

What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States

By James F. Simon

Simon & Schuster, New York, NY, 2002.

REVIEWED BY MICHAEL COBLENZ

Today's climate of political acrimony may disgust many people, but it pales in comparison to the outright partisan hostility that existed in the early years of this nation. And it was in that political milieu that our Constitution was drafted and defined. This book describes that defining period in parallel biographies of Thomas Jefferson and John Marshall.

Jefferson was involved early on in the struggle for Colonial self-government and wrote the key exposition of Colonial grievances and proclamation of freedom — the Declaration of Independence. He was governor of Virginia during the Revolutionary War and our first ambassador to France after the war. The Constitution was drafted while Jefferson was abroad, but, when he returned, he served as the first secretary of state, the second vice president, and the third President of the United States.

Marshall, 12 years younger and less precocious than his second cousin Jefferson, was a Colonial legislator before the war and a Continental soldier during the war, serving with Washington at Valley Forge. Marshall said that his wartime experience led him to view "America as my country and Congress as my government." After the war, Marshall served as a Virginia legislator, a peace delegate to France, a congressman, and secretary of state under John Adams before his appointment to the Supreme Court.

What Kind of Nation covers the period from the XYZ Affair before Jefferson became President to the Supreme Court's 1824 decision in *Gibbons v. Ogden*, 15 years after he left office. But its main focus is on the animosity between the Federalists and the Republi-

cans, and how it affected the developing nation.

The Republicans, of whom Jefferson was the most prominent, believed that the Constitution represented a compact between the states and the federal government and that the states therefore had equal if not superior rights, with the federal government merely an adjunct to the states. The Federalists considered the Constitution a pact between the people of the nation and their federal government and therefore believed that the federal government was supreme over the states. Marshall was not the most prominent Federalist but used his position on the Supreme Court to do more than most to shape the nation on Federalist principles.

What Kind of Nation provides only a brief background of the lives of Jefferson and Marshall and of events before 1798. A reader unfamiliar with colonial and Revolutionary War history may be a bit lost. The most glaring absence is the lack of discussion of the drafting of the Constitution, particularly because constitutional interpretation was at the heart of many of the struggles between Marshall and Jefferson. But neither Jefferson nor Marshall was directly involved in drafting the Constitution. Jefferson's contribution, while he was ambassador to France, was limited to his suggestions to James Madison, the Constitution's chief author, though Madison also made use of Jefferson's draft Virginia Constitution. Despite this, and because of the many changes and compromises involved, Jefferson was highly skeptical of the final document.

In the Virginia legislature, Marshall was a leading voice for ratification of the Constitution. Virginia was the ninth and deciding state to hold its ratifying convention. Patrick Henry was the leader of the Anti-Federalists (who later became the Republicans, then Democratic-Republicans, and eventually the Democratic Party) and argued passionately against ratification. Madison gave a scholarly account of the Constitution, but it was Marshall's forceful advocacy that largely swayed the Virginia house to vote for ratification.

The basic outlines of party politics were established during the ratification debates between the Federalists and the Anti-Federalists, but the event that solidified party lines was the XYZ Affair during John Adams' presidency. Not long after the end of the Revolutionary War, the English and French went to war. Both raided American ships — the British for sailors and the French for booty. John Jay negotiated a neutrality treaty with the British. The American delegation to France, which included Marshall, was less successful. During negotiations, three French diplomats, referred to as X, Y, and Z in diplomatic correspondence, demanded a personal bribe of £50,000 to ensure a successful outcome. The Federalists were outraged by the affront, and some even pushed for war against France. Jefferson and the pro-French Republicans urged caution. Hamilton and many other Federalists (though notably not Marshall) used the episode to paint the Republicans as unpatriotic, if not treasonous.

The Federalists also used the incident to pass the Sedition Act, making it a crime to make "false, scandalous and malicious writing or writings against the government of the United States."¹ The act, though cloaked in the rhetoric of protection from foreign intrigue, was a thinly veiled partisan tool to stifle domestic political opposition. As Simon notes, "Under the Sedition Act, twenty-five persons were arrested, fourteen indicted, and ten tried and convicted, all of them supporters of the Republicans and critics of the governing Federalists."

The Republicans responded with the Virginia and Kentucky resolutions, the former of which saw "the powers of the federal government as resulting from the compact to which the states are parties, ... and that, in case of a deliberate, palpable, and dangerous exercise of other powers, not granted by the said compact, the states, who are parties thereto, have the right, and are in duty bound, to interpose. ..." The states, in other words, could veto

REVIEWS continued on page 50

federal laws. The resolutions were seen by many as a potential prelude to succession, but other state legislatures, mostly under Federalist control, responded unfavorably. In any case, the Sedition Act lost public support because of Federalist overzealousness in prosecuting Republicans.

Partisanship also defined the 1800 presidential election, which President Adams lost, but which ended up with the Federalist-controlled House of Representatives having to choose between two Republicans, Jefferson and Aaron Burr, for president. Ironically, it was Alexander Hamilton, whose hatred of Jefferson was well-known, who swayed the Federalists to Jefferson, though his support was tepid at best. "Jefferson is preferred," he wrote. "[H]e has pretensions to character." Burr, by contrast, was dangerous, "the Catiline of America."² Finally, in mid-February 1801, after many votes, the House selected Jefferson as the third President.

After his election defeat, President Adams attempted to create a legacy through a series of judicial appointments. Two had a profound impact on the country, though for vastly different reasons. The first was to replace Chief Justice Oliver Ellsworth. Adams had asked his secretary of state, John Marshall, to help select a suitable candidate, but after all their choices either declined or were deemed unacceptable, Adams chose Marshall. Marshall was surprised but accepted. He was easily confirmed in the Federalist Senate and was sworn in as chief justice on Jan. 27, 1801.

The second historic appointment was of a justice of the peace in the District of Columbia. There were actually 41 such appointments, with one going to William Marbury. Adams signed the judicial commissions on his last day in office and instructed Marshall to deliver them. Marshall was busy with last-minute business as secretary of state and with taking over as chief justice of the Supreme Court. As a result, many commissions, including Marbury's, were never delivered.

Jefferson was sworn in as President on March 4, 1801, with Marshall, his future political foe, administering the

oath of office. In his inaugural address, Jefferson attempted to set a tone of reconciliation with the defeated Federalists. Unfortunately, his subsequent actions belied his words.

The first major clash involved Jefferson's refusal to appoint many of Adams' last-minute Federalist nominees. This was followed by Republican efforts to repeal the Judiciary Act of 1801, which had established numerous new federal circuit judgeships, to which Adams had appointed Federalists. Republicans saw both acts as attempts by the Federalists to gain power through judicial appointments. Federalists viewed repeal of the Judiciary Act as a Republican effort to increase the party's power by removing Federalist officeholders. When leading Federalists approached Marshall to obtain his support, he wisely stayed out of the battle and persuaded the other Supreme Court justices to remain neutral as well. The repeal was ultimately passed by the Senate by a single vote, and by a wider margin in the House. This proved to be a rare victory for Jefferson in his struggles with the Federalist judiciary.

Marshall, meanwhile, was more successful in putting his imprint on the Supreme Court. Simon notes that, prior to Marshall's stewardship as chief justice, the Court had been politically insignificant, in large measure because of its limited legal significance. Judgments had been written individually by each member who bothered to attend a hearing or write an opinion, and as a result, the rulings had limited precedential effect.

One of Marshall's first acts was non-judicial but profoundly affected the future of the Court: he obtained rooms for all the justices in the same boarding house. This ensured that all the justices stayed in the district and removed an excuse for nonattendance at court sessions. It also increased the collegiality on the bench and increased Marshall's ability to persuade (or pressure) the other justices. And, in the first case to come before the Marshall Court, Marshall wrote the first unanimous opinion.

It was during the repeal fight that

Marshall ordered the Jefferson administration to show cause why Marbury's judicial commission had not been delivered. Jefferson viewed the order as an extension of the repeal fight and as a purely political act. His administration, therefore, did not cooperate. In fact, both parties viewed the central legal dispute in the case as whether the Court could compel action by an agent of the President.

On Feb. 24, 1803, Marshall delivered his unanimous opinion in *Marbury v. Madison*. Marshall first held that Marbury had been properly appointed and that the secretary of state was duty-bound to deliver the commissions. The next issue was whether the Supreme Court could issue a writ of mandamus ordering the President to act. Here there was a conflict between the Judiciary Act of 1789, which granted the Supreme Court the authority to issue the writ of mandamus, and Article III of the Constitution, which grants the Court original jurisdiction only in cases involving ambassadors and public ministers and in cases where a state was a party. In all other cases, the Court has only appellate jurisdiction.

In the most famous and influential portion of the ruling, Marshall held that the Supreme Court had the power to determine whether laws passed by Congress complied with the Constitution. Oddly, this was an issue only briefly raised by the litigants. The result was that the 1789 Judiciary Act's grant of mandamus was unconstitutional, and the Court had no authority to order Madison to deliver Marbury's commission. Marshall thus shrank the power of the Court in one respect (mandamus) but, beginning with *Marbury v. Madison*, greatly expanded its power by making it the final arbiter of what is and what is not constitutional. The Jefferson administration was not relieved that the Court had not compelled it to act. Rather, it saw the decision as a bare-faced power grab by the Court.

Partisan animosity came to a head with the impeachment of Justice Samuel Chase. Chase, like many Federalist judges, used his judicial office to further his political goals. Chase had

been particularly zealous in prosecuting Republicans under the Sedition Act. More recently, he had given a political diatribe in place of a grand jury instruction, suggesting that Jefferson's view of democracy amounted to "mobocracy." Outraged, Jefferson suggested that Chase should be impeached, and a year later he was. Fortunately, even many Republicans realized that there was a difference between overt politicking from the bench and the high crimes and misdemeanors required for impeachment, and Chase was acquitted. Subsequently, judges attempted to be nonpartisan, and impeachment was reserved for criminal acts.

The remaining two years of Jefferson's presidency were devoid of serious political conflict with the Marshall Court. Jefferson's tenure in office helped shape the nation, but it was often in ways that did not exactly comport with his view of states' rights and limited federal power. The principal example is the Louisiana Purchase. Jefferson was like many modern supporters of federalism, who proclaim faith in limited federal power but are all too willing to use it when it serves their purposes. For Jefferson, his supposed beliefs took a back seat when presented with the opportunity to expand the nation with the Louisiana Purchase.

Jefferson left office in 1809, but Marshall remained on the bench until his death in 1835. In those years he decided a number of key cases that expanded the power of the federal government. In *Martin v. Hunter's Lessee* (1816), Marshall joined an opinion by Joseph Story holding that the Court had jurisdiction to review state laws. In *McCulloch v. Maryland* (1819), the Court held that Congress could do all that is "necessary and proper" to further the goals of the Constitution, including chartering a bank. In *Cobens v. Virginia* (1821), the Court held that it had jurisdiction to determine the validity of a state criminal law and held that federal criminal law supersedes state criminal law. In *Gibbons v. Ogden* (1824), the Court gave an expansive reading to the Commerce Clause and held that a federal shipping statute superseded a state law that granted a shipping monopoly to Robert Fulton,

the inventor of the steamboat.

Interestingly, the concurring opinion in *Gibbons v. Ogden*, written by Republican Justice William Johnson, went even further than Marshall's opinion in expanding the federal government's power under the Commerce Clause. Even Republicans, it now appeared, had been convinced by the Marshall Court that the federal government was supreme.

What Kind of Nation brilliantly highlights the rancorous political battles of the years when Marshall expanded the power of the Supreme Court and the federal government. It shows that the debate over our form of government was tinged with partisanship, hostility, and personal acrimony. This was true when the Constitution was drafted, and it was true when it was defined by Marshall. If the framers and the early interpreters of the Constitution could not agree as to its meaning, then we should not expect harmony on every point today. Advocates of "original intent" largely ignore the combative origins of our constitutional history. **TFL**

Michael Coblenz is an intellectual property attorney in Houston, Texas. Before law school he studied history and served as a B-52 navigator in the U.S. Air Force.

Endnotes

¹Stat. 596 (1798), which, together with the Alien Act, 1 Stat. 570 (1798), is often referred to as the Alien and Sedition Acts. The Supreme Court discussed the Sedition Act and the Virginia Resolution in *New York Times v. Sullivan*, 376 U.S. 254, 273-277 (1964).

²Hamilton's comparison of Burr with Catiline was prophetic. Catiline conspired to overthrow the Roman Republic in 65 B.C. and, when unsuccessful, fled to Etruria to raise an army to fight Rome, where he was killed in battle. Burr, after killing Hamilton in a duel, fled to New Orleans, where he allegedly entered into a conspiracy to establish a new nation in the Louisiana territories, with the alleged plan to overthrow the government of the United States. This fascinating incident is briefly recounted in chapter 10.

At The Hands of Persons Unknown: The Lynching of Black America

By Philip Dray

Random House, New York, NY, 2002. 528 pages, \$35.00.

REVIEWED BY JON M. SANDS

For approximately a century, lynching was a pervasive and deadly fact of life — and death — in America. Its time ran from the Civil War in the 1860s to the civil rights movement in the 1960s. Lynching was brutal murder by an organized mob, numbering from the thousands down to just a few, acting outside the law. It was designed to terrorize and to send a message demanding submission. The murder was usually by hanging and usually included a whole range of other atrocities, such as mutilation, mayhem, and burning. Lynching was primarily directed against African-Americans and was predominant in the South. Federal attempts to intervene were often unavailing in the face of Southern intransigence. At its crest, in the three decades from 1890 to 1920, lynching's toll annually ran into the hundreds. Philip Dray's *At the Hands of Persons Unknown* chronicles the dark history of this savage act.

The history of lynching is a history of atrocity. Lynching began as a means of unleashing Southern terror outside of state or local authority in the aftermath of the Civil War and during Reconstruction. Lynching became an instrument of community control during the Jim Crow era, where lynchings were celebrated almost as community festivals. Not much was needed for such awful gatherings — just an African-American who was suspected of a criminal act or of breaking a "moral code," as by being uppity or even by just striving to better himself. In fact, Dray shows that lynchings for people suspected of noncriminal acts apparently outnumbered those of suspected criminals.

One account can stand as an example. In 1887, an old abolitionist postmaster sought to fill the many post-

REVIEWS continued on page 52