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Chief Justice John Marshall: A Reappraisal, edited by W. Melville Jones

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CHIEF JUSTICE JOHN MARSHALL: A REAPPRAISAL, edited by W. MELVILLE JONES. Ithaca, New York, Cornell University Press, 1956, 195 pages, $3.00.

One of the highlights of the Marshall Bicentennial Program was a conference held at the College of William and Mary in Williamsburg, Virginia, in May, 1955. Out of that Conference, where various writers presented papers on the various phases of the life and growth of the noted Chief Justice and the events which helped shape his career, came the material for this short but interesting volume. The tone of the collection of eulogies is fittingly set in a Foreword by the present Chief Justice, Earl Warren. The contributors deal among other matters with the personal side of Marshall, his decorum as a judge, his part in weaving the doctrine of judicial review into our constitutional fabric, his views toward the relationship of the common law and so-called constitutional principles and his role in shaping the economic structure of this growing nation.

There is no doubt that John Marshall's personality was a great factor in his achievements in the moulding of our principles of government. True, as it is often said, Marshall, as with other great and wise men, seemed to be destined to be born at the time of his country's greatest need. But his greatness is not adequately reflected in the sometimes held picture of him as a Virginia aristocrat and a dry and very learned jurist. His work lives partly because he brought to it a broad humanity which was based on both experience and intelligence — and a real love of his fellow human beings.

But the John Marshall known to constitutional students did not leap to the court full grown in greatness. When he took his place on the bench, very few questions of constitutional law had been presented to the Supreme Court. The members of the Court, like the States, were young in years as well as experience, and a great deal of John Marshall's genius may be attributed to the fact that he grew in greatness with his Country while he helped it grow. His genius also lay in bringing to the Court a sense of dignity and direction so that his leadership succeeded in lending a tone to that body never before achieved.

On the important doctrine of judicial review, we are told that there was some difference of opinion concerning its adoption at the Constitutional Convention. The Convention did not, however, select words which would clearly settle this conflict, thus leaving the choice open. Contrary to the view held in some quarters, John Marshall should be given the credit for initiating the doctrine into American constitutional law, that is, in helping make the choice. Some might argue that "credit"

is not the right word. They would assert that while the doctrine might be used skillfully as a deterrent to a too powerful legislature, still it might also be used to give the judicial organ a power never intended. Such power might be gained by the simple maneuver of defining "law" very broadly. Southern leaders today argue that the Supreme Court has over-reached itself in its decisions in the recent Segregation Cases. Southerners believe that the Court has interpreted "law" too broadly. They believe that the problem of segregation is not a legal matter but a social matter. But careful limitations *have* been placed on the judiciary to counterbalance the power of judicial review. For instance, the constitutional provision limiting jurisdiction of the courts to cases and controversies has been carefully followed with emphasis on what constitutes a case or controversy and on such matters as adverse interests and friendly suits.

In another chapter, we learn that the relationship of the common law to the law of the Constitution was a matter of never ending dispute during the early years and, generally, John Marshall preferred to argue legal questions in terms of constitutional principles. These principles were often illustrated by decisions in English common law, but for Marshall they did not derive their effectiveness solely from these cases. However, the common law has been very influential in determining the character of federal law.

Highly significant in the Marshall era, according to another writer, was the impact of the Supreme Court on the economic problems of the time. Marshall saw the interrelation of the Constitution and this country's economic problems calling for the Court to meet problems arising in connection with foreign and domestic commerce. He felt particularly that these problems needed to receive uniform treatment across the country. He felt that the main purpose of the new federal government was to assure stability to property; property was to be protected against state as well as individual interference. His concern is quite understandable, for these were paramount issues of the time. However, some of the most important decisions of this court in the economic field were those involving an interpretation of the scope of the commerce clause. Of course, it is from the commerce clause, as well as the taxing and war powers, that the federal government wields its great regulatory and proprietary authority today. John Marshall built the basis for this authority by interpreting the commerce clause broadly and by protecting the accumulating federal power against state encroachments through state exercise of concurrent commerce power, police power and so on. In protecting the right of the federal government to regulate where it saw fit he paved the way for an exercise of power which may have far

exceeded his expectations. One wonders if he would, today, be pleased or appalled at the results of his handiwork in this field.

While Chief Justice Marshall performed wonders in judicial leadership, the consensus of the time was that he dominated his brothers on the bench. Closer examination is showing this not to be true. He tried to have the Court speak impersonally as a Court rather than as individuals or groups of individuals. The Chief Justice built up the conception of the Court as an impartial instrument of the law, as an impersonal instrument of "a government of laws and not of men."

All in all, this book seems to me to be well worth the reading. It is thought-provoking as well as informative and particularly so to one interested in the history of the development of constitutional law in the United States and in the lives of great Americans of another era. I recommend it highly.

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