

ner that would accommodate religion as both unhistorical and fraught with danger.

The collection concludes with an essay by John M. Murrin titled "A Roof Without Walls: The Dilemma of American National Identity." Contrary to the Handlins' work, with which this review began, Murrin emphasizes the differences that existed among the people who inhabited the colonies and argues that independence left a diverse people without the normal attributes of national identity. In the Constitution, he argues, Americans found both a symbol and a set of standards, "a substitute for any deeper kind of national identity characterized by an "acceptance of pluralism, frank pursuit of self-interest, and the legitimization of competing factions."

Murrin's imagery is colorful, and his placing of the Constitution at the center of any meaningful conception of national identity is sound. Despite Michael Kammen's recent book on the Constitution in American culture,<sup>12</sup> much work remains to be done in drawing out the cultural importance of that document and tracing its relationship to both the idea and the characteristics of our national identity.

**THE PAPERS OF JOHN MARSHALL, VOLUME V: SELECTED LAW CASES, 1784-1800.** Edited by Charles F. Hobson,<sup>1</sup> Fredrika J. Teute,<sup>2</sup> George H. Hoemann,<sup>3</sup> and Ingrid M. Hillinger.<sup>4</sup> Chapel Hill, N.C.: University of North Carolina Press. 1987. Pp. lxxix, 583. \$37.50.

*Donald O. Dewey*<sup>5</sup>

The history of the United States judiciary in the first third of the nineteenth century is epitomized to a large extent by the judicial career of John Marshall, because of the political talents and powers of persuasion that he brought to the bench. In a similar vein, the

---

12. M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

1. Editor, College of William and Mary.  
 2. Associate Editor, College of William and Mary.  
 3. Assistant Editor, College of William and Mary.  
 4. Professor of Law, Marshall-Wythe School of Law and Consulting Editor, College of William and Mary.  
 5. Dean of Natural and Social Sciences and Professor of History at California State University, Los Angeles.

fifth volume of *The Papers of John Marshall: Selected Law Cases, 1784-1800* provides a legal and judicial history of the Commonwealth of Virginia, but for quite different reasons.

Many of the forty-three cases that are presented here would be close to incomprehensible without the extensive editorial notes that precede the case and the lengthy introduction to the traditions, procedures, and, most important, vocabulary of each of the courts in which Marshall practiced. The editors thus provide a history of the Virginia courts, interspersed among Marshall cases which show the courts in action.

This meticulously edited volume maintains a reasonable balance between too much and too little editing. The chief editor, a historian rather than a lawyer, does not expect his readers to have extensive legal knowledge. Even so, a glossary would have been helpful, to explain archaic legal terminology that might have been defined hundreds of pages before. Whenever possible the cases are personalized; a few of the struggles for wealth and property become quite melodramatic. Marshall's clients ranged from Lord Fairfax and Superintendent of Finance Robert Morris to the humble Pleasants slaves whose freedom Marshall won.

As a practicing attorney, Marshall clearly could not afford the carelessness with paper which characterized him later as he rode circuit. Attorneys were dependent on their own notes and filing systems during the long wait for the publication of court reports. Marshall's notes, in fact, became the basis for some of the Virginia reports published by Bushrod Washington (later Marshall's colleague on the Supreme Court) and Daniel Call (to whom Marshall was related by marriage). More than two hundred of Marshall's cases have survived in printed or manuscript report. Yet the editors complain that they lack the documentation to approach the fullness and variety of Marshall's practice: "The beginnings of his law practice constitute perhaps the largest gap in the spotty documentary record of his career." Thus Marshall's extensive common-law practice is "fragmentary, with whole sections missing and others in various degrees of completeness." Even so, Marshall left far too much documentation for a single volume, so the editors selected examples of the variety of cases he argued in each of the courts where he practiced.

The cases are apportioned among six sections: The General Court and the Fredericksburg District Court, three cases; the High Court of Chancery, four cases; the U.S. Circuit Court of Virginia, four cases; British debt cases in the U.S. Circuit Court, grouped separately because Marshall argued more than a hundred of these

cases, almost exclusively for the Virginia defendants, of which seven are presented; the new General Court, thirteen cases so brief that they consume only 34 pages of text; and selected arguments in the Virginia Court of Appeals, twelve cases.

These cases, and the courts, vary widely in interest and significance. Naturally those of greatest interest, at least to a non-Virginian, are the ones in the U.S. Circuit Court and in the Virginia Court of Appeals. Two of the federal cases would eventually become famous Supreme Court cases. When *Martin v. Hunter's Lessee* came before the Supreme Court in 1816, Marshall disqualified himself, not just because he had argued the case as *Fairfax v. Hunter* in Virginia, but also because he was personally involved in the outcome of this huge land case. There is an Old World charm when the future great Chief Justice, at the beginning of a landmark case, contrasts George Goodtitle and Peter Plunderer rather than the tiresome John Doe and Richard Roe. In *Ware v. Hylton* we see the diligent attorney arguing against his own principles before courts on which he would one day impress those nationalist principles. Previously unpublished notes of Marshall's arguments before the circuit court show him arguing ingeniously to avoid the obvious conflict between the Treaty of 1783 and various Virginia laws designed to frustrate British creditors. His Supreme Court argument in *Ware* was published in an earlier volume of *The Papers*, as are a number of his other more significant legal papers.

Marshall the man, counselor, and budding jurist is best presented in Section VI: "Selected Arguments in the Virginia Court of Appeals." These are all from printed court reports, though four of the reports had been taken directly from Marshall's own notes of his arguments. At the bar, as at the bench, Marshall was "vigorously logical, analytical, and enumerative." His one "original, and, almost supernatural" trait, remarked a contemporary, was "the faculty of developing a subject by a single glance of his mind, and detecting at once, the very point on which every controversy depends." He liked to separate his case into its various components, so that even if he lost on one point he could still prevail on another. In court he excelled as a counter-puncher, preferring to let his colleagues lead off. Chief Justice Marshall was most likely shaped in the courtrooms of Judge Edmund Pendleton, whose practice was "to ascertain, the very right and justice of every case, that came before him, and then to hunt up law to support it."