

# A Man for All Seasons: Historical Memory and John Marshall

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The heroes of American politics are often represented as timeless figures, sometimes literally carved in stone. A growing literature on collective memory, however, has emphasized the ways in which historical reputations are socially constructed—and reconstructed—over time. This article considers Chief Justice John Marshall as a case study in this dynamic process of constructing historical reputation. Marshall stands above all others as “the great chief justice,” but nonetheless his reputation has not always been secure. Surveying both citations to Marshall’s key opinions and popular and scholarly discussions of the chief justice himself across time, the article shows how Marshall’s reputation has been remade over time to fit the political needs of the moment. Marshall’s durability as a historical figure has turned not on a single set of particularly timeless accomplishments but on the diversity of his contributions to the constitutional canon.

Keywords: U.S. Supreme Court history, John Marshall, collective memory, judicial reputation

Chief Justice John Marshall has long been known in the United States as “the great chief justice.”<sup>1</sup> A larger-than-life statue of Marshall presides over the ground floor of the U.S. Supreme Court building.<sup>2</sup> He is routinely the subject of book-length biographies, winning scholarly and popular attention that far exceeds what other justices have been able to command.

There is little question that Marshall left a lasting mark on the Court. He was not the first to serve as chief justice, but by a wide margin he served the longest in that office.<sup>3</sup> His tenure spanned several presidential administrations and a trans-

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1. For example, see R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), 479. Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University Press of Kansas, 1996).

2. Fittingly, the statue was sculpted by the son of Justice Joseph Story, Marshall’s closest ally on the bench.

3. He served nearly six years longer than his nearest competitor, his successor Roger Taney.

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formation of the party system. Perhaps most importantly, his tenure coincided with a dramatic increase in judicial business for the Court and its emergence as a regular player in constitutional and legal disputes. Marshall's achievements may seem obvious and timeless, yet the study of historical memory suggests that few things are truly timeless. What seems important and celebrated is itself historically contingent. We choose to remember what is important to us, and what is important and valuable to us is always changing and very much of the moment. Consider the recurrent rankings of presidents by historians. The carved stone of Mount Rushmore and public memorials like the Washington Monument suggest permanence. But surveys reveal that presidential fortune is often fleeting. While the stature of presidents like Abraham Lincoln and George Washington has been secure, others such as Martin Van Buren and Andrew Johnson have found fame to be more transient.<sup>4</sup>

The goal of this article is to investigate how and why Marshall's reputation has persisted. There is no doubt that Marshall's overall historical standing among Supreme Court justices is as secure as Washington's is among presidents.<sup>5</sup> The question is what accounts for that persistence, given how historical memory is constructed. Rather than considering why John Marshall is systematically preferred to Melville Fuller, the article unpacks the shifting components of Marshall's own legacy. We investigate Marshall's reputation for the public at large and also within the legal profession by tracking citation patterns to his decisions.<sup>6</sup> How have later generations chosen to remember John Marshall, and why do we consider him "great"?

A major part of the answer is that there is not one John Marshall, but many. Marshall has found a place in our collective memory by showing different facets of himself over time. Marshall has been remembered as a dangerous nationalist and a prudent guard against national dissolution; an adamant defender of property rights and an unscrupulous Federalist bent on protecting economic interests; a usurper of state and federal power and a bold advocate of the Supreme Court's

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4. We have in mind "fame" in Douglass Adair's sense, that is, a kind of "secular immortality" conferred by posterity on those who accomplish great deeds; see Douglass Adair, *Fame and the Founding Fathers* (New York: Norton, 1974), 24. Presidential rankings based on more than twenty sources, from Arthur M. Schlesinger, Sr.'s 1948 survey through the American Political Science Association's 2015 poll, are helpfully summarized at [http://en.wikipedia.org/wiki/Historical\\_rankings\\_of\\_Presidents\\_of\\_the\\_United\\_States](http://en.wikipedia.org/wiki/Historical_rankings_of_Presidents_of_the_United_States).

5. See, for example, William G. Ross, "The Ratings Game: Factors that Influence Judicial Reputation," *Marquette Law Review* 79 (1996): 401–52, at 445, 450.

6. For more on the distinction between "external" and "internal" legal cultures, see Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975), 223–24.

role in resolving important national disputes. The reasons why he has been celebrated or criticized at some moments in American history have little resonance at others, but Americans have consistently found new reasons for remembering Marshall even as they have let go of their old reasons for doing so.

We begin this article with a few brief remarks about the the construction of collective memory. We then investigate two kinds of data that illuminate Marshall's place in our collective memory: popular and scholarly writings about Marshall throughout U.S. history; and citations to some of Marshall's most important decisions in the U.S. Supreme Court, lower federal courts, and state courts. These two sets of sources help us understand different aspects of Marshall's legacy. From the popular and scholarly sources, we gain a rough sense of the image of Marshall that was alive in the public consciousness in different periods of U.S. history. Alternatively, our citation rates focus on Marshall's reputation for a very specific audience: federal and state judges. This second layer of data is necessary to assess how Marshall's constitutional decisions have actually been used by different courts during different periods of U.S. history. Though there is some overlap between the two sets of data, for the most part they tell distinctive stories about the ways that Marshall's legacy has been used by different actors and audiences. Both sets of data are important for understanding what made "the great chief justice" great.

### The Fluidity of Historical Memory

Over the past few decades, scholars have become increasingly interested in the construction and significance of shared histories.<sup>7</sup> In their pioneering work on the sociology of knowledge, Peter Berger and Thomas Luckmann argue that human institutions are transmitted from one generation to the next and become accepted as part of the objective reality of the world. In order to do so, however, individuals must be socialized into the traditions that make sense of and legitimate society.<sup>8</sup> "Communities," Robert Bellah and his colleagues observed,

have a history—in an important sense they are constituted by their past—and for this reason we can speak of a real community as a "community of memory," one that does not forget its past. In order not to forget that past,

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7. See Barry Schwartz, "The Social Context of Commemoration: A Study in Collective Memory," *Social Forces* 61 (1982): 374–402; David Lowenthal, *The Past is a Foreign Country* (Cambridge, U.K.: Cambridge University Press, 1985); For a survey of scholarship in this area, see *The Collective Memory Reader*, ed. Jeffrey K. Olick, Vered Vinitzky-Seroussi, and Daniel Levy (Oxford, U.K.: Oxford University Press, 2011).

8. Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality* (New York: Anchor Book, 1977), 61–62.

a community is involved in retelling its story, its constitutive narrative, and in so doing, it offers examples of the men and women who have embodied and exemplified the meaning of the community. . . . The communities of memory that tie us to the past also turn us toward the future as communities of hope. They carry a context of meaning that can allow us to connect our aspirations for ourselves and those closest to us with the aspirations of a larger whole and see our own efforts as being, in part, contributions to a common good.<sup>9</sup>

Communities are imagined through the effort of social actors seeking to remake individual identities.<sup>10</sup>

Creating and maintaining these communities of memory is no easy task. Traditions are “invented” to “inculcate certain values and norms of behavior by repetition,” establishing “continuity with a suitable historic past.”<sup>11</sup> Historic sites are selected and preserved in a manner that shapes collective memories in a politically useful way.<sup>12</sup> Such historical narratives are constructed and reconstructed in response to the changing needs of the present. Social actors need a usable past, a past that informs contemporary needs and concerns and reinforces contemporary affiliations and aspirations. Although routinely presented as mere found objects or objective presentations of the facts, such narratives are subject to revision as contemporary needs develop. Collective memory is important enough that powerful political and social actors have a stake in trying to manage it, but it is also important enough that those efforts are likely to be challenged. The materials of history are, Michel Foucault pointed out, “scratched over and recopied many times.” Official histories are challenged by a “counter-memory” that denies the truth of what has been presented.<sup>13</sup> The presentation of the past is a site of contestation, and even apparently durable monuments to past historical narratives can be re-incorporated and reinterpreted by future actors.

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9. Robert N. Bellah et al., *Habits of the Heart* (Berkeley: University of California Press, 1985), 153.

10. Benedict Anderson, *Imagined Communities*, 2nd ed. (New York: Verso, 1991).

11. Eric Hobsbawm, “Introduction: Inventing Traditions,” in *The Invention of Tradition*, ed. Eric Hobsbawm and Terence Ranger (New York: Cambridge University Press, 1983), 1.

12. Diane Barthel, “Getting in Touch with History: The Role of Historic Preservation in Shaping Collective Memories,” *Qualitative Sociology* 19 (1996): 345–64.

13. Michel Foucault, *Language, Counter-Memory, Practice*, ed. Donald F. Bouchard (Ithaca, N.Y.: Cornell University Press, 1977), 139.

## Remembering the Great Chief Justice: A Study of Scholarly and Popular Sources

One such site of historical reconstruction is the the selection of American heroes in books, monuments, and other attempts to shape collective memory. The effort to identify the greatest American presidents in history is an example of the struggle to embody historical traditions in individual biographies. Historical political figures can be used to teach lessons for the future and to provide symbols to pull together individuals and groups in the present. These individual stories are told and retold, reconstructed and reimagined, to serve changing purposes. Once-familiar features of a historical biography can be selectively edited out of the cultural memory, even as other aspects of a life can be brought to the fore, whether to be celebrated or pilloried.

Abraham Lincoln, for example, stands at the head of the American pantheon of presidential heroes.<sup>14</sup> However, our reasons for remembering Lincoln have changed over time. Merrill Peterson persuasively demonstrated the presence of five distinct themes in the presentation of Lincoln in popular and scholarly sources.<sup>15</sup> But that multifaceted Lincoln apparently has not penetrated into the public consciousness, where today Lincoln's role as the Great Emancipator overwhelms all others.<sup>16</sup> The public perception has undoubtedly been bolstered by the increasing emphasis of textbooks on this aspect of Lincoln.<sup>17</sup> An earlier generation may have remembered Lincoln as the savior of the Union, but by the late twentieth century the trials of race took precedence over the trials of nationhood and the collective memory of Lincoln was adjusted accordingly.

Similarly, John Marshall's reputation has been a contested site of social memory. Many social actors have used his actions, character, and legal decisions to advance their own agendas. The causes he for which he is an exemplar have been many, and the aspects of his life that have been remembered have evolved with the issues that have faced America. This section reviews the contribution of those outside the courts—scholars, historians, lawyers, and political actors—to Mar-

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14. Marc Landy and Sidney M. Milkis, *Presidential Greatness* (Lawrence: University Press of Kansas, 2000), 114.

15. Merrill D. Peterson, *Lincoln in American Memory* (New York: Oxford University Press, 1994).

16. *Ibid.*, 348–58.

17. Barry Schwartz and Howard Schuman, "History, Commemoration, and Belief: Abraham Lincoln in American Memory, 1945–2001," *American Sociological Review* 70 (2005): 183–203.

shall's historical reputation. The evidence suggests that he has endured not by standing as a rock, the same yesterday and today and forever. Marshall persists because his accomplishments are diverse and profound.

To gain a rough sense of how Marshall has been viewed in popular and scholarly writings from 1835 to 2009, we selected a sample of ten sources per decade that treated Marshall's legacy in some way, with a total of more than 170 sources. We used two methods to locate our sources. First, we used Google Books to conduct full-text searches in order to identify books with a substantive discussion of John Marshall. Google Books allows the user to search for key terms within specific date ranges and has a large database of publically available texts. This method allowed us to locate many sources, particularly those in the 1800s. Second, we searched the libraries of Princeton University and Clemson University for general histories of the United States that discussed Marshall in some way. In each source we looked for the dominant themes of Marshall's legacy: what was he remembered for and why he was considered important or significant. For the most part, our sample was based on convenience: the availability of sources on Google Books and the Princeton University and Clemson University libraries. We were able to locate ten sources in every decade except the 1860s, when the country was preoccupied with the Civil War.

For the first several decades after Marshall's death we had difficulty finding ten sources per decade, and thus we had to use all the sources we could find. Almost all of our sources from that period came from Google Books. Beginning around 1880, there were more sources to choose from. For those later years, we continued to draw from many different kinds of sources, but we chose to include a larger proportion of general histories (approximately 55% of the total, compared to 7% in the decades before 1880), on the assumption that general histories must try to situate individuals within a broader historical narrative and thus would be a useful prism to gauge Marshall's significance and historical relevance. We supplemented our bias toward general histories with various other kinds of writings: general histories, encyclopedias, law review articles, articles in the popular press, biographies, scholarly works, and others.

We note, at the outset, that this method is imprecise—some authors emphasize themes about Marshall that others neglect, and some set trends that others follow. The extent to which our sources are representative of the broader social climate is also debatable, both because we were constrained by the availability of sources and because any selection of sources will fail to include some voices. Still, by looking at ten sources per decade, and particularly by focusing on general histories, we hope to get a rough measure of how Marshall's legacy has evolved over

time.<sup>18</sup> Changes in the ways that authors situate Marshall vis-à-vis his contemporaries, praise or criticize his personal attributes, and reconstruct his legacy will allow us to say something valid about how Marshall has been viewed across time. We found that while there are some continuities in Marshall's legacy—such as that he was an excellent judge who strengthened the power of the federal government and established the judiciary as a branch of government equal to the executive and legislative branches—people can see enough sides in Marshall to make him interesting and useful to many different political actors and political causes. Therefore, reviewing the historical sources in this way provides useful information that is not captured in our other measures about how Marshall has been appropriated across history, and no other method could reasonably accomplish the same purpose.<sup>19</sup>

Based on our reading of these sources, we divided Marshall's legacy into four periods: from Marshall's death (1835) until about 1890, when his personal qualities and judicial excellence were prominent; from 1890 to 1940, when Marshall's connection to Hamilton and his conflict with Jefferson were emphasized; from 1940 to 1970, when authors focused on Marshall's support for business interests and his protection of the right to contract; and from 1970 to 2009, in which Marshall is remembered for establishing judicial review and strengthening the national government. This periodization is not one we would have chosen prior to reading the sources; indeed, the timing of some trends surprised us. However, we tried to let the sources drive the periodization, rather than seeking to fit the sources to pre-established periods.

From Marshall's death until about 1890, Marshall was remembered as an excellent judge with exemplary personal qualities. His reputation was founded less on the substance of his work or the merits of his accomplishments than the content of his character. His intelligence was often highlighted: Marshall was remembered as “one of the most brilliant intelligences of the age.”<sup>20</sup> Marshall was praised

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18. The inspiration for this method of “historical sweeps” is, of course, David R. Mayhew. See David Mayhew, *Divided We Govern*, 2nd ed. (New Haven, Conn.: Yale University Press, 2005), 37–50; David R. Mayhew, *America's Congress* (New Haven, Conn.: Yale University Press, 2000), 29–70.

19. Of course, it would be possible to write a much more detailed and extensive review of Marshall's legacy, something akin to Merrill D. Peterson's *The Jefferson Image in the American Mind* (New York: Oxford University Press, 1960). For the purposes of this article, we decided to use a much more limited approach in this section in order to complement the other forms of data presented in our article.

20. Southern Quarterly Review, “Review of *The Memoirs of Aaron Burr*,” *Southern Quarterly Review* 7 (1845): 220–50, at 245. See also John MacGregor, *The Progress of America from the Discovery by Columbus to the Year 1846* (London: Whitaker and Co., 1847), 244; H.J. Herring and

for creating a new, “almost original system of National Jurisprudence adapted to an experimental government”<sup>21</sup> Though not yet referred to explicitly as “the Great Chief Justice,” Marshall was definitely ranked as first among his brethren: Marshall was “the brightest ornament [of the Court]. During this period of his chief-justiceship . . . he was unremittingly employed in rearing that monument more durable than brass, which lives in his written constitutional opinions, and has won for him the title of the EXPOUNDER OF THE CONSTITUTION.”<sup>22</sup> Another author made the point more succinctly and extravagantly: Marshall was “Wisdom on the seat of Power, pronouncing the decrees of Justice.”<sup>23</sup> Marshall was to be celebrated for his wisdom and judgment, but the content of his constitutional opinions was discreetly tucked away.

It was during this period that Marshall received the most praise for his private virtues. Marshall was remembered as an exemplary family man and friend: “Chief Justice Marshall was in the domestic circle exactly what a wife, a child, a brother, and a friend would most desire.”<sup>24</sup> Many authors also highlighted his religious convictions: “At a period when skepticism was fashionable among cultivated men [Marshall] never uttered a word calculated to throw doubt upon the divine origin of Christianity.”<sup>25</sup> Authors also noted his humility and jovial character. In an oft-told story, a plainly-dressed Marshall offered to carry a turkey home for a young gentleman who could not find anyone else to do the job. Marshall “actually received a shilling for his services which proved a very costly retainer to the young man in the amount of chagrin he endured when he found that his porter was the Chief Justice of the United States.”<sup>26</sup> Indeed, sometimes the praise of Marshall bordered on the hagiographic:

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James Barton Longacre, *The National Portrait Gallery of Distinguished Americans: With Biographical Sketches* (Philadelphia: D. Rice & A.N. Hart, 1854), 13; George van Santvoord, *Sketches of the Lives and Judicial Services of the Chief-Justices of the Supreme Court of the United States* (New York: Charles Scribner, 1856), 256; L.J. Bigelow, *Bench and Bar: A Complete Digest of the Wit, Humor, Asperities, and Amenities of the Law*, rev. ed. (New York: Harper and Brothers Publishers, 1871), 121.

21. “John Marshall: Chief Justice of the United States,” *Family Magazine* 3 (1843): 97–98, at 97.

22. James Wynne, *Lives of Eminent Literary and Scientific Men of America* (New York: D. Appleton & Company, 1850), 299.

23. Rufus Wilmot Griswold, *The Prose Writers of America: With a Survey of the History, Condition, and Prospects of American Literature* (Philadelphia: Carey and Hart, 1847), 85–88.

24. Louisa Caroline Tuthill, *Success in Life: The Lawyer* (New York: G.P. Putnam, 1850), 48.

25. *The New American Encyclopedia*, ed. George Ripley and Charles A. Dana (New York: D. Appleton and Company, 1865), 218–23.

26. Evert A. Duckinck and George L. Duyckinck, *Cyclopedia of American Literature*, vol. 1 (New York: Scribner, 1855), 405. See also Charles C. Savage, *Illustrated Biography* (Buffalo, NY: Phinney & Co., 1856), 411.

I might speak of that rare combination of virtue and wisdom which his private as well as his public life manifested; of that wise and considerate propriety of conduct; -that natural dignity of deportment; -that love of truth and deep sense of moral and religious obligation; that unaffected modesty; that simplicity of character, manners, dress and deportment; that deep sensibility and tenderness; -that ardent love of home and attachment to the pleasures of the domestic circle; that respect, courtesy and kindness which he always manifested for the female sex; that absence of all selfish feeling; -that benevolence, and that kindly charity which was not only a principle and rule of life, but an innate sentiment of the heart."<sup>27</sup>

Around 1890, our sources begin to say less about his personal characteristics and begin to emphasize Marshall's connection to Hamilton and his conflict with Jefferson.<sup>28</sup> Just as the newly established American Bar Association and the Populist movement began to square off over the legitimacy of judicial review and constitutional protections for property rights, Marshall began to take on a more ideological and partisan cast.<sup>29</sup> Marshall was increasingly portrayed as Hamilton's "judicial exponent"<sup>30</sup> on the Court, at times in decidedly negative terms. One author writes that Marshall carried the Federalist "usurpation of power to the uttermost limits . . . to fix it there for a century to come." The *Marbury* (1803) decision "completed the process of usurpation of power and destruction of democratic control which was begun with the first arrangements for a constitutional convention."<sup>31</sup> This same author sees the *Dred Scott* (1857) decision as a continuation of Marshall's usurpationist legacy.<sup>32</sup> Critical appraisals were in the minority, however, as other authors cast Marshall's nationalist opinions in a positive light: "But

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27. William Banks Slaughter, *Reminiscences of Distinguished Men* (Milwaukee, Wisc.: Godfrey and Crandall, 1878), 117.

28. See Henry Adams, *History of the United States*, Vol. II (New York: Charles Scribner's Sons, 1891), 146–47; John Bach McMaster, *A History of the People of the United States* (New York: D. Appleton and Company, 1895), 168; Willis Mason West, *American History and Government* (Boston: Allyn and Bacon, 1913), 405; Goldwin Smith, *The United States: An Outline of Political History* (New York: Macmillan, 1901).

29. See, for example, Davison M. Douglas, "The Rhetorical Uses of *Marbury v. Madison*: The Emergence of a 'Great Case,'" *Wake Forest Law Review* 38 (2003): 375–413; William G. Ross, *A Muted Fury* (Princeton, N.J.: Princeton University Press, 1994).

30. Talbot Fox Fontaine, *A Study in Alexander Hamilton* (New York: The Neale Publishing Company, 1911), 94.

31. A.M. Simons, *Social Forces in American History* (New York: Book League of America, 1911), 126.

32. *Ibid.*, 259.

for all of [the Republicans'] contempt, Marshall did not quail. Doffing the neutrality of an ideal judge he boldly set himself the task of shaping the constitution in its most plastic period. . . . No greater deed of firm leadership has been performed in our country than this persistent assertion of the vital will of the federal republic."<sup>33</sup>

From about 1940 through the mid-1970s, our sources focused more and more on Marshall's support for business interests and his protection of contracts.<sup>34</sup> Although the New Dealers might have been able to co-opt Marshall to their constitutional project in the 1930s, once the *Lochner* Court was vanquished in 1937, the disquieting connections between Marshall and the interests of property proved to be more salient.<sup>35</sup> This is an aspect of Marshall's legacy that received scant or no attention in our sources up to this period. As one writer saw it,

Marshall's role was to effect a nexus between the property interests under an expanding industrialism and the judicial power under a federal system of government. He was to be the strategic link between capitalism and constitutionalism. Rarely in American history has the exterior tension of events been matched so completely by an interior tension of preparation and purpose on the part of the exactly right man.<sup>36</sup>

Often the point was made in the form of a criticism: "As a phenomenally successful young lawyer, he had amassed property and learned how to use the law to protect and magnify it. Now, by good strategy, he had been deposited as a kind of legal

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33. John Spencer Bassett, *Short History of the United States* (New York: The Macmillan Company, 1913), 359.

34. According to one author, Marshall's great decisions can be divided into two main categories: "Those representing conflict between nationalism and states rights, and those representing, in addition, the sanctity of contracts." See Frank W. Wellborn, *The Growth of American Nationality: 1492-1865* (New York: MacMillan Company, 1943), 470. See also Robert E. Riegel and David F. Long, *The American Story*, vol. 1 (New York: McGraw-Hill Book Company, 1955), 274; Harold Underwood Faulkner, *American Political and Social History*, 7th ed. (New York: Appleton-Century-Crofts, 1957), 220-21; Richard N. Current, Harry T. Williams, and Frank Freidel, *American History: A Survey* (New York: Alfred A. Knopf, 1959), 237; Charles Sellers and Henry May, *A Synopsis of American History* (Chicago: Rand McNally and Co., 1963), 121. James M. Merrill, *The USA: A Short History of the American Republic* (Philadelphia: J.B. Lippincott Company, 1975), 82.

35. On the ambivalent relationship between the New Deal and John Marshall, see Peter H. Irons, *The New Deal Lawyers* (Princeton, N.J.: Princeton University Press, 1993), 295; Max Lerner, "John Marshall and the Campaign of History," *Columbia Law Review* 39 (1939): 396-431; Howard Gillman, "The Struggle over Marshall and the Politics of Constitutional History," *Political Research Quarterly* 47 (1994): 877-86; George Thomas, "New Deal 'Originalism,'" *Polity* 33 (2000): 151-61.

36. Max Lerner, *Ideas are Weapons* (New York: Viking Press, 1939), 29.

Trojan horse in the camp of the enemy . . . [one of Marshall's main objectives was to] fortify and sanctify the rights of property against interference at the hands of the people's representatives."<sup>37</sup> Indeed, this period saw perhaps the peak of criticism of Marshall:

Politically the national spirit was nowhere better expressed than in the decisions of Chief Justice John Marshall of the Supreme Court. This grim old Hamiltonian, who held his high post for thirty-four years after John Adams placed him there in 1801, was often an inferior judge but always an outstanding statesman. . . . Marshall's ringing decisions, couched in crystal-clear language and supported by adroit logic, were intended as propaganda documents. They served their purpose admirably.<sup>38</sup>

By contrast, since the mid-1970s, Marshall's reputation has consolidated around three main themes: Marshall was a "great" chief justice, he strengthened the national government, and he established judicial review. Here are two examples:

The Court, in the first decade and a half of its existence, was an unsure and insecure institution. It lived in the shadow of the Congress and the Presidency, but under Marshall the Court became far more assertive and established the practice of judicial review, and through judicial review its influence on American society and politics. Marshall's talents as a judicial statesman have been described as "pre-eminent—first with no one second."<sup>39</sup>

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It is simply beyond dispute that he, more than any other individual in the history of the Court, determined the developing character of America's federal constitutional system. It was Marshall who raised the Court from its lowly, if not discredited, position to a level of equality with the executive and the

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37. William Harlan Hale, *The March of Freedom* (New York: Harper and Brothers Publishers, 1947), 142–43.

38. Ray Allen Billington, Bert James Loewenberg, and Samuel Hugh Brockunier, *The United States: American Democracy in World Perspective* (New York: Rienhard and Company, Inc. 1947), 136–38. See also Riegel and Long, *American Story*, 142, 274 (see note 34 above); Thomas A. Bailey, *The American Pageant: A History of the Republic* (Boston: Little, Brown and Co., 1961), 233; Sellers and May, *Synopsis of American History*, 121 (see note 34 above); Merrill, *The USA: A Short History*, 82 (see note 34 above).

39. J.D. Lees, R.A. Maidment, and M. Tappin. *American Politics Today* (Manchester, U.K.: Manchester University Press, 1985), 27–28; see also G. Edward White, *The American Judicial Tradition* (New York: Oxford University Press, 1988), 33; and J. Jackson Barlow, *The New Federalist Papers* (Boston: University Press of America, 1988), 211.

legislative branches—perhaps even to one of dominance during the heyday of his chief justiceship.<sup>40</sup>

In this period, Marshall continues to be remembered as our greatest Justice and a central actor in the development of constitutional law. As one author put it: “John Marshall is at the top of every list of Supreme Court greats. He was not merely the expounder of our constitutional law, but was also its author, its creator.”<sup>41</sup>

As with other American leaders, Marshall’s life and contributions were capacious enough to offer a variety of reconstructions suited to the times and purposes of various writers (and their readers). The four periods we just described highlight different aspects of Marshall’s legacy. In the first period (1835–1890), the emphasis on Marshall’s personal characteristics and virtues fits in with the general focus on character development that was prominent in didactic literature of this time. As education scholar B. Edward McClellan put it, just as Americans were moving towards more democratic politics and increased personal mobility, “they moved in precisely the opposite direction in the realm of morals and personal behavior, abandoning the relaxed style of the eighteenth century in favor of an insistence on rigid self-restraint, rigorous moral purity, and a precise cultural conformity.”<sup>42</sup> This period was the most difficult for us to locate sources that discussed Marshall’s legacy, and many of the sources we did find had an unambiguous didactic purpose.<sup>43</sup> Given the general emphasis on virtue and character in the writing of this period, it comes as no surprise that writers were particularly attentive to Marshall’s private virtues.

Marshall’s connection to Hamilton was emphasized in the sources beginning in our second period of analysis (roughly during 1890 to 1940). The theme is not surprising given Hamilton’s influence on Marshall and the extent to which Marshall enacted Hamilton’s ideas as chief justice, especially in *McCulloch v. Maryland* (1819).<sup>44</sup> The connection to Hamilton became prominent after 1890 in part

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40. Henry J. Abraham, *Justices, Presidents, and Senators* (Lanham, Md.: Rowman and Littlefield Publishers, 1999), 62.

41. Bernard Schwartz, *A Book of Legal Lists* (Oxford, U.K.: Oxford University Press, 1997), 5.

42. B. Edward McClellan, *Moral Education in America* (New York: Teachers College Press, 1999), 16.

43. Titles of works such as *Lives of Eminent Literary and Scientific Men of America*; *Reminiscences of Distinguished Men*; *Lives of Illustrious Men of America: Distinguished in the Annals of the Republic as Legislators, Warriors and Philosophers*; *The National Portrait Gallery of Distinguished Americans: With Biographical Sketches*, suggest a didactic purpose on the part of the authors. Titles such as these fade towards the end of the nineteenth century.

44. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

because Hamilton's reputation became more politicized then. Stephen F. Knott, who chronicles the peaks and valleys of Hamilton's reputation in *Alexander Hamilton and the Persistence of Myth*, argues that white Northern Republicans believed the outcome of the Civil War had vindicated Hamilton. During the Gilded Age, "Northerners hailed Alexander Hamilton as an indispensable figure, eclipsed only by Washington as the father of the Union."<sup>45</sup> As our sources show above, Marshall's role in implementing Hamilton's vision of a strong federal government and a national commercial economy was both praised and criticized, but the dominant tone of this period was positive.

The same cannot be said of our next period, 1940–70. Here the connection to Hamilton remained important, but our sources focused on Marshall's support of business interests and the protection of strong property rights, for example, in *Dartmouth* (1819) and *Gibbons* (1824). Many (but not all) of the sources in this period cast Marshall as an ingenious plutocrat, using his privileged position within the judiciary to further the interests of his class. The stock market crash of 1929 and subsequent Great Depression convinced many that Hamilton's vision of a commercial republic built on a free market was fundamentally mistaken; they thought that Marshall's role in laying the legal groundwork for the implementation of Hamilton's economic theories could not be ignored.<sup>46</sup>

The tide turned for Marshall's reputation in our fourth period, from 1970 to the present, when the salience of the class struggles of the early twentieth century was supplanted by that of the civil rights struggles of the latter twentieth century. Marshall's nationalism and valorization of judicial supervision of government officials lent itself naturally to a political and constitutional world remade by the civil rights movement and the Warren Court. One might think that conservatives, who have been very critical of what they see as judicial activism, would reject Marshall and *Marbury* for (allegedly) inaugurating judicial review. However, Robert Bork summed up the mainstream conservative viewpoint in 1990 by saying that "even those of us who deplore activism admire Marshall, and it is clear that Marshall was, in some respects, an activist judge." Bork rescues Marshall by claiming that "his activism consisted mainly in distorting statutes; . . . his constitutional rulings, often argued brilliantly, are faithful to the document."<sup>47</sup> Other critics of judi-

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45. Stephen F. Knott, *Alexander Hamilton and the Persistence of Myth* (Lawrence: University Press of Kansas, 2002), 67.

46. *Ibid.*, at 112: "Those in search of scapegoats responsible for the shattered American economy fell on Hamilton."

47. Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: The Free Press, 1990), 21.

cial review deny that Marshall was an activist judge in any significant sense. Raoul Berger argued that Marshall “flatly repudiated” the idea that judges could change the meaning of the Constitution by interpretation,<sup>48</sup> and Matthew J. Franck went so far as to say that Marshall “was neither an activist nor a nationalist.”<sup>49</sup> Thus, the enemies of judicial activism are generally not the enemies of Marshall.

### Marshall and the Constitutional Canon: A Study of Citations

Unlike other important historical figures, such as presidents, Supreme Court justices have the additional role of speaking authoritatively to judges, both present and future. Legal practice is highly abstract and specialized, and thus it should not come as a surprise that Marshall’s legacy is constructed somewhat differently within the legal profession than it is in the public at large. Judges have to care about case law and precedent in a way that the general public does not, and the output of a “great” justice such as Marshall can be an important symbolic resource for judges as they seek to justify their positions.

In this section we assess how Marshall’s opinions have been cited and used by the U.S. Supreme Court, lower federal courts, and state courts. The way that some of Marshall’s opinions have become “canonical”<sup>50</sup>—or ceased to be canonical—tells us something important about how he has been viewed within the legal profession. The formation of canons is parallel in some ways to the elevation and maintenance of famous historical figures. Both involve the collective memory of historical artifacts deemed important to the transmission of contemporary culture. The audience for such canons may be more limited and specialized than those reached by secondary school textbooks or public monuments, but the effort to select for preservation and to interpret these various cultural artifacts is similar.

As John Marshall was arriving at the U.S. Supreme Court, judicial business was picking up.<sup>51</sup> The Court had the opportunity to regularly issue decisions in

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48. Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*, 2nd ed. (Indianapolis, Ind.: Liberty Fund, 1997 [1977]), 430; see 428–33.

49. Matthew J. Franck, *Against the Imperial Judiciary: The Supreme Court v. the Sovereignty of the People* (Lawrence: University Press of Kansas, 1996), 55.

50. J.M. Balkin and Sanford Levinson, “The Canons of Constitutional Law,” *Harvard Law Review* 111 (1998): 964–1022; Richard A. Primus, “Canon, Anti-Canon, and Judicial Dissent,” *Duke Law Journal* 48 (1998): 243–303; Ken I. Kersch, *Constructing Civil Liberties* (New York: Cambridge University Press, 2004); Robert L. Tsai, “Sacred Visions of Law,” *Iowa Law Review* 90 (2005): 1095–1161.

51. See R. Kent Newmeyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), 146–57.

significant constitutional cases over the course of Marshall's tenure, although many of his most important constitutional opinions were not written until Marshall's second and third decades on the Court. Of course, Marshall was also instrumental in making an important change in how the Court issued judgments, with the established and common practice of seriatim opinions being replaced by a single opinion of the Court announcing the judgment and its rationale. Having given the Court a single voice, Marshall was also able to position himself as the speaker of that voice in nearly every significant constitutional case that came before the bench during his tenure. Few judicial eras were as aptly named after the chief justice who presided over them as was the Marshall Court.<sup>52</sup>

Not all of those constitutional decisions have proven equally important over time, but a large number have commanded continued attention from the courts ever since they were issued. Figure 1 lists the most well-known constitutional decisions issued by the Marshall Court, ranked by the number of citations in later U.S. Supreme Court cases from 1801 to 2012.<sup>53</sup>

This simple measure readily separates the Marshall Court's decisions into more and less important ones. At least judging by the Court's own citation patterns, cases such as *Stuart v. Laird* (1803)<sup>54</sup> and *United States v. Schooner Peggy* (1801)<sup>55</sup> have little claim to canonical status, at least when the entire period from 1835 to the present is considered. By contrast, cases such as *McCulloch v. Maryland* (1819)<sup>56</sup> and *Marbury v. Madison* (1803)<sup>57</sup> stand far above them, with obvious continued relevance for the justices.

The consideration of individual cases is a reasonable starting point for assessing the historical reputation of John Marshall.<sup>58</sup> Opinions are the primary work product of the justices, and constitutional decisions are among the Court's most high-profile and important exercises of political power. A justice may not be

52. This article focuses on Marshall's constitutional cases given their broad salience. For convenience, we will simply refer to the opinions of the Marshall Court, though our reference is specifically to the constitutional cases.

53. The data for all tables and figures are drawn from Westlaw's Citing References function; the list of notable cases included in Figure 1 is based on the senior author's assessment of the most important cases.

54. 5 U.S. 299 (1803). But see Bruce Ackerman, *The Failure of the Founding Fathers* (Cambridge, Mass: Harvard University Press, 2007).

55. 5 U.S. 103 (1801). But see Mark A. Graber, "Establishing Judicial Review? *Schooner Peggy* and the Early Marshall Court," *Political Research Quarterly* 51 (1998): 221–39.

56. 17 U.S. 316 (1819).

57. 5 U.S. 137 (1803).

58. See also Michael J. Klarman, "How Great Were the 'Great' Marshall Court Decisions?," *Virginia Law Review* 87 (2001): 1111–84.

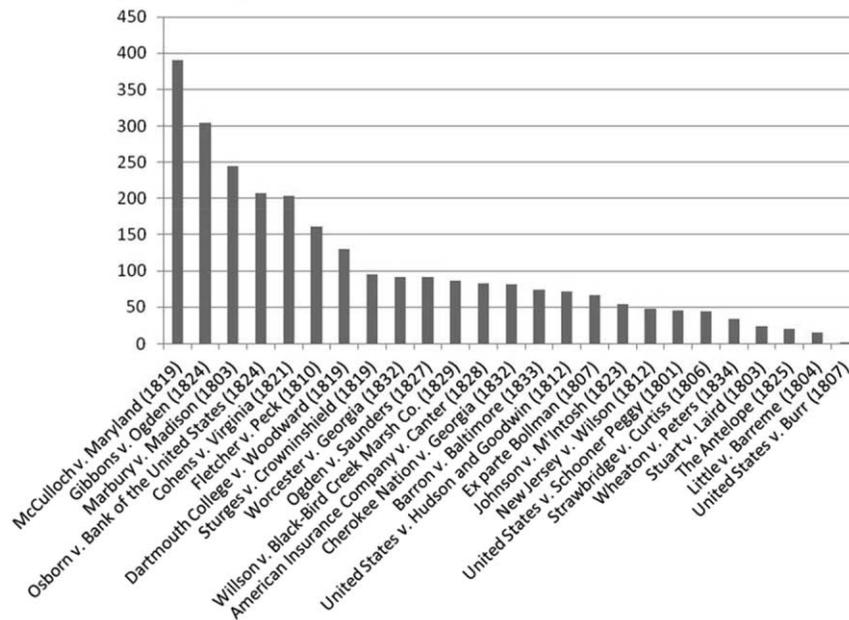


Figure 1. Notable Constitutional Decisions of the Marshall Court, Ranked by the Number of Citations by the U.S. Supreme Court, 1835–2012

Source: Westlaw's Citing References function.

known exclusively by his or her opinions, but the historical resonance of those opinions will help determine the continuing salience and significance of the justice in our historical memory. Especially when judicial opinions are closely associated with their author, the rise and fall of those opinions will significantly shape how (and whether) the author is remembered.<sup>59</sup>

Beginning to get a handle on the cases that make up Marshall's legacy requires thinking across time and audiences. The U.S. Supreme Court is not the only judicial audience for legal opinions. While we can anticipate that other courts will follow its lead and be influenced in their pattern of citation by many of the same considerations that drive the Supreme Court justices, there are some potential differences in the salience of cases for different judicial actors. The concern with historical reputation is also necessarily diachronic in nature. The goal is not only to understand how and why Marshall is remembered today but also to under-

59. The judicial citation and interpretation of such opinions is, of course, only a starting point. The judiciary's own use of precedents is informative, but the courts are a highly specialized audience and their interests in historic judicial opinions may not perfectly reflect how other audiences view such opinions.

stand how he has been remembered across time. We should be sensitive to the particular historical contexts that can drive citation patterns.

Table 1 presents the rank orders of the top six Marshall Court cases in later citations by the Supreme Court across different time periods and court systems.<sup>60</sup> The table distinguishes between citations by the U.S. Supreme Court, the lower federal courts, and the state supreme courts, and within four different historical eras. Raw data for this table is included in the Appendix. Some cases, such as *Dartmouth College v. Woodward* (1819), were cited heavily early in the nation's history but faded in importance; others, such as *Marbury*, were initially overlooked but later became central to the Court's work and self-understanding. Ranks are given in the table only for those cases that ranked among the top five cases in each period. However, not every case that ranked that highly appears in our table, because we excluded some cases that were important only briefly. For example, in the 1930–59 period, *McCulloch* was the most-cited Marshall decision on the U.S. Supreme Court, followed by *Gibbons v. Ogden* (1824) and *Cohens v. Virginia* (1821). The fourth most-cited Marshall opinion in that period was *Osborn v. Bank of the United States* (1824), a case that does not have continued salience and therefore does not appear in our table of prominent Marshall decisions. In the ranking for the 1930–59 period, *Osborn* was followed by *Marbury*, a case whose importance was rising rapidly.

The periodization of the tables does not reflect hard-and-fast eras in American constitutional history, but it does mark a useful cut at identifying the underlying historical patterns. The cases that are most often cited by the U.S. Supreme Court are generally familiar. However, the prioritization over time of these cases may be more surprising. As the revisionist literature has contended, *Marbury* is remarkably absent from the Court's most-cited cases through the nineteenth century.<sup>61</sup> Marshall's legacy on the Court for over a century turned less on his pioneering effort to justify the power of judicial review than on his understanding of property rights and federal-state relations. By contrast, in the lower federal courts, *Marbury* was consistently cited in all periods, perhaps because these courts were routinely asked to define the jurisdiction of the federal courts. For similar reasons, these courts routinely cited *Cohens*, a case that decided that state court rulings

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60. Westlaw provides the number of citations to each case by type of court (Federal Supreme Court; Federal Circuit and District Courts; and State Courts), and we aggregated the numbers for each of our three categories.

61. Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: University Press of Kansas, 1989).

Table 1. Rank Orders of Prominent Marshall Court Cases in Later Court Citations

	1801–1869			1870–1929			1930–1959		
	USSC	Federal	State	USSC	Federal	State	USSC	Federal	State
<i>McCulloch</i>	2			2		2	1	5	1
<i>Gibbons</i>	3	2		1	2		2	2	4
<i>Marbury</i>		4	5		5	3	5	4	3
<i>Cohens</i>	5			4	3		3	3	
<i>Fletcher</i>	1		2			4			
<i>Dartmouth</i>	4		1	5	4	1			2

	1960–2012			1801–2012		
	USSC	Federal	State	USSC	Federal	State
<i>McCulloch</i>	2		2	1		2
<i>Gibbons</i>	3	3	3	2	3	5
<i>Marbury</i>	1	2	1	3	2	1
<i>Cohens</i>	4	4	5	5	5	
<i>Fletcher</i>						4
<i>Dartmouth</i>						3

Notes: USSC = U.S. Supreme Court. Rank within each historical period for each case is based on the number of citations by the U.S. Supreme Court, federal circuit and district courts, and state supreme courts, respectively. Ranks for only the first five cases in each period are included.

Source: Westlaw's Citing References function.

could be reviewed by the U.S. Supreme Court if the defendant claimed that his rights under federal law had been violated. Similarly, the state courts were even more preoccupied with federal constitutional rights against the state governments and the scope of state power under the Constitution. *Dartmouth*, which held that states must respect contracts that predated the states themselves, was the most-cited case in the state courts from 1801 to 1929 and was the second most-cited case in the 1930–59 period. The other courts also cited *Dartmouth* frequently, especially in the 1870–1929 period, but this case was clearly more central to the work of the state courts than it was to the work of the other courts.

In the figures that follow, we compare *Marbury* with other important Marshall cases in the different court systems. This familiar case can provide a baseline for thinking about the changing fortunes of other cases in the courts. *Marbury* was routinely cited by judges over the course of the nineteenth century (often for issues other than the existence of the power of judicial review), but the case underwent

an explosive growth in attention in the post-civil rights era.<sup>62</sup> Marshall's current reputation is firmly rooted in the legacy of *Marbury*, but this was not always the case. Other cases, such as *Gibbons* and *McCulloch*, have eclipsed *Marbury* in the past, just as *Marbury* eclipses those decisions now.

The U.S. Supreme Court's own citation patterns reveal the shifting fortunes of *Marbury* and *McCulloch*. Given the relative paucity of judicial opinions produced by the U.S. Supreme Court, the patterns implicit in its citations are more uneven than what would appear in a more extensive judicial system handing down a larger number of cases each year. Nonetheless, the basic tendencies are evident even at the level of the Court. Figure 2 shows a five-year moving average of citations in the U.S. Supreme Court to *Marbury* and *McCulloch* over time. The two cases stand for starkly different constitutional propositions and represent two distinct sides of Marshall's jurisprudential legacy. Especially in the later twentieth century, *Marbury* stands for judicial enforcement of legal limits on legislative power.<sup>63</sup> *McCulloch*, by contrast, emphasized the expansive scope of congressional power in relation to the states.<sup>64</sup> In the early nineteenth and late twentieth centuries, citations to *Marbury* and *McCulloch* followed similar patterns (though *McCulloch* is less prominent in recent decades in other courts). Of greater interest is the divergence between the two cases in the first decades of the twentieth century. As the Court focused its attention on the growing administrative state, *McCulloch* achieved its greatest prominence. Marshall's place in the collective memory rode on a story of congressional power adequate to address national problems. For example, in 1911, the Court cited *McCulloch* to sustain a congressional act that prohibited the interstate shipment of "adulterated" food or drug products.<sup>65</sup> Later, in the New Deal period, for both the Court and its commentators, *McCulloch* had its greatest salience as the justices debated the scope of congressional powers. New Dealers welcomed and celebrated Marshall's apparent foresight in emphasizing the broad authority of Congress to act in the national interest and judicial deference to controversial exercises of that authority.<sup>66</sup> Citations to *McCulloch* continued

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62. Keith E. Whittington and Amanda Rinderle, "Making a Mountain Out of a Molehill? *Marbury* and the Construction of the Constitutional Canon," *Hastings Constitutional Law Quarterly* 39 (2012): 823–60.

63. Whittington and Rinderle, "Making a Mountain out of a Molehill" (see previous note).

64. Robert G. McCloskey, *The American Supreme Court*, 5th ed. (Chicago: University of Chicago Press, 2010 [1960]), 51.

65. *Hippolite Egg Co. v. U.S.*, 220 U.S. 45 (1911).

66. For example: "The conception of the nation which Marshall derived from the Constitution and set forth in *McCulloch v. Maryland* is [his] greatest single judicial performance." See

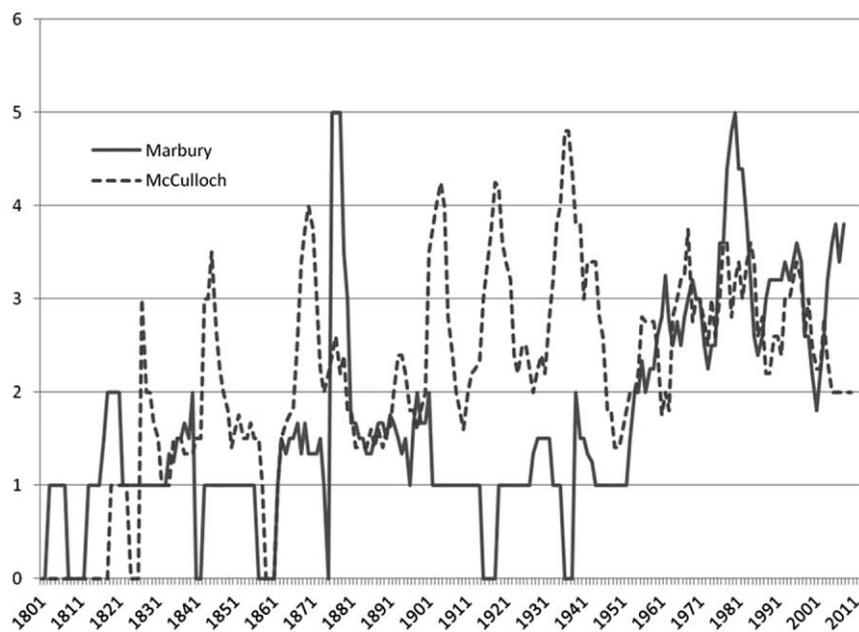


Figure 2. Five-Year Moving Average Number of U.S. Supreme Court Citations to *Marbury* and *McCulloch*, 1801–2012

Source: Westlaw's Citing References function.

throughout the twentieth century, but after the constitutional revolution of 1937 was accomplished, that decision no longer defined Marshall's legacy. Especially after *Wickard v. Filburn* (1942) held that Congress could regulate any activity which, in the aggregate, has a substantial effect on interstate commerce,<sup>67</sup> there was little debate over the scope of Congress's power to regulate interstate commerce.<sup>68</sup> By contrast, after Earl Warren joined the Court in 1953, *Marbury* became the most visible case in Marshall's repertoire. The Warren Court's bold invocation of judicial review (and later of judicial supremacy<sup>69</sup>) in order to strike down state and federal legislation naturally raised questions about the Court's authority.

Figure 3 compares *Marbury*'s trend with that of *Gibbons* in the lower federal courts. In that figure, the outsized growth of *Marbury* in the late twentieth century obscures the importance of the events of the first century and a half of Amer-

Felix Frankfurter, "John Marshall and the Judicial Function," *Harvard Law Review* 69 (1955): 217–38, at 219.

67. 317 U.S. 111 (1942).

68. David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* (Chicago: University of Chicago Press, 1990), 238.

69. *Copper v. Aaron*, 358 U.S. 1 (1958).

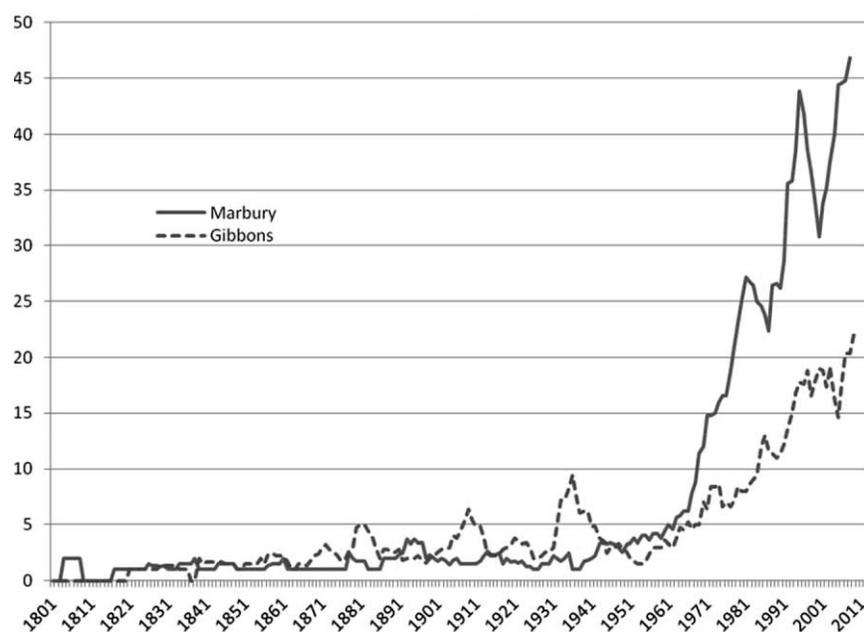


Figure 3. Annual Number of Lower Federal Court Citations to *Marbury* and *Gibbons*, 1801–2012

Source: Westlaw's Citing References function.

ican constitutional history, but a closer look at the pre-1941 portion of the figure shows the relative significance of *Gibbons* from the Gilded Age through the New Deal, when *Gibbons* was cited much more often than *Marbury* was. Like *McCulloch*, *Gibbons* was Janus-faced. *Gibbons* stands both for the proposition that the federal government has ample powers to regulate interstate commerce<sup>70</sup> (which itself is a sweeping term) and that the states cannot interfere with national commercial activities.<sup>71</sup> As the federal courts struggled with the effort to stitch together a national economy (often by striking down state interference with the free flow of goods), *Gibbons* was an important touchstone.<sup>72</sup> For both legal scholars and popular historians

70. See, e.g., *Spencer Kellogg and Sons, Inc., v. United States*, 20 F.2d 459 (2nd Cir. 1927).

71. *Gibbons* is even more complicated than that, since later interpretations of the case could point to both the expansive federal powers in this arena and the fact that there were limits to those powers. Like many canonical works, *Gibbons* was fertile, offering something in which all sides could engage. For limits on state power to regulate commerce, see *Long, Mayor, et al. v. Miller et al.*, 262 F. 362 (5th Cir. 1919).

72. For example, *Pittsburgh & W.V. Ry. Co. et al. v. Interstate Commerce Commission et al.*, 293 F. 1001 (D.C. Cir. 1923), citing *Gibbons*, held that states could not interfere with federal regulations concerning how railroads issue stock.

writing at the turn of the twentieth century, *Gibbons* was an obvious case of “the greatest importance and of the most lasting consequences.”<sup>73</sup> The commercial republic being constructed in those decades was being built on the back of *Gibbons*, and Marshall was celebrated for laying those strong foundations.<sup>74</sup>

But again the success of the New Deal created rivals to the glory of *Gibbons*. Cases such as *West Coast Hotel v. Parish* (1937), *U.S. v. Darby* (1941), and *Wickard* went beyond *Gibbons* and structured the conversation about congressional power in a new way. *Gibbons* did not assume a bad odor or fall from the canon in the second half of the twentieth century, but Marshall’s accomplishments in that case no longer loomed so large. The efforts of Justice Robert Jackson and his colleagues could reasonably claim some of the glory that Marshall had once had to himself, and the cases of the New Deal era became the critical touchstones for understanding the modern constitutional allocation of regulatory authority.

The state supreme courts provide a final perspective from which to view variation in Marshall’s constitutional legacy over time, as shown in Figure 4. The contrasting case this time is *Fletcher v. Peck*, which, like *Gibbons*, showed a strong, smooth, continuing pattern of growing citations.<sup>75</sup> The *Fletcher* decision was the first instance in which the Court struck down a state law as violating the U.S. Constitution and offered a broad reading of the Contract Clause (“No State shall . . . pass any . . . Law impairing the Obligation of Contract . . .”<sup>76</sup>) to protect property from state legislatures. Naturally, the Contract Clause held particular importance among federal constitutional provisions for state courts hearing local cases involving state laws, but the basic trend is similar to what we observed in the other court systems. *Fletcher* enjoyed its moment in the sun in the state courts, before eventually being displaced by the now familiar blossoming of *Marbury*. *Fletcher* (and *Dartmouth*, another important decision that further established the Contract Clause, follows an almost identical pattern) represents the rise and fall of the Contract Clause as a significant judicial restraint on legislatures.<sup>77</sup>

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73. Hampton L. Carson, *The Supreme Court of the United States*, vol. 1 (Philadelphia: A.R. Keller Company, 1892), 259.

74. See, e.g., W.W. Willoughby, *The Supreme Court of the United States* (Baltimore, Md.: Johns Hopkins Press, 1890), 61.

75. 10 U.S. 87 (1810).

76. U.S. Constitution, Article I, section 10, clause 1.

77. State court cases between the 1850s and the 1880s show how *Fletcher* and the Contract Clause were used to restrain legislatures, often by holding that legislative grants are contracts, and as such are protected by the U.S. Constitution. See *State of Arkansas v. County Court of Crittenden County*, 19 Ark. 360 (1858); *Stein v. Mayor, etc. of Mobile*, 49 Ala. 362 (1873); *Grogan v. City of San Francisco*, 18 Cal. 590 (1861). This last decision, citing *Fletcher*, held that

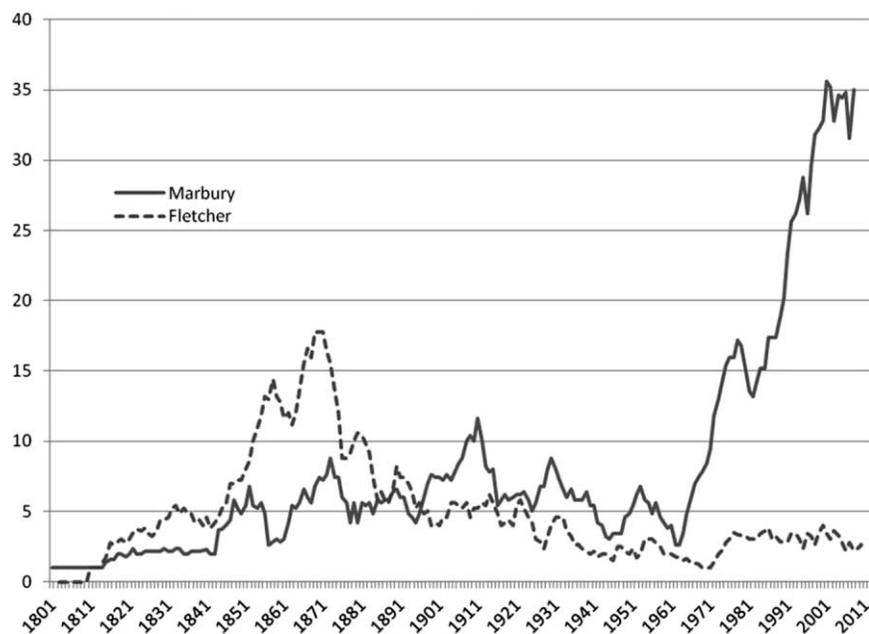


Figure 4. Annual Number of State Supreme Court Citations to *Marbury* and *Fletcher*, 1801–2012

Source: Westlaw’s Citing References function.

From the late Jeffersonian period through the end of Reconstruction, courts grappled early and often with the legacy of *Fletcher* and with the significance of federal constitutional protections of property rights.<sup>78</sup> The Marshallian legacy during the middle decades of the nineteenth century was bound fast to the judicial protection of property rights against popular impulses in the states. *Fletcher* hit a high water mark in the mid- and late-nineteenth century, however, lapsing into relative obscurity over the course of the twentieth century. Where the debate over the scope of federal constitutional rights once revolved around Marshall’s views in cases like *Fletcher*, the modern debate, since the demise of *Lochner*-era jurisprudence in 1937, turns instead on cases like *United States v. Carolene Products* (1938), *Brown v. Board*

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all legislative grants are valid contracts and could not be destroyed “by any subsequent legislative enactment.”

78. The decline in the contracts clause as a meaningful protection for property rights in the years after the Civil War was matched by the emergence of the due process clause of the Fourteenth Amendment as a bastion of federal constitutional protections for property rights against state interference. However, the jurisprudence arising out of the Fourteenth Amendment did not owe an immediate debt to Chief Justice John Marshall, as justices like Melville Fuller and Stephen Field worked to establish property rights as a fundamental constitutional liberty.

of *Education* (1954), and *Griswold v. Connecticut* (1965). If Marshall's reputation had rested entirely on cases like *Fletcher*, then he might well have suffered the same fate as justices like Stephen Field, who was important in his own time but not in ours. Marshall's diversified constitutional portfolio could withstand the buffeting of the historical forces that devalued the importance of judicial protection of vested property interests.

## Conclusion

This initial analysis of the judicial transmission of Marshall's legacy suggests part of what has made the memory of the chief justice particularly enduring. The historical reputation of John Marshall is complex and has changed over time. Marshall's multiple contributions to the workings of the law and the Court have created multiple opportunities for a variety of interests to claim him as one of their own and promote him as a valuable ally. Our review of popular and scholarly sources shows how Marshall's legacy was a contested site of collective memory for causes as varied as character formation, property rights, and judicial supremacy, while our data on citation rates shows how different courts used Marshall's opinions to promote economic nationalism and justify an expansive role for the Supreme Court in advancing a civil rights agenda. Future research on Marshall's reputation could explore citation patterns to Marshall's decisions in scholarly works, competing portrayals of Marshall in book-length biographies, and the Progressive critiques of Marshall that flourished in the post-New Deal decades.

Over the long sweep of American history, the values and interests that hold sway at one time are often displaced by others at a different time. Reputational survival depends on being able to ride out these storms. In truth, Marshall's reputation has not always been as sturdy as it seems now. It is perhaps unsurprising that shortly after Marshall's death, the leading Democratic Party newspaper somewhat sardonically referred to the "great Chief Justice" whose personal qualities were undeniable but whose "great mind" was too imbued with a "federal tone of political principles" that gave birth to a rampant "abuse of the judicial veto."<sup>79</sup> The mantle of "great" did not sit firmly on Marshall's shoulders until after the Civil War, when Republican writers began to routinely praise him for his prescience in producing "wonderful judicial judgments" that laid down principles "which have been the sheet anchor of national unity against the disrupting and disintegrating tendencies

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79. "The Supreme Court of the United States: Its Judges and Jurisdiction," *United States Magazine and Democratic Review* 1 (January 1838): 143–72, at 155 and 160.

in our dual system of government”<sup>80</sup> and for forcefully exerting “his statesmanlike conviction that this was and must be a nation” and keeping the disunionist “school of Jefferson” at bay.<sup>81</sup> Gilded Age lawyers gathered to celebrate the “one man in the history of this country” who had done the most to shape “the very framework of our institutions,” by establishing the principle that the people and government were subject to legal limits enforced by courts and that the rights of contract were protected “from hostile legislation,” a decision that “has been one of the chief causes of our individual and national prosperity.”<sup>82</sup>

After the Great Depression, however, references to the “great chief justice” notably fell off or took on an ironic tinge. Left-wing journalist Max Lerner, for example, wrote of how the “great Chief Justice” seemed to have cast a “spell” over his biographer. His “disarming democratic ways” concealed how Marshall used his position on the Court “to fight the battles of business enterprise.”<sup>83</sup> The appellation of “great” did not become fashionable again until the end of the twentieth century, when Marshall’s name could be invoked for the adaptability of the Constitution and the importance of judicial enforcement of individual rights against misguided majorities without necessarily calling to mind the economic battles of the first decades of that century.

Fame can be fleeting. Even a towering figure of the early republic like John Marshall has seen his reputation buffeted by the forces of history. Marshall’s place in our collective memory has been secured, however, not necessarily by the permanence of his achievements but by their diversity. Even as some parts of his life’s work have fallen out of favor, other parts have risen in the public mind.

The case of Chief Justice John Marshall illustrates the ways in which historical memory is always constructed in the present. We remember the departed to the extent that they help us navigate our present concerns and controversies. The example of John Marshall has proven useful again and again, but not always for the same reasons and to the same people. Like the Constitution itself, Marshall’s historical reputation has been able to endure precisely because it could “be adapted to the various crises of human affairs.”<sup>84</sup>

80. Charles Andrews, “Charles James Folger,” *Albany Law Journal* 32 (July 11, 1885): 33–38, at 37.

81. William Howard Taft, *Popular Government* (New Haven, Conn.: Yale University Press, 1913), 132, 134.

82. John F. Dillon, *A Commemorative Address on Chief Justice John Marshall* (New York: n.p., 1901), 7, 35, 41.

83. Lerner, *Ideas Are Weapons*, 28, 29 (see note 36 above).

84. *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819).

### Appendix: Number of Citations to Prominent Marshall Opinions by Type of Court and Decade

Key for the following tables: The most cited case of the decade is designated by dark gray, and the second most cited case of the decade by light gray. If the most-cited or second-most-cited case of the decade is not among our top six, it is not highlighted.

Table A1. United States Supreme Court's Citations

	McCulloch	Gibbons	Marbury	Cohens	Fletcher	Dartmouth
1800–1809	0	0	1	0	0	0
1810–1819	0	0	1	0	3	0
1820–1829	4	3	3	2	6	1
1830–1839	6	7	8	10	10	14
1840–1849	12	9	4	7	7	7
1850–1859	10	13	5	9	25	15
1860–1869	14	9	6	11	9	6
1870–1879	25	28	4	12	16	24
1880–1889	14	21	13	11	7	8
1890–1899	19	21	9	17	12	11
1900–1909	27	27	7	23	6	5
1910–1919	22	25	2	6	4	6
1920–1929	25	10	3	11	0	3
1930–1939	38	24	4	12	7	7
1940–1949	26	22	7	7	2	6
1950–1959	20	6	7	9	4	1
1960–1969	23	15	24	8	9	3
1970–1979	29	12	25	10	11	6
1980–1989	29	22	38	12	9	3
1990–1999	28	13	33	14	8	1
2000–2009	15	13	29	8	4	2

Table A2. Federal Courts' Citations

	McCulloch	Gibbons	Marbury	Cohens	Fletcher	Dartmouth
1800–1809	0	0	2	0	0	0
1810–1819	0	0	0	0	3	0
1820–1829	0	3	3	1	1	0
1830–1839	0	4	7	8	4	3
1840–1849	0	8	4	3	4	1
1850–1859	0	10	2	0	2	0
1860–1869	0	9	6	4	5	1

Table A2. (Continued)

	McCulloch	Gibbons	Marbury	Cohens	Fletcher	Dartmouth
1870–1879	0	24	3	16	5	15
1880–1889	0	39	8	23	17	14
1890–1899	3	18	15	21	9	23
1900–1909	5	36	17	40	18	13
1910–1919	4	36	13	34	8	12
1920–1929	19	22	10	23	5	14
1930–1939	37	63	11	44	12	12
1940–1949	19	36	22	35	5	15
1950–1959	13	22	36	30	5	12
1960–1969	19	35	53	41	14	20
1970–1979	56	75	143	78	32	25
1980–1989	78	101	248	81	39	18
1990–1999	90	162	350	102	50	24
2000–2009	78	189	376	173	20	22

Table A3. State Courts' Citations

	McCulloch	Gibbons	Marbury	Cohens	Fletcher	Dartmouth
1800–1809	0	0	2	0	0	0
1810–1819	2	0	9	1	14	2
1820–1829	11	4	20	5	30	29
1830–1839	12	7	22	2	50	53
1840–1849	16	15	24	8	54	90
1850–1859	43	32	52	28	108	125
1860–1869	86	41	42	29	143	124
1870–1879	92	38	74	37	126	177
1880–1889	42	32	50	29	78	115
1890–1899	42	30	54	39	61	102
1900–1909	73	56	76	97	49	99
1910–1919	78	80	90	75	48	85
1920–1929	106	60	55	54	43	80
1930–1939	135	55	77	51	36	86
1940–1949	118	45	42	30	19	52
1950–1959	73	25	52	17	18	42
1960–1969	68	29	43	29	13	36
1970–1979	81	38	119	25	21	36
1980–1989	125	68	153	31	27	24
1990–1999	132	94	245	31	33	18
2000–2009	77	61	336	45	26	8

Source: Westlaw's Citing References function.

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