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EDITING MARSHALL

CHARLES F. HOBSON*

INTRODUCTION

The Papers of John Marshall is an enterprise devoted to producing a Marshall legacy: the first annotated edition of his correspondence and papers. This project is nearing completion, though not soon enough to coincide with the bicentennial of his appointment as Chief Justice of the United States. In February 2000, the University of North Carolina Press published Volume 10, which covers the years 1824 through March 1827. The complete edition of twelve or thirteen volumes should be finished in five or six years. Enough time has elapsed since the first volume was published more than a quarter century ago to offer a preliminary appraisal of the ways in which this multi-volume edition enhanced the study of both Marshall the man and Marshall the jurist. To carry out this assignment I will consider three broad areas: (1) his education and practice as a lawyer in late eighteenth-century Virginia; (2) his three decades as Chief Justice of the United States, during which time he sat not only on the Supreme Court but also on the United States Circuit Courts for Virginia and North Carolina; and (3) lastly, his life off the bench, including his roles as historian and biographer, enterprising landowner, and family chieftain. As a prelude to this discussion, I will describe the nature and extent of the Marshall archive and the problems involved in creating a documentary record.

I. THE FORMATION OF A COLLECTION

The publication of the Marshall edition marks the fulfillment of an aspiration first announced within a few years of the Chief Justice's death in 1835. In an anonymous sketch published in the *New York Review* in October 1838, the author (probably James Kent) wrote: "[t]hat the biography of the [C]hief [J]ustice should be written and his private papers and correspondence fully published, we deem it to be the positive duty of those who have been entrusted with them."¹ Early in 1845, Joseph Story, who had

* Editor-in-Chief, *The Papers of John Marshall*.

1. *Chief Justice Marshall*, N.Y. REV. 342 (1838). James Bradley Thayer identified Kent as the author of this anonymous article in JOHN MARSHALL.

previously published sketches of Marshall's life as well as a eulogy, drew up a proposal to write a full-length biography based on the Chief Justice's personal papers. Story hoped to get the family's permission to borrow the papers for this purpose, but his death a few months later put an end to that project. Before that event, Story received some discouraging news about the state of Marshall's papers. Speaking for the family, Marshall's son and executor James K. Marshall replied that "we are almost *entirely* destitute of papers of any interest to the public," though "very willing to submit for his [Story's] inspection the few papers which were found loosely scattered in his [father's] office, and to make every exertion to procure copies of all addressed by him to others."² The son further noted that the Chief Justice's "great modesty" prevented him from preserving any of the "numerous" commendatory letters he received, adding that "the few letters I have were found among old and valueless papers long since thrown aside in old boxes or trunks liable to be used as waste paper."³

Whether the papers stored in old boxes and trunks were "valueless" may be doubted, but their relegation to the status of "waste paper" probably assured their eventual loss or destruction. In relating the history of the Marshall collection, the key point to be emphasized is that neither the Chief Justice nor his family made any systematic effort to preserve his personal papers. Indeed, he took positive action to destroy accumulated papers, as shown by this passage from a letter to Story that reveals his characteristic endearing modesty:

In looking over some old papers the other day to determine how many of them were worthy of being committed to the flames, I found a totally forgotten letter (you need not communicate this) from the Historical [S]ociety of Massachusetts (or Boston) announcing that I had been elected an honorary member. To show my gratitude for this distinction, I ask them to accept my book—a poor return indeed, but the only one I can make.⁴

On another occasion Marshall wrote to William B. Sprague, an Episcopal clergyman and autograph collector, who had requested some specimens from the Chief Justice's correspondence: "Be assured it would give me real pleasure to furnish the autographs you are in search of were it in my power.

JAMES BRADLEY THAYER ET AL., JOHN MARSHALL 54 n.6 (1967).

2. Letter from Richard Peters to James K. Marshall (Mar. 3, 1845) (on file with the collection of the late Mrs. James R. Greene in Markham, Va.); Letter from James K. Marshall to Richard Peters (Apr. 3, 1845) (on file with the Peters Papers in the Historical Society of Pennsylvania).

3. Letter from James K. Marshall to Richard Peters, *supra* note 2.

4. Letter from John Marshall to Joseph Story (Apr. 24, 1833) (on file with the Story Papers in the Massachusetts Historical Society). The "book" was the second edition of THE LIFE OF GEORGE WASHINGTON.

But the letters I may have received of the description you mention have either not been preserved, or contain such communications as are private in their nature."⁶ Unlike his Virginian contemporaries George Washington, Thomas Jefferson, and James Madison, Marshall did not bequeath a rich legacy of papers that could serve as the core of an enlarged collection. The Marshall archive had to be created virtually from scratch long after he had passed from the scene.

Efforts to this end did not get underway until early in the twentieth century, no doubt in consequence of the centennial of Marshall's appointment as Chief Justice. In his brief biography published in 1901, James Bradley Thayer commented that "No systematic attempt seems ever to have been made to collect Marshall's letters. It should be done."⁶ Although some Marshall letters began to appear in print during the late nineteenth century, Thayer and previous biographers had precious little original material to work with of a biographical nature. Up to that time all accounts of Marshall's life and career derived in one way or another from the several sketches drawn by Story, two of which were published in Marshall's lifetime and the third and most extensive was given as a eulogy delivered to the Suffolk Bar in October 1835.⁷ Story, in turn, had access to what is still the single most important source from Marshall's life and career up to 1801: an autobiographical sketch that Marshall composed in 1827 and sent to Story, who used it in his review of Marshall's *History of the Colonies* that appeared in the January 1828 issue of the *North American Review*.⁸ Ten years earlier Marshall had sent a briefer version of his autobiography to Joseph Delaplaine, who intended to use it in a volume of *Delaplaine's Repository of the Lives and Portraits of Distinguished Americans*.⁹

5. Letter from John Marshall to William B. Sprague (July 22, 1828) (on file with the MARSHALL PAPERS in Swem Library, College of William and Mary).

6. THAYER, *supra* note 1, at 89.

7. See Joseph Story, 26 *N. Am. Rev.* 1, 1-40 (1828) (reviewing JOHN MARSHALL, *HISTORY OF THE COLONIES*); JAMES HERRING & JAMES B. LONGACRE, *NATIONAL PORTRAIT GALLERY OF DISTINGUISHED AMERICANS* 103-20 (1834); JOSEPH STORY, *A DISCOURSE UPON THE LIFE, CHARACTER, AND SERVICES OF THE HONORABLE JOHN MARSHALL* (1835).

8. Story also had access to Marshall's letters to George Washington, via Jared Sparks, to whom the Washington Papers at Mount Vernon had been entrusted in preparing the first edition of Washington's correspondence. See DOROTHY S. EATON, *INDEX TO THE GEORGE WASHINGTON PAPERS* xii (1964).

9. Letter from John Marshall to Joseph Delaplaine (Mar. 22, 1818), in 8 *THE PAPERS OF JOHN MARSHALL* 186, 186-89 (Charles F. Hobson ed., 1995) [hereinafter referred to as *THE PAPERS OF JOHN MARSHALL*]. Apparently, the earliest published sketch of Marshall was in a Philadelphia magazine, *The Port Folio*, in 1815. *Id.* at 189 n.6. The editors have identified John Wickham as the author from a manuscript draft of the article in Wickham's hand (on file with the Wickham Family Papers in the Virginia Historical Society). *Id.*

In 1906, William E. Dodd, a history professor at Randolph-Macon College, and Waldo G. Leland of the Carnegie Institution announced plans "to collect and publish the writings and correspondence of John Marshall."¹⁰ Noting that there was "no single large collection, so far as is known, of Marshall papers," the aspiring editors called for "an extensive search" to be made of contemporaries' papers and requested that persons possessing pertinent material communicate with them.¹¹ By this time the family papers, which evidently were not extensive and were in some disarray at the time of Marshall's death, had suffered further losses from neglect or destruction. Leland recalled meeting a great-grandson who informed him that all his family letters had been destroyed in a fire at his Fauquier County house.¹²

Whatever materials Dodd and Leland were able to collect were no doubt made available to Senator Albert J. Beveridge, who began writing his monumental four-volume biography of Marshall in the summer of 1913. The endeavors of Beveridge and his research team represent the first successful effort to compile Marshall's papers. The biographer tracked down numerous descendants who supplied him with original documents that became the nucleus of the Marshall collection at the Library of Congress. He also visited such repositories as the Library of Congress, the Virginia State Library (now Library of Virginia), the Virginia Historical Society, the Historical Society of Pennsylvania, the New York Public Library, and the Massachusetts Historical Society. The year before the publication of his first volume, Beveridge reported his findings in *Some New Marshall Sources*.¹³ Among the sources he first brought to light was a manuscript volume discovered in a smokehouse at the Fauquier residence of the Chief Justice's brother. Marshall had used this volume to compile his law notes and to record his accounts of expenses and receipts from 1783 to 1795. Beveridge also turned up some early Marshall letters and, most importantly, a set of letters to his wife that had been preserved by descendants of Marshall's daughter. These letters form the core of a small collection of papers purchased from the family by the College of William and Mary in 1935.¹⁴

10. 11 AMERICAN HISTORICAL REVIEW 747 (1906).

11. *Selected William E. Dodd-Walter Clark Letters*, 25 N.C. HIST. REV. 91 (Hugh Talmadge Lefler ed., 1948).

12. Waldo Gifford Leland, *Some Early Recollections of an Itinerant Historian*, 61 PROC. AM. ANTIQUARIAN SOC'Y 290 (1952).

13. JOHN BRAEMAN, ALBERT J. BEVERIDGE: AMERICAN NATIONALIST 227-29 (1971); Albert J. Beveridge, *Some New Marshall Sources*, ANNUAL REPORT OF AMERICAN HISTORICAL ASSOCIATION FOR 1915 203-5 (1917).

14. 33 BULLETIN OF THE COLLEGE OF WILLIAM AND MARY IN VIRGINIA 12-19 (1939) (source on file with author).

The bicentennial of Marshall's birth in 1955 gave rise to renewed efforts to locate and collect his papers. A major step in the assembling of materials by and about the Chief Justice was the 1956 publication of *A Bibliography of John Marshall*, compiled by James A. Servies. Although it did not cover manuscript sources, Servies' bibliography provided a comprehensive chronological listing of the printed sources of Marshall's correspondence, speeches, legal arguments, opinions, reports, and miscellaneous papers. Servies later compiled an unpublished checklist of Marshall manuscripts—the first of its kind—drawn from printed works (library catalogs, auction catalogs, articles, and books) that listed or cited manuscript sources.¹⁵

Servies' bibliography and checklist continue to be useful to Marshall researchers but were largely superseded by the monumental work of Irwin S. Rhodes, a Cincinnati lawyer who, beginning in the 1950s, executed the most thorough search to date of Marshall documents. Rhodes' plan to edit and publish Marshall's papers was completely independent of the editorial project established in the 1960s under the sponsorship of the College of William and Mary and the Institute of Early American History and Culture. When the latter project obtained the endorsement of the National Historical Publications and Records Commission, Rhodes abandoned his original scheme in favor of a two-volume "descriptive calendar." This work, published five years before the first volume of the Institute's edition, is also entitled *The Papers of John Marshall*, though in fact no connection exists between the two.¹⁶

Rhodes' calendar was a great boon to the budding editorial enterprise at William and Mary, as attested to by the well-worn copy in the project's office. Far more than a handy checklist, the calendar identified many new sources and provided indispensable leads for the editors as they undertook their own independent search for documents. Although the project's greater resources ultimately enabled it to go well beyond the calendar, Rhodes' work stands as enduring testimony to individual accomplishment in documentary searching and collecting. Particularly noteworthy was his meticulous combing of county, state, and federal court records—order books, record books, and case papers—that identified scores of cases in which Marshall participated as a lawyer, judge, and party and which also unearthed a number of autograph documents.

Rhodes spoke for all who have tried to reconstruct Marshall's paper trail when he remarked that this task was "greatly

15. James A. Servies, *The Manuscripts of John Marshall* (1965) (unpublished manuscript, on file with the College of William and Mary).

16. 1 IRWIN S. RHODES, *THE PAPERS OF JOHN MARSHALL: A DESCRIPTIVE CALENDAR* v-vi (1969).

complicated by the fact that the Marshall papers are widely scattered in federal, state, and local archives and libraries, in court records and reports, and in private hands.”¹⁷ Unlike the personal and public papers of other eminent Americans, he added, “there is no single, easily accessible source.”¹⁸ This essential fact also largely explains the nature of the resulting collection. Marshall’s correspondence is very much a one-way conversation, consisting predominantly of the recipient’s copies of letters that he wrote. Comparatively few letters to Marshall have come to the collection, either as recipient’s copies or as copies retained by the sender. The recipient of the largest number of his surviving letters was his close friend and brother judge, Bushrod Washington. As against fifty-six letters to Bushrod written between 1804 and 1827, only one letter exists from Bushrod to Marshall. As against forty-five letters to Mary W. (“Polly”) Marshall written between 1797 and 1831, there is not a single letter from her. With Joseph Story, another friend and Court colleague, the record is only marginally better: forty-two letters to Story and eight from Story between 1816 and 1834. This great imbalance between letters sent and letters received is consistent with what we know of Marshall’s indifference to preserving his correspondence and papers—indeed, his attempts to burn this material or consign it to waste matter. The absence of letters from Polly Marshall to her husband, however, is probably not attributable to loss or destruction. In all the letters he wrote to her, Marshall acknowledged receiving a letter from her only twice, once in 1797 and again in 1800.¹⁹ After 1800, she apparently never wrote to him again, leaving him dependent on other family members or friends for news of her during his absences from home. Possibly her extreme nervous condition prevented her from writing letters to Marshall—or to anyone for that matter. No letter or any other document in her hand has been found.

The extant letters from Marshall most certainly represent a small percentage of those he wrote during his long life. Even those to Bushrod Washington, Story, and Polly do not constitute a complete record. The large gaps in his correspondence have not been bridged by letter books or drafts. As a practicing lawyer, Marshall surely must have retained copies of his business correspondence in letter books, but these, if they once existed, have long since vanished with the contents of his law office. As for personal correspondence, a few drafts survive to indicate that

17. *Id.*

18. *Id.*

19. Letter from John Marshall to Mary W. Marshall (July 10, 1797), in 3 THE PAPERS OF JOHN MARSHALL 97, 97-98 (Charles T. Cullen ed., 1979); Letter from John Marshall to Mary W. Marshall (Aug. 8, 1800), in 4 THE PAPERS OF JOHN MARSHALL 209, 209-10 (Charles T. Cullen ed., 1984).

Marshall customarily composed a rough draft of his letters, which he then copied over for posting to his correspondents. None of these drafts, however, match a surviving recipient's copy, precluding an editorial opportunity for comparing texts and noting variations that inevitably occurred.

Although the active phase of collecting Marshall documents ceased years ago, new leads arise that result in additions to the correspondence. We keep abreast of the occasional trade in Marshall autographs among collectors and dealers, making every effort to obtain a copy of a letter offered for sale and not previously accessioned. In this way several new items are added to the collection each year. Documentary editors always live in the hope of discovering a cache of hitherto unknown letters moldering in the proverbial trunk in the attic of an old house. Although no such scenario has occurred in the history of this project, a 1985 sale at Sotheby's, in London, yielded an unprecedented bonanza of autographs: nine letters written to Bushrod Washington between 1814 and 1821. The existence of these letters was previously unsuspected, as they had been in the possession of an English family that had married into the Washington family in the late nineteenth century. How these letters moved across space and time, from Mount Vernon on the Potomac to Highcliffe, Christchurch, Dorset, where they reposed until auctioned for sale, and finally to their permanent home at the College of William and Mary is an interesting story in itself.²⁰

In addition to correspondence, the other principal classification of "papers" in the Marshall collection consists of legal and judicial documents. Prominent in this category are autograph drafts of opinions delivered in the Supreme Court and in the United States Circuit Court for Virginia. Other manuscripts include his law notes, legal pleadings drafted for clients and on his own behalf, and notes of lawyers' arguments taken while sitting on the bench. It bears emphasis that the mere assembling of the Marshall archive (now numbering some 8,500 documents, of which less than forty percent will be published in full or in calendar form) is no mean achievement. Apart from the annotated edition, the collection itself has been a boon to scholarship. The value of this and similar editorial enterprises does not lie solely in the published volumes, which cannot be produced quickly enough to satisfy scholarly demand. A major, if not somewhat underappreciated benefit of these projects, is that they serve as research centers open to serious students whose own projects draw them to the resources gathered there. This has certainly been true of the *Marshall Papers*.²¹

20. Charles F. Hobson, *Sotheby's Sale of John Marshall Letters*, 9 DOCUMENTARY EDITING 1, 1-4 (1987).

21. Among those scholars who have done research in the MARSHALL

II. LEGAL EDUCATION AND PRACTICE

The principal theme of the edition's first five volumes is Marshall's career as a lawyer in post-Revolutionary Virginia. Until the appearance of these volumes, this subject was either ignored or treated superficially. Biographers were usually content to adduce Marshall's laconic autobiographical comments about his legal education and practice and to refer to a few of his arguments preserved in printed reports. Because the contents of his law office largely vanished, and most of Virginia's higher court records perished during the Civil War, an important body of materials documenting Marshall's law practice simply does not exist. The project nonetheless succeeded in stitching together a documentary record from an eclectic mix of correspondence, commonplace notes, accounts, opinions, petitions, court records, pleadings and other litigation papers, and reports of cases.

A. Preparation for the Bar

The documentary recovery of the law practice should dispel the myth that Marshall passed his long career in law unencumbered with much legal learning. This grossly misleading view, popularized by Beveridge and perpetuated by succeeding biographers, continues to cast a long shadow. According to Beveridge, Marshall entered the profession with "practically no equipment except his intellect, his integrity, and his gift for inspiring confidence and friendship. Of learning in law, he had almost none at all."²² Like a refrain, the biographer repeats the observation that Marshall was "but slightly equipped with legal learning."²³ In reiterating the "meagerness" of the young lawyer's "learning in the law," Beveridge attributes Marshall's success at the bar to native wit and intuition, his quick and discerning knack for absorbing the essentials of law not by laborious research and reading but by listening attentively to the arguments of his more learned fellow counselors.²⁴ Marshall, so it is said, never really overcame his deficient legal training, as reflected in his omission to cite precedents or authorities in his opinions. Moreover, it is further suggested or implied that Marshall's lack of learning actually served him well as a jurist, that ignorance of the weight of authority left him freer to practice creative jurisprudence.²⁵

PAPERS files are Frances Howell Rudko, Jean Edward Smith, R. Kent Newmyer, and James Simon. See FRANCES HOWELL RUDKO, JOHN MARSHALL AND INTERNATIONAL LAW xi (1990); JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 709 (1996). Newmyer is the author of a forthcoming biography and Simon is writing a book on Jefferson and Marshall.

22. 1 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 174 (1916).

23. 2 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 177 (1916-1919).

24. *Id.* at 177-78.

25. EDWARD S. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION* 42

In his overdrawn portrait of a deficiently educated and unstudious young practitioner, Beveridge plays down Marshall's attendance of "perhaps six weeks" at the College of William and Mary in 1780, too short a time to have gained much legal knowledge, particularly when his attention was also preoccupied with courting his future wife.²⁶ Yet it was during this brief sojourn in Williamsburg, says the biographer, that Marshall acquired all the legal training he received prior to entering upon the profession.²⁷ Indeed, this was his only *formal* study of law, but it lasted closer to three months—a full term—not six weeks.²⁸ At that time, however, formal instruction in law was a novelty, the first chair of law in the United States having been established at William and Mary only a few months before Marshall's attendance. Another generation or two would pass before law schools became the preferred means of legal education. Prospective lawyers, including young Marshall, continued to follow the traditional method of preparing for the bar by reading with a practicing attorney while performing clerical duties. As the beneficiary of the recent establishment of a law professorship at the College, Marshall enjoyed the additional advantage of attending the lectures of the learned George Wythe, the first holder of the chair of law and police.²⁹ Marshall took Wythe's second course of lectures commencing May 1 and continuing through July 1780.³⁰ In addition to attending twice-weekly lectures, Marshall participated in moot courts held once or twice a month, model legislative assemblies held every Saturday, and the debates of the Phi Beta Kappa Society.³¹ Brief as it was, this college interlude can be seen as an invaluable supplement to his previous legal training and to his continuing self-education in the law.

The only documentary evidence of Marshall's law study, the notes he entered in a bound volume containing blank pages, presumably dates from this period, though the precise date remains a matter of conjecture. Thanks to the researches of the late William F. Swindler, which have been incorporated in the Marshall edition, we now have a more accurate understanding of the nature and significance of this document. Beveridge wrongly assumed that Marshall made these notes from Wythe's lectures.

(1920).

26. 1 BEVERIDGE, *supra* note 22, at 154, 174.

27. *Id.* at 154-61, 174.

28. Charles T. Cullen, *New Light on John Marshall's Legal Education and Admission to the Bar*, 16 AM. J. LEGAL HIST. 345, 348 (1972).

29. *Id.* at 345-48.

30. *Id.*

31. *Id.* at 345-51. See generally E. Lee Shepard, *Breaking into the Profession: Establishing a Law Practice in Antebellum Virginia*, 48 J.S. HIST. 394 (1982).

Swindler conclusively demonstrated that the notes, alphabetically arranged under standard legal topics such as "Abatement," "Bail," "Ejectment," and "Jointure," were the product of a law student's "commonplac[ing]."³² He further showed that Marshall's entries were mostly verbatim extracts or close paraphrases of entries from the third edition (1768) of Matthew Bacon's *New Abridgment of the Law*,³³ one of the essential sources for neophyte lawyers in quest of a comprehensive understanding of English law.³⁴ Marshall also copied extracts from Blackstone's *Commentaries* and from a 1769 Virginia code.³⁵ All the internal evidence, Swindler observed, suggests that the notes were Marshall's personal manual, reflecting the state of the law in post-Independence Virginia.³⁶ Although Swindler believed the bulk of the notes was compiled under Wythe's tutelage, it is entirely likely that Marshall's commonplac[ing] extended over a longer period.³⁷ The larger significance of the commonplace notebook is that it directly links Marshall to the method of professional legal education that prevailed in England and the United States from the early sixteenth to the nineteenth century.

Whatever mastery of the law Marshall had acquired by the end of his term at William and Mary was sufficient to qualify him for a license, which he obtained soon after leaving the college. To qualify, he had to persuade two practicing attorneys that he possessed "a distinct knowledge of the common law, of such of the important statutes, prior to [1607], as are in force in Virginia, of the Acts of Assembly, of the principles of equity, and of the outlines of practice."³⁸ Although his license pronounced him professionally fit, Marshall almost certainly pursued further law study to prepare himself for practice in the superior courts of the state at Richmond, where he moved permanently in 1784. Circumstantial evidence points to a close relationship with state Attorney General Edmund Randolph (later the first U.S. Attorney General) who enjoyed a good reputation as a teacher of young law students and possessed a valuable law library. Marshall had attracted Randolph's notice as "a promising young gentleman of the law" as early as 1782 and perhaps entered the Attorney

32. William F. Swindler, *John Marshall's Preparation for the Bar—Some Observations on His Law Notes*, 11 AM. J. LEGAL HIST. 207, 207-13 (1967). For the extract from the law notes published in the edition, see 1 THE PAPERS OF JOHN MARSHALL 37, 37-87 (Herbert Johnson ed., 1974). At the time of his death Professor Swindler prepared an annotated edition of the law notes (typescript on file with the MARSHALL PAPERS project).

33. MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW (3d ed. 1768).

34. Swindler, *supra* note 32, at 207-13.

35. *Id.*

36. *Id.*

37. *Id.*

38. Notice in the VIRGINIA GAZETTE or AMERICAN ADVERTISER (Richmond), Apr. 14, 1784 (source on file with author).

General's office as a kind of junior attorney. Elected Governor in 1786, Randolph had sufficient confidence in Marshall to leave him his unfinished legal business.³⁹

Not to belabor the point, Marshall entered the highly competitive arena of the superior court bar in Richmond better prepared than Beveridge would have us believe. His legal training was equal if not superior to the standards for practice in his native Virginia. Although not learned in the sense of possessing "technical or recondite" knowledge or familiarity with comparative law, contemporaries readily acknowledged his command of English common law and equity jurisprudence, which formed the foundation of American law. He was "a *common law lawyer*, in the best and noblest acceptation of that term," whose particular strength lay in his mastery of principles and doctrines acquired through close study of adjudicated cases.⁴⁰ Marshall could never have reached the pinnacle of the Virginia bar nor have successfully presided over the highest court in the land without having acquired a comprehensive practical knowledge of law.

B. Law Practice

Marshall did not begin his law career in earnest until 1784, by which time he had determined to focus his practice exclusively in the superior courts at Richmond. These were the General Court, which had common law jurisdiction; the High Court of Chancery, which had equity jurisdiction; and the Supreme Court of Appeals. Although the records and papers of these courts went up in smoke in 1865, the Marshall project gleaned information about his cases and clients from a variety of other sources. Essential in this respect is an account book Marshall kept from 1793 to 1795, making entries on blank pages in the same bound volume containing his law notes. Here he recorded more than two thousand fees for cases in addition to fees for advice and for drawing documents. Building on Rhodes' earlier research, the editors amplified the account book entries by collating them with published reports of cases and with other court records. This process enabled them to link the case fee to a particular court and to establish Marshall's participation as attorney in numerous cases where the report itself does not identify the lawyers. Besides its great value in identifying cases and clients, the account

39. Notice in the VIRGINIA INDEPENDENT CHRONICLE (Richmond), Nov. 15, 1786 (source on file with author).

40. 2 BEVERIDGE, *supra* note 23, at 179 (quoting Gustavus H. Schmidt, *Reminiscences of the Late Chief Justice Marshall*, 1841 LA. L.J. 81, 81-82 (1841)). Beveridge elided quotations to make it appear that Schmidt bore "witness to Marshall's scanty acquirements." *Id.* In fact, Schmidt, after noting Marshall's lack of acquaintance with "Roman jurisprudence" and "the laws of foreign countries," is at some pains to show that Marshall mastered the common law through laborious study. *Id.*

book tracks the phenomenal growth of Marshall's income from law throughout the remainder of the 1780s and into the 1790s, supporting contemporary observations that placed him at the top of the Richmond bar.

Although the destruction of Virginia's higher court records makes it impossible to recover the full extent of Marshall's trial practice, the reorganization of the court system in 1789 fortuitously preserved a cross section of his cases. The General Court's jurisdiction was dispersed among eighteen separate district courts, many of whose records and case files survive in various courthouses throughout the state. Collating these records with the account book resulted in the identification of more than two hundred Marshall cases that either began in the General Court and were subsequently transferred to the appropriate district court or that originated in the district court. In addition, the original case papers of the district court at Fredericksburg survive virtually intact, including legal pleadings, correspondence, and other documents in Marshall's hand. About sixty-five of his General Court and district court cases have at least some documentation.⁴¹ These were mostly suits for the recovery of a debt, with a handful of actions in ejectment, assault and battery, slander, detinue, and covenant. Unlike the General Court, the High Court of Chancery remained centralized in Richmond until 1802, and the 1865 fire accordingly consumed what must have been an extensive mass of papers emanating from Marshall's practice in that court. Account book fees identify Marshall as counsel in twenty High Court of Chancery cases published by Chancellor Wythe in the 1790s. A few of his cases in that court were reconstructed from documents collected from various sources.⁴²

Further documentation of Marshall's trial practice in the General Court was extracted from the reports of St. George Tucker, a judge of that court when Marshall was at the bar. Tucker's reports fill three manuscript volumes and are preserved at the College of William and Mary. The early volumes of the *Marshall Papers* presented with extensive annotations of twenty-eight cases in which Tucker reported Marshall's arguments. Subsequently, the editors discovered thirteen additional reported cases among the loose papers in the Tucker collection and published them in the special volume devoted to Marshall's law practice.⁴³ Tucker's reports are especially valuable because they

41. Editorial Note and cases, in 5 THE PAPERS OF JOHN MARSHALL 3, 3-49 (Charles F. Hobson ed., 1987).

42. Editorial Note and cases, in 5 THE PAPERS OF JOHN MARSHALL, at 53-160.

43. Editorial Note and arguments, in 5 THE PAPERS OF JOHN MARSHALL, at 409-48.

constitute the only surviving glimpses of Marshall “in action” in the General Court.

By the late 1780s Marshall gained admission to that elite fraternity of lawyers who practiced in the Supreme Court of Appeals of Virginia. Thanks to the published reports of Bushrod Washington and Daniel Call, Marshall’s career as an advocate in this court is more easily accessible and far better known than other aspects of his law practice. One hitherto largely unnoticed fact is that Marshall himself kept reports of cases in the Court of Appeals. For the greater part of his practice there were no published reports, which meant that Marshall and his fellow lawyers and judges had to be their own reporters, jotting down the facts of the case, summarizing the arguments of counsel, and preserving a memorandum or copy of the court’s opinion. Although Marshall’s manuscript reports, which must have been voluminous, have not survived, a portion of them covering fifteen cases heard in 1790 was appended to Call’s third volume. Call did not identify Marshall as the reporter at the time, but other contemporary references cite this group of cases as “Marshall’s reports.”⁴⁴

Marshall’s arguments in 125 cases in the Supreme Court of Appeals between 1786 and 1800 were recorded in Washington’s two volumes and in Call’s first four volumes of reports. These reports constitute the best source for assessing Marshall’s qualities as a lawyer—his style of argument, his grasp of the principles of common law and equity, his knowledge of statute law, his ability to analyze and interpret past decisions and to extract from them the applicable rules of law. The edition did not attempt to reproduce all his reported arguments (which are relatively accessible) but selected seventeen as a representative sampling. The bar of this court was reputed “to be the most enlightened and able on the continent.”⁴⁵ Competing in this formidable company, Marshall developed and refined the characteristic style of argumentation—rigorously logical and analytical—that he displayed as Chief Justice. He thoroughly familiarized himself with the great variety of disputes that he would later hear on the bench of the Supreme Court and of the U.S. Circuit Court. Most of his appellate cases involved the application of common law rules or equity principles derived from English jurisprudence, though he also had numerous occasions to employ his skill in the art of statutory construction in litigation arising under the positive laws of Virginia. Property disputes, typically centering on the distribution of a decedent’s estate among heirs, devisees, legatees,

44. Editorial Note on *Crump’s Executors v. Dudley*, in 5 THE PAPERS OF JOHN MARSHALL, at 473-74.

45. Editorial Note, in 5 THE PAPERS OF JOHN MARSHALL, at 455-56 (quoting WILLIAM WIRT, *THE LETTERS OF THE BRITISH SPY* 153 (5th ed. 1813)).

and creditors, formed the largest class of appeals. Another large category embraced suits where a party sought equitable relief after a judgment at law. Both kinds of cases afforded Marshall ample opportunity to master the abstruse doctrines of property law and the technical rules for construing wills and to define with ever greater precision the boundaries between law and equity. An aspiring judge could have no better intellectual training than an apprenticeship at the bar of the Supreme Court of Appeals of Virginia.

In 1790, Marshall qualified to practice in the newly established United States Circuit Court for Virginia. It was a court of general jurisdiction, having cognizance of suits at common law and equity. Its records and papers have been preserved and are deposited at the Library of Virginia in Richmond. The editors identified approximately 150 cases in which Marshall served as counsel in this court during the 1790s. Scattered among the voluminous case files are numerous pleadings and other documents in Marshall's hand, testifying to his extensive business. Because it heard essentially the same kinds of disputes and followed the same procedures as the state courts of common law and equity, Marshall's federal court cases are broadly representative of his career as a practicing lawyer. On the law side the overwhelming majority of cases involved the recovery of a debt, either by action of debt or assumpsit. Most of the former were founded on bonds for the payment of money; the other debt actions were brought on protested bills of exchange or promissory notes. The assumpsit actions comprehended unliquidated debts due by open account and also a few cases for the recovery of money due by bills of exchange. Marshall had far fewer cases on the chancery side, most of them bills of injunction to stay proceedings at law. Besides representing Virginia planters and merchants, he acted as counsel for merchants residing in New York, Philadelphia, Baltimore, and London. It was precisely in being almost continuously engaged in mundane disputes involving mercantile transactions that Marshall prepared himself for the great bulk of the business that came before him as a judge.

Marshall devoted the greater portion of his federal practice to defending Virginia clients in suits brought by British creditors to recover debts contracted before the Revolution. Perhaps the edition's single most important act of recovery concerning Marshall the lawyer was the identification, documentation, and annotation of his "British debt" cases.⁴⁶ Previous accounts of this subject focused on a single case and relied on a single source: *Ware v. Hylton*,⁴⁷ which was heard in the Supreme Court in February

46. See *The British Debt Cases*, in 5 THE PAPERS OF JOHN MARSHALL, at 257-406.

47. *Ware, Administrator of Jones v. Hylton*, in 5 THE PAPERS OF JOHN

1796 and reported by Alexander Dallas.⁴⁸ However, this case represents only the tip of the iceberg as respects the legal history of the British debts and Marshall's central role in that history. In researching this episode, the editors unearthed more than a hundred cases taken on by Marshall beginning in 1790. In addition to examining the original case files, they mined a rich lode of materials presented to the claims commissions established under the Jay Treaty and the Convention of 1802. These sources document the proceedings at the circuit court level that constitute the essential but previously unexplored background for understanding the Supreme Court's consideration of the appeal of *Ware* in 1796.

We now have a much clearer sense of the tortuous path of *Ware* from its filing in 1790 to its final disposition six years later. Apart from his appearance in the Supreme Court, anecdotal evidence had pointed to Marshall's close involvement in the British debt business from the outset as attorney for the Virginia debtors. Indeed, the ended case files and records of the circuit court abundantly confirm this impression. The entry of cases brought by British creditors at the very first term of the federal court shows Marshall's name for the defendant almost to the exclusion of any other.⁴⁹ Marshall almost certainly had a principle share in formulating the brilliant legal strategy employed on the Virginia debtors' behalf. Although his clients ultimately lost on the legal issues, he made the best case possible for the debtors and obtained a better settlement than they otherwise might have received.

Marshall based his defensive strategy on the perception that the British debt cases implicated both law and politics, being at once a series of private disputes and an inseparable part of the larger public controversy between the United States and Great Britain over the enforcement of the Peace Treaty of 1783. If these suits had been ordinary debt cases—say, between citizen and citizen—the great majority of them would never have been contested. The debtor's bond or protested bill of exchange would have constituted indisputable evidence of the debt. In the British suits, however, the defendants invariably entered pleas. Even the routine common law plea of the "general issue," or denial, of the debt, was an integral part of the defensive strategy. In every such suit, Marshall took care to plead the general issue, so that the case would ultimately go to a jury. This tactic eventually bore fruit when juries returned verdicts that denied interest on the debts for

MARSHALL, at 295-329.

48. *Id.*

49. See generally Charles F. Hobson, *The Recovery of British Debts in the Federal Circuit Court of Virginia, 1790 to 1797*, 92 VA. MAG. HIST. & BIOGRAPHY 185 (1984).

the eight years of the war. These general verdicts, moreover, constituted unappealable findings of fact, which meant that the Supreme Court could not, in *Ware* or in any other case, consider the highly contentious issue of war interest.⁵⁰

The distinctive feature of the British debt cases, what defined them as such, was the elaborate special pleas the defendants submitted in addition to the general issue. Marshall was largely responsible for drafting these pleadings, whose texts were so lengthy that he had copies printed up. Eventually there were four separate special pleas, each grounded on the plaintiff's being a subject of Great Britain and artfully composed to link the private suit of creditor and debtor with the festering public controversy over the enforcement of the peace treaty. Marshall perhaps doubted whether these pleas would stand up in court but supposed they might serve the purpose of delay—keeping the creditor at bay as long as possible was the time-honored means of defending a beleaguered debtor. Given time, the debtor might be able to improve his personal circumstances against the eventual day of reckoning. Delay might also allow time for the forces of diplomacy to work out an agreement whereby the federal government would assume a significant portion of the liability for British debts. The special pleas, which called forth successive “replications,” “rejoinders,” and “demurrers,” had the effect of keeping the case on the clerk's rule docket for a longer time than an ordinary debt case. Once the case was transferred to the court docket, no trial by jury could take place until the court decided the issues of “law” raised by the special pleas. Moreover, because these issues compelled them to venture into controversial areas of public policy concerning the Peace Treaty and its status as “supreme law” over conflicting state laws, the judges were understandably reluctant to decide them. Indeed, the circuit court in Virginia heard two full-dress arguments, one in November 1791 and the other in May 1793, before rejecting three of the pleas and sustaining the plea alleging that the debtor's payment into the state loan office under Virginia's sequestration law of 1777 legally discharged the debt.

Until recently, no record of Marshall's circuit court argument in *Ware* was known to exist. As it happens, Justice James Iredell took down a rough outline of his speech in a minute and nearly indecipherable scrawl, which the editors painstakingly transcribed and annotated. Iredell's notes are particularly valuable because they encompass all four British debt pleas, while Dallas's report covers only the loan office plea, which was the sole issue before the Supreme Court.⁵¹ The Marshall edition also made use of another

50. Editorial Note on *Banks v. McCall*, in 5 *THE PAPERS OF JOHN MARSHALL*, at 370-71.

51. Editorial Note on *Ware v. Hilton*, in 5 *THE PAPERS OF JOHN MARSHALL*, at 296, 299-313. The late James R. Perry of the Documentary History of the

recently discovered document: lawyer William Tilghman's notes on *Ware* as argued in the Supreme Court. Dallas, who was not present at the argument, used these notes to compile his report. Given a rare opportunity to collate a printed text with its manuscript source, the editors presented in parallel columns Tilghman's notes and Dallas's text of Marshall's argument. This collation reveals at a glance how Dallas adhered to the substance of Tilghman's notes while improving their readability by stylistic embellishments and interpolations.⁵² Students can now compare the reports of Marshall's argument on circuit and in the Supreme Court. Such a comparison shows, for example, that Marshall on circuit cited not only Vattel but also other authorities on the law of nations such as Grotius, Burlamaqui, Pufendorf, and Bynkershoek. Indeed, a careful study suggests that Marshall as counsel for the debtors exhibited a much more extensive and sophisticated grasp of international law than has previously been credited to him.⁵³

In presenting Marshall's law practice, the editors attempted to offset the relative paucity of personal legal papers by giving close attention to the legal environment in which the future jurist operated. They organized the law volume around a series of cases grouped within sections corresponding to the court in which they were heard. They selected cases for their typicality and to illustrate the range of disputes and the variety of documents generated by a lawsuit. In addition to annotations that deal with the particular case or document, they wrote a lengthy general introduction and a series of editorial notes that discuss broader topics such as the court system of post-Revolutionary Virginia, the forms of action, common law pleading and procedure, execution of judgments, and equity pleading and practice. Even the introductory notes to the individual cases strove to place the case within a larger context—for example, a case in debt, assumpsit, assault and battery, or ejectment became the occasion for a general discussion of these various common law actions and how they worked in Virginia. The editors aspired to produce a volume that would serve the dual purpose of recreating a sense of Marshall as a practicing lawyer and of recovering the legal culture of eighteenth-century Virginia. Without question the law volume should bring about a reappraisal of Marshall the lawyer that anchors him solidly to the common law tradition as adapted to his native state. Without gainsaying his unique personal qualities of

Supreme Court, 1789-1801, and John Semonche of the University of North Carolina, directed the editors to this source. *Id.* at 299 n.6.

52. *Id.* at 296-97, 317-27. Credit for discovering the notes belongs to Perry and to James Buchanan, also of the Documentary History of the Supreme Court, 1789-1801. *Id.* at 299, n.7.

53. RUDKO, *supra* note 21, at 24-31.

mind and character, Marshall is best understood as the product of a particular legal environment.

III. JUDICIAL CAREER

With the publication of Volume 6 in 1990, the *Marshall Papers* commenced chronicling Marshall's lengthy tenure as Chief Justice of the United States. In undertaking this task, the edition necessarily focused on the man rather than on the institution of the Supreme Court. It was never intended to be a documentary history of the Marshall Court. Given the sponsors' agreement with the publisher to keep the edition within approximately twelve volumes, the scope of the project never entailed reproducing all of the more than five hundred opinions Marshall delivered in the Supreme Court. Such a comprehensive plan seemed less compelling because of the ready availability of the opinions in the official *United States Reports*. Also, the original manuscripts of the great majority of the opinions have not survived, which precludes a more accurate rendering of the texts we already have. The autograph opinions, moreover, do not reflect a first or working draft but the final version given to the reporter for publication. Although such considerations might justify excluding the Supreme Court opinions entirely, the editors never seriously considered this option—which would be akin to presenting Hamlet without the Prince of Denmark. As a workable compromise, the editors adopted a plan of publishing most of the constitutional opinions in full (about thirty), along with a representative sample of other opinions that reflect Marshall's jurisprudence in such fields as international law, the interpretation of federal statutes and treaties, contracts and commercial law, and land law. Each volume contains a calendar listing of all opinions Marshall delivered during the period covered by that volume. It includes such information as the date of the opinion, the citation to the printed report, the type of appeal, the name of the court below, the appellate case number, and the date of argument.

As Chief Justice of the United States, Marshall was also Judge of the United States Circuit Court for the Fifth Circuit, sitting in Richmond, Virginia, and in Raleigh, North Carolina. Each year he marched to the rhythms of the various court seasons. Winters, from early February (January, beginning in 1827) through mid-March, he spent in Washington presiding over the Supreme Court. Early in May he began his spring circuit, traveling to Raleigh, where court lasted a week or less. He then returned home to Richmond for the session of the Virginia court, which began in late May and normally lasted three or four weeks. Soon after the spring adjournment, Marshall and his family escaped the Richmond heat for an extended visit to the upland region of Fauquier and neighboring counties. The fall circuit

commenced in early November with a trip to Raleigh and closed in Richmond about the middle of December.

In contrast to the highly selective policy with regard to the Supreme Court opinions, the *Marshall Papers* is publishing all the extant circuit court opinions in full, which number less than a hundred. Not only is this a manageable quantity for an edition of this scope, the editors believe they have a special obligation to provide the fullest possible record of the circuit cases. Marshall spent the greater part of his judicial time on circuit, yet this side of his career is not nearly so well known and the sources are less accessible. A two-volume edition of his circuit opinions, published by John W. Brockenbrough in 1837, is extremely rare. Although Brockenbrough's reports were reprinted in *Federal Cases*, the alphabetical arrangement of that work scattered Marshall's opinions over many volumes. Brockenbrough also took certain liberties with Marshall's drafts, regularizing his spelling and punctuation, for example, and occasionally improving what he regarded as infelicitous phrasing. He misdated certain opinions and in one instance misidentified an opinion as issuing from the circuit court at Richmond in 1819 that in fact was prepared for a Supreme Court case of 1813.⁵⁴ Bringing together the circuit opinions and presenting more accurate texts with accompanying annotations accordingly serves a sound documentary purpose.

By far the most well-known of Marshall's circuit cases was the 1807 treason trial of Aaron Burr, which for historical significance and high drama could not be surpassed. The proceedings elicited from the Chief Justice no fewer than sixteen formal opinions, including an authoritative exposition of the American law of treason—the lengthiest judicial pronouncement of his career. Appropriately enough, the edition devoted considerable space to this case, which monopolized Marshall's time for the better part of six months. All of Marshall's opinions—from the preliminary hearing in late March 1807, through the grand jury proceedings of May and June, the treason trial of August, the misdemeanor trial of September, and concluding with the hearing from mid-September through mid-October on a motion to commit for trial elsewhere—are now conveniently accessible in one volume.⁵⁵ Burr's case was an exception to the usual docket of circuit court business, which consisted primarily of mundane private disputes. Of all the cases in which Marshall wrote out an opinion, the overwhelming majority were complicated suits in equity. A significant percentage of these in turn were brought by or against a decedent's estate for the recovery of a long-standing

54. See Appendix III, in 8 THE PAPERS OF JOHN MARSHALL, at 404-07. The case is *The Brig Caroline v. U.S.*, 11 U.S. (7 Cranch) 496 (1813).

55. See *U.S. v. Burr*, in 7 THE PAPERS OF JOHN MARSHALL 3, 3-164 (Charles F. Hobson ed., 1993) (detailing *U.S. v. Burr* and all of its various proceedings).

debt. One such dispute, involving the liability of a certain tract of land for an ancient debt, called forth an elaborate opinion that exhibited in full measure Marshall's mastery of equity law and his adept handling of numerous English cases cited by counsel.⁵⁶ Another category of circuit opinions embraced admiralty and prize cases arising from the revenue, embargo and nonintercourse laws, the War of 1812, and the wars for Latin American independence. In one such case the Chief Justice offered his first judicial commentary on the extent of the Commerce Clause of the Constitution.⁵⁷ Marshall also heard a number of cases brought by the government against federal officials or agents who had defaulted on performance bonds. One of these cases, too, gave rise to constitutional exposition, in this instance the President's power of appointment.⁵⁸

A. Source Texts for Judicial Opinions

The texts of the judicial opinions are taken from manuscript and printed sources. If available, Marshall's original manuscript is the source text. For the Supreme Court, only eighty-eight autograph opinions have been preserved, most of them dating from 1828. No attempt to retain the original opinions as part of the official archival record occurred until 1834, so it is not surprising that most of the earlier ones did not survive. Up to that time the practice was to give the opinion to the reporter after it was read. Once the opinion was set in type, the reporter must in many instances have destroyed the original or made no special effort to preserve it. By good fortune Richard Peters, Jr., who became the Court's reporter in 1828, kept a number of Marshall's drafts and eventually turned them over to the clerk. Today these drafts are part of a collection of original Supreme Court opinions in the National Archives.⁵⁹ In the absence of a manuscript, the source text is taken from the reports of William Cranch, Henry Wheaton, and Peters. If an opinion was first published in a newspaper, which happened in cases of great public moment, the editors use that source, noting significant variations from the text in the report of Cranch, Wheaton, or Peters. For example, the opinions in *Marbury v. Madison*,⁶⁰ *McCulloch v. Maryland*,⁶¹ *Cohens v.*

56. *Garnett v. Macon*, in 10 THE PAPERS OF JOHN MARSHALL 205-38 (Charles Hobson ed., 2000).

57. *Brig Wilson v. U.S.*, in 9 THE PAPERS OF JOHN MARSHALL 31, 31-40 (Charles F. Hobson ed., 1998).

58. *U.S. v. Maurice*, in 9 THE PAPERS OF JOHN MARSHALL, at 304-21.

59. See Editorial Note on the Supreme Court, in 6 THE PAPERS OF JOHN MARSHALL, at 70. One manuscript opinion, *Osborn v. Bank of the U.S.*, remains in private hands. It is now in the Gilder Lehrman Collection at the Pierpont Morgan Library in New York City.

60. 5 U.S. (1 Cranch) 137 (1803).

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

Virginia,⁶² and *Gibbons v. Ogden*⁶³ were spread on the pages of Washington newspapers within a few days of their delivery.

The original manuscript survives for sixty-four of the eighty-eight circuit court opinions reported by Brockenbrough. Late in life, Marshall gave his circuit drafts to Brockenbrough, who, after publishing them in 1837, presented them to the American Philosophical Society in Philadelphia, where they repose today. The editors have turned up several opinions not reported by Brockenbrough, including an autograph draft of an 1814 opinion found among the papers of St. George Tucker, who served with the Chief Justice on the United States Circuit Court for Virginia from 1813 to 1824.⁶⁴ Another unreported opinion of 1806 was printed in a Richmond newspaper.⁶⁵ Newspapers occasionally summarized opinions not otherwise reported and other judicial proceedings emanating from Marshall's court. Examples include a sentence in a counterfeiting case of 1804, a jury charge in an 1819 piracy case, and a report containing a summary of Marshall's 1823 opinion in *Bank of the United States v. Dandridge*.⁶⁶ The texts of the Burr trial opinions are taken from the Richmond *Enquirer*, which printed them "from the original manuscript furnished by Chief Justice Marshall, who was given the proof sheets for 'his inspection and correction.'"⁶⁷

Nearly all of Marshall's known circuit opinions originated in cases brought in the court at Richmond. Brockenbrough reported just three North Carolina circuit opinions, only one of which survives in manuscript. For other North Carolina opinions, the editors used John Haywood's reports, which present brief synopses of opinions in eighteen cases heard between 1802 and 1806, and contemporary reports of a half dozen cases published in Raleigh newspapers.⁶⁸ The newspapers would have published Marshall's grand jury charges, but at the time he gave his first charge at the Raleigh court in December 1802, Marshall "laid it down as a rule from which he did not intend to depart, not to allow his charges to be published."⁶⁹ The Chief Justice's refusal to allow publication of his charges and their use as a forum for political statements

62. 19 U.S. (6 Wheat.) 264 (1821).

63. 22 U.S. (9 Wheat.) 1 (1824).

64. U.S. v. Jones, in 8 THE PAPERS OF JOHN MARSHALL, at 36-42.

65. Bond v. Ross, in 6 THE PAPERS OF JOHN MARSHALL, at 411-19.

66. U.S. v. Logwood, in 6 THE PAPERS OF JOHN MARSHALL, at 290-91; U.S. v. Smith, in 8 THE PAPERS OF JOHN MARSHALL, at 370-72; *Bank of the U.S. v. Dandridge*, in 9 THE PAPERS OF JOHN MARSHALL, at 324-26.

67. Editorial Note on U.S. v. Burr, in 7 THE PAPERS OF JOHN MARSHALL, at 11.

68. See Editorial Note, in 6 THE PAPERS OF JOHN MARSHALL, at 144.

69. *Id.* (quoting from the *Minerva* (Raleigh, NC), Jan. 4, 1803). For one found manuscript draft of a grand jury charge, given in an 1823 piracy case at the Virginia court, see U.S. v. Manuel Catacho, in 9 THE PAPERS OF JOHN MARSHALL, at 344.

reflected a more cautious judicial posture than had recently been the custom among his colleagues and signified his broader aim to keep the federal judiciary within its proper sphere of adjudicating cases at law.

B. Annotating the Opinions

Because only a few previously unpublished opinions have come to light and the reported opinions do not in most instances have variant texts, the Marshall edition's principal aim has been to enhance the accessibility and usability of the opinions and to amplify their meaning with annotations. Such annotation typically consists of informational notes identifying persons, places, and events relating to the particular case and providing full references to legal sources cited or quoted in the opinion. In preparing these annotations, the editors draw heavily upon original sources, particularly the rich collections of federal judicial records in the National Archives. Supreme Court records include the minutes and dockets, which provide useful information about the parties, lawyers, type of case, originating court, and dates of the argument and decision. The most valuable source for researching the Supreme Court opinions is the voluminous appellate case files. A typical file consists of a transcript of the record of the case in the court below, exhibits, correspondence, and other documents that shed light on the controversy. The minutes and the original case papers of the United States Circuit Court for North Carolina are also preserved in the National Archives, while those of the United States Circuit Court for Virginia are on deposit at the Library of Virginia. In the case papers are found the documents—pleadings, depositions, mercantile accounts, letters, and the like—that Marshall refers to in his opinions. A search of the Virginia circuit case files has occasionally yielded documents in the Chief Justice's hand, such as the formal decree in equity that accompanied his opinion.⁷⁰ The Washington, Richmond, and Raleigh newspapers provide details about a case not disclosed in the official records. A valuable supplementary source for the Federal Court in Virginia is St. George Tucker's manuscript casebook, which contains reports of arguments and other information not available in other sources.⁷¹

70. For examples of such decrees, see *Short v. Skipwith*, in 6 THE PAPERS OF JOHN MARSHALL, at 464-65; *U.S. v. Schooner Little Charles*, in 8 THE PAPERS OF JOHN MARSHALL, at 196-97; *Ronalds Heirs v. Barkley*, in 8 THE PAPERS OF JOHN MARSHALL, at 214-16; *Coates v. Muses*, in 9 THE PAPERS OF JOHN MARSHALL, at 155-56; *Backhouse v. Jett*, in 9 THE PAPERS OF JOHN MARSHALL, at 163-65; *U.S. v. Shelton*, in 9 THE PAPERS OF JOHN MARSHALL, at 169-71; *Hopkirk v. Randolph*, in 10 THE PAPERS OF JOHN MARSHALL, at 109-10; *Byrd v. Byrd's Executor*, in 10 THE PAPERS OF JOHN MARSHALL, at 140-41; *Teakle v. Bailey*, in 10 THE PAPERS OF JOHN MARSHALL, at 257.

71. *Evans v. Jordan*, in 7 THE PAPERS OF JOHN MARSHALL, at 408-11. For

Access to an extensive base of original source materials enables the editors to produce authoritative annotations. The guiding principle is to supply enough information and explanation to make the opinion intelligible to the general reader. Numbered footnotes address matters arising immediately from the document—for example, identifying a case, statute, treatise, or technical words and phrases. With respect to ancient treatises, abridgments, and other legal works, every attempt is made to identify the edition that Marshall used or might have used. For most of the opinions, the editors supply brief introductory contextual notes that typically state the full names of the parties, the essential facts of the dispute (including, in the case of appellate opinions, the history of the case in the court below), and the particular point or motion addressed by the opinion. Editorial notes that go beyond the immediate context to set forth at greater length the historical background and significance of the case introduce major Supreme Court opinions. These notes also attempt to convey new information or correct errors that have crept into previous accounts. One such note, for example, unearthed the protracted history of the land companies' efforts to obtain legal recognition of titles acquired by direct purchase from the Indians that lay behind *Johnson v. McIntosh* (1823).⁷² Another recounted in some detail the Ohio legislature's proceedings against the Second Bank of the United States by way of explaining the issues involved in *Osborn v. Bank of the United States* (1824).⁷³ The editorial note to *Sturgis v. Crowninshield* (1819) gave due notice to previous judicial opinions concerning state insolvency legislation.⁷⁴ That in *Ogden v. Saunders* (1827) identified several other cases on the docket raising the same issue and related the pending cases to the debate in Congress on a national bankruptcy bill.⁷⁵

In addition to substantive annotations, the editors also compile a distinct set of "textual" notes for those opinions in which

other examples of annotation using Tucker's case book, see *Scott's Executors v. Ross*, in 7 THE PAPERS OF JOHN MARSHALL, at 396-98; *Pegram v. U.S.*, in 7 THE PAPERS OF JOHN MARSHALL, at 398-402; *U.S. v. Mann*, in 9 THE PAPERS OF JOHN MARSHALL, at 232-36; *U.S. v. Belew*, in 10 THE PAPERS OF JOHN MARSHALL, at 91-94.

72. *Johnson v. McIntosh*, in 9 THE PAPERS OF JOHN MARSHALL, at 279-84.

73. *Osborn v. Bank of the U.S.*, in 10 THE PAPERS OF JOHN MARSHALL, at 36-44.

74. *Sturgis v. Crowninshield*, in 8 THE PAPERS OF JOHN MARSHALL, at 239-44.

75. *Ogden v. Saunders*, in 10 THE PAPERS OF JOHN MARSHALL, at 350-55. In legal citation the defendant will always be known as "Saunders" because of reporter Henry Wheaton's misspelling of his name, which was in fact "Sanders." *Id.* at 355 n.1. An interesting sidelight to the *Ogden* case is that the transaction giving rise to the dispute occurred in connection with Aaron Burr's western expedition of 1806.

the text is a manuscript draft. The draft was almost never a clean copy and frequently contained numerous deletions and insertions. The textual notes provide a complete record of Marshall's revisions and reveal his thought process in the act of writing for publication. An assiduous researcher can use this material to undertake a close analysis of Marshall's writing style and gain new insights into his jurisprudence. Perhaps the edition's most useful "annotation" of the judicial opinions is the comprehensive analytical index at the end of each volume. Specially constructed subentries facilitate systematic study of Marshall's use of precedent and his commentary on such topics as judicial review, natural law, obligation of contract, and statutory construction.

C. *Notes of Arguments*

The edition documents Marshall's judicial career principally by presenting annotated texts of his opinions. It is also publishing a surviving remnant of his manuscript notes of arguments. On the bench Marshall continued his practice begun at the bar of taking notes on cases. Other than the record of the case from the lower court, Supreme Court Justices had no source but the lawyer's oral argument for obtaining a statement of the case, the questions involved, and the points of law and authorities on which the party relied. Even after 1821, when written briefs were required to be submitted in advance, Marshall and his brethren maintained the practice of note taking, an indication that they continued to rely on the oral argument as the key "document" to inform and persuade them. After the close of a term, Marshall delivered his accumulated notes to the reporter to use in drawing the arguments of counsel.⁷⁶ The reporter in most instances discarded the notes after publishing his report, though Wheaton and Peters did save some as samples of the Chief's handwriting. These notes comprehend some twenty cases heard at various terms of the Supreme Court (most of them dating from his last five years on the bench) and are preserved in collections at the National Archives, Columbia University, the Pierpont Morgan Library, and the Historical Society of Pennsylvania.⁷⁷ They cast light on his working methods during the actual hearing of a case, most obviously in showing what he regarded as the essential points of a lawyer's argument. In a few instances Marshall's notes cover

76. Letter from John Marshall to William Wirt (July 6, 1825), in 10 THE PAPERS OF JOHN MARSHALL, at 193.

77. Editorial Note, in 6 THE PAPERS OF JOHN MARSHALL, at 72. As recently as 1966 the National Archives acquired Marshall's notes on six cases heard in 1831, the manuscript having been discovered in the law library of the Prudential Insurance Company of Newark, New Jersey. *Id.* The company had obtained the notes in 1890 from a Newark citizen who received them from the man to whom Peters had given them years earlier. *Id.*

cases or arguments not reported in the official reports.⁷⁸

D. Marshall's Judicial Career as Reflected in His Correspondence

Marshall's correspondence is a rich source of information about his career presiding over the Supreme Court and the circuit courts in Richmond and Raleigh. Particularly noteworthy is the epistolary commentary provoked by certain critical events in the history of the Marshall Court. One such episode arose from the repeal of the Judiciary Act of 1801 and the ensuing restoration of circuit-riding by Supreme Court Justices. Chief Justice Marshall doubted the validity of this measure, believing that the Constitution required distinct appointments and commissions for Supreme Court Justices and circuit court judges. On this point he wished to consult with his brethren, but the Justices would not convene again until after they were supposed to attend their circuits. The result was a remarkable exchange of letters among the Justices in which they ultimately resolved to acquiesce in the reinstatement of the circuit system. In reaching this decision, Marshall suppressed his own "strong constitutional scruples," holding himself "bound by the opinions of [his] brothers."⁷⁹ In this first test of his Chief Justiceship, he revealed at the outset those qualities of leadership that characterized his judicial tenure: his openness to argument and persuasion and his willingness to subordinate his own views if necessary to obtain a single opinion of the Court—characteristics that were no less essential to effective leadership than was his formidable intellect. Although previous accounts of this episode quoted portions of these letters, the entire correspondence can now be consulted in the Marshall edition.⁸⁰

Another critical moment in the Court's history was the controversy over the decision in *McCulloch v. Maryland*, which flared with particular intensity in Virginia during the spring and summer of 1819. So vehement were the newspaper attacks on that opinion that Marshall himself was provoked to reply with a series of essays, concealing his identity under the pseudonyms "A Friend to the Union" and "A Friend of the Constitution." In letters to Story and Washington, the Chief Justice identified the Court's

78. For examples, see *Fenwick v. Sears*, in 6 THE PAPERS OF JOHN MARSHALL, at 153-59; Notes on Arguments, in 9 THE PAPERS OF JOHN MARSHALL, at 17-25; Notes on Arguments, in 9 THE PAPERS OF JOHN MARSHALL, at 275-79.

79. Letter from John Marshall to William Paterson (Apr. 6, 1802), in 6 THE PAPERS OF JOHN MARSHALL, at 106; Letter from John Marshall to William Cushing (Apr. 19, 1802), in 6 THE PAPERS OF JOHN MARSHALL, at 108.

80. The first reference to the correspondence was in the anonymous article by James Kent, who possibly had access to Paterson's papers. THAYER, *supra* note 1, at 54-55 (citing to Kent's article, *Chief Justice Marshall*, 3 N.Y. REV. 347 (1838)) (source on file with author). See also 3 BEVERIDGE, THE LIFE OF JOHN MARSHALL 122 (1919).

principal antagonists—Virginia judges William Brockenbrough and Spencer Roane—and disclosed his own authorship of the “Friend” essays. Despite sufficient clues provided in his correspondence, the full dimensions of Marshall’s counterattack escaped the attention of biographers and scholars until recently. In 1969, Professor Gerald Gunther brought to light nine previously unknown essays as well as a reprinting of two earlier pieces that had been hopelessly mangled in their original publication.⁸¹ This public defense of the Supreme Court was an extraordinary, even risky, undertaking by the sitting Chief Justice, who took special care to keep his authorship secret. His unprecedented personal intervention was a measure of his deep alarm that the attacks on *McCulloch* were the opening wedge of a meditated attack on the Constitution and Union. All the essays along with the opinion itself and Marshall’s correspondence on the subject are now conveniently accessible within the covers of a single volume.⁸²

Other letters afford illuminating glimpses into the Court’s institutional workings. For example, in response to a newspaper publisher’s request to publish the opinion in *Cohens*, the Chief Justice explained that the opinion was “the property of the court” and he would have to “ask the other Judges this evening whether they will part with the original; having no copy.”⁸³ To a similar request in 1824 for a copy of the opinion in *Gibbons*, Marshall again noted that there was no copy and further stated that:

. . .the rough draft has, as will always happen when an opinion on an extensive & complex question is written without previous arrangement, frequent insertions of arguments which are supposed to belong properly to a part which has been passed, in separate papers with letters of reference. Without great care this will lead to blunders in printing of a serious extent. Mr. Wheaton is accustomed to copying our opinions & will be enabled to be of great service to you should you proceed to print it.⁸⁴

As these remarks suggest, the Chief Justice took an active interest in the publication. After reading the newspaper rendition of *Cohens*, he drew up a list of typographical and other errors for Wheaton to correct before publishing his report, carefully noting the page, column, paragraph, and line where the errors had occurred.⁸⁵

81. See JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed., 1969).

82. Essays Defending *McCulloch v. Maryland*, in 8 THE PAPERS OF JOHN MARSHALL, at 282-87.

83. Letter from John Marshall to Gales and Seaton (Mar. 3, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 143.

84. Letter from John Marshall to Gales and Seaton (Mar. 3, 1824), in 10 THE PAPERS OF JOHN MARSHALL, at 35.

85. Letter from John Marshall to Henry Wheaton (Mar. 24, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 147-48.

The publication of the opinions in *Dartmouth College v. Woodward* (1819) departed from the usual course. Instead of being given to the newspaper or to the reporter, Marshall's opinion for the Court and the concurring opinions of Justices Washington and Story were placed in the hands of Daniel Webster, who had argued the case on behalf of the college. Webster carried the manuscripts to New Hampshire and turned them over to his law partner Timothy Farrar, who subsequently published the most complete record of the case, including the arguments and opinion in the state court as well as those in the Supreme Court. In preparing his own report of the Supreme Court case, Wheaton used the proof sheets of Farrar's book.⁸⁶ Story "edited" the Chief Justice's opinion to the extent of suggesting the deletion of a passage, to which Marshall readily consented in a way that underscored his implicit trust in his junior brother's judgment: "I would myself prefer that it should stand as you suggest; but were it otherwise, your opinion in a case on which I felt no particular solicitude, would be decisive with me."⁸⁷

Other letters to Story also reflect Marshall's deferential style of leadership and close collaboration with the Massachusetts jurist. On one occasion he informed Story that he

had never thought of preparing an opinion in the militia case. That is committed to you & cannot be in better hands. I shall just sketch my ideas for the purpose of examining them more closely but shall not prepare a regular opinion. As at present disposed I do not think we shall differ.⁸⁸

Another time Marshall confessed that he had "come with very considerable doubt, to a conclusion different from yours & therefore hope you will prepare your opinion."⁸⁹ He further stated that "[s]hould the court concur with you I shall be far from regretting it for my opinion in this case is not one of those in which I feel such confidence as to regret its not prevailing."⁹⁰ Regrettably, such discussions of pending Supreme Court cases occur only rarely in Marshall's correspondence. This omission is largely to be attributed to the circumstance that the Justices fully aired their views during the annual session in Washington. There was usually little need or incentive to resort to written

86. See A Note on the Text – *Dartmouth College v. Woodward*, in 8 THE PAPERS OF JOHN MARSHALL, at 222.

87. Letter from John Marshall to Joseph Story (Apr. 28, 1819), in 8 THE PAPERS OF JOHN MARSHALL, at 309.

88. Letter from John Marshall to Joseph Story (July 13, 1819), in 8 THE PAPERS OF JOHN MARSHALL, at 353-54. The militia case was *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).

89. Letter from John Marshall to Joseph Story (Nov. 24, 1823), in 9 THE PAPERS OF JOHN MARSHALL, at 346.

90. *Id.* The case in question was probably *Kirk v. Smith*, 22 U.S. (9 Wheat.) 241 (1824) (Marshall, J.). *Id.* at n.4.

communications if within a short time the Justices would be able to consult with one another in person.

To the extent that Marshall discussed judicial questions in his correspondence, the cases provoking them were predominantly those he heard on circuit. These cases, in turn, were those that for one reason or another could not be carried to the Supreme Court.⁹¹ When the full Court could not decide a particular question, the Chief Justice believed it was important to maintain consistency and uniformity in similar cases arising in the various circuits. As he explained in a letter soliciting advice on the perplexing questions raised by Burr's trial, he would have preferred a full consultation "with all my brethren of the bench on the various intricate points that occur, on which a contrariety of opinion ought not to prevail in the different circuits, but which cannot easily be carried before the [S]upreme [C]ourt."⁹² Aware of a judge's unwillingness to "commit himself by an opinion on a case not before him & on which has heard no argument,"⁹³ Marshall urged that this consideration was outweighed by the "strong & general repugnance to giving contradictory decisions on the same points" on circuit.⁹⁴

On subsequent occasions, Marshall was not shy about asking advice on new and difficult questions arising on circuit, directing his queries to both Story and Washington. The immensely learned Story could illuminate any legal subject, but was of particular service in admiralty questions, in which the Chief Justice, not having practiced in admiralty courts, was admittedly "not versed."⁹⁵ After obtaining his younger colleague's views on one such case, Marshall replied that he would decide it "in conformity with your reasoning."⁹⁶ Marshall stated that Story's reasoning was "perfectly sound; & were [it] even questionable, the practice of the courts ought to be uniform."⁹⁷ In another case, involving a claim for salvage on a vessel recaptured from pirates, Marshall wondered if the question had been decided elsewhere. If not, he wrote Story, "you will greatly oblige me by your sentiments on it, as I know that you are more *au fait* on these questions than I am."⁹⁸ Other legal queries on which the Chief Justice solicited

91. For example, see Letter from John Marshall to Joseph Story (July 13, 1819), in 8 THE PAPERS OF JOHN MARSHALL, at 352-53 (discussing reasons as to why a case could not be brought before the Supreme Court).

92. Letter from John Marshall to William Cushing (June 29, 1807), in 7 THE PAPERS OF JOHN MARSHALL, at 60.

93. *Id.* at 62.

94. *Id.*

95. Letter from John Marshall to Joseph Story (May 27, 1819), in 8 THE PAPERS OF JOHN MARSHALL, at 313-14.

96. Letter from John Marshall to Joseph Story (July 13, 1819), in 8 THE PAPERS OF JOHN MARSHALL, at 352.

97. *Id.*

98. Letter from John Marshall to Joseph Story (Dec. 9, 1823), in 9 THE

information concerned the respective liabilities of the creditors of an insolvent public debtor, a demurrer to evidence in a case against a whiskey distiller, the sufficiency of process served on the president of a state bank, and a motion for a mixed jury composed of citizens and foreigners. Although his correspondence shows him most often asking advice, Marshall could dispense it as well, as in his reply to Washington's query about whether a bill of exchange was to be considered inland or foreign.⁹⁹

In these exchanges with his judicial brethren, Marshall comes across as modest and deferential, eager to conform to their better-informed judgment, willing to subordinate his views for the sake of uniformity. Along with this engaging humility, the Chief Justice could not entirely suppress his ego when convinced of the soundness of his judicial reasoning, as shown by his explanation of his 1823 circuit decision in *Bank of the United States v. Dandridge*.¹⁰⁰ In that case, he ruled that a corporation's acceptance of a performance bond had to be recorded in the minutes of the board of directors. When the case was appealed to the Supreme Court, Marshall predicted reversal by "your Honors." His jocular tone and professed indifference to being overruled actually betrayed his anxiety about such an unpleasant prospect. If the Supreme Court decided to reverse, he confided to Story, the Judge who drew the opinion "must have more ingenuity than I have if he draws a good one."¹⁰¹ After explaining the reasons for his ruling, Marshall declared he would "bow with respect to the judgment of reversal but till it is given I shall retain the opinion I have expressed."¹⁰² When the Supreme Court did overrule him in 1827 (Story giving the opinion), the Chief Justice offered a lengthy opinion not so much in dissent, but as an expression of professional pride. It was an attempt to explain to the world at large that his circuit judgment was not a "rash and hasty decision" but the result of reasoned consideration of a host of "imposing authorities."¹⁰³

On rare occasions Marshall reflected on constitutional law in his private correspondence. One such meditation, recorded in a recently discovered letter, concerned the constitutionality of state bankruptcy laws. In 1814, five years before he ruled judicially on the subject, he confided to Bushrod Washington his doubts that the Bankruptcy Clause of the Constitution conferred exclusive

PAPERS OF JOHN MARSHALL, at 353-54.

99. See Letter from John Marshall to Bushrod Washington (July 13, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 180-81.

100. 25 U.S. (12 Wheat.) 64 (1827).

101. Letter from John Marshall to Joseph Story (July 2, 1823), in 9 THE PAPERS OF JOHN MARSHALL, at 330.

102. *Id.* at 331.

103. Opinion on *Bank of the United States v. Dandridge* (Feb. 28, 1827), in 10 THE PAPERS OF JOHN MARSHALL, at 375.

power on Congress, foreshadowing his 1819 opinion in *Sturgis*.¹⁰⁴ This admission would appear to belie the notion that the Chief Justice sacrificed a private opinion in favor of exclusive power in order to achieve unanimity in 1819.¹⁰⁵ Of greater significance were the Chief Justice's musings on the Contract Clause's effect on state laws. He admitted that the clause was "probably intended to prevent a mischief very different from any which grows out of a bankrupt law."¹⁰⁶ He added that such laws excited little complaint in 1787 and that "the mind of the convention" was probably directed at paper money and tender laws, observing however that "the words may go further; if they do on a fair & necessary construction, they must have their full effect."¹⁰⁷ Here was the genesis of the important distinction Marshall formulated in *Sturgis* between those clauses prohibiting particular laws—paper-money legislation, for example—and the Contract Clause, which was aimed not at specific acts but intended "to establish a great principle, that contracts should be inviolable."¹⁰⁸ Interestingly, in 1814, Marshall was inclined to accept the validity of a prospective bankruptcy law. Such a law probably did not impair the obligation of contract because the contract was "made with a knowledge that it may be acted on by the law." At the same time, he acknowledged "very great doubts whether I shall retain that opinion."¹⁰⁹

Marshall's comments are noteworthy not only as expressing his early and not yet fully-formed views regarding state bankruptcy laws but also as prefiguring his approach to the question of "intention" in constitutional construction. The words of the Contract Clause, he conceded, may "go further" than the particular mischief the framers had in mind when drafting the Constitution. Eventually, he concluded that the clause embraced retrospective and prospective bankruptcy laws and protected corporate charters against legislative infringement as well. In both cases, he invoked the "intention of the framers," but he did not mean "intention" in an originalist sense as reflecting the subjective intentions of those who framed and ratified the Constitution. Rather, he understood it to mean a collective intention, derived solely from the words of the Constitution, to

104. Letter from John Marshall to Bushrod Washington (Apr. 19, 1814), in 8 THE PAPERS OF JOHN MARSHALL, at 34-35.

105. *Id.*; G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835 635-36 (1988).

106. Letter from John Marshall to Bushrod Washington, *supra* note 104, at 34.

107. *Id.* at 34-35.

108. *Sturgis v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819).

109. In considering the question judicially in 1827 in *Ogden*, he concluded that such laws were prohibited by the Contract Clause, an opinion he probably had reached in deciding *Sturgis*.

establish a broad general principle to preserve the sanctity of contracts against any form of abuse that legislative ingenuity might devise.

As Chief Justice, Marshall had to walk a fine line between activism and restraint in exercising judicial power. The Supreme Court, he perceived, was vulnerable to attacks by the legislative branch, particularly in the form of proposals that would reduce its appellate jurisdiction. In 1823, Marshall brilliantly exercised his persuasive powers to defeat one such measure, as shown by another newly accessioned letter. In reaction to the Court's invalidation of Kentucky's occupying claimant laws in *Green v. Biddle*,¹¹⁰ a Kentucky Senator introduced legislation that would have increased the number of Supreme Court justices to ten and required the concurrence of at least seven justices in cases involving the validity of state laws or acts of Congress. This proposal elicited from Marshall a private communication to his friend Henry Clay, the influential Speaker of the House of Representatives. Clay, as the Chief Justice well understood, had reason to be displeased with the ruling in *Green*, having argued in favor of the validity of Kentucky's laws in the Supreme Court. Marshall accordingly composed his letter with great tact and sensitivity—and a little humor as well. Assuming “the privilege of age to utter *wise sayings* somewhat like proverbs . . . as a substitute for that powerful and convincing argument which it has lost the faculty of making,”¹¹¹ the Chief Justice observed that “it is among the most dangerous things in legislation to enact a general law of great and extensive influence to effect a particular object.”¹¹² He then went on to suggest the “serious inconvenience” that would result “from a very numerous supreme court.”¹¹³ More serious was the requirement of a supermajority to decide constitutional questions, which in effect would prevent the Court from exercising judicial review of legislation.¹¹⁴ A “conscientious legislator” could never assent to a measure that would defeat an object obviously contemplated by the Constitution: “It is I think difficult to read that instrument attentively without feeling the conviction that it intends to provide a tribunal for every case of collision between itself and a law, so far as such case can assume a form for judicial enquiry.”¹¹⁵ The Chief Justice's timely intervention no doubt had its effect. Thanks in no small part to his superb political skills, neither this proposal nor other attempts to curb the Court's power

110. 21 U.S. (8 Wheat.) 1 (1823).

111. Letter from John Marshall to Henry Clay (Dec. 22, 1823), in 9 THE PAPERS OF JOHN MARSHALL, at 365.

112. *Id.*

113. *Id.*

114. *Id.*

115. Letter from John Marshall to Henry Clay (Dec. 22, 1823), in 9 THE PAPERS OF JOHN MARSHALL, at 365-66.

were enacted into law during his Chief Justiceship.

IV. OFF THE BENCH

In this edition, private correspondence and papers are interspersed with formal judicial opinions in the strict order in which Marshall created them. This chronological organization more closely approximates "reality" by presenting his life as he experienced it and provides a broader context and perspective for understanding his career as a jurist. One must keep in mind that being Chief Justice of the United States was not a full-time job. Beyond the courtrooms in Washington, Richmond, and Raleigh, Marshall led a full and active life. Attending four circuits and one Supreme Court term each year still left ample time for private pursuits and avocations. Many today might be surprised to learn that during his first six eventful years as Chief Justice—the period of the repeal of the Judiciary Act, *Marbury*, judicial impeachments, and the Burr trial—Marshall managed to write and publish a multi-volume history of *The Life of George Washington*. Indeed, the writing of this history appears to have been his principal preoccupation at that time—without doubt it looms much larger in his personal papers than do the dramatic events in the public history of the Supreme Court. Revising this work for a second edition turned out to be a lifelong undertaking. Another perennially engaging activity was the purchase of the Fairfax estate in the Northern Neck of Virginia, the one great business venture of Marshall's life. The necessity to defend title to that estate frequently brought him into court as a party litigant—a less familiar side of his "life in law."¹¹⁶ Throughout his life Marshall acted as the family chieftain, a role he took as seriously as he did his official duties. In this capacity he gave primary attention to his immediate family—caring for a sickly wife, educating his five sons and setting them up in professions—while also attending to the needs of relatives in various parts of Virginia and Kentucky.

A. *Historian and Biographer*

The Life of George Washington fills five massive volumes published by Caleb P. Wayne of Philadelphia between 1804 and 1807. The writing of the *Life* is perhaps the best-documented chapter of Marshall's own life thanks to the happy accident that preserved his correspondence with the publisher. Wayne not only saved the letters Marshall wrote to him, but also obligingly wrote drafts of his replies on the blank spaces of those letters. After Wayne's death in 1849, the letters passed into the hands of a Philadelphia lawyer. Ferdinand J. Dreer, a nineteenth-century

116. LEONARD BAKER, *JOHN MARSHALL: A LIFE IN LAW* (1974).

autograph collector, subsequently acquired the letters and gave them to the Historical Society of Pennsylvania.¹¹⁷ This correspondence between author and publisher records their mutual travails and vexations while offering an illuminating perspective on the history of book publishing in the early republic.

Marshall undertook the *Life* at the request of Bushrod Washington, to whom General Washington bequeathed all his papers. He accepted the assignment out of a sense of patriotic duty and a hope of financial remuneration (to help finance his purchase of the Fairfax estate). Beyond these motives, he also saw an opportunity to achieve renown as the author of the first history of the United States from its colonial beginnings through Washington's administration. He produced this voluminous history—totaling over thirty-two hundred printed pages—in five years while attending to his official duties as Chief Justice, an amazing feat of self-discipline and fluency with a pen. In the end, the work brought him more pain and embarrassment than acclaim as a historian and less financial reward than he had originally expected.

Writing for publication was a novel and often mortifying experience. Under constant pressure from Wayne to meet publication deadlines, Marshall fretted over infelicities of style, errors of diction, and prolixity that unavoidably resulted from hasty composition. He quickly came to regret devoting the entire first volume to a general history of the colonies and was “mortified beyond measure . . . that it has been so carelessly written. . . . Its inelegancies are more numerous than I had supposed could have appeared in it.”¹¹⁸ Not until the fourth volume did he begin to hit his stride, taking care to revise and prune before sending the manuscript off to the publisher. After devoting three volumes to the war, he was forced to compress the narrative of the “civil administration,” from the close of the war to Washington's death, in a final fifth volume. This proved to be the most difficult volume to write. There was too much ground to cover, the materials were too abundant, and, as events moved closer to the present, it became harder to maintain the stance of a dispassionate historian. He correctly predicted that his account of the partisan conflicts of the period would provoke political recrimination. He had:

endeavoured to detail the events of a most turbulent & factious period without unnecessarily wounding the dominant party, but without a cowardly abandonment or concealment of truth. What may be the consequences of having ventured to offend those whom truth however moderately related must offend, it is not difficult to

117. The Plan of the Volume and Editorial Policy, in 6 THE PAPERS OF JOHN MARSHALL, at xxvi.

118. Letter from John Marshall to Caleb P. Wayne (Aug. 10, 1804), in 6 THE PAPERS OF JOHN MARSHALL, at 321.

divine.¹¹⁹

The *Life* sold respectably, though below his and Bushrod's unrealistic expectations. For all its flaws, of which the author himself was painfully aware, Marshall produced the first national history of his country, written largely from Washington's immense collection of papers and supplemented by research in other sources such as newspapers, on which he relied for legislative debates, official communications, and other documents. For the war volumes he sent out inquiries to veterans for information about various battles and campaigns. Even in the midst of publishing the first edition of the *Life*, Marshall was anxious to get going on a revised second edition. He managed to get a few corrections into a second printing in 1805 of the first three volumes, but a fully revised and corrected second edition did not finally come out until many years later. Plans for that edition, as well as an edition of General Washington's correspondence, formed the leading topic of correspondence with Bushrod during the ensuing decades.

As long as copies of the first edition remained unsold, the publisher had little inducement to embark on a second. Having become versed in the economics of book publishing, Marshall readily agreed to postpone his ardent wish to redeem himself. Even when Bushrod in 1816 broached the idea of a new publication, the Chief Justice counseled caution: "I do not think a new edition ought to be hurried. . . . It cannot be pressed on the publick. We must wait till it is required."¹²⁰ He apparently began the serious work of revising around this time. By the end of 1821, the process was so far advanced that negotiations commenced for printing a revised work in four volumes. To make the undertaking more attractive to the printer, the Chief Justice at length proposed to publish the "introduction," essentially a history of the colonies, as a separate volume and incur the expense of printing it.¹²¹ There could be no objection, he said, since that part was "considered rather as an encumbrance on the residue of the work."¹²² He had in mind an edition of a thousand copies to be published first, he explained, "because (excuse this vanity & keep it to yourself) I think it is so much improved that its publication may probably be useful to what is to follow."¹²³ He was willing to take on the risk of publication, he added, because "my object" was "to do justice to my own reputation in this work."¹²⁴ Abraham Small, a Philadelphia

119. Letter from John Marshall to John Adams (July 6, 1806), in 6 THE PAPERS OF JOHN MARSHALL, at 452.

120. Letter from John Marshall to Bushrod Washington (Sept. 10, 1816), in 8 THE PAPERS OF JOHN MARSHALL, at 140.

121. Letter from John Marshall to Bushrod Washington (Aug. 12, 1823), in 9 THE PAPERS OF JOHN MARSHALL, at 336.

122. *Id.*

123. *Id.*

124. *Id.*

printer, agreed to this proposition and published Marshall's *History of the Colonies* in 1824.

In the meantime Marshall continued to make revisions to the main body of the *Life*, particularly the volume dealing with civil administration. When a newspaper reported in the summer of 1825 that he was writing a general history of the United States for these years, Marshall publicly denied the rumor, explaining that it probably arose from communications among his friends that he was revising the *Life*. That work, he ruefully confessed, "was composed with too much precipitation, and I have been engaged in correcting its language where it has been negligently written, and in pruning a minuteness of detail which gives a wearisome tediousness to the narrative now, though the facts were at the time of immense importance."¹²⁵ The revised edition in two volumes finally appeared in 1832, not coincidentally the centennial year of Washington's birth.

Along with a revised second edition of the *Life*, Marshall, beginning in 1815, collaborated with Bushrod in preparing an edition of Washington's letters. This project was a logical extension of the biography, in which he had quoted liberally from the General's correspondence. The *Life*, indeed, may be considered as a selected edition of Washington's papers. The two Justices worked intermittently during the next ten years, selecting and copying the letters and considering ways of organizing them. The letters were originally arranged according to the letterbook from which they had been copied, but Marshall preferred a strict chronological presentation. His other editorial principles included avoiding repetitions, omitting uninteresting letters, and correcting "apparent inaccuracies." He also considered suppressing letters that showed the General in an unflattering light.¹²⁶ By the summer of 1826, three volumes were ready for the press. Earlier that year, however, Jared Sparks had approached them with his own ambitious plan of preparing a comprehensive annotated edition of Washington's correspondence, for which he hoped to gain access to the papers at Mount Vernon. Bushrod was initially cold to this project, but when Sparks sweetened the deal by offering an equal interest in the copyright and profits of sale, Marshall "instantly advised his acceptance of it."¹²⁷ The Chief Justice told

125. Letter from John Marshall to Gales & Seaton (Feb. 22, 1825), in 10 THE PAPERS OF JOHN MARSHALL, at 147.

126. Letter from John Marshall to Bushrod Washington (Apr. 3, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 82-83; Letters from John Marshall to Bushrod Washington (Aug. 6, 1823, Oct. 11, 1823), in 9 THE PAPERS OF JOHN MARSHALL, at 334, 340; Letters from John Marshall to Bushrod Washington (Dec. 11, 1824, Apr. 9, 1825), in 10 THE PAPERS OF JOHN MARSHALL, at 134, 170.

127. Letter from John Marshall to Jared Sparks (Dec. 10, 1826), in 10 THE PAPERS OF JOHN MARSHALL, at 316-17.

Sparks that he believed Washington's correspondence "would appear to more advantage if published according to your views of the subject."¹²⁸ The edition he and Bushrod had in mind did not exceed a selective publication "unaccompanied by comment or notes of any description."¹²⁹ With a financial stake in Sparks's enterprise, there was no reason to proceed with their own publication plans.

B. The Fairfax Purchase

Throughout his life John Marshall adhered to the republican precept that ownership of land was the essential foundation for economic independence. This belief lay behind his decision to become a joint purchaser, with his brother James M. Marshall and others, of the vast land holdings of the Fairfax family.¹³⁰ He regarded it as a long-term investment that would provide a steady source of income from rents and also enable him to settle his sons on estates of their own. The undertaking was risky and for some years placed him in the precarious circumstance of needing all the funds he could command to pay off his share of the £20,000 sterling purchase price for the Fairfax manors. The purchase also brought him into the courts, both state and federal, as a litigant and called upon him to exercise his knowledge and skills as a lawyer on his own behalf. Research in old case files in Virginia courthouses, in the federal court case papers at the Library of Virginia, and in the Supreme Court's appellate case files has uncovered new documents concerning Marshall's involvement in the Fairfax litigation.¹³¹

Marshall agreed to become a purchaser of the Fairfax lands in consequence of his conviction that the sixth article of the Peace Treaty of 1783, which stipulated that there should be no future confiscations of estates belonging to British subjects, fully protected the Fairfax title to the Northern Neck proprietary. During the 1780s and 1790s, the state of Virginia asserted its title to the Fairfax estate on the ground that the lands, having been devised to an alien incapable of holding lands in the Commonwealth, escheated to the state. After some inconclusive legal sparring in the state and federal courts, Marshall mustered his formidable legal and legislative skills to engineer a compromise between the purchasers and the Commonwealth in

128. *Id.*

129. *Id.*

130. See generally Marshall and the Fairfax Litigation: From the Compromise of 1796 to *Martin v. Hunter's Lessee*, in 8 THE PAPERS OF JOHN MARSHALL, at 108-21 (analyzing Marshall's involvement in the Fairfax litigation).

131. Charles F. Hobson, *John Marshall and the Fairfax Litigation: The Background of Martin v. Hunter's Lessee*, in 2 J. SUP. CT. HIST. 1996, 36-50.

1796. By this compromise, the purchasers relinquished Fairfax's claim to those lands that were "waste and unappropriated" at the time of Lord Fairfax's death in 1781, and the Commonwealth relinquished its claim to lands "specifically appropriated" by Lord Fairfax "to his own use by deed or actual survey."¹³² Both parties gained from this agreement. The Commonwealth had an indisputable right to issue patents in its name for vacant lands in the former proprietary. The Marshalls had an uncontested title to the Fairfax manors, those lands in the proprietary that Lord Fairfax set aside for himself. Having previously contracted with Denny Fairfax (Lord Fairfax's devisee) to purchase the principal manors, the Marshalls in 1797 paid £6,000 to gain title to South Branch (56,000 acres on the south branch of the Potomac River in present-day West Virginia). In 1801 and 1802 they sold most of this manor to obtain revenue for the richer prize, Leeds Manor (160,000 acres lying mostly in Fauquier County). By 1806 the Marshalls were able to pay the final installment on the £14,000 for Leeds.¹³³

Earlier accounts of the Fairfax purchase did not satisfactorily explain why litigation over the title persisted after the 1796 compromise agreement between the Marshalls and the Commonwealth. In particular, why did a case that began as an ejectment brought by one David Hunter against Denny Fairfax in 1791 continue on the docket of the state courts for twenty years before going to the federal Supreme Court, where it was finally decided as *Martin v. Hunter's Lessee*¹³⁴ in 1816? The compromise was intended to put an end to pending legal cases and forestall future disputes. However, the compromise in fact proved to be the beginning, not the end, of litigation for the Marshalls. Lands they considered to be part of their purchase, that is, those tracts previously set aside by Lord Fairfax for his personal use, were claimed by persons holding patents from the Commonwealth. Those persons contended that their patents were for tracts formerly designated as waste and ungranted. Beginning in 1798, the Marshalls brought suits in the state High Court of Chancery to establish their title over those patent holders whose lands conflicted with their purchase.

Fortuitously, these chancery suits escaped the 1865 Richmond fire that destroyed Virginia's higher court records. They were still pending in 1802 when chancery jurisdiction was split among three courts at Williamsburg, Richmond, and Staunton. Five cases in which the Marshalls (or each singly) were parties were transferred to Staunton, where the original papers

132. 2 THE STATUTES AT LARGE OF VIRGINIA 22-23 (Samuel Shepard ed., 1970) (1835).

133. Appendix IV, in 6 THE PAPERS OF JOHN MARSHALL, at 543.

134. 14 U.S. (1 Wheat.) 304 (1816).

are preserved in the clerk's office of the Augusta County Circuit Court. Among these papers are pleadings and other documents in Marshall's hand that show he was closely involved in prosecuting the suits. He drafted bills in chancery and took depositions in Winchester, Martinsburg, and other locations in the lower Shenandoah Valley region where the disputed lands lay.¹³⁵ An interesting pattern emerges from these suits. None of the lands in dispute fell within South Branch or Leeds Manors, the two principal manors the Marshalls had originally contracted to purchase in 1793. How did these additional tracts enter the picture? It turns out that the Marshalls acquired these lands as a result of executing the two deeds that put the 1796 compromise into effect. By a deed of August 1797, Denny Fairfax conveyed to James M. Marshall his residuary estate in the Northern Neck. A second deed in 1798, signed by James Marshall and his wife, conveyed the waste and ungranted lands to the Commonwealth. The net result was not simply a transfer of title to the unappropriated lands from Fairfax to the state of Virginia, but a conveyance of additional manor lands to James Marshall. These lands, an unspecified part of the residuary estate, were identified in a subsequent deed of partition of June 1799 in which the Marshall brothers—James, John, Charles, and William—and their brother-in-law Rawleigh Colston divided them up into four parts.¹³⁶

This purchase of the additional manor lands, consisting of an estimated 12,500 acres lying in counties of northwestern Virginia and in present-day West Virginia, has been little noticed but provides the key to understanding the continuation of the Fairfax lands litigation. Nearly all of the title dispute cases concerned the lands divided up in the 1799 partition deed. Under the compromise of 1796, the Commonwealth relinquished to the purchasers its claim to all lands Lord Fairfax had specifically appropriated to himself "by deed or actual survey." Much the greater part of the Marshalls' claim under the Fairfax title, including South Branch and Leeds Manors, had been reserved by deed. The boundaries of these tracts were well-established by the public records in the state land office and were largely exempt from legal challenge. Most of the additional lands conveyed in 1797 and partitioned among the Marshalls in 1799, however, had been appropriated by survey rather than by deed of conveyance. The Marshalls insisted that their claim to the lands appropriated by survey was good under the compromise, but had difficulty establishing the superiority of their title over those claiming the same land under grants from the Commonwealth. In some cases

135. *Marshall v. Hunter and Pendleton*, in 6 *THE PAPERS OF JOHN MARSHALL*, at 95.

136. See *Martin v. Moffatt*, U.S. Cir. Ct., Va., *Ended Cases [Restored]*, 1824, Lib. of Va. (containing a copy of the partition deed written in Marshall's hand).

the best proof they could offer of a survey was a private memorandum book of the proprietor or of one of his surveyors. Their opponents contended that the only admissible evidence of an appropriation to Lord Fairfax's use was the survey books formerly kept in the proprietor's office and subsequently transferred to the state land office. In dismissing the Marshalls' bills in chancery, the state chancery court appeared to support a strict reading of the compromise as including only those surveys duly recorded in the land office books.¹³⁷

The additional manor lands partitioned in 1799 were the subject not only of new litigation arising after the compromise, but also of the long pending ejectment brought by Hunter against Fairfax in 1791. The connection between this case and the 1799 partition had hitherto gone unrecognized because the formal set of stipulated "facts" on which the ejectment was tried completely obscured it. Research published in a recent volume established that connection and clarified much of the puzzlement about the case. Hunter's ejectment concerned a tract of land on Cedar Creek in Shenandoah County, for which he had obtained a patent from the Commonwealth in 1789. In the statement of facts on which the case proceeded, the land in Hunter's patent was described as being part of the vacant land of the Northern Neck. In 1794, a state court ruled in favor of Fairfax's title to this land. Hunter appealed to the Supreme Court of Appeals of Virginia, where the case was pending at the time of the compromise between the state and the purchasers of the Fairfax estate. Once the compromise went into effect, the Supreme Court of Appeals of Virginia presumably should have suspended further proceedings and awarded the land to Hunter on the basis of that agreement. However, this did not happen. Eventually, in 1810, the Court did uphold Hunter's claim on the basis of the compromise. The Marshalls then took the case by writ of error to the Supreme Court, which upheld the Fairfax title in 1813 and in 1816 reaffirmed that decision and asserted its appellate power over state courts in *Martin v. Hunter's Lessee*.¹³⁸

On the face of it, the protraction of Hunter's case appeared to be a brazen attempt by the Marshalls to evade if not overturn the compromise of 1796 by means of a Supreme Court decision and thereby lay claim to the waste and ungranted lands of the Northern Neck. Nothing could be further from the truth, however. Nor was the appeal to the Supreme Court contrived to be a test case for determining the extent of the Supreme Court's appellate jurisdiction over the state judiciaries. So far as Chief Justice

137. *Marshall v. Hunter and Pendleton*, *supra* note 136, at 94-97; *Marshall v. Hunter and Pendleton*, in 6 THE PAPERS OF JOHN MARSHALL, at 122-24; *Marshall v. Janney*, in 6 THE PAPERS OF JOHN MARSHALL, at 202-06.

138. 14 U.S. (1 Wheat.) 304 (1816).

Marshall was concerned, the case from beginning to end was a live dispute over a particular parcel of land in Shenandoah County. He did indeed want to remove Hunter's case from the terms of the 1796 compromise, but only because Hunter insisted that the case should continue to be based on the fact stipulated in 1793, namely, that his patent fell within the unappropriated lands. Since that time, however, Marshall had discovered that Hunter's patent actually conflicted with a tract of land on Cedar Creek that had been allotted to James Marshall under the 1799 partition deed. In 1793 the Marshalls were probably unaware that Hunter's land was previously set aside by survey, but in any event the distinction between granted and ungranted lands was unimportant before the 1796 compromise. The Fairfax title affirmed by the state court decision of 1794 comprehended the entire proprietary, manor as well as unappropriated lands.

A researcher's delight is to come upon a previously unknown document that casts a whole new light on a subject and suddenly makes clear what was hitherto obscure. Something like this effect was produced by the discovery of a Marshall autograph document in the appellate case file of *Fairfax's Devisee v. Hunter's Lessee*,¹³⁹ the case decided three years before *Martin v. Hunter's Lessee*.¹⁴⁰ The manuscript is a tattered fragment, damaged by fire, but enough remains to identify it as an argument relating to the Hunter and Fairfax dispute. Marshall may have drawn it up for the use of counsel. Among other points in this fragment of a brief, Marshall contended that the compromise was "not in the record and of course cannot be considered by this court nor ought to have been considered by any court."¹⁴¹ That is, the case should be decided solely on the facts agreed in 1793, as if the compromise adopted three years later had never taken place. This apparent attempt to evade the compromise, however, was a response to Hunter's refusal to let the case be tried "on its real merits."¹⁴² If the compromise was to be brought into the case, then the purchasers should be allowed to show that the disputed property "was in fact set apart by Lord Fairfax for his own use & was at the time occupied by his tenant to whom the lands have since been actually conveyed in fee."¹⁴³

Marshall went on to suggest why the case had so long remained on the docket:

139. 11 U.S. (7 Cranch) 603 (1813).

140. See *Martin v. Hunter's Lessee*, Fragment of Argument, reprinted in 8 THE PAPERS OF JOHN MARSHALL, at 122-25 (referring to a partially destroyed fragment of the argument in *Fairfax's Devisee v. Hunter's Lessee*).

141. *Martin v. Hunter's Lessee*, Fragment of Argument (Dec. 1815 – Mar. 1816), in 8 THE PAPERS OF JOHN MARSHALL, at 124.

142. *Id.* at 125.

143. *Id.*

The offer to try this cause on its real merits in a new ejectment has been repeatedly made by the party claiming the Fairfax title & repeatedly rejected. He may therefore properly say now that the compromise forms no part of this case but will appear in a new ejectment if one should be brought.¹⁴⁴

Deed books confirm that the Cedar Creek survey lands were "conveyed in fee" by James Marshall to the occupying tenants between 1799 and 1807.¹⁴⁵

From Chief Justice Marshall's point of view, the Supreme Court cases of 1813 and 1816 were less important than has commonly been supposed. In no sense did the success or failure of his huge investment in the Fairfax lands hinge on the Supreme Court's decision. After the compromise of 1796, such a decision could not affect the main portion of the purchase, Leeds and South Branch manors. Before the compromise, Marshall sought to obtain a decision by the Supreme Court upholding the Fairfax title on the basis of the Treaty of 1783. There was less urgency for an affirmative ruling after 1796, though it might serve to place the additional lands purchased in 1797 on a more secure foundation. Marshall reasoned that if the Supreme Court declared the Fairfax title to be good under the treaty, such a decision might compel the state courts to interpret the compromise more liberally in the purchasers' favor by placing the burden of proof on claimants under the Commonwealth to show that their patents truly embraced vacant lands. For this purpose it was not necessary for the Supreme Court to have appellate jurisdiction. The Supreme Court's exposition of the treaty should be binding, said Marshall, on the principle "that the courts of every government are the proper tribunals for construing the legislative acts of that government." To Marshall's disappointment, the Supreme Court, though ruling in favor of the Fairfax title, did not do so on the basis of the 1783 treaty.¹⁴⁶

C. Family Life

One other theme of Marshall's private life that emerges from this edition of his papers, particularly the later volumes, is his relationship with his family. "Home was the scene of his real triumphs," observed Story in his eulogy of Marshall.¹⁴⁷ His 1783 marriage to Mary Willis Ambler was a true love match over a

144. *Id.*

145. *Id.* at 126 n.10.

146. Letter from John Marshall to James M. Marshall (July 9, 1822), in 9 THE PAPERS OF JOHN MARSHALL, at 239-40. In this letter Marshall said the "case of Hunter & Fairfax is very absurdly put on the treaty of 94 [Jay Treaty]." *Id.*

147. Joseph Story, *A Discourse Upon the Life, Character and Services of the Honorable John Marshall*, in 3 JOHN MARSHALL: LIFE, CHARACTER, AND JUDICIAL SERVICES 365 (John F. Dillon ed., 1903).

period of forty-six years until her death in 1831. Unlike the marriage of John and Abigail Adams, which is well chronicled in hundreds of letters exchanged by both partners, our knowledge of the Marshalls' marriage comes to us mainly through the husband's eyes in forty-five letters invariably addressed to "My dearest Polly." In a memoir written a year after her death, Marshall dilated on her "estimable qualities": her "very attractive" person, "uncommonly pleasing" manners, "fine understanding," "sweetest temper," "sound" judgment, "chaste delicate and playful wit," and "fine taste for belle lettre reading." All of these qualities made "her a most desirable and agreeable companion." Yet the joy he experienced in this companionate marriage was tempered by an abiding concern, briefly alluded to in this memoir, for his wife's "protracted ill health, and her feeble nervous system."¹⁴⁸ Indeed, her precarious health was a leitmotif of their life together, recurring time and again in his letters to her.

Polly Marshall's poor health, both emotional and physical, apparently had its origins in childbirth. Over a period of twenty-one years she endured ten pregnancies, losing four children in infancy, including two in quick succession in the summer of 1792. These losses triggered episodes of extreme melancholy and nervous collapse. The birth of John in 1798, while her husband was in France, sent her into a deep depression, and she was still bedridden and under a physician's care when Marshall returned home. In subsequent years such bouts of depression and nervous attacks increased to the point that she became a virtual recluse, incapable of mixing in company except for intimate family gatherings. She could not endure noise of any kind. "Her nervous system is so affected," Marshall wrote in 1816, "that she cannot set in a room while a person walks across the floor."¹⁴⁹ When the city of Richmond celebrated Christmas, Washington's birthday, and the Fourth of July by setting off fireworks, the Chief Justice always took his wife to their farm a few miles outside town to escape "the noisy rejoicings."¹⁵⁰ Even there, on the occasion of Washington's birthday in February 1821, she could hear the drum, and the "Cannon shook the house," which must have interrupted her "mornings nap."¹⁵¹ In 1824, Marshall wrote to a friend that his wife's health, "which was you know always delicate, has long been

148. Eulogy for Mary W. Marshall (Dec. 25, 1832), MARSHALL PAPERS (on file with Swem Library, College of William and Mary), *printed in* FRANCES NORTON MASON, *MY DEAREST POLLY: LETTERS OF CHIEF JUSTICE JOHN MARSHALL* 343-45 (1961).

149. Letter from John Marshall to Louis Marshall (Dec. 23, 1816), *in* 8 *THE PAPERS OF JOHN MARSHALL*, at 146.

150. Letter from John Marshall to Mary W. Marshall (Feb. 26, 1821), *in* 9 *THE PAPERS OF JOHN MARSHALL*, at 104.

151. *Id.*

so wretchedly bad as to make life almost a burthen to her.”¹⁵² In the summer of 1829, the “incessant barking” of a neighbor’s dog “scarcely left her a night of quiet since the beginning of summer.” If this situation continued, “she cannot live.” They could not go to their small country house, which afforded “her only a confined and hot chamber in which she thinks she cannot live.” Nor could they seek refuge with friends in the upper country, for his “wife cannot travel, and cannot sleep in a house with a family.” At her request the Chief Justice addressed a plaintive note communicating the circumstances in the hope that something could be done. It was “painful” to him that his family situation “should interfere in the slightest degree with the inclination of a neighbour,” but he had “refrained as long as possible from applying to you on this irksome subject.”¹⁵³

In consequence of Polly’s “wretched health,” Marshall was “entirely excluded from society.”¹⁵⁴ Although reading and conversation “beguiled” long winter evenings in which they were “confined . . . entirely to each other,” the Chief Justice was a decidedly convivial being who enjoyed company.¹⁵⁵ When judicial duties took him to Washington or to Raleigh, Marshall no doubt felt a sense of relief at escaping confinement mingled with feelings of guilt in abandoning Polly. In Washington, where most of his letters to Polly originated, the Chief Justice attended his share of dinners and parties. While cheerily reporting his social engagements, he took care not to betray too much enjoyment and to reassure his wife that home was where his heart lay. “I have been invited to dine with the President . . . & with the minister of France & tomorrow I dine with the British minister,” he informed Polly in February 1817.¹⁵⁶ After expressing his pleasure at being in the company of the French minister’s wife, he added: “In the midst of these gay circles my mind is carried to my own fire side & to my beloved wife.”¹⁵⁷ In February 1826 he reported having “received three invitations for evening parties this week,” but an influenza attack confined him to his boardinghouse, preventing him from feasting “my eyes with gazing at the numerous belles who flock to this place during the winters.”¹⁵⁸ Later that term,

152. Letter from John Marshall to Martha Jackson (May 7, 1824), in 10 THE PAPERS OF JOHN MARSHALL, at 88.

153. Letter from John Marshall to James Rawlings (July 25, 1829), in MARSHALL PAPERS (on file with Swem Library, College of William and Mary).

154. Letter from John Marshall to Louis Marshall (Dec. 7, 1817), in 8 THE PAPERS OF JOHN MARSHALL, at 160.

155. MASON, *supra* note 148, at 344.

156. Letter from John Marshall to Mary W. Marshall (Feb. 14, 1817), in 8 THE PAPERS OF JOHN MARSHALL, at 149.

157. *Id.*

158. Letter from John Marshall to Mary W. Marshall (Feb. 12, 1826), in 10 THE PAPERS OF JOHN MARSHALL, at 273.

after spending an "evening at Mrs. Adams' drawing room," he confided to Polly that "a person as old as I am feels that his home is his place of most comfort, and his old wife the companion in the world in whose society he is most happy."¹⁵⁹ Three years later, on the eve of Andrew Jackson's inauguration, he dined with outgoing President Adams, sitting next to Mrs. Adams and "an agreeable as well as handsome" lady of a member of Congress. This was followed by a dinner with the British minister and an unprecedented second dinner with the President. As for the approaching event of March 4, the Chief Justice wished he "could leave it all and come to you. . . . How much more delightful would it be to sit by your side than to witness all the pomp and parade of the inauguration."¹⁶⁰ One wonders whether Polly took as much comfort in these assurances as the Chief Justice intended to convey.

Polly Marshall's fragile health was a perennial source of concern to the Chief Justice. Another domestic preoccupation was the raising of five sons and a daughter. In 1815, the year he turned sixty, Marshall still had three sons of minor age who needed to be educated and established in professions. With respect to these children, the Chief Justice may have experienced more than his fair share of the vexations of parenthood. John, born 1798, and James K., born in 1800, manifested a rebellious streak and a tendency toward unruly behavior. As early as 1810, the father contemplated placing them in a Philadelphia countinghouse to be educated in business, but they were then too young.¹⁶¹ A few years later he sent them off to Harvard College, but both left Cambridge in the spring of 1815 under circumstances that caused him no little mortification. This incident came to light in the course of researching some new Marshall letters.

With the return of peace and the restoration of commerce in 1815, Marshall renewed his original plan to educate James for a business career.¹⁶² "He is now at Cambridge," he wrote in March 1815, "but I should remove him without hesitation the instant it becomes proper to place him in a counting house."¹⁶³ At that time James had been at Harvard for a year, during which he was "admonished for breaking a window" and "fined for improper attitude at worship." In May 1815 his father ordered James to

159. Letter from John Marshall to Mary W. Marshall (Feb. 14, 1817), in 8 THE PAPERS OF JOHN MARSHALL, at 149; Letter from John Marshall to Mary W. Marshall (Mar. 12, 1826), in 10 THE PAPERS OF JOHN MARSHALL, at 276.

160. Letter from John Marshall to Mary W. Marshall (Feb. 1, 1829), in MARSHALL PAPERS (on file with Swem Library, College of William and Mary).

161. Letter from Bushrod Washington to John Marshall (May 2, 1810), in 7 THE PAPERS OF JOHN MARSHALL, at 244-45.

162. Letter from John Marshall to Bushrod Washington (Mar. 16, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 81.

163. *Id.* at 81-82.

leave Cambridge for Philadelphia, having learned that a countinghouse had consented to accept him as an apprentice.¹⁶⁴ Concerned about the “conduct & morals of [his] son,” Marshall hoped that the proprietor of the firm would “exercise the authority of a Father a Guardian & a master.”¹⁶⁵ He added that “[h]is first sliding into bad company, should it happen, will I trust be firmly & sternly corrected.”¹⁶⁶ James eventually settled down and led the life of a gentleman farmer in Fauquier County.

His son John also left Harvard involuntarily at this time but not on orders from his father. The faculty voted to dismiss him for unspecified “immoral & dissolute conduct, which had been long continued & under circumstances that left little hope of his reform.” On receiving this news, an anguished Marshall reproached himself for placing “unlimited confidence” in his son and being “in some measure accessory to his disgrace.”¹⁶⁷ He was grieved “to perceive in him no mark of sincere penitence, no deep conviction of his faults, no resolute determination to correct them.”¹⁶⁸ The boy’s reformation depended “on himself, & he may rest assured that it will not be in his power to practice imposition on me.”¹⁶⁹ John, like his brothers, also became a farmer, but, fond of alcohol and gambling, he continued to be a source of disappointment and exasperation to his father. In 1827, when Marshall was in his seventies, John’s “extravagance” and “indiscretion” involved the Chief Justice “in debts which require all my resources and from which I shall be several years in extricating myself.”¹⁷⁰ Marshall’s disgust at his son’s behavior is reflected in a previously unknown will he drew up in April 1827, the original of which is in a chancery case file in Fauquier County. “Some indiscretions on his part in the management of pecuniary affairs extremely painful to me,” he wrote, “have induced me to place the property I intended for him in the hands of trustees for the benefit of his family.”¹⁷¹ John was not the only son to incur

164. Letter from John Marshall to Willing & Francis (May 2, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 89-90.

165. *Id.* at 90.

166. *Id.*

167. Letter from John Marshall to [Joseph G. Cogswell?] (Apr. 9, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 83. See also Letter from John Marshall to Joseph G. Cogswell (May 29, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 398-99 (discussing the conduct of his “very culpable son”).

168. Letter from John Marshall to Joseph G. Cogswell (Apr. 9, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 84.

169. *Id.* at 84. Letter from John Marshall to Joseph G. Cogswell (May 29, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 398-99.

170. Letter from John Marshall to Philip Slaughter (Sept. 22, 1827) (on file with the MARSHALL PAPERS); Letter from John Marshall to James Marshall (Apr. 7, 1828) (on file with the MARSHALL PAPERS).

171. Will, Apr. 12, 1827, in *Ambler v. Marshall* (1838), clerk’s office, Fauquier County Circuit Court, Warrenton, Va.

debt. Writing to James in 1828, Marshall was “surprized as well as grieved at the magnitude” of his debts and expressed the hope that in the next two years he would be able “to liberate” himself “entirely” or at least bring the debt under control. He complained that his sons did not “feel the proper horroure at owing money which cannot be paid.” Vexed as he was by his sons’ inability to manage their finances, the Chief Justice accepted the trials of parenthood with philosophic calm. Those “who have several children cannot expect that all will be prudent, and I have a portion of happiness with which I ought to be content.”¹⁷²

Marshall also sent his youngest son, Edward C., born in 1805, to Harvard, which he entered in 1823. Story kindly undertook to help the young scholar get settled and to advance funds on his behalf.¹⁷³ Although the father had given Edward money, he purposely restricted the amount so as not to “encourage expensive habits.”¹⁷⁴ A subsequent advance of money went directly to Story, Marshall explaining that “my sons, in the north, have such an aptitude for spending money, that I am unwilling to tempt Edward by placing too much in his hands.”¹⁷⁵ Unlike John and James, Edward compiled a creditable record at college, though he was once “admonished for a Festive Entertainment.” He received his degree in 1826, the only one of the Chief Justice’s sons to graduate from Harvard. Edward, too, managed to put his father in an embarrassing predicament, or rather the father unwisely allowed himself to be influenced by his son so as unknowingly to commit a social impropriety. This incident gave rise to two remarkable letters published in Volume 10 of the *Marshall Papers*.

Soon after graduating from Harvard, Edward informed his parents that he had become engaged to a young lady from Cambridge, the daughter of Judge Samuel Fay. Without having actually discussed the engagement in person with Edward, Marshall wrote a friendly letter to Judge Fay welcoming his daughter to the family, noting that his

sons situation is far from splendid, but I hope to make it comfortable with proper exertions on his part; and though he will reside in the country, the neighborhood is far from being ineligible. His wife must be an economist, & will I trust find her truest happiness at home!¹⁷⁶

172. Letter from John Marshall to James K. Marshall (Dec. 21, 1828), in MARSHALL PAPERS (on file with Swem Library, College of William and Mary); Letter from John Marshall to Philip Slaughter (Sept. 22, 1827), in MARSHALL PAPERS (on file with Swem Library, College of William and Mary).

173. Letter from John Marshall to Joseph Story (June 1, 1823), in 9 THE PAPERS OF JOHN MARSHALL, at 323.

174. *Id.*

175. Letter from John Marshall to Joseph Story (Sept. 26, 1823), in 9 THE PAPERS OF JOHN MARSHALL, at 338.

176. Letter from John Marshall to Samuel Fay (Sept. 15, 1826), in 10 THE PAPERS OF JOHN MARSHALL, at 302-03.

To his acute embarrassment, the Chief Justice received a reply (not found) that conveyed Judge Fay's "positive and deliberate" refusal to consent to the marriage. This elicited a second letter to Judge Fay, which Marshall crafted with the exacting attention he gave to composing his judicial opinions. The result was a literary gem, worthy of Jane Austen, whose novels he was reading at the time. Cast in the form of an apology for a gross impropriety, it expressed his deep mortification while communicating a subtle reproach to the Cambridge judge. Acknowledging the "intrinsic weight" of Fay's objections to the marriage "independent of their authority," Marshall hoped the Judge's decision was "made with the approbation of Mrs. & Miss Fay."¹⁷⁷

A devoted husband and father, Marshall (the oldest of fifteen children) also dutifully tended to the needs of relatives in the numerous branches of his prolific family living in Virginia and Kentucky.¹⁷⁸ He raised an orphaned nephew in his household for ten years. He looked after the affairs of a widowed sister. He gave advice about the education and disciplining of nephews who had the same bent for misbehaving as his own sons. For example, he advised the immediate withdrawal of a nephew who had committed indiscretions while attending the Military Academy at West Point. Not only were the prospects unfavorable for "a young man in the military line in this country," but there was "danger of his acquiring very pernicious habits."¹⁷⁹ "He is at a time of life when it is extremely dangerous to trust him to such a place without a prudent & experienced person who will in some measure

177. Letter from John Marshall to Samuel Fay (Oct. 15, 1826), *in* 10 THE PAPERS OF JOHN MARSHALL, at 309-11. *See also* Letter from John Marshall to Joseph Story (Nov. 26, 1826), *in* 10 THE PAPERS OF JOHN MARSHALL 315 (discussing Marshall's reading of Jane Austen).

178. For a sample of John Marshall's relationships with his extended family, see Letter from John Marshall to Martin Marshall (Sept. 10, 1816), *in* 8 THE PAPERS OF JOHN MARSHALL, at 138; Letter from John Marshall to Louis Marshall (Dec. 23, 1816), *in* 8 THE PAPERS OF JOHN MARSHALL, at 146; Letter from John Marshall to Louis Marshall (Aug. 30, 1817), *in* 8 THE PAPERS OF JOHN MARSHALL, at 157; Letter from John Marshall to Louis Marshall (Dec. 7, 1817), *in* 8 THE PAPERS OF JOHN MARSHALL, at 159-60; Letter from John Marshall to Louis Marshall (May 19, 1818), *in* 8 THE PAPERS OF JOHN MARSHALL, at 190-91; Letter from John Marshall to Basil Duke (June 8, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL, at 315-16; Letter from John Marshall to Basil Duke (July 24, 1819), *in* 8 THE PAPERS OF JOHN MARSHALL, at 364; Letter from John Marshall to Agatha Marshall (July 1, 1820), *in* 9 THE PAPERS OF JOHN MARSHALL, at 61; Letter from John Marshall to Louis Marshall (July 1, 1820), *in* 9 THE PAPERS OF JOHN MARSHALL, at 61-62; Letter from John Marshall to Martin P. Marshall, *in* 10 THE PAPERS OF JOHN MARSHALL, at 306-07.

179. Letter from John Marshall to Lucy Marshall (Aug. 26, 1817), *in* 8 THE PAPERS OF JOHN MARSHALL, at 156.

superintend his education."¹⁸⁰ The Chief Justice spoke from experience. Despite his misgivings about West Point, he wrote numerous letters on behalf of his nephews seeking admission to the Military Academy. He also helped another nephew secure a midshipman's warrant and a choice assignment to a navy ship.¹⁸¹

This review of Marshall's life off the bench has singled out his pursuits as a historian and biographer, his business affairs as a purchaser of the Fairfax estate, and his role as a husband and father. Other activities reflected in his papers rate at least a brief mention. For example, Marshall was a serious farmer, regularly escaping the bustle of town life for his farm on the Chickahominy River a few miles outside Richmond. There, he spent many pleasant hours in "*laborious relaxation*,"¹⁸² though complaining lightheartedly to Richard Peters (another jurist-farmer) that his plantation was "productive only of expence & vexation."¹⁸³ Even in the midst of his Supreme Court term in Washington, the Chief Justice directed his thoughts to the farm, anxious to know whether his overseer was carrying out his "explicit instructions" about preparing plaster and drawing "in the stalks & hay" and, also, how "the grubbing & cutting" was progressing.¹⁸⁴ Within his crowded schedule of judicial duties and private occupations, Marshall also found time to answer calls to public service on behalf of his state. In 1812 the legislature appointed him chairman of a commission to survey a water and land route to connect the eastern and western regions of the state. After leading an arduous expedition up the James River, across the mountains, and into the interior of present-day West Virginia, he prepared a report that became a landmark in the history of internal improvements in Virginia.¹⁸⁵

180. *Id.*

181. For various letters outlining the Chief Justice's assistance to numerous nephews, see Letter from John Marshall to [James Monroe?] (Mar. 10, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 66; Letter from John Marshall to [William H. Crawford?] (Oct. 20, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 101; Letter from John Marshall to [Joseph Story?] (Feb. 16, 1816), in 8 THE PAPERS OF JOHN MARSHALL, at 126; Letter from John Marshall to Benjamin W. Crowninshield (Feb. 21, 1818), in 8 THE PAPERS OF JOHN MARSHALL, at 180; Letter from John Marshall to Benjamin W. Crowninshield (Mar. 13, 1818), in 8 THE PAPERS OF JOHN MARSHALL, at 186; Letter from John Marshall to James Barbour (Sept. 7, 1826), in 10 THE PAPERS OF JOHN MARSHALL, at 301.

182. Letter from John Marshall to James Monroe (June 25, 1812), in 7 THE PAPERS OF JOHN MARSHALL, at 333.

183. Letter from John Marshall to Richard Peters (Oct. 12, 1815), in 8 THE PAPERS OF JOHN MARSHALL, at 100.

184. Letter to John Marshall to Jaquelin A. Marshall (Feb. 16, 1818), in 8 THE PAPERS OF JOHN MARSHALL, at 179. See also Letter from John Marshall to James K. Marshall (Feb. 26, 1821), in 9 THE PAPERS OF JOHN MARSHALL, at 105.

185. River Commission Report, in 7 THE PAPERS OF JOHN MARSHALL, at 355-79.

In 1828 he attended a convention on internal improvements held in Charlottesville and submitted a series of resolutions. And at the age of seventy-four in 1829 he served as a delegate to the Virginia constitutional convention, where he proved to be an able and impassioned defender of the principle of judicial independence.¹⁸⁶

CONCLUSION

In making all the extant papers accessible, amplifying their meaning with annotation, and enhancing their usability with detailed yet discriminating indexes, *The Papers of John Marshall* promises to facilitate systematic study of the jurist who presided over the Supreme Court for more than three decades—a period in which the Court consolidated its power and successfully asserted its claim to decide cases according to the law of the Constitution. Incomplete as it is, a published documentary record exists for conducting more probing and sophisticated research into Marshall's mind and personality than was heretofore possible. My paper has focused on those aspects of his life and career that are most fully chronicled in the published edition, drawing attention to new or previously unknown documents that contain fresh information or compel us to modify previously held views. My purpose, frankly, has been to publicize the edition and to promote its use among the community of scholars it is intended to serve. In a brief concluding section, I would like to report the results of an investigation that I undertook with some trepidation. I wanted to find out if the *Marshall Papers* had entered the realm of academic discourse, using as evidence the citations in learned journals. With online databases such as LEXIS-NEXIS, JSTOR, and InfoTrac, such an experiment can be carried out with a few clicks and keystrokes.

I was interested not only in the frequency of citation but also, more importantly, in how the edition was being used. What documents did scholars cite or quote and did they refer to the annotation as well? For this purpose the most convenient place to search was the law reviews, which are completely available online, though I checked other academic journals as well. I quickly discovered that references to John Marshall in legal scholarship are plentiful but that these far exceed the citations of the edition. This disparity is easily explained. Most of the references to Marshall in law reviews are to his judicial opinions; for these the citation will always be to *United States Reports* or to *Federal Cases*. Only when the document is non-judicial—a letter or speech, for example—is the edition likely to be cited. Given this

186. Marshall's participation in these conventions is covered in 11 THE PAPERS OF JOHN MARSHALL (forthcoming in 2002).

unalterable circumstance, I was pleasantly surprised at the number and variety of ways the edition has begun to infiltrate the professional literature.

For example, scholars are turning to the edition for documents arising from Marshall's legal education and practice such as his law notes, legal pleadings and arguments, and the British debt cases.¹⁸⁷ Others cite the editor's introduction to Volume 5, which discusses Marshall's practice in the context of the legal culture of post-Revolutionary Virginia.¹⁸⁸ Apart from the law practice, the edition appears to be stimulating renewed interest in Marshall's speech of March 1800 on the extradition of Jonathan Robbins.¹⁸⁹ Both Ruth Wedgwood and H. Jefferson Powell, law professors with a pronounced interest in the history of the early republic, have not only closely analyzed the speech as published in the edition but also taken careful note of the editors' commentary. They stress the importance of the speech as a seminal document in the perennial debate concerning the president's authority over foreign affairs. Powell and Walter Dellinger also see the speech as clarifying the meaning of Marshall's famous distinction between law and politics uttered in *Marbury*.¹⁹⁰

So far the edition has focused new attention on Marshall's pre-Supreme Court career, particularly his activities as a Federalist politician during the 1790s. Two recent articles make abundant use of Marshall's published papers for these years while at the same time criticizing the omission of a document that has long been attributed to Marshall. This is the 1799 "Address of the Minority of the Virginia Legislature," drawn in defense of the Alien and Sedition laws.¹⁹¹ Beveridge uncritically stated that

187. See generally Richard A. Brisbin, Jr., *John Marshall and the Nature of Law in the Early Republic*, 98 VA. MAG. OF HIST. AND BIOGRAPHY, 63, 66 (1990); Steve Sheppard, *Casebooks, Commentaries, and Curmudgeons: An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547, 555-56 (1997); James E. Phander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against Government*, 91 NW. U. L. REV. 899, 907, 912 (1997); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 420-23 (1999).

188. Richard A. Brisbin, Jr., *John Marshall on History, Virtue, and Legality*, in JOHN MARSHALL'S ACHIEVEMENT 107, 114 n.107 (Thomas Shevory ed., 1989); William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 568 (1994).

189. Speech of the Honorable John Marshall (Mar. 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL, at 82-109.

190. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 339-52, 354 n.476 (1990); H. Jefferson Powell, *The Founders and the President's Authority Over Foreign Affairs*, 40 WM. & MARY L. REV. 1471, 1511-28 (1999); Walter Dellinger and H. Jefferson Powell, *Marshall's Questions*, 2 GREEN BAG 2d 367-77 (1999).

191. See Andrew Lenner, *A Tale of Two Constitutions: Nationalism in the Federalist Era*, 40 AM. J. LEGAL HIST. 72, 72-105, 79-80 n.26 (1996); Gregg

Marshall wrote the address, and many others in turn have uncritically accepted Beveridge. The Marshall editors briefly stated in a footnote their reasons for believing that Henry Lee, who actually presented the address to the legislature, was the likely author.¹⁹² This note clearly did not settle the question, and given the widespread attribution of Marshall's authorship the editors perhaps should have undertaken a more explicit and detailed defense of their decision not to publish the document. In any event, scholarship has progressed beyond the automatic assumption that he wrote the address.

Scholars are also following suit as the edition moved into Supreme Court years. Marshall's correspondence during Jefferson's first administration, when the federal judiciary seemed to be in constant crisis, is attracting increasing scrutiny. Prominent in this regard is the perennial effort to fathom the meaning and motives of *Marbury*. On this subject and on the broader topic of judicial independence, the literature quotes extensively from the edition's publication of the Justices' correspondence in the spring of 1802 concerning the repeal of the Judiciary Act.¹⁹³ The same is true of the celebrated letter written during the impeachment proceedings against Samuel Chase in which the Chief Justice stated that the "doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault." Here, as in other writings, Marshall left it to scholars to puzzle over what exactly he meant.¹⁹⁴ Perhaps this is the place to confess to an embarrassing editorial error. Marshall dated his letter to Chase January 23, 1804, but the editors placed it in January 1805 on the assumption that it was written on the eve of the impeachment trial that began in February of that year. In

Costa, *John Marshall, the Sedition Act, and Free Speech in the Early Republic*, 77 TEX. L. REV. 1011, 1011-47 (1999).

192. Editorial Note on Congressional Election Campaign, in 3 THE PAPERS OF JOHN MARSHALL, at 499 n.1.

193. James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219, 241-55 (1992); David Engdahl, *John Marshall's 'Jeffersonian' Concept of Judicial Review*, 42 DUKE L. J. 279, 324-25 and n.146 (1992); Charles Gardner Geyh and Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT. L. REV. 31, 81-83 (1998).

194. Letter from John Marshall to Samuel Chase (Jan. 23, 1804), in 6 THE PAPERS OF JOHN MARSHALL, at 347-48; O'Fallon, *supra* note 193, at 241; Engdahl, *supra* note 193, at 331-32; Barry Friedman, *'Things Forgotten' in the Debate over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 737 (1998); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 333 (1998); Mark A. Graber, *Establishing Judicial Review? Schooner Peggy and the Early Marshall Court*, 51 POL. RES. Q., 234, 234-35 (1998).

fact, however, the Chief Justice correctly dated the letter.

In some instances the project has assisted scholarly research by sharing information and copies of letters in advance of their publication in the edition. In 1985 Stewart Jay published Marshall's letter to St. George Tucker of November 1800 in an appendix to his massive study of the origins of the federal common law. Jay credited the editors for identifying Tucker as the recipient by means of internal evidence.¹⁹⁵ Another scholar obtained a copy of Marshall's letter to Bushrod Washington in 1814 concerning state bankruptcy laws and quoted it in an article published eight years before its publication in the edition.¹⁹⁶ The process can also work the other way. In 1990 Professor Wedgwood alerted the project to the sale of the previously unknown letter from Marshall to Henry Clay of December 1823 in response to a Congressional proposal to reduce the Supreme Court's appellate jurisdiction. As a bidder at the sale, Wedgwood obtained a copy of the letter and sent it on to the project. Both Wedgwood and another legal scholar published the full text of the letter in journal articles before its publication in the edition.¹⁹⁷

This inquiry has yielded encouraging evidence of scholarly use of the Marshall edition. There is always a time lag, of course, between the publication of a volume and its entry into the stream of scholarship. With the passage of time, I fully expect to see an increase in the rate of use and an enlargement of the universe of users. There is still much "educating" to be done in bringing the edition to the attention of lawyers, political scientists, and historians. It is frustrating, for example, to see an unreliable collection of Marshall documents published in 1914 continue to be cited instead of the modern edition.¹⁹⁸ My hope is that the bicentennial of Marshall's appointment will not only suitably memorialize the man and the jurist but also afford opportunities to publicize this edition of his papers.

195. Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1326-28 (1985); Letter from John Marshall to St. George Tucker (Nov. 27, 1800), in 6 THE PAPERS OF JOHN MARSHALL, at 23-25.

196. John C. McCoid, II, *The Origins of Voluntary Bankruptcy*, 5 BANK. DEV. J. 361, 379, 99 n.98 (1988).

197. Ruth Wedgwood, *Cousin Humphrey*, CONSTITUTIONAL COMMENTARY, 247-69 (1997); Frances Howell Rudko, *Matter of Power: Structural Federalism and Separation Doctrine in the Present*, 32 U. RICH. L. REV. 483 (1998).

198. JOHN EDWARD OSTER, THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL (1914).