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# "The faults of a Virginian": John Marshall and republican legal culture

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“THE FAULTS OF A VIRGINIAN”: JOHN MARSHALL AND REPUBLICAN  
LEGAL CULTURE

A Thesis

Submitted to the Graduate Faculty of the  
Louisiana State University and  
Agricultural and Mechanical College  
in partial fulfillment of the  
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in

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by  
Nathan Hall  
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This work is dedicated to my grandfather - Lester “Zip” Hall – my first and best history teacher. His classroom was a sedan on the country roads of Hanover County. Driving “the loop” to the post office and back, he showed me the mailboxes where bootleggers hid their wares in the days of prohibition, and the dirt roads where Patrick Henry met the parsons and agreed to argue their famous cause. Yes, some of the events were embellished, some of the details were suspect, and every story had a punch line. I think the most important thing I learned on those rides is that the truly great men are not the ones to whom historians devote their attention. They are the people who make a difference in our lives. We don’t write about them, but we still remember. And you will never be forgotten, Zip.

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## Abstract

As chief justice of the United States for thirty-five years, John Marshall molded the Supreme Court into a co-equal branch of government. His efforts to fashion a powerful and independent federal court often ran counter to popular sentiment in his home state of Virginia. There, Marshall's ideological and political opponent, Thomas Jefferson, dominated the political landscape.

The adversarial narrative of Marshall and Jefferson's national political battles is the subject of much scholarship. Rarely considered, however, is the common legal culture from which they both emerged. Understanding the personalities and the decisions that populated Virginia's legal culture from the American Revolution through the age of the Marshall court provides a deeper understanding not only of Marshall and his motivations, but also of how he continued to shape the legal and political environment of Virginia -his lifelong home - and how, in turn, that culture continued to influence him even after he abandoned local affairs for the national stage.

If the Jeffersonian Revolution of 1800 produced a Virginia dynasty of leadership, John Marshall can be considered a part of it. When he took on the role that defined his place in American history, he had spent more than half his life as a Virginian attorney and popularly elected local politician. Yet he was more than just a Virginian who became a nationalist, leaving the politics and legal culture of his home state behind. The Marshall court retained a Virginian cast, and this explains many aspects of how the chief justice negotiated the boundaries between republican political economy and republican law.

What emerges is a story of an intertwined legal and political culture, infused with classical republican idealism by the American Revolution, whose optimistic principles

were sorely tested in the courts of the early republic. And as local figures failed to effectively address the significant legal contradiction of slavery, the responsibility fell to a federal government dominated largely by Virginians – Marshall included – who were consistent in their failure to prevent the transition from republic to democracy and in their inability to solve the sectional dilemma that ultimately led to Civil War.

“When conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. So great is his sophistry you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not, I’d reply, ‘Sir, I don’t know, I can’t tell.’”

- Thomas Jefferson to Justice Joseph Story<sup>1</sup>

## Introduction

In the spring of 1800, Virginian Congressman John Marshall was eager to return home. He determined to quit Philadelphia in the first week of May, though Congress was still in session. Attending to his neglected legal career at home concerned him more urgently than national affairs. Money was running short. Congress would have to make due without him.

Before leaving the federal capital on May 8, the representative stopped at the office of the War Department to attend to some business affairs on behalf of friends in Virginia. James McHenry, the secretary of war, was an old friend from the days of the Revolution. They had seen battle together at Monmouth, endured the harsh winter at Valley Forge, and served on General Washington’s staff.<sup>2</sup> In the intervening years, they remained on affectionate terms – until today. The visiting Virginian was left ill at ease by an inexplicable coldness of McHenry’s demeanor.

In the course of concluding his business in the war office, the homebound Virginian was shocked to discover the reason for the awkward exchange when Mr. Fitzsimmons, the chief clerk, greeted him with enthusiastic congratulations on his recent

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<sup>1</sup> Recorded by Rutherford B. Hayes, from a lecture by Joseph Story at Harvard Law School, September 20, 1843, in Charles R. Williams, *Life of Rutherford Birchard Hayes* (Columbus, Ohio: F.J. Hear, 1928), 33.

<sup>2</sup> Bernard C. Steiner and James McHenry, *The Life and Correspondence of James McHenry* (Cleveland: Burrows Brothers Co., 1907).



promotion – to the office of secretary of war! He left the department (of which he was now apparently the head), dashed off an earnest letter of refusal to President Adams, and promptly departed Philadelphia.

When the reluctant legislator arrived in Richmond a few days later, he received word that Congress approved his appointment as secretary of war on May 10, and that Adams kindly relieved him of the obligation by nominating a replacement on May 12. But by the end of the same day, Adams had appointed him secretary of state instead. His commission was approved by Congress, mailed the next day, and would arrive any moment. Would the struggling attorney refuse this second offer?

When Marshall left Philadelphia in early May of 1800, he was a committed nationalist, but his willingness to hold national or state offices was always qualified by a mixture of personal ambition and financial interests. More than a decade earlier, he refused the office of attorney general for Virginia, offered by President Washington. He cited the inconvenience of traveling between distant superior courts at the expense of his private practice as the reason. He declined Washington's offer to serve as attorney general of the United States in 1795, and the 1796 offer to become U.S. minister to France, partially because of his growing entanglement in a complicated land dispute in which most of his family's fortune was tied. Unlike many successful Virginians, Marshall did not engage in large-scale agriculture,<sup>3</sup> so the outcome of the Fairfax land case was vital to his solvency. It therefore demanded his proximity to the Richmond courts and his constant attention. In 1798, Marshall refused a justiceship on the United States Supreme Court for likely the same reason. And because the justices' duties included an obligation

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<sup>3</sup> Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company, 1996), 162.

to travel extensively in order to preside over distant federal circuit courts, Marshall's aversion to the inconvenience of judicial duties could only have been magnified at the federal level. It is fairly easy to discern the practical and logical reasons that Marshall declined judicial service. But other factors, relating to Marshall's place in a vibrant legal culture within his home state, should also be considered

Marshall's path to national prominence was more indirect than many of his Virginian peers. His former Richmond law partner, Edmund Randolph, left the local legal community immediately upon the formation of a federal government. George Washington made him the first attorney general of the United States. At the same time, the Virginian statesman Thomas Jefferson became the first secretary of state. Washington also surrounded himself with familiar veterans of the Continental Army. His former aide Alexander Hamilton became treasurer and a favorite general, Henry Knox, served as the first secretary of war. Marshall's childhood friend and fellow officer James Monroe served as ambassador to France in 1794. In addition, Marshall's father was a personal friend and former surveying partner of the president. In short, Marshall's Virginian and veteran status made him the perfect candidate for the patronage of the new federal government.

Marshall's absence from federal office did not stem from lack of ambition, but from financial necessity. After the Revolution, his father and some of his fourteen siblings relocated to Kentucky, where they continued the family tradition of surveying and land speculation. In Richmond, Marshall supervised the legal resolution of the family's most valuable holding – 215,000 acres of prime real estate in Virginia's eastern Tidewater region. He finally secured title to the property in the second half of the 1790s,

by which point political parties had formed and had begun to mature. Virginians Thomas Jefferson and James Madison led the Democratic-Republicans, while the New Yorker Alexander Hamilton and New Englander John Adams headed the Federalists. Marshall sided with George Washington, advocating a moderate Federalism within Virginia, while desiring to remain aloof from partisan wrangling. As Jefferson's Republican Party began to largely dominate politics within his home state, Marshall's façade of impartiality became harder to maintain and his national ambition grew in response.

The rise of oppositional party politics, combined with the favorable trend of court decisions in the Fairfax case, made Marshall more eager and more able to participate in politics by the end of the 1790s. When Washington stepped down and John Adams was elected to succeed him in 1796, Marshall was finally in a position to participate in national affairs. In fact, the circumstances of foreign policy coincided with Marshall's financial necessity. In 1797, President Adams decided to send a three-man delegation to France in order to negotiate a peaceful resolution of diplomatic tensions between the two nations.

Adams selected a geographically and politically diverse mixture of representatives. Charles Cotesworth Pinckney, a South Carolina Federalist, and Eldridge Gerry, a moderate New England Federalist, would go to France. The president hoped to include James Madison in the delegation, but the Virginian Republican declined. In his place, Adams offered the position to a moderate southern Federalist whom he knew only by reputation – John Marshall. At this moment, Marshall possessed secure title to his Fairfax lands but not the money to complete the purchase. His brother James was in Europe, attempting to court foreign investors to front the money for their speculation.

Marshall eagerly accepted Adams' appointment and left for Europe, where he spent the first weeks of his journey in Amsterdam, finalizing the foreign investment.<sup>4</sup>

Marshall also anticipated the potential political reward of taking such a prominent role in the international struggle. Recalling his decision to join the delegation, he admitted that, "ambition, though subjected to controul, was not absolutely extinguished."<sup>5</sup> Marshall's cautious admission of ambition reflected the prevailing political culture of the early republic. Joanne Freeman notes that the successful politician of the time was well advised to conceal any personal desire to hold office, because a leader's legitimacy was understood to stem from his disinterestedness – public service should be a duty and an obligation, but not openly acknowledged as a path to wealth or fame.<sup>6</sup> George Washington's public persona exemplified this ideal, and John Marshall consciously attempted to emulate it. And though Nancy Isenberg concludes that by the mid 1790s, the aversion to openly courting the electorate was more idealized fantasy than reality, the social and political consequences of failing to observe the tradition remained real, as evidenced by the severe criticism leveled at New York politician Aaron Burr for his own public electioneering.<sup>7</sup>

The diplomatic delegation to France culminated in the infamous "XYZ Affair," wherein the French foreign minister, through intermediaries, refused to even meet the American delegates before receiving a large bribe. The Americans indignantly refused,

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<sup>4</sup> Smith, *Definer of a Nation*, 186.

<sup>5</sup> John Marshall, "*The Events of My Life*": *An Autobiographical Sketch* (Ann Arbor: Clements Library, University of Michigan, 2001), 23.

<sup>6</sup> Joanne Freeman, *Affairs of Honor: National Politics in the New Republic* (New Haven: Yale University Press, 2001), 5.

<sup>7</sup> Nancy Isenberg, *Fallen Founder: The Life of Aaron Burr* (New York: Penguin Books, 1997), 144.

and Marshall's official dispatches to President Adams were published at home. He returned to the United States as a celebrity and a source of national pride. It was, as Burstein and Isenberg characterize it, "a career-making moment." His diplomatic success allowed him to believe that he might be able to effectively transcend petty factional disputes at the national level as he had managed to do in Virginia.<sup>8</sup>

Marshall's success endeared him to President Adams, who offered him the chance to occupy a vacant position on the United States Supreme Court. Marshall declined. At the personal insistence of George Washington, he did concede to run for Congress the following year. Before completing his single congressional term, however, he left Philadelphia with the intention of repairing his neglected legal career.

By 1800, Marshall (like many others) had grown weary of the acerbic nature of party politics. He resented the personal attacks, but found himself drawn into political battles in the service of his wounded pride, or what he referred to as a "struggle with injustice."<sup>9</sup> Simply put, a sense of honor inclined him to remain in national politics.

Accepting a position in Adams' cabinet would mean abandoning his Virginian law career, but could lead to important contacts and public recognition that might yield future fame and wealth in other venues. It represented not only a more promising outlet for national ambition, but for his standing in Virginia as well. He joined President Adams in the new federal city of Washington as his secretary of state.<sup>10</sup> Before the end of the year, the presidential election resulted in Adams' defeat, and the outgoing executive

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<sup>8</sup> Andrew Burstein and Nancy Isenberg, *Madison and Jefferson* (New York: Random House, 2010), 331.

<sup>9</sup> Marshall, *Autobiographical Sketch*, 23.

<sup>10</sup> In his autobiography, Marshall said, "I never felt more doubt than on the question of accepting or declining this office." *Ibid.*, 27.

offered the chief justiceship to Marshall. Marshall began a thirty-six year tenure on the Supreme Court with none of the laborious contemplation that marked his decision to accept the state department position six months before.

Relying on hindsight, it is tempting to narrate the trajectory of Marshall's life as aimed toward his greatest accomplishment of serving as chief justice. But before he was the towering national figure of modern historical memory – before he left Philadelphia that first week of May – he was a frontier gentryman, steeped in the deferential politics of colonial Virginia. In that pivotal season of Marshall's life, his ambition was clearly not aimed toward the federal judiciary, or any judiciary, for that matter. Quite simply, a judicial career was not an attractive proposition to a Virginian who aspired to either personal wealth or political relevance during the last decade of the eighteenth century. At worst, the bench was a convenient way to eliminate a political rival – a fate Jefferson had once suggested for Marshall.<sup>11</sup> At best, the courts represented an ambiguous prospect for ambitious men like Marshall, because their political potential was as yet unrealized. Some of Virginia's high court judges, notably George Wythe and St. George Tucker, had begun to recast the reach of judicial power in post revolutionary Virginia, with varying degrees of success. At the time, Tucker described his role as a judge by narrowly quoting *The Federalist Papers*. “The judiciary,” he said, “has no influence over either the sword

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<sup>11</sup> To keep Marshall from becoming a potential rival in national politics, Jefferson mused, “I think nothing better could be done than to make him a judge.”

Thomas Jefferson to James Madison, June 29, 1792. *The Papers of Thomas Jefferson Digital Edition*, ed. Barbara B. Oberg and J. Jefferson Looney. Charlottesville: University of Virginia Press, Rotunda, 2008.

Canonic URL: <http://rotunda.upress.virginia.edu/founders/TSJN-01-24-02-0134> [accessed 10 Mar 2011]

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or the purse, no direction either of the wealth of society, and can take no active resolution whatsoever. It may be truly said to have neither **force** nor **will**.”<sup>12</sup>

The office of secretary of state, on the other hand, was “was precisely that which I had wished, and for which I had vanity enough to think myself suited,”<sup>13</sup> Marshall admitted. The weak Supreme Court and the war department would not have allowed him to engage his enemies, but the state department represented an opportunity to do so from a position of established authority.

Within six months, Adams was ousted and Marshall made the sudden and surprising decision to become a judge. This rapid and fundamental change in Marshall’s attitude toward his public career occurred largely because it was the only national office he could retain, and in this sense Bruce Ackerman is correct in characterizing Marshall as motivated primarily by political partisanship.<sup>14</sup> He simply could not allow the Jeffersonian Revolution, with its alarmingly democratic tendencies, to go unobstructed. But more than the single-minded lust for power that Ackerman attributes to the chief justice made him willing to embrace the change.<sup>15</sup> For more prosaic reasons, a judicial career was simply more attractive than before. The capital, after all, had moved some one hundred and fifty miles closer to home, from Philadelphia to the new federal city of Washington. Additionally, Adams had relieved the justices of the inconvenience of having to ride the circuit. Thus, the chief justiceship offered Marshall a quick commute, a

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<sup>12</sup> Quoted in St. George Tucker, *Blackstone’s Commentaries: with Notes of Reference, To The Constitution and Laws, Of the Federal Government of the United States; And the Commonwealth of Virginia*, Vol. 1, Book 1 (Philadelphia: Robert Carr, Printer, 1803), 127. Emphasis in original.

<sup>13</sup> Marshall, *Autobiographical Sketch*, 23.

<sup>14</sup> Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge: Harvard University Press, 2005), 141.

<sup>15</sup> *Ibid.*, 50.

handsome salary, and no obligation to spend half the year in arduous circuit traveling. Even though he had no experience as a judge, and professed to disdain the political travails of national office, Marshall accepted the position without a moment's hesitation.

All of the Virginia lawyers struggled to reconcile their private needs with their public obligations to the young republic, and Marshall, not surprisingly, was shaped by the same impulses. His association with the legal community in his home state determined exactly how he would go about fashioning the weak and ineffective Supreme Court into a political tool. Coming of age at the time of the Revolution, Marshall was born into a mature legal culture. The legal profession of Marshall's age offered a potential source of wealth and some degree of social mobility, and it also provided membership in an exclusive intellectual community, as well as a forum for defining the ideological and practical meaning of "republicanism" – the definitive struggle of the post-revolutionary era.

Colonial era lawyers provided the foundation for what became the Virginian concept of republican law. Edmund Pendleton cultivated wealthy and influential clients, strengthening the stability of the profession, and George Wythe mentored the most important Revolutionary lawyers, creating an intimate circle of legal scholars. Thomas Jefferson benefitted from Wythe's instruction, eventually partnering with his mentor and with Edmund Pendleton to revise Virginia's code of laws during the Revolution. Contemporary lawyer Patrick Henry, meanwhile, illustrated the possibility of simply making a living at the profession. With continued success, Henry eventually realized the potential of law as a source of great wealth and influence. Virginia law offered more than one path to prominence.



As a young Continental officer, John Marshall combined military service with a brief but influential instruction by Wythe to claim entrance to the Virginia elite. His law partner Edmund Randolph, on the other hand, was born to the bar, guaranteed a place among the ruling class by his relation to the colonial statesmen John Randolph (his father) and Peyton Randolph (his uncle). Another young man of the revolution, St. George Tucker, found professional success only after the war. A transplant from the island of Bermuda, Tucker found social mobility through the combination of an education with Wythe and by marrying into the elite Randolph family.

In Marshall's Virginian legal culture, George Wythe's tutelage conferred a certain legitimacy, especially after the rise of factions made Wythe's absence from political office seem all the more admirable. Virginians valued the intellectual certainty promised by the Enlightenment and at least the appearance of disinterested public service not fueled by personal ambition. They hoped that Wythe could instill that disinterest in his circle of professionally educated lawyers.

Virginia underwent a conservative Revolution, whereby the ruling class still ruled at the war's end. At the same time, lawyers became a distinctive, professional class, allied with the ruling elite.<sup>16</sup> In this legal culture, John Marshall and Thomas Jefferson shared an Enlightenment legal philosophy, one that provided a faith in the law's ability to reform society – the legal basis for what both men defined as republicanism.

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<sup>16</sup> For the political conservatism of the Revolution in Virginia, see Charles Sydnor, *American Revolutionaries in the Making: Political Practices in Washington's Virginia* (New York: The Free Press, 1965).

For the rise of lawyers as a distinct, professional class, see A.G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia's Legal Culture, 1680-1810* (Chapel Hill: University of North Carolina Press, 1981).

At its core, republicanism meant representative government. Citizens should be ruled by freely chosen leaders and not by a hereditary monarch. Enlightenment philosophy and the American Revolution suggested that such a government was possible, but republicans acknowledged that human faults required the legal and political system to protect citizens from the moral corruption that accompanied power. In the local courts of Virginia's individual counties, for example, the law was administered by unprofessional amateur judges, who sometimes appointed their own successors – often their sons. To a republican, the Virginian legal system threatened to perpetuate despotism and displayed the remnants of monarchy.

The common thread of Virginian republicanism was the emphasis on sacrificing private ambition to the public good and the effort to ensure that such virtuous individuals could actually be elevated to public service instead of their selfish peers. Determining precisely how to ensure the necessary virtue of the judges and lawyers created a division of opinion on the best solutions. Virginians saw the potential dangers differently – and they measured virtue by very different standards.

Thomas Jefferson and George Wythe espoused what fellow republican lawyer William Wirt called “above-board” legal dealings.<sup>17</sup> The meaning of justice and fairness was clear, and did not require complicated explanations. For them, law was a tool for all republicans. They wanted skilled and educated attorneys and judges to administer enlightened law, but allowed for the more democratic institution of juries to counter their

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<sup>17</sup> William Wirt, *Sketches of the Life and Character of Patrick Henry* (Philadelphia: Desilver, Thomas & Co., 1836), 66.

aristocratic excesses. In the end, Jefferson preferred “honest ignorance” to “perverted science.”<sup>18</sup>

But to Jefferson, Marshall appeared to be in a different camp. Marshall could use the lawyer’s “sophistries” and linguistic trickery to prove to him whether it was “day or night.” He meant the law could be twisted. Marshall’s law seemed to be independent of truth and of the public will of the majority.

Marshall saw this differently. In his conception of republicanism, law was a tool for lawyers to discourse with judges in order to determine the greatest good for the greatest number, regardless of the popular will. The popular will, after all, might support illegal or immoral action. In essence, the public sometimes could not be counted on to act in their own best interests, or in the interests of the republic. Marshall cited the witch trials of Salem, Massachusetts, as a warning of “the degree of depravity” that was possible “when the public passions countenance crime.”<sup>19</sup> The special nature of republican law safeguarded against this possibility of mass hysteria or ignorance. Jefferson believed that democratic impulses should guide the function of the law, while Marshall viewed it as a tool for insuring stability and predictability in judicial rulings.

The widening factional divide of national politics in the 1790s obscures significant similarities among Virginia’s ablest legal minds. In the adversarial narrative of Federalist Marshall versus Republican Jefferson, it is easy to forget the significance of their shared Virginian legal perspective, and that some of Virginia’s “republican” judges

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<sup>18</sup> James Morton Smith, ed. *The Republic of Letters: Correspondence Between Thomas Jefferson and James Madison, 1776-1826* (New York: W.W. Norton and Company, 1995), II, 1076 n.2.

<sup>19</sup> John Marshall, *The Life of George Washington*, 4 vols. (New York: Wm. H. Wise & Co., 1925) I, 481.

espoused federal supremacy and judicial review years before Marshall did so from the Supreme Court.

If the Jeffersonian Revolution of 1800 produced a Virginia dynasty of leadership, John Marshall can be considered a part of it. When he took on the role that defined his place in American history, he had spent more than half his life as a Virginian attorney and popularly elected local politician. Yet he was more than just a Virginian who became a nationalist, leaving the politics and legal culture of his home state behind. The Marshall Court retained a Virginian cast, and this explains many aspects of how the chief justice negotiated the boundaries between republican political economy and republican law.

Though they differed in their application, Virginia's republican lawyers agreed that the science of law could improve their society, especially in their home state – what they called their “country” - even after they ascended to national prominence. Marshall's republicanism was fully matured when he left Virginia for a seat in the United States Congress in 1800. It guided his political efforts as a congressman and as secretary of state and it defined the interaction of politics and law in his Supreme Court jurisprudence. New England Federalist George Cabot correctly identified the guiding force behind Marshall's republicanism when, in 1800, when he complained that the new congressman displayed “the faults of a Virginian. He thinks too much of that State, & he expects the world will be governed according to the Rules of Logic.”<sup>20</sup>

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<sup>20</sup> George Cabot to Rufus King, January 20, 1800. In *The Life and Correspondence of Rufus King*, 6 vols. (New York: G.P. Putnam's Sons, 1896), III, 184.

## Chapter 1: Virginia Legal Culture from Colony to Commonwealth

In 1780, Virginia's wartime governor Thomas Jefferson signed the law license of John Marshall, a twenty-four year old captain of the Continental Army. Twenty years later, John Marshall was forty-five, and just finishing his first month as chief justice when he administered the oath of office to incoming President Thomas Jefferson. The so-called "Jeffersonian Revolution" of 1800 marked the end of Federalist rule, and yet Marshall would find himself defending his vision of Federalism and Virginia legalism from the nation's highest court.

George Washington ascended to the presidency with unanimous support in 1789, but the constant political crises of the 1790s quickly divided national politicians into acerbic factions during what some historians have aptly termed the "pathological decade."<sup>21</sup> These ten years laid the groundwork for the rise of party politics and the political-legal rivalry between Jefferson and Marshall. Both men conceived of law as a tool to maintain political power, though neither fully acknowledged the extent to which partisan agendas shaped legal assumptions.

Marshall, for his part, obsessed over keeping law and politics separate. His version of republicanism allowed him to believe that law, interpreted by the right man, could be apolitical. This approach was at least partly a survival instinct, ironically rooted in the intensely political nature of some of the cases brought before him on the Supreme Court. Where a political misstep on the bench could theoretically open the door for the dismantling of the judiciary by the Virginian executive, the Virginian chief justice had to

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<sup>21</sup> Burstein and Isenberg, *Madison and Jefferson*, 213.

rely on a carefully crafted legal logic that was derived from the shared assumptions of his formative legal culture. This allowed Marshall to be an active partisan without acknowledging the role of partisanship in the law. In other words, he failed to separate them even as he believed he had succeeded.

Law in post-revolutionary Virginia was not only a question of political economy, but also of social economy. The postwar state of Virginia's legal culture reflected how "revolutionary" the revolution had actually been, as the ruling elite resisted the social mobility and democratic tendencies beginning to emerge in both politics and law. In this sense, politics and law in Virginia were fundamentally interconnected, a distinction not always fully explored by historians of the period, and not acknowledged by Marshall himself.

Lawrence Friedman and Harry Schieber note that scholars have used the term "legal culture" for a variety of purposes. Like "republicanism," it is a term at once useful and difficult to concretely define. It can refer to a general continuum of attitudes and beliefs about the law, a pattern of legal thought distinctive to a time or place, or to the specific function of a legal institution. However the term is used, Friedman and Schieber conclude that legal culture refers to "living law," meaning that "if the dry texts of statutes and cases... are the bones and skeleton of the legal system, then legal culture is what makes the system move and breathe."<sup>22</sup>

Lawrence Rosen has integrated legal and cultural studies, ultimately concluding that they are inseparable. First, he offers a clear definition of culture as "the capacity for creating categories of experience." For Marshall and his contemporaries, those categories

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<sup>22</sup> Lawrence Friedman and Harry Schieber, eds. *Legal Culture and the Legal Profession* (Boulder: Westview Press, 1996), 1.

of experience included their overlapping identities as gentry planters, professional lawyers, local politicians, Virginians, Southerners, and Americans. He observed that cultural concepts “traverse the numerous domains of our lives – economic, kinship, political, legal – binding them to one another.”<sup>23</sup> Culture thus defined, Rosen has concluded that law does not exist separately. “To understand how a culture is put together and operates,” he says, “one cannot fail to consider law; to consider law, one cannot fail to see it as part of culture.”<sup>24</sup> Because one purpose of law is to provide for an orderly society, the legitimacy of law must ultimately be rooted in its interconnection with every other aspect of that society.<sup>25</sup> For the Virginians, that meant reconciling their conflicting cultural loyalties to national and state interests.

When A.G. Roeber examined the evolution of Virginia’s legal institutions in the colonial and post-revolutionary periods, he identified profound changes rooted in the legal community’s adoption of more rigid standards, leading to their seeing themselves as an educate elite. They favored principles over custom, and they hoped to dethrone the old planter aristocracy with a republican meritocracy. Talent, not birthright, should provide the republic with its leaders.<sup>26</sup>

By studying the function of Virginia’s political system, Charles Sydnor came to a different conclusion. He determined that the Revolution did little to alter the class

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<sup>23</sup> Lawrence Rosen, *Law as Culture: an Invitation* (Princeton: Princeton University Press, 2006), 4.

<sup>24</sup> *Ibid.*, 5.

<sup>25</sup> *Ibid.*, 7.

<sup>26</sup> A.G. Roeber, *Faithful Magistrates and Republican Lawyers: Creators of Virginia’s Legal Culture, 1680-1810* (Chapel Hill: University of North Carolina Press, 1981).

structure in Virginia.<sup>27</sup> The same elite planters who ruled Virginia as a royal colony continued to rule it as a commonwealth. Even the revolutionary republican lawyers had come from the ranks of the gentry. The great legal minds of Virginia were drawn from the wellborn. Only Patrick Henry seemed to represent the Revolution's democratic impulse of upward social mobility. His disdain for the science of law and for legal learning made him, in Jefferson's view, a dangerous anomaly. Instead of favoring enlightened and rational disquisitions on the law, Henry favored rhetorical displays that appealed to popular passions.

The relative radicalism of the revolution in Virginia cannot be gauged by looking at legal or political cultures as separate institutions. Indeed, Sydnor's political study contended that the study of law was the path to political power in Virginia, while Roeber's legal study found that professional lawyers were uniquely qualified to address the political dilemmas of republicanism. Lawrence Rosen invites the reader to "see law as contributing to the formation of an entire cosmology, a way on envisioning and creating an orderly sense of the universe, one that arranges humanity, society, and ultimate beliefs into a scheme perceived as palpably real."<sup>28</sup> The Revolution represented just such an opportunity to fundamentally redefine the organization of society through law. The Virginians had long since integrated practical law with their local politics, allowing them to conceive of law not only as a science, but, as Clifford Geertz suggests, to accept it as "a species of social imagination."<sup>29</sup>

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<sup>27</sup> Charles Sydnor, *American Revolutionaries in the Making: Political Practices in Washington's Virginia* (New York: The Free Press, 1965).

<sup>28</sup> Rosen, *Law as Culture*, 11.

<sup>29</sup> Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 232.



Colonial law was a hybrid mixture of English legal practices and Virginia's unique statutory traditions. Virginia's original colonial charter was just one in a series of "organic documents," as Bernard Schwartz has argued, that guaranteed the colonists the legal rights of Englishmen.<sup>30</sup> Seventeenth-century Virginians carried their rights across the ocean, and were absentee English citizens. National boundaries were less important than national identity.

The law of England and the colonies was the common law. Instead of a written constitution, English law relied upon centuries of precedent and tradition. "Not arbitrary power but the predictable and equitable application of law – ancient, customary, common law – determined the fate of an Englishman," Roeber observed. The responsibility of applying the law, in this system, fell most often on judges. Opposing lawyers cited relevant precedent, and the judge determined which was most applicable in pronouncing his decision. Lawrence Friedman describes the common law tradition as "judge-made law – molded, refined, examined, and changed in the crucible of actual decision, and handed down from generation to generation in the form of reported cases."<sup>31</sup> In theory, this meant that judges were bound to decide a case based on a preexisting principle, rather than inventing or expounding their own. As Friedman describes it, judges "found" the law - "they did not make it, or tamper with it as it was found."<sup>32</sup> This system was overwhelmingly conservative; there was little freedom to interpret the meaning of

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<sup>30</sup> Bernard Schwartz, *Main Currents in American Legal Thought* (Durham: Carolina Academic Press, 1993), 4.

<sup>31</sup> Lawrence Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), 21.

<sup>32</sup> *Ibid.*, 23.

centuries of self-perpetuating legal tradition. As such, the common law protected the interests of the gentry and nobility, which suited the ruling planter class of Virginia.<sup>33</sup>

The wealthy Virginians, more than any other colony, imitated the aristocratic pretensions of their fellow countrymen back home. They built large manor homes, purchased expensive furnishings, imported rare books, and sent their sons to England to receive a proper education.<sup>34</sup> Despite this tradition, the legal culture of eighteenth-century Virginia differed significantly from Great Britain. The flow of reported cases, in the form of up to date legal texts from across the Atlantic, was minimal. The result was the concurrent development of a body of American common law distinct to the individual colonies. In addition, justice in Virginia was meted out mostly in county courts, where judges were drawn from the landed elite in each county, elected by their social inferiors to serve as arbiters in local disputes.

Sometimes the justices of the county courts were trained in the law; just as often, they were not. The men who elevated them were poorer farmers, dependent on the patronage of the gentry for loans in an almost cashless economy. Very little hard money changed hands in Virginia; instead, tobacco sufficed for currency. The cash crop economy created a network of financial interdependency wherein smaller farmers depended on the resources of the gentry, and the gentry on the labor of the yeomen and slaves. In this social and economic culture, the aristocratic planters and their sons were

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<sup>33</sup> Ibid., 25.

<sup>34</sup> See Michal J. Rozbicki, *The Complete Colonial Gentleman: Cultural Legitimacy in Plantation America* (Charlottesville, University of Virginia Press, 1998). and Ronald L. Hatzenbuehler, *I Tremble for my Country: Thomas Jefferson and the Virginia Gentry* (Gainesville: University Press of Florida, 2006).

perpetually elected to serve in the legislature and on the county courts. Here we see the first proof of the inseparability of politics and law in colonial Virginia.

Slave ownership was the key distinction between the yeoman and the gentry, and an important aspect of Virginia law. As with other legal principles, the Virginians adapted English slavery law to suit their local needs. When the case of *Somerset v. Stewart* declared, in 1772, that slavery was unlawful in England, slave owners in the colonies feared that the common law tradition might be evolving to undermine the source of their wealth and authority. When the colonies broke from England, they emerged from the Revolution with more authority to regulate slavery for themselves, and even the federal Constitution of 1787 ultimately strengthened the ability of the individual states ability to protect the institution.<sup>35</sup>

No law schools existed in colonial Virginia, and in the libraries of Virginia gentlemen, law books did not predominate.<sup>36</sup> Virginia's tobacco based economy discouraged urban growth in favor of widely dispersed, river-adjacent individual farms; no bustling port cities like Boston, New York, or Philadelphia developed in Virginia during the colonial period.<sup>37</sup> In the capital of Williamsburg – situated midway between two major rivers but not even a port - the College of William and Mary offered education

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<sup>35</sup> For the state of slavery before and after the Revolution and the Constitution's protection of it, see George William Van Cleve, *A Slaveholders' Union: Slavery, Politics, and the Constitution in the Early American Republic* (Chicago: University of Chicago Press, 2010).

<sup>36</sup> For an excellent synthesis of the state of the legal profession in pre-Revolutionary Virginia, see Alan McKinley Smith, *Virginia Lawyers, 1680-1776: the Birth of An American Profession* (PhD dissertation, Johns Hopkins University, 1967).

<sup>37</sup> In 1781, Thomas Jefferson explained, "We have no townships. Our country being much intersected with navigable waters, and trade brought generally to our doors, instead of our being obliged to go in quest of it, has probably been one of the causes why we have no towns of consequence." Thomas Jefferson, *Notes on the State of Virginia*. David Waldstreicher, ed. (New York: Palgrave, 2002), 152.

in philosophy and religion, but a potential lawyer could only learn the craft through apprenticeship or by traveling to the Inns of Court in England.

Just as there were two methods of learning the law in Virginia in the 1700s, there were two kinds of courts in which a lawyer could practice. At the colony's founding, a General Court in the capital sufficed to administer justice, but as settlement dispersed, royal authority allowed for the creation of lesser courts in the individual counties. As previously discussed, county courts allowed local communities to police themselves – the popularly elected justices of the peace dealt with lawsuits for recovery of small debts and minor criminal offenses and were not compensated for their efforts. The gentlemen volunteered their time in the service of their community; county law was not a profession. Salaried legal practitioners heard larger debts and appeals at the General Court in Williamsburg.

As a professional class, lawyers barely existed in Virginia at this time. Few could afford the expense of a London legal education, and those sons of elite planters who did travel to the Inns of Court did so mainly for social reasons. In actual practice, very little legal instruction took place there. It was even possible to enroll, pay the fines for absence from instruction, and then receive a degree *in absentia*, never having attended classes at all.<sup>38</sup>

English education represented one way for the wealthy men of Virginia to ensure their fragile social legitimacy.<sup>39</sup> Despite their wealth and elite status at home, Virginia's gentry could not escape anxiety about the security of their social position. Their fathers and grandfathers had been the English castoffs who had chosen to settle in the colonial

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<sup>38</sup> McKinley, *Virginia Lawyers*, 2, 146, 154.

<sup>39</sup> Roeber, *Faithful Magistrates*, 26.

wilderness, and despite all the appearances of wealth in their homes and land holdings, a Virginia planter would find it impossible to know, at any given moment, how much he was actually worth.<sup>40</sup> Their wealth, after all, was not rooted in money but in an interdependent web of debt and deference based on the whims of a cash crop and on the labor of and equity in their slaves.

The elite Virginia planter who returned from London with a law degree was highly unlikely to engage in the practice of law in the colony. He would consider himself a planter by profession and perhaps apply his law knowledge to an unpaid but prestigious position on the county court, which met once a month.<sup>41</sup> “Court day,” as it was known, attracted citizens from all tiers of society and was the focal point of social life in colonial Virginia. The militia drilled, commanded by one of the gentry, elected to the position by the rank and file of yeoman, merchants, and laborers. Men of property cast their votes in elections for the House of Burgesses, choosing who would represent them in the legislature in Williamsburg, and the justices of the peace adjudicated civil and criminal disputes.<sup>42</sup>

If the working, semi-professional lawyers who argued before the county magistrate had studied the law at all, they most likely learned their craft in the colony. However, at this time no regulations or professional standards dictated who could earn their living as a lawyer.<sup>43</sup> In the counties, unlicensed gentlemen could informally manage

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<sup>40</sup> Ibid., 40.

<sup>41</sup> McKinley, *Virginia Lawyers*, 3.

<sup>42</sup> For an examination of the culture of ‘Court Day’ in colonial Virginia, see E. Lee Shepard, “‘This Being Court Day’: Courthouses and Community Life in Rural Virginia” *The Virginia Magazine of History and Biography* 103 (Oct. 1995): 459-470.

<sup>43</sup> Roeber, *Faithful Magistrates*, 67.

each other's legal affairs before a poorly trained judiciary, who were sometimes uncertain of the boundaries between English common law and Virginian tradition.<sup>44</sup>

Creeping changes in Virginia's legal culture in the eighteenth century were fueled by the gentry's struggle to reconcile conflicting worldviews in the face of a changing economic, social, and political environment. Roeber describes a "Country" versus "Court" mentality that pitted the tendency to centralize government and professionalize the law against the feisty independence of rural English landowners, accustomed to ruling themselves autonomously. When this trend crossed the Atlantic in the 1600s, Virginia's gentry resisted, because the existence of a legal profession threatened the fragile, deferential social order of the colony.

What, then, allowed such a class of legal professionals to develop in the 1700s in Virginia despite the resistance of the ruling elite? As the century began, the distant royal government administered by the Burgesses in Williamsburg had little presence in the day-to-day lives of the colonists. The county courts were the only government power experienced by most colonists firsthand.<sup>45</sup> There, knowledge of the law was no prerequisite, and legal professionalism was less relevant than simply maintaining order and stability.<sup>46</sup> By the mid 1700s, that goal became more and more elusive as conditions in Virginia forced a crisis of identity among the gentry. On the one hand, the planters obsessed over maintaining Roeber's "Country" sensibility. Their superiority and the stability of their society depended on the clarity of the social order; knowing who should

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<sup>44</sup> Ibid., 62.

<sup>45</sup> Sydnor, *American Revolutionaries*, 80.

<sup>46</sup> Ibid., 101.

defer to whom.<sup>47</sup> This hierarchy had been maintained for some generations by a combination of conspicuous wealth, copying English taste and manners, and preserving local legal traditions. By mid-century, however, changing conditions undermined the clarity of their aristocratic identity.

To succeed as planters, they depended on an international tobacco market ruled by complicated legal machinations. They could no longer ignore statute and procedure. To succeed as patriarchs of their communities, they needed to ensure the stability of a symbiotic economic relationship with their social inferiors based in mutual indebtedness. The confusion wrought by amateur judges and lawyers attempting to settle complicated suits arrested the discharge of debts, clogged the superior General Court with appeals, and slowed the speed of business, threatening the make the whole socio-economic system collapse, or at least grind its progress to a crawl. For the aristocracy to survive, they would need able, educated lawyers to untangle the mess. Finally, the complications evident in their struggle to determine the overlapping boundaries of English versus Virginian common law meant that they would eventually have to face the troubling reality that they were not, in culture or in law, Englishmen. All of this meant that the “Court” attitudes of legal professionalism, government centralization, and mercantilism were seeping into the gentry’s insular world. Lawyers became, and would continue for some time, to be “indispensible allies of the aristocrats.”<sup>48</sup>

The economic, social, and political changes that challenged the gentry’s identity in the mid 1700s prompted legal changes, namely the acceptance of some kind of

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<sup>47</sup> Roeber, *Faithful Magistrates*, 36.

<sup>48</sup> Robert Bevier Kirtland, *George Wythe: Lawyer, Revolutionary, Judge* (Ph.D. dissertation, University of Michigan, 1983), 62.

professional standards for lawyers. If the planters would prefer to administer their own “Country” justice, the reality of their dependence on the tobacco trade meant they needed someone more qualified than their gentleman neighbors to represent them in an increasingly complex legal culture. The realities of population growth and economic demands forced the gentleman planters to reluctantly become gentleman merchants. In Williamsburg, the focal point of business transactions, procedure mattered. In the counties, where the gentry adjudicated, unraveling the intricacies of debt and land law begged for a skilled class of legal professionals. Thus, when the political break with England did come, the rising class of Virginia lawyers was in a unique position to seize the reins of power by framing the language of revolution in the terms most familiar to them. Even if it did not begin that way, conditions in Virginia made their American Revolution a legal revolution.

A fundamental shift in attitudes, necessitated by economic and social conditions, made possible the growth of the legal culture that defined Virginia’s leadership in the Revolution and for a generation thereafter. In 1732, Virginia’s lawyers were finally required to submit to examinations before they could practice law. By the 1740s, colonial Virginians perceived lawyers as a distinct profession.<sup>49</sup> In 1748, the most significant distinction in Virginia’s legal culture was drawn when the bar was formally divided between the county courts and General Court. Thereafter, an aspiring attorney who conformed to the emerging professional standards of the Virginia bar had to choose whether he would practice in the counties or in Williamsburg, at the General Court.<sup>50</sup> The legal distinction between the lay courts of the counties and the professional courts of the

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<sup>49</sup> Ibid., 110.

<sup>50</sup> Roeber, *Faithful Magistrates*, 121.



capital only served to enhance the crisis of identity faced by the ruling gentry, whose interests straddled both of the now distinctly separated court systems and legal cultures.

From the 1750s on, the adversarial dynamic of the county and general courts guided the development of the colony's legal culture. The rarity of trained lawyers had blurred in the common law tradition over time.<sup>51</sup> The advent of professional standards, at least in Virginia's General Court, meant that proper attention to English common law could be revived in the eighteenth century. As the English parliament began to focus more attention on governing the colonies through legislation during this time, the Americans increasingly relied on their understanding of the common law as the embodiment of their rights.<sup>52</sup> Thus, lawyers were becoming more powerful just as discontent with the English rule was beginning to spread.

Because both the county and the General Court of Virginia now required some form of examination before being admitted to the bar, the neglected field of legal education finally received some attention. The Inns of Court in London still represented an option for the aspiring lawyer. However, none but the wealthiest Virginians could afford it and the profession of law was, for the most part, beneath their social station.

The Randolph brothers, John and Peyton, represent a noteworthy exception to this trend. Their father, Sir John Randolph (the only colonial Virginian ever to have been knighted), sent his sons overseas for a proper immersion in British culture and an

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<sup>51</sup> Schwartz, *Main Currents*, 9.

<sup>52</sup> *Ibid.*

aristocratic legal education at the Inns of Court. They eventually returned to occupy active positions in colonial politics as well as law, as their father had done.<sup>53</sup>

The more practical option for a potential lawyer of less impressive parentage was to ‘read the law,’ an informal process wherein a practicing attorney took on the responsibility of educating a young man in the profession, usually for a fee. Ideally, the mentor-lawyer prescribed a course of study, provided legal texts, and tendered examinations to prepare his student for admittance to the bar of either the county courts or the General Court according to his preference. The scarcity of law books and absence of English case reports meant that deciphering the workings of common law would have been exceedingly difficult, even with an able and attentive teacher. In any case, busy lawyers with little time to attend to educating a protégé just as often neglected to instruct them at all and instead relegated them to the tedious drudgery of clerical work – especially the endless task of copying documents.<sup>54</sup> Courtroom procedure was typically gleaned from the student’s attending court of his own accord for the purpose of observation.

If the potential attorney desired to practice before the county courts, he submitted to an oral examination by the justices of the county. (Who, as noted, may or may not have had any legal training themselves). If he so desired, he might gain approval to practice in several neighboring counties in order to better secure a living. Justice in the counties was unpredictable, unscientific, and often the source of frustration for trained lawyers whose knowledge of precedent and procedure often eclipsed the judges they addressed. As

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<sup>53</sup> The careers of John and Peyton Randolph are treated in John J. Reardon, *Edmund Randolph: a Biography* (New York: MacMillan Publishing Co., 1974).

<sup>54</sup> Kirtland, *George Wythe*, 40.

Robert Kirtland points out, Virginian judges generally concerned themselves with substance more than procedure.<sup>55</sup>

Admittance to practice before the General Court, on the other hand, required the consent of a body known as the Governor in Council, who were typically selected from the ranks of judges or lawyers of the General Court. Their legal training was more thorough and their examination more rigorous. If approved to practice before the General Court in Williamsburg, the new lawyer could expect larger fees than those limited by law in the distant counties, and a significantly more professional legal environment in the colonial capital.

The progress of education, professionalization, and economic necessity meant that by mid-century, the planter-statesman had begun to cede his dominance to the lawyer-statesman, as Virginia's rising class of legal professionals used the law to give voice to the coming revolution.

In the midst of these cultural changes, George Wythe was born sometime around 1726, the youngest of three children. His father was a third generation planter of the Tidewater – the eastern coastal plain of Virginia long dominated by tobacco agriculture and populated by would-be English aristocrats. In 1729, when Wythe was three years old, his father died. English and colonial common law alike perpetuated the ancient customs of primogeniture and entail – laws that protected estates from being divided among heirs and dictated inheritance from father to eldest son.<sup>56</sup> As the youngest brother, Wythe

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<sup>55</sup> Ibid., 60.

<sup>56</sup> C. Ray Kleim determines, in fact, that the divergent course of common law in Virginia made the entail and primogeniture laws even more strict in the colony than in the Great Britain. "Primogeniture and Entail in Colonial Virginia," *William and Mary Quarterly* 24 (Oct. 1968): 546.

received no share of his father's estate. By now the law, once a hobby of the gentry, had evolved to an acceptable vocation for the disadvantaged younger sons of Virginia's elite families.<sup>57</sup>

After an informal early education that included immersion in classical studies, Greek, and Latin, the young Wythe apprenticed to one of the rising class of professional colonial attorneys in the early 1740s. As a student, Wythe lamented that he was treated "less as an apprentice at law and more as a clerk in routine matters."<sup>58</sup> During Wythe's course of study, the Randolph brothers, John and Peyton, returned from London where they had qualified as barristers at the Inns of Court.<sup>59</sup> After three or four years' preparation, Wythe submitted to examination and received certification to practice before a number of the county courts, the entry-level position of the colony's legal profession, in 1746 and 1747.

When the 1748 division of the courts occurred, Wythe chose to relocate to Williamsburg and practice before the more lucrative and more professional General Court. A little more than five years after his arrival in the capital, when he was just twenty-nine years old, he received the honor of being appointed interim attorney general for the colony. Edmund Pendleton, a Virginia lawyer five years his senior, temporarily vacated the position in order to represent the colony in England. This may have whetted Wythe's appetite for politics, because he stood for election to the House of Burgesses before the end of the year, becoming Williamsburg's representative. This no doubt

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<sup>57</sup> McKinley, *Virginia Lawyers*, 345.

<sup>58</sup> Kirtland, *George Wythe*, 40.

<sup>59</sup> Frank Dewey, "Thomas Jefferson's Law Practice," *The Virginia Magazine of History and Biography* 85 (July 1977): 289.

improved his social and professional standing among potential elite clients of Williamsburg.

About this time, Wythe inherited a significant portion of property upon his brother's death. He remained an absentee planter, however, his attention focused firmly on a legal career.<sup>60</sup> By 1754, the new generation of lawyer-statesmen were coming into their own.

By all accounts, Wythe was an impressive intellect, but demure in his personal manner. A modern biographer described him as “rather stooped, almost frail, of distant, courtly manner, reticent and shy.”<sup>61</sup> His legal mind was articulate, but not creative. He was, “among the first in point of abilities,” recounted a biographer in 1836, and “no man was more destitute of art than Mr. Wythe.”<sup>62</sup> These qualities are precisely what made Wythe so admired in the postwar republican legal culture. “Art” was a negative trait – it was the vice of selfish, corrupt attorneys. In the colonial period and beyond, criticism leveled at the legal profession insisted that lawyers profited from their neighbors' misfortune and created legal disputes out of thin air from the manipulation of language and procedure. Wythe's reputation as a man of principle rather than a lawyer who just wanted to win his case was an asset in the colonial courtroom and one of the foundations of the republican notion of virtue. His approach reflected the later insistence of his student Thomas Jefferson that “laws are made for men of ordinary understanding.”<sup>63</sup>

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<sup>60</sup> Kirtland, *George Wythe*, 45-46.

<sup>61</sup> *Ibid.*, 52.

<sup>62</sup> Wirt, *Patrick Henry*, 65-66.

<sup>63</sup> Thomas Jefferson to Judge William Johnson, June 12, 1823, in Andrew Lipscomb and Albert Bergh, *The Writings of Thomas Jefferson*, 15 vols. (Washington, D.C.: Thomas Jefferson Memorial Association, 1903), 449.

In his Williamsburg practice, Wythe repeatedly faced off against Edmund Pendleton, a superior orator possessing a more commanding public presence. His power of argument and mental agility apparently eclipsed the bookish Wythe. When faced with one of Wythe’s immaculately constructed arguments, Pendleton “could, and would, whenever necessary, tease him with quibbles, and vex him with sophistries, until he destroyed the composure of his mind, and robbed him of his strength.”<sup>64</sup> In fact, Kirtland notes that Pendleton was one of the few members of the Williamsburg bar who consistently bested the erudite Wythe.<sup>65</sup> A kind, if hyperbolic, reminiscence of later years insisted that “appellants to the General Court first sought either Wythe or Pendleton... and failing to retain one, turned to the other.”<sup>66</sup>

The description of Pendleton as someone able to “vex” with “sophistries” implies that his success was sometimes seen as rooted in unfair, unprincipled, and unrepugnant tactics. This is the same accusation Thomas Jefferson leveled at Chief Justice Marshall – that a virtuous republican should be transparent, and able to defend his principled position easily and clearly, as Wythe had always done. The principles of truth and justice should not require the questionable skills of a professional attorney, who could, like Marshall, craftily manipulate language to prove whether it was daylight or not according to his own interest. The traditional skills of the professional attorney, long the uneasy ally of the gentry, seemed antithetical to republicanism.

Summarizing Pendleton’s approach to the law, Kirtland says:

It was not a rigid framework within which the ambitions and conflicts of men were to be channeled and contained, but a

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<sup>64</sup> Wirt, *Patrick Henry*, 66.

<sup>65</sup> Kirtland, *George Wythe*, 51.

<sup>66</sup> *Ibid.*

form of argument, drawn from statute, precedent, legal reasoning, and the experience of the past, on the basis of a few broad principles *subject to continual restatement and revision*, to achieve the ends of minimal government and to reconcile as fairly as possible the competing interests of individual litigants. Justice was not to be discovered in abstract absolutes, but *in the practical judgment of reasonable men, attuned to the standards of their time and community...* a government of men, not laws.<sup>67</sup>

Pendleton, then, exemplified the pre-1750 Virginian perception of law - a combination of attachment to the immemorial custom of the common law and the relative autonomy of county court justice. The unique conditions of the colony thus encouraged a unique legal culture wherein common law existed as an admired but indirect influence.

Marshall's version of republican law reflected this attempt to minimize social conflict while still maintaining a clarity that would not confuse an observer or a jury.

"Reasonable men" could be expected to follow Pendleton's line of argument.

Because not all men in a republic were reasonable, though, the elevated class of judges and lawyers was necessary, in order to intervene when the will of the majority contradicted the best interests of the community. If the cunning, artful lawyers could abuse their skill, the reasonable judges should be able to discern and counteract it.

Pendleton had both wealthy clients and republican legitimacy because his rhetorical skill did not violate the basic rules of reasonableness required by county courts and republicans alike.

Wythe, for his part, seems to have embraced the optimistic bent of the Enlightenment with regard to the nature of law. Though he left no personal accounting of his feelings on the matter, his pronouncements made during a lifetime as Virginia judge

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<sup>67</sup> Ibid., 53. Emphasis added.

survive and are revealing. Wythe's opinions in a number of provocative cases suggests a belief that the increasing precision of the profession promised that law could be perfected as a science, that matters of principle could be absolute, and that lawyers and judges could be trained to determine them.<sup>68</sup> His courtroom manner supports this conclusion as well. If Pendleton's nimble mind could skillfully adapt an argument to the needs of his audience, Wythe was "too open and direct in his conduct." In his approach to law, "he knew nothing... of 'crooked and indirect by-ways.' Whatever he had to do, was to be done openly, avowedly, and above-board."<sup>69</sup> He argued this way; he expected the law to function this way.

The Revolution offered the opportunity to draft a new body of laws and remove the less desirable features from the existing common law. One of the first efforts of the Revolutionary Virginians was to create a Declaration of Rights – a legally binding document based on abstract and absolute Enlightenment ideas and principles, drafted in 1776. George Mason, who was not an attorney, was the primary author of the document. His importance in the early formation of Virginia's system of government reflects the republican ideal of the intellectual who participates in statecraft as an obligation and not for ambition.

The Declaration of Rights stated that all men "are by nature equally free and independent," a moral absolute that Wythe later used to undermine the legal legitimacy of slavery in Virginia. Edmund Pendleton, on the other hand, was responsible for inserting a clause into the declaration that qualified that only those who "enter into a state of

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<sup>68</sup> Kirtland, *George Wythe*, 54.

<sup>69</sup> Wirt, *Patrick Henry*, 66.



society” possess the inherent right of liberty.<sup>70</sup> In a sense, the direct and absolute Wythe dismissed the clause as unrepresentative legal misdirection. Chief Justice Marshall’s ambivalence toward the institution of slavery reflected deference to stability and tradition. The standards of the community dictated the slavery was legal, so it could not be overturned by reference to moral and legal absolutes. In this sense, Marshall’s jurisprudence is more reflective of his background in Virginia’s county courts than of the professional standards of law in the General Court system.

Also in 1776, Virginia ratified a state constitution, which followed the anti-authoritarian impulse of the recently begun Revolution by creating a system of government with a weak executive and court system, and a powerful representative legislature.

During and after the Revolution, Virginia’s lawyer-statesmen faced a dilemma brought on by the struggle to embrace the democratic passions of the Revolution while maintaining the stable order that only hierarchical deference had thus far provided. This was the social and political dilemma of republicanism, and the Virginia legal community attempted to legislate solutions by allowing for participation and accountability in government while protecting the able rulers (and lawyers) from popular passions. How, then, could the law help to elevate the virtuous to rule while displacing the aristocratic elite, especially when they sometimes overlapped?

All of the old questions about the nature of law and the state of the profession remained, alongside troubling new ones. What *was* the law now? Did English common

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<sup>70</sup> Eva Shepard Wolf, *Race and Liberty in the New Nation: Emancipation in Virginia from the Revolution to Nat Turner’s Rebellion* (Baton Rouge: Louisiana State University Press, 2006), 4-5.

law still bind Virginia's courts, or was its authority cast off with the Revolution? And if the ancient customs and traditions, which had maintained order in the colony for generations, were suddenly eliminated, what was there to preserve the order of society now? In the face of these difficult considerations, the function of the county courts was largely curtailed and intermittently suspended throughout the war. The resulting abandonment of the profession by many wartime lawyers and the inevitably overwhelming backlog of unattended legal business ultimately undermined the patriarchal authority of the gentleman justices of the counties when the war finally ended.<sup>71</sup>

The war permanently displaced one class of Virginia's elite – Tory lawyers. Afterwards, only Patriot, ostensibly republican lawyers remained. But men who agreed on a general principle of “republicanism” disagreed on how far to extend the urge to refashion society along democratic lines. Henry and Pendleton attempted to protect the stabilizing influence of the Anglican Church, for example, while Jefferson was instrumental in passing the Virginia Statute for Religious Freedom in order to disestablish it. Jefferson, Pendleton and Wythe comprised a wartime committee to revise Virginia's laws, and proposed one hundred and twenty-six bills to the state legislature in an effort to refashion the state's law from the ground up. In the end, only a few were passed. Among them were the abolishment of primogeniture and entail, one of the most obvious remnants of English aristocratic rule.

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<sup>71</sup> For an account of the wartime function of Virginia's courts, see Charles T. Cullen, *St. George Tucker and Law in Virginia: 1772-1804*. (Ph.D. dissertation, University of Virginia, 1971).

Among the laws not enacted by the legislature was educational reform intended to cultivate the meritocracy necessary to displace hereditary rule. For enlightened legal scientists like Jefferson and Wythe, proper education offered the apparent solution to the crisis of republican law. In the absence of wholesale public education, Wythe had to suffice himself with personally training his potential replacements, giving his many apprentices (free of charge),<sup>72</sup> the intensive attention they would need to take on the mantle of becoming legal reformers and practitioners. One such reformer, Thomas Jefferson, arrived to Williamsburg's College of William and Mary in 1760, and began his apprenticeship with Wythe in 1762.

Jefferson was born in Albemarle County in 1743, as the legal culture in Virginia was changing. At that moment, George Wythe was attending to his studies, and he anticipated a career mediating the legal affairs of the Tidewater planters. The young Randolph brothers, meanwhile, were being groomed for colonial leadership through law. Their father had been attorney general for the colony, a position Peyton Randolph would eventually occupy after receiving an English education. John Randolph also traveled to the Inns of Court and returned to cultivate a personal relationship with Virginia's legislators and royal governor as clerk of the House of Burgesses.

Like Wythe, Jefferson came from a comfortable but not affluent planter family, received a well-rounded classical education in a rural setting, and grew to embrace the optimism of the Enlightenment. Jefferson's formative years witnessed the transformation of public perceptions about law and the legal profession in Virginia. The colony's only

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<sup>72</sup> Ibid., 11, and McKinley, *Virginia Lawyers*, 43.

printing press, located in Williamsburg,<sup>73</sup> facilitated the reproduction and dissemination of legal treatises that were eagerly consumed by the rapidly growing legal profession.<sup>74</sup> The increasing availability of statutes, precedents, and case reports provided studious lawyers the ammunition to challenge the authority of the lay judges of the counties. Meanwhile, the flow of intellectual ideas from Europe allowed the new generation of Virginia lawyers to be modern philosophers as well. Thus, as print culture grew, the unquestioned authority of justices over legal culture disappeared, just as the seeds of Revolution started to bloom.<sup>75</sup>

From the perspective of Peyton and John Randolph, firmly entrenched at the apex of the colonial hierarchy, the shifting attitudes of the legal culture might represent a threat or an opportunity. In the event of Revolution, the elite families of Virginia risked finding themselves obsolete, unnecessary holdovers from a discarded legal and political system. On the other hand, in the struggle to maintain social order in the midst of social upheaval, their perspective might prove valuable if they chose to ally themselves with the likeminded republicans who struggled to determine the appropriate balance between popular will and class stability. How the Randolph brothers reacted to the changing legal culture ultimately determined their political choices in the approaching conflict.

At age seventeen, Jefferson left the mountainous Albemarle country to pursue higher education at William and Mary College in the colonial capital. Along the way, he rested in Hanover County, spending the Christmas season with family friends. There he became well acquainted with a neighbor, Patrick Henry, who was six years his senior.

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<sup>73</sup> Isaiah Thomas, *The History of Printing in America, Vol. 1* (J. Munsell, printer, 1874), 332.

<sup>74</sup> Roeber, *Faithful Magistrates*, 118.

<sup>75</sup> *Ibid.*

Henry was already a married family man, and planning to travel to Williamsburg as well. Having failed once as a shopkeeper, he had attempted to subsist as a small farmer. Lack of talent for the art of cultivation, uncooperative weather, and a devastating fire that destroyed his home prompted him to sink the remainder of his meager resources into a second retail venture and he presently found himself in a dire financial position.<sup>76</sup> Mired in debt and threatened by insolvency, Patrick Henry finally decided to try for a legal career as a last resort.<sup>77</sup>

When Jefferson entered William and Mary College in 1760, he started on the path to becoming the standard-bearer for the new generation of lawyer-statesmen. When Patrick Henry submitted to examination for admittance to the bar at the same time, he apparently aspired to “nothing more from the profession than a scanty sustenance for himself and his family.”<sup>78</sup> Jefferson began two years of general education followed by half a decade of legal apprenticeship and preparation under Wythe while Henry applied to the bar having read the law, on his own, for a few months at most.<sup>79</sup> Five respected legal professionals administered Henry’s oral examination; George Wythe and his

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<sup>76</sup> Wirt’s biography characterizes Henry as utterly bankrupt, with “every atom of his property... now gone.” (31-32) Modern historians acknowledge the leanness of his financial situation but deemphasize the desperation of his condition. See, for example, Richard R. Beeman, *Patrick Henry: a Biography* (New York: MacGraw-Hill, 1974), 7-8.

<sup>77</sup> Wirt, *Patrick Henry*, 32-33.

Wirt added that “no one expected him to succeed in any eminent degree.”

<sup>78</sup> *Ibid.*, 34.

<sup>79</sup> Primary accounts of Henry’s legal education vary greatly, ranging from Jefferson’s estimate of ‘not more than six weeks,’ conveyed to William Wirt, to recollections of six, eight, and nine months. John Tyler “had it from his own lips” that Henry’s preparation for the bar consisted entirely of his reading Coke upon Littleton (a standard beginning text for legal students of the day) and the Virginia laws in the space of one month. From Wirt, *Patrick Henry*, 34.

sometime courtroom rival Edmund Pendleton were among them. Present as well were John Randolph and his brother Peyton.

In later years, Jefferson insisted that the Randolph brothers “signed [Henry’s] license with as much reluctance as their dispositions would permit them to show,” and that his mentor George Wythe “absolutely refused” to do so. (Henry’s license, still existing, bears Wythe’s signature). Henry’s own recollection of the examination relates that the polished John Randolph at first refused to examine him at all, based on his clumsy demeanor and appearance, but that the power of Henry’s reasoning convinced the venerable attorney of his potential, if not his capability.<sup>80</sup> By any account, the examiners agreed upon the inadequacy of his preparation and reluctantly awarded him his license upon the assurance that he would continue his studies. Thus, the twenty-four year old new attorney embarked upon his profession as a man who knew almost nothing of the either the science of law or the practical procedures of the profession. His first biographer expresses no surprise that Henry lingered in obscurity for three years before attracting public notice, and even as he amassed an impressive body of courtroom victories and a significant popular following in the following years, he never wavered in his “insuperable aversion to *the old black-letter of the law-books*.”<sup>81</sup>

After five years of diligent study under George Wythe, Jefferson was admitted to the General Court bar, apparently bypassing the usual custom of practicing before the entry-level county courts in order to gain experience before graduating to the demanding

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<sup>80</sup> Both accounts are narrated in Wirt, *Patrick Henry*, 36.

<sup>81</sup> *Ibid.*, 55. Emphasis in original.

professional environment of Williamsburg.<sup>82</sup> Like the old aristocracy, though, Jefferson preferred to consider himself a planter, scientist, philosopher, and legislator – anything but a professional lawyer.<sup>83</sup> He engaged in the practice for five years, while also serving as a representative of his home county in the House of Burgesses. He permanently retired from the bar by 1774, but continued to be one of the most significant and influential shapers of commonwealth’s legal culture, which speaks volumes about the integral nature of politics and law in republican Virginia.

Henry’s aversion to precedent, procedure, and the science of law rankled enlightened, soon-to-be republican lawyers like Wythe and Jefferson. Though it proved an asset in Henry’s preferred forum – the county courts – where the habits of informal law died hard. Henry elevated himself to celebrity status with his argument in the Parson’s Cause, a 1763 action in his home county of Hanover. The local magistrate (who was also Henry’s father) allowed the country lawyer wide latitude to argue the case outside the accepted legal protocol. Henry asked for jury nullification in the case by appealing to emotion and not legal reasoning, in order to circumvent what he insisted was an unjust royal law.

Henry addressed a simple sense of right and wrong. He persuaded the jury that no matter what the statute dictated, even if it were instituted according to every legitimate legal procedure, its amorality made it void. Though Wythe had acknowledged the importance of moral certainty in the law, he had no desire to allow popular passion to decide the law and threaten the social order. The tumultuous political environment of the

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<sup>82</sup> Frank Dewey argues persuasively that, despite some claims to the contrary, Jefferson never practiced before the county courts. “Thomas Jefferson’s Law Practice,” 289.

<sup>83</sup> see Frank Dewey, *Thomas Jefferson, Lawyer* (Charlottesville: University of Virginia Press, 1986).

decade did indeed invite the possibility of upsetting the social (and legal) status quo, but care had to be taken to ensure that order was maintained in the transition. The purpose of law was to preserve order, not disrupt it. Therefore if British rule were to be resisted, it should be done procedurally, so that a stable but oppressive political and legal system was not exchanged for chaos. Scientific law offered the promise of an orderly transition to a more just application of legal principles.

Henry's brand of justice by popular consent proved useful in arousing the rank and file of Virginians against British rule. His courtroom success encouraged his entry into politics, and he soon took his place in Williamsburg as representative of Louisa County (bordering his Hanover home). But his influence remained local – aside from a brief stint in the Continental Congress, he never held a national office.

By the 1770s, then, there existed three sorts of Revolutionary legal minds in Virginia, all of which soon agreed that British rule had forfeited its legitimacy, but because of different conceptions of law, offered divergent expressions of resistance. In 1775, it was Patrick Henry who exclaimed “Give me liberty or give me death,” imploring that the unrepresented colony, possessing no power to nullify an unjust law in the jury box, should express that legal right by force instead. It was Thomas Jefferson, meanwhile, who formally declared independence in the form of a legal brief the following year.<sup>84</sup>

Edmund Pendleton represented a third sort of republican legal mind, more flexible than Jefferson's abstract absolutes, yet able to curb the excesses of Henry's populism through the “practical judgment of reasonable men.” In other words, republican law

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<sup>84</sup> Burstein and Isenberg, *Madison and Jefferson*, 37.



clearly required a special class of citizens who were elevated above the community, but connected to the community's standards and interests. Virginia's ablest legal minds thus abandoned their identities as Englishmen and adopted the personae of "republican" revolutionaries, though the exact legacy of their Revolution and the meaning of their republicanism would not be clear even a generation later.

In August of 1774, with Revolution drawing near, Thomas Jefferson finalized his abandonment of the legal profession by transferring his pending cases to an up-and-coming lawyer of the next generation.<sup>85</sup> Edmund Randolph was twenty-one years old, ambitious, and like his father John Randolph and his uncle Peyton, was born to a pedigree of legal professionalism and political leadership.

John and Peyton actively supervised Edmund's education in Williamsburg rather than sending him to London for the sort of training they had received at the Inns of Court. In contrast to the shaky credentials of the profession and the shoddy state of legal education in the colony when John and Peyton came of age mid-century, Virginia now had enough legal experts to provide Edmund with superior training.

As Edmund Randolph accepted the stewardship of Jefferson's pending General Court cases in 1774, he faced a devastating decision. His father, John, steadfastly refused to side with the Revolution, while his uncle, Peyton, committed himself wholeheartedly to the cause. When the first Continental Congress assembled at Philadelphia in September, Peyton Randolph was its president. John Randolph remained in Williamsburg for another year, engaging in a desperate effort to mediate between the Burgesses and the

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<sup>85</sup> Reardon, *Edmund Randolph*, 15.

royal governor, Lord Dunmore. By the next summer, the governor had fled the capital to the safety of a British warship in the Chesapeake Bay.<sup>86</sup>

Into this chaotic environment, a newly minted lawyer named St. George Tucker struggled to find his professional footing. He was a year older than Edmund Randolph, but without the advantages of an elite Virginia pedigree. He came from a respectable enough family, but their prominence was largely limited to their home – the twenty-one square mile island of Bermuda, seven hundred miles from Virginia’s shores. The youngest of four sons of a struggling merchant, St. George Tucker’s social status and financial situation meant that he would have to work for a living.<sup>87</sup> In the mid 1700s, the island was mainly a stopover point for Atlantic shipping and offered little opportunity. Its economy was not based in the large-scale sugar plantations and slave trading that allowed many other Caribbean islands to prosper. Bermuda produced little; its economic efforts were geared mainly toward facilitating Atlantic shipping and trade. Economically stagnant and culturally isolated, it was, Richard Cullen asserts, “a good place for a young man of ambition to abandon.”<sup>88</sup>

Tucker came to Williamsburg in 1772 because declining fortunes prevented his merchant father from sending him to the Inns of Court in London. Commencing studies at William and Mary College, Tucker expected to eventually complete his education in England and probably return to Bermuda to practice.<sup>89</sup> He received private instruction from George Wythe, who was now teaching a new generation of legal apprentices.

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<sup>86</sup> Ibid., 19.

<sup>87</sup> McKinley, *Virginia Lawyers*, 33.

<sup>88</sup> Cullen, *St. George Tucker*, 1-2.

<sup>89</sup> Ibid., 7.

By the 1770s, Wythe possessed a new and powerful educational tool in Blackstone's *Commentaries on the Laws of England*, a four-volume treatise published in England and widely disseminated in the American colonies. The *Commentaries* attempted to summarize and interpret the entire corpus of English common law. Common law predominated in the American colonies partly due to a commitment to English tradition and partly because colonial courts rarely recorded and published their statutes and decisions for later reference.<sup>90</sup> The *Commentaries* offered a far from definitive but very handy guide for colonial lawyers and judges. While well received in England, the *Commentaries* had their most enthusiastic reception across the Atlantic, where it became the standard authority.<sup>91</sup>

Blackstone's authority predominated in America not because it was flawless, but because it was the only work of its kind. For practicing lawyers, the distillation of centuries of precedent offered a practical courtroom reference. Yet Blackstone's summary was so convenient that those with little training often decided they needed nothing more.

In the chaotic time between the summers of 1774 and 1775, Edmund Randolph rested in Williamsburg as he contemplated his political and familial loyalties. St. George Tucker traversed the continent that year, in search of career prospects. Finding no promise in Bermuda, Tucker returned to Williamsburg, where George Wythe and John Randolph certified him to practice before the county courts in April. In May, the courts started shutting down in the buildup to war. He tried South Carolina and Philadelphia

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<sup>90</sup> Schwartz, *Main Currents*, 101.

<sup>91</sup> Julius S. Waterman, "Thomas Jefferson and Blackstone's *Commentaries*" in *Essays in the History of Early American Law*, David H. Flaherty, ed. (Chapel Hill: University of North Carolina Press, 1969), 454.

with no more success, and his brothers warned him away from trying Georgia.

Languishing in Williamsburg again by the spring of 1775, he stood for admittance to the General Court and they approved him in their April session. Unfortunately, that was their last session – after April the court shut down for the next three years.<sup>92</sup> With no Virginia court to employ him, and no more money, he went back to his father in Bermuda and soon gave up on his fruitless attempt to embark on a law career.

That summer of 1775, Edmund Randolph finally committed his allegiance to one side of the Revolution and one side of his family. In the aftermath of the Battle of Bunker Hill, he quit Williamsburg, bound for the outskirts of Boston and General Washington's Continental Army. Certain of his social station, he hoped to secure a position as the General's aide-de-camp. To ensure this appointment, and to reassure anyone who cared to doubt his loyalty in light of his father's allegiance to the Crown, Edmund stopped in Philadelphia along the way to procure letters of recommendation from the five Virginia delegates. His uncle, Peyton Randolph, Thomas Jefferson, and Patrick Henry were among the Continental Congressmen who signed on his behalf.<sup>93</sup>

Before the end of August, Edmund Randolph was on Washington's staff. In September, word reached the camp that his father John Randolph had fled the continent. At the end of October, Peyton Randolph suffered a stroke and died suddenly in Philadelphia.<sup>94</sup> The closing months of 1775 found Edmund Randolph, only twenty-two, compelled to quit the army and return to Williamsburg in order attend to the urgent affairs left in disarray by the loss of two Randolph patriarchs.

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<sup>92</sup> Cullen, *St. George Tucker*, 18-21.

<sup>93</sup> Reardon, *Edmund Randolph*, 20.

<sup>94</sup> *Ibid.*

In August of 1774, Lord Dunmore dissolved the House of Burgesses when the representatives expressed their solidarity with the Massachusetts colonists' after the blockade of the port of Boston. The deposed delegates moved to a nearby tavern and convened in secret. They met again next spring, but this time assembled in the little tobacco-trading village of Richmond, sixty miles upriver from the colonial capital and away from the watchful attention of the governor. After this convention, the delegates dispersed and prepared for war. Before the end of the summer, George Washington was commanding the Continental Army. His longtime friend, surveying partner, and delegate from Fauquier County Thomas Marshall left the Richmond convention to rally the volunteers of his frontier community to arms.<sup>95</sup>

When Fauquier was formed from a neighboring county sixteen years earlier, Thomas Marshall surveyed its borders and served as its first justice of the peace.<sup>96</sup> The newly established and undeveloped counties of northeast Virginia represented a different source of wealth than the staple crops of the eastern Tidewater. Like many Virginians, Thomas Marshall succeeded at both cultivation and speculation, and by the Revolution he was a respected member of his local community. No formal legal training preceded his service as a county court clerk, justice of the peace, and delegate to the Burgesses, though he was a subscriber to the first American edition of Blackstone's *Commentaries*.<sup>97</sup>

Thomas Marshall, despite a comparatively recent ascension to social significance in an environment far removed from the cultural pretensions of the Tidewater gentry, in

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<sup>95</sup> Albert Beveridge, *The Life of John Marshall*, 4 vols. (Boston, Houghton Mifflin Company, 1919) I, 69.

<sup>96</sup> David Robarge, *A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court* (Westport: Greenwood Press, 2000), 5.

<sup>97</sup> *Ibid.*, 7.

some ways was not that different from Wythe, Jefferson, and Randolph. The stability of his community was based in agriculture and slave labor, just as in the rest of Virginia. Like Wythe, Thomas Marshall was not a large-scale slaveholder, but his authority depended upon a social and political system defined by the institution. More than a third of Fauquier's population consisted of slaves, and any success in land speculation depended on an influx of enterprising, slave owning freeholders to purchase property in the county.<sup>98</sup>

There is little to indicate that John Marshall, the oldest of Thomas Marshall's fifteen children, aspired to join the rising class of lawyer-statesmen. John apparently spent the two years leading up to Revolution studying the art of military science,<sup>99</sup> and recalled that his youthful attentions were geared more toward political essays than the classics or Blackstone.<sup>100</sup> So while Edmund Randolph lingered in Williamsburg, deciding his loyalties, and St. George Tucker chased the elusive prospects of practical employment in his craft, John Marshall mustered into the militia as a lieutenant, a leadership position to which his neighbors elected him. His father served as Major, the third ranking officer in the company, a testament to his own position in the community.

When John Marshall left Fauquier County in 1775, he carried the ideology of the gentry packaged in the rough-hewn appearance of the frontier. The unique mixture of democratic manner and traditional hierarchy instilled in him by the culture of his home county would serve him well in the postwar struggle to define republican law. As a

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<sup>98</sup> Kurt Schick, "Slavery in Fauquier County," *News and Notes from the Fauquier Historical Society* 5 (Fall 1983): 1.

<sup>99</sup> Beveridge, *Life of John Marshall* I, 70.

<sup>100</sup> John Marshall, *Autobiographical Sketch*, 15.

seemingly populist sort of gentryman, Marshall embodied the contradictions of republican law but offered the hope of reconciling them as well.

Four years after John Marshall marched out of Fauquier County as a militia lieutenant, he passed the summer in Williamsburg, awaiting reassignment. He had faced the enemy in combat at Great Bridge as a militiaman and at Germantown and Brandywine as a Continental officer. He received his first practical experience with the law as deputy judge advocate general for George Washington, with whom he formed a personal relationship during the severe conditions of the winter at Valley Forge. Now, midway through the eight-year struggle for independence, a surplus of Continental officers found the twenty-four year old captain unneeded in the ranks, so he passed the spring and summer of 1780 in Williamsburg while waiting for a place in the Army.

Thomas Jefferson, now in his late thirties, was serving as Virginia's wartime governor at the new capital of Richmond. For security reasons, Jefferson removed the functions of government to the little tobacco-trading post upriver. At that time, he also reorganized the College of William and Mary, creating the nation's first law curriculum and appointing his mentor George Wythe as its first law professor. Wythe created a series of law lectures based on Blackstone's *Commentaries* and taught courtroom and parliamentary procedure by presiding over moot courts and mock legislatures populated by his students. Wythe's well-rounded curriculum ensured that the next generation of Virginian lawyer-statesmen would possess a firm background in the common law (with appropriately republican interpretation by the professor). He wanted his students to be both professional attorneys and refined legislators. For Wythe, education and

professionalism offered the hope that virtuous lawyers could administer the laws in a new republic.

While Wythe was training his potential lawyers to be statesmen in the now abandoned chambers of the House of Burgesses in Williamsburg, Jefferson supervised the removal of the functions of government to Richmond, some sixty miles away from the new law college. This physical separation of law and politics meant that to Wythe would fall the responsibility of republican education and to Jefferson, political governance in a separate sphere.

To pass the idle time in the summer of 1780, John Marshall attended Wythe's law lectures at William and Mary. In the course of about three months, he received the entirety of his formal legal education.<sup>101</sup> He also began the courtship of his future wife, the fourteen-year-old Mary Ambler (known to all as "Polly"), the shy and unassuming daughter of an elite family in the nearby port city of Yorktown.<sup>102</sup>

Expectations ran high among the Ambler daughters when they learned that a heroic soldier of the Revolution, from a prominent Virginia family, would be entertained at their home. Based on Marshall's unquestioned status as a Virginia gentleman, the Ambler girls "looked forward to seeing a handsome, romantic figure, brilliantly appareled, and a master of all the pleasing graces."<sup>103</sup> In other words, they expected a refined gentleman of the sort typified by Marshall's Williamsburg peer, Edmund Randolph - the sort of Virginian whose gentry status was not only based in family wealth

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<sup>101</sup> Charles Cullen, "New Light on John Marshall's Legal Education and Admission to the Bar," *The American Journal of Legal History* 15 (October 1972): 348.

<sup>102</sup> Beveridge, *Life of Marshall I*, 151.

<sup>103</sup> Elizabeth Ambler Carrington to her sister Nancy, written in 1810, published in "An Old Virginia Correspondence," *The Atlantic Monthly* 84 (July 1899): 547.



and community deference, but also embellished with aristocratic refinements. Randolph possessed “attitudes dignified and commanding... gesture easy and graceful... his whole manner that of an accomplished and engaging gentleman.”<sup>104</sup> At the time of Marshall’s appearance in polite Virginia society as a young officer, Randolph was away in Philadelphia, having taken his natural and expected position in the leadership of the commonwealth as a new delegate to the Continental Congress, even though he was not yet thirty.

Marshall’s appearance in 1780 defied the expectations of Tidewater society. Instead of a refined gentleman, the Ambler daughters beheld a man of “awkward figure, unpolished manners, and total negligence of person.”<sup>105</sup> At the same time, he was learning the science of law from Virginia’s foremost republican legal mind and refining the “antipathy to parochialism” that his frustrating experience with the disorderly militia of the Revolution had taught him.<sup>106</sup> Marshall’s surprising appearance in the social atmosphere of Yorktown emphasizes the duality of his social status – elite on the frontier but rustic in the old east, and as a republican lawyer, steeped in rural simplicity but skilled in the science of law. His legal and political identity as a Virginian eventually reflected the same contradictory tendencies.

St. George Tucker, lately the unsuccessful pre-Revolutionary lawyer from Bermuda, found his fortunes much improved by 1780. In the four years since giving up the frustrating pursuit of a law career, Tucker reinvented himself as a high-seas smuggler, profiting handsomely from the daring enterprise of supplying the rebels in the southern

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<sup>104</sup> William Wirt, *Letters of the British Spy*, Fourth Edition (Baltimore: Fielding Lucas, Jr., 1811), 128.

<sup>105</sup> Carrington, “An Old Virginia Correspondence,” 547.

<sup>106</sup> Roeber, *A Chief Justice’s Progress*, 38.

states with war materiel from the West Indies and Bermuda at the command of his ship, the *Dispatch*.<sup>107</sup> Even more significantly, during this time he attracted the attention of a wealthy Virginia widow, Frances Bland Randolph, and they were married in 1778. By marrying into the elite Randolph clan, St. George became a distant cousin of Edmund Randolph, of Thomas Jefferson (whose mother was a Randolph) and of John Marshall (who had Randolph grandmother).

At twenty-five, St. George Tucker became stepfather to three sons and took possession of three Virginia plantations – “Matoax,” “Roanoke,” and the curiously named “Bizarre.”<sup>108</sup> His new status as a planter allowed him to leave the smuggling business as it became too risky and expensive in light of the British military’s campaign in the South. The British invaded Virginia in 1781, burning the capital in Richmond despite Governor Jefferson’s efforts to remove the functions of government from vulnerability to attack. St. George Tucker defended the commonwealth (and was wounded by friendly fire) as an officer in the militia – the sort of non-professional military service that would provide a certain kind of republican legitimacy in the coming decades, as military professionalism - like John Marshall’s - became equated with monarchical elitism and Federalism in the language of Jeffersonian party rhetoric.

Tucker’s wartime marriage elevated his social status and provided financial security, allowing him to easily embark on the successful legal career that had eluded him in the prewar period. Like Marshall, St. George Tucker represents something of a unique cultural mix, as the postwar period found him straddling the identities of the old-style planter-statesman and the professional class of lawyer-statesmen. The unique form of

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<sup>107</sup> Cullen, *St. George Tucker*, 24-29.

<sup>108</sup> *Ibid.*, 29.

Tucker's republican law took the form of his eschewing the "statesman" title altogether. First he practiced law, and then became a judge, but he never sought or accepted political office, as was the habit of Virginia's elite planters and lawyers alike. The legal culture of Virginia led gentlemen to conclude that their natural place was in politics, but like George Wythe before him, Tucker's committed absence from elected office conferred upon him a unique sort of legitimacy, as he appeared to personify the ideal of the disinterested republican.

By the war's end, John Marshall had been to Williamsburg, studied a little bit of law under the venerable George Wythe, and courted the daughter of an affluent Tidewater family. He was set firmly on the path of becoming one of Virginia's lawyer-statesmen. From his wartime stint in Williamsburg until the end of the century, Marshall refined the legal ideology that guided his statesmanship. More than twenty years of immersion in the Virginian legal culture taught him to defend experience and community standards, as perpetuated by the county courts. Given the chance, as when he defended a rakish young aristocrat in *Commonwealth v. Randolph* in 1793, Marshall argued for order and stability, and rejected the populist appeal to majority rule.

Connected to this, a respect for the authority of common law tradition guided his ambivalence toward slavery. This support of traditional law over natural law was only strengthened by the violent direction of popular passions during the French Revolution, which convinced Marshall of the necessity of the educated statesman's role in curbing the democratic impulse.<sup>109</sup> His experience in the county courts and the example of George Wythe suggested that Virginia's legal system could be the model for a successful

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<sup>109</sup> See Morton Frisch, "John Marshall's Philosophy of Constitutional Republicanism," *The Review of Politics* 20 (January 1958): 41.

republic – one in which the skilled judge could be trusted to select the appropriately republican interpretation of contested legal arguments.

At the same time, Marshall’s Revolutionary War experience convinced him that nationalism was not incompatible with the interests of his home state. The combined effect of a career spent as a Virginian politician and lawyer was to produce the fully formed conception of the law that Marshall carried with him to the stewardship of the Supreme Court. With support from the legal tradition of his home state, Marshall embarked on a legal-political rivalry with Thomas Jefferson in 1800 that was rooted more in their similarities than differences, and forged in the local courts where Virginia’s ablest lawyers ultimately found republican principles compromised by the practical considerations of their careers.

## Chapter 2: “Deliver Us From Eavesdroppers!”

Seventeen ninety-three found some of Virginia’s republican lawyers elevated to national prominence. Thomas Jefferson and Edmund Randolph were in Philadelphia, providing counsel to President Washington as members of his cabinet. In Europe, the French Revolution had escalated with the execution of King Louis XVI, the start of the Reign of Terror, and the commencement of war with England.

John Marshall, meanwhile, remained primarily concerned with local affairs. While President Washington struggled to maintain American neutrality in the face of discord in Europe, Marshall prepared to argue a case before the county magistrates in the isolated county of Cumberland, Virginia.

Court day in early 1790s Virginia functioned much as it had for generations. All strata of society were present in the vicinity of the courthouse, where they transacted business, shared local gossip, gambled, mustered for militia duty, and attended legal proceedings. The county magistrates still presided over their local courts, and juries, when required, were selected from among the propertied gentlemen, lesser planters, and ordinary laborers alike, based on their proximity to the courthouse at the commencement of the session.<sup>110</sup> The relevance of county justice began an accelerated decline during this time with the creation of Virginia’s district courts in 1787. District courts widened the realm of professional law in Virginia by providing the litigants in the counties the ability

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<sup>110</sup> St. George Tucker’s observations about the county court’s jury selection lamented that after the first day or two of court business, the “respectable freeholders” departed and thereafter, juries were composed mainly of “idle loiterers about the court, who contrive to get themselves summoned as jurors,” merely for the sake of receiving compensation to offset the expense of traveling to the county seat. Tucker, *Blackstone*, III, 64.

to conveniently appeal the decisions of their local, amateur justices. Correcting errors in procedure and judgment no longer required traveling to Richmond, as the new courts moved the once distant professionalism of the capital closer to home. As a result, the 1790s saw the permanent abandonment of the county courts by the most talented attorneys. They could be lured back for the right cause and the right price, though, as Richard Randolph's 1793 case illustrates.

Richard Randolph would have been a familiar sight at "court day" in Cumberland County – a remote rural community about fifty miles south of Jefferson's Charlottesville and about fifty miles west of Richmond. Richard resided nearby at the plantation known as "Bizarre," a reluctant gift from his stepfather, St. George Tucker. When Tucker married Frances Bland Randolph during the Revolution, he gained a useful name that conferred upon him the status of gentleman and fueled his successful legal career. He received three plantations, including the Cumberland property of Bizarre, and three sons, among them Richard Randolph. When the district courts were created, Tucker was appointed its first judge for the Richmond district. His stepson Richard, meanwhile, fancied himself "a gentleman planter with scholarly aspirations."<sup>111</sup> Unlike his assiduous, upwardly mobile stepfather, Richard seemed content to live the increasingly anachronistic life of the colonial gentry into which he was born – whom Charles Sydnor aptly described as "interested in *being*, rather than *becoming*."<sup>112</sup> At nineteen, Richard married his cousin Judith and persuaded his stepfather to give him Bizarre in 1789. As

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<sup>111</sup> Christopher L. Doyle, "The Randolph Scandal in Early National Virginia, 1792-1815: New Voices in the 'Court of Honour'," *The Journal of Southern History* 69 (May 2003): 289.

<sup>112</sup> Charles Sydnor, "The Southerner and the Laws," *The Journal of Southern History* 6 (February 1940): 16. Emphasis added.

one of the old breed of Virginian gentry, Richard might have expected to read a little Blackstone and grow into a position as a county magistrate in his community someday.

Four years later, Richard attended the April session of the Cumberland county court in an unexpected role – that of defendant. The young gentleman planter stood accused of “feloniously murdering a child.”<sup>113</sup> More shockingly, the newborn infant alleged to have been killed and left outside on a pile of shingles was his own – a child supposedly born of an illicit affair with his wife’s sister, Nancy.

But there was no murdered child to be found. Only the gossip of slaves insisted on the existence of the hidden evidence, long since disappeared. And while slaves were prohibited from offering testimony against whites in court, the law did allow for the inclusion of their recollections in a roundabout way. Their white masters and mistresses could offer their own accounts of what the slaves had said as evidence. In addition, the observations of the women in Nancy’s social circle strongly suggested that she indeed hid a pregnancy, then attempted to surreptitiously procure the means for an abortion, and finally gave birth on an overnight visit to a neighboring plantation, accompanied by Richard and her sister Judith, Richard’s wife. For months after the incident, the community buzzed with rumors about the affair and the alleged murder, finally forcing Richard Randolph and his stepfather, St. George Tucker, to stem the tide of the deleterious effect of the gossip on the family’s reputation.

In April of 1793, Richard Randolph surrendered himself to the custody of the Cumberland county court to publicly address the accusations. The scene was carefully

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<sup>113</sup> Cumberland County Order book, 29 April 1793, Library of Virginia. Quoted in full in Cynthia Kierner, *Scandal at Bizarre: Rumor and Reputation in Jefferson’s Virginia* (New York: Palgrave MacMillan, 2004), 50-51.

staged to the advantage of the defendant. No less skilled an orator than Patrick Henry, assisted by the legal professional John Marshall, would attempt to prove to the magistrates and the public alike (without a prosecutor to oppose them) that the Randolph family's honor was unimpeachable.

The sensational 1793 case of *Commonwealth vs. Randolph* has provided historians with useful perspectives on the function of gender and race, as well as gossip and honor in the early republic. But the people involved, the setting and timing, and the issues raised by the case offer the unexplored opportunity to use the Randolph scandal to contribute to the narrative of Virginia's experimental decade of republican lawyers. Patrick Henry, John Marshall, St. George Tucker, and Thomas Jefferson played pivotal roles in the defense of one of the elite Randolphs in a rural county court, at a time when each man was formulating the distinctive legal identity that would guide him on different and often conflicting paths toward national prominence. The jurisprudence of republican lawyers, displayed at this early stage of their development, illustrates how their legal philosophies guided their actions. Thus, this story of adultery, secret pregnancy, and cover-up of a possible murder is more than a titillating scandal; it is one of the first tests of republican law by the Virginian legal community.

As the Virginians of the 1790s paid more attention to the political and legal economy of the federal republic, gentry sons like Richard Randolph and the county courts that perpetuated their authority seemed increasingly outdated and unrepublican. When Richard appeared at Cumberland's April court day in 1793, some of the nation's greatest legal minds arrayed on his behalf. No jury was present at the informal hearing. Rather, the magistrates functioned like a grand jury, evaluating the testimony and evidence



before determining if Richard would then stand trial for murder at the nearest district court. In the meantime, no statute allowed for him to post bail for the crime, so he remained for a week in the county jail while counsel prepared their defense and witnesses gathered for their courtroom appearances.

Fourteen county magistrates presided over the April session of Cumberland's county court. Cynthia Kierner, in her treatment of the case, summarizes a complicated set of interrelationships in the makeup of the court.<sup>114</sup> When the Revolutionary War closed the county courts, popularly elected committees, fueled by Revolutionary democratic enthusiasm, took their place. The committees did not hear cases, but attended to the essential administrative duties that the courts had provided, such as supervising the maintenance of roads and bridges. At the war's end, the courts reopened and most of the gentry returned to their former positions of prominence, but a few upstarts managed to retain their authoritative posts as county administrators. One such holdover from the wartime democratic committees remained on the Cumberland County Court in 1793.

Similarly, the wartime disestablishment of the Anglican Church, one of the cornerstones of Jefferson's refashioning of Virginia law in republican terms, meant that the character of county justice had changed. For the first time, a Presbyterian sat on Cumberland's court, something that would not have been possible before the Revolution. Others on the court presided as their fathers and grandfathers had done before them, representing the self-perpetuating aristocracy of the system. Though it strongly resembled

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<sup>114</sup> Kierner, *Scandal at Bizarre*, 51.

the aristocratic pattern of the colonial social order, when Richard Randolph faced the magistrates, the county courts were at least partially republican.<sup>115</sup>

Richard Randolph, though he depended on the combined efforts of the commonwealth's preeminent republican lawyers, was no ideal republican himself. A lackadaisical student, he attended three colleges but obtained no degree. A child of privilege, he inherited his estate and his social standing without earning it. His public excesses and private affairs suggested to his peers in Virginia society that his "morals were corrupt."<sup>116</sup> Richard's behavior upset the ruling elite because it confirmed all their fears about the decline of their privileged position in the face of republican reform.<sup>117</sup> To the democratically minded republican, he personified all the faults of hereditary privilege, amateur county justice, and the moral decay of aristocratic rule. If the republican lawyers were looking for virtue, they were certain not to find it in Richard. They would, however, refine their legal conception of republican virtue in the ways they approached his case.

It is telling that the men whose political identities would make them bitter enemies in the coming decade combined their efforts in this case to find a suitably republican defense of a non-virtuous, hereditary aristocrat in an undemocratic legal forum. They did so because their common background made them all personally invested

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<sup>115</sup> Christopher Doyle further contends that the county courts were further republicanized/democratized as the combination of the new district courts with the decreased profitability of tobacco agriculture made the gentry increasingly reluctant to volunteer their service as magistrates. Doyle says, "many a squire grew to disdain the office of justice of the peace as an unwanted burden."

*Lord, Master, and Patriot: St. George Tucker and Patriarchy in Republican Virginia, 1772-1851* (PhD diss., University of Connecticut, 1996), 82-83.

<sup>116</sup> Ann 'Nancy' Randolph Morris to St. George Tucker, March 2, 1815, Tucker-Coleman Collection at the Swem Library, College of William and Mary (quoted in Doyle "The Randolph Scandal," 290.)

<sup>117</sup> Doyle, "The Randolph Scandal," 289.

in the outcome, even if achieving the desired result conflicted with their stated ideals. Whether Richard Randolph was guilty, in this instance, was irrelevant. What was at issue was that his guilt had been decided in the court of public opinion and not in the court of law. Gossip was irrational, and beyond the possibility of control of an elite authority, whether that authority consisted of aristocrats or emotionally disinterested republicans. In this case, they shared a common interest.

St. George Tucker was a first generation Virginian who had married into a wealthy family. Patrick Henry, whose bombastic appeals to popular favor bothered Tucker, nonetheless possessed some degree of gentility of equally recent pedigree. Marriage and family connections gave both men the stature to be influential. Likewise John Marshall, the western gentryman who married into the Tidewater elite and partnered with the young and refined Edmund Randolph, shared the concern over the danger of gossip. They shared the belief, espoused by republican leaders such as Madison and Jefferson, in the ability of reasonable men to govern above the distraction of the passions of the masses. And if the case of Richard Randolph suggested this was impossible, their strategy for victory in the courtroom and in the public sphere shows that when their collective status was at stake, the republicans were not above compromising republican principles to protect themselves.

Republican law sought the enlightened principles of universal truth, which would, in turn, allow for justice and fairness to govern mankind in and out of the courtroom. It suggested that an open forum, such as a legal culture of skilled professionals or a public sphere of information, would encourage this end result of justice. In the case of Richard Randolph, however, the public sphere was propagating an opinion that, if true, was

decidedly inconvenient to all of the republican lawyers involved. And if Richard were in fact guilty – as many of them certainly believed he was – the republican principles of truth would undermine their own interests. As such, to defend Richard Randolph, the commonwealth’s best republican lawyers had to use some distinctly unrepublican methods. Patrick Henry could counter gossip with his own display of showmanship, and John Marshall’s legal mastery (which Thomas Jefferson derided as ‘art’ and ‘sophistry’) was well suited to a case in which it did not matter whether the defendant was truly guilty, only that it could not be proven. Winning an acquittal on this basis was an admirable skill for a legal professional, but hardly the goal of a virtuous republican.

St. George Tucker, as patriarch of the Cumberland Randolphs, supervised the family’s reaction to the scandal. First, the Randolph clan chose to ignore the rumors. After all, it was just the talk of slaves and women – not worthy of notice or acknowledgment. As months passed, however, it became clear that the gossip was not going away. Frustration mounted because the talk undermined the family’s social status and offered them no suitable means of recourse.

Richard Randolph responded to the affront to his honor in the logical fashion of a Southern gentleman- he demanded a duel. Unfortunately, there was no one for Richard to meet on the field of honor, because the rumors came partly from his social inferiors, but mostly from no one in particular. One of the essential tools for maintaining the virtue of the republic, according to Jefferson himself, was a free and open public exchange of information.<sup>118</sup> Print culture promised to educate and enlighten citizens and make them

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<sup>118</sup>Jefferson wrote to John Tyler in 1804: “Man may be governed by reason and truth. Our first object should therefore be, to leave open to him all avenues of truth. The most effectual hitherto found, is the freedom of the press.” (Jefferson to Tyler, June 28, 1804;

able republicans, but it also made it more difficult for the old gentry to feel secure in their superiority.

In an open letter to the public in Richmond's *Virginia Gazette and General Advertiser*, Richard demanded that his "timid enemies" show themselves and give him "personal satisfaction."<sup>119</sup> He intended to flush out his accusers, but his strategy failed. In essence, his enemy was the public sphere itself. When no enemies presented themselves, Richard's recourse as a Virginia gentleman was exhausted. St. George Tucker, as a republican lawyer, recognized a legal alternative to the affair of honor. Hoping to adapt the public sphere to his expertise in the field of law, Tucker advised Richard to appear before the county court at the end of the month and insist on answering the in a public forum could not only absolve Richard of *legal* guilt, but he could repair his damaged social reputation. Tucker hoped to use law to undermine the force of gossip, which was beyond the control of republican lawyers and politicians. In a stable, republican environment, he hoped to deflect the rumors, hoping the truth of Richard's testimony would silence, if not mollify, his critics. Yet the county court was as much a forum of men as one of dispassionate debate and laws. To succeed there, Tucker needed to master the informal and formal codes of courtroom procedure.

In preparation, Tucker enlisted the aid of a personal friend and established professional attorney, John Marshall. He was now thirty-seven, maintaining a brisk law practice in Richmond, and served as a state delegate. A decade earlier, Edmund Randolph had called Marshall "a promising young gentleman of the law," and "a young man of

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in Adrienne Kock and William Peden, *The Life and Selected Writings of Thomas Jefferson* (New York: Modern Library, 1944), 576.

<sup>119</sup> Richard Randolph "To the Public," *Virginia Gazette and General Advertiser*, April 3, 1793. Quoted in Doyle, "The Randolph Scandal," 285.

rising character.”<sup>120</sup> Just two years older than Marshall, the more educated and refined Edmund Randolph had befriended the new lawyer and took him on as a junior partner. He had provided a sort of mentoring apprenticeship during the 1780s.<sup>121</sup> As Marshall gained valuable experience and built a reputation at the bar, he also served as the recorder for the Hustings Court in Richmond (the urban equivalent of the rural county courts). There he obtained his only judicial experience before his appointment to the Supreme Court at the end of the century.<sup>122</sup> When Patrick Henry completed his second non-consecutive term as Virginia governor in 1786, Edmund Randolph replaced him and turned over the rest of the law practice to Marshall. By the middle of the 1780s, Marshall had as many clients as he could manage, and success in the legal profession encouraged his appetite for political recognition.<sup>123</sup>

Edmund Randolph vacated the post of Virginia attorney general when he accepted the governorship, and Marshall narrowly failed in his attempt to succeed him. The post was won by James Innes, who shared with Marshall the distinction of being a veteran of the Revolution, student of George Wythe, and a state delegate. The following year, Randolph headed the Virginia delegation at the Constitutional Convention in Philadelphia, where he warned the assembly, “Our chief danger arises from the democratic parts of our [state] constitutions.” He further warned against “the powers of government exercised by the people swallow[ing] up the other branches. None of the

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<sup>120</sup> Edmund Randolph to James Madison, Nov. 29, 1782 and June 20, 1782. *The Papers of James Madison*, William E. Hutchinson et al, eds. (Chicago: University of Chicago Press, 1967) 358, 339.

<sup>121</sup> R. Kent Newmeyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001), 79.

<sup>122</sup> Smith, *Definer of a Nation*, 108.

<sup>123</sup> *Ibid.*, 108.

[state] constitutions have provided sufficient checks against... democracy.”<sup>124</sup> Though Thomas Jefferson was overseas as ambassador to France at the time of the convention, he previously expressed agreement with Randolph’s assessment in his *Notes on the State of Virginia*. Virginia’s Constitution, Jefferson insisted, contained “very capital defects,”<sup>125</sup> born of the democratic impulses of the early days of the Revolution. The defective nature of Virginia’s constitution, in Jefferson’s estimation, was the overwhelming primacy of the legislature over the other two branches, and the failure to delineate any substantive differences between the upper and the lower houses. One body of electors chose Virginia’s Senate and House of Representatives, and did so at the same time, making the executive weak and the judiciary impotent and subservient to the popular will.<sup>126</sup> Criticizing the Revolutionary constitution of Virginia in republican legal and political terms, Jefferson strongly implied that an independent judiciary was necessary for the successful application of republican law.

St. George Tucker agreed and expanded on Jefferson’s reasoning, specifying the un-republican characteristics of Virginia’s courts and offering solutions. First and foremost, Tucker expressed amazement that the state’s constitution did not prohibit county court justices from also serving as legislators. Operating concurrently as two branches of government, “these members unite in their own persons such a variety of powers as appears perfectly incompatible with the principles of a democracy.”<sup>127</sup> For Tucker, democracy gave republican law its basis for legitimacy, but was vulnerable to

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<sup>124</sup> Max Farrand, ed. *Records of the Federal Convention of 1787*, 5 vols. (New Haven: Yale University Press, 1966) I, 26-27

<sup>125</sup> Jefferson, *Notes on the State of Virginia*, 158.

<sup>126</sup> *Ibid.*

<sup>127</sup> Tucker, *Blackstone I*, 115.

exploitation by interested, unrepublican aristocrats. The opportunity they possessed to both legislate and adjudicate in their communities allowed for what Tucker derided as an “elective aristocracy” – elite rule hidden in the guise of democracy. And as Tucker had already observed in the function of the county courts, this self-perpetuating power structure amounted to “a hereditary aristocracy, in fact.”<sup>128</sup> Simply put, judges could not also be legislators. This logic informed Tucker’s eventual reasoning in confronting the problem of slavery in the republic, as he rejected the practice of judge-made law. The legislature had clearly protected slavery with all of their laws, and as a republican judge, Tucker felt he was bound by their intentions and not his own. He could enforce the abolition of slavery if it became the law of the land, but he would not allow himself to broadly interpret the existing laws to suit his own preference (as George Wythe eventually chose to do).

Tucker’s proposed solution to the corruption of the county courts was simple enough - pay the judges. Presently, the elite status of the county magistrates allowed them the luxury of volunteering their time. Tucker, an educated, salaried district court judge, wondered how services, “gratuitously rendered,” could possibly be performed with “the same diligence, punctuality, or even ability, as where they meet with due compensation and encouragement.”<sup>129</sup>

When Virginia legislators proposed that the old professional divisions between the county and general courts be abolished, Thomas Jefferson balked at the suggestion. He wrote to George Wythe: “I think the bar of the general court a proper and an excellent nursery for future judges if it be so regulated as that science may be encouraged and may

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<sup>128</sup> Ibid., 116.

<sup>129</sup> Ibid.



live there. But this can never be if an inundation of insects is permitted to come from the county courts and consume the harvest.”<sup>130</sup> Thus the rural courts were not just un-republican - they devoured virtue like a biblical plague. At the general court and at the College of William and Mary, Jefferson and Wythe could control the standards of republican law and cultivate virtuous republican judges. In the intellectual wilderness of the counties, they had no hope of displacing the elected aristocracy. In Jefferson’s estimation, it was better to keep them separate than to contaminate the higher court with the dregs from below. Throughout the 1780s, Virginia’s republican politicians experimented, with little success, at ways to reform the problematic county courts. In 1785 James Madison expressed disillusionment at the continual failure of legislative reform attempts. “The experiment,” he said, “has demonstrated the impracticability of rendering these Courts fit instruments of Justice.”<sup>131</sup>

Though Jefferson and Tucker alike extolled the virtues of an independent judiciary and a legal culture of enlightened reason, their common interest in the Randolph scandal prompted them to embrace a forum that encouraged neither. Tucker did not count on the expertise of disinterested judges to clear his stepson’s name, nor did his legal team seek to reveal a factual truth so that reason could dictate justice. The good standing of the Randolph name was at stake, an issue that directly affected St. George Tucker, whose stepson stood accused, and Thomas Jefferson, whose daughter had married into the

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<sup>130</sup> Thomas Jefferson to George Wythe, Mar. 1, 1779. *The Papers of Thomas Jefferson Digital Edition*, ed. Barbara B. Oberg and J. Jefferson Looney. Charlottesville: University of Virginia Press, Rotunda, 2008.

Canonic URL: <http://rotunda.upress.virginia.edu/founders/TSJN-01-02-02-0090> [accessed 10 Mar 2011]  
Original source: Main Series, Volume 2 (1777–18 June 1779)

<sup>131</sup> James Madison to James Monroe, Dec. 30, 1785. *The Papers of James Madison Digital Edition*, J. C. A. Stagg, editor. Charlottesville: University of Virginia Press, Rotunda, 2010.

Canonic URL: <http://rotunda.upress.virginia.edu/founders/JSMN-01-08-02-0243> [accessed 10 Mar 2011]  
Original source: Congressional Series, Volume 8 (10 March 1784–28 March 1786)

family. In this case, the “elective aristocracy” which both men feared would serve their needs well enough.

The 1780s had ended with the adoption of a Federal Constitution, and John Marshall, though a newcomer to Virginia politics, distinguished himself in his arguments for ratification. George Wythe lent his prestige to the cause, while Patrick Henry argued against the Constitution with all the Revolutionary zeal he could muster. St. George Tucker was, like Marshall, still in the process of establishing his professional footing. In 1787, his efforts were directed more to his local practice and his plantations than to political affairs. Tucker was not present at the Philadelphia Convention and was occupied with the business of court proceedings during Richmond’s ratification debates. As a politically aware Virginian, he first feared the consequences of the proposed Constitution (“replete with danger,”<sup>132</sup> he called it), but ultimately decided to support ratification. Once passed, Tucker stated in no uncertain terms, its authority was binding and complete. “Hence every attempt in any government to change the constitution (otherwise than in the mode which the constitution may prescribe) is in fact a subversion of the foundations of its own authority.”<sup>133</sup>

Of the young lawyers who had come of age during the Revolution, only Edmund Randolph occupied a position on the national stage, befitting his family’s long tradition of leadership. Randolph, having refused to sign the Constitution in Philadelphia, surprised its antifederalist opponents by campaigning for ratification back home in Virginia. Ultimately, he disapproved of it, but he found the prospect of Patrick Henry’s brand of democracy more threatening than the shortcomings of the proposed federal

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<sup>132</sup> Cullen, *St. George Tucker*, 84.

<sup>133</sup> Tucker, *Blackstone*, I, 19-20.

government.<sup>134</sup> Like his long absent Loyalist father, Edmund Randolph had a tendency, irritating to impatient partisans, to appear noncommittal while stalling for time in quixotic hopes for compromise. As the nation's first attorney general, this trait only exacerbated the annoyance of Secretary of State Jefferson and Treasurer Alexander Hamilton. In the relentless political battle between the other two members of President Washington's cabinet, Randolph refused to always side with his fellow Virginian. Jefferson complained that he was "the poorest chameleon I ever saw, having no color of his own and reflecting that nearest him. When he is with me, he is a whig. When with Hamilton, he is a tory. When with the president, he is that [which] he thinks will please him."<sup>135</sup> In truth, Randolph was a balanced politician who, in attempting to negotiate the middle ground between two violently opposed factions, drew the ire of both. Like his Loyalist father, his conciliatory nature was unwelcome in a time of passionate political upheaval.

Patrick Henry, while hardly magnanimous in defeat, declared after ratification that he would be "a peaceable citizen," and would "retrieve the loss of liberty, and remove the defects of that system, in a *constitutional way*."<sup>136</sup> If he did not like the product, he, like St. George Tucker, at least believed it provided the means for self-correction.

George Wythe, now more than sixty-years old, presently began a new phase of his life. He left the College of William and Mary to accept a position in Richmond as a judge

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<sup>134</sup> Reardon, *Edmund Randolph*, 139.

<sup>135</sup> Thomas Jefferson to James Madison, Aug. 11, 1793, quoted in Mary K. Bonsteel Tachau, "George Washington and the Reputation of Edmund Randolph," *The Journal of American History* 73 (June 1986): 16.

<sup>136</sup> Wirt, *Patrick Henry*, 314. Emphasis added.

of the Chancery Court. St. George Tucker's district court was a court of law, meaning it heard cases according to the established procedures and precedents of the common law. Wythe's court, on the other hand, was a court of equity. Expressed in the simplest terms, equity law, practiced in the Chancery Court, allowed for adjudication where no remedy existed in the procedure of common law, or where the strict application of the common law was clearly unfair or impossible under unusual circumstances. Conditions unique to the Virginian environment – slavery disputes, for example – found English common law often silent or its principles problematic.<sup>137</sup> Equity made the law adaptable, by acknowledging that the pure language of law could not be brought to bear on every situation and providing an alternative forum. There was no jury in the Chancery Court, just a presiding judge with the old English title of “Chancellor,” an educated professional responsible for administering flexible justice based on a sense of fairness where law fell short. In 1789, George Wythe's responsibility thus shifted from instructing his students in Blackstone's timeless principles and precedents, to deciding those unique cases where their application was impossible.

The honor of replacing Wythe as the commonwealth's law professor – the guarantor of republican legal virtue – fell to Richmond's new district judge, St. George Tucker. Tucker relocated to the vicinity of William and Mary, where he took on the stressful task of balancing his duties at the Richmond court and attending to his students in Williamsburg.

Four years later, Tucker's busy schedule was interrupted by the extended visit of his beleaguered stepson. Richard Randolph stayed in Tucker's Williamsburg home for

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<sup>137</sup> James H. Kettner, *The Development of American Citizenship, 1608-1870* (Chapel Hill: University of North Carolina Press, 1978), 301.

much of the winter and spring of 1793, as they contemplated their response to the rumors that had spread well beyond Richard's isolated Cumberland community.

Tucker was determined to use the forum to the county court to benefit Richard by creating the illusion of an open, republican forum and the impartial administration of justice. Republican lawyers would speak to the legal profession and the public alike, giving the appearance that justice was served. In reality, Tucker carefully constructed the proceedings to be weighted in his favor. First, his stepson would appear not before a jury, but rather an informal hearing of his social peers. No legal professional would oppose him – there was no prosecutor to refute the arguments of his legal team. But, surprisingly, they planned to use a familiar set of legal ruses in defense of Richard. Henry would fight fire with fire, using gossip to undermine gossip (rather than rising above it), and Marshall would base his defense on a legal construction (the absence of a body) to win acquittal without regard to the actual guilt or innocence of his client.

Republican "justice" was not Tucker's goal, success on his own terms was. Madison had worried that the county courts could not be reformed – that they would never be instruments of republican justice. And Jefferson worried of the corrosive effect that participating in the unfit system would have on proper republican lawyers. Tucker's manipulation of the proceedings for his family's interest, though it benefitted all the republicans involved, appears to validate Madison and Jefferson's concerns. In one of the first significant tests of republican principles in the Virginian legal community, the idea of republican law was severely tested and sorely compromised.

The stakes were high, so Tucker promptly contacted John Marshall, though his particular brand of eloquence would not necessarily translate into success in a criminal

court. Marshall excelled at civil law – land disputes, contracts, writs and wills – the kinds of cases that required navigating the complicated machinations of statute and procedure. In his entire legal career, he only took on three or four criminal cases.<sup>138</sup> Criminal law, excepting capital offenses, was practiced mostly at the county level, where lawyers of talent rarely remained. Smaller fees deterred more professional lawyers, and men like Marshall facing the typical county judge often spoke a different legal language. William Wirt, the future U.S. attorney general, humorously confessed that an ambitious lawyer in a Virginia county court risked feeling “like a seventy-four gun ship aground in a creek; while every pettifogger, with his canoe and paddle was able to glide around and get ahead.”<sup>139</sup> So although Marshall’s skill was unquestioned, and though he had observed county justice as recorder of the Hustings Court in Richmond, his practical experience as a criminal lawyer was limited. As noted before, the county courts were not just forums of law, but theaters as well. And this case, orchestrated as an appeal to the public consciousness, demanded something more than a skillful legal argument. Marshall probably could have convinced the magistrates of Richard Randolph’s innocence on the basis of there being no body. But Richard Randolph and St. George Tucker needed to convince the public as well. That is why Tucker recruited Henry, the most popular orator in Virginia.<sup>140</sup>

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<sup>138</sup> Beveridge, *Life of John Marshall II*, 181.

<sup>139</sup> William Wirt, Dabney Carr, and St. George Tucker, *The Old Bachelor* (Richmond: The Enquirer Press, 1814), 3.

<sup>140</sup> The exact nature of Marshall’s participation in *Commonwealth vs. Randolph* is not perfectly clear. The only written record of the witnesses’ testimony before the county magistrates is John Randolph’s (Richard’s brother) handwritten copy of a manuscript attributed to Marshall. The text records the statements of the key witnesses and then offers a summation of the argument in Richard’s defense. Jean Edward Smith and Richard Baker conclude from this evidence that Marshall did, in fact, offer closing

More than prove there was no body and therefore no crime, Marshall and Henry attacked the hearsay evidence of slaves. Marshall applied a similar line of logic when he presided over the treason trial of Aaron Burr in 1807. In that case, Jefferson was confident that the public sphere had made the right determination – the rumor and gossip surrounding Aaron Burr’s plot had convicted him in the court of public opinion, and Jefferson was comfortable with the verdict.<sup>141</sup> And while Burr’s prosecution did not rely on secondhand testimony from slaves, Marshall ultimately reached a similar conclusion in both cases – that “justice” required a high standard of transparency and rational experts to evaluate the evidence.

Despite his personal aversion to Henry’s politics and personality, Tucker recognized that he needed him. As Thomas Jefferson once predicted, the most capable lawyers (“men of science”) had long since fled the amateur courts. Jefferson worried that the nature of county justice would undermine the whole system of republican law, because while the quality of rural attorneys declined, the volume of adjudication did not. Significant cases would still be heard in the counties, and Jefferson accurately perceived that difficult disputes would suffer when subjected to the arbitrary nature of county

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arguments to the county magistrates. Kent Newmeyer and David Robarge argue that because the original manuscript does not survive, and its precise purpose cannot be determined, and because no evidence corroborates the conclusion, that it is unlikely that Marshall actually delivered his summation. They alternatively suggest that only Patrick Henry actually presented verbal arguments to the judges. Marshall, in turn, may have transcribed the proceedings or he may have reconstructed them from memory at a later date for the private use of the Randolph family. Richard Cullen, in the editorial note of *the Papers of John Marshall*, makes no conclusive judgment on whether Marshall argued before the court. He does, however, assert that circumstantial evidence persuasively determines that Marshall was at least present at Richard’s examination before the Cumberland County Court on April 29, 1793, a conclusion accepted by all of Marshall’s biographers. Ultimately, however, knowing Marshall’s precise function in the court proceedings is not necessary for analyzing the significance of his participation.

<sup>141</sup> Isenberg, *Fallen Founder*, 328.

justice. As in this case, rural Virginians imported republican lawyers to represent them in county courts when the stakes were high enough. “Men of science then (if there were to be any),” Jefferson warned, “would only be employed as auxiliary counsel in difficult cases. But can they live by that? Certainly not.” Financial pressure, then, threatened to lure republican lawyers to act as “marauder[s] in the county courts,” Jefferson feared, distracting them from their studies. In this case, few lawyers would “have the leisure to acquire science.”<sup>142</sup> The entire profession would suffer.

Patrick Henry personified Jefferson’s fears. He had amassed a tidy fortune and immeasurable fame in practicing before both the county and general courts, without finding the time to acquire the science of law. Henry’s appeal was purely popular. His emotional method might sway the judges, especially with Marshall’s professional oversight, but his flair for the dramatic was aimed squarely at those invisible enemies that Richard Randolph could not meet on the field of honor. Henry spoke to the people, and it was the people who were undermining the reputations of Randolph and Tucker.

Patrick Henry’s efforts addressed the case’s other purpose – undermining the leveling effect of gossip. The testimony of Mary Cary Page, Nancy’s aunt, was the only conclusive eyewitness account that Nancy had actually been pregnant at all. Page stated she had observed Nancy, in passing, “through a crack” in a door. In her state of undress, Nancy appeared to be pregnant. Henry apparently responded by mockingly asking the witness to specify, “which eye did you peep with?” Henry completed his theatrical

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<sup>142</sup> Thomas Jefferson to George Wythe, Mar. 1, 1779. The Papers of Thomas Jefferson Digital Edition, ed. Barbara B. Oberg and J. Jefferson Looney. Charlottesville: University of Virginia Press, Rotunda, 2008.  
Canonic URL: <http://rotunda.upress.virginia.edu/founders/TSJN-01-02-02-0090> [accessed 10 Mar 2011]  
Original source: Main Series, Volume 2 (1777–18 June 1779)



performance by turning from the agitated witness to the magistrates and crying out, “Great God, deliver us from eavesdroppers!”<sup>143</sup>

Henry had not disproved Mary Page’s assertion, but he had publicly discredited her. Highlighting her voyeurism turned her into a snoop – the satirical embodiment of female gossip. Henry made her testimony seem ridiculous in spite of the fact that it may well have been true. Truth, in the republican public forum, was supposed to facilitate justice. But Mary Page’s method was tainted, making her information less reliable. If the public sphere was a place where transparency ruled, a nosy busybody had no place in it.

When all of the testimony was completed, the judges, without retiring to deliberate, declared Richard Randolph innocent and ordered his release. Though the magistrates responded favorably, the people did not. Martha Jefferson Randolph told to her father soon after the dismissal that “only a small part of the world and those the most inconsiderate people in it were influenced in there [sic] opinion by the dicision [sic] of the court.”<sup>144</sup>

It is worth noting that neither Marshall nor Henry offered any personal defense of Richard Randolph. The evidence indicates that his neighbors in Cumberland County had judged him to be immoral even before the scandal with his wife’s sister, though their correspondence does not specify his misdeeds. Richard’s best hope for redemption lay in his association with St. George Tucker and gaining the support of the leading men of the

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<sup>143</sup> William Wirt Henry, *Patrick Henry: Life, Correspondence and Speeches*, 3 vols. (1891; New York: Burt Franklin, 1969) II: 491-492.

<sup>144</sup> Martha Jefferson Randolph to Thomas Jefferson, May 16, 1793, in Edwin M. Betts, ed. *The Family Letters of Thomas Jefferson* (Charlottesville: University of Virginia Press, 1986) 118.

bar. Ironically, it was Tucker's spotless reputation as a judge and the law professor at William and Mary that was the only hope for salvaging the Randolph name.

George Wythe had mentored Thomas Jefferson, who had in turn taken on the responsibility of guiding James Monroe and William Wirt; personal relationships based on the idea that mentorship and education could confer merit from one generation to the next in place of the old ties of kinship. Tucker was doing the same in his role as professor at William and Mary, but he found a difficult challenge with his wife's son.<sup>145</sup>

Republican law was still the province of elite lawyers, but the community judged cases by different standards. Common law form and precedent still guided the function of Virginia's justice system. How to cultivate republican virtue and how republican principles should be applied was still unclear, and even Jefferson had difficulty drawing the boundaries. "State a moral case to a ploughman and a professor," he theorized, and "the former will decide as well, and often better than the latter, because he has not been led astray by artificial rules."<sup>146</sup> The county courts, of course, were just the sort of forum where artificial rules did not decide the merits of a case.

Jefferson's solution was education. Instead of encouraging a new generation of republican lawyers to focus on the rigid function of statutes and precedents, Jefferson attempted to create a public education system to encourage a virtuous pool of talented men to adjudicate the law. Planter elites would not rule courts, and neither would the amateurs.

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<sup>145</sup> Tucker had more success guiding his three biological sons from his second marriage into productive careers in the law. Tucker's supervision of his sons' education is explored in detail in Doyle, *Lord, Master, Patriot*.

<sup>146</sup> Thomas Jefferson to Peter Carr, 10 Aug. 1787, in Julian P. Boyd, ed., *The Papers of Jefferson* (Princeton: Princeton University Press, 1955) XII, 15.

“Laws are made for men of ordinary understanding,” Jefferson insisted, “and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in the metaphysical subtleties.”<sup>147</sup> By simplifying the law, juries could understand the proceedings and avoid being misled by the tricks of clever lawyers. Juries would check the authority of the professional legal class – leading to greater fairness by balancing the voice of the experts with the voice of the people – embodied in the jury. In the Randolph case, the two different styles of lawyers on his team appealed to two different audiences. Marshall had the knowledge, and Henry had the common touch.

While Patrick Henry and John Marshall were preparing to defend Richard Randolph in the informal arena of Cumberland court, they were also engaged in a legal effort that would have far reaching local and national consequences. *Ware v. Hylton*, known colloquially as “the British Debts Case,” proposed to determine, after some ten years since the conclusion of hostilities with Britain, whether Virginia’s merchants were obligated to repay their debts to British creditors incurred before the war. The federal treaty that ended the Revolution insisted that they did, but a wartime Virginia law that predated it had absolved them of the responsibility. Marshall, already a committed nationalist, did not wish to undermine the Constitution, and in his arguments on behalf of the Virginia debtors he avoided the state versus federal sovereignty question.<sup>148</sup> He attempted to reconcile federal supremacy with a historical argument: that the debts had been acquired during the Revolutionary War, when Virginia had been a sovereign state, and thus its wartime laws were binding on the new federal government because they

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<sup>147</sup> Thomas Jefferson to Judge William Johnson, June 12, 1823, in Lipscomb, *Writings of Thomas Jefferson*, 449.

<sup>148</sup> Newmeyer, *Heroic Age of the Supreme Court*, 99.

predated it.<sup>149</sup> When the war ended, Marshall argued, so did Virginia's sovereignty. Marshall made the case for a Virginia law to supersede a federal law – but only in this special instance – without providing ammunition to the current generation of state sovereignty advocates. The Virginian judges of the circuit court accepted Marshall and Henry's argument and ruled in their favor in 1793.

When Marshall offered the same argument to the United States Supreme Court on appeal (his only appearance before that body), they unanimously dismissed him. But because the Supreme Court's ruling settled the unresolved issue of prewar debts, it cleared the way for the future validation of prewar land titles – a subject of personal importance to Marshall. He had gambled most of his financial resources on purchasing Virginia's Fairfax lands on the basis of a prewar British title of ownership. In the 1790s, the state of Virginia began to confiscate and reallocate the land on the basis that British titles were invalid. In this case, if state sovereignty prevailed, it would bankrupt Marshall. Those legal efforts overwhelmingly occupied his attention in the 1790s and kept him from following so many of his peers into national politics. As he had done in defense of Richard Randolph, Marshall skillfully ignored the assumption that the purpose of law was to locate truth or serve some greater sense of justice. As questions of state versus federal sovereignty played out in Virginia and across the nation in the 1790s, his more flexible interpretation drove a wedge between Marshall and many of his fellow Virginians.

In his consistent efforts to resolve the Fairfax land dispute throughout the decade, Marshall once again showed that he was a different breed of Virginian – not a planter-

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<sup>149</sup> Ibid., 100.

statesman, but a speculator-statesman. The planters' livelihood was beyond their control, subject to the vicissitudes of weather and international economic forces. By contrast, Marshall's own talent in the courtroom would help ensure his solvency. Marshall's brand of republicanism offered a new promise of financial independence through law (and land investment) – something a republican lawyer could hope to control, or at least influence. A successful, virtuous republic required land to prevent the decay that plagued European societies,<sup>150</sup> and Marshall clearly understood that in the new republic, lawyers would determine the status of the land. Unfortunately, land speculation was hardly considered a “virtuous” occupation in the young republic. Though, as Isenberg points out, “land matters,” i.e. speculation, was “the principle pastime of all ambitious men in the early years of the republic.”<sup>151</sup>

The farmers and cultivators who worked the land were, in Jefferson's opinion, independent enough to populate a rational and enlightened republic. Those who bought the land purely for speculation and profit, on the other hand, were treated with the same suspicion and derision as had traditionally been reserved for professional lawyers – predators who acted only in their own interests and not for the greater good. Here Marshall began to take a divergent path, parting ways with the other Virginians who gravitated to the Republican Party. He spent the better part of the decade securing his fortune not through labor and trade, but through combat in the courts. British debts, constitutional sovereignty, and even defending errant aristocracy in the form of Richard

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<sup>150</sup> The perception that land was necessary for the function of the republican political economy is treated in detail in Drew McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (Chapel Hill: University of North Carolina Press, 1980).

<sup>151</sup> Isenberg, *Fallen Founder*, 92.

Randolph, reflected his consistent need to privilege his financial interests over republican ideals.

In March of 1793, Americans learned of the escalation of the French Revolution and King Louis XVI's beheading at the hands of the revolutionary mob in Paris. In April, as Marshall and Henry prepared Richard Randolph's defense, the news arrived that France and England were at war. Seven days before the Cumberland court session, President Washington publicly declared his commitment to neutrality in the contest between the European powers.

A month after the sensational Cumberland court inquest, the new ambassador of the Revolutionary French government arrived in America. Citizen Genêt aroused strong divisions among Americans, some who encouraged American involvement on behalf of the Revolutionary French and others who remained committed to President Washington's neutrality pledge. Genêt's efforts to outfit privateers in American ports and to circumvent the President's authority by appealing directly to the American people created an intense political division. In August, John Marshall organized a public meeting in Richmond to protest Citizen Genêt, and convinced George Wythe to preside, much to Jefferson's chagrin.<sup>152</sup> Two years after the Genet affair, however, Wythe chaired another political

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<sup>152</sup> Kirtland, in *George Wythe: Lawyer, Revolutionary, Judge*, 150, insists that Wythe, in this instance, was "an unwitting tool of John Marshall and those who would soon identify themselves as Federalists." Kirtland is unwilling to accept the possibility that Wythe's political views could differ substantially from Jefferson's, even though Wythe supported ratification without reservation and is identified by some historians as a Federalist. The uncertainty of Wythe's political self-identification arises from his own commitment to eschew factional loyalties and the absence of any personal papers from which to draw conclusions. As such, historians apply the label of Federalist or Jeffersonian-Republican to Wythe as it best suits their needs.

meeting in Richmond, this time in defiance of the Jay Treaty, a pet issue of the new Federalist Party.

Historian Richard Beeman concludes that “up until the time of the Federalist [anti- Genêt] meeting in Richmond, it had never been necessary for the Republicans to organize themselves within the state; they could always be assured of a majority in the legislature without the necessity of building a party structure. The decision of the Federalists to appeal directly to the people through county meetings changed this.”<sup>153</sup> As he had done in Richard Randolph’s defense, Marshall proved remarkably adept at being both Federalist and popular.

While Marshall was organizing his home state against Citizen Genêt, his former law partner, Edmund Randolph, was supervising a high profile prosecution of one of the American privateers who had violated the neutrality pledge with Genêt’s support. Gideon Henfield, an American citizen, had participated in outfitting a vessel to prey upon British shipping before learning of the President’s declaration of neutrality. When he arrived in Philadelphia, at the command of a captured British ship, Henfield was promptly arrested.

At first, Henfield insisted that he was innocent on the basis of having put to sea as a privateer before the government stated its stance on neutrality. As far as he had been aware, he was a law-abiding American citizen. But he quickly changed his defensive strategy, claiming the natural right of expatriation – Henfield insisted that he had renounced his American citizenship and was, in fact, a French patriot and therefore not subject to prosecution for violating the American law. In pure republican terms, Henfield claimed a natural law that superseded a statutory one. Douglas Bradburn notes that

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<sup>153</sup> Richard R. Beeman, *The Old Dominion and the New Nation, 1788-1801* (Lexington: University Press of Kentucky, 1982), 133.

Henfield only formulated this argument after it emerged as his most viable legal defense; he had made no declaration of French citizenship before his arrest, or even in the period immediately after.<sup>154</sup> Thomas Jefferson, though he agreed that Henfield possessed the right to renounce his citizenship, privately admitted that he doubted the defendant had ever intended to do so.<sup>155</sup> Nevertheless, Jefferson embraced the legal fiction that formed the foundation of Henfield's defense. This left him vulnerable to criticism from commentators who accused him of exhibiting the same "apostasy and sophistry" in defense of Henfield and Genêt that he himself leveled against those with aristocratic pretensions.<sup>156</sup> Just as Marshall had constructed an airtight defense of Richard Randolph by compromising certain republican legal principles, Jefferson supported a convenient and creative construction of statute that was independent of enlightened truth, but suited to his immediate needs.

In the case of Citizen Genêt, arousing popular passion through gossip threatened to undermine American neutrality and draw the young republic into war. Could the legal system adjudicate dangerous agitators more rationally than the court of public opinion? A jury directly defied the explicit instructions of the judge and acquitted Henfield, proving that popular support of Genêt and his associates was too pervasive to be swayed by republican legal rationality.

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<sup>154</sup> Douglas Bradburn, *The Citizenship Revolution: Politics and the Creation of the American Union 1774-1804* (Charlottesville: University of Virginia Press, 2009), 110-112.

<sup>155</sup> *Ibid.*, 112.

<sup>156</sup> *Ibid.*



Jefferson had relied on the same kind of legal construction that Marshall used to successfully convince the magistrates, but not the public, of Richard Randolph's innocence (or at least lack of culpability). In both cases, the public could not be swayed. In both, legal professionals had made a successful argument, and in one case there was no jury to question them. In the other, a judge instructed the jury that they must convict. The jury, however, acted independently, refusing to adhere to the appeal to legal reason.

In the end, St. George Tucker was unable to prevent the Randolph name from being tainted, though Richard's untimely death shortly after the scandal quieted the rumors. In defending his stepson, Tucker fought several battles. One was for Richard's and his own reputation. Another was to convert the county court system into a dual forum: one that allowed Tucker to defend his family's honor and yet do so by relying on deliberation rather than violence.

Richard Randolph died in 1796 at the age of twenty-six, just three years after his public exoneration before the Cumberland court. He was not guilty of murder, but remained a social pariah. Richard still represented the vices that threatened to upset the gentry's deferential authority. His trial proved that the social effects of the Revolution were real and pervasive. Gossip could indeed have a leveling effect, and republican law had not adapted to effectively resist it.

Richard's behavior had threatened to disrupt the gentry's fragile social status quo, and perhaps with his premature death, they breathed a sigh of relief. If so, their relief was short lived, as Richard's will stipulated the immediate emancipation of his more than two

hundred slaves.<sup>157</sup> In an ironic twist, he publicly condemned the perverted morals of the hypocritical, self-satisfied slaveholding gentry. If his youthful indiscretions had undermined their authority, he posed an even greater threat from beyond the grave.

Not until some twenty-three years after the fact did the probable truth of the Randolph scandal finally come to light when Nancy - who supposedly bore the murdered child that night – circulated a letter of explanation among prominent Virginians. By 1815, Nancy had long abandoned the toxic social environment of Virginia for a new life and a new marriage in New York City to a respected gentleman twenty-two years her senior. She married Gouverneur Morris, the revered, one-legged founding father who is credited with authoring the preamble to the U.S. Constitution.<sup>158</sup> Back in Virginia, the last survivor among St. George Tucker’s three Randolph stepsons, John Randolph of Roanoke, had reignited the gossip and Nancy, in turn, responded from New York with her version of the truth. Recalling the tumultuous winter of 1792, when she was “not yet seventeen,” Nancy admitted that she had been pregnant, and had indeed secretly given birth at their neighbor’s home.<sup>159</sup> The father, she clarified, was not the oldest Randolph

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<sup>157</sup> Doyle gives the number as two hundred in “Randolph Scandal,” Newmeyer as two-hundred and fifty in *Heroic Age of the Supreme Court*, 95.

<sup>158</sup> Before proposing marriage to Nancy Randolph, Gouverneur Morris sought reassurance that her scandalous past would not come back to haunt him. Morris was a prominent Federalist in New York and feared that his marriage to a disgraced woman might undermine his political viability and the credibility of the national party. Morris wrote to the only Virginian whose opinion he could trust – John Marshall – who assured him that “while many believed the accusations [of adultery and murder] brought against Mrs. Randolph to be true... others attached no criminality to her conduct.” *Papers of John Marshall*, VII, 220-221. This coolly legalistic assessment of Nancy’s innocence does not reveal much about Marshall’s opinion of Nancy’s character, but its conclusions were good enough for Morris, who proposed to Nancy the day after receiving Marshall’s response. See Keirner, *Scandal at Bizarre*, 126.

<sup>159</sup> Nancy never explicitly specified that her child was stillborn and therefore not murdered. Some historians have offered this conclusion, while others are silent on the

brother Richard. Rather, it was the middle son, Theodorick, twenty-one years old, tubercular, and an alcoholic, who died almost precisely nine months before Nancy gave birth and to whom she was secretly engaged. Richard apparently “knew every circumstance” of his younger sibling’s secret.<sup>160</sup> He remained silent in the aftermath and accepted the social and legal consequences, and he took Nancy’s secret with him to the grave just three years later. Richard had sacrificed his own reputation to protect the honor of his deceased younger brother and his wife’s sister.

Richard’s decision to free his slaves and publicly denounce the institution that provided the basis for the gentry’s economic security undermined their sense of order and harmony. Around the same time Richard’s will became public, St. George Tucker offered the Virginia legislature a plan for gradual abolition. Tucker’s 1796 *Dissertation on Slavery: with a Proposal for the Gradual Abolition of it, in the State of Virginia* was meant as both a proposal for the consideration of the legislators and as an appeal to the public consciousness. Tucker recognized the ideological dilemma in the legal fiction that

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matter, as the evidence offers no definitive answer. Like John Marshall’s cautiously legalistic reassurance to Governor Morris that Nancy was not criminally culpable, Nancy herself resorted to insisting that “[T]here was the strictest examination...” and “The severest scrutiny took place,” after which Richard Randolph “was acquitted.” Ann ‘Nancy’ Randolph Morris to John Randolph, Jan. 16, 1815, cited in William Cabell Bruce, *John Randolph of Roanoke, 1773-1833: a biography based largely on new material*, 2 vols. (New York: G.P. Putnam’s Sons, 1922 II), 284. Even in constructing her own vindication, Nancy offered no outright denial of the charge of infanticide.

<sup>160</sup> John Randolph to Ann Randolph Morris, Oct. 31, 1814, and Ann Morris to John Randolph, Jan. 16, 1815, quoted in Bruce, *John Randolph*, II, 274-75.

a slave was both a person and property.<sup>161</sup> Or maybe his stepson's death had encouraged him to raise the politically charged issue in a new public forum.

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<sup>161</sup> The origins and implications of this concept are discussed in Malick W. Ghachem "The Slave's Two Bodies: The Life of an American Legal Fiction" *The William and Mary Quarterly* (Vol.60, No.4, Oct. 2003), 809-842. See also Wolf, *Race and Liberty*.

### Chapter 3: “Butting a Wall in Sport”

On January 27, 1801, the United States Senate unanimously confirmed John Marshall as the new chief justice of the United States. It was just eight months since Marshall labored to decide whether he would return to a Virginian legal practice or accept the second offer of a position in President Adams’ cabinet. In that time, a contentious presidential election swept Adams and the ruling Federalist Party from office. In less than three months, Thomas Jefferson would begin his tenure as president, and his Republican Party would command a majority in Congress.

The outgoing Federalists scrambled to protect their waning political influence by enshrining their authority in the only place beyond the control of Jefferson’s popular mandate – the courts. New federal judgeships were created, the Supreme Court justices were relieved of the time consuming duty of riding to distant circuit courts, and a new chief justice was appointed. For the soon to be displaced Federalists, Marshall was less the vocal political ideologue than they desired, but he was their last viable option.

Though not as outspoken as his High Federalist contemporaries in New England, Marshall nonetheless possessed a clear political vision for the young republic. And while the nationalist Marshall had been growing ideologically apart from his home state of Virginia for some time, he continued to reside there for the next thirty-five years as he presided over the nation’s highest court. St. George Tucker served in the district court just blocks from Marshall’s home. Former partner Edmund Randolph still plied his trade in the neighborhood as well. And George Wythe, still active in his mid-seventies, sat on the nearby Chancery Court bench. Though he no longer interacted directly with his

former colleagues in Richmond's courts, Marshall continued to have influence in Virginia, especially in those rare cases when the Supreme Court was forced to confront the institution of slavery – one of the most difficult political and legal issues facing the new republic.

The era of the Marshall Court is often viewed as a time of remarkable unity, when few justices dissented and the court spoke with one voice (usually Marshall's). The significant slavery cases argued before the court, however, illustrate the impossibility of compromise. A fundamental contradiction between natural rights and property rights could not be easily reconciled, especially when a Virginian was guiding the proceedings. Marshall's legal reasoning, both as chief justice and as a Virginian lawyer, illustrates how debates over the sources of legal authority, the moral limits (and obligations) of law, and the distribution of legal power played out in cases involving slavery.

One of Marshall's most significant slavery decisions as chief justice came in 1825 with the *Antelope* case.<sup>162</sup> The court had to determine the legal status of more than two hundred African slaves, illegally taken by American pirates when they captured a Spanish vessel, the *Antelope*. The slave trade had long been outlawed in the United States, but not in Spain and Portugal. The complement of slaves aboard the *Antelope* was a mixture of Spanish property, acquired legally by the ship's crew according to Spanish law, and some were captured from a Portuguese vessel. Complicating matters, twenty-five of the slaves had been forcibly taken from an American vessel illegally engaged in the slave trade. The Spanish and Portuguese governments demanded that all of the slaves be returned, as they were legally acquired under the laws of the respective countries. The

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<sup>162</sup> *The Antelope* 23 U.S. 10 Wheat, 66 (1825).

U.S. attorney general, William Wirt, argued that the trade was not only illegal under American law, but international law as well. The combined actions of the United States, Britain, and France to ban the trade, as well as limitations imposed on it by collective diplomatic actions in Europe, meant that slavery was, by implication, banned by international law. Thus if Spanish and Portuguese slaves, their own laws notwithstanding, came into the possession of the United States, the court was in no way bound to return them. Justice Joseph Story, by now an intimate friend of Marshall as well as an associate justice, had made the same argument in an earlier circuit court ruling of *U.S. v. La Jeune Eugenie* in 1822.<sup>163</sup>

The friendship between Story and Marshall was based on a remarkable compatibility of their temperaments. But in politics and legal philosophy, they parted ways significantly. In his earlier ruling in the Massachusetts circuit court, Story proclaimed in no uncertain terms that “Christian duty” as well as the “external maxims of social justice” made the slave trade illegal on simple grounds of morality.<sup>164</sup> It was clearly morally wrong, and therefore not legal. Story backed up his moral argument with a positive legal construction, noting that the preponderance of international action against the trade made its illegality enforceable in American courts.

Marshall soundly rejected Story’s, as well as Wirt’s, reasoning in the *Antelope* case. Addressing the broad issue of whether slavery was sanctioned by international law, Marshall denied the authority of his court to make a legal decision binding on other nations. He conceded that nations, gathered for that specific purpose, might indeed pass

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<sup>163</sup> Newmeyer, *Heroic Age of the Supreme Court*, 284.

<sup>164</sup> *U.S. v. Le Jeune Eugenie*, 26 Fed. Cas. 832 (No. 15, 551) (C.C.D.Mass), quoted in *Ibid.*

international legislation or treaties banning the trade if they so desired, but insisted that the collective actions of the few could not be binding on all. As such, Spain and Portugal, in Marshall's opinion, could not be prohibited from trading in human property, and the *Antelope's* Spanish and Portuguese slaves would be returned.

Addressing the specific question of which slaves should be freed, the Marshall Court faced another crucial determination. In the *Antelope* case, as in many of the early republic's complicated slavery suits, the practical limits of the dilemma often hinged upon a judge's decision of who bore the burden of proof. Rather than assuming that all of the slaves were property of the foreign governments and ordering them promptly returned, the court placed the burden of proof on Spain and Portugal to provide documentation of their claims. Because the Portuguese had no proof of ownership (their slaves in this case had been pirated onto a Spanish vessel), their slaves were freed. Spain could prove ownership of twenty percent of the remaining slaves, and so that number was chosen by lot to be returned to bondage.<sup>165</sup>

In his decision on the *Antelope* case, Marshall offered an equivocal denunciation of slavery that echoed the sentiment of fellow Virginian Thomas Jefferson. Both men expressed dissatisfaction with the institution, but neither could imagine that their respective positions of power offered them any means to correct it. For Marshall, the limitation was based in his perception of the source of legal authority in three areas: legal precedent was rooted in tradition; the law's moral limits aimed at maintaining order while

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<sup>165</sup> Attorney General Wirt continued to press the case, arguing in 1827 that the Spanish government's proof of the slaves' identities was inadequate, and therefore all should be freed.

Leslie Friedman Goldstein, "Slavery and the Marshall Court: Preventing 'Oppressions of the Minor Party?'," *Maryland Law Review*, 67 (2007): 189.



not upsetting the stability of society; and the federal system placed limits on the judicial branch, which was independent, but could not impose its will arbitrarily.

“That [the slave trade] is contrary to the law of nature will scarcely be denied,” read the court’s decision, “That every man has a natural right to the fruits of his own labor is generally admitted.”<sup>166</sup> As to whether the law of nature superseded the law of nations, the court’s (and Marshall’s) opinion was clear. “Slavery... has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent cannot be pronounced unlawful.”<sup>167</sup> By contrast, Justice Story had declared in the *La Jeune Eugenie* case, “It is insufficient to stamp any trade as interdicted by public law, when it can justly be affirmed, that it is repugnant to the general principles of justice and humanity.”<sup>168</sup>

Legal challenges to slavery in the early republic forced lawyers and judges to define their own balance between law and morality when the two clashed. Marshall conceded that force could determine legitimacy, at least as far as slavery was concerned. Even if slavery was immoral, it could be lawful if upheld by custom and consent. The admiring biographer Albert Beveridge recognized that Marshall’s stance on slavery rejected “humanitarian” impulses, but instead put political interests first.<sup>169</sup> Later in life, Marshall was actively involved in the American Colonization Society, which sought to gradually emancipate Virginia’s slaves and relocate them to Liberia. But the cornerstone

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<sup>166</sup> 23 U.S. (10 Wheat.) 66

<sup>167</sup> *Ibid.*

<sup>168</sup> *United States v. La Jeune Eugenie*, 26 Federal Cases 832 (1822) 846-48 quoted in William Wiecek, “Slavery and Abolition Before the United States Supreme Court, 1820-1860,” *The Journal of American History* 65 (June 1978): 37.

<sup>169</sup> Beveridge wrote: “There was nothing in him of the humanitarian reformer. But there was everything of the statesman.” *Life of Marshall*, IV, 472.

of the colonization effort – the removal of free blacks from a white republic – at least suggests that Marshall shared the common Virginian view that racial cohabitation was impossible, or at least undesirable.

In a lifetime of arguments and decisions, Marshall’s balance between the rights of man and the rights of property is fairly consistent.<sup>170</sup> As a lawyer and a judge, he argued for the protection of property rights over natural law, though he drew a clear legal distinction between inanimate property and property in human beings.

As a Virginia lawyer in 1798, Marshall argued for this distinction on behalf of Robert Pleasants. A Richmond Quaker, Pleasants sued his relatives who refused to manumit certain slaves as dictated by his father’s will. Instead of arguing abstractly in favor of natural rights, Marshall posited a legal argument hinged on there being an inherent difference between applying the law to objects and people, even if both were property. The law must, he argued, take this difference into consideration. In the lower Chancery Court, George Wythe agreed. On appeal, District Judge St. George Tucker dismissed Marshall’s construction.

More than thirty years later, Chief Justice Marshall applied the same logic to the case of *Boyce v. Anderson* (1829). The claimants sought damages from the operators of

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<sup>170</sup> Leslie Friedman Goldstein, in “Slavery and the Marshall Court,” posits a change in Marshall’s approach to slavery beginning in 1816, which she attributes to his involvement in the American Colonization Society. In examining all of the Marshall Court’s slavery cases, Goldstein notes a trend, after 1816, of leniency and an increased tendency to rule in favor of freedom when creative legal construction would allow it. The court’s effort to produce unanimous opinions during this time makes it difficult to determine whether this trend indicates an evolution of Marshall’s ideology or a gradually increasing influence of justices Gabriel Duval (appointed in 1811) and Joseph Story (appointed in 1812), both vocal opponents of slavery. Bruce Ackerman argues that Marshall’s ability to command the acquiescence of his associate justices began to wane after 1810, which would also account for the shift in the attitudes of the court as a whole. *Failure of the Founding Fathers*, 232-33.

the steamboat *Washington* for the loss of four slaves, who drowned in the Mississippi River. The slaves had escaped a crippled vessel, the *Teche*, for the safety of the shore. The plaintiffs alleged negligence on the part of the *Washington's* crew, who were responsible for conveying the slaves from the shore of the river to their steamboat. Had the operators of the *Washington* been salvaging baggage or freight from the shore, the burden of proof was relatively low and they would be liable for the lost property. The legal question at issue was whether the *Washington* had taken on freight or passengers when it undertook to retrieve the slaves. The court applied the stricter standard of evidence, acknowledging that the slaves, though property, were legally discernable from “inanimate matter.” In the court’s decision, Marshall specified, “A slave has volition, and has feelings which cannot be entirely disregarded... In the nature of things and in his character, he resembles a passenger, not a package of goods.”<sup>171</sup>

In the *Antelope* case, Marshall expressed a similar sentiment regarding the burden of proof where slaves as property were concerned. “A distinction is taken between men, who are generally free, and goods, which are always property,” the court determined. When assessing the evidence, “...something more is necessary where men are claimed.”<sup>172</sup> Marshall’s consistent reasoning in the federal court reflects a long tradition in Virginia, examined by Malick Ghachem, of relying on a legal fabrication of “mixed character” to allow the contradictory status of slaves as concurrently persons and property to be legally coherent.<sup>173</sup>

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<sup>171</sup> *Boyce v. Anderson*. 27 U.S. (2 Pet.) 154-155.

<sup>172</sup> *The Antelope* 23 U.S.(10 Wheat.) 124-125.

<sup>173</sup> Ghachem, “The Slave’s Two Bodies,” 816. See also Burstein and Isenberg, *Madison and Jefferson*, 177.

In addition to navigating the murky legal status of slaves as both human and property, lawyers and judges of the early republic had to contend with the equally vexing issue of how to distinguish race. Enslaved status was not determined solely by race – slaves were a legal caste distinct from free persons of color, whose existence challenged the stability of the social order by preventing white Virginians from relying on racial criteria to delineate who deserved the benefits of citizenship and who did not.<sup>174</sup> And because slavery passed from mother to child but not from father to child, visual characteristics eventually became all but useless in decoding race as the law had defined it. Quirks of genealogy and variations in appearance brought some of the most significant challenges to the slavery in the courts.<sup>175</sup>

In *Mima Queen v. Hepburn* (1813), the Supreme Court threw out a freedom suit because there was no living witness who could substantiate Mima Queen’s claim that she was distantly descended from a free woman and therefore free. Her lawyers offered hearsay evidence from whites in her community, who recalled that it was generally acknowledged that Mima Queen was a matrilineal descendant of Mary Queen, a free woman. In other issues of law, hearsay evidence was inadmissible. But an applicable common law rule in Maryland allowed such indirect testimony to be considered in establishing lineage in freedom suits, simply because in the vast majority of such cases, no other evidence could possibly exist. When rumor was the only corroboration available, the Maryland law allowed that race could be subject to community standards – and that if something was well understood by the general population to be true, it was accepted as

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<sup>174</sup> Wolf, *Race and Liberty*, 47.

<sup>175</sup> Wolf notes: “Liberty could rest on small technicalities, turns of phrase, and points of law that would-be emancipators probably never considered or anticipated.” *Ibid.*, 155.

true in the court. This style of adjudication, in the manner of rural, county court justice, was the only possibility for Mima Quenn to secure her freedom.

When Marshall defended Richard Randolph at the Cumberland County Court in 1793, his defense strategy depended significantly on the inability of slaves to testify and the inadmissibility of whites' hearsay evidence to corroborate what the slaves had seen. Though the community had judged the evidence to be compelling – that there was a body and therefore a crime – he urged that strict rules of evidence should be adhered to because the community was biased against the defendant. Gossip had muddied the waters, and to counteract this bias, Marshall had called for a higher standard of evidence.

Twenty years later, Marshall's sentiment had not changed. He would not make an exception for the benefit of the enslaved. They were more than freight, yes, but they were entitled to no special consideration. Evidence in slave freedom suits was subject to the same strict standard of evidence– even though it would be inestimably harder to meet that burden of proof. The court ruled against Mima Queen, relegating she and her daughter to bondage.

Relatively new Supreme Court appointee Gabriel Duval, of Maryland, understood the traditions and habits of slave freedom suits in his home state, and adamantly dissented from the court's majority opinion. First, he wrote, “to exclude hearsay in such cases would leave the party interested without remedy.”<sup>176</sup> And, even more importantly, Duval boldly proclaimed, “It will be universally admitted that the right to freedom, is more important than the right to property.”<sup>177</sup> At a time when the Supreme Court made a strenuous effort at projecting an image of unity, slavery cases and the fundamental

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<sup>176</sup> *Mima Queen v. Hepburn* 11 U.S. (7 Cranch) 298.

<sup>177</sup> *Ibid.*, 298-299

contradictions they exposed challenged their conciliatory façade like no other issue.

Duvall's argument against depriving slaves of one of their only means of legal recourse, for example, was his only dissent in twenty-five years on the court.

James Kettner notes that these first decades of the nineteenth century produced a fundamental "conflict of laws" between the application of slavery principles in the North and in the South. In practice, the legal fiction of slaves' status diverged in local application and the Supreme Court was reluctant to side with either region.<sup>178</sup> George William Van Cleve further notes that St. George Tucker's failed attempt at measured emancipation in Virginia illustrated that the institution would continue to grow absent intervention at the federal level.<sup>179</sup>

Marshall's biographers tend to be forgiving when evaluating the Chief Justice's failure to address the slavery issue. Smith, for example, says that though Marshall unerringly supported the right of property in the slave cases brought before him, that "his dicta became increasingly hostile" over time.<sup>180</sup> Yet Smith's only evidence was Marshall's involvement in the doomed colonization effort, whose ideological basis was far from progressive.<sup>181</sup> Donald Roper forgives Marshall's ambivalence by insisting that definitive action opposing slavery could have had "little effect on the impending crisis."<sup>182</sup> William Wiecek recognizes Marshall's anti-slavery activity as circumspect, but credits Marshall for displaying a keen sense of the Supreme Court's limitations. He notes

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<sup>178</sup> Kettner, *American Citizenship*, 302-303.

<sup>179</sup> Van Cleve, *A Slaveholders' Union*, 210-211.

<sup>180</sup> Smith, *Definer of a Nation*, 3.

<sup>181</sup> Burstein and Isenberg note that "Colonization as envisioned by white reformers encroached on free blacks more than it consulted their interest." *Madison and Jefferson*, 635.

<sup>182</sup> Donald M. Roper, "In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery," *Stanford Law Review* 21 (February 1969): 537.

that the Marshall court simply dodged the slavery issue, knowing that it could not resolve it. The later court lacked Marshall's caution and attempted to address the issue, ultimately precipitating Civil War.

Marshall, for his part, readily acknowledged his desire to avoid ruling on the constitutionality of slavery altogether. In 1823, *the Brig Wilson* case allowed him the opportunity to address a Virginia law, similar to one in South Carolina, which combined the issues of state sovereignty and the prohibition of the slave trade. This case provided Marshall a platform to extend, if he desired, the reach of federal supremacy with regard to slavery. "A case has been brought before me in which I might have considered its constitutionality, had I chosen to do so," Marshall remarked to his friend Joseph Story. But, Marshall mused, "as I am not fond of butting a wall in sport, I escaped on the construction of the act."<sup>183</sup>

Historians are reluctant to critically evaluate Marshall's views on slavery. Because he deliberately avoided recording his opinions on the subject in detail, the scholar is left with limited resources from which to draw conclusions. Unlike Jefferson, Marshall did not ruminate on race and emancipation for the benefit of correspondents and posterity. Unlike Tucker, he did not publicly announce the dangers of failing to ignore the legal dilemma and offer a legislative solution. And unlike Wythe, his private affairs did not make his views on race abundantly clear. Additionally, because Wythe served alone of the bench, his opinions can be read as clear indications of his individual legal reasoning. The Supreme Court's opinions, on the other hand, must be read as the product of communal consensus. As a subject of undeniable significance, Marshall attracts no

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<sup>183</sup> John Marshall to Joseph Story, Sept. 26, 1823. Cited in Charles Warren, *The Supreme Court in United States History*, rev. ed. (Boston: Little, Brown and Co., 1947), 626.

shortage of admiring biographers. The tendency to look for the best in Marshall's character contributes to the reluctance of historians to go very far in filling in the blank spaces in the historical record. But the same characteristics admiring biographers espouse – such as Marshall's ability to deftly construct the law to suit his political vision for the republic – make all the more glaring his deliberate refusal to bring that legal talent to bear on one of the most pressing issues of the day. Though he chose not to record his personal opinions on slavery for posterity, that he actively ignored it speaks volumes.

Back in Richmond, a world away from the political considerations of the Marshall court, George Wythe remained a permanent fixture in his comfortable position on the bench of the Chancery Court, which he occupied from 1789 until his death seventeen years later, where was the only judge of that tribunal.<sup>184</sup> In essence, equity law in Virginia was exclusively George Wythe's law. Long before Marshall's tenure on the Supreme Court cultivated his nationalist conception of judicial supremacy, Wythe personified judicial independence in Virginia. In 1782, Wythe offered the first recorded instance of a judge asserting the authority to determine the constitutionality of the law, in *Commonwealth v. Canton*.<sup>185</sup> In stronger language than Marshall ever used, Wythe warned the state legislature that if they “should attempt to overleap the bounds prescribed by them by the people, I, in administering the public justice of the country, will meet their united powers at my seat in the tribunal; and pointing to the Constitution, will say to them, *'here is the limit of your authority; and hither shall you go but no further.'*”<sup>186</sup>

<sup>184</sup> Kirtland, *George Wythe*, 175.

<sup>185</sup> Schwartz, *Main Currents*, 83.

<sup>186</sup> *Commonwealth v. Canton* 9 Va. (4 Call) 634 (1782). The precise wording of Wythe's pronouncement is debatable, having first been recorded forty-five years after the case.



Despite its incendiary language, Wythe's statement caused little uproar because it did not actually attempt to overturn a legislative act. It affirmed one, and then warned that next time the legislators might not be so fortunate. Since it ruled in the negative, it amounted to no more than a non-binding legal opinion. Marshall built upon, but expanded, this Virginian tradition of law with his landmark decision in *Marbury v. Madison* in 1803, when he similarly asserted judicial supremacy while ruling in the negative. While limited in its immediate effect, the rhetorical significance of Wythe's declaration, coming from the commonwealth's most independent judge, foreshadowed the attitude Wythe would display toward the most challenging questions of law posed by slavery.

When called upon to judge complicated legal principles in his court, Wythe relied upon the Virginia constitution as his source of authority. Drafted during the height of Revolutionary fervor in 1776, the document remained unchanged during Wythe's tenure as chancellor, allowing him to cast himself as the defender of natural law and natural rights. He positioned himself as a classical republican in an increasingly liberal legal culture.<sup>187</sup> Jefferson and Marshall, despite their intense personal and ideological

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Biographers universally accept the quotation, especially as the sentiment is consistent with the accepted tenor of Wythe's jurisprudence.

<sup>187</sup> Richard Brisbin, in "John Marshall and the Nature of Law in the Early Republic," *The Virginia Magazine of History and Biography* 98 (January 1990): 57-80, summarizes a transition of Virginia legal culture from a "classical republican" to a "liberal" paradigm. In the classical model, "higher law" and virtuous leadership were the instruments to build a community consensus – the basis of government's authority - typified by Wythe's judicial independence and reliance on the Revolution's emphasis on natural law, codified by the Virginia Constitution. The liberal model, on the other hand, emphasized personal liberty protected by a secular, impersonal set of institutions, wherein government was relieved of the responsibility to facilitate fairness or justice, in the philosophical sense. Instead, it existed to facilitate the individual's ability to succeed at personal interests, such as commercial gain. Brisbin ultimately concludes that John Marshall was a liberal

divisions, shared an inability, as national political figures, to affect any substantive challenge to slavery's existence in the republic. Citing its longstanding sanction by the community as the basis for its legality, Marshall said of the slave trade in the *Antelope* case, "This court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law."<sup>188</sup> For Marshall, the impersonal application of legal principles meant that for the moment, custom trumped concerns of humanity. In Wythe's estimation, however, those very "feelings" (of human compassion, natural rights, and justice) that Marshall dismissed as legal distraction were, for him, the very basis for the law's authority.

The volume of equity cases in Virginia eventually necessitated the creation of additional chancery courts in eastern and western Virginia in 1802. Wythe remained the sole chancellor in the central district of Richmond even as he approached his eightieth birthday. The equity principles that governed Wythe's court, as well as his virtual independence on the bench, meant that he was uniquely free to apply his own personal views on republican law in a manner not available to most judges. When the unusual republican dilemma of slavery appeared in Wythe's court, the subject, more than any other, reflected his personal philosophy.

The idea of judicial review was not new when Wythe expressed it in 1782, any more so than when John Marshall specified it twenty-one years later in *Marbury v.*

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jurist influenced by a classical foundation. In slavery cases, Marshall adhered to Brisbin's model; he deliberately ignored standards of fairness of republican "justice" in favor of supporting the rights of property that promoted commercial development at the cost of human rights. Wythe, on the other hand, appealed to a universal concept of natural law from his elevated position on the bench to undermine the institution of slavery in Virginia.

<sup>188</sup> *The Antelope*, 23 U.S. 10 Wheat, 66 (1825)

*Madison*. In America, as early as 1776, John Adams suggested that independent judges would be required to check the potential abuses of power by the legislative or executive branches in a three-branch system of government that had yet to come into existence.<sup>189</sup> In *The Spirit of the Laws*, Montesquieu had described such a government, but conceded that the judicial branch would be “in some fashion, null.”<sup>190</sup> Alexander Hamilton agreed eleven years later when he wrote, in *Federalist 78*, that the federal judiciary would possess “neither *force* nor *will*.”<sup>191</sup> St. George Tucker likewise bemoaned the subservience of the judicial branch by quoting Montesquieu in his edition of *Blackstone’s Commentaries*.<sup>192</sup>

In practice, judges in the early years of the republic wielded little more power than Montesquieu or Hamilton had imagined. Judicial review was often discussed but rarely asserted. But the foundation laid by Adams, in his pamphlet *Thoughts on Government* in 1776, whose logic was adopted by George Mason and integrated into Virginia’s constitution of the same year, provided the means for assertive judges to slowly fashion the judiciary into an appropriately authoritative check on the executive

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<sup>189</sup> Adams’ influence on the concept of judicial review in American is summarized by Scott D. Gerber in *The Political Theory of an Independent Judiciary*, 116 Yale L.J. Pocket Part 223 (2007), <http://thepocketpart.org/2007/01/09/gerber.html>.

<sup>190</sup> Anne M. Cohler, Basia C. Miller & Harold S. Stone, eds., Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989), 160. Quoted in Gerber, *Political Theory*, 224.

<sup>191</sup> Alexander Hamilton, "Federalist #78," in *The Federalist Papers* (Chicago: American Bar Association Publishing, 2009), 450.

<sup>192</sup> Tucker, *Blackstone*, I, 127-128.

and the legislature.<sup>193</sup> In Virginia, from the 1780s on, Wythe spearheaded this effort. Elevated to the nation's highest tribunal in 1801, John Marshall built on the tradition.

Despite his confidence of his own judicial independence, Wythe's rulings in the court of equity were subject to review in a court of law at Richmond's General Court of Appeals. Above Wythe in the legal chain of command presided Edmund Pendleton – the same amiable lawyer whose force of personality had often bested Wythe's intellect in Virginia's colonial courts. A biographer notes that during this period of judicial independence, more than half of the decisions appealed from Wythe's Chancery Court were modified or reversed by Pendleton's Court of Appeals.<sup>194</sup> Thus the mid-century disagreements over the nature of law still provided a source of tension and conflict, even in the post-revolutionary commonwealth. Wythe and Pendleton, the last living links to the colonial legal culture, still struggled to apply their own visions of the law to benefit society, a dichotomy only broken by Pendleton's death, at age eighty-two, in 1803. The vacant position on the Court of Appeals, in turn, was offered to St. George Tucker.

St. George Tucker left the District Court bench for the Virginia Court of Appeals in 1803, and the increased responsibility of the higher court prompted him to quit the law professorship at the College of William and Mary. He followed Wythe's footsteps from educating Virginia's young republicans to actively applying that law in the commonwealth's highest courts. As a judge of the Appeals Court, Tucker often had the task of reviewing, correcting, and sometimes criticizing Wythe's version of the law.

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<sup>193</sup> Gerber notes that “George Mason, who is generally credited with being the principal author of Virginia's initial state constitution, borrowed heavily from Adams's pamphlet.” Gerber, “Political Theory,” 228.

<sup>194</sup> Kirtland, *George Wythe*, 179.

George Wythe and St. George Tucker, as relatively minor figures in the grand history of the early republic, are often described simply as Jeffersonian or Republican in their legal and political thinking. Those who have explored their interaction further have found the more nuanced realities that underlie the popular categories of analysis. Eva Shepard Wolf correctly characterizes Wythe as “one of the most liberal judges in Virginia,”<sup>195</sup> while Christopher Doyle, in more than one publication, offers persuasive evidence of the overwhelmingly conservative nature of Tucker’s republicanism.<sup>196</sup> Jefferson respected, influenced, and sought counsel from both men.<sup>197</sup>

Tucker publicly displayed his suspicion of the national Federalist Party. In a letter to John Marshall, written on the occasion of the death of George Washington in 1799, Tucker reminded his old Federalist friend of his “forever unbounded veneration” for the first president. He could not resist slipping in that “by some circumstances in his administration,” his respect for Washington had been reduced, but “within limits,” of course.<sup>198</sup> Tucker enclosed a brief memorial eulogy, in Latin, which he suggested might make a suitable inscription for a national monument to Washington. He recorded the exchange in his personal notebook and on the following pages he set about drafting a

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<sup>195</sup> Wolf, *Race and Liberty*, 148.

<sup>196</sup> see Christopher Doyle “Judge St. George Tucker and the Case of *Tom v. Roberts*: Blunting the Revolution’s Radicalism from Virginia’s District Courts,” *Virginia Magazine of History and Biography*, 106 (Autumn 1998), “The Randolph Scandal,” and *Lord, Master and Patriot*.

<sup>197</sup> Richard Brisbin, however, explicitly identifies George Wythe as a Federalist in “John Marshall and the Nature of Law in the Early Republic,” 63, as does Christopher Doyle in *Lord, Master and Patriot*, 35. On the other hand, George Kirtland refers to Wythe as “an unwitting tool” of the political machinations of John Marshall and the Federalists.” *George Wythe*, 150.

<sup>198</sup> St. George Tucker to John Marshall, June 15, 1800 (copy, in Tucker’s hand, in an unnumbered red volume labeled “St. Geo Tucker Notes” in Tucker-Coleman Papers, Mss. 40 T79, Box 63, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary).

proposed revision for the United States Constitution. With Washington gone, he suggested the repeal of Article II – the provision for the Executive Branch – in its entirety. In place of a president, Tucker offered the alternative of a “Federal Council of the United States,” consisting of one deputy from each state in the Union.<sup>199</sup>

Tucker’s sentiment recalls the efforts of George Mason and Edmund Randolph, who, at the Constitutional Convention, had suggested an advisory council similar to Tucker’s new proposal.<sup>200</sup> Tucker, Mason, and Jefferson alike feared what Tucker called an “elective aristocracy.” Locally, the deference to a seemingly hereditary progression of county magistrates and administrators in the courts similarly bothered Tucker, and he never ceased criticizing the backward and unrepublican nature of county justice. Though, in the case of his stepson Richard, its faults had served his interests well.<sup>201</sup>

In one sense, Tucker’s views on the executive reflect a Jeffersonian tendency to encourage democratic participation as a preventative measure against the potential tyranny of a powerful executive. The death of Washington provided a possible opportunity to revise the national government into something more like the previous Confederation; a regional solution to the Virginians’ fears of Northern influence. Tucker’s revision of Blackstone’s *Commentaries* a few years later offered one of the first detailed, public legal justifications of what became known as the “compact theory” – the contention that each state possessed the legal authority to judge the constitutionality of federal legislation.

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<sup>199</sup> “St. Geo Tucker Notes,” pages not numbered, in Tucker-Coleman Papers, Mss. 40 T79, Box 63, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary.

<sup>200</sup> Burstein and Isenberg *Madison and Jefferson*, 163.

<sup>201</sup> Tucker, *Blackstone*, III, Book 4, Note A. “Summary View of the Judicial Courts of the Commonwealth, and of the United States, in Virginia.”

Marshall, on the other hand, believed in the concept of the “great man,” who was uniquely suited to lead. Washington was such a man, Marshall’s father had been such a man, and Marshall believed he was as well. The unique opportunity of the Revolution had elevated superior men, and it was those men’s responsibility, it followed, to utilize their leadership positions to adopt measures to protect the people from their own ill-advised decisions before the corrosive effects of democracy took that power away. Marshall stressed a strong executive – an idea that went against the traditional Virginian notion of republicanism. Virginia, under the wartime direction of Wythe, Mason, and Jefferson, had established a very weak executive. No one man, no matter how great, could rule Virginia from either the governor’s office or the bench.

Tucker ultimately conceded somewhat to Marshall’s viewpoint inasmuch as he acknowledged that popular democratic passion represented a more clear and present danger than did an overreaching executive. He did not present his proposed amendment to Congress, and in its margin he scribbled, “The Experiment of an Executive Directory in France, by no means tends to recommend this amendment. ‘We are better as we are.’”<sup>202</sup>

Even for a distinctly local figure like Tucker, national politics and international events shaped the evolution of his concept of republican law. The chaos of the French Revolution stoked American fears of the fragility of their own republic, and warned that rampant democracy might violently displace it. The simultaneous slave revolt in Haiti offered nervous Virginians a glimpse of what might happen if the legal community

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<sup>202</sup> “St. Geo Tucker Notes,” pages not numbered, in Tucker-Coleman Papers, Mss. 40 T79, Box 63, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary.

continued to ignore the contradiction between the property rights of white men and the natural rights of slaves.<sup>203</sup>

At this time Virginia's most distinguished legal minds consistently concluded that the judiciary offered the best hope to ensure the survival of the republic in the new century. Wythe, the eldest and the freest from institutional or political oversight, used the bench to keep the ideals of 1776 alive in the courts, to the consternation of the more conservative judges who heard his cases on appeal. Tucker, an upwardly mobile young man of the Revolution, united the nervous gentry's need for order and deference with the Republicans' distrust of monarchical rule. His alliance with Jefferson, his revision of Blackstone, and his legal efforts to address slavery reflect the difficulty of reconciling those ideals. Marshall, the frontier-gentry turned Federal judge, cautiously navigated the ideological gray area between interested politics and scientific law – an immemorial intersection that was seamless in Virginia but problematic in Washington. Even Jefferson, long absent from direct involvement in functional law in Virginia, remained an ever-present guiding force in republican legal thought in the new cultural era of the Jeffersonian Revolution.

“Slaves and Indians,” Robert Faulkner writes, “were those unfortunate men essentially outside of America's civil society, but ruled by it.”<sup>204</sup> Though the law acted upon them, their legal opportunities were few. After 1795, however, slaves could sue as paupers.<sup>205</sup> The circumstances of the court system meant that for most slaves, their first appearance in Virginia's legal culture would be before the Chancery Court and George

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<sup>203</sup> Wolf, *Race and Liberty*, 115-116.

<sup>204</sup> Robert K. Faulkner, *The Jurisprudence of John Marshall* (Princeton: Princeton University Press, 1968), 58.

<sup>205</sup> Doyle “Randolph Scandal,” 297.



Wythe. His equity court addressed cases where the common law offered no procedure for redress or where its application clearly contradicted basic principles of fairness. The function of the court of equity differed from the court of law in other significant ways as well. In simplest terms, a claimant applied to the General Court for compensation, especially in the form of money. For example, a farmer could ask the court to compel a neighbor to pay for a damaged fence, or, in Virginia, to punish them for killing or maiming their slave property.

The Chancery Court, on the other hand, addressed a different sort of legal need – to compel a fair action or to prevent a harmful one, rather than to compensate after the fact. An injunction, for example, came from the Chancery Court, as did any attempt to modify the conditions of an existing contract. For example, a slave claiming free status benefitted little from the prospect of monetary compensation or from punishing their attacker. The remedies of the General Court could not alter their location or status, especially when threatened with sale to the deep South. The Chancery Court could halt their sale and ultimately order the owner to free his human property. In this manner, many of the most difficult questions aroused by slavery in the republic came to George Wythe before anyone else.

Wythe’s personal views on slavery can be interpreted from his private behavior as much as judicial decisions. When his wife died in 1787, just before the reorganization of the courts prompted his retirement from William and Mary and appointment to the Chancery bench, Wythe freed his own slaves.<sup>206</sup> His forty-five year old cook and

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<sup>206</sup> Philip D. Morgan “Interracial Sex in the Chesapeake and the British Atlantic World, c.1700-1820” in Jan Ellen Lewis and Peter S. Onuf, eds., *Sally Hemmings and Thomas*

housekeeper, Lydia Broadnax, stayed on as his free servant, relocating with him to Richmond in 1791. The same year, Michael Brown, a free mulatto boy of unknown parentage was born. By the end of the decade, Michael resided in the Wythe household, receiving all the benefits of a Wythe-supervised education.<sup>207</sup> Broadnax divided her time between duties in Wythe's household and taking in boarders at her own house in the city.<sup>208</sup> Upon his death in 1806, Wythe, who had no children, provided in his will for the financial support of Lydia and Michael, as well as another of the slaves he freed in 1787.

St. George Tucker maintained his planter status and his extensive slave holdings, even as he decried the theoretical evils of slavery. Like other Virginians, he blamed the British for binding the colonists to the reprehensible system. But unlike most of them, he undertook some practical attempts to compose a palatable solution to extricate the Americans from their dilemma without disrupting the social order.

Tucker expressed a Jeffersonian optimism about the transformative power of the Revolution, which he deemed the perfect time to cast off the corrupt English tradition, just as Jefferson had desired to cast off the constraints of English common law. "Should

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*Jefferson: History, Memory, and Civic Culture* (Charlottesville: University of Virginia Press, 1999), 58.

<sup>207</sup> Michael may have been Lydia Broadnax's son, though she was fifty years old at the time of his birth. At least one contemporary insisted that Lydia was Wythe's mistress and Michael his son. See "Memoranda concerning the death of Chancellor Wythe" related by a Dr. John Dove to T.H. Wynne, 16 September 1856, in Julian P. Boyd and Edwin W. Hemphill, *The Murder of George Wythe* (Philadelphia: privately printed for the Philobiblion Club, 1949).

Philip Morgan dismisses this conclusion, noting the ages of the participants (Wythe was sixty-five, Lydia fifty) and the half-century lapse between Wythe's death and Dr. Dove's account. Robert Kirtland further proclaims there is "not a shred of evidence" to support the conclusion. *George Wythe*, 163. The convenient timing and unusual living arrangement certainly invites the speculation, but ultimately either possibility is indicative of Wythe's practical anti-slavery commitment and progressive racial attitudes.

<sup>208</sup> Richmond City tax records, 1797, cited in Kirtland, *George Wythe*, 163.

we not have left our gift upon the altar,” Tucker declared, “that we might first be reconciled to our brethren whom we held in bondage? Should we not have loosed their chains, and broken their fetters?” Eva Shepard Wolf, in her examination of manumission practices in Virginia, finds that the period immediately following the Revolution indeed offered cause of optimism among antislavery advocates. Their hopes dissolved over time, ironically because increasingly successful efforts at individual manumission emphasized the existence of free blacks in the community, causing the stability of racial order - as perceived by white Virginians - to break down.<sup>209</sup> And George William Van Cleve cites Tucker’s 1796 abolition proposal as one of the last plausible efforts to keep slavery a local, rather than federal, problem.<sup>210</sup>

Tucker’s attitude toward slavery coincides with his general approach to republican law: that the chaos of Revolution provided the appropriate time for the mass restructuring of society, but that once the Revolution was complete and society returned to orderly operation, change must occur within the strict confines of law. Thus Tucker’s postwar abolition plan was thoroughly conservative, even if his language borrowed from the radicalism of Revolutionary sentiment. In fact, Tucker’s plan accomplished *abolition* without a single *emancipation*. No slave alive at the time of the passage of the bill would die free. Their children would be bound to servitude for the first decades of their lives in order to compensate their masters for their value, and then *their* children, in turn, would be free. Full emancipation would take about a hundred years, allowing slaveholders to slowly transition to paid labor and not costing them a penny in lost equity. Economic stability trumped humanitarian concerns, although it is impossible to estimate to what

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<sup>209</sup> Wolf, *Race and Liberty*, 86.

<sup>210</sup> Van Cleve, *A Slaveholders’ Union*, 210-211.

extent this proposal represented Tucker's own convictions or is his pragmatic realization of the overwhelming conservatism of the legislature. His stepson Richard and fellow judge George Wythe actively introduced the destabilizing elements of free blacks into the community, but Tucker certainly preferred gradual abolition and removal. Even so, he urgently warned, "considerations of policy, as well as justice and humanity, must evince the necessity of eradicating the evil, before it becomes impossible to do it, without tearing up the roots of civil society with it."<sup>211</sup>

Tucker sounded definitively Jeffersonian when he wrote, in opposition of slavery, "democracy..." forms "the *basis* and *foundation* of our government. For our [Virginia] bill of rights, declares, "that all men are, by nature *equally free*, and independent, and have certain rights of which they cannot deprive or divest their posterity... namely the enjoyment of life and *liberty*, with the means of acquiring and *possessing property*."<sup>212</sup> Tucker's celebration of Virginia's Bill of Rights contained the primary republican contradiction of human and property rights, but his *Dissertation on Slavery* offered the solution. First, free the slaves, who, as human beings, were suited for *liberty*, but as inferiors, not for *equality*.<sup>213</sup> Second, make them leave the state by their own volition. Tucker concluded African colonization too expensive to be practicable, so he simply opted to make existence for free blacks in Virginia so unbearable that they would leave of their own accord. With this accomplished, both the dilemmas of liberty versus property and the unsettling question of racial cohabitation would be solved, in Tucker's estimation. Jefferson, as noted, allowed for no such possibility. Former slaves should be

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<sup>211</sup> Tucker, *Dissertation on Slavery*, 66.

<sup>212</sup> Tucker, *Blackstone*, I, 54. Emphasis in original.

<sup>213</sup> Tucker, *Dissertation*, 75.

exiled from Virginia (and the American continent) after emancipation, lest their proximity to white republicans “produce convulsions which will probably never end but in the extermination of one or the other race.”<sup>214</sup>

Before attempting to formulate a feasible plan to eliminate the slavery dilemma, Tucker solicited advice of Massachusetts clergymen Jeremy Belknap. The reverend, in turn, circulated Tucker’s inquiry among many prominent men of Massachusetts, including then vice-president John Adams. Adams, in his 1776 *Thoughts on Government*, had provided the seed for the logic that underpinned the independent judiciary in Virginia that George Wythe and St. George Tucker now enjoyed. Perhaps he and other prominent New Englanders could provide Tucker the necessary insight to affect gradual abolition in the southern states as had been accomplished in the North. Tucker, however, voiced a critical distinction. In a letter to Belknap of November 27, 1795, Tucker insisted “Blacks and Mulattoes should be excluded from all the valuable rights of Citizenship.” “Narrow as that policy may appear,” Tucker conceded, “I am persuaded it is necessary for the preservation of the peace of Society.”<sup>215</sup> Unlike Jefferson, who voiced an unapologetic assertion of the superiority of the white race in *Notes on the State of Virginia*, and Marshall, who remained effectively silent on his personal racial views, Tucker openly acknowledged his prejudice, while publicly apologizing for it.<sup>216</sup>

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<sup>214</sup> Jefferson, *Notes on the State of Virginia*, 176.

<sup>215</sup> St. George Tucker to Jeremy Belknap, 27 November, 1795 (from the Jeremy Belknap Papers, Massachusetts Historical Society, accessed online at <http://www.masshist.org/endofslavery/?queryID=52>)

<sup>216</sup> In *Lord, Master, and Patriot*, Doyle notes that historians who examine Tucker’s views on race are prone to be more forgiving of his prejudices, insomuch as he at least expresses a certain guilt at being unable to overcome his bias. Ultimately, Doyle concludes that Tucker’s racism is not less harmful than Jefferson’s, even if it is more self-aware.

Tucker's apology for his racism and efforts at gradual emancipation (in seeking counsel from New England, proposing legislation, and publishing it all) speak to his commitment to a republican ideal of speaking to posterity. For Tucker who tried to legislate it away, for Wythe who tried to strike it down from the bench, and for Jefferson who could not address it at the national level, slavery was a local problem. More importantly, it was problem for the future. Wythe's efforts were immediate but subject to revision by the more conservative appeals courts. Tucker's were pragmatic and dispersed the solution over multiple generations. In national politics, Jefferson expressed the opinion that each generation should revise its laws. His position was radically different from Marshall's, whose sacrosanct federal Constitution was elevated above popular meddling.

The Virginia legislature, however, failed to enact Tucker's emancipation plan, and as a republican judge, he felt his hands were tied. Even as a strong proponent of judicial review and supremacy, his conception of that power was very limited. When slavery appeared in his court, he continually acted as a Jeffersonian Republican, inasmuch as he conceded to the primacy of the legislature. Of this approach to law, Tucker explained, "if the will of the majority is not permitted to prevail in questions where the whole society is interested, that of the minority necessarily must. The society, therefore, in such a case, would be under the influence of a minority of its members, which, generally speaking, can on no principle be justified."<sup>217</sup> In his view, judges were bound to enforce

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<sup>217</sup> Tucker, *Blackstone*, I, 168-169. There is a distinctive irony to Tucker's acquiescence to the majority will as it pertains to slavery. By the 1830s, immigration and westward expansion had made slaveholders a minority in Virginia and in the nation. The political discourse of the antebellum period continually stressed the frustration of non-slaveholders submitting to the political bullying of the southern slaveholding minority, a

the law, not construct it. They “interpreted” only where the meaning of the statute was indiscernible, not just disagreeable. Therefore if the legislature would not pass his anti-slavery legislation, he refused to find a way to enact it from the bench.

George Wythe seemed to have no such qualms about judge-made law. In the case of slavery, he clearly believed the majority in Virginia to be wrong, and the common law was wrong as well. Time, tradition, and precedent clearly dictated slavery’s legality in Virginia. Enlightenment law promised the moral certainty that common law obscured, and Wythe’s comfortable independence on the bench allowed him to practice his vision unobstructed. Of Wythe’s relationship to the common law, Kirtland concluded that the Chancellor apparently “had no quarrel with precedent as such, but is critical only of its indiscriminating application.”<sup>218</sup> This, in essence, was the function of the Chancery Court – to mediate the harsh aspects of the common law. In this case, common law allowed for consistent, predictable application, but its predictability stifled liberty. Kirtland contends that Wythe’s jurisprudence acknowledged that rigorous predictability occasionally stifled the real object of the law – substantial justice.<sup>219</sup> Post-Revolutionary law was aimed at fairness, but republican judges had to choose whether slaveholders or slaves themselves deserved “justice” when they opposed each other in the courts.

In 1776, John Adams had warned that juries could not be trusted to have the capacity to function as an effective check on the legislative and executive branches; a

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crisis ultimately resulting in Civil War. See William Freehling, *The Road to Disunion, Vol. II: Secessionists Triumphant, 1854-1861* (New York: Oxford University Press, 2007), and *Proceedings and Debates of the Virginia State Convention of 1829-1830* (Richmond: Samuel Sheperd & Co., 1830)

<sup>218</sup> Kirtland, *George Wythe*, 288.

<sup>219</sup> *Ibid.*, 289.

cadre of professional judges would have to guide them.<sup>220</sup> Jury participation offered a tangible exercise of the Revolution's promise of popular participation, but the successes of amateur lawyers like Patrick Henry in swaying juries from rational decisions also worried Jefferson. If common juries were free from the corruption of law's "metaphysical subtleties," they were also free from the refined reasoning of the Enlightenment. Jefferson realized that no simple solution existed. Ultimately, he decided that in protecting republican virtue, "honest ignorance would be safer than perverted science."<sup>221</sup>

The honest ignorance Jefferson preferred, however, had certain restrictions. He sought to restrict foreigners from juries,<sup>222</sup> and he desired to grant the House of Delegates the power to impeach federal grand jurors and jurors – a responsibility that would nudge legal authority nearer to the state level and away from the federal level, as well as away from a federal judiciary and closer to a legislature. Like Tucker, Jefferson still believed that only freeholders should serve on juries. In short, Virginian jurors should have vested interest in Virginia – the classical republican notion still prevailed that property was the measure of autonomy. John Marshall, despite his innumerable differences with Jefferson on many counts, expressed an identical conviction at the convention to revise Virginia's Constitution in 1829-1830. As one of the last remaining political figures of the founding generation, Marshall clung to the notion that property ownership should dictate civil status.

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<sup>220</sup> Gerber *Political Theory*, 224.

<sup>221</sup> Quoted by Daniel Blinka in "Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic," *The American Journal of Legal History* 47 (January 2005): 101.

<sup>222</sup> Burstein and Isenberg, *Madison and Jefferson*, 332-333.



St. George Tucker shared the Jeffersonian concern for encouraging able juries as a healthy part of the democratic impulse. In 1798, Jefferson suggested that juries be chosen by election and thus be subject to democratic accountability – another instance of adapting the political paradigm to the needs of republican law. Tucker’s solution differed; he betrayed the elitist streak that separated him from Jefferson in this regard. Jurors, Tucker insisted, should be “men whose understandings may be presumed to be above the common level.”<sup>223</sup> Helpfully, Tucker offered a list of the sorts of gentlemen who could be presumed to make good jurors. His list of qualifications was short: “honest, discreet, and intelligent.” In addition to those intangible qualities of character, Tucker offered a more precise list of acceptable occupations. Only “yeoman, freeholders, merchants, and traders,” should populate the jury box. His extensive list of undesirables is much more lengthy and specific:

clergymen, practitioners of physic, or surgery, or attorneys of any court, sheriffs, or their deputies, collectors of the public taxes, county-levies, or poor rates, overseers of the poor, county surveyors (a stipulation that would have disqualified George Washington and his friend Thomas Marshall from public service), or their deputies, inspectors of tobacco, ferry-keepers, or constables ; nor tavern keepers, distillers (disqualifying Washington again!), or venders of spirits by retail, overseers or managers of plantations or mills for others, merchants’ clerks, or shopkeepers (precluding, for a time, Patrick Henry), journeymen, or apprentices ; nor such as be, or be reputed to be conspirators, barretors, champertors, embracers, maintainers or movers of suits, swindlers, gamblers, idle haunters or frequenters of taverns, breakers or disturbers of the peace, or other disorderly persons, or person, whatsoever ; but altogether be of the best fame, reputation, and understanding, and credit, in their country.<sup>224</sup>

Precisely who would determine which potential jurors possessed the disqualifying traits of character – swindling, gambling, idleness, disorder – or attest to their fame, reputation, or credit, Tucker did not specify. It almost goes without saying that the growing

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<sup>223</sup> Tucker, *Blackstone*, III, 64.

<sup>224</sup> *Ibid.*

population of free blacks in Virginia were universally excluded from all participation in civil society, jury service included, a view consistent with Tucker and Jefferson's stated opinions on race.

Tucker's suspicion of such an expansive subset of the population meant that he was much friendlier to the still ubiquitous *Blackstone's Commentaries* than Jefferson. The synthesis of English common law, first published some thirty-five years earlier, was still the standard reference for Virginia lawyers and educators at the time of the Jeffersonian Revolution. Julian Waterman offers that Jefferson found "little to praise in the political economy of Blackstone, the eulogist of an English society and government which had as its foundation the protection of the propertied class."<sup>225</sup>

Jefferson's antagonism toward Blackstone stemmed from his hostility toward the common law itself, which he condemned as complicated, confusing, and ultimately ruinous to liberty. Jefferson believed the ancient Saxons had perfected law and liberty, and that their conquest and the subsequent centuries of piling on English common law tradition made the original, virtuous, law unintelligible. In winning the Revolution, Waterman contends, Jefferson believed the "American colonists had assumed the long lost rights of the Saxons" in a "victory in the war against the English king and his lawyers."<sup>226</sup>

As a legal revolution, American independence offered the unprecedented opportunity, in Jefferson's view, to discard the unwieldy trappings of common law and return to the simple virtue of statute law – that is, written law dictated by the legislature instead of informally passed from judge to judge over generations. Statute law was

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<sup>225</sup> Waterman, "Thomas Jefferson and Blackstone's Commentaries," 465.

<sup>226</sup> *Ibid.*, 466-467.

unchanging, in theory, where common law was constantly in motion, growing more complicated and cumbersome over time. To borrow the words of Bernard Schwartz, the Revolution promised to prove “statute law was the real law,” and that “the legislator not the judge was the true lawmaker.”<sup>227</sup>

During the Revolution, Jefferson partnered with Wythe in an attempt to discard the existing English laws and create a definitive, original body of republican statutes to govern Virginia. St. George Tucker, on the other hand, boldly declared, “*Great revolutions are too immense for technical formality.*”<sup>228</sup> Jefferson and Wythe’s bold experiment mostly failed. From their frustrating experience in legal-statesmanship, Jefferson and Wythe parted ways, methodologically speaking. Jefferson carried the Revolution’s optimistic spirit of reform with him to national governance, while Wythe moved from the college to the bench, where he never abandoned his belief in the transformative power of law, an ideology he applied liberally in his court.

Some thirty years later, the legal culture’s continued dependence on Blackstone bothered Jefferson. Virginia law was still largely the “judge made” law of English tradition, and John Marshall’s elevation to the nation’s highest court threatened to corrupt the whole republic with this undesirable habit. “Unwritten law,” Marshall said, “is really human reason applied by the courts, not capriciously, but in a regular train of decisions, to human affairs, for the promotion to the ends of justice.”<sup>229</sup> This exposes a critical

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<sup>227</sup> Schwartz, *Main Currents*, 109-110.

<sup>228</sup> Tucker, *Blackstone*, I, 91. Emphasis in original.

<sup>229</sup> John Marshall in *Livingston v. Jefferson*, Nov., 1811, from John W. Brockenbrough, ed., *Reports of Cases Decided by the Honourable John Marshall, Late Chief Justice of the United States, in the Circuit Court of the United States, and for the District of Virginia and North Carolina, from 1803 to 1833 Inclusive*. 2 vols. (Philadelphia: James Kay, Jun. & Brother, 1837) I, 207.

ambiguity in the concept of republican law: balancing the adherence to precedent and science (uniformity) with the acknowledgment of the judges' obligation to actively construct the law through their decisions (*creating* justice; the judge as a social engineer).

George Wythe, as Virginia's most independent jurist, embraced his role as judicial engineer, especially when slave freedom suits came before his court (as they often did). One of the first such significant cases involved the slaves of John Pleasants, Sr., a Virginia Quaker who died in 1771, stipulating in his will that his slaves be freed when they reached thirty years of age.<sup>230</sup>

In the 1790s, the Pleasants slaves began to come of age, and the Pleasants heirs freed close to one hundred slaves in multiple counties around Richmond. John Pleasants' son, Robert, actively opposed slavery in Virginia during this time, joining Virginia's abolition society and corresponding with Thomas Jefferson and James Madison about the subject. Pleasants asked Madison, his Congressional representative in 1791, to sponsor a legislative condemnation of the African slave trade, which was constitutionally protected until 1808. Further, he expressed his strong desire to see Madison support a plan of gradual abolition in Virginia. "Seeing we live in an enlightened age," Pleasants wrote to Madison in familiar language, "when liberty is allowed [sic] to be the unalienable right of all mankind, it surely behoves us of the present generation, and more especially the Legislature, to endeavour to restore one of the most valuable blessings of life, to an

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<sup>230</sup> Manumission was illegal in Virginia at the time of John Sr.'s death in 1771. His will optimistically dictated that his slaves be freed according to the provisions of the manumission law he assumed would exist thirty years hence. Such a law was passed in 1782.

David Brion Davis, *The Problem of Slavery in the Age of Revolution, 1770-1823* (New York: Oxford University Press, 1999), 196.

Newmeyer, *Heroic Age of the Supreme Court*, 94-95.

injured and unhappy race of people.”<sup>231</sup> Madison, in response, offered measured political justifications for his refusal to consider either suggestion. Regarding a public denunciation of the slave trade, Madison insisted he must defer to “those from whom I derive my public station.” To his slaveholding Virginia constituents, he “might be chargeable at least with want of candour, if not of fidelity, were I to make use of a situation in which their confidence has placed me, to become a volunteer in giving a public wound...to an interest on which they set so great a value.”<sup>232</sup> As for any plan for practical abolition in Virginia, Madison astutely warned that efforts to undermine slavery might do more harm than good, by arousing slaveholder’s fears and prompting political backlash. Madison predicted nervous slave owners might respond to perceived threats to their institution by revoking the legal right of manumission altogether.<sup>233</sup>

As a judge, St. George Tucker did not derive his public station from popular consent, so he possessed a bit more freedom to dissent from the majority opinion. Despite misgivings about its disruptive potential, Tucker reluctantly attached his name to Robert Pleasants’ abolition petition.<sup>234</sup> Throughout the 1790s, Pleasants and Tucker exchanged correspondence as they attempted to legislate a solution to ending slavery in Virginia.

Five years after his exchange with Madison, Pleasants wrote to Jefferson to solicit support for educational reform to coincide with gradual abolition. Appealing to his

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<sup>231</sup> Robert Pleasants to James Madison, Jun. 6, 1791.

The Papers of James Madison Digital Edition, J. C. A. Stagg, editor. Charlottesville: University of Virginia Press, Rotunda, 2010.

Canonic URL: <http://rotunda.upress.virginia.edu/founders/JSMN-01-14-02-0024> [accessed 10 Mar 2011]  
Original source: Congressional Series, Volume 14 (6 April 1791–16 March 1793)

<sup>232</sup> James Madison to Robert Pleasants, Oct. 30, 1791.

Stagg, ed. Papers of James Madison

Canonic URL: <http://rotunda.upress.virginia.edu/founders/JSMN-01-14-02-0086> [accessed 10 Mar 2011]  
Original source: Congressional Series, Volume 14 (6 April 1791–16 March 1793)

<sup>233</sup> *Ibid.*

<sup>234</sup> Doyle, *Lord, Master and Patriot*, 151.

republican intellectual idealism, Pleasants reminded Jefferson that freedom, in “this enlightened day is generally acknowledged to be their right.”<sup>235</sup> While the law did not recognize this enlightened viewpoint, Jefferson praised the Quaker’s efforts at providing for general public education, consistent as it was with his own view that enlightened learning, in any form, could only strengthen the republic, because “ignorance and despotism seem made for each other.”<sup>236</sup>

While Robert Pleasants actively campaigned for abolition, some of the Pleasants’ heirs refused to comply with the conditions of John Sr.’s 1771 will. Robert filed suit against them in 1798 in order to force them to free the remaining slaves. Because Robert’s legal action required the court to compel the enforcement of a will, it fell under the jurisdiction of George Wythe’s Chancery Court. As his counsel, Robert Pleasants obtained two talented attorneys, including John Marshall. Opposing Marshall was Edmund Randolph, his former Richmond law partner. Exiled from national politics since 1795, and facing huge personal debts,<sup>237</sup> Randolph comfortably returned to the life of a busy, professional Richmond lawyer, where his skill and prestige placed him in high demand. By the end of the 1790s, Randolph was appearing as primary or co-counsel in half of all the cases heard by Richmond’s Court of Appeals. The only attorney equally successful by volume was the popular New York expatriate John Wickham.<sup>238</sup> In the

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<sup>235</sup> Robert Pleasants to Thomas Jefferson, June 1, 1796.

Oberg, Looney, eds. Papers of Thomas Jefferson Digital Edition

Canonic URL: <http://rotunda.upress.virginia.edu/founders/TSJN-01-29-02-0084> [accessed 10 Mar 2011]

Original source: Main Series, Volume 29 (1 March 1796–31 December 1797)

<sup>236</sup> Thomas Jefferson to Robert Pleasants, Aug. 27, 1796.

Ibid., Canonic URL: <http://rotunda.upress.virginia.edu/founders/TSJN-01-29-02-0135> [accessed 10 Mar 2011]

Original source: Main Series, Volume 29 (1 March 1796–31 December 1797)

<sup>237</sup> Reardon, *Edmund Randolph*, 337.

<sup>238</sup> Ibid., 348-349.

Pleasants case, Randolph and Wickham argued together against their friend and neighbor John Marshall.

Chancellor Wythe ruled in favor of John Marshall and Robert Pleasants, proclaiming the legality of their emancipation and taking the surprising step of awarding the slaves compensation for the time they had been illegally held in bondage.<sup>239</sup> The opposing Pleasants heirs quickly appealed the case, and it was presented to the Court of Appeals in Richmond the following year.

Rather than relying on broad appeals to liberty or justice, Marshall attempted to define a practical boundary to the conflicted legal space between property rights and human rights that plagued the republican lawyers and judges. The defendants argued that because the law allowing emancipation was not passed until 1782, any slaves born between the time of the will and the emancipation law should not be subject to freedom. All things being equal, in terms of property law, the argument was sound. If the slaves had been livestock, tools, or other physical property, the statute was plain. Marshall's argument insisted that the will granted some legal guarantee of freedom to persons even as they remained property, and acknowledged the overlapping legal concepts. His argument insisted that some legal distinction must exist between human property and inanimate property. The court partially agreed. The three judges of the appeals court, among them Wythe's sometime ideological opponent Edmund Pendleton, upheld the legality of the emancipation but reversed Wythe's award of damages.<sup>240</sup>

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<sup>239</sup> *Virginia: In the High Court of Chancery, March 16, 1798* (Case #38963), 2-3.

<sup>240</sup> Smith, *Definer of a Nation*, 251-252.

When Robert Pleasants appealed to Madison for political assistance in effecting abolition, he wrote to him “believing thou art a friend to general liberty.”<sup>241</sup> In 1791, Madison deemed his support politically impossible. In 1796, Pleasants believed Jefferson “to be a real friend to the cause of liberty,”<sup>242</sup> and as far as education was concerned, Jefferson agreed. In 1798 and 1799, the responsibility fell on John Marshall to construct the legal foundation for a legal right to liberty for slaves, and Pleasants found a receptive audience in the George Wythe. Marshall even succeeded on appeal in the stricter legal environment of the Court of Appeals. By the end of 1799, Marshall left Richmond for a seat in the U.S. Congress at Philadelphia, and the four hundred Pleasants slaves began a life as free persons in republican Virginia.

Seven years later, Marshall was absent from the Virginia legal culture when Jackey Wright brought a pauper’s suit against Houlder Hudgins in the Chancery Court. Wright was a slave, though she appeared “perfectly white.”<sup>243</sup> When Hudgins sold her to a slave trader, she sued. The 1806 case of *Hudgins v. Wright* once again brought Wythe’s revolutionary legal ideals into direct conflict with the higher court.

The outcome of the case rested on Wright’s assertion that she descended from a late seventeenth-century Virginia Indian named “Butterwood Nan.” By Virginia law, Indians could not be enslaved, and existing evidence sufficiently proved that Nan was born of an Indian father. Slave status, however, was matrilineal – passed from slave mother to children. The father’s race or status was irrelevant. Edmund Randolph led

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<sup>241</sup> Robert Pleasants to James Madison, Jun. 6, 1791.

<sup>242</sup> Robert Pleasants to Thomas Jefferson, June 1, 1796.

<sup>243</sup> William W. Hening and William Munford *Reports of Cases Argued and Determined Before the Supreme Court of Appeals of Virginia: with Select Cases Relating Chiefly to Points of Practice, Decided by the Superior Court of Chancery for the Richmond District* (Philadelphia: 1808), I, 134.



Hudgins' defense, claiming that Butterwood Nan's mother had been a black slave, thus extinguishing all of her descendants' legal claims to freedom. Neither the claimant Wright nor Randolph for the defense could prove the status of Nan's mother, so Wright's matrilineal status was legally indeterminate. In Wythe's court, then, Jackey Wright's freedom rested on the judge's decision of which party possessed the burden of proof. If a slave were automatically a slave unless they could prove otherwise, Wright would remain in bondage. If a slave owner were obligated to conclusively defend their claim to ownership against any and all challenges, Wright would go free, and the legal foundation of the entire institution would be seriously compromised.

Chancellor Wythe ruled in favor of Jackey Wright, granting her freedom on the basis of her perfectly white appearance. "Whenever one person claims to hold another in slavery," he announced, "the *onus probandi* [the burden of proof] lies on the claimant."<sup>244</sup>

The broad reaching decision shocked the defense, but Wythe's legal reasoning startled them even more. As his legal authority, Wythe did not claim a common law tradition or precedent, or even an abstract notion of justice, but rather the letter of republican statute, in the form of what he called Virginia's "political catechism"<sup>245</sup> - the Revolutionary era bill of rights. Wythe reminded the court that the republican ideals of the Revolution, codified by the legally binding bill of rights, clearly stated that "freedom is the birthright of every human being,"<sup>246</sup> Anyone claiming the right to enslave another must prove their legal right to do so on an individual basis. He was not proclaiming the illegality or unconstitutionality of slavery, and in fact his decision acknowledged the

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<sup>244</sup> Ibid.

<sup>245</sup> Ibid.

<sup>246</sup> Ibid.

established legal principle that only white men were entitled to republican liberty. Instead, he undermined the institution of slavery by placing the burden on free white republicans to prove that the men and women they enslaved were not white as well - a limited, but significant antislavery victory.

Unlike his extralegal “here is the limit of your authority” proclamation of 1787, Wythe’s 1806 *Hudgins* decision incorporated his personal claim to judicial authority into the legitimate point of law on which the case rested. As such, his claim that the Revolutionary rights of man trumped the rights of property became part of the precedent by which future judges would be bound to abide; that is, if the decision survived an appeal.

After his courtroom defeat in March of 1806, Edmund Randolph quickly appealed the Chancery Court’s decision and began preparing for an appearance before the Court of Appeals and its newest judge, St. George Tucker, at the end of the year. Two months later, the legal community and the whole nation were shocked by the sudden death of the eighty-year old Chancellor Wythe – not by natural causes, but by murder. Apparently poisoned by his shiftless teenage grandnephew George Wythe Sweeney, Wythe survived barely long enough to revise his will in order to disinherit his murderer. To assist him in his weakened state, Wythe called upon his friend and legal colleague Edmund Randolph.<sup>247</sup> Wythe’s longtime housemate and cook, Lydia Broadnax, suffered the effects of the poison but recovered. His fifteen-year old free black protégé Michael Brown died.

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<sup>247</sup> Bruce Chadwick, *I Am Murdered: George Wythe, Thomas Jefferson, and the Killing That Shocked a New Nation* (Hoboken: John Wiley & Sons, 2009), 157.

Before settling the *Hudgins* case at the November session of the Court of Appeals, Randolph found the time to participate in the most sensational trial of the year, the September indictment of George Wythe Sweeney for the chancellor's murder. Randolph took on the surprising and thankless task of defending Sweeney, assisted by William Wirt, a relatively young lawyer. Originally from Maryland, Wirt was too young to be a revolutionary (he was born in 1772), and fancied himself as much a literary talent as a legal one. In 1803, he anonymously published a series of fictional foreign dispatches under the title *Letters of the British Spy*, describing the life and culture of Richmond. In it, he offered a satirical critique of the city's most prominent lawyer, Edmund Randolph. "His mind," wrote the titular spy, "as is often but not invariably the case, corresponds to his personal appearance: that is, that it is turned rather for ornament than for severe use."<sup>248</sup>

Wirt was an outsider and a socially mobile upstart, whose journey more closely paralleled that of St. George Tucker than the aristocratic Randolph,<sup>249</sup> but whatever their differences, they successfully defended George Wythe Sweeney in September of 1806. Sweeney's acquittal resulted from the exclusion of the eyewitness testimony of his surviving victim; Lydia Broadnax's race made her testimony inadmissible.

The following month, Randolph appeared before the appeals court to finally settle the *Hudgins* case. In his decision, St. George Tucker declared his firm loyalty to the precedence of property rights over human rights. In the *Pleasants* case, John Marshall had tried to combine the two concepts, arguing that the slaves' humanity vested them

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<sup>248</sup> Wirt, *British Spy*, 129.

<sup>249</sup> In 1814 Wirt and Tucker collaborated, along with Richmond judge Dabney Carr, on *The Old Bachelor*, a series of satirical essays critical of the Virginia gentry.

with some kind of legal identity beyond simple property, but not fully men (a concept he was able to elucidate from the Supreme Court bench in the *Antelope* case and *Boyce v. Anderson*).<sup>250</sup> Tucker refuted this construction, stating in no uncertain terms that slave property warranted no special legal consideration in his court by virtue of their humanity. “In deciding upon the rights of property,” he wrote, “these rules which have been established are not to be departed from, because freedom is in question.”<sup>251</sup> He upheld the legality of Wythe’s decision, but was careful to specify how his logic differed from Wythe’s. Wythe insisted that Jackie Wright was free because Virginia’s Bill of Rights declared all persons to be free unless proven otherwise. Tucker did not accept this notion of default freedom. Instead he allowed that Wright was free because she was acceptably white by his standards of evidence – in this case, the discretion of the judge. Virginia statute dictated, as Tucker reminded, that “all *white* persons are and ever have been free in this country.”<sup>252</sup> An independent judge, in Tucker’s view, could evaluate the evidence and determine an individual’s race. Wythe’s interpretation of his own latitude to interpret the meaning of the Bill of Rights, however, was overstepping his judicial prerogative. “The Bill of Rights,” Tucker insisted, “was meant to embrace the cause of free citizens... and not by a side wind overturn the rights of property.”<sup>253</sup>

Throughout his life, John Marshall displayed the typically ambivalent Virginian attitude toward slavery and unwillingness to engage in any substantive effort to end it

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<sup>250</sup> James Madison went a step beyond Marshall in his interpretation of the dual nature of slaves’ legal status. He suggested that though slaves were legally more property than man, their status could, theoretically, be altered to that of a dependent, on par with women, children, and aliens. See Burstein and Isenberg, *Madison and Jefferson*, 177.

<sup>251</sup> Hening, *Reports of Cases*, I, 136.

<sup>252</sup> *Ibid.*, 139.

<sup>253</sup> *Ibid.*, 141.

from economic and political necessity. Clearly, the Virginia legislature was too conservative to act. In light of their refusal, George Wythe felt an obligation to correct the injustice and believed it within his authority to do so.

Recalling the infamous witch trials of Salem, John Marshall warned of “the degree of depravity always to be counted on when the public passions countenance crime.”<sup>254</sup> Where the Virginian majority perpetuated its own depravity on a scale far beyond Salem, Wythe concluded that a strict textual application of Virginia’s Revolutionary statute could counter the criminal impulses of the public will. Chief Justice Marshall suggested the survival of this conception of republican law when he wrote in 1813, “an act ought to be so construed as to avoid gross injustice if such construction *be compatible* with the words of the law.”<sup>255</sup> In his own decisions, however, Marshall consistently erred on the side of protecting property rights, even while acknowledging the injustice he was facilitating.

Like Marshall, Tucker relished his judicial authority but in the case of slavery, couched it in a democratic deference to the legislature. In the *Hudgins* case, he reminded the court that the Virginia Bill of Rights was deliberately framed to exclude slaves.<sup>256</sup> Wythe’s attempt to enforce natural rights, though compatible with the words of the law, subverted its obvious intention. Marshall, for his part, conceded that “where great

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<sup>254</sup> Marshall, *Life of George Washington*, I, 481.

<sup>255</sup> *Oliver Evans v. Jordan & Morehead*, 1813, in Brockenbrough *Reports of Cases*, I, 251. Emphasis added.

<sup>256</sup> Edmund Pendleton inserted the clause into the Virginia Bill of Rights specifying that the Enlightenment human rights were conferred on all men “when they enter into a state of society.” White men, of course, were born into this privileged state. Through this legal construction, slaves, who existed outside of civil society, could be excluded from the Revolutionary legacy.

Wolf, *Race and Liberty*, 4-5.

inconvenience would result from a particular construction, that construction is to be avoided, unless,” he qualified, “the meaning of the legislature is plain.”<sup>257</sup> The legal theory expressed by this rhetorical construction allowed Marshall to resign himself to his inability to address the slavery issue in any substantive way by conceding that his belief that an individual judge's personal aversion to slavery could not overcome its sanction by statute, common law, and legislature alike.

Marshall’s judicial career, however, clearly demonstrates that when his personal conviction was attached, his talent at interpreting ‘the words of law’ to suit what he deemed the best interests of the republic was unparalleled. In *McCulloch v. Maryland* in 1819, he famously determined the statutory limitation of the federal government to “necessary and proper” tasks was sufficiently ambiguous as to allow the court to interpret its meaning. When the state of Georgia claimed sovereignty over federally protected Cherokee Indians within their borders, Marshall allowed himself the latitude to prevent the injustice of their removal. Granting the Cherokees their federally dependent sovereignty was not specified, but constructed, by the chief justice as compatible with the words of the law.

An indistinct idea of “republicanism” was the guiding force for Virginia’s early legal culture, but slavery distorted some its keys principles, strongly suggesting that republicanism simply could not work in Virginia. The benefit of open public forums, able to produce rational decisions based on all available information, was impossible. Slaves often possessed crucial information but were rendered silent. A disinterested meritocracy could not replace the hereditary aristocracy, as the slave system continually perpetuated

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<sup>257</sup> *United States v. Fisher*, 6 U.S. 2 Cranch. 358 (1805).

the dependence of the lower classes. This likewise rendered impossible the assembling of neutral, dispassionate juries. And genuine fairness – a true sense of justice as the purpose of law – could not prevail in a legal setting where property rights always trumped natural rights.

Marshall carried some of this frustrating ambiguity to his career in the federal court. His tendency to appoint himself the translator of the “spirit of the law” aligned, in theory, with Wythe’s concept of the role of judge as enlightened arbiter. In terms of slavery, of course, their paths could not have differed more. Marshall’s conception of judicial independence was in line with Wythe and Tucker as well, though his jurisprudence weighted the balance of power toward federal rather than state sovereignty and judicial over legislative authority. Marshall’s position as a federal rather than a state judge widened his separation from the Virginian perspective, where judicial independence meant something entirely different.

Marshall’s views on the executive were likewise unusual in Virginia, a distinction born of his service outside the state during the American Revolution. There, he served with “great men” - often fellow Virginians - but their shared wartime suffering at the hands of an inattentive and weak federal compact of states forever cured them of the local tendency to fear centralization.

Marshall’s career path eventually took him away from Virginia’s courts, where others, still engulfed by the culture whose addiction to slavery choked the republican values they espoused, continued to champion the sort of weak compact government Marshall had experienced and loathed. Virginians like Spencer Roane and John Taylor of

Caroline, with support from Jefferson and legal justification from Tucker, grew increasingly vocal in their denunciation of the power structure Marshall was fashioning. When their rhetoric gained traction, Marshall anonymously combatted them in public newspaper exchanges, but his break with Virginia was complete. His authoritative position on the federal court could not sway the culture he had left behind.

At the federal level, Marshall chose his battles carefully, and framed his opposition with a skillful regard for the fragile state of the ongoing republican experiment. For him, federal supremacy meant the survival of virtue in the face of increasing democratic assault from below, and his constitutional cases reflect a hope for stabilizing the rule of law made possible by the Revolution's elevation of great men. That concern for maintaining stability into the next generation meant that protecting the union was worth the risk, but breaking it up over slavery was not. Though no longer a cultural Virginian, slavery posed the same threat to Marshall's vision of the republic that it did to his ideological opponents.

Marshall did not anticipate the gradual marriage of the unresolved antifederalist claims to state sovereignty with the southern addiction to slavery. He casually deflected it in the one instance it appeared before his court (and joked to Justice Story that bothering to address it would constitute "butting a wall in sport"). During Marshall's tenure on the court, states' rights theory matured, then evolved into a purely southern phenomenon. At the same time, the momentum of abolitionist sentiment provoked increasingly committed counterattacks from slaveholders across the south. In the face of these combined forces, Marshall desperately clung to his position on the Supreme Court even as his health failed and he approached his eightieth birthday.



“The case of the south seems to me to be desperate,” he distressed near the end of his life. “The union has been prolonged thus far by miracles. I fear they cannot continue.”<sup>258</sup>

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<sup>258</sup> John Marshall to Humphrey Marshall, May 7, 1833, *New York Tribune*, February 7, 1861. Cited in Faulkner, *Jurisprudence*, 100.

Epilogue: “Will you draw down this curse upon Virginia?”

Soon after Virginia ratified a state constitution in 1776, Thomas Jefferson warned that its “capital defects” created an urgent and perilous situation.<sup>259</sup> Jefferson urged his countrymen “to be sensible of it, and...apply at a proper season the proper remedy; which is a convention to fix the constitution, amend its defects.”<sup>260</sup>

Fifty years later, Jefferson died in Virginia, and his state’s constitution was unchanged. St. George Tucker died the next year, in 1827, leaving behind an earnest argument against the republican legitimacy of slavery, but a firm judicial confirmation of its legality. Tucker also left behind a carefully crafted legal defense of what came to be known as the “compact theory” of state sovereignty in his edition of Blackstone’s *Commentaries*. Jefferson argued in the Virginia and Kentucky Resolutions of 1798 and 1799 that the states retained their ultimate sovereign authority when they entered into the federal union. Tucker backed up this political argument with legal reasoning in 1803, insisting that “a law is not binding upon posterity, merely because it was made by their ancestors; but, because posterity have not repealed it.”<sup>261</sup>

In other words, succeeding generations of republican lawyers and statesmen possessed the authority to revisit and revise the nature of their laws, even the Constitution – the fundamental law of the land. Jefferson entreated republicans to “get rid of the magic supposed to be in the word *constitution*.”<sup>262</sup> The existing legislature, he argued, had no authority to create a body of law above the authority of future legislatures. This, he

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<sup>259</sup> Jefferson, *Notes on the State of Virginia*, 158.

<sup>260</sup> *Ibid.*, 168.

<sup>261</sup> Tucker *Blackstone*, I, 178.

<sup>262</sup> Jefferson, *Notes on the State of Virginia*, 163.

insisted, was a legal fiction. Thus, a constitution's authority was dependent upon the continued consent of the people, whose will was expressed by their representatives. St. George Tucker agreed, and specified that the acceptance of the constitution was not just an act of the legislature, but of the people themselves, acting in "their sovereign character and capacity." In this sense, the "assent of the people was indispensably necessary to the validity of the compact."<sup>263</sup>

John Marshall's interpretation of this same republican concept – the sovereignty of the people – led him to a different conclusion, namely that popular sovereignty could be somehow divorced from the popular will.<sup>264</sup> In *McCulloch v. Maryland* in 1819, Marshall famously declared, "it is a constitution we are expounding... intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs."<sup>265</sup> In other words, the Constitution (and, it follows, the judges who held the responsibility to apply it) was, by definition, removed from direct accountability to popular control. The necessity to separate the democratic impulse from constitutional law is analogous to Marshall's genuine belief that he could separate the court from politics. The failure of both attempts became evident when Andrew Jackson won the presidency in 1828. Claiming the popular mandate of the common man, he threatened to undue all of Marshall's careful efforts at building the elevated authority of the court as the arbiter of Constitutional law.

At the time of Jackson's election, Thomas Jefferson had been dead for two years, and St. George Tucker for one. Edmund Randolph had died some fifteen years earlier,

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<sup>263</sup> Tucker, *Blackstone*, I, 169.

<sup>264</sup> Roeber, *Faithful Magistrates*, 94.

<sup>265</sup> *McCulloch v. Maryland*, 17 U.S. 4 Wheat. 371 (1819)

and George Wythe another seven years before that. Of Virginia's Revolutionary era lawyers, few remained. Marshall was nearly seventy-four years old, and his health was declining. The Federalists had long ceased to exist as a political party, though Marshall's essential views had not changed. He was a partisan without a party.

Marshall determined to remain on the Supreme Court in light of the 1828 election for much the same reason that compelled him to first accept the position in 1800 – to protect his political vision from a president who claimed a popular mandate. But this time, the threat was more urgent. As a fellow Virginian of the Revolutionary era, Jefferson could at least be trusted to approach their political battles with a common concern for the fragility of the Union. Jackson could not be counted on to exercise the same discretion.

On March 4, 1829, Chief Justice Marshall administered the oath of office to Andrew Jackson, as he had for four other presidents. For twenty-five years, Marshall had abstained from voting in presidential elections, as part of his public effort to claim the court's disinterest in political affairs. Marshall finally broke his own rule in order to cast a vote *against* Andrew Jackson for President – a fact that was made public during the campaign.<sup>266</sup>

The same day Marshall swore in President Jackson, he was summoned to Virginia, where delegates were being selected to attend a convention for the purpose of revising the state's 1776 constitution.<sup>267</sup> Some fifty years since Jefferson first warned of the urgent deficiencies of Virginia's constitution, and forty-two years since Edmund Randolph told the Philadelphia Convention “none of the state constitutions have provided

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<sup>266</sup> Robarge, *Progress*, 295.

<sup>267</sup> *Ibid.*, 296.

a sufficient check against... democracy,”<sup>268</sup> Virginia was, by many estimations, the least democratic state in the union.<sup>269</sup> It was, for example, the last state mandating a minimum property requirement for voting. The national trend of Jacksonian democracy and the burgeoning population in Virginia’s mountainous western region – where slavery did not flourish and the lower classes did not own land – created a strong public outcry for universal white male suffrage. The Tidewater elite of the east were no longer the majority in Virginia, but a half-century old constitution guaranteed their political dominance through property requirements and the additional representation allotted to them by virtue of their extensive slave holdings.

James Monroe emerged from a comfortable retirement to attend the convention, as did a visibly feeble and trembling James Madison.<sup>270</sup> The trio of Madison, Marshall, and Monroe was symbolic – their presence would allow the new generation of Virginian politicians to claim the authority that only the support of the founders could confer. It was also the last chance for the survivors of the republican generation to protect their “country” – Virginia – from the dangerous national trend of Jacksonian democracy.

It is easy to forget that Marshall, who had long abandoned local politics in favor of building the authority of the federal court, was still connected to his home state. He never stopped living in the home he built in Richmond in the heyday of his legal career between 1788 and 1790. And when he was not attending the brief sessions of the

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<sup>268</sup> Farrand, *Records of the Federal Convention*, I, 26-27

<sup>269</sup> See James Oakes, “Review: The Muted Fireball of Old Virginia” *Reviews in American History* 11 (September 1983): 383, and Robarge, *Progress*, 296.

<sup>270</sup> A reprint from the New York *Commercial Advertiser* in the *Richmond Enquirer*, Oct. 20, 1829, said Madison’s voice “betrayed the feebleness of his age, and, like his whole frame, trembled with agitation and apparent embarrassment.” See Drew McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* (New York: Cambridge University Press, 1989), 242.

Supreme Court in the nearby federal city of Washington, he traveled Virginia and North Carolina as a circuit court judge.<sup>271</sup> His willingness to attend the convention to revise the constitution and the attitudes he expressed there prove that Marshall still possessed, as George Cabot chided when he first entered national politics in 1799, “the faults of a Virginian.” He meant that Marshall gave precedent to his home state and expected the world to be governed by his own brand of logic.

When the convention assembled, Madison maintained a minimal presence.<sup>272</sup> Marshall attended every meeting and served on key committees that reflected his most urgent concerns.<sup>273</sup> The main sources of contention in the Virginian constitution were suffrage and representation. The tide of Jacksonian democracy suggested that western Virginians, despite having little property or slaves, had equal claim to participation in government.

The so-called “frontier” upbringing emphasized by so many Marshall biographers had much more in common with Jefferson and Madison’s piedmont aristocracy than it did with the immigrants and lower-class white men of the mountains of what is now West Virginia. Marshall had a genuine rustic appearance, but he owned slaves and hundreds of

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<sup>271</sup> As noted earlier, Marshall accepted the chief justiceship at least in part because President Adams had eliminated the responsibility of justices to serve concurrently on the federal circuit courts. One of the first acts of the Jefferson administration, however, was to theoretically weaken the Federalist dominated Supreme Court by repealing the act that limited their duties, thus compelling them to spend a large part of their time traveling to distant circuit courts. Marshall was so irritated by the decision that he and some of the other justices strongly considered going on strike – refusing to perform their circuit duties on the grounds that the law was unconstitutional. Ultimately, Marshall determined that outright defiance of the President might provoke a Constitutional crisis, and he grudgingly rode the circuit for the rest of his life.

See Ackerman, *Failure*, 157-162.

<sup>272</sup> McCoy, *Last of the Fathers*, 296.

<sup>273</sup> Robarge, *Progress*, 297.

thousands of acres of valuable land, and he feared as much as the Tidewater's planter-statesmen the corrosive effects of allowing people with no permanent republican connection to their community to rule. Furthermore, the legitimacy of proper republicans was based in disinterest – the independence to serve as a volunteer and not as a dependent partisan. Expanding the privileges of republican citizenship to everyone threatened to make the interested and dependent class a legislative majority, in which case republican virtue, as the surviving founders understood it, could not possibly survive.<sup>274</sup>

Marshall, despite the weariness of his seventy-five years, was animated in his defense of the traditional legacy of government and law in his home state. When the convention addressed the question of restructuring the county courts along more purely democratic lines, Marshall responded with an impassioned plea in their defense. Bernard Schwartz notes that across the nation, the Jacksonian era brought the legal culture full circle, back to the colonial days when law was suspicious – a barely tolerated necessity. The egalitarian cast that Jackson's election promised, and what Alexis de Tocqueville claimed as America's distinguishing feature, garnered support for leveling the power of the courts, as well.<sup>275</sup>

In defense of the county court system – largely unchanged since the colonial era – Marshall expressed an emotional exhortation that is remarkably uncharacteristic of the man who spent his whole life cultivating a public aura of disinterested objectivity, even in intensely political debates. But the threat that the judiciary might become subject to serve at the discretion of the legislature prompted Marshall to exclaim, “I have always

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<sup>274</sup> McCoy says that “Madison’s ultimate fear was that of a society in which ‘this unfavoured class of the community’ would actually constitute a majority of the population.” *Last of the Fathers*, 192-193.

<sup>275</sup> Schwartz, *Law in America*, 59.

thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent Judiciary. Will you draw down this curse upon Virginia?”<sup>276</sup> If the age old system of gentleman-justices was more ignorant than Marshall would like to admit, he at least believed that their social status elevated them above the temptation to be corrupt and encouraged the republican value of independence.

Ultimately, the convention left the old county courts to function as they always had. They also maintained a property requirement for voting and allowed the slaveholding eastern gentry to maintain their dominance over Virginia politics. The result was a sectional divide along east/west lines that mirrored the national divide over the same issues in the antebellum period. Just like Americans in the northern states, Virginians in the west grew increasingly frustrated over the ability of a minority of slaveholders to dominate the political discourse. More than twenty years later, in 1851, Virginia finally adopted democratic reforms on par with the rest of the nation in a new constitutional convention, but the issues of representation, suffrage, and the divide over slavery were not conclusively settled until the western portion of the state seceded, creating the separate state of West Virginia, in the midst of the Civil War in 1863.

The convention of 1829-1830 marked the final effort of the last founders to secure their vision of republicanism in their home. James Monroe died a year after the convention concluded, while Madison – “the last of the fathers,” lingered for five more years. Drew McCoy, in his examination of Madison’s retirement years, paints a picture of

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<sup>276</sup> *Proceedings and Debates of the Virginia State Convention of 1829-1830: To Which Are Subjoined, The New Constitution of Virginia, and the Votes of the People* (Richmond: Samuel Sheppard & Co., 1830), 619.



a disillusioned statesman who lived to see his republican dream slip away. John Marshall, in a sense, faced an even more frustrating dilemma. As the last of the founding generation to cling to an active position in national politics, the burden of defending the legacy of the Revolution fell squarely on his shoulders even as it proved increasingly impossible to protect. Madison, in retirement, could devote his time to instilling values in a younger generation of would-be republicans,<sup>277</sup> but Marshall had to contend with Jackson's efforts on a practical basis every day until the end of his life. His commitment to his legal and political vision and his fear of democracy never allowed him to retire.

In the nullification crisis of 1832, Marshall found an unlikely ally for federal supremacy in President Jackson, who denied the right of South Carolina to determine the constitutionality of a federal tariff. At the same moment, however, Jackson provided national assistance to the state of Georgia, based on its own claims of sovereignty, to remove the Cherokee Indians from within their borders despite a ruling by the Marshall Court that federal Indian treaties superseded state prerogative. Georgia's defiance illustrated, in an alarmingly concrete manner, that the judicial supremacy Marshall had spent a lifetime carefully cultivating might prove an idle illusion if the president openly defied it. Jefferson had never done so, and Marshall had always framed his decisions in such a way as not to provoke such outright defiance. But if, in the case of Jackson, the President were not guided by the shared principles of the Revolutionary era, the whole system might collapse.

John Marshall died on July 6, 1835, during Andrew Jackson's second term. Like Madison, he despaired for the fate of the republic in his final years. Marshall located the

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<sup>277</sup> McCoy discusses Madison's effort to cultivate republican protégées in detail in *Last of the Fathers*.

failure of the republican experiment in the issue of sovereignty. Virginia's own compact theory, South Carolina's flirtation with nullification, and Jackson's tacit support for Georgia's circumvention of the Supreme Court, all defied Marshall's hopes for the survival of the republic. Of this belief, Marshall said in 1833, just two years before his death, "The time is arrived when these truths must be more generally spoken, or our Union is at an end. The idea of complete sovereignty of the State converts our Government into league, and, if carried into practice, dissolves the Union."<sup>278</sup>

In final analysis, McCoy concluded the dilemma of slavery undid Madison.<sup>279</sup> If Madison could marvel at the compromise that forged the Constitution and created the union, and could find reason to be hopeful that republican political economy would continue to adapt to a modern world, slavery proved to be a source of either despair or delusion. Ultimately, McCoy determined that the success of the Constitution and the continued survival of the union depended on the federal government remaining inactive on the slavery issue. He traced, through Madison's life, the "compromises" that amounted really to postponing the inevitable conflict. McCoy's emphasis on Madison's misplaced determination to support colonization is particularly effective – and Marshall supported this effort with as much enthusiasm. St. George Tucker, on the other hand, determined as early as 1796 that colonization was a pipe dream – mathematically and economically impossible.<sup>280</sup>

Not long after the conclusion of Virginia's constitutional convention, Nat Turner's 1832 slave rebellion sent shockwaves through every level of Virginia society.

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<sup>278</sup> John Marshall to Humphrey Marshall, May 7, 1833, *New York Tribune*, February 7, 1861 (copy in Library of Congress), quoted in Faulkner, *Jurisprudence*, 99.

<sup>279</sup> McCoy, *Last of the Fathers*, 252.

<sup>280</sup> St. George Tucker, *Dissertation on Slavery*, 82-84.

Virginians had long ignored St. George Tucker's warning that the republican contradiction of slavery, if ignored, would tear up the roots of civil society. Rather than acknowledge the contradiction in order to address it, Virginians increasingly resorted to the rhetoric of slavery as a positive good. If they could not solve the dilemma, they would deny it existed. After the deaths of Madison and Marshall less than a year apart in 1835 and 1836, the issues of slavery defense and states' rights became gradually inseparable, and when they combined, they undid the union.

Richard Ellis refers to the years from 1776 to 1815 as a time of remarkable unity in republican legal culture.<sup>281</sup> The survival of John Marshall into the next generation of law and politics underscores the conclusion that he and Jefferson had more in common than most historians and especially they themselves would have been willing to admit.<sup>282</sup> But by the 1830s, the insistence on democratic reform of the Virginia constitution and the presidency of Andrew Jackson proved that the Virginian concept of justice had shifted, and that John Marshall, the last republican of the Virginia dynasty of leadership, had postponed but not prevented the transition from republic to democracy. He worried that the union had been preserved "thus far by miracles," and he feared that the ability to fashion those miracles would die with the founding generation.

John Marshall died in the city where he first found a home in national politics – Philadelphia. It was during the first week of July, in 1835. Almost precisely twenty-eight years later, in the first week of July 1863, James K. Marshall marched onto the field of battle at Gettysburg, Pennsylvania. What Madison and Marshall had feared was now a

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<sup>281</sup> Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (New York: Oxford University Press, 1971), 278.

<sup>282</sup> *Ibid.*, viii.

reality. The nation had split along sectional lines over the intertwined issues of slavery and sovereignty in 1861, and just two weeks before the Gettysburg battle, so had the commonwealth of Virginia. The new state of West Virginia was admitted to the Union on June 20<sup>th</sup>. On July 3<sup>rd</sup>, the twenty-four year old grandson of the Great Chief Justice led a regiment of Confederates in Pickett's Charge. Looking to a fellow officer, James Marshall remarked, "we do not know which of us will be the next to fall," and within minutes, he was felled by enemy fire while rallying his soldiers to make the impossible advance.<sup>283</sup> The nation ultimately reunited, though Virginia did not.

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<sup>283</sup> F. Lewis Marshall, Oct. 6, 1863, from VMI Archives, Manuscript #0165, accessed online at <http://www.vmi.edu/archives.aspx?id=6671>.

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## Vita

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