



FROM THE BAG

In speculation, he was a real republican, devoted to the constitution of his country, and to that system of equal political rights on which it is founded. But between a balanced republic and a democracy, the difference is like that between order and chaos. Real liberty, he thought, was to be preserved, only by preserving the authority of the laws, and maintaining the energy of government. Scarcely did society present two characters which, in his opinion, less resembled each other, than a patriot and a demagogue.

John Marshall

*2 The Life of George Washington 447 (2d ed. 1832)*



# MARSHALL'S MAPS, THE *U.S. REPORTS*, AND THE NEW JUDICIAL RESTRAINT

Ross E. Davies

**A**S A BIOGRAPHER OF George Washington, John Marshall was a believer in the value of pictures as complements to the written word. Both the first and second editions of his *Life of Washington* feature an “Atlas” of handsome maps of various regions and locales as they appeared at important points in Washington’s career.<sup>1</sup> (Nowadays, the text-filled volumes of the *Life* are easy to find, but the atlases are rare and expensive to the point of inaccessibility. So, the *Green Bag* is sharing an atlas on pages 453-462 below – in black-and-white print and color pdf.<sup>2</sup>) As a member of the Supreme Court, however, Marshall apparently had little interest in illustrations. There were very few in the *U.S Reports* for the 34 years he served on the Court. Modern Justices seem to hold the opposite view. They put illustrations (sometimes lavishly large and colorful ones) in their judicial opinions, but their extrajudicial book projects rarely have more than a few pictures, and those they do include are invariably plain and small and black-and-white. Perhaps times – and judicio-authorial perspectives on pictures –

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<sup>1</sup> JOHN MARSHALL, *THE LIFE OF GEORGE WASHINGTON*, etc. (1804-1807) (5 vols. plus atlas); *id.* (2d ed. 1832) (2 vols. plus atlas).

<sup>2</sup> These maps, with the title page on page 443 above, are the entire 1832 atlas. The 1807 atlas (available in part at [archive.org](http://archive.org)) consists of maps of the same ten areas, with similar rendering and not-quite-so-elegant captions.

have changed. Or perhaps not. A quick comparison of the circumstances in which Marshall's writings and those of his modern successors have included illustrations – lavish or plain – suggests that in at least two respects thinking about pictures is as Marshallian today as it was in Marshall's day: (1) the Justices do indeed like to illustrate their work,<sup>3</sup> but (2) their publishers print lavish pictures only when they have no choice, and opt for black-and-white when they can.

## JOHN MARSHALL'S PICTURES

### *The Life of George Washington*

Bushrod Washington inherited the papers of his uncle George when the great man died in late 1799. Shortly thereafter, Bushrod entered a contract with John Marshall under which the two would collaborate on what became the *Life of Washington*. Bushrod would supply the documents, Marshall would do the writing, and the two friends would split the proceeds – which they expected to be huge – 50-50.<sup>4</sup> After about two years of prospecting and negotiating, Bushrod settled on a publisher, Caleb P. Wayne of Philadelphia. The publishing contract provided that Wayne would pay a royalty of “one dollar for every volume of the aforesaid work which may be subscribed for or which may be sold and paid for,” and would not charge “a higher price than three dollars per volume in boards.”<sup>5</sup> Wayne began marketing the *Life* immediately, and he promised subscribers that it would include, “plans and charts of those parts of the country which were the scenes of the most important events during the War; these to be published in a volume by themselves, & charged as such.”<sup>6</sup> Thus he promised the *Atlas*.

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<sup>3</sup> Reasonable minds can differ about the propriety of illustrating judges' work. See, e.g., Hampton Dellinger, *Words Are Enough*, 110 HARV. L. REV. 1704 (1997).

<sup>4</sup> *The Life of George Washington: Editorial Note*, in CHARLES F. HOBSON ET AL., EDS. 6 THE PAPERS OF JOHN MARSHALL 219-30 (1990) (hereinafter *Marshall Papers*).

<sup>5</sup> Articles of Agreement between C.P. Wayne and Bushrod Washington, Sept. 22, 1802, quoted in ALBERT J. BEVERIDGE, 3 THE LIFE OF JOHN MARSHALL 228 (1919).

<sup>6</sup> Advertisement for the *Life of George Washington*, GAZETTE OF THE U.S., Sept. 22, 1802, reprinted in *Marshall Papers* at 241.

## Marshall's Maps

It was with this combination of deals in the background that Marshall wrote to Wayne in January 1804 to express his strong views about the value of illustrations: "There is one subject of some importance to which I wish to draw your attention. In a history of military transactions, plans or cutts are of vast importance. . . . [They] of course wou[l]d contribute much to the satisfaction of the reader."<sup>7</sup> Marshall could afford to enthuse about illustrations, which were not cheap to create or publish, because he was spending Wayne's money, not his own. Wayne had contracted himself into a corner by promising to:

- pay Bushrod (who would split the take with Marshall) a fixed amount (\$1) per volume sold,
- charge buyers no more than a fixed amount (\$3) per volume, and
- fill one of those volumes with illustrations.

Therefore, it was in Marshall's interest to make the illustrated volume as attractive to potential buyers as possible, even if its lavishness made it more costly to produce than the maximum price Wayne could charge, because by contract Bushrod (and thus Marshall) would still get that \$1-per-volume royalty, even if Wayne were losing money on every sale. It was a pretty moral hazard for Marshall, and he succumbed, pelting Wayne with demands for ever more, and more elaborate, illustrations for the *Life*.<sup>8</sup> It did not take Wayne long to realize his mistake. By the summer of 1804 he was writing to Marshall, "The drafting & engraving of the maps &c. prove a laborious, expensive business, I wish they had never been promised."<sup>9</sup> But Marshall persisted and Wayne was stuck with performing on the contract.<sup>10</sup> Even if Marshall wasn't chasing money in

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<sup>7</sup> John Marshall to Caleb P. Wayne, Jan. 22, 1804, in *id.* at 254, 255.

<sup>8</sup> See, e.g., John Marshall to Caleb P. Wayne, Mar. 27, 1804, in *id.* at 273, 274; John Marshall to Bushrod Washington, Mar. 28, 1804, in *id.* at 274, 275-76; John Marshall to Caleb P. Wayne, June 2, 1804, in *id.* at 292; John Marshall to Caleb P. Wayne, June 6, 1804, in *id.* at 293; John Marshall to Caleb P. Wayne, Feb. 27, 1805, in *id.* at 373; John Marshall to Caleb P. Wayne, May 12, 1805, in *id.* at 380.

<sup>9</sup> Caleb P. Wayne to John Marshall, Aug. 20, 1804, in *id.* at 322, 323.

<sup>10</sup> *The Life of George Washington: Editorial Note*, in *id.* at 222.

this way – even if he was seeking only to make the *Atlas* as beautiful and informative as possible – the lever he was using was still the same: Wayne was bound to pay, and Marshall was not.

*The United States Reports*

On February 4, 1801, just as his collaboration with Bushrod on the *Life of Washington* was getting underway, Marshall began his long service as Chief Justice of the United States. It was a position of power, but that power did not extend to the Reporters of Decisions who published the volumes of opinions of the Supreme Court. The three Reporters during Marshall's tenure – William Cranch (ca. 1802-16), Henry Wheaton (1816-27), and Richard Peters (1827-43) – were mainly creatures of the marketplace, not the government. As Professor G. Edward White crisply puts it,

The Reporters were simply private individuals who ventured to collect the Court's decisions and arrange for their publication. They and the publishers shared the proceeds . . .<sup>11</sup>

Moreover, publishing the Court's opinions was a small-time enterprise of dubious profitability, and a Reporter was not obliged to publish on any particular schedule, or even to publish everything the Court produced.<sup>12</sup> While it was surely true that a Reporter could not succeed in the shoestring business of opinion-publishing without the cooperation of Marshall and his opinion-writing colleagues, it was just as true that if Marshall and his colleagues made the work of reporting too burdensome or unprofitable, there would be no reporting at all.

Marshall was aware of this balance of powers. And it was a factor in his vigorous lobbying for the Reporter's Act of 1817, which provided a small government salary (a subsidy, really) to encourage then-Reporter Wheaton to stay in business.<sup>13</sup> Even after 1817, when

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<sup>11</sup> G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 387 (1988).

<sup>12</sup> *Id.*; MORRIS L. COHEN AND SHARON HAMBY O'CONNOR, *A GUIDE TO THE EARLY REPORTS OF THE SUPREME COURT OF THE UNITED STATES* 31 (1995).

<sup>13</sup> Craig Joyce, *The Rise of the Supreme Court Reporter*, 83 MICH. L. REV. 1291, 1339-48 (1985).

the Reporter became in part a creature of government subject to the authority of the Court, the office remained a largely, and precariously, entrepreneurial one.<sup>14</sup> Thus it should come as no surprise that Marshall seems never to have pressed a Reporter to illustrate the *U.S. Reports* the way he pressed Wayne to illustrate the *Life of Washington*, even though Marshall and his colleagues on the Court decided some cases involving “military transactions” as well as others in which illustrations “wou[l]d contribute much to the satisfaction of the reader” (as he put it when campaigning for the lavish *Atlas*).<sup>15</sup> Just as unsurprisingly, the Reporters did not take the initiative to illustrate the *U.S. Reports* on their own nickel. The result was a near, but not complete, absence of illustrations from the *U.S. Reports* during Marshall's tenure. Those few the Reporters did include were invariably plain and small and black-and-white.<sup>16</sup>

### SOME MODERN JUSTICES' PICTURES

The appreciation of illustrations that John Marshall expressed to Caleb Wayne in 1804 plainly lives on among Marshall's successors at the Court. Justice Stephen Breyer put it eloquently in the introduction to an “Images” appendix in his most recent book, *Making Our Democracy Work*:

This book discusses legal cases and principles at length, but it is important to remember that these cases were decided by, and these principles have a profound effect on, human beings. My hope is that the following paintings and photographs will help the reader to make this connection — to recognize that behind each of the famous cases I have described are real issues that have confronted real people.<sup>17</sup>

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<sup>14</sup> See generally *id.*

<sup>15</sup> *E.g.*, *Wilson v. Mason*, 5 U.S. 45 (1801); *Ex parte Bollman*, 8 U.S. 75 (1807); *Newsom v. Pryor's Lessee*, 20 U.S. 7 (1822); *Doddridge v. Thompson*, 22 U.S. 469 (1824).

<sup>16</sup> *Mechanics' Bank of Alexandria v. Bank of Columbia*, 18 U.S. 326, 327 (1820) (bank check); *Clark v. Washington*, 25 U.S. 40, 44 (1827) (lottery ticket).

<sup>17</sup> STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 221 (2010); see also, *e.g.*, SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW* 279 (2003) (photographs

Modern author-Justices are, however, writing in strikingly different circumstances from those in which Marshall worked.

Unlike their predecessors who dealt with Marshall and his Court, the people who publish the volumes containing the modern Court's opinions are creatures of the government, not the marketplace. The Reporter of Decisions operates "under the direction of the Court or the Chief Justice," which includes matters relating to "the quality and size of the paper, type, format, proofs and binding" of the *U.S. Reports*. By statute, "the Court or the Chief Justice" has similarly broad power over who prints the *U.S. Reports* and the prices they charge.<sup>18</sup> In contrast, modern commercial publishers generally do not put themselves at the mercy of authors, as Wayne did with Marshall. Pick up any good book on the publishing business and you are likely to find some version of these two cautionary notes: (1) "you [the author] are expected to pay for photographs or illustrations" and (2) "[f]our-color books are so expensive to produce and print that it takes longer for publishers to earn back their money, hence low beginning royalties." Indeed, "[f]our-color (industry language for 'full-color') books or books with special features can have royalties half the size of their traditional brethren."<sup>19</sup> In other words, publishers' roles have flipped since Marshall wrote: the modern official publishers of the *U.S. Reports* are in even more of a bind than Wayne was in 1802 (bound to publish whatever the Chief Justice or Court demands, on terms set by the authors), while modern commercial publishers are as well-situated as the early Reporters to resist any demand by a Justice for lavish illustration without compensation.

Under these circumstances it should come as no surprise that no currently sitting or retired member of the Supreme Court has written a book containing colorful or oversized illustrations (other than

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"enhance the material").

<sup>18</sup> 28 U.S.C. § 673, 676; see also *id.* § 411. The moral hazard is more dangerous now than it was in Marshall's time because in the current system it is not the Reporter or the publisher who internalizes the costs of illustrations, it is the taxpayer.

<sup>19</sup> ARIELLE ECKSTUT AND DAVID HENRY STERRY, *THE ESSENTIAL GUIDE TO GETTING YOUR BOOK PUBLISHED* 182, 186-87 (2010).



a glossy dust jacket) – extras they probably would have had to pay for directly or via a reduced royalty.<sup>20</sup> And yet every currently sitting or retired member of the Court who has written such a plain, black-and-white book has also written, or at least joined, judicial opinions containing colorful, sometimes oversized, illustrations.

Compare, for example, Justice Breyer's *Making Democracy Work* with his dissent in *United States v. United Foods, Inc.* In the former (published by Random House, Inc.) the plight of persons of Japanese ancestry in California in 1942 is illustrated by a 3x4-inch, black-and-white, almost unreadably tiny reproduction of part of an internment notice. In the latter (published by the Government Printing Office) the plight of mushroom growers in California in 2001 is illustrated by a 7.5x12-inch, full-color, glossy, fold-out, six-panel, two-sided reproduction of a brochure titled "Let Your Love *Mushroom!*"<sup>21</sup> Some indication of how a commercial publisher would treat the mushroom brochure can be found in *United States v. United Foods, Inc.* itself, as it appears in the *Supreme Court Reporter* (published by West, a Thomson Reuters business): the brochure has been converted to black-and-white, reduced to fit a standard page format, and printed on regular paper.<sup>22</sup> Justice Breyer is not alone. Similar comparisons could be made for all of his book-writing colleagues.

## THE NEW JUDICIAL RESTRAINT?

But that is not the end of the story. Quite recently, there has been a change in Supreme Court practice. If the preliminary prints and slip opinions can be trusted (and for the moment they are all we have for opinions after April 14, 2008),<sup>23</sup> no Justice has issued

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<sup>20</sup> Proving a negative is tricky. See page 371 above. I have done my best to look at all editions of all books by Justice John Paul Stevens and his juniors since their arrival on the Court, and I would welcome correction.

<sup>21</sup> BREYER, *MAKING OUR DEMOCRACY WORK* at 226; *U.S. v. United Foods, Inc.*, 533 U.S. 405, insert between 430 & 431 (2001) (Breyer, J., dissenting).

<sup>22</sup> *U.S. v. United Foods, Inc.*, 121 S.Ct. 2334, 2349-50 (2001) (Breyer, J., dissenting).

<sup>23</sup> "Caution: . . . In case of discrepancies between the slip opinion and any later official version of the opinion, the later version controls." [www.supremecourt.gov/opinions/slipopinions.aspx?Term=07](http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=07) (vis. Aug. 5, 2012).

an opinion containing a colorful, or oversized, or otherwise exotic illustration since the final days of October Term 2004. The photographs and maps and graphs and charts and tables and so on are still appearing, but now they are all in black-and-white and sized to fit the standard page format of the *U.S. Reports*.<sup>24</sup> If OT2004 did mark the end of an era of extravagant illustration, then it went out in a big blaze in June 2005. Justice Anthony Kennedy's opinion for the Court in *Alaska v. United States* (joined in relevant part by Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Souter, Thomas, Ginsburg, and Breyer) features a set of four full-color, glossy, fold-out maps that John Marshall would have been proud of. And in *Van Orden v. Perry*, Justice Stevens's dissent (joined by Justice Ginsburg) includes a full-color, glossy, fold-out photograph of a Ten Commandments monument, while Justice Breyer's concurrence includes a full-color photograph and a black-and-white map (both glossy fold-outs) of the grounds on which the monument stands.<sup>25</sup>

Put another way, the Justices appear to have determined sometime around the beginning of October Term 2005 either (a) to limit themselves to cases that can be decided without lavish illustration or (b) that there is no such thing as a case that cannot be decided without lavish illustration. Or, more simply, maybe the revolutionary Roberts Court has broken – unanimously and admirably – with well-settled practice.



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<sup>24</sup> See, e.g., *Brown v. Plata*, 563 U.S. \_\_\_, slip op. at 51-52 (2011) (Kennedy, J., for the Court, joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) (photographs); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 815, 869-72 (2007) (Breyer, J., dissenting) (advertisement, tables, graphs); *Burlington N. & S. F. R. Co. v. U.S.*, 556 U.S. 599, 620 (2009) (Ginsburg, J., dissenting) (map); *U.S. v. Stevens*, 559 U.S. \_\_\_, slip op. at 21 (2010) (Alito, J., dissenting) (table); *Williams v. Illinois*, 567 U.S. \_\_\_, slip op. at 16-18 (2012) (Breyer, J., dissenting) (chart); cf. *Kelly v. California*, 555 U.S. \_\_\_, slip op. at 2 (2008) (Stevens, J., statement respecting denial of cert.) (citing video on the Court's website).

<sup>25</sup> *Alaska v. U.S.*, 545 U.S. 75, inserts between 111 & 113 (2005); *Van Orden v. Perry*, 545 U.S. 677, inserts between 705 & 707 (Breyer, J., concurring); *id.* at insert between 735 & 737 (Stevens, J., dissenting, joined by Ginsburg, J.).

# Marshall's Maps







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