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Rethinking the Reputation of Chief Justice John Marshall: How Historical Research Can Change Our Understanding of the Past

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In 1899 John Marshall Law School opened in Chicago. In 2019 this one-hundred-and twenty-year-old private law school became part of the state-supported University of Illinois Chicago, but the school retained its historic name. The school was named for the most important chief justice in American history, who served in that office longer than anyone else. Nearly two centuries after his death, his influence lives on. Five of the ten opinions most cited by the Supreme Court itself are Marshall's.[1] Most constitutional law courses begin with his famous opinion in *Marbury v. Madison* (1803). As a constitutional law professor and a historian I have often taught Marshall's opinions and warmly praised his jurisprudence on major constitutional issues.

Before going to the court, Marshall was a junior officer in the Revolutionary War serving under George Washington, and after the war, a very successful lawyer and a member of the Virginia legislature. He campaigned for the ratification of the Constitution, and under the new government it created he was a diplomat in France where he exposed the XYZ Affair to the nation. This made him a national hero and led to his election to Congress, and then to serving as secretary of state of the United States.[2] Even without his years on the court, Marshall would be a significant figure in American history.

He is the only American jurist who has had a cultural impact on United States

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1. This article is based on my book *Supreme Injustice: Slavery in the Nation's Highest Court* (Cambridge: Harvard University Press, 2018). I urge scholars and readers to consult the book for more details of Marshall's involvement in slavery and that of other members of the Supreme Court.

2. Chief Justice John Marshall's first cousin three times removed, George Catlett Marshall, Jr., (1880−1959) would serve as secretary of state from 1947−1949. George C. Marshall would be awarded the Nobel Peace Prize in 1953 for designing the Marshall Plan to help Europe recover from World War II. The plan also provided the model for the United States to give more than 2.4 billion dollars in aid to help rebuild Japan (and another 3.5 billion dollars to other Asian countries) in the late 1940s and early 1950s.

history. At one time there were four law schools that bore his name, as well as a number of institutions, including Franklin and Marshall College in Pennsylvania and Marshall University in West Virginia. A two-meter-high bronze statue of him sits outside the United States Supreme Court building in Washington. A smaller, marble one sits inside the building. He has been on four U.S. postage stamps, a commemorative silver dollar, and both a $20 Treasury note and a $500 Federal Reserve note. Many Americans were named after him, including, ironically, two future Supreme Court justices, John Marshall Harlan (1833−1911), who served on the court from 1877 to 1911, and his grandson, John Marshall Harlan II (1899−1971), who served on the court from 1955 to 1971.

Scholars almost universally admire him. He is often called "the great chief justice." Book titles such as *John Marshall: Definer of a Nation* (1996), *The Great Chief Justice: John Marshall and the Rule of Law* (1996), *John Marshall and the Heroic Age of the Supreme Court* (2001), and *John Marshall: The Man Who Made the Supreme Court* (2018), illustrate how much scholars admire him, and how they almost worship him.[3]

But, on July 1, 2021, John Marshall Law School in Chicago changed its name. Marshall's name disappeared from the school.[4] It is now simply called University of Illinois Chicago Law School. Another law school, Cleveland-Marshall Law School, is debating whether to change its name but has not yet decided what to do. Why this is happening says a great deal about the way historical scholarship can sometimes, unexpectedly, alter American culture.

In 2018 Harvard University Press published my book, *Supreme Injustice: Slavery in the Nation's Highest Court*. The book examines the way three major justices of the nineteenth century, Chief Justice John Marshall, Associate Justice Joseph Story, and Chief Justice Roger B. Taney, dealt with slavery. Two years later I published two very short articles based on that book in the online version of the *University of Chicago Law Review*.[5] These two articles focused entirely on

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3. Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt, 1996); Charles Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence: University of Kansas Press, 1996); R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge: Louisiana State University Press, 2001); and Richard Brookhiser, *John Marshall: The Man Who Made the Supreme Court* (New York: Basic Books, 2018).

4. Susan Adams, "Why Chief Justice John Marshall's Name Was Dropped from University of Illinois Law School," *Forbes*, May 21, 2021. https://www.forbes.com/sites/susanadams/2021/05/21/why-chief-justice-john-marshalls-name-was-dropped-from-university-of-illinois-chicago-law-school/?sh=2a7727de2687 (accessed November 29, 2021).

5. Paul Finkelman, "Master John Marshall and the Problem of Slavery," https://lawreviewblog.uchicago.edu/2020/08/31/marshall-slavery-pt1/ and Paul Finkelman, "John Marshall's Proslavery Jurisprudence: Racism, Property, and the 'Great' Chief Justice" https://lawreviewblog.uchicago.edu/2020/08/31/marshall-slavery-pt2/ (both accessed November 29, 2021).

Marshall, and helped stimulate the debate in law schools over honoring him.

1: Marshall as a Slaveowner

Before the publication of my book every biographer of Marshall asserted that he was not very involved in slavery, although most admitted he owned about a dozen slaves who were servants, cooks, housekeepers, and drivers of his carriage in his house in Richmond.[6] The biographers all said that he did not invest in slaves to profit from them, did not like the institution, and that while he accepted the existence of slavery, he hoped someday it would just go away. He was, from their descriptions, a man of his times, but never a strong supporter of slavery.

Compared to his distant cousin Thomas Jefferson, who owned more than two hundred slaves when Marshall was on the court, the assertation that Marshall only owned a dozen or so slaves made his commitment to slavery appear modest. However, owning a dozen or more slaves actually represented a significant investment in slavery, especially for an urban lawyer and judge who did not need slaves to grow crops. It is hard to make easy comparisons to the value of slaves in today's dollars, but a dozen or so slaves in the 1820s and 1830s would be worth close to a half million dollars, or more, in the twenty-first century.

When I began my research, I believed these descriptions of Marshall's personal relationship to slavery. After all, how could so many scholars be wrong?

However, as I got deeper into Marshall's life, I was surprised—indeed shocked—to discover that all these scholars were wrong. It turns out that Marshall was heavily involved in slavery, and owned at least a hundred and seventy-five slaves at his death, and probably close to three hundred or more during his lifetime. Marshall's wills, census records, tax records, probate documents, and his published letters and speeches in the superbly edited *The Papers of John Marshall*, and a few remaining account books (also in the published papers), tell the story. He was a man who bought slaves, gave them away, and sold them whenever it was convenient, profitable, or he needed ready cash. Far from disliking slavery, Marshall embraced the institution throughout his adult life.

Marshall wrote three different wills, one in 1827, one in 1831, and then a third shortly after his wife died. The three wills were similar, and all illustrated his wealth and his lifelong commitment to slavery. In his second will, in 1831,

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6. Almost shockingly, G. Edward White, a professor at the University of Virginia School of Law, wrote in a major book on the Marshall Court that "John Marshall was not a slave owner." G. Edward White, *The Marshall Court and Cultural Change, 1815–1835* (History of the Supreme Court of the United States, vols. 3–4) (New York: Macmillan, 1988), 689. One exception to this line of scholarship is Donald M. Roper, "In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery," *Stanford Law Review* 21 (1969): 532–39.

Marshall bequeathed to his wife "during her natural life" twelve named slaves plus the unnamed (and unnumbered) "children" of his slave Becky.[7] This is undoubtedly the source of the "dozen slaves," but of course that number did not include the "children" of his slave Becky. But the rest of the will suggested he owned many more slaves. That will gave an estate Marshall owned called Mont Blanc, in Fauquier County (north and west of Richmond), to his son John Marshall, Jr., "together with all the negroes and other property in his possession." He gave land in the same county to his son Edward, noting the "slaves on the said land are already given to him."[8]

In another paragraph he wrote:

> I give to my Nephew Thomas M. Ambler my tract of land on chiccahominy, (reserving to my beloved wife for her life the house and field on which the house stands as a quiet retreat from the town whenever she may find it convenient, also reserving to her as much hay and firewood as she may desire) with all the slaves [,] stock [,] and plantation utensils thereon, [. . .] in trust to apply the annual profits to the maintenance of my daughter Mary Harvie and her family and to the education of her children.[9]

When I first read this clause the key word that caught my eye was "plantation." In the pre-Civil War South, a plantation was a farm with at least twenty slaves. This word, plus the gifts to his two sons, led me to realize, without knowing any actual numbers, that Marshall owned far more than a "dozen" slaves in Richmond. Indeed, just twenty slaves at Chickahominy would have more than doubled the number of slaves he kept at his house in Richmond. This also indicated that, despite what his biographers claimed, Marshall was using slave labor to engage in profitable agriculture. The next stops on this investigation were the U.S. census for 1830, various tax records, and probate records.

The 1830 census revealed Marshall's extensive investment in slaves. The census reported that Marshall had more than sixty slaves at his plantation on the Chickahominy River. I later discovered Marshall had other parcels of land with slaves on them in Fauquier County and elsewhere. The 1831 will did not say how many "negroes" were at Mont Blanc, where his son John, Jr. lived, but the 1830 census counted more than thirty-five slaves there. In 1830 the census counted twenty-seven slaves on the land where Edward lived.

At the time I wrote the book I estimated that in 1830 Marshall owned more than one hundred and fifty slaves, and this number did not include the twenty-

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7. "Revoked will and Codicils, 24 September 1831−5 January 1832," *Papers of Marshall*, 12: 102.

8. Ibid., 12: 100.

9. Ibid., 12: 102.

seven slaves he had recently given to his son Edward. In addition to the slaves in his possession, and those he owned who were mentioned in his will in 1831 as being under the control of John Jr., we know that Marshall's older sons had significant numbers of slaves. In 1830 one son had sixty-four slaves and another had forty-seven slaves. It seems likely that Marshall gave most of these slaves to his two older sons before 1830. As I was writing this article, Candace Jackson Gray, a graduate student at Morgan State University, sent me a probate record for property Marshall owned in another county in Virginia. This record included another twenty-nine slaves owned by Marshall. This record was unknown until now. This would put Marshall's slave ownership in 1830 at over 175 people, not including all the ones he had given to some of his sons.

In addition to giving slaves to his children, he also sold slaves on their behalf. In 1833 his son John Jr. died, leaving a wife, many children, and significant debts. Ever the dutiful father, the chief justice felt obligated to pay off John Jr.'s creditors.[10] At this time Marshall held stock in banks and other companies, owned land throughout the state, and regularly collected interest on money he had loaned out. But rather than use any of these assets to pay his son's debts, the chief justice directed his son James Keith Marshall to sell the Mont Blanc slaves to pay the debts. Marshall knew that John Jr.'s widow would need some of the slaves to run her household, and so he told James Keith "that the servants intended to be reserved for the family should be sold with the others and purchased in my name."[11]

Thus, the perhaps "not-so-great" chief justice achieved the admirable goal of protecting his daughter-in-law and grandchildren from being thrown into poverty by creditors (while also protecting the Marshall family name) by increasing the misery of the slaves who had worked for years to support his son's family. An auction inevitably destroyed slave families—separating husbands from wives and children from parents. Marshall's actions here contrast with his hero, George Washington, who famously refused to buy or sell slaves "as you would do cattle at a market."[12] Marshall was the first great biographer of Washington, but he apparently learned little from the experience about how a true hero of the Republic—even a slaveholder's republic—should treat people, including slaves.

Unlike his cousin Thomas Jefferson, Marshall did not inherit these slaves. His father gave him one slave at the time of his marriage, and later a few more. How did he get so many slaves? He bought them. Marshall burned most of his financial records before he died, so we cannot document all his purchases, but census and

10. Leonard Baker, *John Marshall: A Life in Law* (New York: Macmillan, 1974), 562−63.

11. John Marshall to James K. Marshall, April 12, 1834, and May 19, 1834, in *Papers of Marshall*, 12: 403, 411.

12. On Washington and slaveholding, see Paul Finkelman, *Slavery and the Founders: Race and Liberty in the Age of Jefferson*, 3rd ed. (New York: Routledge, 2012), 200.

other records indicate he was a voracious consumer of slaves. Fortunately, when Marshall burned his financial records before his death, he overlooked some record books from the 1780s and early 1790s. These notebooks reveal a pattern of constantly buying slaves. For Marshall, slaves were an investment that increased his wealth and happiness. He never had a second thought about the happiness or welfare of the people he purchased.

The account books mostly cover his day-to-day life in Richmond and indicate little about his slaves and land in Fauquier County and his growing landholding (and slaveholding) in Henrico County. For instance, in October 1783 Marshall bought Moses for £74 and purchased shoes for Hannah. We do not know when he acquired Hannah. On July 1, 1784, he paid just over £90 for a slave named Ben. Three days later, on the Fourth of July—ironically, the first anniversary of the signing of the Declaration of Independence since the Treaty of Paris ended the Revolutionary War—he bought two slaves for £30, probably children named Edey and Harry. Marshall did not comment—and probably never thought about—how these children felt about being permanently separated from their mother (and possibly their father if he lived with them) and any other relatives or friends. That day he also paid £20 "in part for two servants"—that is, slaves—that he had previously purchased. In September he paid another £25 for unnamed and uncounted "servants." In November he bought Kate and Esau. In 1784 he also purchased Harry but did not record the purchase price.[13] Thus, in the twelve months from October 1783 to October 1784 Marshall bought nine named slaves plus some slaves who were unnamed and uncounted. These were in addition to a few other slaves he already owned. For a relatively young man, just recently married with only a few years of law practice under his belt, this was a significant investment in slaves and the system of slavery.

He apparently used most of these slaves in his house in Richmond, although he rented out Moses. By this time, he also owned nine slaves in Henrico County, and he owned "other slaves . . . on his Fauquier County plantation."[14] By this time he also owned the Oak Hill Farm in Fauquier County, which his father had deeded to him in March 1785, where eventually he would have scores of slaves. There are no records that Marshall bought more slaves in 1785, but in November 1786 he paid £50 for two slaves. In April 1787 he bought Israel for £55 and in May paid another £55 for "a Woman bought in Gloster." On June 3 he made a down payment of just under £11 for two more slaves and paid for the burial of Sam; there is no record of when he acquired Sam. As he had in 1784, on July 4, 1787, Marshall spent Independence Day buying slaves—this time a woman and her child, both of whom he passed on to his father-in-law Jaquelin Ambler. We have

13. Albert J. Beverage, *The Life of John Marshall*, 4 vols. (Boston: Houghton Mifflin, 1916), 1: 167, 181; *Papers of Marshall*, 1: 296, 297, 305, 308, 317, 317 n. 31, 319 n. 38.

14. *Papers of Marshall*, 1: 123; Beverage, *Life of Marshall*, 1: 187−88.

no idea, of course, how that woman felt about being permanently separated from the father of her child, or any other children and family members she might have had. That day he also paid money he owed on another slave he had previously purchased. In August he paid another £30 for slaves he had bought in Gloucester and he also bought an unnamed "negroe man" for £47.[15]

The entries in his account book show that over a four-year period he purchased at least fifteen named (or at least counted) slaves for himself, and a few for others. But there are also purchases with no specific number of slaves attached. Initially he recorded the names of slaves when he purchased them, perhaps a tacit recognition of them as "people" in addition to being commodities. He sometimes noted their names when he bought them clothing. But by the end of this period the slaves he bought or for whom he bought goods generally ceased to have names. He bought a "woman," a "negroe man," and "two slaves," while purchasing clothes for "negroes." In December 1788, he bought "Sundries at Mr. Drinkals [a store in Richmond] for Negroes," and "shoes for negroes." In October 1789 he paid £38 for "a negroe woman." In November 1790 he bought "Shoes for house servants" who went nameless even though they served him daily.[16] Occasionally he still noted names for specific expenditures such as blankets for Ben and Moses and the purchases of Hannibal for £70 in March 1789 and "Negro Bob" for £50 in January 1790. Perhaps emblematic of the naming and not naming of slaves was the quite large expenditure of £130 in June 1790 "for Dick and others." The editors of the Marshall papers surmise that the "others" were two or three more slaves.[17] In 1789 and 1790 Marshall bought at least six more slaves in addition to the many he already owned.

This pattern of buying and selling slaves would apparently continue for the rest of his adult life, although later, as I have noted, he began to give slaves to his children, and perhaps other relatives as well.

2: Chief Justice Marshall and Claims to Freedom Before the Court

In addition to ignoring Marshall's massive, lifetime-long investment in slaves, his biographers also mostly ignored how he approached slavery as a jurist. They said that while he was chief justice, from 1801 to 1835, the Supreme Court heard very few cases involving slavery. In fact, the Marshall court heard at least fifty cases where slavery was an issue. Many involved business issues but a number involved the federal laws which restricted American participation in the African slave trade after 1794 and categorically prohibited any slave importations into the United States after 1808. Some cases involved suits by slaves who had strong

15. *Papers of Marshall*, 1: 363, 377, 377 n. 89, 383, 385, 386–87, nn. 27–29, 389, 408.
16. *Papers of Marshall*, 2: 346, 349, 351, 375, 406.
17. *Papers of Marshall*, 2: 356, 382, 396.

claims to actually being free. These cases allowed jurists to use the law to enhance freedom, especially when there were solid facts that could be used to free a slave under a particular law or legal rule. One biographer asserted that Marshall heard "relatively few freedom suits."[18]

But "relatively" is clearly a relative term. The Marshall court heard fourteen cases involving black freedom. That was almost one every other year while he was on the court. Given how difficult it was for a slave to find a lawyer to take his case all the way to the Supreme Court, these fourteen cases might actually seem like a relatively large number.

To understand the meaning of these cases, we need a brief discussion of how the court in this period differed from the modern court. In the early nineteenth century most of the court's decisions were unanimous. Even when justices disagreed with the outcome of a case, they often remained silent. Marshall dominated the court for most of this period. In his thirty-four years on the bench, he wrote 58 percent of the court's opinions: 508 majority opinions and 25 concurrences. When Marshall disagreed with the outcome of a case, he was usually just silent. Thus, Marshall only wrote six dissents as chief justice.

With this in mind, we can look at the fourteen cases involving black freedom. Marshall wrote the opinion of the court in seven of these, and the slaves lost in every one of them. Another justice, from South Carolina, wrote one opinion in which the slave lost. But in the other six cases other jurists favored freedom. Marshall did not dissent in these because he rarely dissented. But his silence underscores his hostility to black freedom.

Most of these cases involved slaves who had been brought to the nation's capital, Washington, D.C., after 1801. Under the existing law, slaveowners moving to Washington were required to register their slaves and pay a small registration fee. Failure to follow these rules made the slave free. In a number of cases juries of all white men ruled some slaves were actually free because the registration rules had not been followed. A jury declared one slave to be free after he was able to prove that his mother had never legally been a slave, and thus he had been born a free person and had never legally been a slave.[19] Another slave argued he was free because his master had taken him to a federal territory where slavery was prohibited under the Northwest Ordinance of 1787. No matter what the law said, no matter how clear the facts were that the black plaintiff was entitled to freedom, Marshall always found a reason for keeping the person in slavery. In one case, Marshall admitted, the statute at issue was "certainly ambiguous, and the one construction or the other may be admitted, without great

18. Charles F. Hobson, ed., *The Papers of John Marshall* (Chapel Hill: University of North Carolina Press, 2000), 10: 156.

19. *Hezekiah Wood v. John Davis and Others*, 11 U.S. (7 Cr.) 271 (1812).

violence to the words which are employed."[20] How he read that "ambiguous" act would determine whether an African-American spent his life in slavery or freedom. Here was a chance for Marshall to come down on the side of liberty, at least for one person. But he did not do so. Marshall never missed an opportunity to support slavery.[21] The slave Ben remained in bondage.

In *Scott v. Negro London* (1806) Marshall reversed a jury verdict in favor of black freedom.[22] London sued for his freedom in the District of Columbia under a law prohibiting the importation of slaves. Under this law, anyone bringing a slave into Washington, D.C. had to take an oath of citizenship and file the relevant certificate with the clerk of the court.[23] Here a jury of twelve white men, some of whom were probably slave owners, determined that London was free because he had been imported into the District and kept there for more than a year without his master taking the requisite oath indicating an intention to move to the District of Columbia. The trial court also found that London was actually sent into Washington *before* the master moved there and before the master expressed any intention to move there. In finding that London had been illegally imported into Washington and was free, the trial court rigorously adhered to the law.

Marshall might easily have upheld London's freedom. A distinguished federal trial judge in the slave jurisdiction of the District of Columbia had already concluded that London was entitled to his freedom. Such a decision would not have threatened slavery or even been seen as "antislavery." Rather, it would have been consistent with jurisprudence in a number of slave states. But Marshall chose to read the statute in favor of slavery and not freedom, stating in part that his interpretation was consistent with the "spirit" of the law.[24] For Marshall, "the spirit" of American law—the spirit of a nation that claimed in the Declaration of Independence that "all men are created equal" and were entitled to "life, liberty, and the pursuit of happiness"—was to favor slavery over freedom.

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20. *Scott v. Negro Ben*, 10 U.S. (6 Cr.) 3 (1810) at 6.

21. This is a paraphrase of the famous statement by the Israeli diplomat Abba Eban about the failure of Arab nations to embrace opportunities for peace in the Middle East. Kenneth S. Stern, *The Conflict Over the Conflict: The Israel/Palestine Campus Debate* (Toronto: University of Toronto Press, 2020), 148. See also https://www.nytimes.com/1991/08/08/opinion/yasir-arafat-and-the-beanball.html (accessed November 29, 2021).

22. *Scott v. Negro London*, 7 U.S. (3 Cr.) 324 (1806).

23. This law is "An Act to reduce to one, the several Acts concerning Slaves, Free Negroes, and Mulattoes," passed December 17, 1792, found in *Certain Acts of the General Assembly of the Commonwealth of Virginia* (Richmond: Augustine Davis, M.DCC.XCIV [1794]), 70. The relevant section of this law was based on the 1785 act: "An Act concerning Slaves," chapter LXXVII, *Laws of Virginia*, *1785*, 60; and "An Act to amend the Act preventing the farther importation of slaves," Act of December 17, 1789, chapter XLV, *Virginia Laws*, *1789*, 26–27.

24. *Scott v. Negro London*, at 331.

Hezekiah Wood v. John Davis and Others[25] further illustrates Marshall's hostility to freedom for black people. A Maryland court had concluded that John Davis's mother, Susan Davis, had *never* legally been a slave. Thus, under this ruling she became free and all her children living in Maryland became free. By this time John Davis and some of his siblings had been taken to Washington, D.C. They argued that they were born free, and they had never been slaves. This was consistent with the law of *every* slave state. Since the 1660s southern slave law had held that the children of all free women—even those of African ancestry—were free. Because their mother was never a slave, Davis and his siblings won their case in the circuit court. The presiding judge in that case was Justice Gabriel Duvall, who also sat on the U.S. Supreme Court. At this time (unlike today) Supreme Court justices presided over trials in some federal courts. Before being appointed to the Supreme Court, Duvall had been the chief justice of Maryland. In this case, which involved a Maryland ruling that Davis's mother had always been free, Justice Duvall noted that in similar cases in Maryland the rule was always the same. If the mother was proven to be free from birth then the children "were only bound to prove their descent."[26] It is worth noting that Duvall owned slaves and supported slavery, but this did not prevent him from ruling in favor of freedom when the law led to that result.

On appeal Wood argued that he had purchased the Davis children before their mother had proven her freedom and thus their claim to freedom was not governed by the case that led to Susan Davis's freedom. Wood's lawyer, Francis Scott Key (who would later be the author of the American national anthem, the "Star Spangled Banner,") argued that Wood "was not a party, nor privy to any party, to the suit of Susan Davis" for her freedom.[27] This argument should have been a nonstarter for Marshall. If Susan Davis was *always free* and had never been a slave, then her children were not slaves when Wood bought them. Under this theory, Wood would have had a valid suit against the person who sold John Davis to him. During the oral argument, Justice Duvall "stated in open court that when he had been in practice in Maryland he had filed petitions to establish freedom" for a number of slaves, and that after their freedom had been proven, "the descendants of the petitioners had only to cite the judgment and prove their descent."[28]

Marshall ignored Duvall's knowledge of Maryland practice, concluding that the Davis children were not free, even though he knew their mother had always been a free person, and he knew that under the law of every state in the United States, all the Davis children were free. This result was completely at odds with

25. *Hezekiah Wood v. John Davis and Others*, 11 U.S. (7 Cr.) 271 (1812).
26. *Wood* at 272.
27. *Wood* at 271.
28. *Wood* at 271.

the universally accepted American rule that the children of a free woman were always born free. Marshall, obsessed with property rights, was more concerned about the nature of contract law than about the settled law of every slave jurisdiction in the country or the freedom of a handful of African Americans.

Marshall asserted that the judgment giving Susan Davis her freedom "was not conclusive evidence in the present case" because there was "no privity" between Wood and the man who had claimed to own Susan Davis.[29] But this was a non sequitur, because the case had nothing to do with Susan's owner. If Susan had never been a slave, then under the law of *every* state in the nation, the children were also free, no matter how they ended up in the hands of others who illegally claimed them as slaves. Wood was effectively in possession of stolen property, that he had bought in Maryland. The rightful owner of that property—John Davis, who had always "owned" himself—asserted the right to claim possession of himself. A court in the District of Columbia, which had adopted Maryland's laws on slavery, legitimately accepted the finding that Susan was free, and thus her children were as well. Marshall might have concluded that the D.C. courts were obliged—under a concept akin to full faith and credit—to accept the rulings of the Maryland courts. Alternatively, Marshall might have held that, because Susan Davis's freedom had been confirmed by another court, the burden of proof had shifted to Wood, who had to prove that John Davis and his siblings were slaves. But he did not.

Marshall ought to have held that once Susan Davis established that she was free from birth there was no legal theory under which her children could be enslaved. This was Duvall's position at trial. However, Marshall rejected it without any discussion. Here Marshall divorced himself from the law of slavery, and instead introduced an irrelevant contract theory to a case that should have turned on the free birth of the mother. Marshall may have laid the "foundations of power," as one scholar claims,[30] for the court and the national government, but here he abused his power to deny liberty to a family of African Americans who were considered free under the laws of every state in the nation.

Why did Marshall always rule against freedom and always support slavery and human bondage? The likely explanation is threefold. First, he believed in slavery and was committed to it. He did not want blacks to be free. As we will see below, he considered free blacks to be a dangerous class who were "pests" on society. Thus, he always favored keeping them in bondage. Second, he had been buying slaves his whole life. He was actively buying slaves when he wrote these decisions. He doubtless sympathized with those slaveowners who bought slaves

29. *Wood* at 271.

30. George Lee Haskins and Herbert A. Johnson, *Foundations of Power: John Marshall, 1801−1815* (History of the Supreme Court of the United States, vol. 2) (New York: Macmillan, 1981).

and then discovered they might not actually be slaves. He favored white buyers of blacks who might really be free. At least on a psychological level, Marshall must have been able to imagine that he might someday buy a slave, only to discover that the person had a legitimate claim to being free. Finally, Marshall was obsessed with private property—buying and owning large amounts of land and slaves his whole life. For him, the property of white people was more important than the freedom of black people.

3: Marshall's Jurisprudence and the African Slave Trade

Marshall heard a number of cases involving the illegal African slave trade. Starting in 1794, Congress prohibited U.S. citizens from direct participation in the African slave trade. After 1808 Congress prohibited anyone from importing new slaves from Africa into the United States. Under a later statute, Congress declared that slave trading was piracy, punishable by death. It is unlikely that Marshall favored the African slave trade because most Virginians did not. But he never fully supported the enforcement of the laws against the trade. Marshall may have intuitively understood that if the African trade was morally wrong, then keeping people in bondage might also be morally wrong. Furthermore, he was never inclined to punish white people for their participation in slavery, even when their acts violated the law or denied black people their legitimate claims to freedom. Whenever he wrote an opinion on the African trade, invariably the slave traders were acquitted. In other cases, where other justices wrote the opinion of the court, the outcome often supported strict enforcement of the laws banning the slave trade, which led to freedom for illegally imported Africans.[31]

One famous case illustrates how Marshall seemed to always find a way to support slavery. The case of the ship *The Antelope* involved slave trading, international warfare, piracy, and a tragic outcome for many Africans who had been illegally transported across the Atlantic. In that case Marshall vigorously asserted that the slave trade could not be piracy because slave trading was "consistent with the law of nations." Thus, Marshall asserted the African slave trade "cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it."[32] However, the United States had in fact passed a statute declaring that slave trading was piracy, punishable by death, and that slaves brought into the United States, as happened here, were free. Here Marshall simply ignored a federal law because it ran counter to his own political goals and views on race and slavery.

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31. I have detailed all these cases in chapter 4 of my book, *Supreme Injustice*.

32. See Act of March 3, 1819, chapter 101, 2 Stat. 532; Act of May 15, 1820, chapter 113, § § 4−5, 2 Stat. *The Antelope*, 23 U.S. at 122.

In the same opinion he asserted that the U.S. Supreme Court could not consider "natural law" when adjudicating cases, even though he admitted the slave trade violated natural law. This rejection of natural law, when applied to the African slave trade, dramatically contrasts with an opinion two years later involving a bankruptcy law. In *Ogden v. Saunders* (1827), Marshall wrote one of his very few dissents, and his only dissent in a case involving the interpretation of a constitutional clause. He vociferously objected to New York state's bankruptcy law because it allowed an insolvent to avoid paying his creditors. As a very rich man who lent money out on interest and owned stock in banks, Marshall's heart and his pocketbook were aligned with creditors.

In *Saunders*, Marshall wrote: "If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to, and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and, although they may be controlled, are not given by human legislation."[33] He argued that his view of contract law "is, undoubtedly, much strengthened by the authority of those writers on natural and national law, whose opinions have been viewed with profound respect by the wisest men of the present, and of past ages."[34] As one scholar has observed, this opinion "is notable for its extension of natural-law protection to contractual agreements."[35]

Thus, when it came to contracts, property, and money, Marshall was ready to incorporate natural law into American constitutional law. When it came to selling people on the coast of Africa, chaining them up, and bringing them to the United States, he was opposed to even considering natural law.

4: Marshall's Opposition to Blacks Becoming Free

Marshall's views on black liberty show up most clearly in a petition to the Virginia legislature in 1831. At the time, Marshall was the leader of the Virginia branch of the American Colonization Society. The goal of the Society was to remove free blacks to Africa. The Society also accommodated slaveowners, who wanted to emancipate their slaves and send them out of the country. In the summer of 1831 Virginia witnessed the greatest slave rebellion in its history, known as the Nat Turner Rebellion, that left at least fifty-five whites and at least two hundred blacks dead. Marshall's petition was in response to the Turner Rebellion.

In the wake of the rebellion, Marshall asked the Virginia legislature to

33. *Ogden v. Saunders*, at 345.

34. Ibid., at 347.

35. Herbert Johnson, *The Chief Justiceship of John Marshall, 1801–1835* (Columbia: University of South Carolina Press, 1997), 187.

appropriate money to remove most (or all) of the free blacks living in the state, sending them to the ACS's colony in Liberia. Without any evidence that any free blacks had been involved in the Turner Rebellion, Marshall argued that because of the Turner Rebellion there was an "urgent expedience of getting rid in some way, of the free coloured population of the Union." Marshall declared that free blacks in Virginia were worthless, ignorant, and lazy and that in Richmond half the free blacks were "criminals." Marshall suggested that the presence of free blacks led to the Turner Rebellion, "the awful scenes in Southampton a few months ago," a claim consistent with his hostility to free blacks.[36] In fact, there were very few free blacks in Southampton County, and there was no evidence that any of them participated in the Turner Rebellion.

Like his cousin Thomas Jefferson, Marshall used the word "pests" to describe free blacks, and argued free blacks should be removed from the state.[37] Marshall did not believe in promoting even gradual emancipation. He thought all emancipation schemes were impractical. If there ever were an emancipation program he believed in, it would have to include sending all the former slaves to Africa. He told the Marquis de Lafayette that this was the "only secure asylum" that would be "beneficial for them and safe for us."[38] Marshall's most aggressive racism and hostility to free blacks never appeared on the pages of U.S. reports or in a book like Jefferson's *Notes on the State of Virginia*, but he carried these ideas to the bench when he heard cases involving slavery and when he petitioned the state legislature to expel free blacks who had been born and raised in that state.

Conclusion

When I began this project, I had no expectation of where the evidence would lead me. As a scholar, I must always follow the evidence, look at the record, report what I find, and then evaluate the evidence. When I discovered Marshall's massive slave ownership, and his consistent record of opposing black freedom in cases where the law seemed to support freedom, I spoke to distinguished Marshall scholars. One of them asked me if the purpose of my research and my book, *Supreme Injustice*, was "to destroy the reputation of a great man." I replied, no, that I was "trying to understand a great man." When we study history and do research, we do not always get the answers we want.

Marshall was certainly a great legal craftsman, and often a great jurist. But, as I discovered, he was perhaps not a "great man." In his personal life he bought and sold people, unlike his hero George Washington, who refused to sell or buy slaves

36. J[ohn] Marshall, Chairman, "Memorial: To the General Assembly of Virginia," December 13, 1831, *Papers of Marshall*, 12: 127, quoted at 128 and 130.

37. Ibid. On Jefferson and free blacks, see Finkelman, *Slavery and the Founders*, 270.

38. Marshall to the Marquis de Lafayette, May 2, 1827, *Papers of Marshall*, 11: 11−12.

"as you would do cattle at a market."[39] As a jurist he *always* supported slavery, always protected slave buyers and the owners of slaves, and never found any reason to free someone held in bondage. He also never found a good reason to punish someone for illegal slave trading. He would not accept the federal law that declared the African slave trade to be piracy. He aggressively argued for using natural law in cases involving contracts, property, and money, but even more adamantly argued that natural law had no place in cases involving human beings who were kept in bondage against their will.

We will continue to teach Marshall's great cases, and sometimes stand in awe of his powerful opinions. But should we "honor" him? Should we continue to have his name on institutions of higher education, on streets, and on buildings? Or should we rename colleges and law schools that currently honor Marshall? That is not for me to decide; it is an institutional decision. But it is clear that our thinking about Marshall has changed. Whether a school changes its name, the discussion of Marshall and slavery provides us all with a teaching moment so that we can better understand the history of the United States, the importance of slavery in the creation of the nation, and the present-day legacy of human bondage.

39. Finkelman, *Slavery and the Founders,* 200.