

Introduction

John Marshall and the American Constitution

Seated on the ground floor of the United States Supreme Court, the oversized statue of Chief Justice John Marshall is a mute reminder of a figure whose opinions and career most shaped the nation's judiciary. Like many of the monuments in the Capitol, the sculpture of Marshall is at once solid and remote, a bronze testament to both the greatness of his mind and the distance separating his time from our own.¹ His legal opinions, still read by most students of American law, remind us of his achievement in establishing the Court as a coequal branch of government.² In prose by turns sober and rousing, his words impress us with the strength of mind that shaped the rule of law into the hallmark of American government it represents today. But it would be a mistake to believe that Marshall's words are merely of historical importance, too far removed in time and place to guide Americans' contemporary conversations about the Constitution. Like Marshall, we continue to tie the Constitution's authority to the ongoing project of creating a more perfect union. In fact, Marshall's political thought has a great deal to teach Americans today.

This book is an investigation of that political thought. At the outset, it is important to distinguish its purpose from the many existing studies of Marshall's legal legacy. If ever a Mount Rushmore of Supreme Court justices is built, surely his face would be the first to be chiseled. He "has done more to establish the Constitution of the United States on sound construction than any other man living," President John Quincy Adams once wrote.³ Nearly a century later, Woodrow Wilson was even more effusive in his praise of Marshall in a lecture to the students of Columbia University: "By common consent the most notable and one of the most

statesman like figures in our whole judicial history is the figure of John Marshall," he declared. A master of "the fundamental conceptions which have enlightened all great lawyers in the administration of law," Wilson continued, "Marshall may be said to have created for us the principles of interpretation that have governed our national development."⁴ Nor has Marshall's legal legacy been praised by Presidents alone. "If American law were to be represented by a single figure," Justice Oliver Wendell Holmes once rhapsodized, "sceptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall."⁵ So we have been told, and so we believe. Yet in spite of his prominence in the realm of legal discourse, Marshall's political thought remains a subject of surprisingly little scholarly attention. This neglect is unfortunate, because Americans continue to grapple with many of the same issues of constitutional theory Marshall confronted. Thus, an engagement with Marshall's thought offers more than a better appreciation of perhaps our most important Supreme Court justice. It also speaks to and clarifies many of the questions and debates Americans continue to have regarding the Constitution.

Of course, the broad outlines of Marshall's political views are familiar to most students of the founding era. When it came to everyday politics, his beliefs were fairly straightforward: an unwavering commitment to the Federalist Party of Washington and Adams, a strong national government, and a robust, relatively unhampered market economy are among its trademarks. But the political philosophy underlying these principles—especially as it related to the fledgling role of the Constitution in the nation—is terrain that remains largely unexplored. Underneath Marshall's apparently uncompromising beliefs lies a larger political theory neither uniformly liberal nor republican but tethered above all to the authority of the Constitution. And just as it was the centerpiece of his thinking, so too he hoped it might become the guidepost for Americans with their own diverse political philosophies.

To some extent, the reasons for neglecting Marshall's political theory make sense. Marshall's opinions addressed timely political controversies rather than timeless principles of political theory. Unlike other members of the founding generation, he did not drink deeply from the wells of abstract political philosophy. Consumed instead with details of disputes, parties, and resolutions, little space remained for the detached speculation and high philosophy that we sometimes find in the writings of contemporaries such as James Madison and Thomas Jefferson.⁶ Today, Marshall is remembered as a patriot, politician, diplomat, and judge, but not as a political

philosopher. Nevertheless, his writings were inevitably both political and theoretical, insofar as he addressed timely controversies as well as timeless themes of political thought. For this reason, he deserves to be considered an important contributor to the history of American political thought.

To understand Marshall the political thinker, we should have some acquaintance with Marshall the man, for his rustic and frugal early life inevitably shines through his writing. He was born to Thomas Marshall and Mary Randolph Keith in 1755 in Fauquier County, Virginia, at that time a frontier community nestled in the Blue Ridge Mountains. Perhaps because of his rank in the family—he was the eldest of fifteen children—from an early age he cut a levelheaded and unaffected figure. Despite serving in the American Revolution and maintaining a lifelong admiration for George Washington, Marshall never indulged delusions of political grandeur. Instead, the study of law suited his practical, down-to-earth character, and following the Revolution he attended the lectures of Judge George Wythe at the College of William and Mary before being admitted to the Virginia bar and beginning his own private practice. And in such a private situation he may very well have remained, had not his reputation in legal circles led him to be nominated and elected to various positions in state government, including the General Assembly and State Executive Council. In 1788, his reputation for impartiality as well as his status as a war hero won him election to the Virginia Ratifying Convention of 1788, where he defended the proposed federal Constitution against such opponents as the formidable Patrick Henry, while also articulating his earliest public statements on the virtues of an independent judiciary.

Eventually, Marshall's devotion to order, property rights, and the restraints imposed by the rule of law led him to leave behind Virginia politics and a lucrative law practice. In 1797, he accepted an appointment by President John Adams to serve as an ambassador to France, where he defended the administration's policy of neutrality in what came to be known as the "XYZ" Affair. Buoyed by newfound national popularity in the aftermath of the negotiations, he reluctantly ran for and was elected to the House of Representatives in 1799, where his moderation and statesmanship distinguished him from partisan zealots on both sides of the political aisle. To the chagrin of Federalist Party leaders, Marshall was never a firebrand on behalf of his party's agenda, and perhaps for that reason his career in Congress proved short-lived. In 1800, he left Congress to serve as Secretary of State of the United States, his last official post before the one that would define his legacy.

On January 20, 1801, Adams nominated Marshall to the United States Supreme Court. Confirmed one week later, he took his seat on February 4. It was an office he would come to dominate: of the more than 1,000 cases he presided over as Chief Justice, he penned 519 opinions. Over the next three decades, his legal prowess was on display in his authorship of major constitutional opinions that helped define the document's role in the new nation. In cases such as *Marbury v. Madison* (1803), *McCulloch v. Maryland* (1819), and *Cohens v. Virginia* (1821) he empowered national authority; in cases like *Fletcher v. Peck* (1810), *Dartmouth College v. Woodward* (1819), and *Ogden v. Saunders* (1827) he defended property rights and the sanctity of private contracts; and in cases such as *Gibbons v. Ogden* (1824) he laid the legal foundations for a national economy. But perhaps Marshall's greatest contribution was the informal influence he wielded during his tenure. As Chief Justice, he took pains to build the prestige and influence of the Supreme Court, a body that political leaders and everyday citizens looked down on as weak and ineffective. On his watch, justices dined and lived together, donned uniform black robes for the first time, and began the norm of writing majority and minority (as opposed to seriatim) opinions. Alongside Marshall's written opinions, these personal touches—reinforced by his agreeable if austere personality—were pivotal in transforming the Court into a national institution. By the time he died, on July 6, 1835, the Supreme Court had achieved the prestige it still holds in the American political system.

Over the years, both Marshall and the volumes of opinions he left behind have been the subject of much scholarship. Interpretations vary widely, from the hagiographic to the cynical. Some have painted his life in grand and sweeping strokes, portraying his career as one of almost mythic accomplishment. Among the most famous of such panegyrics is Senator Albert Beveridge's multivolume *Life of John Marshall*, which portrays Marshall in a highly sympathetic light as a legal and political giant during his own lifetime and a national hero after his death.⁷ Even more admiring interpretations have followed, emphasizing his decisive contribution in securing individual rights and legitimizing national power, as well as his self-conscious avoidance of the narrow political squabbles of his day. In these interpretations, Marshall was "the Great Chief Justice," the Constitution's most stalwart defender.⁸ As one admiring biographer recently concluded, "Above all, Marshall's Court gave the American people—'We the people'—a means of redress against tyranny by federal, state, and local government."⁹

Other scholars have taken a more critical view of Marshall, often by situating him as a central player in early party politics. On these accounts, Marshall was the Federalist par excellence who used his position on the Supreme Court as a covert means to promote the party's policies. In these interpretations, Thomas Jefferson's devotion to decentralized authority and popular sovereignty met its match in Marshall, whose more subtle loyalties to the Federalist Party consistently led him to endorse strong central authority and separation of powers.¹⁰ Look past his pretensions of upholding the Constitution and the rule of law, these authors argue, and one will see the authentic Marshall: the "ardent Federalist," loyal to the end to Washington, Adams, and the principles of national consolidation they championed.¹¹

In contrast to those who either exalt or decry Marshall's political impact, other scholars have emphasized his legal legacy, notably his approach to constitutional interpretation. Yet here again scholars differ widely. For some, Marshall's chief contributions to legal theory are his fidelity to the rule of law and the words of the Constitution. His entire body of work, summarizes William Draper Lewis, shows "that he adhered closely to the words of the Constitution." Indeed, in his concentration on the constitutional text, "Marshall was the strictest of strict constructionists; and as a necessary result, his opinions are practically devoid of theories of government, sovereignty, and the rights of man."¹² Others have drawn very different conclusions, arguing that he expanded the power of the federal judiciary far beyond the limits set by the text of the Constitution.¹³ These more critical appraisals point to opinions in cases such as *McCulloch*, which one recent writer has submitted as Exhibit A of Marshall's "aggressive nationalism."¹⁴ Yet on one point most of these interpretations agree: that Marshall was the first in a long line of thinkers who defined the character of American constitutional law. As Supreme Court justice Benjamin Cardozo once declared, Marshall "gave to the constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is, because he moulded it . . . in the fire of his own intense convictions."¹⁵

Compared to these political and legal analyses, political theorists have had little to say recently about John Marshall, and none brings his thought into conversation with contemporary political theory. His peripheral role in American political thought is unfortunate, because his opinions in fact have much to say about many of the themes and debates that occupy such theorists. By returning to his thought in light of these debates, we can better contextualize these discussions within our own political and

legal history. But more than of mere historical interest, Marshall's political thought can still teach us a great deal about the bases for the Constitution's authoritative status in the twenty-first century. As prevalent as social, economic, and political divisions were in Marshall's time, they are even more pronounced today. Yet his message continues to be a forceful one for any of us who seek to build a sense of unity and shared purpose out of our diversity. Marshall believed in a type of civic solidarity that rested firmly on constitutional government and the rule of law, and his constitutional nationalism warrants the attention of all thoughtful citizens.

To date, what work has been done to tie Marshall to political theory has tended to consign him to conventional categories, with some seeing his thought as representative of the influence of the philosopher John Locke and the classical liberalism of the American founders, while others have described it as linked to classical versions of republicanism. Robert Faulkner, in an admirable study of Marshall's political thought, locates Marshall's emphasis on the protection of individual liberty and property rights squarely within the libertarian-Lockean framework, while Morton Frisch sees a nascent "constitutional republicanism" in Marshall's Supreme Court decisions.¹⁶ Other Marshall scholars such as Richard Brisben have questioned the conceptual importance of either classical republicanism or liberalism as a means for appraising Marshall's thought, instead arguing that "[h]e was an individual whose values reflect the transition from republicanism to liberalism."¹⁷ Among these scholars, Faulkner's work stands out as certainly the most detailed and extensive statement of Marshall's political thought. Acknowledging his work, we must certainly recognize Marshall's debt to the classical liberal tradition, with its emphasis on natural rights, private property, and a minimalist government.¹⁸ But we must also try to reconcile this liberalism with the farsighted and at times even idealistic strand of nationalism that runs throughout his Supreme Court opinions. Motley were the qualities that made up John Marshall's thought, and the conventional labels only take us so far in describing its character. He believed that the United States needed a functioning government and common market, but he also thought that the stability of such goods relied on a healthy admiration, if not exaltation, of the nation's Constitution. By relegating this civic concern to the outer margins of Marshall's constitutionalism, we stop our ears to the complexity and strange harmonies of his philosophy.

So let us begin this search for understanding Marshall's thought with a resolve to move beyond political theory's familiar boxes. Marshall was not simply or only a liberal, conservative, or nationalist. He eludes

easy categorization in his agreement and departures from these schools of thought. In fact, the plain black robe and somber trappings of the Supreme Court disguised a mind shaped by a variety of sources and traditions belonging to politics, law, and philosophy. Marshall's humble childhood, little formal education, and at times prosaic writing style should not deceive us about his intellectual acumen. Marshall was literate not only in the legal writings of Sir William Blackstone and Edward Coke but also in the Latin classics, including Homer, Horace, and Livy. He took no less delight in the Bible than he did in the works of Shakespeare, Edmund Burke, and Jane Austen.¹⁹ These works fed an imagination that informed not only his jurisprudence, but also a broader vision of the role the Constitution might play in the new nation. His was a political theory that expanded beyond the court of law and the politics of the day to win the hearts and minds of all Americans.

The broader implications of Marshall's political thought are important not only for their historical import. As we will see, several concepts that are central to contemporary political thought—ideas of legitimacy, sovereignty, citizenship, and nationalism—were also of great interest to Marshall and were invoked in some of his most significant opinions. Debates concerning constitutional legitimacy familiar to the founding generation continue to be controversial, as seen in the writings of those such as Bruce Ackerman, David Strauss, and Ronald Dworkin.²⁰ Arguments related to national and state sovereignty remain highly charged in American politics, and prominent scholars of the founding such as Jack Greene, Forrest McDonald, and Alison LaCroix remain divided on the proper historical understanding of American federalism.²¹ Similar debates have taken place concerning understandings of citizenship during the founding period. Scholars such as Joyce Appleby, John Diggins, and Michael Zuckert have emphasized notions of self-sufficiency, the exercise of natural rights, and commercial exchange as essential elements of citizenship in these years,²² while authors such as Drew McCoy, Bernard Bailyn, and Lance Banning have discussed the centrality of republican themes of popular virtue, power, and political corruption.²³ Marshall's opinions address all of these controversies, and by adding his voice to these debates, we not only challenge historical interpretations of Marshall but also see how his thought intervenes in the political controversies of today.

Nor are the implications of Marshall's thought limited to the United States. The topic of nationalism, a concept by turns celebrate and derided, remains pivotal for scholars who stress the significance of national identity

for understanding social and political loyalties.²⁴ Marshall was concerned with the acrimony generated by subnational allegiances, and he looked to the Constitution as playing a key role in unifying all Americans. Indeed, in his thought we find an early articulation and defense of principles similar to what the German philosopher Jürgen Habermas and others have called “constitutional patriotism,” principles that emphasize the importance of the rule of law as embodied in a constitution as a form of civic identity for individuals in multicultural societies.²⁵ Yet the application of such ideas should not be limited to citizens in the developing world.²⁶ As national loyalties have taken on a new, at times troubling worldwide salience in the twenty-first century, it is worthwhile to revisit Marshall's constitutional nationalism for the lessons it imparts to theorists of nationalism today.

This book analyzes the development of Marshall's political thought as seen in several of his most important cases as Chief Justice, with his opinions in them providing a venue for explaining one of the core concepts of his political thought. Thus *Marbury v. Madison* illustrates Marshall's understanding of the basis of the Constitution's legal and political legitimacy, its moral authority as fundamental law. *McCulloch v. Maryland* sheds light on his view of constitutional sovereignty and the superiority of the law of the Constitution relative to national and state legislation. *Ogden v. Saunders* provides a venue for his understanding of the duties of citizenship and the meaning of liberty in the emerging commercial republic of the nineteenth century. And his opinions in the Native American Trilogy of *Johnson v. McIntosh* (1823), *Cherokee Nation v. Georgia* (1831), and *Worcester v. Georgia* (1832) bring to light his belief in a new form of American constitutional nationalism. Overall, these opinions go to the heart of Marshall's political thought: his belief in the Constitution's fundamental moral legitimacy, its purpose in mediating relations between the national government and the states, its promotion of a modern neo-republican form of liberty, and its institution of a nationalism extending beyond ethnic ties or the principles of liberal theory. Uniting these topics is Marshall's concern with explaining to citizens the Constitution's role in the still young republic, a role whose importance could not be understated as sectional conflicts threatened to tear the nation apart.

The first chapter focuses on the case of *Marbury v. Madison*, perhaps Marshall's most celebrated opinion. Although scholars have typically approached the opinion from the perspective of judicial review, this analysis views the case through the lens of constitutional legitimacy. The chapter argues that Marshall looked to a variety of familiar traditions to justify the

binding authority of the Constitution, including the document's protection of rights, its representation of popular sovereignty, and its instrumental value in settling political questions. Moving beyond these themes, however, it argues that Marshall offers a unique theory of the Constitution's moral legitimacy that is derived from its embodiment of principles of good government and its status as the only viable legal order available to the nation. Hence, *Marbury* provides more than an argument on behalf of judicial supremacy and thus moves beyond the parameters of jurisprudential thinking alone. As we will see, the opinion adjudicates modern accounts of constitutional legitimacy while also illustrating Marshall's own theory of constitutional obedience.

Chapter 2 turns to *McCulloch v. Maryland*, drawing on Marshall's opinion in the case as well as a series of Virginia newspaper essays he penned anonymously in the aftermath of the Court's decision to explore his view of the Constitution's sovereignty. While scholars are typically divided on the question of whether *McCulloch* advocates national sovereignty or federalism, this chapter contends that Marshall rests ultimate sovereignty in neither the nation nor the states but in the Constitution itself. Moreover, his commitment to constitutional sovereignty is brought into sharper relief in his editorial exchanges with states' rights advocate Spencer Roane. The reasoning of the states rights' proponents troubled Marshall greatly, and he did not shy from insisting on its flaws. Writing as "A Friend of the Constitution," Marshall defends the Constitution as the final legal authority, superior to the political branches as well as the state governments. In this rare excursion into the realm of public opinion, Marshall set forth an understanding of sovereignty that was meant to nullify theories that would render the Constitution as a mere league between the states or identify its rule with a consolidated national government. By situating these essays alongside the Court's official opinion in *McCulloch*, one achieves a more comprehensive assessment of Marshall's understanding of the concept of sovereignty and the limits his idea imposed on national and state authority alike.

Chapter 3 examines Marshall's lone dissent as Chief Justice on a constitutional question in the case of *Ogden v. Saunders*. For Marshall, a seemingly innocuous New York bankruptcy act was a crisis point for a nation that was increasingly neglecting the law of the Constitution. While his fellow justices had upheld the act permitting state legislative interference in the terms of contracts governing default, Marshall argued that the legislation was not only incompatible with the Constitution's contract clause, but also undermined core aspects of the classical liberal and

republican traditions that most Americans took for granted. But of even greater significance, Marshall's dissent also presents what can be seen as an early instance of what Philip Pettit would later term a "neo-republican" theory of nondomination that reconciled individual rights with the common good.²⁷ This fragile partnership of concepts was jeopardized by the prospect of arbitrary political power. Here the greatest threat posed by the act was not its disruption of the national economy, but the specter of state legislatures invading the liberties and private agreements reached by citizens. In *Ogden*, Marshall presents the Constitution as the only barrier against such invasions, and declares that it is among the powers of the Supreme Court to preserve the document's authority from future threats of legislative infraction interference. The dissent is significant in its defense of much of the political theory undergirding the Constitution, a theory including elements of classical liberalism and republicanism but also embracing a modern version of republican liberty that was possible only under the rule of law.

Chapter 4 considers some of Marshall's most controversial opinions, those comprising the so-called Native American trilogy. These opinions—*Johnson v. McIntosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*—have rarely earned praise from Marshall scholars. Indeed, his role in these cases is often belittled, whether he is cast as an accessory to forced migration or a resigned and helpless witness to events beyond the Supreme Court's control. This chapter argues that such interpretations have neglected the broader contribution of Marshall's nationalism in these opinions, particularly his defense of the Constitution as an alternative source of national identification. In contrast to those who would frame nationalism in either narrow ethnic or universal liberal terms, Marshall offered an understanding of constitutional government broad enough to encompass all Americans. Although these cases revealed the institutional weaknesses of the judiciary, the opinions nevertheless show Marshall's understanding of the document's function in knitting together a people on the basis of shared principles concerning the rule of law.

Taken together, these cases point to a political theory that stood apart from the philosophical crosscurrents of his time. To be sure, there is much that is familiar in Marshall's political thought for the student of the founding era. Unsurprisingly in light of his Federalist Party credentials, Marshall was a vigorous defender of the sanctity of private property and economic rights generally, drawing heavily on "state of nature" theory and the classical liberal tradition. Yet in other instances, his emphasis on the

importance of responsible citizenship and duty for securing individual liberty seemed more at home in ancient Greece and Rome than in the United States. In fact, Marshall drew on both liberal and republican themes in his opinions. Always wary of taking extreme positions, Marshall's moderation applied as much to his political philosophy as it did to his jurisprudence.

At the center of this political theory was Marshall's commitment to the Constitution as the foundation of America's legal and political life. An unabashed supporter of the Constitution in the Virginia Ratifying Convention, Marshall believed the Constitution was "the greatest improvement on human institutions." But the product of the framers could not rest content as a "splendid bauble" designed for admiration but possessing little practical value. Indeed, its instrumental function could not be exaggerated for a nation coping with its newfound responsibilities in the commercial and international arenas. For him, the document was principled and timeless, while also practical and flexible. As he famously put it, the Constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." A government invested with "ample powers" to fulfill the prosperity and happiness of the nation required by extension "ample means for their execution." Thus Marshall was not only upholding the Constitution, but also explaining the rule of law to an audience still uncertain and in some cases skeptical of the new national government. With great purpose and effect, his words helped transfigure the Constitution from a written text into a kind of mythopoetic symbol, an abstract icon capable of compressing and evoking in a single word all of the complex history, negotiations, and laws that informed the nation.²⁸

Citizens have and will continue to debate the fundamental questions of political theory raised in the cases explored here. Why do we continue to obey a Constitution over the course of several generations as opposed to some other legal convention or tradition? How much political authority should the national government possess? What obligations, if any, does citizenship entail? And just how do we define our national identity as Americans? Marshall's opinions addresses each of these disputes while pointing up a key question about the Constitution itself: to what extent can a written document generate national identity and unity in addition to its function in creating a legal order? Few would question Marshall's influence in his time. This book uncovers the lessons he imparts to our own.