John Marshall-An Enigma for the Fraternity a Puzzling Character in Life, an Inspiration to the Country

By

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Introduction

Who was the man John Marshall, the fourth Chief Justice of the Supreme Court? Did he embrace and practice the principles of Freemasonry? Did he abandon the Fraternity later in life and discredit its teachings as a mere "harmless play thing?"[1]

In this paper we present a thesis that John Marshall was an enigma to the Masonic fraternity, a rare, unique and puzzling character in life, and an inspiration to the country. An enigma to the fraternity in that his perspectives on the fraternity may have modified as he aged, but not in a way that was clear; a puzzling character in life in that he did not reflect the refined character that one might expect of a supreme court justice — a rare bird indeed; and an inspiration to the country in that his influence on our government is equaled but by a few in our history.

An Inspiration to the Country

A list of Marshall's great decisions reads like the ABCs of American constitutional law. He reshaped the role of the supreme court by expanding the authority of the court to declare acts of congress and the president unconstitutional, he established the jurisdiction of the federal government over the States where federal issues were at stake, and most notably interpreted the commerce clause of the constitution to limit the states' ability to control competition.

His influence on shaping the role of the federal courts under the constitution is required and standard reading in law schools when addressing constitutional law. Because of John Marshall, the role of the federal government grew, the role of the judiciary expanded, and the precedent decisions of the Marshall court have withstood the passage of time.

To quote from three prominent Americans on John Marshall's accomplishments in his tenure as chief justice.

> [Marshal] has done more to establish the Constitution of the United States on sound construction than any other man living. — John Quincy Adams[2]

> He would have been deemed a great man in any age, and of all ages. — Joseph Story[3]

> If American law were to be represented by a single figure, skeptic and worshiper per alike would agree without dispute that

[1] Letter, John Marshall to Edward Everett. July 22, 1833. the Papers of John Marshall. vol. XII pp. 285-287.

[2] Adams, John Quincy. 1877. Memoirs of John Quincy Adams., Charles F. Hobson ed.

[3] Story, Joseph. 1835. *Life, Character, and Services of Chief Justice Marshal.Vol. 3 p.* 369.

> the figure could be one alone, and that one, John Marshall. — Oliver Wendell Homes[4]

Biographers of today agree that what was said of Marshall in the mid 1800's and early 1900's is true today.

However, a close look at Marshall's accomplishments as a judge might bring to question his reputation for judicial greatness.[5] As noted by Oliver Wendell Holmes, "If I were to think of John Marshall simply by numbers and measure in the abstract, I might hesitate in my superlatives."[6] Perhaps implying that a close examination of Marshall's decisions does not lead one to an immediate conclusion that Marshall was on the cutting edge of constitutional interpretation nor eloquent in his pros.

However, Marshall was the workhorse of the Supreme Court during his tenure from 1801 until his death in 1835. He spoke for the majority in forty-nine percent of all the cases heard during his tenure, in fifty-nine percent of all the constitutional law decisions, and in almost all of the leading decisions.[7] But the few important decisions defined his reputation and establish the court as truly an equal third branch of government. The three defining decisions are; Marbury,[8] McCulloch,[9] and Gibbons.[10]

Marbury v. Madison, 5 U.S. 137 (1803)

Marbury v. Madison, 5 U.S. 137 (1803), was a landmark U.S. Supreme court case in which the court formed the basis for the exercise of judicial review of congressional and presidential actions under Article III of the Constitution.

Some background history is in order. The idea that a court, or ruling monarch, could declare statutes void was defeated in England in 1688 when King James II was removed and the elected Parliament declared itself supreme.[11] However, this idea of legislative supremacy was not universally accepted in the American colonies, nor was it taught to young attorneys of the newly formed states.

The concept of judicial review was discussed in the Federalist Paper. Alexander Hamilton asserted in Federalist No. 78 that under the Constitution, the federal courts would have not just the power, but the duty, to examine the constitutionality of statutes:

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[4] Holmes, Oliver Wendell. 1920. *John Marshall: In Answer to a Motion that the Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day on which Marshall Took His Seat as Chief Justice, in* Collected Legal Papers. p. 270.

[5] This line of thinking questioning Marshall's accomplishments as a judge is more fully developed by R. Kent Newman in *"John Marshall and the Heroic Age of the supreme court."* 2001, Louisiana State University Press. Epilogue.

[6] Holmes, *supra* note 3, at 267.

[7] Robert G. Seddig, *John Marshall and the Origins of Supreme Court Leadership*, 36 U. PrrT. L. Rev. 805 (1975).

[8] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[9] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[10] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

[11]For a complete discussion of the "Glorious Revolution of 1688" the reader is referred to a more complete work by Macaulay, Thomas Babington. (1889). *The History of England from the Accession of James the Second. Popular Edition in Two Volumes*. Volume I. London: Longmans; and Jones, J. R. 1988. *The Revolution of 1688 in England*. Weidenfeld and Nicolson.

> *[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.*

However, it is important to note that nothing in the text of the Constitution explicitly authorized the power of judicial review.

In the Marbury case, the Marshall court examined the Judiciary Act of 1789 and determines if the act was constitutional.[12] The Marshall court found that the Constitution and the Judiciary Act were in conflict. This conflict raised the important question of what happens when an Act of Congress conflicts with the Constitution. Marshall answered that acts of Congress that conflict with the Constitution are not law and the courts are bound instead to follow the Constitution, affirming the principle of judicial review. In support of this position, Marshall looked to the nature of the written Constitution — "there would be no point of having a written Constitution if the courts could just ignore it." Marshall argued that the very nature of the judicial function requires courts to make that determination. If two laws conflict with each other, a court must decide which law applies. Finally, Marshall pointed to the judge's oath requiring them to uphold the Constitution, and to the Supremacy Clause of the Constitution, which lists the "Constitution" before the "laws of the United States."

A number of legal scholars argue that the power of judicial review in the United States predated Marbury, and that Marbury was merely the first Supreme Court case to exercise a power that already existed and was acknowledged and that the Marshall court just confirmed what many believed to be a very predictable outcome.[13]

[12] The United States Judiciary Act of 1789 (Ch. 20, 1Stat 73) was a landmark statute adopted on September 24, 1789 in the first session of the first United States Congress establishing the U.S. Federal judiciary. Article III, section 1 of the Constitution prescribed that the "judicial power of the United States, shall be vested in one supreme Court," and such inferior courts as Congress saw fit to establish. It made no provision, though, for the composition or procedures of any of the courts, leaving this to Congress to decide. The Court was given appellate jurisdiction over decisions of the federal circuit courts as well as decisions by state courts holding invalid any statute or treaty of the United States; or holding valid any state law or practice that was challenged as being inconsistent with the federal constitution, treaties, or laws; or rejecting any claim made by a party under a provision of the federal constitution, treaties, or laws.

[13] These scholars point to statements about judicial review made in the Constitutional Convention and the state ratifying conventions, statements about judicial review in publications debating ratification, and court cases before *Marbury* that involved judicial review. At the Constitutional Convention in 1787, there were a number of references to judicial review. Fifteen delegates made statements about the power of the federal courts to review the constitutionality of laws, with all but two of them supporting the

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

McCulloch v. Maryland, 17 (1819) was the second of Marshall's noted cases. This case established two important principles in constitutional law. First, the Constitution grants to Congress implied powers for implementing the Constitution in order to create a functional national government. Second, and most importantly, that state action may not impede valid constitutional exercises of power by the Federal government.

On April 8, 1816, the Congress of the United States passed an act titled "An Act to Incorporate the Subscribers to the Bank of the United States" which provided for the incorporation of the Second bank of the United States. However, it was Maryland's contention that because the Constitution did not specifically state that the federal government was authorized to charter a bank, the Bank of the United States was unconstitutional. The initial court upheld Maryland. The case was then appealed to the Supreme Court.

The court determined that Congress did have the power to create the Bank. Chief Justice Marshall supported this conclusion with a number of arguments. The opinion stated that Congress has implied powers that need to be related to the text of the Constitution, but need not be specifically enumerated within the text of the Constitution. This case was seminal in the defining the balance between federal power, and state power. Chief Justice Marshall also clarified that the "Necessary and Proper Clause" of the Constitution does not require that all federal laws be constructed with a restrictive interpretation of this clause. Rather that federal laws enacted pursuant to this clause, should be viewed broadly, holding that the clause; "purport[s] to enlarge, not to diminish the powers vested in the government. It purports to be an additional power, not a restriction on those already granted."

As with the Marbury Case, the principle under which the Marshall court rendered its decision had been articulated by Alexander Hamilton in 1791.[14]

> *[A] criterion of what is constitutional, and of what is not so . is the end, to which the measure relates as a mean. If the end be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority. There is also this further criterion which may materially assist the decision: Does the proposed measure abridge a pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favour of its constitutionality.*

Even Marshall in his decision implied that that issue had already been well decided.

> "It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of

idea. Also see Prakash, Saikrishna, and John Yoo. 2003. The Origin of Judicial Review, Univ. Chicago Law Review 887, 952

[14] *The Papers of Alexander Hamilton.* Edited by Harold C. Syrett et al. 26 vols. New York and London: Columbia University Press, 1961--79. The Founders' Constitution**.** Volume 3, Article 1, Section 8, Clause 18, Document 11 23 Feb. 1791, *Papers 8:97--106*.

> our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department. . ."

Thus, this decision, although precedent setting, was not an unpredictable outcome. Both the Marbury and McCulloch cases are consistent with eighteenth century American thought.[15]

Gibbons v. Ogden, 22 U.S. 1 (1824).

Unlike the Marbury and McCulloch decisions, the Gibbons decision did set a precedent by expanding the interpretation of Commerce Clause of the Constitution. But even in this decision, we find Marshall more dominant in his skills of negotiation and personal relationships than in making a bold interpretation of the Constitution.[16]

Most states had established laws regulating commerce under the Articles of Confederation, which preceded the US Constitution.[17] Under the Articles of Confederation, the US government had little power to intervene or influence state laws; the Constitution elevated the authority of the United States over the states in many areas, emphasizing national supremacy over state sovereignty.[18] Thus, the issue of state versus federal supremacy under the Constitution was sure to eventually come before the court.

In 1808http://en.wikipedia.org/wiki/Gibbons_v._Ogden - cite_note-FedResp-3 the legislature of the State of New York granted to Robert Livingston and Robert Fulton exclusive navigation privileges of all the waters within the jurisdiction of that state, with boats moved by fire or steam, for a term of years.[19] Aaron Ogden had a steamboat operating license valid under New York law; a second operator, Thomas Gibbons, had an operating license issued by the federal government, but not recognized by the State of New York. Ogden successfully sued Gibbons in the New York court system to prevent him from running his ferry business in New York waters. Gibbons appealed to the US Supreme Court.

Ogden contended that states often passed laws on issues regarding interstate matters and that states should have full concurrent power with Congress on matters concerning interstate commerce. Gibbons' lawyer, Daniel Webster, argued that Congress had exclusive national power over interstate commerce according to Article I, Section 8 of the Constitution and that to argue otherwise would result in confusing and contradicting local regulatory policies.

[15] Smith, Jean E. 1996. *John Marshall* pp. 108.
[16] Johnson, Herbert. 2010. *Gibbons v. Ogden.* John Marshall, Steamboats, and the Commerce Clause. 216 pages.
[17] The Articles of Confederation was an agreement among the 13 founding states that established the United States of America as a confederation of sovereign states. The document served as the new nations first constitution. It was drafted by the Continental Congress in 1776, and ratification by all 13 states in early 1781. The Articles provided domestic and international legitimacy for the Continental Congress, conduct diplomacy with Europe and deal with territorial issues.
[18] Article VI, Paragraph 2 of the Constitution is commonly referred to as the Supremacy Clause. It establishes that the federal constitution, and federal law generally, take precedence over state laws, and even state constitutions. See also. Richard Lieb. Federal Supremacy and State Sovereignty" Supreme Court's Early Jurisprudence. ABI Law Review. Vol. 15:3.
[19] Shallat, Todd. 1992. Water and Bureaucracy: Origins of the Federal Responsibility for Water Resources, 1787-1838, pp 13-15. Natural Resources Journal 32.

In a 6-0 unanimous decision, orchestrated by Marshall through negotiations with justice Johnson[20] (Smith Thompson did not participate), the Supreme Court held that that Congress was granted exclusive control over commerce between states in the Constitution's Interstate Commerce Clause.[21] Gibbons provides a salient example of Marshall's ability to gain agreement despite severe differences among his colleagues. This decision being later in the Marshall era, the court was no longer dominated with fellow federalists, requiring Marshall to muster all of his managerial skills to achieve consensus. His opinion for the court reflected the concessions and agreements that he engineered to achieve near unanimity in a decision that favored federal power without establishing a definitive endorsement of it.[22] Nevertheless, the decision of the court was specific and precise.

> "But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress."

Gibbons v. Ogden was the first instance of the federal government exercising the Interstate Commerce Clause. The decision sustained the nationalist definition of federal power, and supported the growth of capitalism by ending state monopolies that impeded a free market economy. This decision set the stage for future expansion of congressional power over commercial activity and a vast range of other activities once thought to come within the jurisdiction of the states. The interpretation of the Constitution gave Congress authority over the states to regulate many aspect of commerce crossing state lines. Thus, any state law regulating in-state commercial activities (e.g., workers' minimum wages in an in-state factory) could potentially be overturned by Congress if that activity was somehow connected to interstate commerce. Indeed, more than any other case, Ogden set the stage for the federal government's overwhelming growth in power into the 20th century.

So in the end, of these three decisions, only one appears to set a new or precedent interpretation of the Constitution. And the precedent case, Ogden, was characterized more by Marshall attempting to cast a decision where he could gain consensus yet advance his Federalist agenda.

Other decisions and writings

Marshall's circuit opinions, though competent, were not notable for pioneering new doctrine. Unlike other famous statesmen of the early republic, Marshall's surviving correspondence is decidedly sparse and brief.[23]

Marshall was not widely read in the law, and seldom cited precedents. After the court came to a decision, he would usually write it up himself. Often he asked Justice Story, a renowned legal scholar, to do the chores of locating the

[20] Justice William Johnson wrote a concurring opinion in order to present points not specifically covered in Marshall's writing. Johnson was the first member of the U.S. Supreme Court that was not a member of the Federalist Party. During his thirty years of service on the Court, Johnson became known as a critic of Chief Justice John Marshall. Johnson has been called the first great Court dissenter because he established a tradition of dissenting opinions.

[21] Although there were seven justices on the Supreme court, Justice Smith Thompson did not participate

[22] Johnson, Herbert. 2010. *Gibbons v. Ogden.* John Marshall, Steamboats, and the Commerce Clause. 216 pages.

[23] Newman. R. kent. 2001. in *"John Marshall and the Heroic Age of the Supreme Court."* Louisiana State University Press. Epilogue.

precedents, saying, "There, Story; that is the law of this case; now go and find the authorities."[24]

Marshall was not creative in his decisions, but as Homes noted, Marshall had "a strong intellect, a good style, personal ascendancy in his court, courage, justice and convictions of his party."[25]

Some might say that Marshall was at the right place at the right time. He was at "a strategic point in the campaign of history and part of his greatness consists in his being there."[26] Like others of the founding generation, Marshall was fortunate to have lived in, an age that not only permitted but invited bold and creative statesmanship.

But is that all there is to it — that the man was at the right place at the right time; that the times made the man. Could others have succeeded equally? Or is there something about the man that enabled him to accomplish what others might not have?

It is not surprising that Marshall's personal qualities, the qualities that we can most appreciate as Masons, and that may have set him up for success, have been neglected, or at least addressed only in attempting to better understand the thinking behind his precedent setting decisions as we have discussed previously.

A Puzzling Character in Life

Marshall's roots in Virginia ran deep. The eldest of fifteen children, he was born in a simple wooden cabin at the foot of the Blue Ridge Mountains. Like many who were reared in that punishing environment, Marshall's health was robust. Until his late seventies, he regularly walked six miles a day.

Marshall served in the Continental Army during the American Revolutionary War and was friends with George Washington. He served first as a Lieutenant in the Culpeper Minutemen from 1775 to 1776, and went on to serve as a Lieutenant and then a Captain in the Eleventh Virginia Continental Regiment from 1776 to 1780. Marshall endured the brutal winter conditions at Valley Forge (1777–1778).http://en.wikipedia.org/wiki/John_Marshall_-_cite_note-Found-12 After his time in the Army, he studied law under the famous Chancellor George Wythe at the College of William and Mary, was elected to Phi Beta Kappa and was admitted to the Bar in 1780. He had been among the first students to complete the legal curriculum prescribed by Chancellor George Wythe at the College of William and Mary.[27]

In 1782, Marshall won a seat in the Virginia House of Delegates, in which he served until 1789 and again from 1795 to 1796.

Once the Constitution had been adopted and the new national government put in place, Marshall returned to private practice. He became the Federalist leader in Virginia but declined Washington's offer to become U.S. attorney for the state.

In late 1783 Marshall's law practice was still struggling. The fact that he was a member of the Council of State, affiliated professionally with

[24]A statement attributed to by Theophilus Pearson, a law professor who knew Marshall personally. Parsons, "Distinguished Lawyers," Albany Law Journal, Aug 20, 1870, pp 126-27.Also see Edward Corwin, *John Marshall and the Constitution: a chronicle of the Supreme Court* (1919) p 119.

[25] Holmes, *supra* note 3, at 269.
[26] *Id.* at 267-68.
[27] William Swindler. 1967. John Marshall preparation for the Bar. 11 American Journal of Legal History. pp 207-213.

Edmund Randolph, and linked personally with the Amblers gave him an advantage. Many lawyers, especially young lawyers back from the war, were abundant in Richmond, and the competition for clients was intense. Marshall's account indicates that during the final quarter of that year he collected only six fees for a total of £5 and a few shillings. That was little more than he won at whist and backgammon.[28] and certainly not enough to support himself and family, in fact, establishing their new household cost Marshall considerably more than he was earning.[29] His records show that for the last three months of 1783 his outlay totaled slightly more than £400.[30] Almost all of that was for family household expenses, furnishings, clothing for Polly and the servants, and Marshall's occasional losses at cards. His income for the same period was £313. The future chief justice made up the difference temporarily from monies he was holding for a Kentucky land purchases. People wishing to invest in Kentucky would often give Marshall the funds to cover his father's surveyor fees. He simply lumped that money with his own income in his account book until such time as he disbursed the funds to the appropriate state agency. In effect, Marshall was giving himself an interest-free loan until his financial situation improved. Today we would question the propriety of such practices, and an attorney would be disciplined severely for commingling a client's money with his own. In 1783, however, there was no expectation that trust funds would be segregated from a lawyer's personal account. Indeed, it was not until well over a century later that regulation to that effect was adopted.[31] No one appears to have been injured by Marshall's action, and when he received his back pay as a member of council, the purchases were made good."[32]

In 1796 he refused an appointment as minister to France. The following year he was induced by President Adams to join Charles Pinckney and Elbridge Gerry on a special mission to Paris — a desperate effort to restore cordial ties with revolutionary France. The mission turned our badly from the standpoint of Franco-American relations, but it established Marshall's national reputation. After the XYZ affair, Marshall resumed his law practice in Richmond.

In 1798 President Adams offered him a seat on the Supreme Court. Marshall declined. The following year, 1799, yielding to the urgings of George Washington, he ran for Congress from Richmond — then a hotbed of Jeffersonian democracy- and secured a seat in the Congress. Quick to follow in 1800 was a request from President Adams that Marshall be Secretary of War, for which Marshall declined, to be quickly followed by a request from the President that Marshall serve as acting Secretary of State, which he accepted. Then within ten months, President Adams again offered him a seat on the Supreme Court, and this time Marshall, at age 45, accepted and was confirmed by the Senate.[33]

[28] Letter from Marshall to Monroe. February 24, 1784. In Marshall Papers 1:116-118.
[29] ibid. 1:296.
[30] ibid. 1:293-303
[31] The concept of fiduciary responsibility was unknown in eighteenth-century America. Consequently, practicing lawyers would not have been under any obligation to keep their funds segregated from trust funds of their clients. A regulatory scheme that addressed the issue of distinction was not adopted until 1908 at the national level, when the American Bar Association established a code of ethics, and was not until 1971when the State of Virginia prohibited the commingling of funds. Also see Ethics and the Legal Profession 26:34-36, Michael Davis and Frederick A. Elliston, eds.(Buffalo: Prometheus Books, 1986).
[32] Smith, Jean. 1998. John Marshall-Definer of a Nation. Henry Holt and Company, NY. pp. 100
[33] Smith, Jean E. 1996. *John Marshall* pp. 6-10 and 14-15.

John Marshall, the man, had charm, humor, a quick intelligence, and the ability to bring men together. His sincerity and presence commanded attention. His opinions were workman like but not especially eloquent or subtle. His influence on educated men of the law came from the charismatic nature of his personality, and his ability to seize upon the key elements of an argument and make highly persuasive rebuttals.[34] There was seldom a dissent while he was Chief Justice, which gives some hint to his personal warmth and clarity of intellect. He was a naturally gifted leader.

In all of the positive attributes that can be made of this man, Marshall was "plain folk" as we might say here in Virginia. He was known as "John of the forest" a pejorative term used by tidewater aristocrats to describe someone less affluent who lived in the woods.[35]

A contemporary who watched Marshall in action wrote that;

> "he is superior to every other orator at the Bar... in his most surprising talent of placing his case in that point of view suited to the purpose he aims at, throwing a blazing light upon it, and keeping the attention of his hearers fixed upon the object to which he originally directed it."[36]

This rare ability to go to the heart of an issue was also noted by Federalist leader Rufus King, who, after hearing Marshall plead a case before the Supreme Court, said, "His head is the best organized of anyone I have known."[37]

The brief overview of Marshall's attributes and conduct are found in almost any Marshal biography or sketch of this esteemed Supreme Court justice. But is there more to the character of this man? What is under the outer peels of the onion?

Let us explore some of the more interesting aspects of this man.

His social interests

Marshall spent many evenings out of the house, in part due to the illness of his wife. He was a very sociable individual, and in addition to his legal and political affairs and Masonic activities, he occupied himself by dining out at the boardinghouse of Mrs. Younghusband, whose spouse was a member of Lodge No.19.[38] Marshall also frequented the city's taverns, gambled (though not very well), and attended dances, balls, horse races, and the theater.

In 1788, Marshall became a founding member of the Quoits-Club (KWAt rhymes with late), also known as the Barbeque Club, as were most of the prominent merchants and politicians. The membership in the Barbecue Club was limited to thirty men, and it is said to be strictly social and nonpolitical. The rules of the club prohibited wine and spirits except on special occasions, however, the members did partake in a special Marshall concoction of brandy, wine, and

[34]Smith, Jean E. 1996. *John Marshall* pp. 351–2, 422, 506

[35] Albert Jeremiah Beveridge, *The life of John Marshall: 13*, Note 1. citing the oral testimony of W.G. Standard, Secretary of the Virginia Historical Society.

[36] letter of Benjamin Latrobe, May 31, 1796. in John Semmes, John H.B. Latrobe and his times. (1917) pp. 7-9.

[37] Rufus King to Charles Pinckney, October 17, 1797. 2 Life of King: 234-235. King's comments were made after hearing Marshall present oral arguments before the Supreme Court on the case Ware v. Hylton, the only case that Marshall argued before the Supreme Court.

[38] Rutyna, Richard and P. Stewart. 1998. The History of Freemasonry in Virginia. University Press of America. pp. 138.

Madeira[39] "poured into a bowl and filled with ice and sweetened."[40] The rules prohibited the discussion of business, politics, or religion — sound familiar — those who transgressed were fined a case of champagne, which the participants would drink at the next meeting. The meal was consumed, and the players adjourned to the "pits" for friendly competition. Most players had fine sets of brass quoits, but Marshall was noted for his uncouth, rough iron quoits, which very few in his club could throw with any accuracy. But Marshall seemed to have great control of these rough hoops and would frequently ring the peg. Marshall continued his participation in the club well into his tenure as Supreme Court Justice as reported by the Richmond Reader.[41]

> "We have seen Mr. Marshall, in later times, when he was Chief Justice of United States, on his hands and knees, with a straw and a penknife, the blade of the knife stuck through the straw, holding it between the edge of the quoit and the hub, and when it was a very doubtful question as to which quoit was closest, pinching or biting of the ends of the straw until it would fit a hair."

Marshall remained a club regular until he died, and relished the Saturday evenings with his friends and neighbors, many of whom were his political adversaries.

Marshall also belonged to a Jockey Club in Richmond, which sponsored horse races in May and October, perhaps at the Reverend Mr. Buchanan's farm, and attended a club that met at Formicola's Tavern in Richmond. The tavern was owned by Seraphino Formicola, who was a member of Richmond Lodge No. 10.[42]

Marshall's style was not without its critics. Jefferson, who was always ill at ease in the tavern, criticized Marshall's "lax and lounging manners."[43]

As chief justice he was a walking companion and confidant of President John Quincy Adams. Only a few years before Marshall's death, Edward Everett reported seeing the old chief justice

> ". . .still walking to court on a bitter March day with no hat and his coat blowing in the wind — a scene that prompted the puritanical New Englander to wonder how a man who had sown some wild oats as a youth could justly reap such a harvest of good health in his old age."[44]

His perspectives on slavery

Marshall's view of slavery matured during his early law practice in Richmond. He owned several slaves who performed routine household duties, but as he was never involved in large-

[39] Madeira is a fortified Portuguese wine made in the Madeira Islands. Madeira was an important wine in the history of the United States of America. No wine-quality grapes could be grown among the 13 colonies, so imports were needed, with a great focus on Madeira. Madeira was a favorite of Thomas Jefferson, and it was used to toast the Declaration of Independence. George Washington, Alexander Hamilton, Benjamin Franklin and John Adams are also said to have appreciated the qualities of Madeira.

[40] Smith, Jean E. 1996. *John Marshall* pp. 160-161. and Samuel Mordecia. 1860. Richmond in by-gone days. Second edition. G. M. Wise. pp. 183-190

[41] Samuel Mordecia. 1860. Richmond in by-gone days, second edition. G. M. Wise.

[42] Rutyna, R. and P. Stewart. 1998. The History of Freemasonry in Virginia. Univ. Press of America. pp. 139.

[43] Smith, Jean E. 1996. *John Marshall* pp. 428.

[44] Newmyer, R. Kent. 2001. John Marshall and the Heroic Age of the Supreme Court. p. 13.

scale agriculture, he had no significant holdings. In the 1790s, Marshall tried four slave cases before the court of appeals, and in three of them he represented the slaves. His account book indicates that he received no payment for the cases, and so one must assume that he volunteered his services. Marshall's principal servant, Robin Spurlock, who, although a slave, was a leading figure among Richmond's blacks, and it is likely that he brought the cases to Marshall's attention.[45]

The issue in each case involved intermarriage between blacks and Indians. Thus, all children of Indian women were considered to be Indian and therefore free persons and that included the children of an Indian mother married to a slave. Slave owners frequently ignored the law and treated the children of such couples as slaves. Marshall aggressively defended the Indian children in these cases as free.

Marshall had helped draft a bill to punish persons guilty of selling free persons as slaves,"[46] His concern for mistreated slaves and Indians was strongly held and earned him the respect of his fellow attorneys, many of whom were reluctant to accept such cases.

Marshall was also not in opposition to intermarriage legislation — Indians and slaves and Indians and whites — stating in response to legislation approving intermarriage that it "would be good for this country" also stating his feelings that our prejudices are too powerful to overcome long term interests of its citizens and the country."[47]

His ability to connect with others

Marshall had a unique quality of listening — truly listening to points of view, though they are contrary to his own. Of particular note is the Gibbons case, one of the three noted above. Daniel Webster represented the steamboat company and the arguments before the court extended for 5 days. Webster described the scene in court as follows:

> I can see the Chief Justice as he looked at that moment. Chief Justice Marshall always wrote with a quill. He never adopted the barbarous invention of steel pens. And always, before counsel began to argue, the Chief Justice would nib his pen; and then, when everything was ready, pulling up the sleeves of his gown, he would nod to the counsel who was to address him, as much as to say, "I am ready; now you may go on." I think I never experienced more intellectual pleasure than in arguing that novel question to a great man who could appreciate it, and take it in.[48]

No greater compliment can be given a high ranking personality than for one to be at ease in the presence of that person. Such was the character and deportment of Marshall.

> "No one admires more than I do the extraordinary powers of Marshall's mind; no one respects more his amiable deportment in private life. He is the most unpretending and unassuming of men. His abilities and his virtues render him an

[45] Newmyer, Kent. 2001. John Marshall and the Heroic Age of the Supreme Court. pp. 13. Smith,Jean E. 1996. *John Marshall* pp. 163.
[46] Thomas, White. 1828. Journal of the House of Delegates of the Commonwealth. October term, 1787. Richmond, VA.
[47] Letter from Marshall to Monroe. December 2, 1784. Marshall Papers. Vol 1:pp 131.
[48] Warren, C. The Supreme Court in United States History, Vol. 1:603

> ornament not only to Virginia, but to our Nation".[49]

His regard for women

Marshall's home life was tragic. He and his wife, Mary (or "Polly" as she was known) were married for forty-eight years, during which period they had ten, children, only six of whom lived to adulthood. By early 1787, following the death of their daughter, Rebecca, and the subsequent miscarriage of another child, Polly was in the throes of a nervous breakdown. Some judged her insane. At the very least, she had a long-term "nervous affection, which must have caused both her and John considerable anguish. The exact nature of Mrs. Marshall's illness is not known.

But what is known is the deep affection that John had for his wife. On the day before Christmas, 1831, Polly was in the last day of her life and gave John a locket of her hair that she had preserved since their courtship. John was grief stricken with her death the next day, Christmas, 1831, and wore the locket around his neck until his death in 1835.[50] As a further evidence of his love for his wife, on the first anniversary of her death he wrote a poem to his deceased wife with the following closing lines.

> Encompassing in an angel's frame,
> an Angel's virtues lay;
> Too soon did heaven assert its claim
> And take its own away.
> My Mary's worth, my Mary's charms
> Can never more return.
> What now shall fill these widowed arms?
> Ah, me! My Mary's urn!
> Ah me! My Mary's urn!!!

Justice Story, Marshall's closest friend on the court and fellow Mason, wrote his wife a few months after Polly's death with this observation of Marshall's feelings for his wife, "She must have been an extraordinary woman . . . and I think he [Marshall] is the most extraordinary man I ever saw, for his depth and tenderness of his feelings."[51]

Joseph Story captured the chief justice's unusual appreciation of the ability of women when he spoke of the high esteem in which Marshall regarded women.

> ". . . held the female sex, as . . . the equal to man. I do not refer to the courtesy and delicate kindness with which he was accustomed to treat the sex, but rather to the unaffected respect with which he spoke of their accomplishments, their talents, their virtues and their excellences."[52]

Marshall's attitudes toward women were sufficiently unique to cause Harriet Martineau, an English feminist, who knew Marshall in his later years to note of the chief justice:

> ". . . maintained through life and carried to his grave a reverence for women, as rare in its kind as in its degree. He brought not only the love and pity . . . which they excite in the mind of the pure, but the steady conviction of their intellectual equality with men, and with this deep sense of their social injury. Throughout life he so invariably sustained their cause that no indulgent libertine dared to flatter and humour, no skeptic . . . dared to scoff

[49] H. Garland. 1850. The life of John Randolph of Roanoke - Volume 2 - Page 212

[50] Smith, Jean E. 1996. *John Marshall* pp. 514.

[51] Story letter to wife Sarah. March 4, 1832. Life and letters of Story. pp. 86-87.

[52] Dillon, John. 1909. *John Marshall: Life, Character, Judicial Service*. vol. 3:365-366.

at the claim of women in the presence of Marshall."[53]

His religious convictions

John Marshall never rejected the church openly but his acceptance was respectful and accepting rather than doctrinal or expressing endorsement of any organized church. Throughout his life, the chief justice declined to become member of any congregation reportedly because he was unable to accept the divinity of Christ.[54] If Marshall needed reinforcement for that skepticism, it may have come from Pope's the "essay on Man" as a ringing endorsement of the deist views of the age of reason. Although Pope was Catholic his emphasis on man as a rational being inevitably diminished the role of Christianity. In Marshall's youth, Pope's writing was studied in depth by Marshall and undoubtedly had an influence on his religious philosophy.[55]

The Enigma with the Fraternity

Given this backdrop of the great man — his role as arguably the most influential Chief Justice of the Supreme Court and his general character and behavior that enabled him to succeed in that role — what was his relationship with the Masonic fraternity? Let's now explore our proposition that John Marshall is an enigma to the Masonic fraternity.

John Marshall as Grand Master

John Marshall was the Grand Master of Masons in Virginia from late 1793 through 1795. One would assume that with such a position of prominence within the fraternity that John Marshall would have a strong lifelong affinity and affection for the craft. But anti-Masons will quickly point out that late in life Marshall characterized the fraternity as ". . . useless pageantry. . ." and" . . . a harmless play thing which would live its hour and pass away."[56] One might draw from these quotes that Marshall may have matured in his thinking of the fraternity and turned his back to the organization that earlier in his life he led. But let us explore this apparent enigma and put a context to these statements and what may have led to such dismissing remarks concerning the fraternity.

John Marshall may have originally entered Freemasonry through a Military Lodge during the War for American Independence, but that is not a certainty." But it is certain that by 1785 Marshall was a member of Richmond Lodge No. 10 before he was appointed Deputy Grand Master by Edmund Randolph in 1786 or elected Deputy Grand Master at the Grand Annual Communication of October 29, 1792. Marshall was elected Grand Master of Masons in Virginia on October 28, 1793 and served in that capacity until his retirement from the chair November 23, 1795.[57] During and after that period, Marshall was also an occasional visitor in Richmond Randolph Lodge No. 19. Marshall was clearly an active member of Richmond Lodge No.10 up to the time of his appointment as Chief Justice of the Supreme Court in 1801.

During his tenure as Grand Master, Marshall issued a number of dispensations ordering that certain individuals be initiated into Lodges, usually St. John's Lodge No.36. He seems to have done this many times for men who were about to leave the jurisdiction of the Grand Lodge of

[53] Martineau, Harriet. 1838. Retrospect of western travel. Vol I; 217.
[54] Dillon, John. 1909. *John Marshall: Life, Character, Judicial Service*. Vol 3:14-17.
[55] Smith, Jean E. 1996. *John Marshall* pp. 33-36.
[56] Marshall letter to Everertt. July 22, 1833. The Papers of John Marshall. vol. XII pp. 285-287.
[57] Virginia Grand Lodge Proceedings, 1778-1822, pp. 112-137.

Virginia and wished to leave the jurisdiction as "made" Masons. He also seems to have exercised this power so as to bring into the society prominent men who were in business or politics and especially the General Assembly of Virginia.[58]

It must be recognized that John Marshall was only the sixth Grand Master of Masons in Virginia. John Blair, its first Grand Master in 1778 until 1984, followed by James Mercer, Edmund Randolph, Alexander Montgomery and Thomas Matthews. All but Montgomery should be familiar to most readers as prominent political figures of their day. John Blair, a delegate to the Constitutional Convention (1787) and Supreme Court Justice in 1789; James Mercer a member of the House of Burgesses in 1765, and a delegate from Virginia to the Continental Congress in 1779; Edmund Randolph a delegate from Virginia to the Constitutional Convention (1787) who introduced the Virginia Plan; Edmund Randolph appointed as the first U.S. Attorney General (1789); and Thomas Mathews a member of the Virginia House of Delegates and Speaker of the House from 1788 to 1799.[59]

All of these men were prominent figures of their time and were occupied in endeavors that clearly would not permit but minimal time for Grand Lodge business or activities. Absenteeism among Grand Lodge officers in these early years was an acute problem with as many as 50 percent not attending Grand Lodge Annual Communications and other Grand Lodge functions.[60] So unlike the Grand Masters of today, we find the early Grand Masters served more in an honorary role than a functioning role; John Marshall being no exception. So one should not assume that just because a man served as Grand Master that it must follow that he would have a strong attachment to the Fraternity.[61]

We do not find in the records of the Grand Lodge, the private papers and writings of John Marshall or his close friend Justice Story, or writings of John Marshall's collogues and friends any evidence that he maintained a strong attachment to the Fraternity — although some Masonic authors would like to assume such affinity based solely on Marshall's having served as Grand Master. Times were different, the role of the Grand Master was different, and the demands of the job were not what they are today.[62] During Marshall's tenure as Grand Master, there were only about 40 Lodges and 1,200 Freemasons within the jurisdiction.[63]

After stepping down as Grand Master in 1795 Marshall quickly involved himself with politics, serving in the Virginia House of Delegates in 1795, being offered the position of Attorney

[58] Rutyna, R. and P. Stewart. 1998. The History of Freemasonry in Virginia. Univ. Press of America. pp. 139.

[59] Eighty-seven percent of the Grand Masters from 1778-1788 were lawyers, during the first 20 years of the Grand Lodge of Virginia, 70% of the Grand Masters were lawyers.

[60] Virginia Grand Lodge Proceedings, 1778-1822; also see Rutyna, Richard and P. Stewart. 1998. The History of Freemasonry in Virginia. University Press of America. pp. 49.

[61] It should be noted that John Marshall attended all of the Grand Lodge Communications during his term, which was rare for Grand Masters of his day and does demonstrate a commitment to his responsibilities as Grand Master but not necessarily to his affinity for the Fraternity.

[62] In 1794 there were only 42 Lodges recognized by the Grand Lodge compared with 230 Lodges today. Membership in Virginia was around 1,200 in 1790 compared with a membership of over 33,000 today.

[63] Numbers derived from Grand Lodge proceedings from 1789 through 1795 and information provided by Rutyna, R. and P. Stewart. 1998. The History of Freemasonry in Virginia. Univ. Press of America.

General in 1795 which he declined, participating as a special envoy to France (the XYZ Affair) in 1797, being elected to the U.S. Congress in 1799, declining an offer to be Secretary of War in 1800, and finally elevation to the supreme court in 1801. Hardly giving the man an opportunity to immerse himself in the business of his Lodge or the Grand Lodge, even if disposed to such thoughts.

And that might have been the end of the story of Johns Marshall's involvement and connection with Freemasonry. He might have gone into the sunset of life leaving a favorable history with the fraternity. But there is more to the story.

The influence of the Morgan Affair and what followed.

The organization of a Christian political party was proposed as early as 1827. Many of the leading religious men of the country entered the Anti-Masonic Party so that it become for all effects and purposes, a religious party, wielding religion as one of its most effective weapons. Churches passed resolutions against Masonic clergymen and laymen, and the Masonic order, resolutions which were endorsed by Anti-Masonic political gatherings. Among the churches condemning Freemasonry were the Presbyterian, Congregational, Methodist, Baptist, Dutch Reformed, Mennonites, Dunkards, and Quakers.[64]

Coupled with a growing anti-Masonic movement, William Morgan, a resident of N.Y was abducted, disappeared, and presumed murdered by Freemasons in 1826. The allegations that followed against a small group of Freemasons sparked a public outcry. Trials followed which did not follow legal protocols in ways that would be considered appropriate. A few Masons were sentenced to jail time from 2 years to a few months. The body of Morgan was never found so murder charges were never made. However, a year after Morgan's disappearance, a body was found that was claimed to be Morgan's, but later was proved to be a Canadian citizen — yet one more event to the circus of events surrounding the trials, convictions, and politics of what has been called the "Morgan Affair." The press coverage was extensive, but the outrage against the fraternity and public outcries were generally restricted to a few northern states — specifically, New York, Pennsylvania, Vermont and Road Island.[65]

This Morgan Affair strengthened the anti-Masonic movement to the effect that an Anti-Masonic political party was formed. A first convention was held in Philadelphia in September 11, 1830.[66] The first convention served as a forum to inform the convention participants on the practices, oaths, and secretes of the Masonic fraternity. In the end, resolutions were passed that declared, "The oaths of Freemasonry are neither legally, morally, nor religiously obligatory." and further "That the organization and principles of the freemasons are inconsistent with the genius of our republican institution."[67]

In September, 1831 the anti-Masonic Party held a second convention in Baltimore in which a former Mason and former Attorney General, William Wirth, was nominated by the Party.[68]

[64] McCarthy, "Anti-Masonic Party," Am. Hist. Assn. Rep., 1902, pp. 540-543.

[65] *The Morgan Affair and Anti-Masonry.* ,John C. Palmer, 1992. Kessinger Publishing, LLC Also see Masonic Service Association *The Short Talk Bulletin* - Vol. XI, March, 1933 No. 3.

[66] Proceeding of the United States Anti-Masonic Party. 1830. Journal of proceedings, the reports, the debate, the address to the people. Philadelphia, September 11, 1830.

[67] Ibid. pp. 84 of proceedings.

[68] Proceedings of the Second United States Anti-Masonic Party. 1831. Journal of reports,

Wirth, running as the Anti-Masonic candidate eventually won Vermont's seven electoral votes for President, but only secured about 0.6% of the popular vote.[69] Eventually, when it became clear that the Anti-Masonic party was essentially an Anti-Jackson party, it collapsed and its followers joined with the Republican Party.[70]

And had it not been for some unusual circumstances and coincidences, John Marshall might not have been connected with any of this anti-Masonic movement nor have communicated any thoughts on Freemasonry that might in any way would reflect negatively upon the fraternity. But such was not the case.

Anti-Masonic literature will point out that John Marshall attended the second convention of the Anti-Masonic party by invitation, was approached to run as their candidate, but declined.[71] Further, that Marshall was strongly opposed to the Freemasons following the Morgan Affair as evidenced by Marshall's writings expression opinions about fraternity, "It was impossible not to perceive the useless pageantry of the whole exhibition," and ". . .convinced me that the institution ought to be abandoned as . . . incapable of producing any good. . .."[72]

On its face, and out of context with events of the day, his participation at the Anti-Masonic convention of 1831 and the 1833 letter to Edward Everett would appear to indicate that Marshall abandoned any affinity he may have had for the fraternity and become a strong critic. A position many Masons would prefer to dismiss as not consistent with a Past Grand Master. But one must be careful in taking such action and words out of context. As Paul Harvey would say — the rest of the story.

The rest of the story

At the first convention of the Anti-Masonic Party, a resolution was passed inviting Marshall and other prominent political figures to the second convention to be held the following year.[73]

In the spring of 1831 Marshall's health was failing, he was in great pain from bladder stones and contacted a noted semi-retired physician Dr. Physics in Philadelphia, PA.[74] Marshall consulted the good doctor over a number of months via mail and eventually scheduled surgery for early October, 1831.[75]

The week of September 26th, on Monday, Marshall set out on his trip to Philadelphia. He took a boat to Baltimore where he would layover for the night, then take a land route to Philadelphia the following day. Marshall was aware of the Anti-Masonic convention, but

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nomination of President and vice president of the United States. proceedings, the reports, the debate, the address to the people. Baltimore, September 1831.

[69] Vaughn, William P. *The Anti-masonic Party in the United States, 1826-1843*. Louisville, KY: University Press of Kentucky, 1983.

[70] Ibid. p. 539-40.

[71] Weed, Autobiography, Volume 1, pp. 385-390.

[72] Letter, John Marshall to Edward Everett. July 22, 1833. the Papers of John Marshall. XII:285-287.

[73] Proceeding of the United States Anti-Masonic Party. 1830. Journal of proceedings, the reports, the debate, the address to the people. Philadelphia, September 11, 1830, p. 14.

[74] , Jean. 1998. John Marshall-Definer of a Nation. Henry Holt and Company, NY. pp. 512. Physics was up in age and had removed himself from daily rigors of surgery. but for his previous association with Marshall, agreed to treat Marshall.

[75] jean

initially declined an invitation to attend during his layover in Baltimore.[76] Marshall did, however, attend the session on the 27th, due to a delay in his departure from Baltimore to Philadelphia.[77] Marshall did not take part in any discussions and was there only as an observer. Given his medical condition and sever pain, it is doubtful that Marshall would have wanted engagement in any discussions.

Other than noting Marshall's presence in the convention proceedings, there was little other written accounts of his attendance.[78] We might assume from such limited coverage and documentation of his attendance that his participation was more an opportunity to occupy himself during his layover and to humor his curiosity. There are no correspondence from Marshall on his attendance, so one might assume that he viewed his attendance of little importance or at least not worthy of comment. That afternoon, following his brief attendance at the convention, he departed for Philadelphia and his scheduled surgery.

Two year later, the noted orator and politician Edward Everett wrote Marshal asking about Marshall's thoughts on Freemasonry.[79] Such a request should not have been unexpected from Everett, he had corresponded with Marshall previously on a number of political matters.[80] Everett was considering a run for governor of Massachusetts and looking for a political affiliation, the Anti-Masonic Party perhaps being one. Valuing Marshall's opinion, Everett inquired about Marshall's attitudes toward the fraternity since he had heard from others, Justice Story specifically, that Marshall had expressed opinions about the Morgan Affair. Marshall's reply letter was direct and firm.[81] Passages from this letter have been used by a number of authors to suggest that Marshall had fallen out of favor with the fraternity. And in fact when one reads a few passages from the letter it is easy to draw such conclusions; for example the following passages.

> *I have not been in one of them [a Lodge] for more than forty years, except once on an invitation to accompany General Lafayette: nor have I been a member of one of them for more than thirty. It was impossible not to perceive the useless pageantry of the whole exhibition.*

[76] The convention assigned Mr. Hopkins to receive and greet the Chief Justice to the Convention. But reported back to the convention that he had "*received for answer that he [Marshall] was expecting to leave the city to-morrow morning, otherwise would have attended with great pleasure*." In Proceedings of the Second United States Anti-Masonic Party. 1831. Baltimore, September 1831, pp. 13.

[77] Immediately after organization of the convention, a resolution was adopted inviting the Hon. Charles Carroll of Carrollton, signer of the Declaration of Independence, Chief Justice Marshall, and the Hon. William Wirt to take seats in the convention. Mr. Carroll, who resided a few miles out of the city, was unable to attend, but, greatly to our gratification, the Chief Justice and the late attorney General of the United States. came into the Convention and took seats by the side of the President. From Weed, T. 1883. The Life of Thurlow Weed — Autobiography, Volume 1, p. 390

[78] Proceedings of the Second United States Anti-Masonic Party. 1831. Journal of reports, nomination of President and vice president of the United States. Baltimore, September 1831, pp. 13

[79] Letter from Everett to Marshall. July 16, 1833. The Papers of John Marshall. Vol. XII, p. 285.

[80] need cite

[81] Letter, John Marshall to Edward Everett. July 22, 1833. the Papers of John Marshall. vol. XII. pp. 285-287

I thought it however a harmless play thing which would live its hour and pass away, until the murder or abstraction of Morgan was brought before the public.

Convinced me that the institution ought to be abandoned as one capable of producing much evil, and incapable of producing any good which might not be affected by safe and open means.

But let us exam more closely the context of this letter and the issues swirling before Marshall when he responded to Everett. Marshall was 78 years of age, in poor health, and had lost his wife two years earlier from which he never completely recovered. He is said to have walked two miles from his home at least twice a week to his wife's grave.[82] Justice Marshall was also considering retiring from the court and removing himself to a more private life.

In his response to Everett and later to John Bailey a few months later,[83] Marshall attempted to separate himself from any debates about the ills or virtues of the fraternity. Marshall was clear in his dismay and disgust with the judicial circus surrounding the Morgan Affair, but tried to distance himself from expressing opinions for or against the fraternity. You can see from the following excerpts how Marshall attempted to dissociate himself from the entire debate of the fraternity and the Morgan affair in his response to Everett.

I was induced to become a candidate for admission into the society by the assurance that the brotherly love which pervaded it, and the duties imposed on its members, might be of great service to me in the vicissitudes of fortune to which a soldier was exposed. After the army was disbanded, I found the order in high estimation; and every gentleman I saw in this part of Virginia was a member.

I have attained an age when repose becomes a primary wish. I am unwilling to embark on any tempestuous sea, or to engage as a volunteer in any controversy which may tend to rouse the angry passions. I am unwilling to appear in the papers on any question — especially if it may produce excitement.

In his letter to Bailey in October of 1833, he reaffirmed his position.[84]

The circumstances represented as attending the case of Morgan were heard with universal detestation, but produced no other excitement in this part of the United States, than is created by crimes of uncommon atrocity. . . . The agitations which convulse the North did not pass the Potomac.

I have said that I always understood the oaths taken by a mason, as being subordinate to his obligations as a citizen to the laws, but have never affirmed that there was any positive good or ill in the institution itself.

It is also worth noting that Marshall seemed concerned that his communication with Everett

[82] Smith, Jean E. 1996. *John Marshall.* p. 523

[83] Bailey (1786-1835), of Massachusetts, graduated from Brown University in 1807. He was a member of the Massachusetts House of Representatives, 1814-17, a clerk in the State Department in Washington, 1817-23, and served in the federal House of Representatives, 1824-31. He was then a member of the Massachusetts senate. He was an unsuccessful Anti-Masonic candidate for governor in 1834.

[84] letter, John Marshall to John Bailey. October 18, 1833.The Papers of John Marshall. Vol. XII, pp. 305-306.

not be made public in any way. Marshall appears concerned that his opinions not reflect badly on the fraternity and more importantly not disrupt relationships which he had with many of his Masonic brethren.[85] In a follow-up letter Marshall again tries his best to distance himself from the entire subject of the Morgan affair and the fraternity.

> *I believe that in this part of the union, no new members will be made and that the institution will die a natural death. I lament that its expiring struggles should be attended with the mischief you mention. By mixing myself in them I should leap into a whirlwind which is not moving towards me, and which I cannot influence. I have performed the part allotted to me to the best of my ability, and am now slipping out of the world. My only remaining wish, so far as respects myself, is to sink quietly into the grave, and to repose with my Fathers. Yes, I have one other — it is to retain the good opinion of those whom I can never cease to value, and whose good opinion confers honor.*[86]

Everett in a responsive letter assures Marshall that his comments will be kept confidential — which of course they were not.[87]

In conclusion, Marshall's remarks on the Masonic fraternity do not show him as an ardent advocate of the institution. However, nor do his remarks take issue with its teaching or philosophy. Marshall was genuinely disturbed by the events and conduct connected with the Morgan Affair, and clearly desired to separate himself, his position, and the Washington D.C. institutions from the events and politics of the northern states. But Marshall respected many of his Masonic brethren, valued their friendship, Justice Story in particular, and desired no disharmony to visit the fraternity as a result of his opinions.

Although Marshall seems to distance himself from the fraternity in his letters to Everett and Bailey by saying he had not visited a lodge in over 40 years, he did participate on a Grand Lodge Committee in 1822 and a Grand Lodge Education Board in 1832.[88]

One last perplexing statement by Marshall occurred while he was recovering from bladder stone removal surgery in Philadelphia in 1831. In a letter to his associate justice, and close friend Joseph Story, Marshall wrote.

> "Our brother Baldwin is here. He seems to have resumed the disposition which impressed us both so favorably at the first term. This is as it should be. He spoke of you in terms not indicating unfriendliness"[89].

Both Justice Story and Justice Baldwin were also Freemasons. Was this reference to "brother" as a brother Freemason, or was this a reference to the "brotherhood' of the Supreme Court. We can find no other private writing of John Marshall where

[85] In his letter to Everett, July 22, 1833, Marshall states, "Several of my personal friends are masons, some few of them more zealous than myself. You will therefore pardon the unwillingness I express that any allusion to this letter should be made in the papers."

[86] letter, John Marshall to Edward Everett. August 6, 1833. the Papers of John Marshall. Vol. XII, pp. 293-294.

[87] letter, Edward Everett to John Marshall. October 11, 1833. the Papers of John Marshall. Vol. XII, p. 298.

[88] Rutyna, Richard and P. Stewart. 1998. The History of Freemasonry in Virginia. University Press of America. pp. 295 and 138.

[89] Letter from John Marshall to Joseph Story. October 12, 1831. The Papers of John Marshall. Vol. XII, pp. 118-120.

he refers to a non-Mason on the court as "brother" in his correspondence. Is this a demonstration of Marshall's affinity for brethren of the fraternity, even though his opinions on Freemasonry later in life seem to be neutral at best?

Thus, Marshall is an enigma for the fraternity.

Concluding Remark

Marshall was such an iconic figure in American history that the rumor made the rounds about his connection with the Liberty bell at his funeral. As quoted from Jean Smith.[90]

> *On July 8, 1835, as Marshall's funeral cortege made its way through the city, the muffled bells of Philadelphia reverberated their mournful message. As fate would have it, July 8 marked the anniversary of that date in 1776 when Philadelphia's bells had first rung out to celebrate American independence. And then, on that day in 1835, again as if by fate, the greatest of the bells, the Liberty Bell in Independence Hall, went silent. It had cracked while tolling the death of the great chief justice. It was never to ring again.*[91]

Not a true accounting, but does demonstrate the power and respect the great man retained.

To Marshall, more than any other person belongs the credit for establishing the interpretation of the Constitution as we know it today. His clear, concise and eloquent decisions are unequaled. But it was his ability to forge agreement and concusses that were his true gift to the court and the country. Had another man been in his place, decisions might have been the same, but the lack of dissenting opinions during his tenure is truly the mark of his genius.

In tribute to John Marshall, his close friend and Masonic brother, Joseph Story wrote:

> "Yes, this good and great man was all that we could ask, or even desire for the station. He seemed the very personification of Justice itself, as he ministered at its altars — in the presence of the nation — within the very walls, which had often echoed back the unsurpassed eloquence of the dead, of Dexter, and Pinkney, and Emmett, and Wirt, and of the living also, nameless here, but whose names will swell on the voices of a thousand generations " [92, 93]

[90] Smith, Jean. 1998. John Marshall-Definer of a Nation. Henry Holt and Company, NY. pp. 20.

[91] So when did the Liberty Bell get its famous crack? That's not exactly clear. According to one of many stories, it first cracked back in 1824, during the visit of the Revolutionary War hero Marquis de Lafayette. Another story holds that it fractured later that year, while tolling to signal a fire. One of the most popular legends claims that the bell cracked during the funeral of Chief Justice John Marshall in 1835, but newspaper accounts of the funeral do not mention such an incident. Whatever the truth is, it seems the bell was certainly damaged by 1846, when Philadelphia's mayor requested that the bell be rung on George Washington's birthday. But on George Washington's birthday in 1846, the crack expanded sufficiently, causing the bell to become unringable. The final zigzag crack measures approximately 1/2 inch wide and 24 1/2 inches long.

[92] Story, J. 1835. Miscellaneous Writings of Joseph Story, The Character, Life and Services of Chief Justice Marshall, P. 692.

[93] The four men mentioned in Story's passage are men who were noted speakers before the Supreme Court in that time frame. Mr. Wirt served as the Attorney General of the United States for 12 years, the longest tenure of any Attorney General. Mr. Pinkney had served as

Phrases in this passage should be familiar to most Master Masons. Was Story making reference to Marshall in connection with the allegory of Hiram Abiff? Are there other connections here with Marshall constructing a Constitutional temple stone by stone or rather, decision by decision? We will never know Story's intentions.

Thus we leave you with the theme of this paper. John Marshall an enigma for the fraternity, a puzzling character in life, an inspiration to the country.

the Attorney General of the United States, making 84 arguments before the supreme court . Marshall is quoted as saying Pinkney was "the greatest man he had ever seen in a court of law.," Emmett argued the case for Ogden in the landmark United States Supreme Court case of *Gibbons v. Ogden*, 22 U.S. 1 (1824) and became one of the most respected attorneys in the nation, with United States Supreme Court Justice Joseph Story declaring him to be "the favourite counsellor of New York." Samuel Dexter administered the oath of office to Chief Justice Marshall, and wrote the memorial eulogy to George Washington upon the first president's death in December 1799.