PAUSE AT THE RUBICON, JOHN MARSHALL AND EMANCIPATION: REPARATIONS IN THE EARLY NATIONAL PERIOD?

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Professor D. Kent Neumyier recently attributed Chief Justice John Marshall’s record on slavery to a combination of “inherent paternalism” and a deep commitment to commercial interests that translated into racism.1 Neumyier found Marshall’s adherence to the law of slavery “painful to observe” and saw it as a product of his Federalism, which required deference to states on the slave issue.2

Marshall’s involvement in the problem of emancipation in the last years of his life, however, indicates that pragmatism primarily dictated his approach to the problems associated with the “slave population.” Marshall’s statements, both on and off the bench, reveal that he hated the institution of slavery and considered it demeaning to both slave and slave-owner.3 While private records disclose that Marshall negotiated his way through the social and economic life of the institution with the ease of a southern slave-owner, his commitment to colonization equally reveals that he, as a Federalist, was above all a pragmatic nationalist. When faced with the question of emancipation, Marshall unhesitatingly adopted the idea of national funding for a colonization scheme to gradually end slavery. National funding for colonization was, arguably, the early national equivalent of “forty acres and a mule.” Inherent in both concepts is the acceptance of national responsibility for a social evil.

2. Id. at 434. Marshall “truly believed . . . that it was possible to separate morals from law . . .” Id.
3. Like his distant cousin, and fellow Virginian, Thomas Jefferson, with whom Marshall did not often agree, Marshall considered slaveholding an evil. He often discussed the matter in the third person as if to distance himself from it and referred to the southern states’ “immoveable prejudice & dislike” for any interference with their “slave population.” Letter from John Marshall to Timothy Pickering (March 20, 1826), in 10 THE PAPERS OF JOHN MARSHALL 277 (Charles Hobson ed., 2000).
Marshall’s pragmatic record on slavery is seen in his participation in the economic and social life of slaveholding Virginia, in private correspondence and in opinions expressed in cases. It is most apparent in his association with the American Colonization Society, where he attempted to deal directly with solving the problem of the “slave population” and emancipation.

(a). Participation in the social and economic life of slavery

The realities of Marshall’s place in time informed his pragmatism. As a slave-holding southerner, Marshall, throughout his life, held ambivalent ideological positions. He fought in the Revolutionary War to establish a country, the government of which would be based on principles of equality. In June of 1788, as a thirty-two year old delegate to the Virginia ratification convention, he argued for approval of the Constitution, a Constitution that contained clauses of inequality prompting its characterization as a pro-slavery document.* In the last decade of his life, he served as a delegate to the Virginia Constitutional Convention that rejected equality by incorporating pro-slavery provisions to determine representation in the state legislature.†

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4. See P.L. STAUDENRAUS, THE AFRICAN COLONIZATION MOVEMENT 1816-1865, 17-20 (1961) (concentrating on the colonization movement in the United States). Discussions of colonization in the early 1800s culminated in the formation in 1817 of the American Society for Colonization of Free People of Colour in the United States on the Coast of Africa (“Colonization Society”). The Reverend Robert Finley of Baskingridge, New Jersey, eventual president of the University of Georgia, adopted colonization as a benevolent cause and published THOUGHTS ON COLONIZATION in 1816. Finley wanted to establish a colony “similar to Sierra Leone” to “ameliorate the condition of free Negroes by removing them to Africa.” Id. at 17. In December of 1816, Finley joined tal- izes with Robert R.oul, Clerk of the House of Representatives and Francis Scott Key, a prominent Washington lawyer, to establish the Society in Washington in January, 1817. At the first organizational meeting on December 21, 1816, Henry Clay, John Randolph of Roanoake and Daniel Webster were among those who voted to establish a colonization society. The organizers met on Dec- ember 28, 1816, in the hall of the House of Representatives and adopted a constitution that was signed by some fifty men. Justice Bushrod Washington was elected President. The thirteen vice-presidents included Secretary of the Treasury William Crawford, Speaker of the House Henry Clay, William Phillips and Charles Pinckney and General Andrew Jackson. Id. at 24-30. See also C. DUNCAN RICE, THE RISE AND FALL OF BLACK SLAVERY (1757) (providing a general history and discussion of colonization movements). Rice refutes the “assumption that the Colonization Society as a whole was pro-slavery and anti-Negro,” and argues that it was a “legitimate agency through which one aspect of the benevolence of America’s philanthropic community was channelled.” Id. at 243.


6. See FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE

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When constitutional protection of the slave trade ended in 1808, Congress immediately passed legislation prohibiting importation of slaves into the United States. Thereafter, Virginia became a breeding ground for the thriving interstate slave trade. By the 1830s, the industry would yield approximately twenty million dollars a year.* For Marshall, slavery was a pervasive institution in the political, social and economic fabric of his state and nation.

Records reveal that Marshall maintained a small holding of slaves throughout his life, that he received slaves as gifts and that he gave slaves to his sons. In 1788, as a wedding present, his father gave him one slave, named Robin Spurlock, who remained with him until Marshall died on July 6, 1835. At his death, Marshall did not free his slaves, but bequeathed them all save one. Only his manservant Robin, could, by virtue of Marshall’s will, choose freedom. The emancipating provision, contained in an August 13, 1832, codicil to his will of April 9, 1832, incorporated the Virginia law on slavery:

It is my wish to emancipate my faithful servant, Robin, and I direct
show that Marshall participated fully in the life of slavery. Marshall kept regular records of receipts and disbursements during the years, 1783 through 1795.15 The entries reveal purchases, receipts and expenses associated with slaveholding. On July 1, 1784, Marshall entered a purchase for "Ben" at ninety pounds, four shillings, a price that indicates that Ben was at a "prime work age."16 Two years later, another entry indicates that Marshall paid one pound, one shilling and four pence in goal fees to get Ben out of jail.17 On April 12, 1787, Marshall paid fifty-five pounds for "Israel," a slave he kept for five years until February, 1792.18 Undesignated expenses associated with slaves are entered in June of 1787, "expenses for negroes, (twenty) pounds," and on April 26, 1788, seven pounds four shillings two pence, disbursements for negroes.19 On June 20, 1787, two entries were made for Sam, "linmen" at nine shillings and a coffin at twelve.20 Census figures supplied by Marshall for the 1810, 1820 and 1830 census years reflect that his slave ownership was never large and declined over time from sixteen to fourteen to seven.21 Irwin S. Rhodes compiled the personal property tax lists filed in Richmond from 1787 to 1835. These records show a fairly consistent holding in that city of eight to ten slaves declining to seven in 1828, and to one (presumably Robin) in 1835, the year of John Marshall’s death.22

(b) Private correspondence

In a letter to Timothy Pickering in 1826, Marshall expressed a sentiment that recurs again and again throughout his personal correspondence:

I concur with you in thinking that nothing portends more calamity & mischief to the southern states than their slave population; Yet they seem to cherish the evil & to view with immovable prejudice

21. See supra note 19.
22. Higgins, supra note 11.
& dislike every thing which may tend to diminish it. I do not won-
der that they should resist any attempt should one be made to inter-
fere with the rights of property, but they have a feverish jealousy of
measures which may do good without the hazard of harm that is I
think very unwise. 24 25

Marshall feared that disintegration of the union would come
as a result of the south state's "feverish jealousy" and extreme pro-
tectionist attitude toward slavery. He expressed this apprehen-
sion during the nullification crisis occasioned by southern opposi-
tion to the tariff of 1828 in a letter to Joseph Story. As a Federa-
list, Marshall felt kinship with his colleagues "north of the Potow-
mack" and spoke of the Virginians who urged cessation in the
1830s as those with "creeds irreconcilable with the constitutional
creed of nationalism." 26 Marshall acknowledged this kinship
when he congratulated Story on the completion of a "Herculean
 task" — his treatise on Constitutional law. Marshall assured Story
that constitutional law, with its national interpretation, was a
subject "on which [they] concur(red) exactly. Our opinions on it, I
believe, are identical. Not so with Virginia or the South gener-
ally." 27

Obviously, Marshall's opinions on slavery were not those of
Pickering and Story, but his fear of slavery as a threat to union in-
firmed his opinions. Given Marshall's political adherence to Fed-
eralism, it is natural that he would look to a national solution to
solve the problem of emancipation. Slavery posed the threat of
disunion. For Marshall, that was the direct threat. In the same
letter to Story, Marshall referred to an upcoming debate over res-
olutions concerning emancipation submitted to the Virginia state
legislature:

You have undoubtedly seen the message of our Governor and the
resolutions reported by the committee to whom it was referred,—a
message and resolutions which you will think skillfully framed had
the object been a civil war. . . . On Thursday, these resolutions are to
be taken up, and the debate will, I doubt not, be ardent and tempe-
tuous enough . . . it may conduce to a southern league, — never to a
southern government . . . . We have fallen on evil times. 28

Marshall did not participate in the debates, but his son, Tho-
mas Marshall, argued on January 11, 1832, for emancipation in
the following words:

Wherefore, then, object to slavery? Because it is ruinous to the

24. Letter from John Marshall to Timothy Pickering (Mar. 20, 1826), in 10
25. Letter from John Marshall to Joseph Story (Dec. 25, 1832), in 14
PROCEEDINGS OF THE MASS. HIST. SOCIETY 392-94 (24 series 1900).
26. Id.
27. Id.
28. Id., supra note 8, at 722. See also Michael Kent Curtis, The 1859
Crisis over Hinton Helper's Book, The Impending Crisis: Free Speech, Slavery,
and Some Light on the Meaning of the First Section of the Fourteenth Amend-
ment, 66 CHI-KENT L. REV. 1113 (1993) (comparing the 1830 controversy
over emancipation with the 1859 controversy over slavery and Helper's 1859
book).
29. STITTS, supra note 6. Francis Sitts thought that Thomas Marshall
"echoed his father's sentiments." Id. Accord Jean Edward Smith, Marshall
Misconstrued: Activist? Partisan? Reactionary!, 33 J. MARSHALL L. REV. 1109,
1124 (2000).
30. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 162
(1996).
31. Id. at 163.
32. Id.
33. 2 Call 319, 325-26 (1800).
34. Charles F. Hobson, Editorial note, 5 THE PAPERS OF JOHN MARSHALL
once to following testator intent. The Pleasants case has been cited as evidence that Marshall was skilled in appellate advocacy reasoning that arguing against the rule against perpetuities to free slaves was "swimming upstream against one of the most sacred canons of property law." Obviously, the "strict legal grounds" important for Marshall's argument were adherence to the intent of the testator, a time honored rule of will construction. Marshall could conscientiously announce his method, strict application of the law, and argue for manumission.

His decision in the slave trade case, The Antelope, announced the same focus espoused in the Pleasants manumission case:

In examining claims of this momentous importance; claims in which the sacred rights of liberty and of property come in conflict with each other; which have drawn from the bar a degree of talent and of eloquence, worthy of the questions that have been discussed; this Cour must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law.

In considering the issue in The Antelope—"whether the slave trade is prohibited by the law of nations ...?" Marshall began by acknowledging that natural law favored liberty:

That [the slave trade] is contrary to the law of nature will scarcely be denied. That every man has a natural right to the fruits of his own labor is generally admitted; and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission.

He reasoned that slavery originated in force, and looked to state positive law to outlaw the practice. Because slavery had not been universally recognized as illegal, Marshall took the position that customary international law illegalizing slavery was evolving. He therefore declined to rule that all the Africans should be delivered up to the United States for return to Africa under the Slave Trade Act of 1819. He recognized Spain's claim because slavery was legal in Spain and ordered that, after precise calculation of the number of Africans due Spain, "all the remaining ..."

35. Smith, supra note 30, at 1114. See also Paul Finkelman, Exploring Southern Legal History, 64 N.C. L. REV. 77, 92 (1986). Professor Paul Finkelman found the "judge's humanitarian instincts" prompted the decision which "ignored" existing law. The two scholars disagree over the number of slaves involved—whether it was 100 or 400. Id.


37. Id. at 124.

38. Id. at.

39. United States v. La Jeune Eugene, 26 F. Cas 838 (D. Mass. 1822). In this, Marshall inferred from Story who had ruled on circuit that slavery was prohibited by international law, i.e., that the customary international law outlawing slavery had involved. Id.

[were] to be delivered to the United States, to be disposed of according to law. . . ."

The process of returning the Africans dragged on from the date of the decision on March 15, 1825, until July of 1827 "when some 130 Africans adjudicated to the United States sailed from Savannah for Liberia." Marshall's decision and subsequent actions should be considered in the context of his membership in the Colonialization Society. Some months after the March decision, Marshall, as president of the Richmond and Manchester Auxiliary of the American Colonization Society, made the following inquiry of the Secretary of the Navy, Samuel Southard:

In the case of the Antelope otherwise called The General Ramirez, the Supreme court, at its last term directed a considerable number of Africans to be delivered to the United States, & I understood that You had ordered a vessel to be in readiness to receive them & transport them to Africa. The papers have given us no information on this subject & I am uncertain whether these Africans have ever been delivered, in conformity with the decree, to the United States. As the annual meeting of the Auxiliary colonization society at this place approaches some interest will feel in this augmentation of the colony & I shall be gratified at being enabled to communicate the fact: [author's emphasis] Will you pardon the trouble I give in asking you to have the goodness to drop me a line giving some information on the subject? With great respect I am Sir your obedient.

Southard replied that a dispute had arisen over allocation of the Africans to the Spanish claimant and that the dispute would be submitted to the Supreme Court. After incessant delays, the remaining Africans set sail for the colony in Liberia under the auspices of the Colonization Society.

Although Federal funding for the Colonization Society's plan was often sought, the advocates were never successful. Monies were, however, appropriated by Congress to fund the 1819 Slave Trade Act, under which Africans captured during enforcement against the trade by the United States were to be returned to the coast of Africa. The Colonization Society had been instrumental in passing this legislation and worked closely with the government in enforcing the Act. Marshall's opinion in The Antelope is interesting in this context, not only for the particular ruling in the case,
but also for the implementation of the opinion which drew on federal funds. 44

(4). Association with the Colonization Society

Marshall was involved with the Colonization Society almost from its beginning in 1817. 45 He sympathized fully with its goal of voluntary emancipation and colonization. In 1819, two years after the Colonization Society was formed, Marshall purchased a life membership for $50. 46 In that same year, he sent the Society's president, Justice Bushrod Washington, $30 "on account" of his subscription, noting that he would have sent it to the Elias Caldwell, Clerk of the Supreme Court who was also secretary of the Colonization Society, but Caldwell was out of town. 47 Marshall became president of the Richmond and Manchester Auxiliary of the Colonization Society in Virginia in November of 1823 48 and remained so until his death. He unstintingly supported the efforts of colonization:

[Marshall] gave handsome donations to the state and national organizations, privately believing that colonization would strengthen the Union and relieve the country from a danger whose extent can scarcely be estimated. He urged free Negroes seeking his advice to go to Liberia. . . . 49

In 1834, when the Society's finances were in disarray, Marshall pledged $5,000. 50 The Richmond group, over which he presided, met in the House of Delegates, and was recognized as one of the most prestigious groups within the organization. 51

Legal scholars and historians have ascribed various motives to the proponents of colonization schemes, noting the obvious racism inherent in such plans. Colonization, after all, was based on the assumption that America could not exist as a biracial society. Richard B. Morris, writing in 1969, thought that the colonization movement was "less important for the minimal results it achieved than for the negative attitude toward racial integration in America which it exemplified." 52 Others have emphasized the evils and folly of the plan that the Abolitionists soundly attacked as hypocritical. Literature on the American Colonization Society often concentrates on the conflict between the Abolitionists' proposal for emancipation and that of the Colonizationists. The Abolitionists proposed immediate, unconditional and universal emancipation whereas the Colonizationists proposed gradual, conditional and voluntary emancipation and concentrated on removing the emancipated from white society. The Abolitionists coursed civil war. The Colonizationists courted accommodation. 53

Of Marshall's motives for becoming a Colonizationist, one can only speculate, giving due credit to his view that slavery was contrary to natural law. One finds, however, that the contours of Marshall's support distinguished him from most southern slaveowners. Marshall, with Madison, looked to the federal government for funds to realize a plan of emancipation and colonization. His support for colonization is notable when viewed in connection with the recognition that the national government should be involved in funding the efforts to colonize freed slaves. Most southern Colonizationists opposed national funding of the program. 54 Significantly, Marshall did not. When Lafayette asked Marshall for an opinion about the colonization plan proposed by Benjamin Lundy, 55 Marshall, after thoroughly evaluating the plan, stated that he preferred the funding plan proposed by Senator Rufus King of New York. 56 King had introduced legislation in the Senate

44. See NOONAN, supra note 41. See also EARLY LEE FOX, THE AMERICAN COLONIZATION SOCIETY 1817-1840 215-28 (photo. reprint 1971) (1919).
45. See STAUDENRAUS, supra note 4 (discussing the origins of the movement).
46. STAUDENRAUS, supra note 4, at 70.
48. FRANCES NORTON MASON, MY DEARST POLLY: LETTERS OF CHIEF JUSTICE MARSHALL TO HIS WIFE 266 (1961).
49. STAUDENRAUS, supra note 4, at 107.
50. Id. at 224.
51. Id. at 107.
52. Richard B. Morris, Introduction to MATTHEW T. MELLON, EARLY AMERICAN VIEWS ON NEGRO SLAVERY: FROM THE LETTERS AND PAPERS OF
on February 18, 1825, in which he proposed that the "whole of the public land of the United States, with the net proceeds of all future sales thereof" should be:

invitably applied to aid the emancipation of such slaves, within any of the United States, and to aid the removal of such slaves, and the removal of such free persons of color, in any of the States, as by the laws of the States respectively may be allowed to be emancipated, or removed to any territory or country within the limits of the United States of America."

King's plan was a version of one proposed in 1819 by Madison in a letter to Robert J. Evans, written two years after the American Colonization Society was formed. Madison's letter is a comprehensive approval of the Society and of colonization, enumerating the prerequisites for a valid emancipation scheme.

"A general emancipation for slaves ought to be 1. gradual. 2. equitable & satisfactory to the individuals immediately concerned. 3. consistent with the existing & durable prejudices of a nation." Madison believed that the Colonization Society's plan had a due regard for these requirements and that not only supported national funding for the project but also explained why national funding was essential.

"The object, as an object of humanity, appeals alike to all: as a national object, it claims the interposition of the nation. It is the nation which is to reap the benefit. The nation therefore ought to bear the burden."

Madison knew that the funds necessary to "pay for, to transport, and to establish all the slaves in the United States" whose

fersom, however, questioned whether Africa could provide a satisfactory asylum. He reminded Sparks that when he proposed emancipation and colonization forty-five years earlier in NOTES ON THE STATE OF VIRGINIA, he had not assigned a "particular place of asylum," deeming the revolutionary period not the appropriate time to select a place. In 1824, Jefferson thought that the colony should be established in St. Domingo. Instead of the Society's plan, Jefferson preferred his own plan of "emancipating the after-born, leaving them, on due compensation, with their mothers, until their services are worth their maintenance, and then putting them to industrious occupations, until a proper age for departure." Id. at 1495. Jefferson "followed the Colonization Society's career and privately applauded its aims." STAUBENRAUS, supra note 4, at 171. He also traces King's plan to Jefferson's suggestion. However, Madison had proposed the funding plan adopted by King earlier in 1819. The idea of colonization was obviously shared by the two ex-presidents. They agreed that federal funding was essential, although they did not agree on the source of the funding. Id.

57. Fox, supra note 44, at 87.
59. Id. at 283.
60. Id. at 284.
61. Id. at 285-87.
62. Id. at 286.
64. Id. at 199.
65. Id. at 200.
fertile to make their labour profitable, and, if fertile, will cost a great deal of money. The effect of these and other causes is such that, in point of fact, the increase of slaves, whom a man divides among his children, and the support of his family, constitute their chief profit. In Maryland and Virginia the net profits of their labour would probably not liberate them as fast as they multiply.  

Lundy’s plan also required transferring slaves from areas where slave labor was not profitable to southern territory “where lands are cheap and labour profitable.” Marshall noted:

Sufficient allowance is not I think made for the expenses of removal and of maintaining the slaves till the lands can be cleared and put in a state for profitable culture. These must be considerable. But the great objection to executing the plan in this mode consists in the invariable fact that distant estates are not profitable to the Proprietor. The managers keep all that is gained, the employers get nothing; consequently there would be nothing to apply towards the liberation of the labourers.  

Marshall concluded that the plan would fail “because the profits of labour, modified as [the plan] proposes, can never bear any proportion to the multiplication of slaves, and can consequently never reduce their numbers.”

Six years after Marshall endorsed King’s plan in his letter to Lafayette, he wrote to Ralph R. Gurley, agent of the Colonization Society and editor of the Colonization Society’s journal, AFRICAN REPOSITORY:

It is undoubtedly of great importance to retain the countenance and protection of the general government . . . the power of the government to afford this aid is not, I believe, contested. I regret that its power to grant pecuniary aid is not equally free from question. On this subject I have thought and still think that the proposition made by Mr. King in the Senate is the most unexceptionable and the most effective than can be devised.

CONCLUSION

Marshall thought that the solution to emancipation and the end to slavery were to be nationally funded. He considered slavery a national problem, not a state problem, as most of his fellow Virginians insisted. In this he differed from most southerners who argued that slave matters were state matters and that the nation could involve itself in the institution of slavery only by strictly adhering to the role assigned to it by the Constitution under the three fifths clause and the fugitive slave clause.

The discussion reveals Marshall’s serious and pragmatic approach to ending slavery, a problem that was, as he indicated to Lafayette, “attended with such difficulties as to impress despair rather than hope on the minds of those who take a near view of the subject.”

The historical significance of Marshall’s approval of emancipation and colonization must be seen in connection with Marshall’s nationalism. Unlike many southern contemporaries, Marshall viewed emancipation as an entrenched economic problem that could be solved only on a national scale. Realistic emancipation and colonization would require voluntary emancipation or compensation to the slave owner and a stake for the freed slave who would acquire not only the benefits but also the burdens of freedom. The funds to pay for the slaves, to transport the freed slaves and to establish all the freed slaves would be, as Madison said, huge. Nonetheless, Marshall believed it could be accomplished if the “countenance and protection of the federal government” could be retained to effectuate King’s funding plan.

On August 2, 1832, Marshall wrote to Story:

“Things to the South wear a very serious aspect. If we can trust to appearances the leaders are determined to risk all the consequences of dismemberment. I cannot entirely dismiss the hope that they . . . will pause at the Rubicon.”

66. Id. at 200.
67. Id.
68. Id. at 201.
69. See STRAUHNSBAUM, supra note 4, at 100, 171 (noting that The AFRICAN REPOSITORY AND COLONIAL JOURNAL began publication in 1825). As editor of the journal, Gurley plead for “national aid in removing the free Negro population.” Id.
70. FOX, supra note 44, at 87 (quoting a letter from John Marshall to Ralph R. Gurley).

72. Letter from James Madison to Robert J. Evans (June 15, 1819), supra note 58, at 235.
73. Fox, supra note 44, at 71.