portion, Frankfurter's memorandum suggested:

The most important sentence ever written by Chief Justice Marshall is a part of the opinion in which over one hundred years ago that great Chief Justice established the constitutionality of the legislation which saved the banking system of this country in 1933 and insured the safety of your deposits for the future. In that opinion Marshall, who had fought through the Revolutionary War and had experienced all the difficulties of his generation in the founding of a nation, admonished those who would narrowly limit the great document to remember "*that it is a Constitution we are expounding.*"

And the modern Marshall—Mr. Justice Holmes—who like Marshall had seen the price paid on the battlefield to establish a nation, elaborated the thought of Marshall in these memorable words: "the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."<sup>136</sup>

Frankfurter obviously felt the references to Holmes and Marshall would resonate with the public; he repeated them again near the end of his drafted speech:

We shall hold to this true course; we shall be most loyal to our history and most reverent to the framers of the Constitution if we view it as the great interpreters have always viewed it, as Marshall viewed it, as Holmes viewed it.

Thus only will we be true to the avowed purposes of the Constitution itself—"to form a more perfect Union, establish Justice, insure domestic tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."<sup>137</sup>

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136. Draft of Pres. Franklin Roosevelt's Sept. 17, 1937, Constitution Day speech prepared by Felix Frankfurter, in ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE, 1928-1945, at 413 (Max Freedman ed., 1967) (citation omitted).

137. *Id.* at 416-17 (citation omitted).

Frankfurter's references to Marshall, before his own appointment to the Court in 1939 and before Hughes and Roberts cast their historic votes in pivotal Commerce Clause cases,<sup>138</sup> reveal the nature of Marshall's influence over the emerging Commerce Clause doctrine. Of particular significance was Frankfurter's recognition that Marshall's opinions merely provided the starting points rather than directed the final resolution of the contemporary Commerce Clause issues before the Court. Once the Court settled those issues, others arose that helped to divide the New Deal Democrats on the Court. By the 1940s, the Court increasingly became engaged with constitutional questions outside of the realm of the Commerce Clause, specifically dealing with incorporation, the extent of constitutional protection of noneconomic liberties, and the necessity for redressing political processes weighted against unpopular minorities. In dealing with these latter issues, Justice Frankfurter confronted increasing pressure on and off the Court to reconcile his pleas for judicial restraint with judicial protection of the affected interests and political minorities, especially African-Americans.<sup>139</sup> Thus, it is not surprising to find as his judicial career advanced, Frankfurter grappled more openly with the limits of Marshall's insights into judicial review. Indeed, the advent of the Warren Court coincided not only with renewed interest in Marshall but also with renewed analysis of the limits of judicial review.

## V. THE ADVENT OF THE WARREN COURT

Even before Earl Warren became Chief Justice in 1953, there was a resurgence of interest in Marshall's stature and achievements as the Great Chief Justice. The year 1951 marked the 150th anniversary of Marshall's appointment as Chief Justice. The celebrations in that year hardly matched those in 1901, though there were more than a few prominent speeches and articles throughout the year reminding the public of the enduring legacy of John Marshall. One of these was by Justice Harold Burton, who wrote a notable tribute to Marshall as the presiding judge in the

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138. See *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937); *Nebbia v. New York*, 291 U.S. 502 (1934).

139. See Michael J. Gerhardt, *The Rhetoric of Judicial Critique: From Judicial Restraint to the Virtual Bill of Rights*, 10 WM. & MARY BILL RTS. J. \_\_ (forthcoming 2002).



treason trial of Aaron Burr.<sup>140</sup> Justice Burton praised the seriousness and even-handedness of Marshall in presiding over the trial. In Burton's estimation, Marshall presided with such fairness that when the trial was over, "[t]he nation had reason to feel that, when administered after the manner of Marshall, Justice is the Guardian of Liberty."<sup>141</sup>

The stage was being set for even greater homage to be paid to Marshall in 1955, the year of the bicentennial of his birth. It would prove to be a remarkable year for John Marshall, the Constitution, and the Supreme Court. To honor Marshall and to inaugurate nationwide observance of September 1955 as "John Marshall Bicentennial Month," both President Dwight D. Eisenhower and Chief Justice Earl Warren addressed the annual convention of the American Bar Association. One can find in each of their remarks on that occasion oblique and sometimes not so oblique references to another more recent event, the Supreme Court's remarkable, unanimous opinion in *Brown v. Board of Education*.<sup>142</sup> Decided little more than a year before, *Brown* required yet another unanimous opinion in 1955 to clarify the first important step in its implementation.<sup>143</sup>

President Eisenhower spoke first. His speech is striking for its candid discussion of the principles he derived from Marshall's example to guide his own judicial nominations, in spite of the pressures he saw the Court confronting in 1955. At the outset, he recognized that as Chief Justice Marshall

established himself, in character, in wisdom, and in his clear insight into the requirements of free Government, as a shining example for all later members of his profession.

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140. Harold H. Burton, "Justice the Guardian of Liberty": John Marshall at the Trial of Aaron Burr, 37 A.B.A. J. 735 (1951), reprinted in 3 THE MARSHALL READER, *supra* note 122, at 131.

141. *Id.* at 147. Justice Burton had praise as well for Aaron Burr who, in Burton's estimation, "had presided in the Senate, with marked fairness and competency, over the impeachment trial of Associate Justice Chase of the Supreme Court . . . . On leaving the Vice Presidency, he had delivered to the Senate . . . an affecting farewell address marked with expressions of strong devotion to his country and its Constitution." *Id.* at 147 n.1.

142. 347 U.S. 483 (1954).

143. See *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

Through a generation, he expounded [about the Constitution and federalism] and formulated decisions of such clarity and vigor that we now recognize him as a foremost leader in developing and maintaining the liberties of the people of the United States.<sup>144</sup>

Moreover, President Eisenhower credited Marshall with having helped to

create among Americans a deep feeling of trust and respect for the Judiciary. Rarely indeed has that respect been damaged or that trust betrayed by a member of the Judicial branch of our three-sided Government.

Americans realize that the independence and integrity and capacity of the Judiciary are vital to our Nation's continued existence. For myself, this realization is understandably with me most sharply when it becomes my duty to make a nomination to the Federal Bench.<sup>145</sup>

With *Brown* an intensely recent memory, Eisenhower proceeded to make his boldest statement as President about his intentions in nominating judges: "You [of the ABA] have helped secure judges who, I believe, will serve in the tradition of John Marshall. No other kind will be appointed."<sup>146</sup> He explained in some detail precisely what he meant by this pledge: "Obviously, a rough equality between the two great political parties should be maintained on the Bench. Thus we help assure that the Judiciary will realistically appraise and apply precedent and principles in the light of current American thinking, and will never become a repository of unbalanced partisan attitudes."<sup>147</sup>

President Eisenhower then turned to the lessons that Marshall's example had for judicial selection not just for the United States but for other nations:

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144. President Dwight D. Eisenhower, Address of the 78<sup>th</sup> Convention of the American Bar Association (Aug. 24, 1955), in JOHN MARSHALL BICENTENNIAL CELEBRATION, 1955: FINAL REPORT OF THE UNITED STATES COMMISSION FOR THE CELEBRATION OF THE TWO HUNDREDTH ANNIVERSARY OF THE BIRTH OF JOHN MARSHALL 76 (1955) [hereinafter JOHN MARSHALL BICENTENNIAL].

145. *Id.* at 77.

146. *Id.*

147. *Id.*

I feel that John Marshall's life and his works have even a more profound significance than is to be found in our veneration for the American courts and for his memorable services during the formative years of the Republic.

The central fact of today's life is the existence in the world of two great philosophies of man and of Government. They are in contest for the friendship, loyalty, and support of the world's peoples.

On the one side, our Nation is ranged with those who seek attainment of human goals through a Government of laws administered by men. Those laws are rooted in moral law . . .

On the other side are those who believe—and many of them with evident sincerity—that human goals can be most surely reached by a Government of men who rule by decree.<sup>148</sup>

President Eisenhower of course saw the United States as following the first course rather than the second. Interestingly, he suggested that in trying to maintain this first course the appropriate model was John Marshall:

[L]et us be clear that, in the global scene, our responsibility as Americans is to present our case as tellingly to the world as John Marshall presented the case for the Constitution to the American public more than a hundred years ago. . . .

In his written works and innumerable decisions, John Marshall proved the adequacy and adaptability of the Constitution to the Nation's needs. He was patient, tireless, understanding, logical, persistent. He was—no matter how trite the expression—a Crusader; his cause, the interpretation of the Constitution to achieve ordered liberty and justice under law.

Now America needs to exercise, in the [international] Crusade for peace, the qualities of John Marshall. . . . [We need to] stand uncompromisingly for principle, for great issues, with the fervor of Marshall—with the zeal of the Crusader.<sup>149</sup>

Eisenhower emphasized that Marshall's vision was especially relevant for providing the substance of the case the United States

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148. *Id.*

149. *Id.* at 78.

needed to make around the world for peace: "Our program must be as dynamic, as forward looking, as applicable to the international problems of our times as the Constitution, under John Marshall's interpretations, was made flexible and effective in the promotion of freedom, justice, and national strength in America."<sup>150</sup> In short:

Our case for peace, based on justice, is as sound as was John Marshall's for the Constitution and the Union. . . . [As we work for peace and justice around the world,] we shall prove ourselves—lawyers and laymen alike—worthy heirs to the example and spirit of John Marshall. Like him in his great mission, we shall succeed.<sup>151</sup>

To an audience in 1955, President Eisenhower's remarks must have been remarkable. His speech is one of the few instances in which he showed no public ambivalence or personal discomfort with either *Brown* or its implications for the future of civil rights.<sup>152</sup> The speech is also remarkable in part because it suggests, at least implicitly, how the defense of the Court, in the immediate aftermath of *Brown*, was connected to the President's domestic and international agendas.<sup>153</sup> Moreover, President Eisenhower's remarks represent the last time that a Republican president openly has acknowledged and indeed praised adapting the Constitution to meet current problems by means of judicial construction.<sup>154</sup>

Following the President was Chief Justice Earl Warren, who had been appointed less than three years before. Chief Justice Warren offered an even more passionate defense of Marshall's legacy and drew even more lessons from it than Eisenhower for contemporary attitudes about judicial review. He found fitting celebration of the occasion in Philadelphia, for it "was here that John Marshall,

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150. *Id.* at 79.

151. *Id.* at 80-81.

152. See JAMES PATTERSON, *GRAND EXPECTATIONS* 392-94 (1996) (explaining Eisenhower's response to *Brown*); see also STEPHEN AMBROSE, *EISENHOWER* (1983).

153. See *infra* note 163 and accompanying text.

154. Subsequent Republican presidents, including Richard Nixon, Ronald Reagan, George H.W. Bush, and George W. Bush have come to the presidency as vigorous critics of judicial activism and defenders of judicial restraint. Either as candidates or in office, none have made any public defense of a broad construction of the Bill of Rights or the equal protection and due process guarantees of the Fourteenth Amendment.

expounder of the Constitution, [died] after making a contribution to constitutional government unparalleled in history."<sup>155</sup> These contributions were quickly recognized, in Warren's judgment, after Marshall's death, when "he soon became judged by the rule of reason rather than the rule of perfection."<sup>156</sup> From the vantage point of the bicentennial of Marshall's birth, Warren suggested the nation could look back upon Marshall "as we would a lofty mountain peak—not by the crevasses, jagged rocks, and slides that are apparent at close view—but by the height, the symmetry, and the grandeur it acquires in the perspective of distance."<sup>157</sup> From this perspective, "John Marshall stands out as a colossus among the giants of his time. . . . [H]e left us a heritage of both freedom and stability."<sup>158</sup> The current generation's challenge was to preserve the legacy left by Marshall. "Our problems . . . are as pressing as they were in the days of John Marshall, and call for the same devotion to constitutional principles."<sup>159</sup>

In the remainder of his remarks, Chief Justice Warren drew parallels between the principles Marshall helped to establish and protect and the Court's ongoing responsibilities. Foremost among these principles was "an independent judiciary" without which "there can be no freedom" and whose success required courage.<sup>160</sup> Moreover,

[w]ithout a militant bar to assert in court the constitutional rights of individuals, regardless of how unpopular those assertions might be at the moment, such rights become merely sounding brass and tinkling cymbals.

Insistence upon the independence of the judiciary in the early days of our Nation was perhaps John Marshall's greatest contribution to constitutional law. He aptly stated the controlling principle when in speaking of the court during his tenure he said that they had never sought to enlarge the judicial

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155. Chief Justice Earl Warren, Address at the 78th Convention of the American Bar Association (Aug. 24, 1955), in *JOHN MARSHALL BICENTENNIAL*, *supra* note 144, at 82.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

power beyond proper bounds nor feared to carry it to the fullest extent that duty requires.

That is precisely the obligation of the judiciary today.<sup>161</sup>

As Warren continued with the parallels between the pressures faced and overcome by Marshall and by his own Court, he placed increasing emphasis on the importance of the example that the Court could set for the world:

In Marshall's day the paramount problem was that of implementing the National Government so that it would have the strength to perpetuate itself and command respect, both at home and abroad.

Through the years, that had been accomplished to a remarkable degree. . . . Freedom has been preserved. Marshall's goal has been achieved.

But we now live in a different kind of world, an ideological world which disagrees violently on the proper relationship between the individual and the state, and in which there is a constant struggle for the minds and hearts of people.

We, and other free countries, are endeavoring to demonstrate that freedom and dignity for all constitute the only sound basis for world peace.

In such a gigantic struggle, where the eyes of a critical world are constantly upon everyone, the power of example is far more colorful than that of precept.<sup>162</sup>

Chief Justice Warren's remarks signal at least as clearly as President Eisenhower's that the legitimacy of the Court's overturning of state-mandated segregation depended to some extent on the Cold War, and vice versa.<sup>163</sup> He concluded: "Thus interpreted and applied, the constitutional principles of John Marshall will take

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161. *Id.* at 82-83.

162. *Id.* at 83.

163. President Eisenhower's and Chief Justice Warren's explicit attempts to connect the Cold War with the Court's obvious efforts as early as 1955 to dismantle state-mandated segregation were of course no accident, and they provide as clear confirmation as any of the extent to which the political and international circumstances under which these cases arose influenced their content, direction, and legitimacy. See generally Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); see also Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991).

on even added luster through the years. No higher mission could be the lot of the bar and the bench of America than to achieve this purpose and we grasp the opportunity."<sup>164</sup>

Later in the same year, Chief Justice Warren returned to some of the same themes in a speech given upon the presentation of a bust of John Marshall in Williamsburg, Virginia. In commenting upon the origins of the American legal system and its Constitution, the Chief Justice observed:

It fell to the lot of John Marshall to translate our Constitution from paper into real life, to enable it to meet the problems of a new, poor, war-tired and divided country. To say that it took wisdom, foresight, patience and courage to do this task is trite. But it is none the less true, and he did it for 34 years during the most formative and politically turbulent period of our national history, leaving at his death a greater imprint on our legal institutions than any American to this day has ever made.<sup>165</sup>

Warren discussed the intense disputes dividing American leaders, at the time of Marshall's tenure, between "those who would center most power in the Federal Government" and "those who would leave practically all power in the states."<sup>166</sup> Warren regarded Marshall's management of this dispute as one of his greatest legacies:

It was Marshall's mission in life to pursue a course somewhere between those two extreme positions through the construction of the new Constitution in a myriad of cases that arose during his thirty-four years as Chief Justice. . . . He believed in a strong, central government—federal supremacy in all matters within the domain of the Federal Government. He believed the Constitution should be construed liberally to accomplish that end, and he confirmed the power of Congress to do so in [*McCulloch v. Maryland*].

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164. Chief Justice Earl Warren, Address at the 78<sup>th</sup> Convention of the American Bar Association (Aug. 24, 1955), in JOHN MARSHALL BICENTENNIAL, *supra* note 144, at 83.

165. Chief Justice Earl Warren, Address and Presentation of the Bust of John Marshall at the College of William & Mary (Sept. 25, 1954), in MARSHALL-WYTHE-BLACKSTONE COMMEMORATION CEREMONIES, 56 (College of William & Mary 1954).

166. *Id.* at 57.

He believed that if we were to remain a nation we must have a national economy, and that any strong economy must be based upon the scrupulous performance of contracts, and the orderly regulation by the central government of commerce among the states and with other nations. He realized that if we were to command the respect of the world, we must meticulously fulfill our international obligations and honor the treaties we make. All of these desired results he achieved through decision after decision until they became embedded in our law.<sup>167</sup>

Yet John Marshall's "greatest contribution" was not any particular decision but rather, as Warren had suggested previously to the ABA, "the establishment of an independent judiciary through the principle of judicial review."<sup>168</sup> Through the exercise of this power, "in accordance with his belief, stone by stone, [Marshall] built the foundation of our constitutional structure, and he constructed it sufficiently strong to support everything we have since built upon it."<sup>169</sup> Warren recognized the political retaliation that confronted Marshall as he tried to build this edifice, "but he continued to build, patiently, logically, courageously. His sense of duty is epitomized at the time of the trial of Aaron Burr, which he conducted fearlessly in spite of the intense feeling of the public and the national administration against the defendant."<sup>170</sup> Marshall never flinched from doing his duty in the face of constant political pressure against him. When he died, his steadfastness won him "acclaim[] by friend and foe alike as a man of virtue and great accomplishment."<sup>171</sup>

In that same year in September, Justice Frankfurter commenced a conference at Harvard Law School commemorating Marshall's birth. Written almost twenty years after his lectures on Marshall's Commerce Clause decisions at the University of North Carolina, Justice Frankfurter's speech, later published as an article in the Harvard Law Review, is striking for at least two reasons. The first is that it reflects the same if not greater reverence Frankfurter had exhibited in his earlier remarks on Marshall's legacy. In many instances, Frankfurter expands on and waxes even more poetic

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167. *Id.* at 57-58.

168. *Id.* at 58.

169. *Id.*

170. *Id.*

171. *Id.* at 59.



than he had in his prior praise for Marshall. Second, Justice Frankfurter segues in the latter half of his speech into an examination of the limits and promise of judicial review. It is in this latter portion of his speech that one can perceive the impact of intervening events and his public service on his constitutional outlook.

The first significant theme of the speech is the case for John Marshall's distinctive ranking among Supreme Court justices. Justice Frankfurter suggested that

the decisive claim to John Marshall as a great statesman is as a judge. And he is the only judge who has that distinction. It derives from the happy conjunction of Marshall's qualities of mind and character, the opportunities afforded by the Court over which he was called to preside, the duration of his service, and the time in which he served—the formative period in the country's history.<sup>172</sup>

Working virtually on a blank slate insofar as constitutional meaning and explication were concerned, Marshall

gave institutional direction to the inert ideas of a paper scheme of government. Such an achievement demanded an undimmed vision of the union of states as a nation and the determination of an uncompromising devotion to such insight. Equally indispensable was the power to formulate views expressing this outlook with the persuasiveness of compelling simplicity.<sup>173</sup>

Frankfurter explained further the lasting power of Marshall's

ideas, diffused in all sorts of ways, especially through the influence of the legal profession, [which] have become the presuppositions of our political institutions. He released an enduring spirit, a mode of approach for generations of judges charged with the awesome duty of subjecting the conduct of government and the claims of individual rights to the

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172. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 218 (1955).

173. *Id.*

touchstone of a written document, binding the Government and safeguarding such rights.<sup>174</sup>

Of all of these ideas Frankfurter found none more significant than Marshall's recognition that "it is a *constitution* we are expounding," which Frankfurter stresses as "the single most important utterance in the literature of constitutional law—most important because most comprehensive and comprehending."<sup>175</sup> Yet, Frankfurter goes further to caution his listeners not to imbue Marshall with infallibility. "It is important not to make untouchable dogmas of the fallible reasoning of even our greatest judge, and not to attribute godlike qualities to the builders of our nation."<sup>176</sup>

After dispelling the persistent myths regarding Marshall's shortcomings (indeed, the same myths he had tried to dispel twenty years before), Frankfurter discussed the distinctive attributes of Marshall's methodology. Marshall "was not dogmatic in the choice of doctrine" for promoting adequate national power.<sup>177</sup> "He eschewed precedents, such as were then available, in his opinions for the Court. But he showed mastery in treatment of precedents where they had been relied on for an undesirable result."<sup>178</sup> And Frankfurter heartily endorsed an appraisal of Marshall's abilities by a contemporary, who found Marshall's mind to be "creative, so well organized by nature, or disciplined by early education, and constant habits of systematick [sic] thinking, that [Marshall embraced] every subject with the clearness and facility of one prepared by previous study to comprehend and explain it."<sup>179</sup>

At this juncture, Justice Frankfurter moved into a discussion of the progression of judicial review since Marshall's time. In reviewing this progression, Frankfurter openly acknowledged the significance of his own intellectual heritage:

One brought up in the traditions of James Bradley Thayer, echoes of whom were still resounding in this very building in my student days, is committed to Thayer's statesmanlike conception

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174. *Id.*

175. *Id.* at 218-19 (citation omitted).

176. *Id.* at 219.

177. *Id.* at 223.

178. *Id.*

179. *Id.* at 224 (citation omitted).

of the limits within which the Supreme Court should move, and I shall try to be loyal to his admonition regarding the restricted freedom of members of that Court to pursue their private views.<sup>180</sup>

From this perspective, Justice Frankfurter described the evolution of constitutional law since the days of Marshall, who

would be amazed by the interpenetration of law in government, because during his whole era he was concerned with the Constitution as an instrument predominantly regulating the machinery of government, and more particularly, distributing powers between the central government and the states. The Constitution was not thought of as the repository of the supreme law limiting all government, with a court wielding the deepest-cutting power of deciding whether there is any authority in government at all to do what is sought to be done.<sup>181</sup>

Frankfurter explained, "The vast change in the scope of law between Marshall's time and ours is at bottom a reflection of the vast change in the circumstances of society."<sup>182</sup>

At the end of his speech, Justice Frankfurter suggested that perhaps the greatest lesson he had learned in his tenure on the Court up until that point was the difficulty of the challenge to hew closely to the limits of judicial review. He recognized that he had

an old-fashioned liberal's view of government and law . . . [The label] implies allegiance to the humane and gradualist tradition in dealing with refractory social and political problems, recognizing them to be fractious because of their complexity and not amenable to quick and propitious solutions without resort to methods which deny law as the instrument and offspring of reason.<sup>183</sup>

The important thing for judges to do is to respect their inability to resolve such problems on their own. Hence, Justice Frankfurter

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180. *Id.* at 225.

181. *Id.*

182. *Id.* at 226.

183. *Id.* at 237.

refrained from “fashion[ing] criteria for easier adjudication of the specific cases that will trouble future judges.”<sup>184</sup> Moreover, he acknowledged having

tried to dispel the age-old illusion that the conflicts to which the energy and ambition and imagination of the restless human spirit give rise can be subdued, even if not settled, by giving the endeavors of reason we call law a mechanical or automatic or enduring configuration. Law cannot be confined within any such mould because life cannot be so confined. Man’s most piercing discernment of the future cannot see very far beyond his day, even when guided by the prophet’s insight and the compassionate humility of a Lincoln. And I am the last to claim that judges are apt to be endowed with these gifts. But a fair appraisal of Anglo-American judicial history ought to leave us not without encouragement that modest goals, uncompromisingly pursued, may promote what I hope you will let me call civilized ends without the need of defining them.<sup>185</sup>

Frankfurter concluded with a twist on his usual plea for judicial self-restraint:

The intention of my emphasis has been not on the limited scope of judicial enforcement of laws. My concern is an affirmation—my plea is for the pervasiveness throughout the whole range of government of the spirit of law, at least in the sense of excluding arbitrary official action. But however limited the area of adjudication may be, the standards of what is fair and just set by courts in controversies appropriate for their adjudication are perhaps the single most powerful influence in promoting the spirit of law throughout government.<sup>186</sup>

Judges had a special responsibility in promoting this spirit: For “judges cannot free themselves from the responsibility of the inevitable effect of their opinions in constricting or promoting the force of law throughout government. Upon no functionaries is there a greater duty to promote law.”<sup>187</sup>

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184. *Id.*

185. *Id.*

186. *Id.* at 237-38.

187. *Id.* at 238.

In yet another speech in 1955, Justice Burton continued his own homage to John Marshall. As part of a symposium in honor of the bicentennial of Marshall's birth, Justice Burton published his own account of Marshall's personal and professional accomplishments.<sup>188</sup> The account mixes established fact with hagiography. At the outset, Burton praised Marshall as "a vigorous, courageous, warmhearted, and modest man, exemplifying the best traditions of the American revolution."<sup>189</sup> Moreover, "[u]nder [Marshall's] leadership, the loose stones provided for the nation's structure were built into a firm foundation," and his "conduct" in overseeing Aaron Burr's treason trial "set an admirable example of judicial courage and demeanor."<sup>190</sup> Burton concluded his speech, as Warren had ended his earlier in the year, with a reference to the dramatic cracking of the Liberty Bell at the moment it "announce[d] his death. His active service and that of the bell ended together. . . . Their voices were silenced, but they have never ceased to inspire the nation to seek to fulfill the high mission to which both Marshall and the bell were dedicated."<sup>191</sup>

These homages to Marshall were the first salvos in a highly visible, intense debate over the legitimacy of the Warren Court's activist decision in *Brown*. Critics of this activism did not hesitate to draw negative inferences from suggested parallels between the Warren and Marshall Courts. For instance, in 1957 the conservative columnist James J. Kilpatrick published a book denouncing the Warren Court's failures to respect state sovereignty, which he traced back to the nationalist bias of John Marshall.<sup>192</sup> In his Preface, he predicted that "[t]he political heirs of Alexander Hamilton and John Marshall will not care much for"

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188. Harold H. Burton, *John Marshall—The Man*, 104 U. PA. L. REV. 3 (1955). Burton's interest in John Marshall was evident throughout his tenure on the Court. See Harold H. Burton, *The Cornerstone of Constitutional Law: The Extraordinary Case of Marbury v. Madison*, 36 A.B.A. J. 805 (1950) (discussing Marshall's handling of the case); see also Burton, *supra* note 140.

189. Burton, *John Marshall—The Man*, *supra* note 188, at 3.

190. *Id.* at 6.

191. *Id.* at 7.

192. JAMES J. KILPATRICK, *THE SOVEREIGN STATES: NOTES OF A CITIZEN OF VIRGINIA* (1957).

his strong support for state sovereignty and the doctrine of interposition.<sup>193</sup>

Subsequently, Marshall's image hardly has been dormant. Over the past five decades (and counting), it has figured prominently in numerous debates on and off the Court regarding the legitimacy of the Warren Court's activism, the Burger Court's failure to implement a constitutional revolution and realize its promise to undo many of the Warren Court's landmark decisions, and the Rehnquist Court's overturning of more than two dozen federal laws in recent years for the sake of protecting state sovereignty and restricting the scope of congressional authority, particularly under the Commerce Clause and Section 5 of the Fourteenth Amendment.<sup>194</sup> These debates encompass periods in which the nation has celebrated the bicentennials of both the Bill of Rights and John Marshall's appointment as Chief Justice. These are the debates (and celebrations) of the modern era, and they are likely to be familiar to us,<sup>195</sup> as are of course our own conceptions of Marshall's stature and legacy. While I leave for another day more detailed analysis of Marshall's different and recurring images in the modern era, one can presume that throughout the period national leaders, with rare exceptions, have not hesitated to make recourse to Marshall's image whenever they needed authority to confirm the legitimacy of the national government deriving from the people of the United States, to defend the independence of the federal judiciary, to support broad constructions of Congress's Commerce Clause and Necessary and Proper Clause powers, and to justify judicial construction of the Constitution to meet the pressing issues of the day.

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193. *Id.* at xi.

194. On the Court's activities under the chief justiceships of Warren Burger and William Rehnquist, see generally Gerhardt, *supra* note 139.

195. See, e.g., Tom Campbell, *Scalia Lauds Marshall for His Influence, Example*, RICH. TIMES DISPATCH, Feb. 4, 2001, at B3 (explaining the continuing "influence" of John Marshall as "present even in the form today's opinions take" and acknowledging, "I am saddened when I compare his performance not only to my own but to other public officials"); Harry L. Carrico, *The Illustrious Legacy of John Marshall Endures*, RICH. TIMES DISPATCH, Feb. 4, 2001, at F7 (the remarks of the Chief Justice of Virginia Supreme Court in recognition of Marshall's greatness as a judge, concluding that "[t]o gauge the extent of Marshall's legacy, one need only guess what this country would have become without him. That we are a nation governed by a rule of law because he lived, there can be no doubt.").

## VI. MARSHALL AND THE MEASUREMENT OF JUDICIAL GREATNESS

The shifting or evolving image of John Marshall from his death until the advent of the Warren Court confirms Jack Balkin's opinion that greatness depends primarily on how future generations make use of the past.<sup>196</sup> Balkin suggests that the factors that explain the continuing perception of Marshall as a great judge include his long tenure on the Court, his institutional role in helping the Court to achieve a more important role in the political order than it had before his arrival, his performance as an intellectual leader who wrote on the subjects of critical importance to the citizens of his day, his choice of opinions to write, and his having been on the "right side" on most national disputes from the viewpoint of subsequent generations.<sup>197</sup> While I agree with all of these factors, I suggest there are other notable factors both beyond and implicit within those recognized by Professor Balkin.

Indeed, the very first of the factors mentioned by Balkin bears repeating. It seems obvious that longevity should matter to a justice's stature, but it can hardly be taken for granted. This factor is critical because the longer a justice serves the likelier he or she will be involved in a wide range of constitutional issues of enduring social and political importance. Longevity provides opportunities indispensable to a justice's stature in the public mind. In the prior parts of this Article, virtually every political leader whom I have quoted on Marshall's image refers to his length of service. To be sure, length of service, standing alone, hardly qualifies one for greatness as a judge; there have been more than a few justices who served for many years but who either were poor colleagues, contributed little positive input into the Court's deliberations or work product, lacked judicial temperament, or wrote few opinions and added little to those they did not write. At the same time, there have been other justices—notably, both Benjamin Cardozo and Robert Jackson—who had relatively short tenures, but are generally recognized for some significant opinions they wrote and shaped and for what they might have accomplished had they lived longer. Notably, other justices, such as Marshall, Oliver Wendell

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196. Balkin, *supra* note 10.

197. *Id.*

Holmes, and Hugo Black, each served for over thirty years on the Court, during which they were actively involved in the Court's most sensitive and important work. While the longevity of service of each of these justices does not explain why they all are considered by most commentators as among the greatest justices who served on the Court, they took advantage of the opportunities their longevity provided. In other words, how each of these justices used the opportunities available by virtue of his longevity illuminates each's distinctive judicial performance.

Second, the quality of a jurist's decisions or opinions is critical to his stature. Many factors are relevant to an evaluation of the quality of a jurist's decisions, including their relative craftsmanship, creativity, influence, and durability. Craftsmanship encompasses a justice's writing style, and there is no question judicial greatness requires, *inter alia*, exemplary opinion-writing. The style must be both distinctive and memorable. Writing an opinion in an important case is one thing, but writing an opinion that resonates beyond the facts of the case before the Court is quite another. Few tend to look to the opinion in *Roe v. Wade*<sup>198</sup> as the model of exemplary writing, but *Brown*'s simple declarative sentences resonate to this day. The written opinions of a justice constitute the lifeblood of his or her legacy. Marshall stood out in his day and since for both how and what he wrote about the great issues of his day. Almost every law student and lawyer (and many high school students) are aware of his great pronouncements regarding the Constitution in part because of his forceful rhetoric.<sup>199</sup> Marshall is known for having borrowed language or arguments from briefs before the Court, but much of his most remarkable language bears his unique rhetorical flourishes. Justice Cardozo described Marshall's style as magisterial, because it eschewed formalisms and technical language and uninformative analogies and instead captured the essence of legal issues in bold, clear language that was (and remains) accessible to the public.<sup>200</sup> Justice Holmes's pithiness—his ability to craft memorable phrasings and epigrams in notable cases—remains a hallmark of his long

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198. 410 U.S. 705 (1973).

199. See *supra* notes 14, 73, 88 and accompanying text.

200. See KAUFMAN, *supra* note 107, at 447.



tenure.<sup>201</sup> Charles Evans Hughes cast his arguments not only in clear, powerful logic but also achieved similarly majestic resonances in his writing as Marshall did.<sup>202</sup> Hugo Black purposely set out to write opinions the press could quote and the public could understand.<sup>203</sup> Robert Jackson is admired for his eloquent turn of phrase and some of the most memorable images ever constructed in Supreme Court opinions,<sup>204</sup> and Felix Frankfurter is admired for his remarkable erudition and passionate argumentation in defense of judicial restraint at times when controversy enveloped the Court.<sup>205</sup> Few, however, continue to revere the opinions of Justice Horace Gray, though he was widely admired in his day by other judges for his even-handedness, learning, and temperament; Gray's style does not transcend time because it is dry, technical, and long-winded.<sup>206</sup> Nor did Taney ever match the simple but powerful elegance of

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201. See, e.g., *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J. dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."). Abhorrent today, but no less well known, is Justice Holmes' oft quoted 1927 statement in *Buck v. Bell*, 274 U.S. 200 (1927), that "[t]hree generations of imbeciles are enough." *Id.* at 207.

202. See, e.g., *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) (declaring the original understanding of the Constitution irrelevant); *Near v. Minnesota*, 283 U.S. 697 (1931) (declaring freedom of the press and freedom of speech to be incorporated by the Fourteenth Amendment). As David Currie notes, "Hughes wrote concisely and admirably" and was "the authoritative voice of the . . . Court . . . who wrote nearly twice as many majority opinions in constitutional cases as any other member of the Court, including most of the big ones . . . ." DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986*, at 273 (1990).

203. ROGER NEWMAN, *HUGO BLACK: A BIOGRAPHY* 276 (2d ed. 1997) (noting that Justice Black deliberately wrote for public consumption). Black explained that he wrote his opinions so that "my uncle down on the farm plowing the fields can read them." *Id.* at 292 (internal quotations omitted) (quoting Newman's interview with Hugo L. Black). Black strived to make his opinions accessible to the public whom he saw as the ultimate beneficiary of the Court's work. *Id.* Hence, Black was one of the first justices to have been widely covered by the press, and that coverage, in turn, increased his notoriety with the public. See *id.* at 276 (quoting from an interview with Guido Calabresi who claimed that Haywood Brown once remarked that "Black is certainly popular with the newspaper men . . . because he recently wrote a dissent in English as plain and simple and clear as a good running story on the first page. And, naturally, reporters take to those who speak their own language. And it is a finer tongue than that invented by Mr. Blackstone.").

204. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641-46 (1952) (Jackson, J., concurring) (setting out a memorable three-prong framework of executive power); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (providing a memorable description of the purpose of the Bill of Rights).

205. See, e.g., *Baker v. Carr*, 369 U.S. 186, 266-330 (1962) (Frankfurter, J., dissenting).

206. This is equally true for his long speech in honor of the centennial of Marshall's appointment as Chief Justice. See *supra* notes 71-75 and accompanying text.

Marshall's rhetoric, preferring instead to cast his opinions in relatively formal, passionless phrasing.<sup>207</sup>

Creativity and innovation are also important attributes of a judge's opinions. Marshall introduced into the constitutional lexicon conceptions about judicial review, constitutional interpretation, and congressional power that still influence or inform contemporary doctrine, thinking, and debate on constitutional questions. While creativity or innovation for its own sake can be problematic in judging (consider, for example, how poorly many opinions of William D. Douglas wear with age), Marshall's creativity and innovations strengthened the Court's stature and have fared better in part because of their reception by other institutional leaders over time.<sup>208</sup>

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207. Taney's style contrasts sharply with Marshall's. Whereas Marshall cast his opinions in magisterial terms, Taney, as one of the radical Democrats of his era, wrote opinions that might have seemed less pompous and presumptuous to him but also were devoid of much memorable imagery or craftsmanship.

208. Judge Posner agrees that creativity and innovation are relevant indicia of a judge's stature. In a recent essay, he gives Marshall enormous credit for his ingenuity in helping to lead the Court to keep the nation unified and not collapsing "into a set of completely independent nation-states . . . John Marshall's Court did much to check these fissiparous tendencies. For this, most of us are profoundly grateful." Posner, *supra* note 6, at 39. He suggests that "[i]t was the extraordinary fit between Marshall's kit of qualities and the volatile historical setting in which he worked that explains his success and his greatness." *Id.*

Professor Michael Klarman does not, however, consider creativity or innovativeness as indicia of the greatness of a judge's opinions. Instead, in a recent article he is skeptical of the greatness of Chief Justice Marshall's opinions. Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1112 (2001). He rejects the view that Marshall's opinions "fundamentally shaped the course of American national development" and instead demonstrates how opinions such as *Gibbons* or *McCulloch* had "little concrete effect." *Id.* at 1112, 1144. While Professor Klarman recognizes that the Court's "stature . . . did increase dramatically under Marshall's leadership" and how in particular Marshall's "brilliant political gamesmanship . . . contributed to the growth of the Court's stature," he suggests that Marshall's Court also benefitted from "some good fortune" including, *inter alia*, the failure to convict Justice Samuel Chase in his impeachment trial and "the general concordance of views shared by the Justices." *Id.* at 1153, 1158, 1165, 1169.

Professor Klarman may take far too narrow a view of the indicia of judicial greatness. The fact that an opinion fails to produce significant social and political consequences hardly is the only measure by which it may be evaluated. The fact that an opinion—or series of opinions—might have consolidated rather than precipitated social or political developments is another reasonable measure of significance. Moreover, the fact that Marshall's opinions sometimes reflected rather than led a political movement help to explain their favorable reception by political elites long after the death of the Federalist party. In addition, the fact, as recognized by Professor Klarman, that a sea-change in the stature of the Court vis-à-vis

Third, the relevance of a jurist's leadership on and off the Court to his enduring significance cannot be overestimated. Such leadership manifests itself in many ways. One is how a justice interacts with his colleagues or builds coalitions on the Court. It is hard to imagine a justice more skilled at these endeavors than John Marshall. Moreover, Marshall seems to have keenly understood the importance of treating one's enemies as well as one could. It is no accident that Marshall, in spite of his strong constitutional opinions, commanded the respect of almost everyone with whom he served in spite of the fact that most did not share his ideology. In spite of the differences he had with Taney, Marshall expressed respect for his legal abilities and tried to help him secure confirmation as an Associate Justice. In the end, justices who did not agree with Marshall on constitutional issues could at least agree on his collegiality, decency, and even-handed administration of the Court. They understood better than anyone how much Marshall sometimes compromised his own personal views to cultivate a majority or unanimous opinion for the Court. These efforts paid dividends during Marshall's lifetime in the collegial atmosphere over which he presided and in the good will of almost every justice who served with him.

An important ingredient of leadership is clarity if not boldness of vision, particularly with respect to the Constitution. Leadership entails coordinating institutional implementation of an agenda. To the extent a justice identifies both a clear resolution of an important issue (or set of issues) and path by which to get there, he distinguishes himself in the short—if not long—term. Marshall often coordinated the implementation of his vision of the Constitution. Indeed, the bolder the vision arguably the more difficult the implementation, but Marshall often seemed to have succeeded.

Marshall's leadership also entailed implementing a huge change in the Court's operation: he led the Court to abolish its previous

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the other branches occurred during Marshall's tenure as Chief Justice is itself another reasonable measure of his leadership on the Court. Indeed, Klarman unduly discounts the cumulative effects of the Marshall Court decisions on how the institutional leadership of the other branches come to view the Court both during Marshall's tenure and subsequent to his death.

practice by which each justice would deliver an opinion in each case and to substitute assignment to one justice to write an opinion for the Court. This innovation enabled the Court from Marshall's time to the present to specify with a single voice.

Interestingly, matching boldness of vision with a majestic style of writing is a powerful combination likely to capture attention. The best writing without a powerful or appealing vision is, however, unlikely to resonate to the same extent; and no vision is likely to have much appeal without suitable phrasing. For the most part, justices who tended to decide cases incrementally (because they envisioned a relatively narrow judicial role), such as Byron White,<sup>209</sup> Potter Stewart,<sup>210</sup> and perhaps Lewis Powell,<sup>211</sup> often commanded the respect of their colleagues (to be sure, no mean feat), which they all did, but are less likely to receive nearly the extent of public attention or acclaim that justices with more capacious views have received. A bolder vision seems more courageous—some might say reckless—because it stretches boundaries and likely requires considerable skill to implement. Marshall's nationalist ideology obviously qualifies as such a vision.

Perhaps most importantly, we should also remember, as Jack Balkin reminds us, who judges judicial greatness.<sup>212</sup> There are many different audiences and constituencies. Judges are obviously important consumers of judicial opinions, but their criteria are likely not to be divorced from either their methodologies or substantive visions of constitutional law. Another important consumer of judicial opinions are national political leaders, including the president and members of Congress. When Jack Balkin speaks of a justice having been on the "right side" of an issue insofar as the country is concerned, he means, I think, being on the side of the issue that political leaders and perhaps other judges endorse.<sup>213</sup> In other words, the political process becomes another critical forum for measuring judicial greatness. Marshall's opinions often tracked the dominant federal regime, but in doing so they garnered the regime's respect and enhanced the Court's stature.

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209. See, e.g., ABRAHAM, *supra* note 37, at 210-11.

210. See, e.g., *id.* at 205-07.

211. See, e.g., *id.* at 264-67.

212. See Balkin, *supra* note 10.

213. *Id.* at 1325-27.

Taney's efforts to use this stature to achieve different ends came to naught, for after his tragic opinion in *Dred Scott*,<sup>214</sup> Taney became a political pariah, at least insofar as national political leaders were concerned by the 1860s. Few dared to point to any Taney opinion as a model unless they were prepared to be challenged if not castigated. As Taney's star fell, Marshall's arguably began to rise further. By the 1950s, one could speak of Marshall's greatness without fear of political retaliation and with perhaps the hope of enhancing one's own stature with the listening or reading audience. Indeed, positive reception within the political community is perhaps not just a measure of judicial greatness but also required for a sustained legacy. The celebrations of key moments in Marshall's career reinforce if not further heighten his stature. By the same token, that no one celebrates the milestones in Taney's career—in spite of the respect many scholars have had for his nonslavery opinions—is further testimony to just how far he has fallen in the public regard.

The critical factor I am discussing—the extent of a justice's popularity, appeal, influence, or stature in political fora—might be the single most important measure of judicial greatness. For it provides both the means of recognizing judicial greatness and its perpetuation through the appointments of other like-minded people. Hence, the political stature of a justice is a factor that could be understood as subsuming the others—they merely contribute to the political perception of a particular justice (or how a justice is perceived in the political marketplace). Appointment or confirmation of like-minded justices is, ultimately, perhaps the highest praise any justice can receive.

Last but not necessarily least, judicial temperament is an important element in a judge's performance on the bench. Much has been made of Marshall's fervent commitment to his Federalist party's convictions, but much also should be said about his willingness often to subvert his personal views for the sake of institutional harmony. For Marshall to have formally dissented one time in his unusually long tenure on the bench, especially when one recalls how most of the other justices did not share his constitutional convictions, is a remarkable achievement.

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214. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

## CONCLUSION

It is important not to confuse the public images of John Marshall that recur through constitutional, congressional, and other debates throughout history with the man who lived and worked as the third Chief Justice of the United States. Thanks to historians such as Chuck Hobson, Kent Newmyer, and Jean Edward Smith, we have treatises that give us a sense of the real man behind these images,<sup>215</sup> but their wonderful works cannot obscure the fact that the Marshall who dominates our debates is a different being from the one whose bicentennial we celebrate today.

One question to consider is not just what image of Marshall each of us has in mind but what purpose it serves. Marshall has become almost unique in constitutional annals as a figure that time can no longer diminish. Few regard him as perfect, but he stands apart from his contemporaries for having led the Court to speak with one voice and having uniquely helped to clarify (and even solidify) the source of the power of the national government in the people of the United States, the legitimacy of adapting the Constitution to meet the pressing issues of the day, and the indispensable importance of the independence of the federal judiciary. Moreover, in fashioning these significant principles, Marshall has become a model of judicial excellence. As such, he exemplifies some of the important attributes that we seek in measuring the degree of others' influence or accomplishments as Supreme Court justices—their length of service on the Court, their rhetorical skills, their participation in and influence over the resolution of politically and socially significant conflicts, their leadership in helping the Court to maintain or achieve its institutional role in our political and legal order, and their crafting of opinions in distinctive and memorable writing styles. If few, if any, justices can come close to matching Marshall with respect to any of these factors, then the time is long overdue, not to concede Marshall's place in our history, but to wonder why he stands nearly, if not completely, alone. Clarifying not just Marshall's greatness as a judge but also his uniqueness as a figure

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215. See, e.g., CHARLES HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* (1996); R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001); SMITH, *supra* note 8.

in our constitutional history is a useful inquiry to initiate on the occasion of the bicentennial of Marshall's appointment as Chief Justice. It is indispensable in the ongoing quest to define his legacy.