

JOHN MARSHALL: DEFINER OF A NATION

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Fortunately, there was no wig. There was only a simple black robe that had seen better days, for it had been worn by my predecessor, the Honorable Louis P. Peck, throughout his long judicial career. It was Justice Peck's retirement that occasioned the vacancy and permitted my appointment to the Vermont Supreme Court, a bench that had been sitting without people of my gender since it began in 1782. Two hundred and eight years later, it was an investiture that challenged the traditional way of looking at that bench and I was grateful for the uniform that would lessen my difference from my established colleagues.¹

Although I was very much aware of the symbolism of the black robe, I did not know the origin of the tradition for United States judges until I read Jean Edward Smith's excellent biography of John Marshall.² Eschewing the scarlet and ermine robes of some of his colleagues, or an academic gown, John Marshall wore black when sworn in as Chief Justice of the United States. It was a tradition he was familiar with from his home state of Virginia. As Smith points out, Marshall was "making a quiet statement."³ He was a prominent Federalist, a party accused by its Republican opponents of monarchical leanings, but by donning the simple black robe, Marshall indicated his departure from political life. In Smith's view, Marshall was signaling that the new leadership on the Court would move it away from partisan politics and into the realm of

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1. Indeed, I have solid proof that wearing a black robe on the bench obliterates the individual judge's identity. When we swear in a new group of lawyers and then greet them afterwards, *sans* robes, the new lawyers and their families often do not recognize me without my robe or confuse me with the other woman on our bench.

2. Jean Edward Smith, *John Marshall: Definer of a Nation* (Henry Holt & Co., Inc. 1996).

3. *Id.* at 286.

judicial authority.⁴ The robe also implied something about Marshall himself—that he was a person without pretension or artifice, one whose humble and unaffected personal qualities would not be altered by his ascension to power. In many ways, the black robe says everything about John Marshall.

Smith's lively recreation of Marshall's rich personal and professional life as soldier, politician, political envoy, secretary of state, and most of all, as Chief Justice, is a lesson for every appellate judge or public servant. I first read the book in 1996 in conjunction with an appellate seminar I was working on entitled "The Compleat Appellate Judge." We chose to focus on John Marshall as our professional model, and we could not have chosen a better historical figure for modern judges to emulate. When I returned to the book recently to write this reflection, I looked for connections between my present day role as an appellate judge and that of John Marshall.

I was reminded that everything we do in law has a connection to the past, and that we revere tradition. When I was sworn in, and donned the black robe of my predecessor, I accepted the principle of impartiality and the challenge of matching the wisdom of my forebears. I embraced the fact that decisions should be based on precedent, and that the common law is still developed by judges who are connected to each other, case by case, over the centuries. The weight of that history is humbling when one assumes the bench because one becomes a part of that long and continuing tradition.

Many of the judicial customs I would come to know began in the Marshall Court and have provided the floor, walls, and ceiling of my professional life: the conference of the justices to resolve the knotty legal problems the cases present; the importance of maintaining the collegiality of an appellate bench, where all points of view are entitled to respect, but where the attempt is made to speak with one, authoritative voice through unanimous opinions; and the example of judicial temperament, which Marshall set in the impeachment trial of his colleague, Justice Chase, and that reverberated throughout the federal system. That example served not only to correct Justice Chase's behavior on circuit; it also provided a lesson for those judges

4. *Id.*

who had been carried away a bit by their own Federalist predilections, and who needed to absorb the lesson that impartiality is an important element of credibility.

It isn't just the enduring customs of Marshall's bench that provide a sense of connection between my appellate world and Marshall's. The Marshall Court's enunciation of the constitutional principles that would define the allocation of power among the three branches of the federal government and its relations with the states have become second nature to modern judges—the concept of the American constitution as law and the Supreme Court as its ultimate interpreter; the deference to Congress in areas where it has spoken and the avoidance of judicial tyranny; the allocation to the executive of the authority to deal with foreign powers; the supremacy of the federal constitution over state law; and the creation of a climate in which a national commerce could flourish.⁵ We take all of these defining principles as beyond question, and have used some of them to define our own state constitutions, but in Marshall's time, the allocation of power in the new democracy was hotly contested, and these were all issues that had to be worked through, case by case. The Marshall Court's decisions were controversial and often roundly criticized. Yet, under Marshall's stewardship, the Supreme Court attained and, of equal importance, came to be seen as having, the independence that has given credibility and authority to its decisions. The concept of judicial independence that Marshall established was critically important to a society committed to a new manner of civil discourse and debate. It is a legacy that the entire judiciary enjoys today and one that we take for granted at our peril.

Judicial customs and legal precedents are obvious connections between Marshall's time and my own, but what about working conditions and personal life experiences? Reading Smith's biography made me wonder where we would be if a lesser man had been at the helm. I want to reach across history and say thank you, on behalf of all of us, because nothing in our own professional lives—not long hours, difficult colleagues, unpopular decisions, perceived political interference, lack of resources, time away from home and family—could ever

5. See e.g. Smith, *supra* n. 2, at 3.

begin to approach the challenges the founding fathers confronted.

When Marshall was Chief Justice, the Justices still rode circuit, and they were not flying first class. In fact, Smith describes circuit duties as the most arduous task the Justices faced.⁶ Marshall's duties required him to travel to Raleigh only twice a year, but the other Justices were not so fortunate:

Justice Cushing, on the first circuit in New England, had been badly injured on several occasions when his coach overturned; Chase almost drowned when his ferry was swept away on the rain-swollen Susquehanna; and Alfred Moore confronted danger constantly in the backwoods of South Carolina and Georgia.⁷

Justice Paterson, on circuit in New Jersey, was seriously injured when his coach "overset down a precipice of ten feet."⁸ Recently, my court rode its own version of circuit by sitting in an historic courthouse in the quaint southern Vermont village of Newfane. The two-hour car trip had its charms, but it had none of the excitement of being swept away on the rain-swollen Susquehanna. I cannot even complain about the five years I travelled the two-hour journey to the Court in my own car and stayed away from home and my small children three nights a week (the absolute limit my family established), as a remotely comparable hardship.

I could identify, however, with certain personal choices that Marshall made. Like many of the founding fathers we have come to know better through popular biographies, Marshall spent periods of time away from home in the service of the nation, and that time amounted to a good deal more than three nights a week. While he defined the nation, he left behind in Richmond his beloved wife, Polly, and his children. His absences clearly affected his relationship with them.

Even before he became Chief Justice, in fact, Marshall served the nation in capacities that required long absences from home. It was during Marshall's months in France as a political envoy that Polly, suffering a bout of postpartum depression perhaps exacerbated by Marshall's absence, became an invalid.

6. *Id.* at 336.

7. *Id.*

8. *Id.* (quoting a letter from Paterson to Marshall).

Marshall thus became essentially a single parent, who thereafter had to rely on other caregivers when he was away from home. I am certain that this situation caused him some concern.

After he became Chief Justice, for example, two of his sons eventually attended Harvard but distinguished themselves principally by lives of dissipation, leading Marshall to entertain the self-doubt of all parents who wonder whether they have made the right life choices, and whether they should have paid more attention to this or that stage of their children's development. As a mother, it was easy for me to relate to Marshall's problem—how to balance an intense and interesting professional life with an equally intense personal life that includes the raising of children. One has to acknowledge, as Marshall implicitly did, that the choice of one necessarily sacrifices some aspects of the other. Indeed, I sometimes wonder whether he said to himself, in his private moments, "I tried to have it *all*." (If he did, I am confident that no one criticized him for wanting it.)

As Marshall's life shows, sacrificing family for work has never been a gender-specific issue. It is only true that women have been less free to make the sacrifice without criticism. When Marshall got the appointment as Chief Justice, almost by accident according to Smith,⁹ his wife was already an invalid, but, apparently he did not think twice. Although devoted to his family, I doubt that Marshall saw his acceptance of the appointment as a choice between the two alternatives—work or family—that have bedeviled the lives of modern-day women. Fortunately, the women's movement freed up the choices for women, and women entered the legal profession in significant numbers. I was one of them, and as I reached adulthood, I wanted to be involved in the public policy issues of my own day, to think about the purpose and development of law, and the balance of power between people and their government. So did Marshall. It is obvious from Smith's book that Marshall relished his professional life and could not have regretted his choice. Neither did I, but I acknowledge that there were times, as there

9. *Id.* at 14 (quoting John Marshall, *An Autobiographical Sketch* 30 (John Stokes Adams, ed. U. Mich. Press 1937): "I had never before heard myself named for the office and had not even thought of it. I was pleased as well as surprised, and bowed in silence. Next day I was nominated.").

must have been for Marshall, when the less attractive realities of the choice were made apparent.¹⁰

It is Smith's portrait of Marshall the man, as well as his portrait of Marshall the Chief Justice, that allows us to appreciate the personal sacrifices Marshall made for the good of the country, and to glimpse his extraordinary personality. Despite the remoteness of Marshall's world from our own, what appellate judge could not be inspired by his exemplary life? In so many ways, Marshall's life refuted the accepted wisdom that power corrupts and absolute power corrupts absolutely. In his judicial decisions and his personal deportment, he was ever the model public servant and loyal friend and relation. Despite his high office, he did not, as might have been said in his day, "take on airs" and he remained essentially the backwoods frontiersman from Virginia, able to relate to the coach driver or the foreign dignitary with ease. In his simplicity, he continued the tradition of his great hero, George Washington,¹¹ in setting the tone for the new democracy. And to think he started it all by donning a simple black robe.



10. I recall, for example, a time shortly after I was appointed to the bench when I was asked to meet with a group of women lawyers for an informal discussion at lunch. I was still very new to my job and a bit overwhelmed by it. I described to them the challenges I felt as I attempted to grasp the sheer variety of the issues before the court, to deal with the amount of reading required, and to find time to write opinions and respond to those of others. I was intensely engaged with this new life and my court colleagues, and I was enjoying it immensely. Yet, home and hearth were definitely getting short shrift as I stayed in Montpelier during the week. One of the lawyers asked me, "How can you leave your children? I just can't imagine doing that." I responded to the effect that when I was alone in Montpelier, I could devote myself totally to my work, without having to respond to demands for orange juice, and concluded by asking, "What's not to like?" After that candid statement, I was probably awarded a new distinction as the President of the Bad Mothers Club. And I suppose that at times, Marshall may have wondered if he was President of the Bad Fathers Club.

11. *Id.* at 4, 7 (noting that Marshall "wrote an imposing five-volume biography of Washington," and that Marshall "delivered the nation's eulogy" when Washington died).