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The Last Days of the Marshall Court

William Davenport Mercer[1]

Introduction

Consider this political issue from the first decade of the American republic: while the new Constitution required the President to update Congress on a periodic basis, it did not specify the etiquette required of Congress by way of a response. In the 1790s, when the capital resided in New York City and then Philadelphia, congressmen began traveling together as a procession to the President's residence to wait on the President and give their response. After the capital moved to the new District of Columbia in 1800, this custom was discontinued within one year, replaced by a courier.[2] Criticized as overly aristocratic and not befitting the representatives of a republic, the congressional procession came to an end because of the changing notions of deference exemplified politically by the transition from federalist to republican control of the government. Marching across marshy and unfinished Washington, D.C., however, also raised objections rooted more in practicality, annoyance, and the reality that the government had moved to a city that barely existed.

Similarly, when we examine the early history of the Supreme Court, we should likewise understand it as not only as driven by legal doctrine or grand political ideology, but as an institution perpetuated by people living in a particular place in time. The justices reacted to the death of loved ones, illness, and changing work conditions as much as they responded to political

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[2] Gordon Wood, *Empire of Liberty* (2009), p. 80; "Mr. Lyon's Speech," *The Time Piece; and Literary Companion* (New York), Vol. 1, Issue 39, p. 153, June 9, 1797, reprinted in *The Early American Republic*, Sean Patrick Adams, ed. (2009), p. 25; James Sterling Young, *The Washington Community, 1800-1828* (1966), p. 74.

events or novel legal questions. We cannot neatly segment activities deemed political from those considered social, cultural, or even environmental.

While the Marshall Court was successful as a result of a membership filled with qualified jurists who had the good fortune to work together as a unit for over a decade, the convergence of three factors – personality, place, and timing – played as important a role. By the last five years of the Marshall Court, the circumstances surrounding all three had changed significantly. Chief Justice John Marshall was entering the final years of his life, beset by personal illness, preoccupied by the death of family and friends, and unable to maintain the accord seen in the Court's early years. Relatedly, Washington was no longer a city in its infancy; the enforced seclusion that initially aided in creating a unified court dissipated as the city and the government matured and its new members scattered. Finally, the country had moved away from the Court's expansive vision of the constitutional order.

A focus on the very difficult last five years of the Marshall Court make it apparent that Marshall and his longtime judicial allies looked to their handiwork not with a sense of accomplishment but largely with a sense of resignation and an understanding that their body of work could soon be undone. In this way, much of the Marshall Court canon that we lionize today has a bit of a modern gloss to it. Of course, politics contributed to this denouement. If, however, we consider Aristotle's famous observation that man is a political animal, we can begin to collapse the artificial distinction between the personal and political that deems the former to reside in the unofficial domain of sentimentality and the latter to be official and thus relevant. If we view politics as did Aristotle, as an essential attribute of man's existence and necessary to the development of his highest purpose, and the city as the place through which people can exercise these abilities in order to truly exist to the fullest degree, where the justices lived, how

they socialized, and who they loved and lost are important concerns.[3] In this respect, the new city of Washington was as important an actor in the Supreme Court narrative as the justices themselves. Simply defining politics as the domain of legislatures and presidents, and of edicts and laws will only tell part of the story.

Madeira and Good Conversation

Piloting the Supreme Court from 1801 until his death in 1835, John Marshall is naturally a focal point for historians. Scholars have long recognized, however, that even in its most powerful early decades, the Court was not uniform in its outlook or its decision making, as Marshall did not solely set its agenda or make its decisions.[4] We should not discount the talents of the many justices who served on the high court for the first three decades of the nineteenth century. Nonetheless, while the Court's voice was not simply Marshall's, try to imagine it without him.

Marshall's thirty-four years as Chief Justice have long given historians the opportunity to classify his tenure into distinct eras; most consider the period between 1812-1823 as the Marshall Court's "golden age," with *McCulloch v. Maryland* in 1819 as the high-water mark of its influence.[5] In these years, we see as its most recognizable element the Court speaking with one voice, usually Marshall's, attributable to the justices working together as a group. Much of this success was due to timing. While the Court was issuing decisions that concerned hotly-contested matters, like the constitutionality of the Bank of the United States during a severe economic depression, the states' rights movement that took off in the 1820s had not yet begun to target the

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[3] Aristotle, *The Politics,* Book 1, Chapter 2, Translation by T.A. Sinclair (1962), p. 28; David J. Riesbeck, *Aristotle on Political Community* (2016), p. 2.

[4] See, for example, *R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court* (2001), p. 270.

[5] G. Edward White, *The Marshall Court and Cultural Change, 1815-1835* (2010), p. 9; Newmyer, *John Marshall*, p. 269

Court.[6] The rise of states' rights ideologies that culminated at the federal level with the ascension of Andrew Jackson to the presidency by the end of the decade made the nationalism of the Marshall Court seem not only anachronistic but dangerous to some. Indeed, foreign observers noted that the speeches in Congress during the 1831 session all seemed to share the common thread of opposing the federal government and trumpeting the supremacy of the speaker's state. English visitor Frances Trollope found their reasons puzzling, noting that

> every debate I listened to in the American Congress was upon one and the same subject, namely, the entire independence of each individual state, with regard to the federal government…I speak solely of the very singular effect of seeing man after man start eagerly to his feet, to declare that the greatest injury, the basest injustice, the most obnoxious tyranny that could be practised [sic] against the state of which he was a member, would be a vote of a few million dollars for the purpose of making their roads or canals; or for drainage; or, in short, for any purpose of improvement whatsoever.[7]

Marshall and his judicial brethren found themselves increasingly out of synch with many of the changes transforming the country. The Court's rulings sanctioned the move toward national markets, empowered corporations to undertake development, and kept states and localities from interfering in these national projects. At the same time, the Court itself was becoming increasingly isolated from the country. The democratic ethos that engulfed the U.S. after the War of 1812 was represented not just in the obvious places, such as the removal of property requirements for voting across the country. It also appeared in how Americans socialized, how they related to one another, and even how they dressed. Indeed, Marshall visually appeared as a relic from a rapidly passing generation. By the 1830s, cravats had disappeared, surpassed by replaceable white collars, while breeches and stockings were

[6] R. Kent Newmyer, *Supreme Court Justice Joseph Story* (1985), p. 156; Newmyer, *John Marshall,* p. 396.
[7] Frances Trollope, *Domestic Manners of the Americans*, Donald Smalley, ed. (1949), p. 227.

supplanted by pantaloons, or trousers. Men's fashion had changed so much that by the 1834 New York mayoral race, the term "silk stocking" had first been used against candidates to paint them negatively as pseudo-Federalists. In spite of these changes, Marshall's daily appearance had barely changed in decades: breeches, a long coat, waistcoat, cravat, stockings, and shoes fastened with silver buckles. This outfit remained almost entirely black, sans the white cravat, and was generally unkempt. He still kept his hair messily tied back, though by 1830 it had largely turned grey and begun to thin.[8]

The Marshall Court was successful for a number of reasons we can attribute to legal or political acumen. Relatedly, there was a consistency of membership that allowed the justices to tackle constitutional issues that lesser courts could have mangled. Not coincidentally, the justices remained the same for the eleven years of the Court's "golden age."[9] This consistency, coupled with Marshall's unique personality, produced the camaraderie essential for the Court's success. Appointed Chief Justice by John Adams, the last American president identified as a Federalist, Marshall managed to maintain a consensus of thought on the Court throughout much of his tenure despite the steady addition of justices by republican administrations. Notwithstanding that William Johnson, Gabriel Duvall, and Joseph Story had all been appointed by republican presidents, they came together for some of the Court's most profound accomplishments – upholding the constitutionality of the Bank of the United States in *McCulloch*, insulating corporate entities from state interference in *Dartmouth College v. Woodward*, and affirming the prerogative of the Federal Government to regulate interstate commerce in *Gibbons v. Ogden*.[10]

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[8] Michael Zakim, *Ready-Made Democracy* (2003), pp. 96-97, 203; Lucy Johnson, *19th-Century Fashion in Detail* (2016), p. 9; Leonard Baker, *John Marshall: A Life in Law* (1974), 755-756, Frances Norton Mason, *My Dearest Polly* (1961), p. 318.

[9] Jean Edward Smith, *John Marshall: Definer of a Nation* (1996), p. 402.

[10] *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Dartmouth College v. Woodward*, 17 U.S. 518 (1819); *Gibbons v. Ogden*, 22 U.S. 1 (1824). Duvall dissented without writing a separate opinion in *Dartmouth*.

This cohesion is often attributed to particular traits of Marshall's personality. From his time as a young officer in the Revolutionary War through his service as Chief Justice, Marshall relied upon an easy sociability that was not instrumental, but part of his character. In many ways, the affability that allowed Marshall to create the necessary cohesion on the Court also allowed him to flourish as well. In this way, the political and personal are rarely separated so neatly. Unlike his cousin and long-time nemesis Thomas Jefferson, who was noted to use social gatherings to make political points, Marshall seemed to have genuinely enjoyed company.[11] Marshall in 1788 helped organize Richmond's earliest social club, known alternatively as the Quoits Club, after the horseshoe style game he learned growing up in western Virginia and perfected playing with his men during his service in the war, or as the Barbecue Club, after the feasting and drinking that occupied the members' time when they were not pitching quoits. Remaining a member until his passing, Marshall helped concoct a semi-official drink for the group – a potent combination of brandy, rum, and his lifelong favorite, Madeira. This was no high tea of dainty finger sandwiches and powdered wigs, and Marshall was no dandy. Marshall astonished visitors to the club with his common touch. One young visitor noted that Marshall was quite simply drunk and pitching quoits while wolfing down mint juleps. To break ties, Marshall was known to get to his knees in the dirt to measure the correct distance of the quoit throws.[12] He spoke with a bit of a backcountry accent more in line with settlers in western Virginia than the tidewater gentry.[13] Charles Fenton Mercer once told a story about meeting a man serving as a state commissioner in western Virginia in the summer of 1812. The man was there to traverse the James River, presumably to uncover the best methods to remove the

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[11] Catherine Allgor, *Parlor Politics* (2000), pp. 4-47, Newmyer, *John Marshall*, p. 129-130.

[12] Smith, pp. 160-161, Baker, pp. 47, 760-761.

[13] Newmyer, *John Marshall*, p. 14.

obstructions choking off navigation. Wearing bark around his ankles to ward off rattlesnake bites, sleeping on a bed of leaves and twigs, and making his own tea of sassafras, the man turned out to be John Marshall, who was also serving as the current chief justice of the Supreme Court.[14]

Washington City

The effectiveness of Marshall's personality on the success of the Court was unmistakably aided by the particular circumstances of holding court in Washington. For roughly two months each year, the justices would return to the capital to hear cases before dispersing to attend to their circuit riding duties. Washington was still very much an aspirational city when the Supreme Court began its tenure there in 1801; historian Catherine Allgor described it as "more potential than place."[15] The optimism of the young nation was evident in its plans for structures that were more at home in classical Rome than along the swampy Potomac river. While the initial proposals for the federal capital included a Supreme Court building, a dedicated court structure was not realized until 1935.[16] During Marshall's term, the Court met most often in the basement of the Capitol building, although damage from the War of 1812 forced it into a private home for a time.[17] This rudimentary arrangement meant that there were no judges' offices or private chambers.[18] Indeed, the courtroom did not even provide a place for the justices to change into their robes privately.[19] As a result, the boardinghouses the justices occupied for their annual

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[14] "Judge Marshall," November 15, 1833 *Salem Gazette* (Salem, Mass.), p. 2.
[15] Maxwell Bloomfield, "Supreme Court Buildings," in *The Oxford Guide to the Supreme Court*, Second Edition, Kermit Hall, ed. (2005), p. 118; Allgor, p. 10.
[16] Young, p. 3-4; White, p. 158; Bloomfield, p. 119.
[17] White, p. 158.
[18] Edward White posits that there may have been a rudimentary conference room, but little else. White, p. 160.
[19] Newmyer, *John Marshall,* p. 398. Though Newmyer is referring to the original courtroom on the first floor of the Capitol that housed the court until 1810, the basement courtroom likewise gave the gallery a view of the Justices donning their robes.

Washington sessions served as a hub for a myriad of professional and social activities; court business was done at the same location where the justices ate, drank, and socialized. Given the blurring of professional and social lines in this way, it is easy to see how a personality as gregarious as Marshall's could draw seeming opponents into an esprit de corps.[20] The move to Washington was essential for building the camaraderie of the Court in ways that would have been difficult had the capital remained in the more cosmopolitan and livelier Philadelphia.[21]

1830

While the Marshall Court had successfully weathered the political currents of the early republic, in its final five years, from 1830 to 1835, the Court faced perhaps its most insurmountable challenges. Much of the turmoil faced by the Court in these final five years can be traced to election of Andrew Jackson in 1828. Joining Marshall on the Court during the election year were Joseph Story (Massachusetts), William Johnson (South Carolina), Gabriel Duvall (Maryland), Smith Thompson (New York), and Bushrod Washington (Virginia). With the exception of Thompson, these justices had served together as one group since Story's appointment in 1812. The seeds of the breakup were nonetheless evident. Longtime ally Brockholst Livingston (New York) died in office in 1823. Appointed by Jefferson in 1807 and noted as a staunch anti-Federalist in his politics, Livingston nonetheless joined the Marshall orbit. Noted to possess a friendly and approachable manner, Livingston likely converted to Marshall's viewpoints in part because of the latter's sociability [22] Tapped to replace Livingston

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[20] For a similar point about the blurring of personal and official roles in boardinghouse culture, see. Newmyer, *John Marshall,* p. 398.

[21] A good description of the cosmopolitan state of Philadelphia in the 1790s, at least by North American standards, is found in Francois Furstenberg, *When the United States Spoke French* (2015), pp. 90-94.

[22] Michael Dougan, "Henry Brockholst Livingston," in *The Oxford Guide to the Supreme Court*, pp. 587-588; and Gerald T. Dunne, "Brockholst Livingston," in *The Justices of the United States Supreme Court,* Leon Friedman and Fred Israel, eds. (1969), p. 391.

in 1824, Smith Thompson of New York proved less amenable to the consensus fostered by Marshall, especially as it related to Thompson's more restrictive readings of the commerce clause than the Marshall Court accepted.[23] Nonetheless, Thompson understood the camaraderie required by his membership on the Court. He sold the home he purchased in Washington during his tenure as Secretary of the Navy and joined his new brethren at Brown's Indian Queen Hotel.[24] Robert Trimble replaced nineteen-year member and fellow Kentuckian Thomas Todd after Todd's death in 1826, but Trimble was in ill health and passed away in August 1828 after only two terms.[25] The death of long-time friend Bushrod Washington in November of 1829 hit the hardest. Washington was the only member of the Court with more seniority than Marshall, having been appointed by John Adams in 1799. He and Marshall had quite similar backgrounds; both were Virginians, fought in the Revolution, studied law with George Wythe at William and Mary, practiced law in Richmond, and served in the Virginia Convention that ratified the Constitution.[26]

Marshall exhibited great hesitancy about returning to Washington for the 1830 term; he considered Congress' recent attempt to limit the Court's jurisdiction a constitutional crisis. More importantly, Marshall was facing this challenge with a Court whose personal dynamics were changing in ways that upset the unwritten customs carefully developed over the last three decades. To make this more difficult still, Marshall was also attending to a Court that was in the process of a Jacksonian overhaul. Replacing Bushrod Washington that January was Henry

[23] Donald Malcolm Roper, *Mr. Justice Thompson and the Constitution* (1987), pp. 100, 159.
[24] Smith, pp. 470-471.
[25] Fred L. Israel, "Thomas Todd" and "Robert Trimble," in *Justices of the United States Supreme Court*, pp. 407, 518.
[26] Albert P. Blaustein and Roy M. Mersky, "Bushrod Washington," in *ibid.,* pp. 243-247.

Baldwin of Pennsylvania, while Robert Trimble's seat was filled by John McLean of Ohio.[27] If Thompson represented the start of a transformation of the traditional dynamic of the Marshall Court, the additional appointments of Baldwin and McLean began its collapse.

McLean was elevated to the Court by President Jackson from his position as Postmaster General so the administration could control lucrative postal service appointments.[28] Jackson's predecessor, John Quincy Adams, had likewise soured on McLean. Though McLean denied Adams' accusation that he used his position as postmaster to attend more to patronage than efficient governance, the president remained unmoved, confiding to his diary that McLean was no more than a slick double-dealer. Citing scripture, Adams characterized McLean as one whose "words are smoother than butter, but war is in his heart."[29] While scholars have since defended McLean from Adams' critique regarding mismanagement of the post office, the jab about double- dealing seemed to stick.[30] After taking his seat on the bench, McLean continued to engage in politics; his personal correspondence is rife with letters regarding national politics and political intrigue, while the political establishment routinely gossiped about his political loyalties and his chances of success in obtaining the presidency.[31] The worst-kept-secret nature of McLean's political aspirations must have vexed Marshall, who, by the Adams/Jackson contest of

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[27] January 8, 1830 JM to Joseph Story, *The Papers of John Marshall Digital Edition*, Charles Hobson, editor (2014) (hereinafter "Marshall Papers"), Vol. 11, p. 332; Smith, p. 503, 507.

[28] White, pp. 295-296; Smith, p. 503, *Memoirs of John Quincy Adams*, Charles Frances Adams, ed., Vol. VIII (1970), p. 109-110.

[29] Adams cited Psalms 55, Verse 21. *Memoirs of J.Q. Adams,* p. 25.

[30] Paul Brickner, "Reassessing Long-Accepted Truths about Justice John McLean," 38 *Ohio N.U. L. Rev.* 193, 195 (2011); White, p. 295.

[31] See, for example, *John McLean Papers,* 1817-1861, Library of Congress, ID No: MSS32326, especially Box 6, Reel 3 (Correspondence March 2, 1831 to December 21, 1832) and Box 7, Reel 4 (Correspondence December 22, 1832 to 1834), October 1829 Ninian Edward to Jackson, *Andrew Jackson Papers*, Vol. 7, p. 474, February 16, 1831 Joseph Blount Hinton to Jackson, *Andrew Jackson Papers*, Vol. 9, p. 85, April 2, 1831 James Booker Gardiner to Jackson, *Andrew Jackson Papers*, Vol. 9, p. 162.

1828 had not voted in an election for the president for over twenty years, and throughout his career had made public showings of his obligation as a judge to steer clear of formal politics.[32]

In addition to continuing his political activities, McLean upset the customs of the Court by failing to integrate into the boardinghouse culture. Having served as postmaster since his appointment by President Monroe in 1823, McLean already had a separate house in D.C. where he lived with his family, and thus he never resided with the other justices. This deviation also signaled to William Johnson that it was finally time to leave the boardinghouse, away from the pull of Marshall. Without McLean and Johnson, the boardinghouse culture that had existed since the move to Washington began to collapse. In contrast, at least during his first term in 1830, it appeared that Baldwin would mesh well with the existing ethos and culture of the Court. Indeed, Marshall and Story were initially quite pleased, and Baldwin seemed to fit in well during this first year.[33]

1831

The justices returned to Washington in January for the 1831 term under ominous circumstances. On January 24, 1831, James Buchanan, then a representative from Pennsylvania, unsuccessfully pushed a bill to repeal section 25 of the Judiciary Act of 1789, the clause that gave the Supreme Court the authority to hear appeals from state courts. Indeed, national legislators like Buchanan had taken up what had been a state *cause célèbre* since the 1821 decision in *Cohens v. Virginia* when the Court had accepted jurisdiction of an appeal from a conviction for violation of a state criminal statute. Though the justices ruled in favor of Virginia,

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[32] Charles Hobson, "Preface," *Marshall Papers*, Vol. 11, p. xx; "Letter from Judge Marshall," November 25, 1834 *Nashville Republican*, p. 2.

[33] Smith, pp. 507, 514; Frank Otto Gatell, "John McLean," in *The Justices of the United States Supreme Court*, p. 538; Newmyer, *John Marshall*, p. 405-406; January 31, 1830 JM to Mary Marshall, *Marshall Papers*, Vol. 11, p. 343; George Haskins, *History of the Supreme Court of the United States*, Vol. II, (1981), p. 85; White, p. 160; Newmyer, *Joseph Story,* pp. 218-219; October 12, 1831 JM to Joseph Story, *Marshall Papers*, Vol. 12, p. 119.

the Court's assertion that it had the right to hear such an appeal from a state court struck Virginia as an affront to its sovereignty. Equally as ominous, Buchanan had also served as a manager in the House impeachment of Federal Judge James H. Peck the year before. Peck's trial before the Senate occurred at the same time Buchannan's repeal bill made its way through the House. While Peck was found not guilty by the Senate, he was the first federal judge charged with impeachment since Samuel Chase was tried and acquitted in 1805. Peck's impeachment and near removal seemed to indicate that this quarter-century grace period was ending.[34]

Heading home to Richmond following the 1831 term, Marshall had only a few weeks before he needed to head out on circuit to hear cases. Though the journey was always arduous, this time the prospect of making the trip was much worse. That spring, Marshall began to feel to feel intense pain, making walking difficult and urination unbearable. In addition to the intense pain, the lack of mobility took away an activity that had been part of his daily routine for as long as anyone could remember. Marshall was an early riser; in Washington, he spent this time taking long walks before most of the other justices were even out of bed. These walks may have benefitted Marshall's analysis of the cases before the court that day, not to mention the positive impacts on his overall mental outlook. They also helped him with relationships, as, for example, Marshall was known to walk with fellow early riser John Quincy Adams. Even more so than these benefits, this daily exercise was part of his personality. Earlier that year, the chief justice was spotted walking to the Court on a uniquely cold day with an unbuttoned coat and without a hat.[35] Much like his fondness for good wine and easy conversation, walking was part of his

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[34] 7 *Cong. Deb*. 532 (1831); *Cohens v. Virginia*, 19 U.S. 261 (1821); Frank Thompson, Jr. and Daniel H. Pollitt, "Impeachment of Federal Judges," 49 *U.N.C. L. Rev.* 100-102; Adam A. Perlin, "The Impeachment of Samuel Chase: Redefining Judicial Independence," 62 *Rutgers U. L. Rev.* 725, 100-102 (2010).

[35] Smith, pp. 78, 512; January 31, 1830 JM to Mary Marshall, *Marshall Papers*, Vol. 11, p. 343; Newmyer, *John Marshall,* p. 13; Robert Remini, *John Quincy Adams* (2002), p. 77.

authentic nature that helped him pilot the Court through its most difficult days. The loss of this mobility, along with the acute pain, made the remainder of 1831 quite difficult. His wife Polly gave him a specially designed cushion to help his long and bumpy 150- plus mile ride to Raleigh in May to attend to his circuit riding obligations.[36]

Tired of the pain, limited mobility, and the side effects of the various medications he ingested to deal with what his doctor in Richmond accurately diagnosed as bladder stones, Marshall revised his will and immediately set out for medical treatment in Philadelphia that September.[37] Once in Philadelphia, Marshall saw Dr. Philip Syng Physick, an eminent surgeon who, like Marshall, was in the twilight of his career. Indeed, like Marshall, Dr. Physick was also a bit of a throwback to the last century, as he continued to powder his greying hair and pull it back into a queue, a style more reminiscent of the revolutionary generation. Tied to the table and lacking anesthesia, Marshall survived a tortuous procedure in which Dr. Physick removed hundreds of small particles from his bladder.[38]

After convalescing for several weeks in Philadelphia, Marshall was able to return to Richmond for his duties on the circuit court by the end of November.[39] There, Marshall was faced with perhaps the most daunting challenge of all, the rapidly declining health of his wife Mary, known better to generations of historians as "my dearest Polly," as he affectionately referred to her in three decades of correspondence. Polly did not travel with her husband to Philadelphia, as her own health concerns prevented the trip. Indeed, Polly had long been fragile,

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[36] Newmyer, *John Marshall*, p. 13; May 12, 1831 JM to Mary Marshall, *Marshall Papers*, Vol. 12, p. 65; Smith, p. 512.
[37] John Marshall Will, September 24, 1831, *Marshall Papers*, Vol. 12, p. 100: "Marshall in Philadelphia, 28 September – 19 November," editor's note, *Marshall Papers*, Vol. 12, p. 105; Smith, p. 512.
[38] George B. Roberts, "Dr. Physick and His House," *The Pennsylvania Magazine of History and Biography*, Vol. 92, No. 1 (Jan., 1968), p. 72; The medical term for this procedure is a lithotomy. Smith, 513.
[39] "Marshall in Philadelphia, 28 September – 19 November," editor's note, *Marshall Papers*, Vol. 12, p. 109.

both physically and emotionally. While she and John had six children survive to adulthood, they lost four in succession between 1789 and 1792. These traumas left Polly with a sense of melancholy for the rest of her life. Marshall's personal life was defined by Polly's frailty; Marshall accepted her permanent delicate state and played a bigger role in the parenting of their remaining children. He also doted on her, writing scores of letters during his absences, showering her with gifts, and going to great lengths to compensate for her frail nerves. Shortly after Marshall's return to Richmond, Polly fell gravely ill. For most of December, she was unable to leave her bed. On Christmas Day, Polly died.[40]

Polly's death was devastating. Indeed, death and illness seemed to shadow the Court that year, as old friends and loved ones passed on. Former president James Monroe died that July 4; together Marshall and Monroe attended school, fought a revolution, served in the Virginia House of Delegates; and both went on to national prominence. More so, they were similar in temperament, as they used to frequent taverns to drink, play cards, and shoot billiards when court was out of session in Richmond. They were similar even stylistically, as Monroe was one also of the few, like Marshall, who continued the tradition of dressing in a fashion similar to that of the eighteenth century.[41]

Story also had his own loss earlier that May, when his ten-year- old daughter Louisa succumbed to disease. The correspondence between Marshall and Story is heartbreaking. Seeking to comfort Story, Marshall dredged up the memories of his four lost children buried underneath four decades of grief: "You ask me if Mrs. Marshall and myself have ever lost a child. We have lost four – three of them bidding fairer for health and life than any that have

[40] Newmyer, John Marshall, p. 34; December 19, 1831 JM to James M. Marshall, *Marshall Papers*, Vol. 12, p. 136; Mason, p. 343.
[41] Smith, 98; Zakim, p. 203.

survived them. One, a daughter about six or seven was brought fresh to our minds by what you say of yours. She was one of the most fascinating children I ever saw." Calling forth this memory opened even more painful recollections, as Marshall continued, that his daughter Mary "was followed within a fortnight by a brother whose death was attended by a circumstance we can never forget." Marshall then explained the subsequent death of his son John James, a horrifying scenario in which John had convinced Polly to leave the room when it appeared John James had passed but instead had remained breathing.[42] While Marshall recovered from these losses in a professional sense, consider, however, that this letter to Story was written by a man in his seventy-sixth year, in nearly constant pain from bladder stones, and who was now remembering these events that haunted him, losses from which Polly would never quite recover. This correspondence to Story required him to revisit the moment that altered the remainder of their lives together.

While Marshall was awaiting surgery in Philadelphia, the members of the bar created a committee to host a dinner for him in his honor. Although he turned down the invitation because of his health, the committee then sought to commission a portrait of the Chief Justice. Despite anticipating an agonizing operation, Marshall very patiently walked to Henry Inman's studio to sit for the portrait. In many ways, this episode encapsulates much of what Marshall was facing in the final years. He sought to use the Court to maintain his vision of the ideal constitutional order but had passed into the phase of life where many praised him as if he had already retired from the fight. Within a few months, newspapers began printing rumors that Marshall intended

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[42] May 29, 1831 Story to JM, Marshall Papers, Vol. 12, p. 69; June 26, 1831 JM to Story, *Marshall Papers*, Vol. 12, p. 94.

to resign at the end of the 1832 term.[43] More importantly, the Court would decide a case that would compromise its authority altogether.

1832

Marshall returned to Washington just a few weeks after Polly's death.[44] Marshall and Story were not alone in illness and loss in 1831. William Johnson visited Raleigh that year only to become seriously ill and spend the fall and winter in North Carolina convalescing. When the justices returned to Washington, Johnson would not be among them and would miss the entire 1832 term. Moreover, before the justices dispersed at the end of the 1831 term, the conversation at the boardinghouse turned to plans for 1832. The camaraderie seen by Henry Baldwin in 1830 was fast dissipating as he grew increasingly erratic. While fellow new arrival John McLean was often distant, Baldwin would ultimately prove affirmatively disruptive. Not only had he further fragmented the Court's practice of issuing unitary opinions, dissenting at least five times in 1831 alone, but he began to upset the very fabric of the Court's unity.[45]

The previous year, Baldwin told Marshall that he did not want to reside at the Court's current boardinghouse.[46] A white four-story structure rechristened in 1820 as Brown's Indian Queen Hotel after Jesse Brown had adorned the front of the hotel with large rendering of Pocahontas, the boardinghouse was located on Pennsylvania Avenue, the thoroughfare intended to connect the Capitol building with the White House.[47] Although the poplar trees planted along

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[43] October 14, 1831 *Richmond Enquirer*, p. 1; Andrew Oliver, *Portraits of John Marshall* (1977), p. 136; March 21, 1831 *Baltimore Patriot*, p. 2.

[44] January 11, 1832 JM to James Marshall, Jr., *Marshall Papers*, Vol. 12, p. 139.

[45] White, pp. 298, 343; Gatell, p. 576. There may be more as Richard Peters, the Clerk of Court, complained that Baldwin dissented in two-thirds of the cases that term but would later change his mind or would often fail to file his opinions as he most famously did with his dissent in *Worcester*. Lindsay Robertson, "Justice Henry Baldwin's "Lost Opinion" in *Worcester v. Georgia*," *Journal of Supreme Court History* (March 1999), Vol. 24(1), pp. 51-52.

[46] October 12, 1831 JM to Story, *Marshall Papers*, Vol. 12, p. 119.

[47] Thomas J. Carrier, *Washington D.C.: A Historical Walking Tour (*1999), p. 47.

Pennsylvania Avenue during the Jefferson administration would have been coming in nicely, the Indian Queen often benefitted more from its position as a hotel in a new city with few other options.[48] Maybe it was the unfinished road that ran in front of the hotel; the road was not macadamized until 1832. Possibly Baldwin knew this and did not want to reside at the hotel while all the noise and construction took place.[49] Marshall relented and agreed to let Baldwin find new quarters; Baldwin did nothing on his end, leaving Marshall to scramble to find accommodations for the 1832 term.[50] Marshall found lodging about two miles from the Capitol building for himself, Duvall, Story, Thompson, and Baldwin with Tench Ringgold, the long-serving Marshal of the District of Columbia recently forced out by Jackson.[51]

Returning to Washington not only meant a new living situation but a fundamentally different session for all the justices. Marshall was faced with two months away from Richmond, but this time there would be no letters to Polly. Story would return fresh from the loss of his daughter. Johnson would never make it to Washington because of his illness. By this time, Duvall, though only three years older than Marshall, was largely dependent on the chief justice during their time in Washington. As Duvall was almost entirely hearing- impaired, Marshall took it upon himself to make sure that Duvall lived with them, writing to Story that "Brother Duval must be with us or he will be unable to attend consultations."[52]

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[48] The Pennsylvania Avenue District in United States History (National Park Service Report, 1965), illustration following p. 17.

[49] Constance McLaughlin Green, *Washington: Village and Capital* (1962), p. 127.

[50] Charles Hobson, "Preface," *Marshall Papers*, Vol. 12, p. xxi; June 26, 1831 JM to Story, *Marshall Papers*, Vol. 12, p. 93.

[51] Memoirs of J.Q. Adams, Vol. VIII, p. 22; White, 381-382; November 10, 1831 JM to Story, *Marshall Papers*, Vol. 12, p. 124; David Turk, "Firebrand: U.S. Marshal Tench Ringgold and Early American Politics," at The Historical Society of the D.C. Circuit, at https://dcchs.org/wp-content/uploads/2018/12/RinggoldArticle.pdf (accessed January 29, 2019); Smith, p. 514.

[52] June 26, 1831 JM to Story, *Marshall Papers*, Vol. 12, p 93; Irving Dillard, "Gabriel Duvall," in *The Justices of the United States Supreme Court*, p. 427.

In the midst of these changes, the Court decided the third of three cases that implicated not only the fate of native peoples in the United States and the balance of power between the states and the Federal government but even the power of the Court itself. In 1802, the state of Georgia deeded its western land claims to the Federal government. In return, the United States agreed to extinguish all native land claims within the state.[53] Twenty-five years later, the Cherokee Nation remained in the northwest portion of the state. Georgia hoped that Andrew Jackson would be more sympathetic to its position, so shortly after his election in 1828, the state annexed the Cherokee lands, but it deferred enforcement until June 1, 1830. Georgia bet right; four days before the law was set to take effect, Jackson signed into law the Federal Indian Removal Act, which provided for the relocation of the five civilized tribes of the southeast to west of the Mississippi.[54] The Cherokees turned to the federal courts to force the U.S. government to uphold its specific treaty obligations against the state of Georgia.

Marshall and the Court had seen the confrontation between Georgia and the Cherokees coming for several years. In December 1830, Marshall summoned Georgia to appear before the Supreme Court for its death sentence against a Cherokee man accused of killing another Cherokee on Cherokee land. While Georgia proceeded against the defendant under an expansive view of its own jurisdiction, at the same time it refused to recognize the Court's jurisdiction to review its claimed authority. To make matters worse, Georgia ostentatiously executed the prisoner two days after it received Marshall's order. Newspapers took notice, many speculating not only whether Marshall would punish Georgia but also whether he even had the power to do so.[55]

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[53] Anthony F.C. Wallace, *The Long, Bitter Trail* (1993), 63.

[54] Wallace, p. 64; Francis Paul Prucha, *The Great Father*, abridged ed. (1986), p. 75.

[55] Lindsay Robertson, *Conquest by Law* (2005), pp. 129-130; William McLoughlin, Cherokee Renascence in the New Republic (1986), p. 439; "General Summary," January 14, 1831 *Newburyport Herald* (Newburyport, Mass.), p.

Three days later, the Cherokees served their Federal petition for an injunction on the Georgia governor to stop the state from claiming Cherokee land; this landed on the Court's docket during its 1831 term. While in *Cherokee Nation v. Georgia* (1831), Marshall ruled against the Cherokees as not possessing the attributes of sovereignty that would constitute them as a "foreign state" and thus allow them to use the Federal courts pursuant to Article III of the Constitution, he did indicate that he would be amenable to hearing the dispute once this jurisdictional hurdle was cleared.[56] After Georgia arrested two northern missionaries for living among the Cherokees without the state-mandated license and sentenced them to four years of hard labor, that moment had arrived.[57] Marshall had followed Jackson's navigation of the Indian Removal Act through Congress and was concerned.[58] In *Worcester v. Georgia* (1832), Marshall finally had a chance to weigh in on Georgia's actions. On the morning of March 3, 1832, Marshall read in court the majority opinion in the case. His voice frail, Marshall read aloud from several unbound sheets of paper, some torn, most scribbled upon. For close to an hour, Marshall rebuked Georgia on all counts, holding that their laws over the Cherokee Nation were null and void.[59] And then…nothing.

Racing to the Georgia courthouse with a copy of Marshall's decision, local counsel for the Cherokees intended to secure the missionaries' release. The judge refused to release the prisoners or even admit the decision into evidence and instead quickly adjourned court so he could travel to the former Cherokee lands to hear cases now that Georgia claimed jurisdiction.[60]

3; "Domestic Affairs," January 15, 1831 *Farmer's Cabinet* (Amherst, N.H.), p. 3; Joseph C. Burke, "The Cherokee Cases," 21 *Stan. L. Rev.* 512-513.

[56] *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831).

[57] Grant Foreman, *Indian Removal* (1982), p. 235; Daniel Walker Howe, *What Hath God Wrought* (2007), p. 355.

[58] June 25, 1830 Dabney Carr to JM and June 26, 1830 JM to Dabney Carr, *Marshall Papers*, Vol. 11, pp. 380-382.

[59] *Worcester v. Georgia*, 31 U.S. 515 (1832); "Correspondence of the Mercury," March 7, 1832 *New York Mercury*, p. 77

[60] *Macon Telegraph* (Macon, Georgia), March 31, 1832, p. 3.

For his part, Jackson continued to move forward with his plans to relocate the five civilized tribes to west of the Mississippi. Believing that "[t]he decision of the supreme court has fell still born," he did not fall for what some historians believe was Marshall's re-election year trap: enforcing the order would anger his southern supporters, while refusing to do so would reinforce his image in the north as more of a king than the president of a republic.[61] Jackson rightly interpreted that this was not a problem, as the intended conundrum presumed that a shared appreciation of the supremacy of the Court's decisions outweighed the actions of a popular president. Jackson simply continued his removal plan without regard for the Court's decision.

Marshall was unable to react to this political challenge to the Court with the same success he had showed in the past. Perhaps not coincidentally, the two justices who did not reside with the others at the boardinghouse – McLean and Baldwin – did not join the majority opinion. Baldwin dissented, while McLean wrote a separate concurring opinion that played it safe by ruling that Georgia was in violation of Federal treaties but then leaving a significant invitation for the state to act if the Cherokees were later viewed as incapable of governing themselves.[62] The Court invalidated the convictions of the missionaries, but it did not specifically order Georgia to take any definite action before the Court ended its 1832 session in mid-March.[63] This omission meant that Georgia was not immediately in violation of a federal court order and would allow the state to adopt the position that there was technically no order for Jackson to enforce. Moreover, at the same time that the press began reporting Jackson's intention to do nothing to

[61] April 7, 1832 Andrew Jackson to John Coffee, *Andrew Jackson Papers*, Vol. 10, p. 226; Stephen G. Bragaw, "Thomas Jefferson and the American Nations," *Journal of Supreme Court History*, Vol. 31(2) (2006), pp. 156-157.
[62] Lindsay Robertson, "Justice Henry Baldwin's 'Lost Opinion' in *Worcester v. Georgia*," *Journal of Supreme Court History*, Vol. 24, Issue 1 (March 1999), pp. 50-51.
[63] Anne Ashmore, "Dates of Supreme Court Decisions and their Arguments," U.S. Reports Volumes 2 to 107 (1791-1882) (Aug. 2006), p. 33 available at http://www.supremecourt.gov/opinions/datesofdecisions.pdf; Jill Norgren, "Lawyers and the Legal Business of the Cherokee Republic in the Courts of the United States, 1829-1835," *Law and History Review*, Vol. 10, no. 2 (Autumn, 1992), pp. 156-157.

enforce *Worcester*, Marshall was still quibbling with the clerk of court over the exact citations to place in the reported case, although the decision was quickly becoming a dead letter. The Court would have to wait until its 1833 term to take up the matter again.[64]

The wait proved excruciating. While every day of 1832 had slowly crystalized the reality that the President was leaving the Court ever more humiliated and exposed, news from South Carolina, of the State's nullification of federal law, portended problems for the Union itself. While the immediate focus of South Carolina's objection was the 1828 federal tariffs, the source of the rage was largely attributable to the cratering price of cotton, the state's signature export, over the last decade.[65] By November, South Carolina nullifiers met in convention and passed the Nullification Ordinance, which declared among other things that both the 1828 and 1832 compromise tariffs were void within the state after February 1, 1833, and that any attempt to enforce the tariff would result in South Carolina's declaring itself as an independent state.[66]

Indeed, for much of the rest of the year, Marshall remained alternatively anxious and resigned about the upcoming 1833 term. Sitting at his desk in Richmond on Christmas day of 1832, the one-year anniversary of Polly's death, Marshall expressed his reservations to Joseph Story. Marshall began by congratulating Story on the imminent release of his *Commentaries on the Constitution*. Though the *Commentaries* signaled that Story was gearing up to fight for the Court's legacy in promoting the interests of a strong Federal nation, Marshall grew more resigned. In light of the growing unrest over the federal tariff, Marshall was hesitant over

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[64] "Letter from Washington," (Report from the U.S. Gazette), *Scioto Gazette* (Chillicothe, Ohio), March 21, 1832; March 23, 1832 JM to Richard Peters, *Marshall Papers*, Vol. 12, pp. 188-189; Bragaw, 156-157; Richard Ellis, *The Union at Risk* (1987), pp. 30-31.

[65] William Freehling, *The Nullification Era: A Documentary Record* (1967), p. x.

[66] "Ordinance of Nullification," November 14, 1832, in Freehling, *Nullification Era*, p. 150; *The Papers of John C. Calhoun*, Vol. XII, ed. Clyde Wilson (1979), p. 3

Virginia's response and openly feared for dismemberment of his home state over South Carolina's real plan to form a "southern confederacy."[67]

1833

The Court returned to hear its first oral arguments for the 1833 session on January 15.[68] Only one day earlier, the Georgia missionaries accepted a pardon offered by the governor.[69] The case was officially moot, although the indignity of Georgia's ignoring its *Worcester* order would remain. More pressing, on January 16, Jackson sought the approval of Congress for the use of military force against South Carolina.[70]

In the midst of these dual crises, the Marshall Court heard its last constitutional case. Arising from a dispute in which two Baltimore wharf owners brought an action against the city for taking their property without compensation, a violation of the Fifth Amendment, *Barron v. Baltimore* represented what was the Court's final opportunity to shape constitutional law.[71] Facing Georgia's disregard of its *Worcester* order from the year before and in the midst of an ever- worsening constitutional crisis in which South Carolina threatened secession over obedience to Federal law, the Court had to decide a particularly thorny question: Were the states obligated to follow the Bill of Rights?

While this issue was resolved in the twentieth century when the Court began its process of selectively incorporating the provisions of the Bill of Rights against the states through the Fourteenth Amendment, at the time it was an open question. Many courts routinely applied the liberties contained in the Bill of Rights against state action, as their inclusion in the Constitution

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[67] Newmyer, Joseph Story, pp. 161-162; December 25, 1832 JM to Story, *Marshall Papers*, Vol. 12, p. 248
[68] Ashmore, p. 33.
[69] "The Missionaries," *New-York Spectator*, January 28, 1833.
[70] 9 *Cong. Deb.* 145 (Appendix) (1833)
[71] *Barron v. Baltimore*, 32 U.S. 243 (1833).

was largely treated as unconnected to the question of whether the Bill of Rights was meant to apply to the states. Rather, most courts viewed these liberties – the right to possess firearms, the right against double jeopardy, and the right to compensation for takings of private property, for example – as emanating from extra-constitutional sources like the common law or natural right. Their inclusion into the Bill of Rights was not thought to provide the right; instead, written documents like the federal or many state constitutions simply recognized that the right existed.[72]

Regardless, Marshall found in favor of the city of Baltimore and against the wharf owners by viewing the dispute primarily as a matter of jurisdiction. As the Bill of Rights was only meant to bind the new federal government, he posited, the prohibition against takings could not be used against the state of Maryland. In so doing, Marshall viewed this right as emanating from the Constitution instead of a liberty found in generations of the common law, natural right, or even specifically recognized as a fundamental principle of all free governments dating to the Magna Carta in 1215. Thus, after a career of fortifying federal power, the Marshall Court ended its constitutional jurisprudence on a note that many scholars have thought largely out of tune.[73]

We must, however, consider the specific context. If we return to the snowy Saturday morning of February 16,when the justices trudged to the Capitol building to issue the decision in *Barron*, there was much more before the Court than a question of payment for a wharf.[74] Instead, Washington society was enthralled by the drama taking place in the Senate, where John C. Calhoun was in the middle of a two-day oration defending the actions of his state and attacking

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[72] William Davenport Mercer, *Diminishing the Bill of Rights: Barron v. Baltimore and the Foundations of American Liberty* (2017).

[73] W. Allan Wilbur, "Review of *John Marshall: A Life in Law*,' *American Journal of Legal History* (April 1976), pp. 155, 157; Peter Irons, *A Peoples History of the Supreme Court* (1999), p. 136; H. Jefferson Powell, "The Original Understanding of Original Intent," in *Interpreting the Constitution: The Debate over Original Intent* (1990), p. 115, n. 325; Scott Douglas Gerber, *To Secure these Rights* (1995), p. 104.

[74] Ashmore, p. 33; "Debate in the Senate," *Baltimore Gazette and Daily Advertiser*, February 18, 1833.

the administration's request to Congress to collect the revenue, better known as the Force Bill.[75] Beginning on Friday and continuing into Saturday morning, Calhoun spared no hyperbole in his attacks, accusing the proposed law as authorizing a massacre of South Carolinians.[76] When Calhoun finally ceded the floor, Daniel Webster of Massachusetts immediately rebutted Calhoun's charges that the states created the Union through a constitutional compact and that as a result South Carolina retained its sovereignty to determine whether to follow laws it deemed unconstitutional.[77] Before enthralled standing- room- only galleries, the Senate chamber erupted with accusations equating political positions with support for violence, slaughter, and revolution. For two days, Calhoun and Webster debated nothing less than the very basis of the Union itself.

That same Saturday morning, John Marshall and his brethren also headed to the Capitol building. Instead of following the crowds to the Senate, they headed downstairs to the small basement room directly underneath, where the Court resided. The Court occupied a simple space under the Senate: its lack of natural light and low ceilings not only reminded many observers more of a cellar than a courtroom, but in many ways the space mirrored the Court's still very aspirational importance.[78] In the midst of the constitutional crisis playing out upstairs, Marshall released the Court's decision absolving the states from having to follow the Constitution as it related to individual rights.

The decision makes more sense when we consider it in light of Marshall's concern over not just the nullification crisis but the continued existence of the Union itself, a fear that had consumed him for the last several years. The Court was not insulated from the storm raging

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[75] *Niles' Weekly Register* (Baltimore, MD), February 23, 1833; "Speech on the Revenue Collection [Force] Bill," February 15-16, 1833, John C. Calhoun, *Union and Liberty*, ed. Ross M. Lence (1992), 401
[76] Calhoun, *Union and Liberty*, pp. 68-69.
[77] Daniel Webster, "The Constitution is not a Compact," (February 16, 183), in *The Writings and Speeches of Daniel Webster*, Vol. 6 (1903), pp. 180-181, 197-198.
[78] Clare Cushman, *Courtwatchers* (2011), pp. 30-33.

directly above it; Marshall had followed Webster's arguments and highly approved of them.[79] The state sovereignty backlash the Court had endured over the course of the 1820s seemed to escalate precipitously in the last few years. Georgia had refused to recognize the Court's jurisdiction a year earlier; New York had followed its lead and similarly refused to recognize the Court's authority to hear a boundary dispute case brought by New Jersey.[80] South Carolina was now taking this argument a dangerous step further. Indeed, Marshall had been preoccupied with the escalating showdown between South Carolina and the Federal government; he had carried on correspondence with Story since the year before where he fretted that southern politicians were "determined to risk all the consequences of dismemberment."[81] Even after the dispute formally wound down in March 1833 with the passage of a compromise tariff, his fears continued.[82]

Closer to home, by November 1833, Marshall's long-term project to redeem his son John from a lifetime of bad habits and squandered opportunities had ended when John Jr. succumbed to alcoholism at age thirty-five; Marshall arranged to take care of John's widowed wife and three children.[83] That same month, Marshall commiserated with Story about what seemed like their never-ending search for stable housing in Washington. Frustratingly, though Baldwin began the Court on its search for alternate lodgings away from Brown's Hotel, Baldwin's increasingly erratic behavior caused him to miss the 1833 term entirely.[84] Tench Ringgold was leaving the city and could no longer house the justices as he had for the last two terms.[85] By the end of the

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[79] March 18, 1833 JM to Louis Marshall, *Marshall Papers*, Vol. 12, p. 268.

[80] Michael J. Birkner, "The New York-New Jersey Boundary Controversy, John Marshall and the Nullification Crisis," *Journal of the Early Republic*, Vol. 12, No. 2 (Summer, 1992), pp. 202-203.

[81] August 2, 1832 JM to Story, *Marshall Papers*, Vol. 12, p. 227.

[82] April 5, 1833 JM to Louis Marshall, M*arshall Papers*, Vol. 12, p. 270; May 7, 1833 JM to Humphrey Marshall, *Marshall Papers*, Vol. 12, p. 276; June 3, 1833 JM to Story, *Marshall Papers*, Vol. 12, p. 281

[83] Smith, p. 425.

[84] Frank Otto Gatell, "Henry Baldwin," in *The Justices of the United States Supreme Court*, p. 576.

[85] November 16, 1833 JM to Story, *Marshall Papers*, Vol. 12, pp. 309-310 and October 12, 1831 JM to Story, *Marshall Papers*, Vol. 12, p. 119, note 4.

year, the Court was still without a residence, and Gabriel Duvall was scouring D.C. for something suitable. True to form, Marshall was amenable to even taking the small room if necessary;[86] He was concerned about finding accommodations only for himself, Duvall, and Story. Baldwin missed the 1833 term and McLean never resided with his brethren, and in addition, Smith Thompson's wife passed away in September of 1833. As no one had heard from Thompson since, it was not clear whether he would join them next year.[87]

Marshall attempted to keep up old routines. Back in Richmond, he continued his attendance at the Quoits club, attending Saturday barbeques as he could; they were still held under the same oaks at a nearby spring. Marshall and his friends would pitch quoits and drink hard punch and mint juleps before sharing the barbeque on a single table under a tent. [88] No doubt the company of his few remaining friends with whom he founded the club would prove fortifying, notwithstanding the absence of most of his peers.

1834

Arriving in Washington for the 1834 term, the remaining justices who still resided together – Marshall, Story, and Duvall – unpacked and greeted each other at a boardinghouse owned by Mrs. R. Dunn, located on Capitol Hill. At this point, however, Marshall recognized that he was no longer seeking accommodations for the Court as a body. William Johnson's illness ultimately caused him to miss the entire 1834 term. He died on August 4 in New York City, following complications from jaw surgery.[89]

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[86] December 26, 1833 JM to Duvall, *Marshall Papers*, Vol. 12, p. 322.
[87] November 16, 1833 JM to Story, *Marshall Papers*, Vol. 12, pp. 309-310.
[88] September 13, 1833 JM to James K. Marshall, *Marshall Papers*, Vol. 12, p. 299; Samuel Mordecai, *Richmond in By-Gone Days* (1856), pp. 188-189.
[89] November 16, 1833 JM to Story, Note 6, *Marshall Papers*, Vol. 12, pp. 309-310; Smith, 520; "Death of Judge Johnson," August 11, 1834 *Connecticut Courant* (Hartford, Conn.), p. 3.

Questions of great constitutional import came before the Court during the 1834 and 1835 sessions, but the Court did not rule on them. One concerned whether Kentucky had issued prohibited bills of credit by effectively issuing a state currency, in violation of Article I, section 10. Another questioned whether New York's requirement that ship captains provide lists of incoming passengers in an attempt to stem the tide of indigent immigrants to the city violated the commerce clause. Both cases would have required the court to define the balance of power between the states and the federal government, questions that the Marshall Court had, in decades past, confidently answered. Here, however, Marshall wrote opinions that noted the absence of a quorum, due to illness and resignation of certain justices, which precluded the Court from issuing decisions where constitutional questions were raised.[90]

Although 1834 did not witness the high drama of the preceding year, Marshall was nonetheless still pessimistic. He braced for another year of what he felt was an assault on decades of work. Writing to Henry Lee, he noted that

> we have a stormy session abounding with subjects of great excitement. The old federalists see much to deplore and not much to approve. We fear that the fabric erected for us by our predecessors is about to be tumbled into ruins. But I mix so little with politicians that it would be presumption in me to hazard conjectures on the future. The papers will give you some idea on the state of public feeling. Providence has saved us more than once, and I hope, will save us again.[91]

With his usual humility, he attributed the concern for the upcoming year to "our predecessors," while in reality much of his worry seemed to revolve around the destruction of a system he played an essential role in creating.

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[90] Albert Beveridge, *The Life of John Marshall*, Vol. IV (1919), pp. 582-583; *Briscoe v. Kentucky*, 33 U.S. 118 (1834); *New York v. Miln*, 34 U.S. 85 (1835); *Briscoe v. Kentucky*, 33 U.S. 118 (1834); *New York v. Miln*, 34 U.S. 85 (1835).

[91] January 18, 1834 JM to Henry Lee, *Marshall Papers,* Vol. 12, p. 326.

That summer, Marshall sat alone in his Richmond house. It had been two- and- one-half years since Polly had passed. He tinkered with his will, adjusting the lands he had planned on giving to his son John to vest in his grandchildren.[92] A sculptor arrived that May. Commissioned by a Boston institution to create a bust of his likeness, the artist realized that Marshall lived by himself in a house empty except for the domestic – read enslaved – help. (Marshall was an almost lifelong slaveowner. Most Marshall biographers tend to reconcile this by noting that he owned considerably fewer slaves than his elite contemporaries and was a supporter of the colonization movement. Nonetheless, Marshall profited from the legally coerced labor of many enslaved men and women throughout his life.) Marshall, true to form, asked the sculptor to stay for dinner as well as for two or three glasses of Madeira and even sent him away with a bottle aged at least thirty years.[93] A September with his son James Keith Marshall at James' estate north of Richmond took him away from this seclusion, but once he returned, he continued his correspondence, which generally lamented the damage done to the cause of Union by the nullification crisis.[94]

1835

New faces replaced old ones for the 1835 term. Duvall retired in January, leaving Marshall and Story as the final adherents of the old boardinghouse culture. Johnson was replaced by James M. Wayne of Georgia. Marshall and Story moved into a boardinghouse located near the Indian Queen without the other justices.[95]

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[92] See March 29, 1834 and July 1834 codicils, *Marshall Papers*, Vol. 12, *p. 198.*
[93] *May 22, 1834,* Interview with John Frazee, *Marshall Papers*, Vol. 12, p. 413; Oliver, pp. 173-174.
[94] September 10, 1834, JM to Thomas Hord, *Marshall Papers*, Vol. 12, p. 417; Baker, p. 765; October 6, 1834 JM to Thomas Grimke and October 6, 1834 JM to Story, *Marshall Papers*, Vol. 12, pp. 419-422.
[95] January 16, 1835 JM to Duvall, *Marshall Papers*, Vol. 12, p. 432; Baker, p. 765; *Washington, City and Capital* (WPA Guide, 1937), pp. 632-633.

Marshall kept in contact with the sculptor and bought seven copies of the bust produced the previous year. His return to Richmond at the close of the session was disastrous; his stage coach flipped over and left him seriously injured.[96] Back at home and still in great pain, Marshall finalized plans to retire to James Keith's estate. He went through the mundane arrangements of sending his effects, paying particular attention to the timing of moving his wine and spirits so that he and they would arrive around the same time.[97] He wrote to old friends, lamenting his failing health and the limits of the medical profession, as he complained that his "old worn out frame cannot I beleive [sic] be repaired. Could I find the mill which would grind old men, and restore youth, I might indulge the hope of recovering my former vigor and taste for the enjoyments of life. But as that is impossible, I must be content with patching myself up and dragging on as well as I can."[98]

After collapsing during a walk to visit Polly's grave, Marshall again sought out medical treatment in Philadelphia. An enlarged liver protruded into his stomach and made it impossible to keep food down. Dr. Physick was unable to provide a cure. On the evening of July 6, 1835, at seventy-nine, Marshall died.[99]

Conclusion

Speeches, memorials, and resolutions were quickly produced across the country that celebrated Marshall's legacy as "the judicial father of all."[100] The Tennessee Supreme Court noted that "[w]hen it could be ascertained what had been the opinion of Chief Justice Marshall,

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[96] February 27, 1835 JM to John Frazee, *Marshall Papers*, Vol. 12, p. 457; April 4, 1835 JM to J.Y. Campbell, *Marshall Papers*, Vol. 12, p. 480; May 16, 1835 Interview with James Kent, *Marshall Papers*, Vol. 12, p. 486.
[97] April 13, 1835 JM to James K. Marshall, *Marshall Papers*, Vol. 12, p. 483; May 22, 1835 JM to James K. Marshall, *Marshall Papers,* Vol. 12, p. 487.
[98] April 30, 1835 JM to Richard Peters, *Marshall Papers,* Vol. 12, p. 485-486.
[99] Smith, p. 523.
[100] "Supreme Court of Tennessee" July 28, 1835 *Nashville Republican*, p. 2.

on any important and doubtful legal question, doubts were generally no longer felt, and we willingly followed a guide, who so seldom erred. His name stamped with a seal, of the highest authority, all the decisions of that tribunal, of which he was the head, throughout the whole Union, and insured for them, the highest respect, in all civilized countries."[101] And with his death began the preferred memory of both the chief justice and his Court, a remembrance that largely minimizes the difficult final five years. In our contemporary estimation, Marshall is *the* chief justice, and the Court that operated for the first three decades of the nineteenth century under his direction represents its most celebrated age. The scores of biographies of the chief justice attest to our continuing fascination with and understanding of Marshall as a personally transformative figure who created the Court as a true institution in American life. What this appreciation sometimes obscures is the contingencies of place and era that provided Marshall and the other justices the basis upon which they could enjoy this successful tenure. The challenging five final years of the Marshall Court shows the importance of very contingent variables on their success. When Washington was no longer in its infancy as a city, the justices were no largely forced by the necessity to live together, and the country turned away from the nationalist vision present in so many of the Court's most famous decisions, the forceful nature of Marshall's personality upon which many predicate the Court's success seems less pivotal.

[101] "July 28, 1835 *Nashville Republican*, p. 2.