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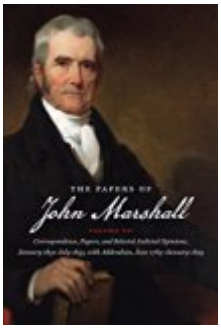
Charles F. Hobson, ed. *The Papers of John Marshall, Volume 12: Correspondence, Papers, and Selected Judicial Opinions January 1831-July 1835, With Addendum June 1783-January 1829.* Chapel Hill: University of North Carolina Press, 2006. i + 603 pp. $80.00 (cloth), ISBN 978-0-8078-3019-2.



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Published on H-Law (August, 2006)

John Marshall: Incomplete but Infinitely Enriching

The first volume of the *Papers of John Marshall* appeared in 1974, with Herbert A. Johnson as the initial editor. Thirty-two years later Johnson is a Distinguished Professor Emeritus at the University of South Carolina School of Law and the project he began has come to an end with the publication of volume 12.

The Marshall we find in these pages is, as we will see, in spirit the same John Marshall who presided over the Supreme Court for thirty-five years. But the four plus years embraced within this volume also depict an individual whose initially robust health deteriorates as a result of accidents and disease, leading to his untimely and unanticipated death in July 1835. More tellingly, the Court and nation have themselves changed and this is a period within which Marshall as Chief Justice has less and less to say about how matters unfold. He remains an acute observer of the political and social scene, very much aware of and predictably unsympathetic to matters like the nullification doctrine and President Andrew Jackson's war on the Bank of the United States.[1] The Court itself, however, is not involved in these and similar controversies, and while at least three major opinions (noted below) flow from Marshall's pen, this is a far different time for Marshall and his Court.

In one respect, the current general editor, Charles F. Hobson, has worked himself out of a job, ending a task he began in 1987 with volume 5. But I suspect that both Hobson's and our relationship with Marshall and his papers is just beginning, as we now have before us, for better and for worse, a comprehensive record of what Marshall had to say about himself and the Constitution, the Court, and the nation with which he is so closely associated.

I say for better and for worse because the appearance of this volume is an occasion for both celebration and regret. The good news is that the project is at an apparent end. Volume 12 does contain an almost sixty-page addendum within which the editors have assembled fifty-six documents from 1783 to 1829 that did not find their way into previous volumes. There is, then, the tantalizing possibility that further labors will uncover additional materials, filling in the numerous gaps that exist in the body of Marshall's life and work.

It is those gaps, in turn, that spell out the proverbial bad news: that the "complete" papers of one of the most important members of the founding generation span a scant twelve volumes. For, as the editors have stressed continuously since the beginning of this project, a substantial portion of Marshall's papers have been lost or destroyed, leaving us with a written record that is at best incomplete.

This reality, which stands in stark contrast to the situation for many of his contemporaries, looms large. Consider for example the parallel undertaking to publish a complete modern edition of the papers of James Madison. It now includes twenty-nine volumes, the first of

which appeared in 1962, initiating a sequence that ended with the publication of volume 17 in 1991. But that series took us only to 1801, and is and will be supplemented by three additional series, covering respectively, Madison's service as Secretary of State, as President, and his retirement.[2]

Madison and Marshall lived what were, in important respects, parallel lives. The Father of the Constitution was four years older than the Great Chief Justice and, as a result of ill health, did not serve in the Continental Army during the American Revolution, an experience of profound importance for Marshall.[3] Both played active, albeit different, roles in the events leading to the ratification of the Constitution–Madison as its principle author and Marshall as a delegate to the Virginia ratification convention. They then, in turn, were two of the major figures in the implementation of a document Madison famously described as the "more or less obscure and equivocal, until [its] meaning be liquidated and ascertained by a series of particular discussions and adjudications."[4] And they died within months of each other, Marshall on July 6, 1835 and Madison on June 28, 1836.

Madison and Marshall were different people and had starkly different temperaments. It is then not surprising to find one writing more than the other. But the difference in known output, even with Madison's papers far from complete, is staggering. And I, at least, cannot help but wonder what it is that we are missing, albeit through no fault of the editors of Marshall's papers, who have struggled long and hard to assemble the materials that have survived.

The comparison between Marshall and Madison is, from one important perspective, unfortunate and unfair, as Marshall's editors have chosen–wisely, I believe–to reproduce only a small portion of his most important written work, the 550 opinions he produced during his tenure on the Supreme Court. That decision was both necessary and practical. A substantial number of the cases decided by the Court were then, and remain now, of only passing interest. The important ones are, in turn, widely available. The *Papers* contain, accordingly, most of Marshall's constitutional opinions and a selection of the non-constitutional ones, supplemented in each instance by an appendix that provides a complete list of every opinion Marshall wrote, with citations to the official reports. [5]

These are in turn supplemented by extensive and thoughtful "Editorial Notes" on each of the major opinions. In volume 12, for example, both *Cherokee Nation v. Georgia* (1831) and *Worcester v. Georgia* (1832) are discussed at length. These notes provide the reader with a history of cases that, as the editors stress, almost certainly did not lead President Andrew Jackson to declare that "Marshall has made his decision, now let him enforce it" (p. 156), but which were nevertheless of considerable importance to the nation and the development of the Court as an institution.

All of this is noteworthy and, given the significance of Marshall's time and labors on the Court, of immense value. Indeed, a conscientious reviewer would at this point acknowledge both the considerable care that has been taken in the preparation of these volumes and the substantial amount of scholarship they contain, in both the primary contents and the editorial notes. These are masterful works, and on that basis alone worthy of our attention and respect. There is nevertheless an aspect of the *Papers* that, at least for me, is of far greater value. For it is in Marshall's letters in particular that we find glimpses of his character and his views that are not widely noted, immensely interesting, and potentially incredibly important.

In volume 12, for example, we find the familiar portrait of an individual who, late in his life, was actively planning to leave the home he had occupied in Richmond for some fifty years and move in with his son, James K. Marshall, at Leeds in Fauquier County, Virginia. Here we see glimpses of Marshall's well-known fondness for the good life, as he frets in a letter to James about the consequences to be incurred when "emptying the demijohns into casks," a process that will make for safer transport but at the same time result in "immense" waste (p. 488). This and other letters of this sort offer insights into Marshall the man, views that can and have been described in biographies and articles, but that come to life far more vividly when read in the full text of a letter that includes this and so much more.

In a similar and far more suggestive vein, there are tantalizing glimpses of Marshall's thoughts about matters constitutional that he never had the occasion to address as Chief Justice, but that are of extraordinary interest to us today. For example, in a May 9, 1833 letter to Jasper Adams, at the time President of the College of Charleston in Charleston, South Carolina, Marshall observes:

"No person, I believe, questions the importance of religion to the happiness of man even during his existence in this world. It has at all times employed his most serious meditation, & had a decided influence on his conduct. The American population is entirely Christian, &

with us, Christianity & Religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it. Legislation on the subject is admitted to require great delicacy, because freedom of conscience & respect for our religion both claim our most serious regard" (p. 278).

The immediate impetus for these comments was a volume Adams had published "on the relation of Christianity to civil government."[6] But the timing of the letter is especially interesting given that it was written at almost the same moment Marshall's great friend and colleague, Justice Joseph Story, was publishing his own thoughts on these matters, his "response" to an essay by Thomas Jefferson within which the author took issue with the notion that Christianity should be seen as a part of the common law.[7] There are no references to either the Adams letter or these matters in two of the most important Marshall biographies, those of Albert J. Beveridge and R. Kent Newmyer, or at least none that an admittedly quick review uncovers.[8] But the position Marshall apparently takes here is potentially quite significant for those of us enmeshed in a twenty-first-century debate about the nature of Church-State relations and the meaning of the Establishment Clause.

Of course, that one letter hardly tells the tale. And there are further suggestions of a much more complicated Marshall view in an account of his meeting with a visiting English author and intellectual, Harriet Martineau. She observed that "he asked me much about English politics, and especially whether the people were not fast ripening for the abolition of our religious establishment–an institution which, after a long study of it, he considered so monstrous in principle, and so injurious to true religion in practice, that he could not imagine that it could be upheld for anything but political purposes" (p. 453).

This "evidence" of Marshall's views on establishment matters is both derivative and incomplete. It is nevertheless extraordinarily interesting, especially since yet another Marshall opinion, *Barron v. Baltimore* (1833) (p. 259), has at least some bearing on why the Court did not address these issues during Marshall's tenure. For it was in *Barron* that the Court confirmed that the various guarantees articulated in the Bill of Rights did not apply against the states.[9]

These are the sorts of gems one finds in Marshall's papers. And so, like its predecessors, volume 12 whets the appetite for further reading within them, an examination of John Marshall on his life and views that will undoubtedly prove rich, rewarding, and invaluable.

Notes

[1]. In a December, 1832 letter to William Gaston, for example, he characterizes South Carolina as "insane" albeit not "so absolutely mad as to have made her declaration of war against The United States had she not counted on unifying the south–beginning with Virginia" (p. 246). In February, 1834, in turn, in a letter to his son Jaquelin A. Marshall he notes, in the context of Jackson's removal of federal deposits from the Bank of the United States, that "nothing will rescue us from our present embarassments but a bank of the United States and that I fear is unattainable" (p. 349).

[2]. There are now seven volumes in the Secretary of State series, which began in 1986 and now takes us only to August, 1804. The five volumes in print in the Presidential Series, which began in 1984, in turn run only to February, 1813. And there are as yet no published volumes in the Retirement Series.

[3]. Marshall was, for example, with George Washington at Valley Forge during the devastating winter of 1777-78, an experience that taught him a great deal about both the human condition and the problems caused by a government, often hamstrung by the bickering and recalcitrance of thirteen decidedly "sovereign" states, that was either unwilling or unable to provide for its citizens. No Marshall letters from that period have survived; the papers in volume 1 from that period consist simply of records documenting his service. The lessons Marshall learned from that experience cannot, however, have been far from his mind as he charted his nationalist vision in the opinions he would pen as Chief Justice.

[4]. The Federalist No. 37 at 236 (James Madison), in Jacob E. Cooke, ed., *The Federalist* (Middletown, Conn.: Wesleyan University Press, 1961).

[5]. The editors also decided to include every opinion Marshall wrote while riding the circuits, an obligation imposed on the Court at that time that had each of the Justices hearing cases in the various United States Circuit Courts, in Marshall's case, those for Virginia and North Carolina. These opinions are also available in the reporter *Federal Cases*. But those volumes reproduce them in alphabetical order, making it virtually impossible to identify and examine the work of a particular Justice. The presence of these opinions in the *Papers* is accordingly an invaluable for those wishing to examine this aspect of Marshall's judicial career.

[6]. Jasper Adams, *The Relation of Christianity to Civil Government in the United States* (Charleston, S.C.: 1833).

[7]. The Jefferson essay, "Whether Christianity is a Part of the Common Law? " appeared in a posthumous volume, Thomas Jefferson, *Reports of Cases Determined in the General Court of Virginia from 1730, to 1740: and from 1768, to 1772* (Charlottesville: F. Carr & Co., 1829). Story's response, "Christianity a Part of the Common Law," originally appeared at *The American Jurist and Law Magazine* 9 (1833), pp. 346-348; and may also be found in William Story, ed., *I The Life and Letters of Joseph Story* (Boston: Little & Brown, 1851), pp. 429-434.

[8]. Albert J. Beveridge, *The Life of John Marshall*, 4 vols. (Boston and New York: Houghton Mifflin Company, 1916-1919); and R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001).

[9]. That is, did not apply at that time, given the absence of the Due Process Clause of the Fourteenth Amendment, which provided the textual basis for selective incorporation by future Courts.

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Citation: Mark R. Killenbeck. Review of Hobson, Charles F., ed., *The Papers of John Marshall, Volume 12: Correspondence, Papers, and Selected Judicial Opinions January 1831-July 1835, With Addendum June 1783-January 1829*. H-Law, H-Net Reviews. August, 2006.

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