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## JOHN MARSHALL'S USE OF HISTORY

*by*

SISTER MARIE CAROLYN KLINKHAMER, O.P., Ph.D.\*

Nation-wide commemoration of the birth of such a man as John Marshall offers many opportunities to evaluate his contributions to our constitutional government. Among the tributes paid to the "Second Father of the Constitution," to the "Great Expounder of the Constitution," it would seem fitting to include some observations on his use of history. The current of Marshall's thought has often been examined, and its depths will undoubtedly be penetrated much further by reason of memorial programs, but for some reason unknown to those interested in historical investigation Marshall's use of history has not been made the subject of special research.

Some conjectures might be offered for this conspicuous gap in Marshall research, and among them might well be the comparatively late appearance of any sort of historical investigation into the Supreme Court's use of history. While this may be admitted as a partial cause, probably the graver reason which will occur to those interested in Marshall is that he has been charged with plagiarism and historical inaccuracy of the most serious kind in his capacity as the historian or biographer of George Washington, and in this bicentennial year it might seem more discreet to overlook altogether any interest Marshall might have displayed in history.<sup>1</sup>

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<sup>1</sup> The charges made against Marshall as an historian are included in W.A. Foran, "John Marshall as a Historian," *American Historical Review*, XLIII (October 1937), 51-64. Either Foran was unable to examine Marshall's letters to his publisher, C.P. Wayne, or he did not believe that Marshall's comments upon the difficulties of historical composition deserved credence. The former supposition seems more logical. Over a period of more than two years Marshall sent frequent letters to Wayne; his comments upon his own authorship will be noted below. The letters are in collections of the Historical Society of Pennsylvania, but transcripts or photostatic copies of them are also to be found in the Division of Manuscripts, Library of Congress, Washington, D.C. This depository contains all the manuscript materials to be cited in this paper.

The redoubtable Chief Justice, however, would hardly have preferred this course of action himself, and some circumstances may even be adduced in his defense before the use he made of history in his decisions is examined. The Virginia-born jurist was much interested in history from his early youth; he wrote Mr. Justice Story, concerning his own father, that "He superintended my education, and gave me an early taste for history and for poetry."<sup>2</sup> As he grew older, these tastes matured, but did not change, and Story wrote of his legal studies that he "seized, as it were by intuition, the very spirit of juridical doctrines, though cased up in the armor of centuries."<sup>3</sup> The armor would not, in fact, have been anything more than an attractive container for such doctrines, to a man of Marshall's temperament, ideally equipped as he was to note the passing scene and compare it with what he knew from study or actual experience in either remote or recent history. While he was Chief Justice, he wrote to a friend that he could not be "inattentive to passing events, or an unconcerned observer of them."<sup>4</sup>

Even these slight testimonies should indicate that Marshall, who had few books, and was never sure that reading many volumes was the best way to secure an education,<sup>5</sup> was the kind of student who impressed what he read deeply on his memory. He was, furthermore, well aware of the many difficulties which attended his composition of the life of George Washington, with which he was concerned during the first decade of the nineteenth century. In his preface to the first volume of that work, later issued separately as a colonial history, he wrote: "Our ideas of America, of the character of our revolution, of those who engaged in it, and of the struggles by which it was accomplished, would be imperfect without some knowledge of our colonial history."<sup>6</sup> Yet he did not feel himself equipped to undertake the investigations necessary to rewrite the entire story of colonial settlement and growth in America, and he announced that he would use accounts of facts "taken from the histories of the day, and the authority relied on for the establishment of their verity has been cited."<sup>7</sup> The chief ground for complaint against this system of Marshall's

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<sup>2</sup> John Marshall, *An Autobiographical Sketch* (Ann Arbor, Michigan, 1937), p. 4. Cf. Joseph Story, *An Address . . . on John Marshall* (Rochester, New York, 1900), p. 9.

<sup>3</sup> Story, *op. cit.*, p. 54.

<sup>4</sup> John Marshall to R. Smith, 27 July 1812. Marshall Papers.

<sup>5</sup> Marshall to Archibald Murphey, 6 October 1827. Marshall Papers.

<sup>6</sup> John Marshall, *A History of the Colonies Planted by the English* (Philadelphia, 1824), p. vi.

<sup>7</sup> *Ibid.*, *The Life of George Washington*, 5 vols. (Philadelphia, 1805-1807), I, ix. Marshall mentioned as his chief source letters to and from Washington; he wrote to Wayne concern-

is that he cited entirely too much from these accounts, failed to give due or extended credit to their authors, and frequently—through the omission of quotation marks—allowed whole paragraphs or even pages to appear to be his own.

Such charges, made at the present time, appear graver than they would have done in Marshall's day, when copyright piracy and less obvious kinds of plagiarism were much more common than they are now. But a word or two may be said in Marshall's defense, beyond entering this first demurrer. While some historians of that period may have been using far more extensive footnotes and citations, the common practice remained what appears in Marshall's volumes for a very long period after this time, and particularly was this true of works intended for the general public, as was the case with Marshall's. It may also be noted that a man of Marshall's formidable memory might seek to be excused on the basis of his having absorbed, almost unconsciously, many passages, and even lengthy ones, from the works of others, especially when he was working so concentratedly as he did on the life of Washington. This latter excuse is not mentioned as any chief argument, but simply as a circumstance which ought to be entered into the record, in fairness to Marshall.

The chief argument, however, is that of the letters from Marshall to his publisher, Caleb P. Wayne. They offer, among other things, a striking study in the relations between author and publisher, as these existed a century and a half ago. They do not, it is true, rescue Marshall from some imputations of carelessness, but they do tend, it is believed, to make Wayne's part in the alleged plagiarism much greater, and Marshall's part much smaller. And it might be noted that before Marshall is accused of incorrect or inadequate—or downright misleading—citations, the practice of his publisher ought to be examined. Wayne's was faulty, but was Marshall therefore chargeable with fault?

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ing the citation of the colonial histories he used: "I am a good deal puzzled to decide what is to be done respecting the authorities quoted. There was some difficulty in fixing the references because several pages successively are substantially taken from the same book. It was my idea that the whole should [*sic*] be considered as refer'd to by placing the names of the authors at the foot of the pages. I cannot now correct it as I have not the manuscript, and can only advise that the mark of reference be placed at the end of some paragraph, as your judgment [*sic*] shall direct. . . . It will generally be right to place the letter of reference at the close of the last paragraph." Marshall to Caleb P. Wayne, 22 January 1804, Marshall Papers. It might be noted here that Marshall was never able to obtain proof from Wayne, but had to correct the completely printed and published first edition for re-printing as a second edition. Marshall to Wayne, 5 July 1804. Other letters bearing on Marshall's trials with inaccurate copyists, inability to correct punctuation, spelling, usage, etc., bear the dates: 22 January, 25 March, 27 March, 28 March, April, 17 May, 1 June, 6 June, 20 July, 10 August, 20 August, 3 September, 8 September, 4 October, 30 October, 1 December 1804; 19 February, 27 February, 16 March, 20 March, 29 June, 16 September, and 5 October 1805. Some of these letters repeat, to Bushrod Washington, Marshall's comment and directions to Wayne.

An examination of the Marshall letters still extant—their number is unfortunately all too slight—discloses that Marshall was seriously concerned over the lack of information which General Washington's letters offered him as to details of the Revolution. Marshall wrote to Charles Cotesworth Pinckney, in November 1802, that "there is much information especially in relation to the war in the southern states, which the papers do not communicate & which I have some hope of being able to receive, at least in part, from you." He followed this request with a detailed list of all the matters on which he desired information.<sup>8</sup> Would it be too much to suppose, especially in view of his own affirmation in the preface to the *Life*, that he had followed the same procedure in writing to other persons? Fortunately, we have a few other evidences that such was his procedure.

In the meantime, however, he was plagued by his publisher for chapters, or even whole volumes, until he had to write that his other "indispensable avocations," including of course the Chief Justiceship, made it impossible for him to write, revise, and superintend the copying of his manuscript any more rapidly than he was doing.<sup>9</sup> Not long after he sent out this epistle he addressed another to Wayne, charging him particularly to look out for all stylistic matters, to revise his spelling so that it would conform to the usage of Johnson's *Dictionary*, and expressing keen mortification over his failure to be consistent in spelling such American names as Chesapeake.<sup>10</sup> Insisting on these same matters in his next letter, he also declared that "In a history of military transactions, plans or cutts are of vast importance. Those preserved by General Washington are not all that should be inserted in the work."<sup>11</sup> A few days later he wrote that he thought "the dates must be inserted. The mind is not satisfied without an exact knowledge of dates."<sup>12</sup>

At virtually this same time, he was writing to Washington's nephew, Bushrod, that he did not mind at all the corrections of friends, which he would not rank with the "bitter sarcasms of a foe," nor would he "feel either wounded or chagrined at inattentions and inaccuracies being pointed out by another."<sup>13</sup> He rebuked, in a somewhat oblique manner, the fears of his publisher over the employment of one Stedman as a draughtsman, declaring that his British citizenship should constitute no objection to his employment if he possessed the means of information required for the

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<sup>8</sup> Marshall to Charles Cotesworth Pinckney, 21 November 1802. Pinckney Papers.

<sup>9</sup> Marshall to Wayne, 23 December 1803.

<sup>10</sup> *Ibid.*, 10 January 1804.

<sup>11</sup> *Ibid.*, 22 January 1804.

<sup>12</sup> *Ibid.*, 7 February 1804.

<sup>13</sup> Marshall to Bushrod Washington, April 1804.

job then in hand.<sup>14</sup> He objected to Wayne's correction of his proofs, when he had used the word enemy, pointing out that "A historian, it is true, is of no nation, but the person whose history he writes is, and the word [enemy] is used to denote, not the enemy of the author, but of the person or army whose actions the historian is relating."<sup>15</sup> These attitudes would seem to be those of the real historian, however imperfectly trained he might have been by twentieth-century standards. But Marshall several times informed Wayne, in addition to these instructions, that he expected him to see to the "pointing," that is, the punctuation, of his manuscript, and told him, also, what works would be valuable as supplying background or additional information, at the same time that he continued his protests against the unconscionable hurry he was being asked to make, to complete the volumes in the time specified by the publisher. It should hardly seem too strange, then, that Marshall was never satisfied with them, and that even in their revised version he noted that the inaccuracies and deficiencies of the first and second editions—he objected especially to the way the second edition had been hurried into print, in such fashion that it had inhibited the sales of the first edition—had not been corrected to his satisfaction.<sup>16</sup>

The judgment that Marshall was not an historian of the first rank may certainly be concurred in today, as may also the description of his work as not truly Federalist. That Marshall was early, however, and always remained an assiduous observer and student of history is far more true, and it is this facet of Marshall's intellectual attainments which deserves much more attention than it has ever received. The circumstances of his early life were naturally conducive to an interest in political affairs, but it is surely obvious that in the history of this country many young men had performed military service during the Revolution who did not remain interested in their later lives in the causes and results of such conflicts.<sup>17</sup> After his retirement from actual hostilities, in 1779, when there were more officers than men available for his contingent, Marshall almost immediately became involved in local and state politics in Virginia, and thus had excellent opportunity to rekindle his historical consciousness.

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<sup>14</sup> Marshall to Wayne, 6 June 1804.

<sup>15</sup> *Ibid.*, 10 August 1804.

<sup>16</sup> *Ibid.*, 5 July, 20 July, 10 August 1804. On September 3, Marshall wrote: "I had to learn that under the pressure of constant application the spring of the mind loses its elasticity & that the style will be insensibly influenced by that of the authors we have been perusing."

<sup>17</sup> Marshall's correspondence with Timothy Pickering is a particularly delightful record of the attitudes of two Revolutionary War figures whose historical interests were always fresh and vigorous. Transcripts of these letters, too, are to be found in the Marshall Papers. The originals are in the care of the Massachusetts Historical Society.

As a member of the Virginia convention called to vote on ratification of the Constitution, Marshall likewise distinguished himself with his strong advocacy of the new instrument of government, and with his keen sense of what the recent Constitutional Convention had meant to do. From this time, when the few Marshall letters begin to be found in some quantity, and from the appearance of the opinions delivered by Marshall as Chief Justice, his historical consciousness may be noted as one of the really cogent aspects of his personality.

As a delegate to France and the chief figure for the new United States in the X.Y.Z. affair, for example, Marshall wrote lengthy letters to George Washington, with the avowed object of giving him reports which should not be official, but merely informative. Washington, Marshall believed, would already have been consulted by President Adams concerning all of the official activities and reports, and the letters Marshall sent should be viewed as merely additional to them. This explanation, offered by Marshall himself, throws into higher relief his keen sense of the historical, when he makes extended reference to the background and current prospects of each of the several countries he visited while abroad on this mission.

Marshall was aware, for example, of the importance of the events of the later days of the French Revolution, and chronicled faithfully the rumors concerning the downfall of Lazare Carnot, together with the results which he expected to flow therefrom. As a matter of particular significance, in view of his own later position, Marshall's fears for the French people because of their disregard for their constitution, are well worth noting.<sup>18</sup> Arrived in Paris, Marshall continued his vivid account of current events, which he viewed as important history being made.<sup>19</sup> He wrote in much the same manner to Washington again in the following spring, and to Timothy Pickering during the late summer. These letters contained penetrating observations on the French, together with equally acute ones on the Swiss and their form of government.<sup>20</sup> When it is remembered that Marshall was, all during this time, engaged in negotiating with Talleyrand and his associates, coping with Elbridge Gerry's anomalous conduct, trying to arrange with Pinckney how to accommodate the latter's family in France when the remainder of the embassy should depart, and maintaining his own reputation as a man of sensibility and good taste, the long letters dispatched to such friends as Washington and Pickering appear all the more valuable as containing the considered historical and political judgments of an acute observer.

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<sup>18</sup> Marshall to George Washington, 15 September 1797. Original in the Jared Sparks Collection, Massachusetts Historical Society.

<sup>19</sup> *Ibid.*, 24 October 1797.

<sup>20</sup> *Ibid.*, 8 March 1798; Marshall to Pickering, 11 August 1798.

If Marshall's faults as an historian are to be noted, perhaps his letter to Charles Dabney, written in 1800, should be instanced, for here Marshall indulged in that most dangerous of occupations for the votary of Clio—speculating about the future. He wrote first about the crisis in government as he saw it then, but commented that higher taxes would be necessary because of the increasing population of the United States, and added that he envisaged a wealthier, stronger America in twenty years.<sup>21</sup> It may be added immediately that most of Marshall's later historical comments fall into the more conventional pattern of "viewing with alarm." By the late summer of the same year, he was compelled to write in the more usual pattern, "There is a tide in the affairs of nations, of parties, and of individuals. I fear that of real Americanism is on the ebb."<sup>22</sup>

A more accurate, and less romantic, attitude was expressed in a letter written some years later to Marshall's old associate, Charles Cotesworth Pinckney. In this letter, Marshall summed up the recent history of continental European nations, and drew a conclusion which he applied forcibly to the United States:

If we are, like Spain under her imbecile administration which was entirely devoted to France, to be whipped into a war when a master requires it; or if, disregarding our best interests, we are at the order of a foreign power to enter into the system of commercial warfare against England which Bonaparte has planned, the success of which infallibly involves our own ruin, we are no longer independent.<sup>23</sup>

In this passage Marshall not only applied the recent history of the European nations to the American situation; he indicated, also, the state of mind which his fellow-Virginian, Jefferson, found not only suspicious but abhorrent. Yet it could hardly be denied that Marshall's evaluation of the factors involved in this equation was sound.

A few years later, he displayed the same perspicacious grasp of matters historical, when he wrote to Robert Goodloe Harper, to congratulate him on his oration concerning the Russian victories over France. Marshall then remarked, "The policy of the world would certainly require that Russia should not be permitted to extend herself further—especially toward the center of Europe."<sup>24</sup> It seems hardly necessary to stress the sound historical and political judgment displayed here, or to note the consequences which would have followed had Marshall's counsel been heeded.

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<sup>21</sup> Marshall to Charles Dabney, 20 January 1800. Dabney Papers.

<sup>22</sup> Marshall to Harrison Gray Otis, 8 August 1800.

<sup>23</sup> Marshall to Charles Cotesworth Pinckney, 21 September 1808. Pinckney Papers.

<sup>24</sup> Marshall to Harper, 22 November 1813.



His letter to Harper commented at some length on recent continental happenings, but with special reference to older historical events:

France within her antient [*sic*] limits was the terror and justly the terror of Europe. A vigorous government was at any time capable of extending her powers over her neighbors, and a combination of great potentates was necessary to restrain her within her legitimate bounds. How much more dangerous must she become with an additional population of at least six million inhabiting a territory whose natural advantages are immense.

Chiding Harper for his suggestion that this state of affairs should be restored, Marshall observed sorrowfully, "But this increased ability to conquer you would give her in order to save Europe from Russia." The proper area to be strengthened, Marshall thought, in terms strikingly similar to those of proposals made in our own day, was farther to the east. "But if augmentation of power must be given to any state for the purpose of forming a barrier against Russia, it is to Austria not to France that this augmentation may be trusted with safety."<sup>25</sup>

It is extremely unfortunate that a far larger body of John Marshall's letters have never been recovered, despite the most diligent search, for, if these samples are truly representative of Marshall's comments on European historical events and politics, his contemporaries and later generations could have learned much from him. For the same reason, but with added poignancy, the loss of his letters containing observations on American history and politics must be mourned. When he did cite history, in the few letters we have, he did so with a trenchancy and incisiveness which must have been as gratifying to his admirers as dismaying to his opponents. One such example, to be found in a letter to his beleaguered friend, Samuel Chase, whose impeachment was widely heralded as the prelude to Marshall's own arraignment, records an interesting bit of legal, or common law history:

According to the ancient doctrine, a judge finding a verdict against the law of the case was liable to an attain, and this account of the present doctrine seems to be that a judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment.<sup>26</sup>

This dry observation was, of course, far below the standard of invective set by Chase in the controversy he was then waging with the Federalists, but Marshall could never be brought to the use of more intemperate language—at least in his written utterances, and there is no record that his spoken ones were much different, except as to formality—and he was perhaps here merely giving Chase more solid ammunition from the arsenal of history than that learned gentleman was wont to use.

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<sup>25</sup> *Ibid.*

<sup>26</sup> Marshall to Samuel Chase, 23 January 1804.

In his private life, Marshall maintained his interest in history, and accepted, with grave decorum, an invitation from the Massachusetts Historical Society to become a member of that group in 1809—although he later confessed to Story that he had lost all memory of this membership through lack of activity in its behalf.<sup>27</sup> The historical observations of Marshall's later life were made, as might have been expected, to his friend Justice Story. Aside from the likenesses so often the subject of comment when these two men have been considered as jurists, they seem to have been very much in sympathy on the subject of history, and Marshall remarked, with some frequency, and much thoughtfulness, on historical incidents when he was writing to Story.

One of the lengthier such letters was occasioned by Story's having given a discourse commemorating the bicentennial of the founding of Salem. He had sent Marshall a copy of this address, and Marshall, in thanking him for it and remarking quizzically that Mrs. Marshall's admiration of it had almost excited his jealousy, went on to comment:

You have drawn a vivid portrait, and I believe a faithful likeness of those extraordinary men who first peopled New England, and my feelings as well as my judgement have accompanied you in your rapid sketch of the character and conduct of their descendants. I wish the admonitory part may have full effect on others as well as on those to whom it is particularly addressed. Some of our southern friends might benefit from the lesson it inculcates.<sup>28</sup>

Since this letter was written in 1828, it is not difficult to deduce the identity of the southern friends to whom Marshall was alluding. Neither is it difficult to note that he was here drawing a parallel between historical events and current ones, while not avoiding completely the temptation to moralize which so often has made historical study an object of suspicion or distaste. His observation, however, was far more acceptable in his own day than it would be if made now, and in any case its justice can hardly be gainsaid.

In his last years, as has been noted on several occasions by all the writers on Marshall's life, he yielded to Story's persuasions that he write out a sketch of his own life; this is surely a kind of amateur exercise in history, as was his reply to J.K. Paulding, who had asked him for information concerning his appointment to the commission to France at the time of the X.Y.Z. affair. His answer to Paulding explained that he had been requested by Washington himself to undertake this task, although Adams was then the president, but Marshall always contended that earlier essays into public life had not attracted the attention of Washington, in spite of

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<sup>27</sup> Marshall to Massachusetts Historical Society, 20 September 1809.

<sup>28</sup> Marshall to Joseph Story, 29 October 1828.

the claims Marshall's friends made to his having had the special notice and favor of the first president.<sup>29</sup>

Fragmentary as such notices of Marshall's historical interest must necessarily be, they may be supplemented—or perhaps it would be more nearly accurate to say that they may supplement—what he used of history as Chief Justice in framing and handing down his celebrated decisions. When his opinions are examined, it may be seen that they differ markedly from those of his successors, and this, of course, largely because he had to furnish the framework on which they would erect their more showy edifices. So much praise has been lavished on Marshall's opinions, and so much sober judgment has been expended upon their merits and demerits, that even a rehearsal of these comments is surely superfluous. What has been neglected, it would seem, is a special examination of the extent to which these opinions were assisted, or clarified, by resort to historical and political information, with which the foregoing paragraphs have demonstrated that Marshall was thoroughly conversant. This is all the more surprising in view of what may be regarded as a generally acceptable evaluation:

Many of the greatest and most luminous of his constitutional opinions contain scarcely a reference to adjudged cases or to the authority of precedents, for there were none, and the conclusions reached do not depend upon technical learning or discussion.<sup>30</sup>

While it has frequently been stated that Marshall owed much to a knowledge of the law gained almost entirely through private study—the six weeks' lecture course of George Wythe could hardly have been more than an incentive to individual effort—and to a knowledge of political theory secured through the same means, and through exposure to the instructions of his father, and of the two clergymen to whom he was sent for some tutelage during his boyhood, no one has thought to look through the opinions to see how heavily Marshall may have relied upon history also to make his notable contribution to our system. Such an attempt should prove interesting, though no claims are made that it will show Marshall to have been an historicist, or one slavishly bound to follow established legal precedents. On the contrary, where he has been found to have used history, Marshall used it to illuminate a point he had already made through some other fashion, or to make more cogent an argument already pre-

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<sup>29</sup> Marshall to Paulding, 4 April 1835.

<sup>30</sup> John M. Dillon, editor, *John Marshall: Complete Constitutional Decisions* (Chicago, 1903.), pp. iv-v.

sented. And this was quite as it should have been, and as it would have seemed to Marshall that it must be. History was a handmaiden of the law, not a despotic mistress.

In his very first celebrated constitutional decision, in *Marbury v. Madison*, Marshall referred briefly to the history of British law, as exemplifying the care government should take to protect individuals who claimed to have suffered injuries.<sup>81</sup> The reference was a passing one, and obviously not one intended by Marshall to do more than shed light on the point he wished to make—an anti-Jeffersonian point, his contemporaries knew—but it is interesting as giving a glimpse into the methods employed by Marshall in supplying for the deficiencies in a judicial system within the common law which had as yet no established precedents.

When he came to consider the involved questions arising out of the Aaron Burr conspiracy, Marshall referred to later history, and that with which he was more immediately familiar. The case of *Bollman and Swartwout* is a famous one, containing Marshall's lengthy, and for long controlling, definition of treason. In the course of his remarks, Marshall referred to the circumstances under which the first Congress had included in its initial legislation an act respecting the issuance of writs of habeas corpus. "Acting under the immediate influence of this injunction [in the Constitution]," he observed, "they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity."<sup>82</sup> The Chief Justice's statement here is as interesting for what it concealed—his own first-hand recollection of the precarious condition of the new government—as for what it recalled of the historical circumstances under which the first Congress acted.

When he considered the situation of Aaron Burr himself, as a circuit judge, Marshall went back further into the history of the meaning of treason, and declared:

It is used in a very old statute of that country, whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom they borrowed it.<sup>83</sup>

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<sup>81</sup> 1 Cranch 137, 163 (1803).

<sup>82</sup> 4 Cranch 75, 95 (1807).

<sup>83</sup> *United States v. Aaron Burr*, 4 Cranch 469, 470 (1807).

His historical citation here was argumentative as well as illustrative, but a little later in the same case he reverted to his more usual use of history when he said:

. . . the law [regarding principals and accessories in treason] is otherwise [than in felonies] because the theatre of action is more extensive.

This reasoning applies in England as strongly as in the United States. While in '15 and '45 the family of Stuart sought to regain the crown they had forfeited, the struggle was for the whole kingdom; yet no man was ever considered as legally present at one place, when actually at another; or as aiding in one transaction, while actually employed in another.<sup>84</sup>

It would be too much to claim that the case of Aaron Burr was decided through the use of history exclusively, but surely Marshall's citations of it were intended to occupy a position other than that accorded to legal precedents properly so called.

Marshall used his knowledge of English law again in the case of the *Bank of the United States v. Deveaux et al.*, when he referred to corporations as taxable under construction of statutes of Henry VIII, as well as under the opinions of Coke, and of Mansfield.<sup>85</sup> He followed a similar course of historical reasoning in *Fletcher v. Peck*, when he reviewed the entire history of grants of land in America from the reign of Charles II to 1763.<sup>86</sup> Neither of these uses was essential to the decision in the case, but it may be said that each was integral.

A little later—and it may be interjected here that Marshall's use of history was not continuous, but rather occasional—the Chief Justice had occasion to pronounce upon the vexatious subject of the validity of paper money when he was actually concerned with the somewhat larger problem of the obligation of contracts. Marshall's own words are interesting, once again, as showing his method as well as his reason for using history:

Every state in the Union, both while a colony and after becoming independent, had been in the practice of issuing paper money. . . . We are told [that the laws] were such as grew out of the general distress following the war in which our independence was established. To relieve this distress, paper money was issued, worthless lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment, stipulated in the contract, was extended by law. These were the peculiar evils of the day.<sup>87</sup>

The entire early nineteenth-century attitude toward history is here exemplified, as well as Marshall's own settled practice of referring to events

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<sup>84</sup> *Ibid.*, 494.

<sup>85</sup> 5 Cranch 61, 88-90 (1809).

<sup>86</sup> 6 Cranch 87, 140-142 (1810).

<sup>87</sup> *Sturges v. Crowninshield*, 4 Wheaton 122, 203-204 (1819).

in which he had himself participated as though they could be known only from other authorities. There is here, perhaps, the jurist's insistence on the line of demarcation between evidence and hearsay testimony.

In another of his most celebrated cases, *M'Culloch v. Maryland*, Marshall invoked history to clarify the legal complexities surrounding the existence and conduct of the second Bank of the United States. The institution itself was one in which he had some slight interest,<sup>38</sup> but again this interest was not allowed to appear. Whether Congress had power to incorporate a bank, rather, was the question which prompted him to refer to some historical circumstances. The legal and legislative history of the young United States was first mentioned, as authorizing the activities of the Bank, and then Marshall went back a little further into the Constitutional Convention itself, and reviewed its history. After examining this at some length, he came to a conclusion based on his historical investigation and judgment, which is pregnant controversy: the people of the new United States had formed a new entity in establishing the national government, inasmuch as the powers conferred by the people on the state governments were different from those conferred on the national government.<sup>39</sup> It is hardly surprising that Jefferson and his associates looked upon Marshall with suspicion, or that his fame remained limited before the Civil War. The whole problem of the location and use of sovereignty was here settled, to Marshall's satisfaction, by recourse to the workings of the Constitutional Convention—to which Jefferson was not a delegate, and at which his later ally, Madison, was a Federalist.

This approach of Marshall's to a question already vital, and to become viciously divisive, was not limited to this one case. Writing in *Cohens v. Virginia*, two years later, the Chief Justice averred:

There is certainly nothing in the circumstances under which our constitution was formed; nothing in the history of the times, which would justify the opinion that the confidence reposed in the states was so implicit as to leave to them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union.

There is a certain poignance in this statement, following as it does on Marshall's remark that "We have no assurance that we shall be less divided than we have been."<sup>40</sup> He recalled, in the same case, that the historical record showed at the time of the adoption of the Constitution

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<sup>38</sup> Marshall to George Simpson, 18 March 1803. In this letter, the Chief Justice asked that his salary be paid him through the Bank.

<sup>39</sup> 4 Wheaton 316, 402 (1819). References to the Constitutional Convention were likewise made at 403 and 405; cf also *Bank of United States v. Planter's Bank*, 9 Wheaton 904 (1824).

<sup>40</sup> 6 Wheaton 264, 386 (1821).

that all the states were greatly indebted, "and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument."<sup>41</sup> For this reason, the matter of concurrent jurisdiction of state and federal courts deserved some mention, and on that matter Marshall felt that the opinion of the *Federalist* should be taken as having great authority. As he phrased it, "Great weight has always been attached and very rightly attached, to contemporaneous exposition."<sup>42</sup> This weight did not, of course, decide the case, but it assisted in making Marshall's disposition of it intelligible.

The Chief Justice's celebrated definition of commerce, in *Gibbons v. Ogden*, was likewise indebted to his insistence on referring to the contemporary record.<sup>43</sup> More extended use of history was likewise to appear in that case, when Marshall reviewed the history of the days of the Embargo—a commercial, not a war measure, he explained, "opposed, in a part of our country which supposed its interests to be vitally affected by the act."<sup>44</sup> Again this history was not essential to the decision, but its worth in delimiting both the term commerce and the Congressional power to legislate thereon was great.

Commerce, and the inequalities between the states during the Confederation period, were likewise subjected to historical analysis and comment in *Brown v. Maryland*.<sup>45</sup> Marshall showed, by these means, that the commerce clause of the Constitution had been intended by its framers to eliminate the "oppressed and degraded state" into which commerce had fallen.<sup>46</sup> When he came to consider contracts in the case of *Ogden v. Saunders*, Marshall went back into history even further. Although this was rather legal history in a narrower sense than that just noted, Marshall's approach is again the chief matter of interest:

So far back as human research carries us, we find the judicial power, as a part of the executive, administering justice by the application of remedies to violated rights, or broken contracts. . . .the proceedings evince the idea of a pre-existing intrinsic obligation which human law enforces.<sup>47</sup>

Inasmuch as this historical appeal is used to buttress an excursion into political philosophy, and that both were employed to underline the obligation of contracts, the importance of Marshall's approach seems obvious.

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<sup>41</sup> *Ibid.*, 406.

<sup>42</sup> *Ibid.*, 418.

<sup>43</sup> 9 Wheaton 1 (1824), at 5.

<sup>44</sup> *Ibid.*, 6.

<sup>45</sup> 12 Wheaton 419 (1827).

<sup>46</sup> *Ibid.*, 446.

<sup>47</sup> 12 Wheaton 213 (1827), at 217.

But Marshall was not content to cite only such history as that just mentioned. He referred, in this same case, to the personal histories of the framers of the Constitution, and ventured to suppose that they were "intimately acquainted with the writings of those wise and learned men whose treatises on the law of nature and nations" had delineated the subjects of obligation and contract.<sup>48</sup> Developing this idea, Marshall came down to the history with which he was himself familiar, and recorded what were probably his own reactions to the Convention, an "august spectacle" of the "assemblage of a whole people," through their representatives. The stress on the concept of the whole people is significant not only of the tense period in which Marshall was writing, but also of the importance he attached to this concept.

The one other case of similar nature to those just mentioned in which Marshall used history was that of *Craig v. Missouri*. Reviewing the history of paper money, Marshall here cited at considerable length Hutchinson's *History of Massachusetts*, and endeavored to discover, from the history of this country, whether the evils of paper money were attributable solely to its having been made legal tender.<sup>49</sup> That his conclusions from this procedure were in the negative is additional proof of the significance which he attached to history when he used it. It must be borne in mind, however, that there are many gaps in his employment of this procedure, and it may be conjectured that Marshall's use of history is too intermittent to prove that he had any special attitude toward it.

If this conjecture were to be accepted as proven, it would be necessary to ignore Marshall's attitude in the last great cases of his career. In *American Insurance Company v. Canter*, for instance, he referred to universal historical testimony as showing that the holding of conquered territory was only military occupation until the conclusion of a peace treaty.<sup>50</sup> In the same year, he exchanged letters with Colonel Timothy Pickering on the subject of the placement of the semi-colon in the taxing clause of the Constitution, and agreed with that gentleman that historical evidence that it did not appear in the original document, nor in the first printed copies of it, should have great weight in the decision of tax cases.<sup>51</sup> His letter to Justice Story,<sup>52</sup> contained, however, the longest private record

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<sup>48</sup> *Ibid.*, 214.

<sup>49</sup> 4 Peters 411 (1830). Marshall quoted Hutchinson, *History of Massachusetts*, I, 402, to show that there were issued bills of credit in 1690 in Massachusetts, in 1755 in Virginia, and also in 1769, 1771, 1773, 1775, 1776, and that Congress had issued more in 1777 and 1781, which were underwritten by Virginia.

<sup>50</sup> 1 Peters 511 (1828), at 542.

<sup>51</sup> Timothy Pickering to Marshall, 10 March 1828; Marshall to Pickering, 28 March 1828.

<sup>52</sup> *Autobiographical Sketch*, p. 4, and *passim*: also letter of 29 October 1828.



extant of his attitude toward episodes in our history which were to provoke from him his longest historical animadversions for the bench.

In his letter to Story, Marshall remarked with great feeling on the treatment which the Indians had received at the hands of the whites. Marshall's words were not intemperate; they exhibit, rather, a considerable measure of historical judgment:

The conduct of our Fore Fathers in expelling the original occupants of the soil grew out of so many mixed motives that any censure which philanthropy may bestow upon it ought to be qualified. The Indians were a fierce and dangerous enemy, whose love of war made them sometimes the aggressors, whose numbers and habits then made them formidable, and whose cruel system of warfare seemed to justify any endeavour to remove them to a distance from civilized settlements. It was not until after the adoption of our present government that respect for our own safety permitted us to give full indulgence to those principles of humanity and justice which ought always to govern our conduct toward the aborigines when this course can be pursued without exposing ourselves to the most afflicting calamities.<sup>53</sup>

Yet, Marshall continued,

I often think, with indignation, on our disreputable conduct (as I think it is) in the affair of the Creeks of Georgia; and I look with some alarm on the course [we are] now pursuing in the Northwest.<sup>54</sup>

These statements may be noted as in the best tradition of the early nineteenth-century historian, of the trained observer of historical events who can legitimately prophesy about future contingencies, and as foreshadowing the decisions in *Cherokee Nation v. Georgia* and *Worcester v. Georgia*. In each of these, Marshall referred to the history of the Cherokees,

a people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sinking beneath our superior policy, our arts, and our arms,<sup>55</sup>

and lamented that at the time of the formation of the Constitution, its framers had knowledge of only such Indian history as would show the red men appealing either to the tomahawk or to the government. It was this circumstance, Marshall was certain, which prevented the framers from including in the Constitution any provision which would make the courts of the United States available to the Indians.<sup>56</sup>

In *Worcester v. Georgia*, Marshall went into far greater detail. After referring to the history of the Indian tribes themselves, and pointing out how many ages had gone by before these tribes and their land had become

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<sup>53</sup> Marshall to Story, 29 October 1828.

<sup>54</sup> *Ibid.*

<sup>55</sup> 5 Peters 1 (1831), at 15.

<sup>56</sup> *Ibid.*, 18.

known to European travellers,<sup>57</sup> Marshall asked what was the legal and historical status of the latter.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

Answering his own question, and again appealing to history, Marshall went on:

But power, war, conquest, give rights which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.<sup>58</sup>

The light Marshall sought here was to be found, if his procedure gives any indication of what he believed, in an exhaustive examination of the behavior of European governments toward their colonies in North America, and in the behavior particularly of the British crown. Pages were devoted to this examination, and particularly to the consideration of the eighteenth-century history of the British colonies. The king, it was pointedly declared, had never interfered with the internal affairs of the Indians, but had contented himself with treaties of alliance and subsidies.<sup>59</sup> The government of the United States had inherited this tradition, and its treaties were then mentioned as giving historical evidence of the same attitude as that of the British.<sup>60</sup> Once again the motives underlying the summoning and activity of the Constitutional Convention were reviewed.<sup>61</sup> Finally, history was called upon to witness to "the actual state of things at this time,"<sup>62</sup> and Marshall proceeded to make his vain, but immortal order to Georgia to release Worcester.

In view of the circumstances of this case, it is not at all to be wondered at that Marshall should, the same year as the decision just reviewed, have written Story to declare that he shared the latter's gloom over the prospects of the country. Marshall's reflections were those of an old man, now historic in himself, and still pondering upon the lessons of history

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<sup>57</sup> 6 Peters 515 (1832), 543.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, 543-544, 547.

<sup>60</sup> *Ibid.*, 549 *et seq.*, 551-552.

<sup>61</sup> *Ibid.*, 558.

<sup>62</sup> *Ibid.*, 558-561.

and politics which he had so early learned. He wondered, if Story felt such gloom, how he would expect a man to feel

whose geographical position enables him to see a great deal that is concealed from you? I yield slowly and reluctantly to the conviction that our constitution can not last. I had supposed that north of the Potowmack a firm and solid government, competent to the security of national liberty, might be preserved. Even that now seems doubtful. The case of the south seems to me desperate; as opinions are incompatible with a united government even among ourselves. The union has been prolonged thus far by miracles; they cannot continue.<sup>63</sup>

He feared for the judiciary, as he had earlier remarked to another correspondent, lest it be "prostrated before opinions which are becoming every day more popular—at least in the south."<sup>64</sup> Though less obviously historical judgments than others which have been cited from his decisions, these remarks are important as showing what was in Marshall's mind as he rendered those decisions, and also to what extent he was using his historical knowledge to inform his judicial pronouncements. The conclusion seems inescapable that there was much interdependence.

In the last great case of his career, *Barron v. Baltimore*, Marshall once more reverted to what had become a favorite theme: the circumstances surrounding the declaration of freedom from British domination, and leading to the adoption of the Constitution. Emphasizing his contention that the new government was framed by the people for themselves, and not for the government of the individual states, he appealed to the "history of the Day" to establish his contention that this new situation had not been brought about with complete unanimity and freedom from discord. This was the historical reason for the adoption of the Bill of Rights, and Marshall was convinced that this reason should be a part of the record when the application of the amendments was in question. "These amendments," he asserted, "demanded security against the apprehended encroachments of the General Government, not against those of the local governments."<sup>65</sup>

If there is something ironic in noticing that Marshall's last appeal to history was against the nationalizing tendency which all his opinions are supposed to display, it may be said that Marshall's own feeling for the testimony of history would hardly disapprove. The evidence of this sort of witness was to be listened to, when occasion indicated that it should be, with all the greater attention and credence because she would bring forward only facts to which all might equally have recourse. Any naivete in this view of Marshall's was more than matched by that of his contem-

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<sup>63</sup> Marshall to Story, 22 September 1832.

<sup>64</sup> Marshall to Joseph Hopkins, 17 December 1830.

<sup>65</sup> 7 Peters 243 (1833).

poraries. As to his use of history in general, it may be noted that where he mentioned his sources, they were the best available; where he used history without citation, his facts are not to be controverted; where he drew lessons from history, he was acting in the spirit of his age, and certainly not contrary to the pattern of the prudent man; where his decisions relied heavily upon history, they were not bound by them in any non-legal sense.

One thing more may be added: in giving the Court so many examples of the way in which it might proceed, in setting a pattern of precedents, it is not too much to claim that Marshall's use of history, particularly the history of his own country, kept before his contemporaries and his successors an awareness of the existence of a beacon frequently to be relied upon in sighting the Constitution.