

The Library of America interviews Charles F. Hobson about John Marshall

In connection with the publication in January 2010 of *John Marshall: Writings*, edited by Charles F. Hobson, Rich Kelley conducted this exclusive interview for The Library of America e-Newsletter.

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John Marshall: Writings collects some 200 of the letters, speeches, essays, resolutions, reports, legal arguments, and judicial opinions written or delivered by John Marshall between 1779 and 1835 as well as selections from his Life of George Washington and his preface to A History of the Colonies. You divide the writings from Marshall's quite varied career into four periods: soldier, state legislator, lawyer and Federalist; diplomat, congressman, and secretary of state; Chief Justice of the Supreme Court: 1801–19; and Chief Justice of the Supreme Court: 1820–35. How would you characterize the changes and evolution in Marshall's writing over these four periods?

Marshall's simple and unadorned prose style appears to have been ingrained from an early age, when he read English literature and history under his father's tutelage. He adhered to this style in every kind of writing he undertook: letter, newspaper essay, legislative speech, report, diplomatic dispatch, and judicial opinion. Marshall's own thoughts about style were best expressed in a letter to his grandson in 1834. In speaking and writing, Marshall observed, "clearness and precision are most essential qualities. The man who by seeking embellishment hazards confusion, is greatly mistaken in what constitutes good writing. . . . The writer should always express himself so clearly as to make it impossible to misunderstand him. He should be comprehended without an effort."

Marshall's one venture into formal literary composition, *The Life of George Washington*, first published in 1804–07, proved somewhat embarrassing. As he explained in his preface to the second edition (1832), the work was "hurried to the press without that previous careful examination, which would have

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resulted in the correction of some faults that have been since perceived.” Readers can consult Marshall’s letters to his publisher, Caleb P. Wayne, for the travails of a novice author. The revision of the *Life* became one of his most important off-the-bench preoccupations. The excerpt presented in this volume is from the revised second edition.

Marshall served as the fourth Chief Justice of the Supreme Court from 1801 until his death in 1835. In that time the jurists heard 1,109 cases and Marshall wrote the opinion in 519 of them, almost half. He dissented only nine times. Writings collects eleven of these opinions, including one dissent, amounting to about 215 pages. What criteria did you use to select these?

The most important criterion was their importance in Marshall’s career and in the history of the Court. Virtually all the opinions selected fall in the category of constitutional law. This is the field where Marshall’s star shown brightest. His good friend and colleague Joseph Story observed that Marshall was not the most learned jurist on the Court (that honor went to Story), but even Story acknowledged that the chief justice had no peer as expounder of the Constitution.

In Marshall’s time Supreme Court Justices spent part of the year sitting as Circuit Court Judges. The longest and most intriguing judicial opinion in the collection is not from the Supreme Court but Marshall’s 1807 Circuit Court opinion in the case of the United States v. Burr, the sensational treason trial of former vice-president Aaron Burr. In his biography of Marshall Jean Edward Smith notes that Marshall found the Burr trial the “most disagreeable experience in his 35 years on the bench.” Why?

The Burr trial was vexing for Chief Justice Marshall because he recognized at the outset that the case would draw the judiciary—and him, personally—into the political arena. It was essentially a “no win” situation for Marshall. If Burr was convicted, Marshall and the judiciary would be denounced for cravenly submitting to the majority political party. If Burr was acquitted, Republicans (as actually happened) would censure Marshall as a partisan judge, culpable of allowing a traitor to escape the noose and of aiding his project to overturn the government. Marshall tried as best he could to cast his decision in favor of Burr’s acquittal as a clash between the rule of law and the popular will—with the judge having no choice but to uphold the rule of law. The uproar over the acquittal eventually subsided but not before a Baltimore mob

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hanged the Chief Justice in effigy. Another disagreeable aspect of the Burr trial was that it took place in August, the hottest month of the year in Richmond, when Marshall usually took his vacation in the mountains.

Marshall worshipped George Washington, having served with him in his twenties as a soldier at Valley Forge. Writings includes his preface and two chapters from his revised two-volume biography. How did Washington influence Marshall's thinking and writing?

Marshall first came to know of Washington through his father, Thomas Marshall, who like Washington was a land surveyor. Although Marshall was at Valley Forge, it is not clear whether the young officer came in direct contact with the commander-in-chief in the encampment or at any time during the war. Marshall later wrote that his view of Washington during the war was from a distance, not up close. Their personal acquaintance grew stronger after the war, with Marshall doing legal business for Washington. We don't know the exact date, but Marshall's most extended personal encounter with Washington might have been at Mount Vernon in the late summer of 1798, shortly after his return from his mission to France. At that famous interview, Marshall was unable to resist Washington's urging him to become a candidate for the U.S. Congress.

Marshall really came to know and revere Washington through his research and writing of the *Life of Washington*. Marshall was the first historian and biographer to read through the General's voluminous correspondence. This experience enlarged and deepened his appreciation of Washington's greatness—as a military commander who against all odds kept the Continental Army in the field and, perhaps more importantly, as the very model of a republican statesman who sacrificed his personal interests and wishes to serve the public at a time when his leadership was crucial to the success of the new nation.

Marshall first came to national prominence as one of the three diplomats dispatched by John Adams to negotiate a treaty with France in 1797. Their protracted and unsuccessful negotiations with a curious mix of bankers and businessmen representing France over a six-month period became known as the infamous "XYZ Affair." Marshall's lengthy dispatches about these exchanges now read like high comedy. Did Marshall intend these accounts to be humorous or is this simply the perspective of history?

I think this is more the perspective of history. Some of the comic-opera aspects of this episode arose from Secretary of State Pickering's substitution of

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“X,” “Y,” and “Z” for the names of the unofficial French negotiators in the published version of the dispatches. Certainly Marshall was not trying to be funny. This was deadly serious business, whose outcome might lead to open war with France. There were, to be sure, rabid Federalists who hoped for just such an event. The publication of Marshall’s dispatches did have the effect of stirring up war fever back home for a time and led to the enactment of the infamous Alien and Sedition laws in the summer of 1798. Marshall himself was a moderate who preferred peace to war and was chagrined by the Alien and Sedition Acts.

One of the longer entries in Writings is the 30-page speech Marshall delivered in 1800 as a Representative from Virginia to the U.S. Congress defending the extradition of Thomas Nash. What was the significance of this case?

Thomas Nash, alias Jonathan Robbins, was arrested in Charleston, South Carolina in 1799 at the request of the British consul. Nash was charged with having committed murder on board a British vessel in 1797, and the consul sought to have him extradited under the 1794 treaty with Great Britain (the Jay Treaty). Nash, who claimed to be an American impressed into British naval service, was turned over to British authorities in compliance with the treaty and was subsequently executed. When Republicans attacked President Adams for surrendering an American citizen without a trial in American courts, Marshall, then in Congress, delivered a masterly defense of the president’s conduct as properly within the executive department’s authority to carry out the terms of international treaties. Marshall contended that this was a case of “political law,” to be decided not by courts but by the president, as “the sole organ of the nation in its external relations.” The speech reads like a judicial opinion and indeed was later reprinted in an appendix to one of reporter Henry Wheaton’s Supreme Court volumes.

With this speech, Marshall emerged as the Adams administration’s ablest advocate and defender. Soon afterwards, President Adams decided that Marshall would be even more valuable to him as a member of his cabinet. Instead of finishing his term in Congress, Marshall served as secretary of state during the last nine months of Adams’s presidency. When John Jay declined Adams’s nomination as Chief Justice, the President turned to his secretary of state and said, “I believe I must nominate you.” If he needed any proof that Marshall was highly qualified for the post, Adams could point to Marshall’s great speech of nine months earlier.

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The permanent exhibit of the Charters of Freedom at the National Archives in Washington D.C. displays only one Supreme Court opinion alongside the Magna Carta, the Declaration of Independence, and the Constitution: the Court's 1803 opinion Marbury v. Madison, which Marshall announced, not in the court room, but in the living room of Stelle's Hotel, where the justices then lodged while in session. What constitutes its great significance and do you think it deserves this separate and higher ranking among all the opinions of the Supreme Court?

Marbury was announced in Stelle's Hotel on Capitol Hill to accommodate Associate Justice Samuel Chase, who was too indisposed to go the courtroom in the Capitol. I suspect that placing *Marbury* alongside the Magna Carta and the Declaration of Independence was done at the behest of some influential lawyer or lawyers. Lawyers revere *Marbury* as the "great case" that established "judicial review," the practice in which courts can pronounce a legislative act void if repugnant to the Constitution. I agree that *Marbury* ranks as one of Marshall's great opinions, not because it established judicial review but more broadly because of its eloquent and timeless affirmation of the rule of law. I would not single out *Marbury* as Marshall's greatest opinion. Many historians regard *McCulloch v. Maryland* (1819), where Marshall expounded the doctrines of national supremacy and implied powers, as superior to *Marbury*. In *McCulloch*, Marshall exercised judicial review by *upholding* an act of Congress incorporating a national bank.

After Marbury v. Madison there was not another Supreme Court opinion declaring a federal law unconstitutional until Dred Scott in 1857. Considering how many of Marshall's decisions had to do with establishing the primacy of the federal government over states' rights (Cohens v. Virginia, McCulloch v. Maryland, Gibbons v. Ogden) or the primacy of contracts (Fletcher v. Peck, Dartmouth v. Woodward), would it be fair to say that these cases more aptly represent Marshall's legacy?

Yes, absolutely. In this respect, *Marbury* is something of an anomaly. Although in setting forth the doctrine of judicial review, Marshall made no distinction between review of federal laws and review of state laws, the fact is that the Marshall Court's exercise of judicial review was almost exclusively applied to state laws. He may have thought that the supremacy clause and the specific limitations and prohibitions on the states provided more solid textual support for judicial review. In *Marbury*, the Court voided a minor clause of the judiciary

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act giving the Supreme Court power to issue writs of mandamus to federal officials. The Court in this instance actually denied itself the power and thus exercised review without provoking much controversy. In *McCulloch*, the Court wisely passed on the invitation to strike down the act incorporating the Second National Bank. Marshall believed the Court should go far in deferring to Congress in determining what measures were “necessary and proper” to the exercise of its enumerated powers. To second-guess Congress in such cases risked getting the Court embroiled in politics.

Much of Writings consists of Marshall’s many letters to friends, fellow jurists, statesmen, mentors, and to Polly, his wife of 49 years. We certainly see another side of Marshall in these letters. I was particularly touched by the one he writes to his wife in 1824 after he has a fall and is convalescing. He passes the time, he writes, remembering the details of their courtship including “my feelings while Major Dick was courting you.” Do you have favorites among the letters?

That letter is one of my favorites. At the time Marshall was attending the Supreme Court, but he was confined to his room after suffering a concussion and dislocating his shoulder from a fall in the dark of night just outside his lodgings. With time on his hands, he begins a charming recollection of their courtship, “How do you think I beguile [the time]?” I just love that word “beguile.” I am pleased that this volume contains a goodly number of Marshall’s personal letters—enough to fully reveal his intimate family life and to show that he led a full and active life off the bench. I hope readers will get to know Marshall, so to speak, with his judicial robe removed. In addition to the letters to Polly, I highly recommend Marshall’s moving eulogy of Polly, written on December 25, 1832, exactly one year after her death.

Two letters Marshall wrote to Samuel Fay in 1826, the first written under the mistaken belief that his son Edward and Fay’s daughter Harriet were engaged and the second written after Fay’s emphatic reply that his daughter was not going to marry a Fauquier County farmer, are not to be missed. I especially admire the craftsmanship of the second letter, in which Marshall manages to express his profuse apologies for the misunderstanding while subtly rebuking Fay for rejecting his son. This whole affair has a Jane Austen aspect to it—in fact, Marshall was reading Austen’s novels at the time. Another favorite is a brief letter Marshall wrote in 1829 to a Richmond neighbor whose barking dog was keeping his wretchedly ill wife awake at night. This letter, I believe, shows

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Marshall in his finest light and says something about how he tried to persuade people to do something he wanted them to do. Another great letter of persuasion is one Marshall wrote to Henry Clay in December 1823, in which the Chief Justice sought the influential Kentuckian's aid in defeating a bill that would have greatly abridged the Supreme Court's power. I could go on and on, but let me conclude with recommending Marshall's letters to Joseph Story, which amply document one of the great friendships of the early republic.

Marshall's Supreme Court term extended from the last days of the administration of John Adams through the presidencies of Jefferson, Madison, Monroe, Quincy Adams and into Jackson's second term—still the longest term of any Chief Justice. In your book The Great Chief Justice: John Marshall and the Rule of Law you note that even though five Republicans joined Marshall and fellow Federalist Bushrod Washington in 1811 that “the court's internal unity . . . was never stronger than during the years from 1812 to 1824.” What accounts for this unity and what changed after 1824?

The unity of the Supreme Court during these years had a lot to do with the surge of nationalism that rolled over the United States during and after the War of 1812. The judges were also bound together by their common heritage as members of the Revolutionary generation, their devotion to the Constitution and union, their shared values as members of a common law legal culture, and their implicit belief that law and courts were vital to the functioning of government and society. Chief Justice Marshall tapped into these unifying elements to consolidate the Court's status and authority as guardian and interpreter of the Constitution in such cases as *McCulloch v. Maryland* (1819) and *Gibbons v. Ogden* (1824).

Of course, the so-called Marshall “monolith” was in truth more of a façade held together by the chief's expert hand. After 1824, with the addition of new members, the court's internal unity began to erode. These new justices, along with some sitting justices, began to express their independence not only in separate opinions but also by living apart from the other justices during the term. One way Marshall sought to promote harmony and efficiency was to have the justices live together in the same Washington boardinghouse. In his last years he was irritated by the disruption in the justices' communal living arrangements.

What seems most remarkable about Marshall's career is that he was appointed Chief Justice in the final days of the last Federalist presidency—

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and in effect he personally extended the influence of Federalist philosophy for decades after the party itself had disappeared. How significant do you think Marshall's Federalist ideology was to the decisions the Court handed down during these years? How different would the history of the early Republic have been had Jefferson appointed the fourth Chief Justice?

I don't think of Marshall as a Federalist ideologue or an ideologue of any kind. True, he was an influential Federalist politician before becoming Chief Justice. It is important to remember, however, that he belonged to the moderate Adams wing of the party. Although he got along well with "high Federalists" like Alexander Hamilton, Marshall was something of a disappointment to his party, notably in his opposition to the Alien and Sedition laws. Some expressed regret at his appointment as Chief Justice, preferring Associate Justice William Paterson for the post. Sure, it made a difference that Adams, not Jefferson, chose the fourth Chief Justice. Yet we should bear in mind that during the period of the Marshall Court's greatest ascendancy, roughly 1812–24, only Marshall and Bushrod Washington had been appointed by Federalist presidents. The other five justices were appointed by Jefferson and Madison. There is a persistent myth that Jefferson, given the opportunity, would have nominated Spencer Roane, a member of the Virginia Court of Appeals, as Chief Justice. Although he later praised Roane for his attacks on Marshall's opinions in *McCulloch v. Maryland* (1819) and *Cohens v. Virginia* (1821), there is no evidence that Jefferson had more than a passing acquaintance with Roane in 1801. Jefferson's first appointment to the Court was William Johnson of South Carolina in 1804. Although called (somewhat inaccurately) the Court's "first dissenter," Johnson was anything but a predictable Jeffersonian judge and was in accord with the major nationalizing decisions of the Marshall Court.

Marshall introduced many changes in how the Supreme Court operated. He chose to wear a plain black robe rather than the colorful regalia of British jurists. He abandoned the practice of seriatim opinions and had the court speak with one voice. What do you see as the most important changes Marshall made as Chief Justice?

From the time he became Chief Justice, Marshall set out to build up the prestige and authority of the judiciary branch of the federal government. The black robes, the opinion of the court, the communal living arrangements in a Washington boardinghouse, were the most obvious changes he brought about in order to serve this larger mission. The plain black robe was not only his per-

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sonal preference but he also recognized that it would be good “public relations” for the justices to adopt judicial garb that was suitable to the republican sensibilities of the new nation. The “opinion of the court” practice actually began under his predecessor, but Marshall carried it much further, so that it became the norm. He strove to obtain agreement among his brethren in a single opinion to be delivered by the chief justice. This involved a great deal of mutual concession and compromise, with the chief exerting his unique combination of intellect and charm to bring his colleagues on board—often aided by a glass of Madeira at dinner at the boardinghouse. Marshall was more than willing to subordinate his private opinions and preferences in order to gain consensus. Eventually, it came to be regarded as bad form—and damaging to the court’s prestige—to deliver a separate opinion. There was considerable institutional pressure on the justices to keep silent when they disagreed with the majority.

Another way Marshall sought to build up respect for the Court was so far as possible to separate law from politics, with the Court concerning itself with strictly legal matters. This, of course, was not an easy task, particularly during the tumultuous years of Jefferson’s first administration. Defining what was “law” and what was “politics” remained controversial, of course, but Marshall to a great extent succeeded in creating a public perception of the Court as an impartial, disinterested legal institution, removed from the political arena.

You have edited volumes five through twelve of the Papers of John Marshall. How did you first become involved with John Marshall? What difficult decisions did you have to make to edit twelve volumes of material into the 900 pages of Writings?

My first acquaintance with Marshall was through a book in a juvenile biography series devoted to the childhoods of famous Americans (which I called the “orange books” from their covers). Much later, in graduate school, I did a dissertation on Edmund Randolph, a Virginia contemporary and fellow lawyer who served as the first attorney general of the United States. My first real job out of graduate school was as a member of the staff of the *Papers of James Madison* at the University of Virginia. I had served on that project for seven years, 1972–79, when I was appointed editor of the *Papers of John Marshall*. Although I was quite familiar with the late-eighteenth-century Virginia milieu in which Marshall came of age, I had no particular expertise on Marshall before I assumed the editorship of his papers. The twelfth and final volume of

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the *Marshall Papers* was published in 2006. Practically all of my working life has been spent in the company, so to speak, of two Virginians, one who was the “father” and the other the “expounder” of the Constitution. Since 2006 I have been working on an edition of the law papers of St. George Tucker, a Virginia jurist who sat with Marshall on the federal circuit court in Richmond from 1813 to 1825. I have an academic home as a resident scholar at the College of William and Mary School of Law—appropriately so, because Marshall attended law lectures here and Tucker was the College’s second professor of law and police.

On the difficulties of selecting the documents for this volume, I did have to make painful decisions. I had to be ruthless. My initial list had to be drastically cut and then cut again. I was particularly anxious to get as much of Marshall’s correspondence as I could into the volume. Of course, his historical significance rests on his long tenure on the Supreme Court, a period in which he wrote nearly 600 reported opinions, including those for the Circuit Court, a number of them many pages in length. I had to be satisfied with selecting only the major constitutional opinions for inclusion in this volume. Even so, the opinions take up quite a bit of space. (I wish Marshall could have found a way to cut his opinion in the Burr treason trial.) As for the correspondence and other non-judicial documents, I had to omit much that I wanted to put in. However, I am satisfied that what is in the volume provides comprehensive documentation of Marshall’s public and private life.