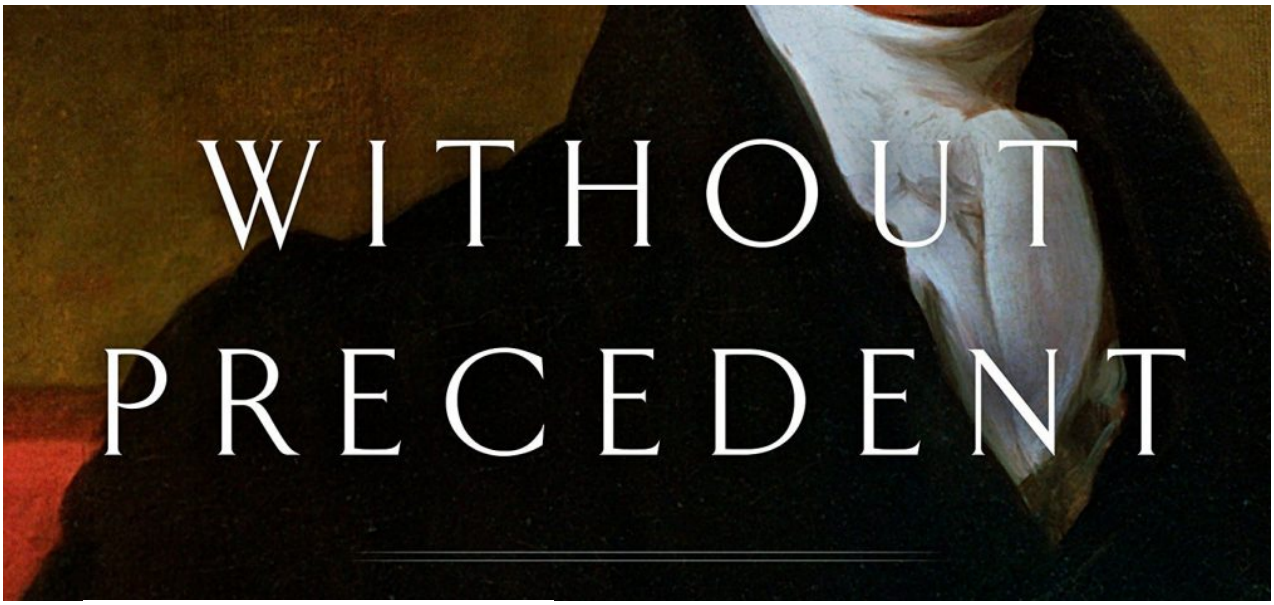

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Without Evidence: Joel Richard Paul's John Marshall

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JOHN MARSHALL—SOLDIER, LAWYER, LEGISLATOR, statesman, and fourth chief justice of the United States—led a long public life that spanned from the American Revolution to the rise of Jacksonian democracy. Joel Richard Paul's full-length biography takes the reader from Marshall's birth on the Virginia frontier in 1755, to his death in 1835 at the head of an American judiciary that had gained significantly in power and respect because of Marshall's leadership over the preceding 34 years.

Paul is a gifted writer and his engaging prose yields a pleasant read. But his portrait of Marshall as a man and jurist too often reflects repackaged conventional wisdom developed over the last century or so. It has neither the immediacy of the older eulogistic accounts by near-contemporaries nor the fresh perspective that can come from renewed and in-depth attention to primary sources in their historical context. The most

significant new historical claim in the book—that John Marshall probably suborned perjury from his younger brother, James Markham Marshall, to embarrass the Jefferson administration in *Marbury v. Madison*—is as baseless as it is bold.

The Progressives' Mythical Marshall

Ever since Albert Beveridge's massive life of John Marshall was published in 1916 (volumes 1 and 2) and 1919 (volumes 3 and 4), Progressives, New Dealers, and latter-day legal liberals have used Marshall's biography to spin myths about his jurisprudence. The Paul biography fits neatly into this genre, although it is not apparently designed to do so.

Earlier Marshallian mythmakers have been so successful that the ideological outlook undergirding *Without Precedent: Chief Justice John Marshall and His Times* is largely invisible not only to the general reader today, but also to anyone who has absorbed the standard account of Marshall typically presented in American law schools. It's no wonder, though, that Riverhead Books, an imprint of Penguin Random House, splashed praise on the back cover from Jill Abramson (former executive editor of the *New York Times* and coauthor of a book criticizing Justice Clarence Thomas's confirmation), Harvard's Laurence Tribe (that institution's Carl M. Loeb University Professor and a lion of liberalism in American constitutional law), and Yale's Harold Hongju Koh (that institution's Sterling Professor of International Law, who served in the Clinton and Obama administrations). These eminences are better suited to approve Paul's conventionally liberal beliefs about Marshall's life and work than they are to recognize the thinness of some of his historical claims and assessments.

Professor Tribe's blurb is a hasty endorsement of the book's conspiracy theory about *Marbury*:

> In every chapter of this page-turning account of Marshall's pivotal place in our nation's history, even the expert will learn something new. How did Joel Paul figure out, for instance, that the great Chief Justice probably suborned perjury on his brother's part during the bizarre Marbury v.

> Madison trial? You owe it to yourself to read Joel Paul's terrific book to find out.

Actually, Paul owes it to the public to withdraw the claim that Tribe promotes. It is based on a perceived inconsistency between two documents: an affidavit submitted by James Markham Marshall when the *Marbury* case was heard by the Supreme Court in early 1803, and a letter that John Marshall wrote to James Markham Marshall in 1801, a couple of weeks after the events that gave rise to the case.

The apparent inconsistency evaporates upon inspection. That Professor Tribe endorses it might perhaps be explained by inattention to the relevant historical materials. Oddly, Tribe appears as untroubled as Paul turns out to be by the suggestion that the chief justice of the United States conspired with his brother (at the time a D.C. circuit judge) to introduce false testimony in a judicial proceeding.

Concocting a Conspiracy

The basic error at the heart of Paul's fabulous *Marbury* tale is easy enough to pinpoint: The biographer perceives an inconsistency where there is none.

Marbury v. Madison was a proceeding filed in the Supreme Court of the United States in December 1801 to obtain an order commanding the new Secretary of State, James Madison, to deliver commissions for William Marbury and a few other petitioners to serve as justices of the peace for the District of Columbia. These four were among 42 appointed to that office earlier that year by lame-duck President Adams pursuant to a law passed by a lame-duck Federalist Congress. The President signed commissions for these appointees, and Secretary of State John Marshall affixed the seal of the United States to the signed commissions.

But all this was done just before the Adams presidency ended, and then-Secretary Marshall left the commissions undelivered in his office on March 4, 1801. That was the day President Thomas Jefferson took office.

This shift in political control from one party to another was an unprecedented event in American government.

Awkwardly, John Marshall was not only chief justice but also acting Secretary of State when he swore Jefferson in as President. Marshall had been Secretary of State since May 23, 1800 and had continued in that position even after he first took the bench as chief justice on February 4, 1801. At that point, it would have been but a month until the change in administration, so there was no point in Adams appointing a successor. And the incoming President asked Marshall to stay on in an acting capacity until he could appoint a replacement.

As a practical matter, Marshall finished carrying out his duties as Secretary of State on the day of Jefferson's inauguration. Jefferson went over to the State Department soon after and found a sheaf of undelivered commissions sitting on a table. He forbade their delivery. We do not know what happened to them after that, but they were presumably destroyed.

Paul's perjury theory focuses on the difficulties that Marbury and his fellow Federalist petitioners had in proving the existence of their individual commissions to support their case in court. With the commissions for Marbury and his fellow petitioners nowhere to be found, the hunt was on for admissible evidence that they had actually been signed and sealed.

In a March 18, 1801 letter to his brother James Markham Marshall, who had become a D.C. circuit judge the day before Jefferson's inauguration, John Marshall expressed regret for his failure to send out for delivery a number of signed, sealed commissions. He figured it was unnecessary, he said in the letter, to deliver commissions for offices for which Jefferson had the power to replace the current occupants. With respect to offices for which Jefferson did not have this power (such as justice of the peace, in Marshall's view), Marshall never expected, he told his brother, that the new President would neglect to follow through on the commissions approved by his predecessor. Further, Marshall noted defensively that he was both busy and understaffed in this period of transition. (Recall that not only was there a change of administration, but Marshall was pulling

double duty at Supreme Court while still serving as Secretary of State in the waning days of the Adams administration.)

In an affidavit submitted by James Markham Marshall in the *Marbury* proceedings (which began in December 1801 but were not heard on the merits until February 1803), James said that on Inauguration Day he went to pick up some commissions for justice of the peace for the Alexandria portion of the District of Columbia (where James lived). He said it was a precaution on his part, for he heard there might be "riotous proceedings" that evening. That makes sense given the transfer of power taking place that day—at least if James had reason to think there would be some undelivered commissions still at the office of the Secretary of State.

And there were. He picked up 12 and left a receipt listing the 12 names they contained. Finding he could not conveniently deliver them all, he returned some, and struck through, on the receipt, the names of those returned. Two of the commissions that he returned to the Secretary of State's office, he averred, were for Marbury's co-petitioners Robert Townsend Hooe and William Harper.

Paul believes there is a discrepancy between James's 1803 affidavit and John's 1801 letter to James: "If James was responsible for delivering the commissions, then Marshall's explanation to James would have been superfluous. It is apparent that James Marshall perjured himself in the Supreme Court and that the chief justice not only knew this but probably asked him to lie."

But there is no discrepancy. James was not "responsible for delivering the commissions." Worried about potential "riotous proceedings" on Inauguration Day, he went to the Secretary of State's office and found some signed and sealed but undelivered commissions there. If none had yet been delivered (and it seems none had), there would have been 42 commissions for justice of the peace. James picked up fewer than a third of them and then put some of those back where he got them. Both John's letter and James's affidavit describe a stack of signed and sealed, but undelivered, commissions sitting in the office of the Secretary of State on

the day that Jefferson became America's third President. That is also consistent with Jefferson's own account (recorded in a June 12, 1823 letter to then-Justice William Johnson) of having discovered the undelivered commissions in the State Department shortly after his inauguration.

Alleging a nonexistent inconsistency is not the only weak point in Paul's account. He writes that "James's testimony was the only evidence that the commissions were issued." But that is simply not true, as a quick inspection of an account of the proceedings (5 U.S. 137, 141-52 (1803)) reveals. Further, if the two Marshalls, and Charles Lee, Marbury's lawyer, made up this story to fill an evidentiary gap, it is odd that they invented a tale with nothing to tell about Marbury's own commission. (Marbury lived in Georgetown, not Alexandria.) It would have been especially odd to make that omission given that Marbury's commission is the only one that Marshall discussed in his opinion for the Court. It would also seem foolish to have included details in the affidavit that could easily have been refuted by publicly available facts. But supposedly they did that, too, even though they knew the opinion in *Marbury* would be subject to partisan criticism because it was the equivalent of a high, hard brushback pitch thrown at the new administration.

Even worse than attributing this underhanded action to John Marshall and his brother, Paul justifies it. "Facing a constitutional crisis—[Jeffersonians] were threatening the independence of the judiciary—Marshall thought that the end justified the means." But a man who believed that the end justifies the means would not be a good judge, much less the Great Chief Justice.

Fletcher v. Peck*, *Foster v. Neilson*, and *The Antelope

As it turns out, Paul presents this alleged invention in *Marbury* as but one of many in a long public career full of Marshall's inventions. Somewhat perversely, the biographer contends this was part of what made Marshall great. Summing up near the end of his book, Paul writes that "Marshall had to invent himself, and the experience of self-invention gave him the confidence and imagination to reinvent the law."

One example adduced by Paul is *Fletcher v. Peck*. Decided in 1810, this was the first Supreme Court decision holding a state law unconstitutional. (Paul elsewhere mistakenly describes *Dartmouth College v. Woodward*, decided in 1819, as the first such case.) The Supreme Court's unanimous decision in *Fletcher*, Paul contends, rests on a "radical reconceptualization of legislative grants" of property.

Another purported example of Marshallian inventiveness is *Foster v. Neilson*, a case addressing the relationship between a treaty and federal statutory law. In *Foster*, Marshall distinguished between those treaties that would have an effect on domestic law directly and others that would have that effect only if Congress enacted implementing legislation. In today's terms, this is the distinction between "self-executing" and "non-self-executing" treaties. "There was no such distinction in contemporary international law," Paul writes. Its formulation by Marshall, he asserts, is "a breathtaking example of Marshall's capacity for invention."

The biographer says something similar about "the principle that U.S. courts will not enforce a foreign government's criminal law." Marshall applied this principle—one that continues to be applied in a number of contexts today—in an 1825 slave-trading case called *The Antelope*. According to Paul, this was yet "another invention of Marshall's legal imagination that persists in our law today."

Paul overstates Marshall's legal creativity in these passages. It would be surprising if Marshall could so confidently invent new law while obtaining unanimous or majority support from his colleagues. It would be even more surprising for these Marshallian inventions to endure by being accepted by future generations of judges if their foundations were so flimsy as one man's say-so.

But this is what *Without Precedent* would have us believe Marshall accomplished. And this observation points us to a more fundamental problem with the admiring portrait painted by Paul. His conception of judicial excellence is entirely different from that of his subject. By Marshall's own criteria and the criteria of his times, the assertion that Marshall repeatedly exercised "confidence and imagination to reinvent

the law" would be a damning criticism. To truly gauge John Marshall and his significance requires that a judicial biographer try to understand his subject as he understood himself. Paul does not.

The mismatch between the biographer's and the subject's ways of thinking causes other distortions. Consider Marshall's opinion for the Court in *The Antelope* holding that the international slave trade did not violate the law of nations. As a result of this decision, many enslaved Africans who could have been free remained in bondage. If Marshall were so accomplished at inventing law, one might ask, why did he not just invent some here so that justice could be done? That is pretty much the criticism that Paul makes: "The man who wrote *Marbury* and *McCulloch* was not shy about inventing legal principles. Marshall understood that he was not just applying the law mechanically; he was also making law." That he did not do so here, Paul claims, "revealed certain faults in Marshall's character." Really? Has this biographer borne the heavy burden to sustain such a claim? Does he recognize how heavy it is?

Gibbons v. Ogden **and** ***Wickard v. Filburn***

Paul's righteousness about Marshall's character defects as ostensibly exposed in *The Antelope* is of a piece with his excessive admiration for Marshall's alleged inventiveness in other cases. Closing out his treatment of *The Antelope*, Paul writes: "Though Marshall would not challenge slavery directly, he found another, indirect route—granting Congress authority to regulate the slave trade domestically. A steamboat provided the unlikely vehicle for Marshall's redemption." This is the lead-in to his discussion of *Gibbons v. Ogden.*

Gibbons was an 1824 case holding that New York could not enforce its state-law steamboat monopoly to prohibit navigation by two federally licensed steamboats ferrying passengers between New Jersey and New York. On the way to the Court's decision in *Gibbons*, Marshall construed the Constitution's grant of power "To regulate Commerce . . . among the several States" as including authority for Congress to enact a federal law regulating the "coasting trade." Paul describes the decision in much broader terms, stating that "virtually all the regulatory authority that the

federal government exercises today—whether over the environment, occupational health and safety, banks, securities markets, labor, transportation, and even terrorism and crime—derives from Marshall's expansive reading of the commerce clause in *Gibbons*. Without Marshall's decision, a truly national economy would not have been possible."

This is an exaggeration, but one with a strong pedigree. The holding that better fits Paul's description is *Wickard v. Filburn*, decided in 1942. This "homegrown wheat" case has been described in Supreme Court opinions more recently as "perhaps the most far reaching of Commerce Clause authority over intrastate activity" and "the *ne plus ultra* of expansive Commerce Clause jurisprudence."

Chief Justice Marshall's opinion for the Court in *Gibbons* explicitly disclaimed an interpretation of the Commerce Clause that would allow federal regulation of "commerce which is completely internal, which is carried on between man and man in a State." But Justice Robert Jackson's opinion for the Court in *Wickard* adopted an interpretation of the Commerce Clause to authorize regulatory authority over wheat that was produced and consumed on the very same farm.

Marshall is such a towering figure that projecting later legal innovations back on to him has proven to be a very effective way to shape the course of American constitutional law.

That is why Jackson and other FDR appointees to the Supreme Court claimed merely to be returning "to the first principles enunciated by Chief Justice Marshall in *Gibbons v. Ogden*" when they decided *Wickard* as they did. Writing for the Court, Justice Jackson spun a creation myth for Commerce Clause jurisprudence that would dominate the next several decades decisions:

> At the beginning, Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from political, rather than from judicial, processes.

For better or worse, Paul's transmission of this myth appears to be unselfconscious. But we should recognize it for what it is.

Marshall's Real Achievement

Although Paul is wrong about the extent of Marshall's inventiveness, he is right about Marshall's ultimate object and his greatest accomplishment. Paul contends in his book's opening sentence that "no one did more than Marshall to preserve the delicate unity of the fledgling Republic." And he echoes this theme of Marshall's contribution to national unity at the end of his introduction: "In a revolutionary time, against myriad enemies both foreign and domestic, Marshall held the Court, the Constitution, and the union together." Although he fumbles in describing Marshall's means, Paul properly grasps Marshall's end.

One reason that Paul and others of a progressive bent may have difficulty appreciating Marshall's *modus operandi* is that Marshall's methods were fundamentally backward-looking in form. To many today, such an approach implies narrowness of mind and a regressive mindset. But looking back and holding to earlier authoritative determinations made by those with legitimate political authority is precisely what Marshall's understanding of the judicial role and his obligation of fidelity to positive law required. His characteristic way of providing, judicially, for the future was to anchor the decisions of his Supreme Court in the record laid down by the people of the United States in the past.

In rejecting this biography's perpetuation of the Progressives' mythical Marshall, we must be careful not to swing to the opposite extreme. While Marshall was not as inventive as *Without Precedent* would have us believe, he obviously possessed abundant legal ingenuity. As R. Kent Newmyer has written, Marshall operated by identifying himself with the Court, the Court with the Constitution, and the Constitution with the People. *That* is the creative Marshall that the jurist himself would have wished to see perpetuated.

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