

VOLUME X, NUMBER 3, SUMMER 2010

# CLAREMONT

REVIEW OF BOOKS

*A Journal of Political Thought and Statesmanship*

Steven F.  
Hayward:  
**Peter Beinart's  
Hubris**

Mary  
Eberstadt:  
**Women  
at Work**

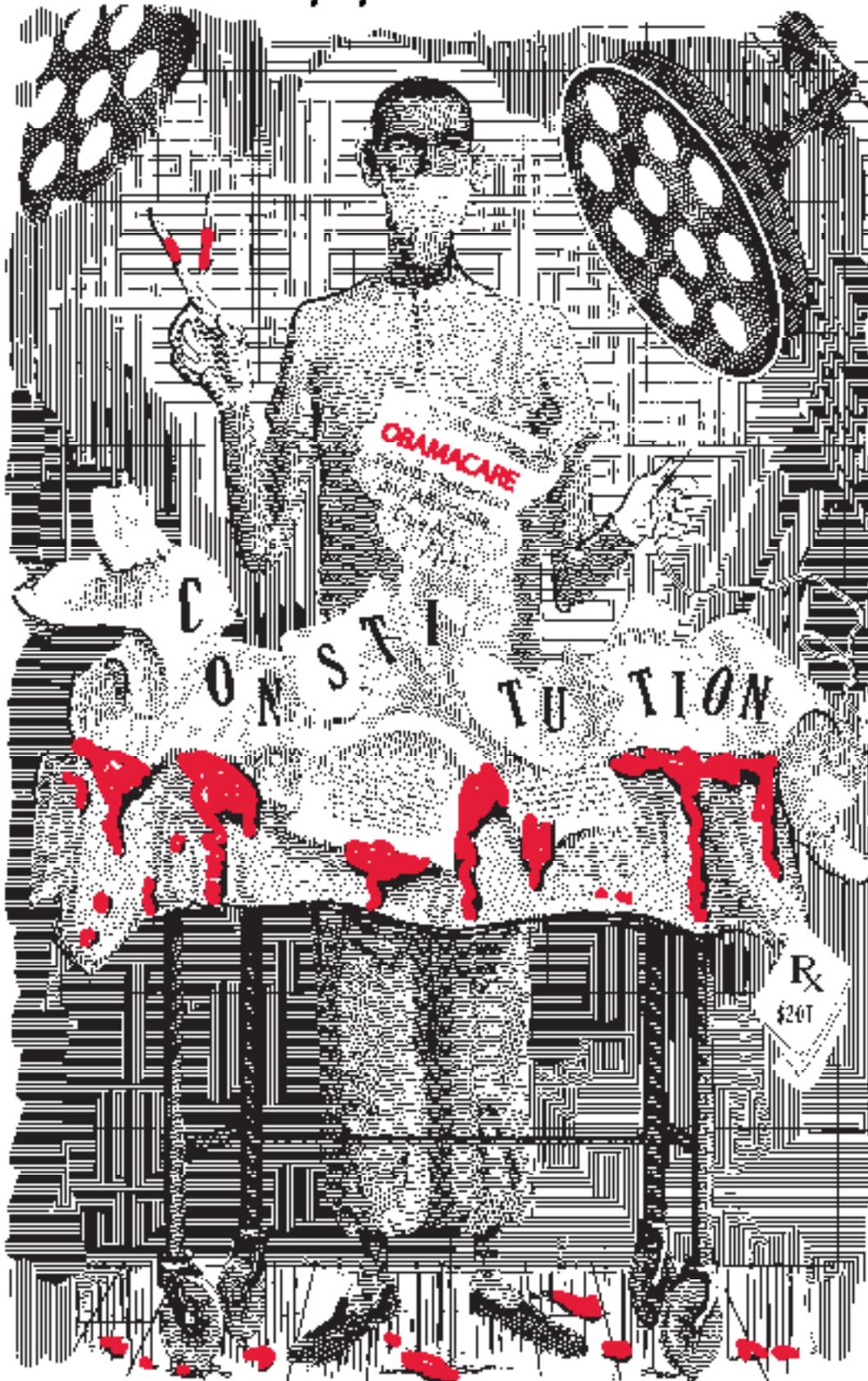
John  
Davidson:  
**Gabriel García  
Márquez**

Douglas Kries:  
**Medieval  
Renaissance**

Ken I. Kersch:  
**Meet John  
Marshall**

## MALPRACTICE!

Essay by Charles R. Kesler



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constitution, in other words, would enable civil society to have it both ways—prerogative to deal with unforeseen contingencies, and the rule of law to ensure that its exercise would not be abused. The United States Constitution seeks to strike the proper balance; but, Kleinerman argues, Hamilton's reading of Article II, especially in his *Pacificus* essays (written in 1793 to defend President Washington's Proclamation of Neutrality), tilts the balance too far in the direction of executive prerogative. It was Madison, he says, who, by questioning the thrust of Hamilton's argument for implied powers, got the balance right.

Fatovic would generally agree, although for slightly different reasons. His main theme concerns the irreducible necessity for virtue in a republic—in the people no less than in their chief executive. He argues that modern political theory's emphasis on creating institutional surrogates for the want of character will not avail. Government cannot be reduced to a machine, and although some institutional solutions are better than others, constitutional structures can accomplish only so much. At the same time, he agrees with Kleinerman that a well-constructed constitution will induce habits of mind and heart conducive to individual liberty and responsibility. And, like Kleinerman, he fears that if prerogative is understood as being within the ambit of the law, its use will become regularized; the governed, like the frog in the pot of slowly warming water, will be lulled into complacency. For that reason, he inclines toward the Jeffersonian belief that, although necessary, prerogative should be understood as extra-constitutional.

Hardly indifferent toward practical consequences, Fatovic is relatively more interested

in tracing the political theory of the modern executive. Kleinerman, who is also deft in his handling of modern political theory, is relatively more interested in exploring the delicate balance between prerogative and the rule of law as it has worked itself out in American political experience. He looks to Lincoln as the proper model for emulation because Lincoln understood that extraordinary (and temporary) exigencies justified departure from the law; but by seeking and obtaining subsequent ratification from Congress for his actions, he made a deep bow to the supremacy of law and reminded the people that he was only the temporary steward of *their* Constitution.

Though his defense of Lincoln is powerful, the line Kleinerman says that Lincoln sought to draw may disappear under the press of modern exigent circumstances. Both he and Fatovic (the latter even more so) excoriate George W. Bush for attempting to constitutionalize prerogative on a regular basis. But this may not be, as they imply, merely a consequence of Bush's misguided thinking about the nature of his powers. Islamist-inspired terrorism presents dangers of a sort quite unlike any we have had to confront in the past, and they are likely to be with us for a very long time. And they may not be easily amenable to defeat in the form of set battlefield encounters. Modern weapons and communications technology, for example, enable the enemy (who neither recognizes the rules of war nor suffers the constraints of state actors) to strike from a distance with deadly effect.

The right policy for dealing with this threat is properly a matter for public debate, in which Congress and, at least indirectly, the people

should be involved. But, operationally, only a president has the knowledge and the capacity to act quickly against the "accidents and necessities" that now confront us. That fact will very likely cause him to push the envelope of his discretionary power to the hilt, not for reasons of self-aggrandizement but for public safety's sake. Whether and how Congress should be informed of, or otherwise involved in, these operational details are, again, matters for debate; but, it is not immediately clear (other than on a high level of abstraction) how the lessons taught by Madison or Lincoln should apply to many features of the war against terror.

Kleinerman and Fatovic argue, for example, that President Bush acted too often without consulting Congress. Despite Bush's occasionally extravagant claims to unilateral power, the charge will not withstand much scrutiny. The record will show that Congress was reasonably well informed on most, if not all, of the larger issues, and that it either formally authorized, or acquiesced in, virtually everything he did.

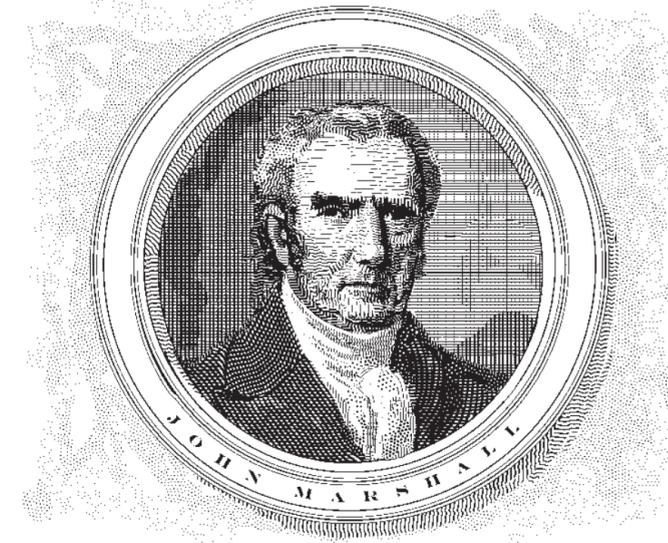
All of which may simply be to suggest that refined understanding of a problem may not yield much in the way of practical results. As Locke, Hamilton, Madison, Jefferson, and Lincoln all recognized, albeit in different ways, self-preservation is the first goal of liberal constitutionalism. One can only speculate about the advice they might have given President Bush under circumstances they could scarcely have imagined—or whether our constitutional order would be necessarily better off if he had listened.

*Michael M. Uhlmann is visiting professor of political science at Claremont Graduate University.*

Book Review by Ken I. Kersch

## A FRIEND TO THE UNION

*John Marshall: Writings*, edited by Charles F. Hobson.  
Library of America, 950 pages, \$40



CASUAL, WARM, CONFIDING, EARTHY, SELF-effacing, and funny, John Marshall was probably the most companionable of the founding generation's patriot-statesmen. Esteemed as the greatest justice in the U.S. Supreme Court's history (he served from 1801 to 1835), Marshall's public life was long, varied, and eventful.

As a young soldier in the Continental Army, he saw action at Brandywine, Germantown, and Monmouth, and spent the brutal winter of 1777–78 at Valley Forge. Elected in 1782 to the House of Delegates in his home state of Virginia, Marshall was subsequently elected to the state's constitutional ratifying convention, where he sparred with the Anti-Federalist Patrick Henry in the ratification debates. At the behest of President John Adams, he joined Charles Cotesworth Pinckney and Elbridge Gerry in the diplomatic mission to France which culminated in the XYZ Affair: the French insisted upon bribes as a precondition to negotiation, enraging the young nation. Though he would have preferred to continue his Richmond law practice, Marshall succumbed to President Washington's entreaties and served in Congress. He was subsequently tapped as Adams's secretary of state, before becoming one of the president's "midnight" appointments in the final hours of his administration, when Adams named Marshall the nation's fourth Chief Justice.

The Library of America's new collection of Marshall's writings includes the full text of some of his most celebrated opinions, including *Marbury v. Madison* (1803), declaring the power of the federal courts to void laws as unconstitutional; *McCulloch v. Maryland* (1819), upholding the constitutionality of the Bank of the United States; *Fletcher v. Peck* (1810) and *Dartmouth College v. Woodward* (1819), both affirming constitutional protection for rights of property and contract; and *Gibbons v. Ogden* (1824), reading the Constitution as conferring upon Congress broad powers to regulate interstate commerce. But Charles Hobson, the editor of the Marshall Papers and of this collection, wisely includes a generous selection of personal correspondence, the issue of a long, engaged life lived largely on the road. At the time, Supreme Court Justices were required to "ride circuit," sitting with lower federal court judges in an assigned geographic region to form regional federal courts of appeal. This meant that Marshall's discussions with his fellow justices—chiefly Bushrod Washington (the president's nephew) and Justice Joseph Story—were frequently epistolary, as was his relationship with his wife, Polly, whom he ministered to tenderly and missed dearly.

Marshall was a Federalist, and, in many respects, a conservative. But his temperament was mild, and his inclinations pragmatic. He

preferred men "unconnected with party and unstained by faction, who can have no object but the public good, no interest distinct from that of the community." "No man regrets more than I do," he explained in 1800, "that intolerant & persecuting spirit which allows of no worth out of its own pale, & breaks off all social intercourse as a penalty on an honest avowal of honest opinions." A man of deep and genuine feeling, he was nevertheless a critic of emotional excess in politics, and repeatedly lambasted the prominence of zeal, excitement, turbulence, and ferment in the public life of his day. He believed in "well-regulated democracy," and thought that the Constitution provided an exemplary framework for its practice.

Marshall's distaste for zeal informed his intense, life-long dislike for his second cousin Thomas Jefferson. The feelings were mutual, and theirs was one of the founding era's most pronounced antagonisms. Marshall tartly reminded Henry Lee, who made the mistake of praising Jefferson in correspondence, that "I have never thought him a particularly wise, sound, and practical statesman." Transported by radicalism and romanticism (Marshall elsewhere referred to him sarcastically as "the great Lama of the mountains"), Jefferson was enthralled by the soon-to-turn-homicidal French Revolution, to the level-headed Marshall's lasting disgust.

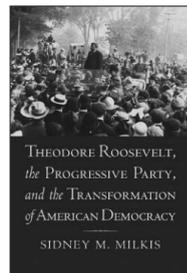
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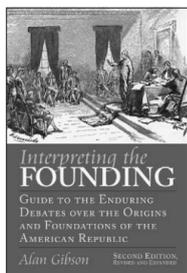
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If Marshall's opinion of Jefferson was low, his estimation of Jefferson's partisans was subterranean. On the eve of the third president's inauguration in 1801, Marshall opined that

the democrats are divided into speculative theorists & absolute terrorists: With the latter I am not disposed to class Mr. Jefferson. If he arranges himself with them it is not difficult to foresee that much calamity is in store for our country—if he does not they will soon become his enemies & calamitators.

Marshall was a vigorous defender of the power and dignity of the federal judiciary—the scourge of Jefferson and the Jeffersonians. (Chief Justice John Roberts's recent defense of the Supreme Court against President Obama's criticism in his State of the Union Address was eminently Marshallian; Roberts is known to be a fervent admirer of his predecessor.) Marshall wrote that Jefferson's "ranting declamation, this rash impeachment of the integrity, as well as opinions of all those who have successively filled the judicial department," bothered him considerably. "I find myself more stimulated on this subject than on any other," he wrote to Bushrod Washington in *McCulloch's* aftermath, "because I believe the design to be to injure the Judges & impair the constitution." To Justice Story, Marshall explained:

For Mr. Jefferson's opinion as respects this department, it is not difficult to assign the cause. He is among the most ambitious, & I suspect among the most unforgiving of men. His great power is over the mass of the people & this power is chiefly acquired by professions of democracy. Every check on the wild impulse of the moment is a check on his own power, & he is unfriendly to the source from which it flows.

Marshall was particularly galled by the Jeffersonians' distrust of the national government, and their enthusiasm for "state rights," which he understood as a revival of the Anti-Federalists' anti-constitutional sentiments. Though he is best known today for *Marbury v. Madison*, Marshall's most significant decision, and the one that occasioned the sharpest public reaction in his own time, was the ringingly nationalist *McCulloch v. Maryland*. There, giving a broad interpretation to Congress's Article I, Section 8 power "[t]o make all Laws which shall be necessary and proper for carrying into execution the foregoing [enumerated] powers," the Court upheld the power of Congress to charter the Second Bank of the United States. "Let the end be legitimate," Marshall wrote in his eloquent

opinion for the Court, "let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." Against those who argued that they could find no express power to charter a bank in the document's enumeration of congressional powers, Marshall answered that, unlike an ordinary statute, the Constitution was necessarily written in broad and general terms, "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

When *McCulloch* was handed down, Marshall privately warned Bushrod Washington that "[w]e shall be denounced bitterly in the papers & as not a word will be said on the other side we shall undoubtedly be condemned as a pack of consolidating aristocrats." He was right. To "excite this ferment the [Court's] opinion has been grossly misrepresented," he observed, "and where its argument has been truly stated it has been met by principles one would think too palpably absurd for intelligent men. But prejudice will swallow anything." So Marshall decided to counter the prejudice in favor of state rights by presenting in the public prints his own defense of *McCulloch*.

**H**IS PSEUDONYMOUS DEFENSE OF THE *McCulloch* opinion—recognized by scholars only in recent years, and making a worthy addendum to *The Federalist*—was published in the Philadelphia *Unionist* in two parts. In April 1819 Marshall wrote as "A Friend to the Union" in response to the editorials of "Amphyction." Two months later, he appeared in the *Alexandria Gazette* as "A Friend of the Constitution" responding in nine parts to "Hampden," a pseudonym sported by Virginia Court of Appeals Justice Spencer Roane, the judge the Marshall Court had checkmated in *Martin v. Hunter's Lessee* (1816). In his essays, Marshall argued at length that the theories advanced by the stinging editorials of Amphyction and Hampden in Marshall's hometown paper, the *Richmond Enquirer*, "would essentially change the constitution, render the government of the Union incompetent to the objects for which it was instituted, and place all its powers under the control of the state legislatures. It would, in great measure, reinstate the old confederation." "[O]ur constitution is not a league," Marshall insisted: "It is a government." "Our constitution is not a compact. It is the act of a single party. It is the act of people of the United States, assembling in their respective states, and adopting a government for the whole nation." "All arguments founded on leagues and compacts," he wrote, were rooted

in "an unaccountable delusion." "Let Hampden succeed," Marshall argued, "and that instrument will be radically changed. The government of the whole will be prostrated at the feet of its members; and that grand effort of wisdom, virtue, and patriotism, which produced it, will be totally defeated." "The question is of real importance to the people of the United States," he insisted: "If the rule contended for would not absolutely arrest the progress of the government, it would certainly deny to those who administer it the means of executing its acknowledged powers in the manner most advantageous to those for whose benefit they were conferred."

Marshall firmly rejected the proposition that the national government possessed only the power to undertake those tasks necessary to its preservation. He defended instead the view that the national government was granted full power to provide for the nation's "happiness, its convenience, its interest, [and] its power." He reminded his critics that "[t]he equipoise... established [by the Constitution] is as much disturbed by taking weights out of the scale containing the powers of the government, as by putting weights into it." These views were the natural consequence of neither liberal nor strict interpretation but rather "fair construction," consistent, he explained, with his understanding that constitutional provisions should be interpreted to "promote the objects for which they were made."

**I**N SUBSEQUENT YEARS, MARSHALL ANXIOUSLY followed the progression of the states' rights cause. He condemned South Carolina's 1832 Proclamation of Nullification as a "mad and wicked measure" and he insisted that "[w]e are now gathering the bitter fruits of the tree even before that time planted by Mr. Jefferson, and so industriously and perseveringly cultivated by Virginia." He found Jefferson's Jacksonian (Democratic) successors to be "a hungry and vindictive party," and worried about the Union's fate under their stewardship. Upon receiving a copy of Joseph Story's masterly *Commentaries on the Constitution* (1833) as a gift from the author, Marshall told Story that he

greatly fear[ed] that, south of the Potomack, where it is most wanted, it will be least used. It is a Mohomedan rule, I understand, "never to dispute with the ignorant," and we of the true faith in the South abjure the contamination of infidel political works. It would give our orthodox Nullifier a fever to read the heresies of your commentaries. A whole school might be infected by a single copy

should it be placed on one of the shelves of a book case.

The same year, he told his cousin Humphrey Marshall that "[t]he time is arrived when these truths must be more generally spoken or our union is at an end. The idea of complete sovereignty in the states converts our government into a league, and if carried into practice, dissolves the union." Alas, he lamented to Story, it seems that "the word 'State Rights'...has a charm against which all reasoning is vain."

Slavery, of course, only compounded the problem. Marshall believed "that nothing portends more calamity & mischief to the Southern states than their slave population." "Yet," he observed, "they seem to cherish the evil and to view with immovable prejudice & dislike every thing which may tend to diminish it." Although he did not live to see it, no one would have been less surprised at the outbreak of the Civil War than John Marshall, and few more satisfied with the nationalization of the country's constitutional politics in its aftermath.

Throughout his busy life, Marshall yearned for the domestic comforts of hearth and home, and looked forward to long days passed in gentle companionship with his wife. He hoped for a retirement in which he would "read nothing but novels and poetry" (Jane Austen was a special favorite). Perhaps inevitably, given his irrepressible enthusiasm for political debate, and his heartfelt patriotism, such a retirement was never to be. In an autobiographical sketch prepared at Joseph Story's behest, he recalled that he had

grown up at a time when a love of Union and resistance to the claims of Great Britain were the inseparable inmates of the same bosom; when patriotism and a strong fellow feeling with our suffering fellow citizens of Boston were identical; when the maxim "United we stand, divided we fall" was the maxim of every orthodox American.

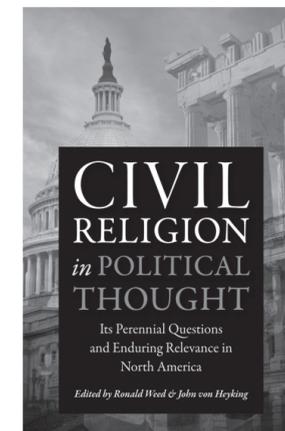
As fundamental questions of the nature and the future of the Union assumed increasing prominence, Marshall remained active, and on stage, dying in office in 1835. His exposition of the political theory of the American Union remains among the most eloquent and compelling ever written. This collection provides a worthy tour of the mind, and an intimate and endearing portrait of the character, of this down-to-earth yet extraordinary man.

Ken I. Kersch is founding director of the Clough Center for the Study of Constitutional Democracy and associate professor of political science, history, and law at Boston College.

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