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Confronting a Monument: The Great Chief Justice in an Age of Historical Reckoning

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Michael S. Lewis

Confronting a Monument: The Great Chief Justice in an Age of Historical Reckoning

17 U.N.H. L. REV. 315 (2019)

ABSTRACT. The year 2018 brought us two new studies of Chief Justice John Marshall. Together, they provide a platform for discussing Marshall and his role in shaping American law. They also provide a platform for discussing the uses of American history in American law and the value of an historian's truthful, careful, complete, and accurate accounting of American history, particularly in an area as sensitive as American slavery.

One of the books reviewed, *Without Precedent*, by Professor Joel Richard Paul, provides an account of Chief Justice Marshall that is consistent with the standard narrative. That standard narrative has consistently made a series of unsupported and ahistorical claims about Marshall over the course of two centuries. The substantial errors contained in this standard narrative are exposed by another book, *Supreme Injustice*, by Professor Paul Finkelman, which reveals, in groundbreaking fashion, Chief Justice Marshall's deep personal and professional commitment to, and investment in, the institution of American slavery.

Chief Justice Marshall's commitment to an institution that has been rejected by our law and by pervasive social norms should give his modern successors, attorneys, judges or students of the law, as well as citizens, substantial pause when relying upon Marshall as a posthumous authority and reference point in debates regarding contemporary legal subjects. Any other conclusion would countenance an unjustified double-standard when assessing American historical figures whose conduct we would condemn if perpetrated by historical figures from foreign nations.

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Reviewing:

WITHOUT PRECEDENT: JOHN MARSHALL AND HIS TIMES. By Joel Richard Paul. Riverhead Books. 2018. Pp. 502. \$30.00.

SUPREME INJUSTICE: SLAVERY IN THE NATION’S HIGHEST COURT. By Paul Finkelman. Harvard University Press. 2018. Pp. 287. \$35.00.

My friend . . . a measure in such things, which in any way falls short of that which is, is no measure at all. For nothing incomplete is the measure of anything.¹

¹ Plato, *The Republic*, in THE REPUBLIC OF PLATO 184 (Allan Bloom trans., 2d ed. 1968) (Socrates to Adeimantus).

INTRODUCTION

In New Hampshire, where I live, practice law, and now teach law, the *Dartmouth College case*² harkens to a time when this state played a consequential role in the fate of this nation at its early stages.³ New England lawyers treasure the region's rich history and its connection to the dawning years of the American Republic. Even in the year of its bicentennial, many lawyers here can still tell you that the *Dartmouth College case* was a dramatic event in our national past. A towering native son, Daniel Webster, stood before the nation's highest court and moved its great Chief Justice to tears with an ode to New Hampshire's most prestigious college.⁴ Speaking to Chief Justice John Marshall, indeed, turning to face him, Webster—the Massachusetts Senator whose statue now stands in the plaza outside New Hampshire's capitol building—declared in open court:

Sir, you may destroy this little institution; it is weak, it is in your hands! . . . But, if you do so, you must carry through your work! You must extinguish, one after another, all those greater lights of science, which, for more than a century, have thrown their radiance over our land! . . . It is sir, as I have said, a small college. And yet there are those who love it.⁵

² Trs. of *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); see also Kathie Ragsdale, *Those Who Love It: Justice Bassett Leads Commemoration of Dartmouth Case*, 29 N.H. B. NEWS 8 (Jan. 16, 2019), at 1, <https://www.nhbar.org/wp-content/uploads/2019/01/BN-Final-1-16-19.pdf> [<https://perma.cc/U3KE-USG4>] (“The court’s landmark decision, involving application of the [C]ontracts [C]ause of the U.S. Constitution, upheld the sanctity of contracts and became a foundation for no less than the American system of free enterprise.”).

³ See, e.g., SUSAN E. MARSHALL, *THE NEW HAMPSHIRE CONSTITUTION* 9 (2015) (“New Hampshire claims the distinction of being the first place in the world where a convention was elected and met for the sole purpose of drawing up a constitution, to be adopted when submitted to and approved by popular referendum.”); see also JOANNE B. FREEMAN, *THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR* (2018) (exploring the observations of Benjamin Brown French, New Hampshire native and clerk to the United States House of Representatives from 1844–1847).

⁴ JOEL RICHARD PAUL, *WITHOUT PRECEDENT: JOHN MARSHALL AND HIS TIMES* 377 (2018). But see R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 131 (1985) (describing Justice Joseph Story’s role in the case, “not as an impartial observer but as an active partisan of the college (which later gave him an honorary degree) and a confidant and advisor of its chief counsel, Daniel Webster”).

⁵ PAUL, *supra* note 4 (first alteration in original); see also Elmer Ebenezer Studley, *The Dartmouth College Case: History and Sequence*, in *HISTORICAL THESES AND DISSERTATIONS COLLECTION, PAPER 17*, 27 (1894). Discussing the undoubted influence Daniel Webster had on the Court through his “great” oratory skills, Studley expounds:

Mr. Goodrich, an eye witness of the trial, has left us an account of it. He says that Chief-Justice Marshall’s eyes were suffused with tears, and that the countenance of Mr. Justice Washington was as pale and livid

As the story of the *Dartmouth College case* goes, Marshall issued an historic ruling, sparing an emerging college from the predations of a power-hungry state government seeking to control it.⁶ In this recounting, Chief Justice Marshall is a judicial hero whose decisions laid the groundwork for a more perfect union.⁷ This perspective on Chief Justice Marshall has hardened over two centuries of history-writing about him. Most of his biographers have come to rank him among greatest of the founding generation.⁸ His famous successor, Chief Justice Earl Warren, wrote of Marshall:

as marble. The other members of the court were also deeply moved, while the entire audience seemed spell-bound.

Id.

⁶ See PAUL, *supra* note 4, at 379 (“But the nation’s colleges and other charitable institutions breathed a sigh of relief.”); see also GORDON S. WOOD, *EMPIRE OF LIBERTY* 466 (2009) (“Although Marshall and his Court could scarcely have grasped the momentous implications for American business of their Dartmouth College decision, the decision did result in placing all private corporations under the protection of the United States Constitution. . . . They became private property belonging to individuals, not the state.”). *But see* LYNN W. TURNER, *WILLIAM PLUMER OF NEW HAMPSHIRE 1759–1850* 246–47 (1962) (describing New Hampshire’s generous history of contributing to the welfare of the college through state funding); John S. Whitehead & Jurgen Herbst, *How to Think About the Dartmouth College Case*, 26 *HIST. EDUC. Q.* 333, 334 (1986) (“The traditional interpretation portrayed the Dartmouth College case as a major watershed in in educational history; it clearly affirmed the existence of the public/private distinction by 1819. After a close observation of the available documents on the case, I revised the traditional interpretation. The case, I concluded, was not a watershed In fact, I could find few people except Justices Joseph Story and John Marshall who were particularly interested in the distinction.”).

⁷ For a survey of approaches to biographical work on Marshall, see Edward L. Barrett, Jr., *Chief Justice John Marshall: A Reappraisal*, *by W. Melville Jones*, 9 *J. LEGAL EDUC.* 424 (1957) (book review); Cassius M. Clay, *Chief Justice John Marshall: A Reappraisal*, *by W. Melville Jones*, 55 *REGISTER OF THE KENTUCKY HIST. SOC’Y* 378 (1957) (book review).

⁸ See, e.g., R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* xvi (2001) (“To save the Framers’ Constitution from the resurgent forces of democratic localism and states’ rights theory, he helped put the Supreme Court, the weakest of the three branches in 1800, at the epicenter of the constitutional government of America. . . . For reasons I hope to show, John Marshall remains America’s representative jurist; a judge for all seasons.”); JEAN EDWARD SMITH, *JOHN MARSHALL DEFINER OF A NATION* 1 (1996) (“John Marshall was the fourth Chief Justice of the United States. . . . Under his leadership, the Supreme Court became a dominant force in American life. The broad powers of the federal government, the authoritative role of the Court, and a legal environment conducive to the growth of the American economy stem from the decisions that flowed from Marshall’s pen.”). *But see* Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 *VA. L. REV.* 1111, 1146 (2001) (“While it is impossible to measure precisely the impact of the[] [*Dartmouth College case* and other Contract Clause] decisions, it is a safe bet that they were much less important than is conventionally assumed.”).

Today, we appraise him as we do a lofty mountain peak—not by the crevices, jagged rocks and slides that are so apparent at close view, but by the height, the symmetry and the grandeur it acquires in the perspective of distance.

Thus viewed, John Marshall stands out as a colossus among the giants of his time.⁹

Perhaps inspired by a desire to reaffirm the importance of the judicial branch in an era in which so many important national controversies have been resolved by the courts, the year 2018 has yielded another book in the tradition of praising Marshall as a great monument of our national past and to the United States Supreme Court.¹⁰ Professor Joel Richard Paul, an international law scholar at the University of California, Hastings, has written *Without Precedent: John Marshall and His Times*.¹¹ Professor Paul depicts Chief Justice Marshall as an international statesman who sought to protect the nation from domestic and international threats and served as the historical precursor to Abraham Lincoln in the story of national unity and freedom.¹² As the title of his book suggests, Paul believes Marshall drew on a blank slate without models for his work and performed mightily.¹³ On the book jacket accompanying the hardcover version, Professor Laurence Tribe, the famed Harvard Law School constitutional scholar, endorses Paul's project:

I would have predicted that there was nothing worth saying about John Marshall that

⁹ Earl Warren, *Chief Justice John Marshall: A Heritage of Freedom and Stability*, 41 A.B.A. J. 1008, 1009 (1955).

¹⁰ PAUL, *supra* note 4. For a discussion questioning the need for another such biography, see Scott D. Gerber, *R. Kent Newmyer's John Marshall and the Heroic Age of the Supreme Court*, 110 VA. MAG. HIST. & BIOGRAPHY 104 (2002) (book review) ("Put directly, do we really need another biography of John Marshall? . . . I must confess that I learned nothing new from Newmyer's tome. The same familiar ground is covered: Marshall's pre-Court years, his confrontations with Thomas Jefferson, his jurisprudence, and the frustrations of his latter years on the Court. Newmyer tells a good story, but it is a story that has been told many times before.").

¹¹ *Praise for Without Precedent*, PENGUIN RANDOM HOUSE, <https://www.penguinrandomhouse.com/books/309740/without-precedent-by-joel-richard-paul/9781594488238/> [https://perma.cc/YYV4-LJE9] (last visited Jan. 13, 2019); see PAUL, *supra* note 4.

¹² See PAUL, *supra* note 4, at 2–3 (describing Marshall's career as a Revolutionary War soldier, diplomat, and United States Secretary of State, and his lengthy career as Chief Justice of the United States); *id.* at 440 (closing his biography with the following reflection: "[d]emocracy requires practical jurists and statesmen who prefer compromise to chaos and who understand that the single-minded pursuit of one's own ideology at the expense of all else is the path to civil war. . . . With his passing, who would save the Union now?").

¹³ See *id.* ("Though he did not have the benefit of precedent, Marshall creatively navigated his way through a thicket of domestic and international controversies, choosing his battles prudently and forging consensus where none seemed possible.").

hadn't already been said. I would've been so wrong. In every chapter of this page-turning account of Marshall's pivotal place in our nation's history, even the expert will learn something new. How did Joel Paul figure out, for instance, that the great Chief Justice probably suborned perjury on his brother's past during the bizarre *Marbury v. Madison* trial? You owe it to yourself to read Joel Paul's terrific book to find out.¹⁴

Professor Harold Hongju Koh, formerly the Dean of Yale Law School, echoes this assessment:

Who was John Marshall, really? Thousands meet him anew each year solely through his published opinions. But finally, Joel Richard Paul gives us this captivating, indispensable account, painting a fascinating picture of the frontiersman, soldier, illusionist, strategist, diplomat and international lawyer who became not just the man behind *Marbury*, but so much more.¹⁵

A review of the prior art demonstrates, however, that these endorsements do not square with reality and give too much credit to a work that is not sufficiently novel to deserve it.¹⁶ Indeed, were it not for the publication of another book on Marshall in 2018, Professor Paul's work would likely pass into the ether without additional comment.¹⁷ This second book on Marshall—*Supreme Injustice: Slavery in*

¹⁴ See *Praise for Without Precedent*, *supra* note 11.

¹⁵ *Id.* See generally Faculty Biography of Harold Hongju Koh, YALE L. SCH., <https://law.yale.edu/harold-hongju-koh> [<https://perma.cc/H3YS-2P8H>] (last visited Feb. 11, 2019).

¹⁶ See, e.g., WOOD, *supra* note 6, at 433–68 (outlining Marshall's activities as a U.S. diplomat, and describing, more broadly, the challenges, external and internal, facing the early American Republic, devoting substantial space to Marshall's role in shaping the national judiciary); see also Jed S. Rakoff, *Hail to the Chief*, N.Y. REV. BOOKS, Nov. 22, 2018, at 40. Per Rakoff:

[Albert J.] Beveridge's biography is largely a panegyric to Marshall, and the titles of more recent biographies, such as Jean Edward Smith's *John Marshall: Definer of a Nation* (1996) and Howard Giles Unger's *John Marshall: The Chief Justice Who Saved the Nation* (2014), indicate how much Marshall is still viewed with an awe that may inhibit critical thinking.

Id. Judge Rakoff goes on to praise Professor Paul's biography in a review even as he concludes with an elliptically critical assessment of Marshall, both in regard to his most famous ruling, concerning the petition of the Cherokee Nation, and for the precedent his compromises with the executive branch set for individuals seeking relief against government excess. See *id.* at 42 ("But I do suggest that, for whatever reason, the Supreme Court has frequently been far more deferential to the [P]resident than to Congress—and that this imbalance took root in the early days of the Court.").

¹⁷ See Kate Galbraith, 'Without Precedent,' by Joel Richard Paul; 'Supreme Injustice,' by Paul Finkelman, S. F. CHRON. (Mar. 7, 2018), <https://www.sfchronicle.com/books/article/Without-Precedent-by-Joel-Richard-Paul-12736500.php> [<https://perma.cc/ZB3F-6FW3>] (trenchantly noting the simultaneous publishing of the books and commenting that "Paul is unduly gentle on this point, seeing Marshall as a product of his time, and more benign than many Virginia slaveholders").

*the Nation's Highest Court*¹⁸—is one whose rendering dramatically contrasts with Professor Paul's.

In *Supreme Injustice*, Professor Paul Finkelman, now President of Gratz College, the “oldest independent and pluralistic college for Jewish studies in North America,”¹⁹ casts significant doubt upon Professor Paul's laudatory description of Marshall. He exposes Marshall's racism and his support and protection of slavery as an institution.²⁰ These perspectives have been ignored or minimized by historians, though they were always obvious from the historical record.²¹ The record includes documented facts about Marshall's personal relationship with and investment in slavery, his slavery jurisprudence, and its link to the jurisprudence of Marshall's justifiably vilified successor, Chief Justice Roger Brooke Taney of *Dred Scott v. Sandford*²² notoriety.²³ Professor Finkelman's account of Marshall and his colleagues is unsparing from its first sentences:

This book explores the slavery jurisprudence of the three most important justices on the antebellum Supreme Court—Chief Justice John Marshall, Associate Justice Joseph Story, and Chief Justice Roger Brooke Taney. All three believed that slavery— or more precisely, opposition to slavery—threatened national unity and political stability. . . . The justices I discuss in this book would have argued that *anti-slavery* was the nemesis of the Constitution. Their goal was to prevent opposition to slavery (and the

¹⁸ PAUL FINKELMAN, *SUPREME INJUSTICE: SLAVERY IN THE NATION'S HIGHEST COURT* (2018).

¹⁹ *About Gratz College*, GRATZ COLL., <https://www.gratz.edu/about-gratz-college> [<https://perma.cc/MVE8-FXAL>] (last visited Jan. 13, 2019); *Meet the President: Dr. Paul Finkelman Brings Passion and Energy to Gratz*, GRATZ COLL., <https://www.gratz.edu/today/meet-president-dr-paul-finkelman-brings-passion-and-energy-gratz> [<https://perma.cc/Y8UY-ZBTL>] (last visited Jan. 13, 2019).

²⁰ See FINKELMAN, *supra* note 18.

²¹ See generally FINKELMAN, *supra* note 18, at 9. According to Finkelman:

A study of Marshall's chief justiceship asserts that the Marshall Court “did not deal with the domestic institution of slavery.” Such conclusions can only be reached by ignoring the Court's many cases on slavery.

Slavery does not fit comfortably in the narrative of the Supreme Court, where Marshall and Story are called great and heroic. Scholars often try to explain away *Dred Scott* by claiming it was a mistake or an aberration and by ignoring most of Taney's other slavery jurisprudence. But slavery does not disappear just because scholars ignore it. Support for human bondage and persistent hostility to the rights of free blacks were important components of the Court's jurisprudence from 1801 until the Civil War.

Id. (footnote omitted).

²² 60 U.S. (19 How.) 393 (1857).

²³ See FINKELMAN, *supra* note 18, at 9; see also MAX LERNER, *NINE SCORPIONS IN A BOTTLE* 99 (1994) (“The Court did not again use judicial review against Congress . . . until the *Dred Scott* case, more than a half century later . . .”).

moral disgust slavery engendered among many Americans) from undermining the nation's constitutional and political arrangements.²⁴

Professor Finkelman is a well-known legal historian who has spent a large portion of his career writing on the interaction between American slavery and American law.²⁵ He has challenged historical accounts that would minimize or deny the role of American slavery in our history.²⁶ He has even provided greater recognition to legal figures who saw the moral hazards of slavery and acted upon this perspective, implicitly highlighting the moral transgressions of their contemporaries by comparison.²⁷ His historical treatment of Chief Justice Marshall is shocking to the American-trained lawyer hitherto deprived of this history, or at least to this American-trained lawyer—trained like almost all American attorneys

²⁴ FINKELMAN, *supra* note 18, at 1.

²⁵ See, e.g., PAUL FINKELMAN, *DEFENDING SLAVERY: PROSLAVERY THOUGHT IN THE OLD SOUTH* vii (2003) (“As this book [documenting early American thought justifying American slavery] goes to press, Americans are being asked to consider whether the nation should pay reparations or in some other way compensate the descendants of slaves.”); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* 3–35 (2014) (tracking the history of the United States Constitution to the desire to perpetuate slavery as a legal practice with political benefits to the American South). Professor Finkelman’s critique of early American constitutional thinking is not without its critics. See SEAN WILENZ, *NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION’S FOUNDING* 8 (2018) (alleging, with little explanation, that Professor Finkelman’s views on the United States Constitution are supported by “meager evidence, suspect logic, and at times sheer supposition”); see also Allen Mendenhall, *The Court’s Supreme Injustice*, L.A. REV. BOOKS (May 24, 2018), <https://lareviewofbooks.org/article/the-courts-supreme-injustice/#!>. [<https://perma.cc/Q9QW-C9D3>] (“Paul Finkelman is an anomaly: a historian with no law degree who’s held chairs or fellowships at numerous law schools, testified as an expert witness in high-profile cases, and filed amicus briefs with several courts . . . Finkelman specializes in American legal history, slavery and the law, constitutional law, and race and the law.”).

²⁶ See, e.g., Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 350–52, 357, 371 (1989) (challenging the merits of an intentionalist approach to historical and judicial analysis of the framing of the Constitution in part because, “[b]y the time of the Revolution, slavery and racial discrimination were entrenched in America’s economic, social and legal structure. . . [which] leads to some troublesome conclusions about the intentions of the founders of this nation”). Finkelman argues that those who advocate for the use of an intentionalist approach “would have to acknowledge that the ‘intentions of the framers’ include[d] certain ideas and concepts—such as slavery, race discrimination, property and religious requirements for voting and officeholding, and the denial of political rights to women—which are simply not acceptable today.” *Id.* at 373. He asserts that we cannot “interpret[] the Constitution according to how we understand the words of the Declaration, [and] interpret[] it according to how the framers understood those words.” *Id.* (emphasis added).

²⁷ See, e.g., Paul Finkelman, *John McLean: Moderate Abolitionist and Supreme Court Politician*, 62 VAND. L. REV. 519, 540–41 (2009) (“On the Court, McLean stood out for his opposition to slavery.”).

to revere and rejoice in Marshall.

Finkelman's book documents Chief Justice Marshall's deep, personal investments in American slavery as well as the many instances in which Marshall withheld from slaves seeking freedom the judicial creativity that won him acclaim, including the innovative approach Marshall deployed in the *Dartmouth College case*.²⁸ In reversal after reversal of lower court decisions granting slaves their freedom, Finkelman demonstrates how Marshall returned humans to bondage despite many judicial devices at his disposal to rule otherwise.²⁹ In so doing, Marshall displayed judicial brutality in the face of the devastation and inhumanity of the peculiar institution of American slavery.³⁰ Finkelman's description of Marshall and his judicial decision-making in cases of fundamental importance to his contemporaries—the men and women who came before him seeking freedom only to be cast back into bondage—is a far cry from Professor Paul's account.³¹

When the tears Marshall shed for Dartmouth are viewed in this light, one is not struck by the humanity of Marshall, but rather by his inhumanity. A sensitive reader of both books must ask: why no tears for Mima Queen?³² Hers is a case Finkelman highlights to distressing effect.³³ Her attorney, Francis Scott Key—author of our

²⁸ See FINKELMAN, *supra* note 18, at 28–29, 97 (“Marshall is remembered as the Great Chief Justice because he was bold, brilliant, forceful, and often fearless. But in slavery cases, Marshall's opinions were cautious, narrow, legalistic, and hostile to freedom.”); see also Hugh Evander Willis, *The Dartmouth College Case—Then and Now*, 19 ST. LOUIS L. REV. 183, 185 (1934) (“The Chief Justice in an obscure way found consideration and all the other essential elements of a contract. The court might have held that even though the charter of a corporation was a contract that it was subject to the sovereign power of eminent domain, taxation and the police power. . . . Yet the courts have always held that private contracts between private individuals are subject to the exercise of these sovereign powers.”).

²⁹ See FINKELMAN, *supra* note 18, at 62–75.

³⁰ See *id.* at 56 (footnote omitted) (“The Marshall Court heard fourteen cases involving freedom claims. The chief justice wrote an opinion in seven cases; in each of these, the slave plaintiff lost. . . . In these cases Marshall often ignored [applicable state] law or precedent on slavery to rule against black plaintiffs, and he never rigorously enforced statutes if doing so would have led to black freedom.”).

³¹ See *id.* See generally PAUL, *supra* note 4.

³² See FINKELMAN, *supra* note 18, at 62–66 (“Mima Queen claimed her freedom on the basis of her ancestry.”). She sought to prove that her great-grandmother was free through the presentation of affidavit testimony. *Id.* at 62.

³³ See *id.* at 62–66 (“An active purchaser of slaves on his way to owning hundreds of human beings over his lifetime . . . Marshall claimed he feared that allowing hearsay in freedom suits—as Maryland law allowed—would threaten property everywhere, although that conclusion was

national anthem, an accomplished lawyer, and an unrepentant slaver—sought to offer proof that she was free on the basis of her ancestry at trial only to be denied the opportunity to present that proof by Marshall’s strict application of the prohibition against hearsay.³⁴ Why no tears for Ben, or “Negro Ben,” who sued for and won his freedom under Maryland law, only to have that verdict reversed by Marshall through a construction of law that dispensed with manner-of-proof obligations almost altogether?³⁵ Consider that, for Mima Queen, Ben, and others victimized by Chief Justice Marshall and our legal system, all we can provide is an acknowledgment by a later generation that they were injured and that their lives were stunted by a more powerful contemporary.³⁶

These are questions Professor Paul’s *Without Precedent* fails to address because Paul lacks an awareness of the scope or existence of Marshall’s slavery jurisprudence. Read against Professor Finkelman’s analysis, Professor Paul’s narrative of Chief Justice Marshall’s life purports to describe him for the purpose of winning the general readership’s admiration. Yet it fails to accurately address Marshall’s personal history as a slaveholder and his role in promoting slavery

patently absurd. Marshall might have easily limited the use of this evidence to freedom suits in the District of Columbia.”).

³⁴ See *id.* at 62–63; Jamie Stiehm, “*The Star-Spangled Banner’s*’ Racist Lyrics Reflect Its Slave Owner Author, Francis Scott Key,” THE UNDEFEATED (Sept. 6, 2018), <https://theundefeated.com/features/the-star-spangled-banners-racist-lyrics-reflect-its-slaveowner-author-francis-scott-key/> [https://perma.cc/PE5W-XLND] (“Lawyer-poet Key, born to massive slaveholding wealth in Maryland, was one of the richest men in America. He liked it that way. As he grew older and darker, Key sought to buttress slavery, known as our own ‘peculiar institution.’ He did just that, past his last breath. The U.S. Supreme Court, which he helped shape, stood strongly for slavery. So beside the anthem, his political legacy as a critical political player in upholding slavery is devastating.”); see also Christopher Wilson, *Where’s the Debate on Francis Scott Key’s Slave-Holding Legacy*, SMITHSONIAN MAG. (July 1, 2016), <https://www.smithsonianmag.com/smithsonian-institution/wheres-debate-francis-scott-keys-slave-holding-legacy-180959550/> [https://perma.cc/YGT5-DLL3] (“Additionally, Key used his office as the District Attorney for the City of Washington from 1833 to 1840 to defend slavery, attacking the abolitionist movement in several high-profile cases.”).

³⁵ See FINKELMAN, *supra* note 18, at 56–57.

³⁶ See DAINA RAMEY BERRY, THE PRICE FOR THEIR POUND OF FLESH 9 (2017) (“My hope is that the enslaved ‘body would not be disposed of like a dead animal but the book be closed with some dignity and solemnity.”); see also Martha Minow, *Forgiveness, Law and Justice*, 103 CALIF. L. REV. 1615, 1630 (2015) (“We may try to promote forms of forgiveness because of the difficulty in doing anything else.”); cf. Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 121 (1998) (emphasizing the difficulties of such trials for humans living at the time); TIMOTHY SNYDER, BLACK EARTH: THE HOLOCAUST AS HISTORY AND WARNING xiv–xv (2015) (“We recall the victims, but are apt to confuse commemoration with understanding. . . . This is not only a matter of justice, but of understanding.”).

through his uneven jurisprudence when presented with opportunities to promote freedom and limit the legal status of chattel slavery.³⁷

In the review that follows, Part I sets the stage for an examination of both books by articulating some general principles about the importance of truth to historical writing about the law. The importance of a truthful accounting of United States history in 2018 has particular merit to the law given the ascendancy of “originalism” as an interpretative concept at the highest levels of the judiciary.³⁸ Parts II and III then address the historical claims made by Professors Paul and Finkelman, and they examine each book from this perspective and with reference to what each book teaches about the other and about its subject.

The difference between the two books—indeed, the difference between Finkelman’s account and virtually all prior biographical efforts—appears to be one involving historical curiosity and basic forensic skill. Finkelman’s book displays both qualities. Paul’s displays neither. A worthy recitation of American historical biography would further our understanding of Marshall by engaging the most

³⁷ For a thorough analysis of this position, see *infra* Parts I–III.

³⁸ Regarding the connection between “originalism” and “good history,” see Gordon S. Wood, *No Thanks for the Memories*, N.Y. REV. BOOKS (Jan. 13, 2011), <https://www.nybooks.com/articles/2011/01/13/no-thanks-memories/> [<https://perma.cc/BC3K-TZ86>] (reviewing JILL LEPORE, *THE WHITES OF THEIR EYES: THE TEA PARTY’S REVOLUTION AND THE BATTLE OVER AMERICAN HISTORY* (2010)). Per Wood:

Originalism may not be good history, but it is a philosophy of legal and constitutional interpretation that has engaged some of the best minds in the country’s law schools over the past three decades or so. It is basic to the mission of the Federalist Society (an important organization of conservative and libertarian jurists, lawyers, law professors, and students), and at times it may have as many as four adherents on the Supreme Court. Justice Antonin Scalia’s book *A Matter of Interpretation: Federal Courts and the Law* (1997), which staked out an originalist position on statutory interpretation, was taken seriously enough to generate critical responses from Ronald Dworkin, Lawrence [sic] H. Tribe, Mary Ann Glendon, and myself, all published in Scalia’s book along with his replies. In other words, originalism, controversial as it may be, is a significant enough doctrine of judicial interpretation that even its most passionate opponents would not write it off as cavalierly as Lepore does in this book.

Id. Regarding the connection between the fundamental character for truth-telling and the United States Supreme Court, see Matt Thompson, *This Was Never About Finding Out the Truth*, THE ATLANTIC (Sept. 20, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/kavanaugh-ford-hearing-was-never-about-truth/571729/> [<https://perma.cc/885F-2GZQ>], as the extreme and troubling confirmation hearing for our most recent nominee to the United States Supreme Court highlighted the importance of taking up the cause of truth in a writing on judicial archetypes. As Thompson writes, “[h]ow, against this backdrop, can the fiction persist that this spectacle has been in pursuit of truth?” *Id.*; see also Nathan J. Robinson, *How We Know Kavanaugh is Lying*, CURRENT AFFAIRS (Sept. 29, 2018), <https://www.currentaffairs.org/2018/09/how-we-know-kavanaugh-is-lying> [<https://perma.cc/6ZKT-CMAY>].

compelling sources of historical study.³⁹ We—the American “We”—are a legal culture that gives credence and authority to great decisions by great judicial figures. Marshall and his opinions are given tremendous weight, even today, in decisions that come before contemporary courts two hundred years after he was appointed Chief Justice.⁴⁰

This is no less true today, where our nation’s highest judicial officers have expressed their deep interest in history and the study of history.⁴¹ The uses of history have been a source of substantial discussion among judicial officers, including our most recent nominee to the United States Supreme Court.⁴² Accuracy in assessing the historical standing and perspective of judicial officers thus has great instrumental value.⁴³ To the extent our assessment causes us to devalue

³⁹ See generally MARTHA HOWELL & WALTER PREVENIER, FROM RELIABLE SOURCES: AN INTRODUCTION TO HISTORICAL METHODS (2001).

⁴⁰ See, e.g., *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1874 (2017) (Breyer, J., dissenting); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2794 (2014) (Ginsburg, J., dissenting); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 532–4 (2012).

⁴¹ See generally Eric Foner, *Donald Trump’s Unconstitutional Dreams*, N.Y. TIMES (Oct. 31, 2018), <https://www.nytimes.com/2018/10/31/opinion/donald-trumps-birthright-citizenship.html?action=click&module=Opinion&pgtype=Homepage> [https://perma.cc/384S-GF89] (discussing United States history in response to constitutional questions regarding the power of the President to restrict the definition of citizenship); Harvard Law School, *HLS in the World/A Conversation with Six Justices of the U.S. Supreme Court*, YOUTUBE (Oct. 27, 2017), https://www.youtube.com/watch?v=_EeU6Lo_i7I&t=4094s [https://perma.cc/TW2B-S4LX] (00:01:13) (capturing Chief Justice Roberts directly referencing Marshall’s most significant biographer).

⁴² See generally Amanda L. Tyler et al., *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 GEO. WASH. L. REV. 1889 (2012) (including then-Judge Brett Kavanaugh).

⁴³ See Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992, 1999 (2003) (“For all their formal insulation from the demands of popular consciousness, it is primarily the courts that bear the explicit institutional burden of collective memory.”); see also Robert W. Gordon, *The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1023 (1997) (“After all, lawyers have recognized history for centuries and put it to work in argument, justification and rationalization. . . . History is not only a source of authority but of legitimacy: [i]t reassures us that what we do now flows continuously out of our past, out of precedents, traditions, fidelity to statutory and Constitutional texts and meanings.”); Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283, 286 (2008) (“Legal and political actors tell and re-tell these histories because they seek to persuade audiences of the moral force of their claims. . . . The way we tell the story of slavery and freedom matters to the arguments we make, and those arguments shape the histories we tell.”). On perspectives regarding the effect of reputations of jurists on the law and how jurists’ own perspectives can impact the significance of a court and its

perspectives of the past we think out of step with our sense of justice, that assessment may determine the path of the law in the present and the future.⁴⁴

Biographies like those written by Professor Paul entrench mythology even as they purport to convey a more complete truth about the men they mythologize.⁴⁵ This approach continues a tradition of deep distortion regarding American history and race that is inherently pernicious and has had devastating consequences for the country and for racial minorities in particular.⁴⁶ More generally, if increasing

decisions, see NUNO GAROUPA & TOM GINSBURG, *JUDICIAL REPUTATION: A COMPARATIVE THEORY* 2 (2015), arguing:

Reputation is crucial to any endeavor, but it is particularly important for courts, which famously lack the purse or the sword. Armed only with pens, judges can only be effective if they are persuasive and authoritative to the parties before them, the legal community, and the public as a whole. To be authoritative requires, at bottom, a reputation for good decision making. . . . [Courts] are constrained by what is possible and by the preferences of others whose action . . . is required to effectuate judicial decisions.

Id. (footnote omitted).

⁴⁴ See JACK N. RAKOVE, *ORIGINAL MEANINGS* 5 (1996) (“Precisely because the Constitution has always played a central role in American politics, law, and political culture, as both a continuing source of dispute and a legitimating symbol of national values, the interpretation of its historical origins and meaning has rarely if ever been divorced from an awareness of contemporary ramifications.”); see also John W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1023 (2000) (“Historians have long stressed the affinity between the jurisprudence of John Marshall and the protection of property rights.”); Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1045 (2005) (“Redemptive constitutionalism is occupied with the time of the present . . . Its privileged locus of constitutional agency and authority is the present. It adopts a critical stance toward history, seeking to uncover discontinuities within historical narratives. Redemptive narratives use history not firmly to bound constitutional interpretation, but openly to rewrite history, and insist upon the continual need to do so.”); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1031 (1997) (“This form of critical history appeals to those who seek to rescue lost voices of the past from the hegemonic claims of the victors whose triumphs the discipline of history has often served and promoted.”).

⁴⁵ See Wythe Holt, *Review of Books*, 55 WM. & MARY Q. 663, 664 (1998) (reviewing CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* (1996), HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–1835* (1997), & JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* (1996)) (“Hagiography, however, is for the lives of saints. Chief Justice Marshall deserves to be treated critically. Fortunately, there is sufficient material in these volumes to provide critical perspective, even if the authors do not often use it.”).

⁴⁶ See, e.g., PETER NOVICK, *THAT NOBLE DREAM: THE “OBJECTIVITY QUESTION” AND THE AMERICAN HISTORICAL PROFESSION* 77–80 (22d prt. 2005) (1988) (describing the complicity of professional historians in historical interpretation of American slavery which was “harshly critical of the abolitionists” as “irresponsible agitators” while accepting “a considerably softened picture of slavery”).

notions of understanding are a justification for more history, Paul's biography would not meet the test. As it relates to the law—to the extent legal practitioners rely upon history when resolving current matters—Paul's approach to history is bound to lead to distortions and bad results.⁴⁷

Indeed, even if we are duty-bound to honor the founding generation for establishing the constitutional and philosophical foundations of our country and the liberties they confer,⁴⁸ we must acknowledge and not minimize how they also transgressed great moral principles, victimizing millions of men, women, and children, all while promoting principles of political humanism unique to the world.⁴⁹

Consider that Chief Justice Marshall, reflecting on the American Revolution,

⁴⁷ See Robert W. Gordon, *The Struggle Over the Past*, 44 CLEV. ST. L. REV. 123, 124 (1996) (describing how debates over the history of law drive approaches to the resolution of contemporaneous legal problems); see also Gordon, *supra* note 43, at 1023 (“After all, lawyers have recognized history for centuries and put it to work in argument, justification, and rationalization. Most of the ways in which lawyers use history are, however, not ‘critical’ in any plausible sense of the term. For lawyers the past is primarily a source of authority—if we interpret it correctly, it will tell us how to conduct ourselves now.”). Attorneys with less time to survey American history critically will accept as true what they read and perpetuate mythology, innocently, through the generations. See Joseph Mattson, *More than an Umpire: Book Examines Chief Justice John Marshall’s Legacy*, 29 N.H. B. NEWS 8 (Dec. 19, 2018), at 8 (recommending Paul’s biography as a means of obtaining a greater understanding of Marshall and the judiciary, and thereby serving as an example of how discussions within the bar can perpetuate perspectives that may have a widespread effect on the law).

⁴⁸ Not all great American judicial figures accepted this assessment. See Michael Long, *Let’s Let Thurgood Marshall Explain What’s Wrong with Brett Kavanaugh’s Originalism*, L.A. TIMES (Sept. 2, 2018, 4:05 AM), <http://www.latimes.com/opinion/op-ed/la-oe-long-thurgood-marshall-originalism-supreme-court-20180902-story.html> [<https://perma.cc/4V87-F35D>]. In his article, Long quotes Marshall as saying, “I do not believe that the meaning of the Constitution was forever ‘fixed’ at the Philadelphia Convention Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound.” *Id.*

⁴⁹ See JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 99 (2018) (“The Declaration that Congress did adopt was a stunning rhetorical feat, an act of extraordinary political courage. It also marked a colossal failure of political will, in holding back the tide of opposition to slavery by ignoring it, for the sake of a union that, in the end, could not and would not last.”); see also, e.g., JOSEPH J. ELLIS, *AMERICAN DIALOGUE: THE FOUNDERS AND US* 14 (2018) (“This is the place to begin, not end, our investigation of the Jefferson legacy, namely with the realization that our most eloquent ‘apostle of freedom’ is also our most dedicated racist, and that in his mind those two convictions were inseparable.”); FRED KAPLAN, *LINCOLN AND THE ABOLITIONISTS* 1–11 (2017) (describing the reaction of President John Quincy Adams to the story of Dorcas Allen, who killed two of her children rather than permit them to be sold, with her, into slavery).

wrote:

Our resistance was not made to actual oppression. Americans were not pressed down to the earth by the weight of their chains nor goaded to resistance by actual suffering. . . . The war was a war of principle against a system hostile to political liberty, from which oppression was to be dreaded, not against actual oppression.⁵⁰

Finkelman has proven that Marshall, as a slaveowner and tradesman in the market of human slavery, knew the other sort of oppression and knew that it was wrong. How could he not? The great injustice of slavery was apparent to leading western philosophers thousands of years before Marshall's birth.⁵¹ In any case, Marshall's own statements deprive him and his contemporaries of a defense on the grounds of factual or moral ignorance.⁵²

When viewed in light of Finkelman's assessment of his slavery jurisprudence and his deep personal stake in the institution of slavery,⁵³ Marshall's perceived heroism in the American Revolution is diminished. So are his accomplishments as a national and international statesman. In the end, Chief Justice Marshall and his contemporaries were simply unable to exert the moral strength to overcome the greatest moral travesty of their time.⁵⁴ Finkelman demonstrates that when

⁵⁰ NEWMYER, *supra* note 8, at 1 (alteration in original) (quoting Letter from John Marshall to Edward Everett, (Aug. 2, 1826)).

⁵¹ See Plato, *supra* note 1, at 298 ("Thus, for example, if some men were causes of the death of many, either by betraying cities or armies and had reduced men to slavery, or were involved in any other wrongdoing, they received for each of these things tenfold sufferings; and again, if they had done good deeds and had proved just and holy, in the same measure did they receive reward.").

⁵² See generally Gideon Rosen, *Culpability and Ignorance*, 103 PROC. ARISTOTELIAN SOC'Y 61, 61 (2003) (describing the defenses of factual and moral culpability and defending an expansive view of the factors that would exculpate otherwise blameworthy conduct viewed in hindsight).

⁵³ See FINKELMAN, *supra* note 18, at 29 ("Marshall's early life, his pre-Court career, his fierce nationalism, his personal investment in and relationship to human bondage in his private life, and his nonjudicial public life help us understand his slavery jurisprudence."); see also *id.* at 37 ("In 1830 he owned more than 125 slaves in Henrico and Fauquier Counties, in addition to more than a dozen slaves in Richmond. His holdings would have been well over two hundred slaves by this time, had he not given about seventy to his sons . . . between about 1819 and 1830."); *id.* at 38 ("As he had in 1784, on July 4, 1787, Marshall spent Independence Day buying slaves . . ."); *id.* at 40 ("Marshall's account books and the Richmond property records, incomplete as they are, illustrate that Marshall owned a substantial and growing number of slaves and that he was deeply engaged in the economic activities of slavery.").

⁵⁴ See RICHARD KLUGER, *SIMPLE JUSTICE* xi (2004) ("If it is a sin to aspire to conduct of a higher order than one may at the moment be capable of, then Americans surely sinned in professing that all men are created equal—and then acting otherwise."); see also FINKELMAN, *SLAVERY AND THE*

presented with the opportunity and the ability to relieve some injustice caused by slavery in individual cases, Chief Justice Marshall's moral compass led him instead to undermine the cause of freedom, where "[s]lavery as practiced in the American South, it is now generally acknowledged, was probably as severe as any form of it in recorded history."⁵⁵

This Review seeks to place both biographies into the context of an ever-accelerating destabilization of the traditional historical assessment of American history in the first generation of our constitutional government.⁵⁶ In this light, Professor Finkelman's contemporaneous account reveals that Professor Paul's biography continues the problematic tradition of recounting our history and evaluating our framers without acknowledging their greatest failures, especially where those failures continue to haunt us.⁵⁷ That tradition has infected the history of this country from its founding moments.⁵⁸ Professor Paul's failure to account fully and accurately for Marshall's participation in slavery is inexplicable because so many sources of relevant information were available, and the justifications for avoiding the truth about American history remain as weak as they have ever been.⁵⁹

FOUNDERS, *supra* note 25, at 247. In a chapter entitled "Thomas Jefferson, Sally Hemings, and Antislavery: Historians and Myths," Finkelman explains:

We consider Jefferson a great man, a leader, an icon. He is praised for his vision; there is nothing ordinary about him. Therefore, it seems reasonable to expect that Jefferson's position on slavery and race should have been at the cutting edge of the late eighteenth century and not somewhere in the middle or at the back of the pack.

Id. at 237, 247.

⁵⁵ See KLUGER, *supra* note 54, at 26.

⁵⁶ See, e.g., MARTHA JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA (2018) (describing the legal history of minorities in antebellum America as they sought legal definition as free American citizens).

⁵⁷ See HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM ix (1976) ("We can no longer afford to take that which was good in the past and simply call it our heritage, to discard the bad and simply think of it as a dead load which by itself time will bury in oblivion.").

⁵⁸ See W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA 1860-1880 4 (2d. ed. 1998) ("So long as slavery was a matter of race and color, it made the conscience of the nation uneasy and continually affronted its ideals. The men who wrote the Constitution sought by every evasion, and almost by subterfuge, to keep recognition of slavery out of the basic form of the new government.").

⁵⁹ See, e.g., Paul John Eakin, *Introduction: Mapping the Ethics of Life Writing*, in THE ETHICS OF LIFE WRITING 2 (2004) ("Like Lauritzen, the biographer Dianne Middlebrook holds that when a writer addresses biographical or historical fact, telling the truth is essential."); Jerome Manis, *What Should Biographers Tell? The Ethics of Telling Lives*, 17 BIOGRAPHY 386, 387 (1994) ("Still it is becoming increasingly evident that some widely publicized and highly profitable biographies are based on dubious information and purposes."); see also MARC BLOCH, THE HISTORIAN'S CRAFT 6 (1953)

This Review concludes that Professor Paul provides an account of Chief Justice Marshall that is consistent with a standard, deeply incomplete, and indeed, error-filled narrative about him. Those substantial errors are exposed by another book, *Supreme Injustice*, by Professor Finkelman, which reveals in groundbreaking fashion Chief Justice Marshall's deep personal and professional commitment to and investment in the institution of American slavery. That commitment to an institution that has been rejected by our law and by pervasive social norms should give his modern successors, attorneys, judges, students of the law, and citizens as well a greater level of pause in relying upon Chief Justice Marshall as a posthumous authority and reference point in debates regarding contemporary legal subjects.

I. USING TRUTH AS THE MEASURE OF OUR HISTORICAL MONUMENTS

Hordes of attorneys, judges, and academics would, if called upon, offer defenses of Chief Justice Marshall and argue that this Book Review and other critical assessments have engaged in an improper and unfairly critical exercise. Perhaps the same group would defend Professor Paul and other Marshall biographers on the ground that their assessments of Chief Justice Marshall rightly focus on issues of greater importance to Marshall and his contemporaries. Professor Gordon S. Wood, for instance, posits:

To be able to see the participants of the past in this comprehensive way, to see them in the context of their own time, to describe their blindness and folly with sympathy, to recognize the extent to which they were caught up in changing circumstances over which they had little control, and to realize the degree to which they created results they never intended—to know all this about the past and to be able to relate it without anachronistic distortion to our present is what is meant by having a historical sense.⁶⁰

(writing of the uses of history and asking whether history has “betrayed us” in the years surrounding the German occupation of France).

⁶⁰ GORDON S. WOOD, *THE PURPOSE OF THE PAST: REFLECTIONS ON THE USES OF HISTORY* 11 (2008); see also FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 244 (Richard Pevear & Larisa Volokhonsky trans., 2002) (“Oh, with my pathetic, earthly, Euclidean mind, I know only that there is suffering, that none are to blame, that all things follow simply and directly one from another, that everything flows and finds its level—but that is all just Euclidean gibberish, of course I know that, and of course I cannot consent to live by it!”); J.G.A. POCOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* 4 (1987) (“At this point, however, we encounter what is at once the paradox and the true importance of the humanist movement, viewed from the standpoint of the history of historiography; for it is not too much to say that in making these claims and demands the humanists were calling for a return to the ancient world ‘as it really was’ And the paradox . . . was this: the humanists aimed at resurrecting the ancient world in order to copy and imitate it, but the more thoroughly and accurately the process of resurrection was carried out, the more

This standard, properly understood, even as it would encourage sympathy with respect to the most egregious violence in the country's past, would still require a comprehensive understanding of history and would not justify historical half-truths or historical denial.⁶¹ It certainly would not prevent a person with historical sense—or one hoping to achieve it—from engaging in a normative assessment of history despite imposing a presumption of sympathy for those who are the subjects of such assessment.⁶²

Moreover, the human need for comprehensive truth as a foundation for justice is as powerful an expression of the human personality as the desire to suppress truth to work injustice.⁶³ Survivors of the highly documented genocides of the twentieth century—specifically the Holocaust, perpetrated by a reputedly developed nation upon millions of largely defenseless human beings and resulting

evident it became that copying and imitation were impossible—or could never be anything more than copying and imitation.”).

⁶¹ See LEPORE, *supra* note 49, at xvi (“I wrote this book because writing an American history from beginning to end and across that divide hasn’t been attempted in a long time One reason it’s important is that understanding history as a form of inquiry—not something easy or comforting but as something demanding and exhausting—was central to the nation’s founding.”).

⁶² See *id.* at xvii (“In the new history books, historians aimed to solve mysteries and to discover their own truths. The turn from reference to inquiry, from mystery to history, was crucial to the founding of the United States. It didn’t require abdicating faith in the truths of revealed religion[,] and it relieved no one of the obligation to judge right from wrong. But it did require subjecting the past to skepticism, to look to beginnings not to justify ends, but to question them—with evidence.”).

⁶³ Within days of his death, a monumental figure of no lesser standing than President Ulysses S. Grant pled, in regard to his role as the commanding officer in for the United States Army in the Civil War: “I would not have the anniversaries of our victories celebrated, nor those of our defeats made fast days and spent in humiliation and prayer; but I would like to see truthful history written.” ULYSSES S. GRANT, *PERSONAL MEMOIRS OF U.S. GRANT* 90 (1999). On the other hand, of course, there is also quite a bit of evidence that humans are either not interested in truth or easily distracted in the quest for truth. See JENNIFER KAVANAUGH & MICHAEL D. RICH, *TRUTH DECAY: AN INITIAL EXPLORATION OF THE DIMINISHING ROLE OF FACTS AND ANALYSIS IN AMERICAN PUBLIC LIFE* iii (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2300/RR2314/RAND_RR2314.pdf [<https://perma.cc/2DKD-EBU6>] (last visited Feb. 12, 2019) (studying the rejection of truth in American public life); see also ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 25 (2012) (“There is one thing a professor can be absolutely certain of: almost every student entering the university believes or says he believes, that truth is relative.”); Maria Konnikova, *Trump’s Lies vs. Your Brain*, *POLITICO* (Jan/Feb 2017), <https://www.politico.com/magazine/story/2017/01/donald-trump-lies-liar-effect-brain-214658> [<https://perma.cc/QJ56-JEUY>] (“When we are overwhelmed with false, or potentially false, statements, our brains pretty quickly become so overworked that we stop trying to sift through everything.”).

in the near eradication of Eastern European Jews—present powerful examples of this phenomenon. These survivors have vocalized a strong desire to protect the truth about their suffering and to combat efforts to deny or minimize it.⁶⁴ As a matter of human development and education, it would be difficult to imagine a credible, justifiable, or prudent philosophy that trafficked in the denial or minimization of human atrocity, at least from the standpoint of an average twentieth or twenty-first century liberal democrat.⁶⁵ In the aftermath of the Holocaust, this sensibility has led to the reexamination of American history through a lens that rejects double standards regarding our own blameworthy history.⁶⁶ Perhaps as a result of this desire for truth, bald-faced lying and distortions—particularly about American history—are more easily challenged and unmasked,

⁶⁴ See, e.g., ARIEL BURGER, *WITNESS: LESSONS FROM ELIE WIESEL'S CLASSROOM 21–22* (2018) (“Wiesel frequently pointed to the Jewish victims of the Holocaust who, hiding in bunkers from the Nazis, scratched their names into the walls and wrote invisible messages in urine, who buried manuscripts in tin cans under the ghetto streets so that one day their names, their words, their lives might be remembered. He believed that those who lived before us call to us to remember them and that by examining the past, we can create a new future.”); see also DEBORAH LIPSTADT, *THE EICHMANN TRIAL* xxiii (2011) (“When survivors heard of my coming legal battle, they sent me notes, letters, and copies of their books. All came with a similar message: ‘[t]his is my story. This is what happened to me and to my family. This is what David Irving and his cohorts wish to deny. This is the history you must protect. You must stand up for us.’”). See generally DEBORAH LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* 8 (1994). Works of striking literary importance have been published for the purpose of ensuring that humanity never forget the atrocities visited upon it. See, e.g., CHARLES REZNIKOFF, *HOLOCAUST* (3d prtg. 2017) (1975) (“All that follows is based on a United States government publication, *Trials of War Criminals Before the Nuernberg Military Tribunals*, and the records of the Eichmann trial in Jerusalem.”).

⁶⁵ See generally JOHN DEWEY, *DEMOCRACY AND EDUCATION* (1916) (outlining the relationship between human development and education, including an accounting of the need for greater sophistication in formal education as human society becomes more complex); BLOCH, *supra* note 59, at 81 (“True progress began on the day when . . . doubt became an ‘examiner’; or, in other words, when there had gradually been worked out objective rules which permitted the separation of truth from falsehood.”). But see YUVAL NOAH HARARI, *SAPIENS* 25 (2015) (“How did *Homo Sapiens* manage to cross this critical threshold, eventually founding cities comprising tens of thousands of inhabitants and empires ruling hundreds of millions? The secret was probably the appearance of fiction. Large numbers of strangers can cooperate successfully by believing in common myths.”).

⁶⁶ See DOUGLAS BLACKMUN, *SLAVERY BY ANOTHER NAME* 3 (2008) (“I was a reporter for the *Wall Street Journal*, exploring the possibility of a story asking a provocative question: [w]hat would be revealed if American corporations were examined through the same sharp lens of historical confrontation as the one then being trained on German corporations that relied on Jewish slave labor during World War II and the Swiss banks that robbed victims of the Holocaust of their fortunes?”).

especially by prominent figures assessing the history of their homelands.⁶⁷

Consider the remarkable speech recently given by the mayor of New Orleans, Mitch Landrieu. On May 24, 2017, this politician of the American South stood at a lectern and explained to a national audience why he was removing statues dedicated to two confederate generals and the President of the Confederate States of America. His explanation was conciliatory and infused with rich historical accuracy long rare in the region.⁶⁸ It was also unsparing in its description of racial

⁶⁷ See, e.g., ERIC FONER, RECONSTRUCTION xvii (1988). Foner writes:

The interpretation elaborated by the Dunning School may be briefly summarized as follows. When the Civil War ended, the white South genuinely accepted the reality of military defeat, stood ready to do justice to the emancipated slaves, and desired above all a quick integration into the fabric of national life. Before his death, Abraham Lincoln had embarked on a course of sectional reconciliation, and during Presidential Reconstruction (1865–67) his successor, Andrew Johnson, attempted to carry out Lincoln's magnanimous policies. Johnson's efforts were opposed and eventually thwarted by Radical Republicans in Congress. Motivated by an irrational hatred of Southern "rebels" and the desire to consolidate their party's national ascendancy, the Radicals in 1867 swept aside the Southern governments Johnson had established and fastened black suffrage upon the defeated South.

Id.; see also COLIN G. CALLOWAY, THE INDIAN WORLD OF GEORGE WASHINGTON 14 (2018) ("Ignoring or excluding Native Americans from Washington's life, like excluding it from the early history of the nation, contributes to the erasure of Indians from America's past and America's memory. It also diminishes our understanding of Washington and his world."); NICHOLAS LEMANN, REDEMPTION THE LAST BATTLE OF THE CIVIL WAR xi (2006) ("In the Southern states with the largest black populations, the tradition of white vigilantism, which had persevered among Confederate veterans despite, or perhaps because of their defeat at Appomattox, began to evolve into an organized, if unofficial, military effort to take away by terrorist violence the black political rights that were now part of the Constitution."); LOU FALKNER WILLIAMS, THE GREAT KU KLUX KLAN TRIALS 1871–1872 28–29 (1996) ("Sweeping through the countryside late at night, masked riders burst into the homes of Republicans, dragged hundreds of them from their beds, and whipped them severely. Driven from their homes, large numbers of freedmen spent the night hours in the woods and swamps. If whippings were the most frequent manifestation of Klan violence, they were hardly the most atrocious. Robbery, rape, arson, and even murder were common."); David W. Blight, *The Silent Type*, N.Y. REV. BOOKS (May 24, 2018), <https://www.nybooks.com/articles/2018/05/24/ulysses-grant-silent-type/> [https://perma.cc/Z5LH-NHUA] (concluding that President Grant's efforts at Reconstruction were "defeated by the unrelenting violence in Southern politics during Reconstruction, and by the overwhelming challenge of the depression of 1873."); cf. ALLEN NEVINS, HAMILTON FISH: THE INNER HISTORY OF THE GRANT ADMINISTRATION 591 (1936) (quoting Secretary of State Hamilton Fish about Attorney General Amos Akerman) ("He has it on the brain. He tells a number of stories, one of a fellow being castrated, with terribly minute and tedious details of each case. It has got to be a bore to listen twice a week to this thing.").

⁶⁸ See Mitch Landrieu's *Speech on the Removal of Conservative Monuments in New Orleans*, N.Y. TIMES (May 23, 2017), <https://www.nytimes.com/2017/05/23/opinion/mitch-landrieus-speech-transcript.html> [https://perma.cc/NPA9-KXTS] [hereinafter *Landrieu's Speech*] ("The soul of our beloved City is deeply rooted in a history that has evolved over thousands of years; rooted in a

violence in New Orleans and of the deeply distorted and continually distorting effects of the conspiracy to hide or cover up the city's violent, racist history. Mayor Landrieu said:

[T]here are also other truths about our city that we must confront. New Orleans was America's largest slave market: a port where hundreds of thousands of souls were bought, sold and shipped up the Mississippi River to lives of forced labor of misery of rape, of torture. America was the place where nearly 4000 of our fellow citizens were lynched, 540 alone in Louisiana; where courts enshrined 'separate but equal'; where Freedom riders coming to New Orleans were beaten to a bloody pulp. So when people say to me that the monuments in question are history, well what I just described is real history as well, and it is the searing truth.⁶⁹

When addressing the claim that the monuments to white supremacy in the South must be maintained for history's sake, Landrieu responded:

[I]t immediately begs the questions, why there are no slave ship monuments, no prominent markers on public land to remember the lynchings or the slave blocks; nothing to remember this long chapter of our lives; the pain, the sacrifice, the shame . . . So for those self-appointed defenders of history and the monuments, they are eerily silent on what amounts to this historical malfeasance, a lie by omission. There is a difference between remembrance of history and reverence of it.⁷⁰

In a book he wrote expanding upon the subjects he addressed in his speech, Mayor Landrieu equates his unwillingness to deny the history of racism in New

diverse people who have been here together every step of the way—for both good and for ill. It is a history that holds in its heart the stories of Native Americans – the Choctaw, Houma Nation, the Chitimacha. Of Hernando De Soto, Robert Cavalier, Sieur de La Salle, the Acadians, the Islenos, the enslaved people from Senegambia, Free People of Colorix, the Haitians, the Germans, both the empires of France and Spain. The Italians, the Irish, the Cubans, the south and central Americans, the Vietnamese and so many more.”).

⁶⁹ *Id.* Of course, Mayor Landrieu could be subject to the critique that he is engaging in “presentism”—the negative assessment of historical figures from the reference point of current norms, without balance. Professor Gordon Wood has leveled this critique at recent scholars who sought to bring attention to connection between our constitution, the founders, and human slavery. Gordon S. Wood, *Reading the Founders' Minds*, N.Y. REV. BOOKS (June 28, 2007), <http://www.nybooks.com/articles/2007/06/28/reading-the-founders-minds/> [https://perma.cc/57DS-8Q9T]. In his piece, he calls for “balance,” notwithstanding the tomes of history he has published throughout his career minimizing the role of slavery during the founding era in remarkably defensive terms. *See id.* (“Now we have these additional two books under review to help satisfy the seemingly insatiable desire of many historians today to place slavery at the heart of America's origins.”).

⁷⁰ *Landrieu's Speech*, *supra* note 68.

Orleans with his experience visiting landmarks of the Holocaust.⁷¹ The parallel experiences of the United States and Nazi Germany, and the extent to which Nazi Germany drew on American examples of racist law, render Landrieu's visits to Nazi concentration camps an apt comparison for an American of the South confronting racism in its most destructive form.⁷² Thus, it is not surprising that in the book chronicling his efforts to remove monuments to slavery, treasonous white supremacy, and terrorism in his city, the phrase "Never Again" reverberates as a buttress against complacency.⁷³ It is not surprising because that phrase has come to represent the refusal to forget history as an important component of recovering from it.⁷⁴

⁷¹ MITCH LANDRIEU, *IN THE SHADOW OF STATUES: A WHITE SOUTHERNER CONFRONTS HISTORY* 48–49 (2018). Landrieu recalls:

I was barely twenty when I visited Auschwitz. I clearly remember the suitcases stacked high bearing the names of people gassed to death, men and women and children who never knew their meager belongings would one day signify their lives. The mounds of hair, hairbrushes, false teeth, prosthetics, the stacks of eyeglasses, they carried a moral weight heavier than anything I had ever felt. To read about the Holocaust from afar is to get a grasp of history and that unspeakable horror. It also allows denial to creep in—*That was then, this is now. It is not us. This can never happen in the United States. . . .*

. . . .

And then the realization came that we had done something like this in America with slavery. The systematic evil of Nazism was the closest thing to the Southern society that relied on slave labor. I was torn by the connection between these two realities of history, different in time and place, but with a common root, a warped sense that some people are superior to others, a supremacy trapped in a frozen heart.

Id.

⁷² JAMES Q. WHITMAN, *HITLER'S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW 2* (2017) ("In the late 1920s and early 1930s many Nazis, including not least Hitler himself, took a serious interest in the racist legislation of the United States. Indeed, in *Mein Kampf*, Hitler praised America as nothing less than 'the one state' that had made progress toward the creation of a healthy racist order of the kind the Nuremberg Laws were intended to establish."); see also Alex Ross, *The Hitler Vortex*, *NEW YORKER*, Apr. 30, 2018, at 71 ("The Nazis were not wrong to cite American precedents. Enslavement of African-Americans was written into the U.S. Constitution. Thomas Jefferson spoke of the need to 'eliminate' or 'extirpate' Native Americans. . . . General Philip Sheridan spoke of 'annihilation, obliteration, and complete destruction.'").

⁷³ Cf. Spaulding, *supra* note 43, at 2000 ("Chattel slavery and segregation are historical injustices of a magnitude not unlike the crimes responsible for the problem of memory Germany now confronts.").

⁷⁴ See, e.g., SNYDER, *supra* note 36, at xv ("Part of the effort to understand the past is thus the effort needed to understand ourselves. The Holocaust is not only history, but warning."); see also Richard Evans, *From Nazism to Never Again*, *FOREIGN AFFAIRS* (Jan./Feb. 2018), <https://www.foreignaffairs.com/articles/western-europe/2017-12-12/nazism-never-again> [https://

In the context of discussing the Holocaust, the denial of history has been confronted by powerful, normative responses that are both deontological and consequentialist in nature.⁷⁵ That is, the responses address alternatives to truth-telling as a matter of justice with and without reference to the costs and benefits of the outcomes.⁷⁶ As an example, Justice Antonin Scalia remarked:

It is the purpose of these annual Holocaust remembrances—as it is the purpose of the nearby Holocaust museum—not only to honor the memory of the six million Jews and three or four million other poor souls caught up in this 20th-century terror, but also, by keeping the memory of their tragedy painfully alive, to prevent its happening again. The latter can be achieved only by acknowledging, and passing on to our children, the existence of absolute, uncompromisable standards of human conduct. Mankind has traditionally derived such standards from religion; and the West has derived them from and through the Jews. Those absolute and uncompromisable standards of human conduct will not endure without an effort to make them endure, and it is to that enterprise that we rededicate ourselves today.⁷⁷

These same “uncompromisable” standards of human conduct apply across national borders and even across time periods. A consistent application of these standards would require an application to the millions-upon-millions of men, women, and children who lived under the yoke of human slavery in the United States prior to the Civil War.⁷⁸ After all, it was the very institution of slavery itself

//perma.cc/QG9C-S7RB] (“When it comes to accepting the sins of the past, there is, in the end, no alternative for Germany.”).

⁷⁵ See, e.g., TONY JUDT, *POSTWAR 103* (2005) (“To deny or belittle the Shoah—the Holocaust—is to place yourself beyond the pale of civilized discourse. . . . As Europe prepares to leave World War Two behind—as the last memorials are inaugurated, the last surviving combatants and victims honoured—the recovered memory of Europe’s dead Jews has become the very definition and guarantee of the continent’s restored humanity. It wasn’t always so.”).

⁷⁶ See generally Larry Alexander & Michael Moore, *Deontological Ethics*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2016), <https://plato.stanford.edu/entries/ethics-deontological/> [<https://perma.cc/L9K8-MKHW>] (last visited Feb. 1, 2019) (describing contrasting philosophical approaches, deontology, and consequentialism).

⁷⁷ Ed Whelan, *Never Again*, *NAT’L REV. ONLINE* (Oct. 20, 2017), <https://www.nationalreview.com/bench-memos/scalia-speaks-holocaust/> [<https://perma.cc/WLY8-SUZ3>]. There are, of course, other traditional derivations of these standards including those derived from western philosophy, both ancient and modern.

⁷⁸ See WENDY WARREN, *NEW ENGLAND BOUND 1* (2016) (“Between the sixteenth and nineteenth centuries, a period that roughly coincides with the colonial periods of North and South America, nearly thirteen million Africans were enslaved and shipped west across the Atlantic, while two to four million Native Americans were enslaved and traded by European colonists in the Americas.”). For a sampling of reading on the atrocities inflicted upon enslaved Americans, see BERRY, *supra*

which drew the condemnation of Justice Scalia's forebear and Chief Justice Marshall's contemporary and friend, Joseph Story, who charged grand juries subject to his supervision as follows:

The existence of Slavery under any shape is so repugnant to the natural rights of man and the dictates of justice, that it seems difficult to find for it any adequate justification. It undoubtedly had its origin in times of barbarism, and was the ordinary lot of those who were conquered in war. It was supposed that the conqueror had a right to take the life of his captive, and by consequence might well bind him to perpetual servitude. But the position itself on which this supposed right is founded, is not true. . . . And even if in such case it were possible to contend for the right of slavery . . . it is impossible that it can justly extend to his innocent offspring through the whole line of descent.⁷⁹

How then, should twenty-first century Americans assess legal actors who abetted and entrenched this most repugnant of early American institutions? The answer must reference the complete and accurate depiction of the legal actors themselves, their body of work, and the historical forces at work that influenced their lives. And yet the two books under review present their subject, Chief Justice John Marshall, in such remarkably different ways that we are forced to ask whether either book lives up to the demands of proper historical accounting.

II. PROFESSOR PAUL'S HISTORY AS THE POLISHING OF MONUMENTS TO UNTRUTH

Almost two decades ago, at least one legal historian asked why any writer would offer another biography of Chief Justice Marshall given the number of prior efforts

note 36, at 46–47, discussing the commodification of slave children, and KAPLAN, *supra* note 49, at 13, describing one of Lincoln's reflections on slave children as follows:

Leaving Farmington, Lincoln boarded the aptly named *Lebanon*. On board were twelve slaves, "chained six and six together . . . like so many fish upon a trot-line," he later wrote to Mary Speed. . . . They were "being separated forever," Lincoln wrote, "from the scenes of their childhood, their friends, their fathers, and mothers, and brothers and sisters, and many of them, from their wives and children, and going into perpetual slavery where the lash of the master is proverbially more ruthless and unrelenting."

Id.; see also WALTER JOHNSON, *RIVER OF DARK DREAMS: SLAVERY AND EMPIRE IN THE COTTON KINGDOM* 28 (2013) ("Jackson spent the next fifteen years—first as a general in the U.S. Army, then as the military governor of Florida, and finally as the [P]resident of the United States—supervising the ethnic cleansing and racial pacification of the south eastern United States."); SANFORD LEVINSON, *WRITTEN IN STONE: PUBLIC MONUMENTS IN CHANGING SOCIETIES* 63–64 (20th anniversary ed. 2018) ("Imagine our reaction if a German *staat*, perhaps inspired by South Carolina, decided to fly the swastika about its state capitol."); ANDRES RESENDEZ, *THE OTHER SLAVERY: THE UNCOVERED STORY OF INDIAN ENSLAVEMENT IN AMERICA* (2016).

⁷⁹ FINKELMAN, *supra* note 18, at 121 (quoting a grand jury charge of Justice Story).

in circulation.⁸⁰ After all, Marshall and the Marshall Court have been the subject of numerous books over the past two centuries.⁸¹ In a C-SPAN lecture presenting his book to a live and televised audience, Professor Paul answered this question in the following way:

The one thing probably most of you know about John Marshall is that he wrote this very famous, probably the most famous, decision of the Supreme Court, *Marbury versus Madison*, which establishes the principle of judicial review, which means that the Supreme Court can strike down laws that are unconstitutional. But he was so much more than this. Probably no one had a more enduring impact on our country than John Marshall. And no one did more to hold together the fragile Union of our nation at a very difficult time without precedent.⁸²

As a result of these observations about Marshall, it became Paul's goal "to describe the whole man. To give you a sense of all of the different ways in which Marshall had contributed to our nation's growth."⁸³ With regard to Marshall's accomplishments as Chief Justice, Paul stated:

As Chief Justice, [Marshall] brilliantly defended the independence of the judiciary against the attempts by the Republicans to impeach the Federalist Judges. He affirmed the federal courts' power to review the actions of the executive and of Congress. He established the supremacy of the federal government over the states. He promoted the idea of a national market that would promote commerce. He protected private property and facilitated the growth of corporations and private colleges. He defended the rights of the Native American tribes and established the foundations of Indian Law that are still in effect today. He was the first judge to declare that international law is part of U.S. law. And he upheld the rights of aliens and alien property. And, finally, he safeguarded the freedom of speech against Jefferson's . . . attempts to prosecute his political enemies for constructive treason.⁸⁴

In this summary of Marshall's accomplishments, however, Paul makes no mention of Marshall's treatment of American slavery as Chief Justice. Yet, during

⁸⁰ Gerber, *supra* note 10, at 104 ("Put directly, do we really need another biography of John Marshall?").

⁸¹ See, e.g., HERBERT A. JOHNSON, *THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–35* (1997); DAVID LOTH, *CHIEF JUSTICE JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC* (1949); ALLAN B. MAGRUDER, *AMERICAN STATESMAN JOHN MARSHALL* (Gaunt, Inc. 2009) (1885); DAVID ROBARGE, *A CHIEF JUSTICE'S PROGRESS: JOHN MARSHALL FROM REVOLUTIONARY VIRGINIA TO THE SUPREME COURT* (2000).

⁸² Without Precedent: *Law Professor Joel Richard Paul Recounted the Political and Judicial Career of the Supreme Court's Fourth Chief Justice, John Marshall*, C-SPAN, <https://www.c-span.org/video/?441642-1/without-precedent> [<https://perma.cc/HH9W-3ERS>] (last visited Jan. 24, 2019) (00:03:22).

⁸³ *Id.* (00:04:14).

⁸⁴ *Id.* (00:06:50).

Marshall's tenure on the Court, it was that legal issue that would cause the country to erupt in civil war, resulting in the deaths of hundreds of thousands of Americans and a series of fundamental changes to our Constitution.⁸⁵ Paul's biography proceeds as if Chief Justice Marshall and his slavery jurisprudence played almost no role in the events leading to the catastrophe of this episode in American history. Instead, Paul posits that Marshall served as a bulwark against disunion and the catastrophic consequences of slavery that drove the country to civil war.⁸⁶

To the extent Paul does devote attention to the subject, he casts Marshall as an opponent of slavery. According to Paul, "Marshall's professional success as a lawyer enabled him to avoid the more common route to wealth and influence in eighteenth-century Virginia as a slaveholding planter."⁸⁷ This conclusion—and Paul's general perspective on Marshall and slavery—is almost entirely derivative of works by Marshall's earlier biographers, and particularly Jean Edward Smith.⁸⁸ Paul further observes:

Marshall was not free of racial prejudice, and he did enjoy the comforts that his household slaves provided to him. Marshall's attitude toward African Americans was paternalistic. He viewed his slaves as family members who needed his guidance and support. There is no evidence that Marshall ever separated families or mistreated or whipped his slaves—as Thomas Jefferson did. It appears that Marshall treated his slaves humanely, and on at least one occasion, he paid for a doctor to care for a slave woman who was ill.⁸⁹

Paul does not provide any register by which one is able to assess how he measures slavery's impact on its victims.⁹⁰ Instead, Paul describes Revolutionary-

⁸⁵ DREW GILPIN FAUST, *THE REPUBLIC OF SUFFERING DEATH AND THE AMERICAN CIVIL WAR* 11–12 (2008); see also *In re Afr. Am. Slave Descendants Litig.*, 375 F. Supp. 2d 721, 780 (2005), *aff'd in part, rev'd in part, and modified in part*, 471 F.3d 754 (7th Cir. 2006) ("Generations of Americans were burdened with paying the social, political, and financial costs of this horrific War.").

⁸⁶ See Jeremy Suri, *Foreign Collusion Is as American as Apple Pie*, FOREIGN POL'Y (Aug. 28, 2018), <https://foreignpolicy.com/2018/08/28/foreign-collusion-is-as-american-as-apple-pie/> [<https://perma.cc/5EYK-6RRG>]; PAUL, *supra* note 4, at 2–3, 440; see also *supra* text accompanying note 12.

⁸⁷ See PAUL, *supra* note 4, at 45–46 (citing NEWMYER, *supra* note 8, at 35). Likewise, when Paul cites to Smith's biography of Marshall, Smith makes no mention of Marshall's need to engage in commercialized slavery. *Id.* at 49–53 (citing SMITH, *supra* note 8, at 145–46).

⁸⁸ See PAUL, *supra* note 4, at 446–47 (citing SMITH, *supra* note 8, at 145–46); cf. SMITH, *supra* note 8, at 488 ("The issue of slavery itself never came before the Marshall Court."); Donald M. Roper, *In Quest of Judicial Objectivity: The Marshall Court and the Legitimation of Slavery*, 21 STAN. L. REV. 532, 532 (1969) ("Yet the isolation of the Marshall Court from the slavery controversy is more imagined than real.").

⁸⁹ See PAUL, *supra* note 4, at 47 (footnote omitted).

⁹⁰ Cf. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 8 (Penguin Books 2018) (1903). Dubois writes:

era fears regarding the possibility of slave revolts, highlighting the threatened leveraging of slave power by British loyalists during the revolution and slave rebellions in Saint-Domingue.⁹¹ Paul also notes that Marshall handled lawsuits for and against slaves, sometimes pro bono, that he was part of the African colonization movement, and that he had a decades-long relationship with a slave, Robin Spurlock, who “made a strong impression on Marshall’s views about African Americans and slavery.”⁹² In a statement with no citation, Paul remarkably hypothesizes that Marshall may have been right to believe that the deportation of the entire slave population to Africa was the best solution for America’s race issues, given the benefit of historical hindsight. He writes:

Of course, most slaves had no ties to Africa and had no reason to leave their homeland for a foreign country. Though today it seems unthinkable that the United States would have deported free blacks to Africa, to Marshall and his contemporaries it seemed just as unthinkable that whites would ever accept blacks as their social equals. More than 150 years after emancipation, it remains to be seen if Marshall was wrong.⁹³

This striking observation would raise red flags, even if it were to be considered historically factual, because it addresses complex topics with imprecision and does not indicate whether any of its propositions are supported by primary or secondary sources.⁹⁴ The reader is left to ask:

Away back in the days of bondage they thought to see in one divine event the end of all doubt and disappointment; few men ever worshipped Freedom with half such unquestioning faith as did the American Negro for two centuries. To him, so far as he thought and dreamed, slavery was indeed the sum of all villainies, the cause of all sorrow, the root of all prejudice . . .

Id.; BOOKER T. WASHINGTON, *UP FROM SLAVERY* 1 (1995) (“My life had its beginning in the midst of the most miserable, desolate, and discouraging surroundings. This was so, however, not because my owners were especially cruel, for they were not, as compared with many others.”).

⁹¹ See PAUL, *supra* note 4, at 16–17, 47. For a far more complete recitation of dynamics between British offers of freedom to American slaves and American efforts to suppress freedom and the violence that ensued against men, women, and children, see LEPORE, *supra* note 49, at 94–108.

⁹² See PAUL, *supra* note 4, at 49; cf. ANNE TWITTY, *BEFORE DRED SCOTT: SLAVERY AND LEGAL CULTURE IN THE AMERICAN CONFLUENCE, 1787–1857* 118 (2018) (“For these individuals, prosecuting freedom suits may have simply been a way for them to live out a paternalist fantasy or foster a reputation as a benefactor to the oppressed.”).

⁹³ See PAUL, *supra* note 4, at 48; cf. TWITTY, *supra* note 92, at 112 (“A racist, largely ineffectual body of well-intentioned Christians, the ACS acknowledged slavery as a curse but embraced the notion that people of color had no place in America’s divinely ordained future.”).

⁹⁴ See Barbara W. Tuchman, *History by the Ounce*, in *PRACTICING HISTORY* 39 (Paperback ed., Random House Trade 2014) (1981) (“When I come across a generalization or a general statement in history unsupported by illustration I am instantly on guard; my reaction is, ‘Show me.’”).

- Is this international law professor endorsing Marshall's goal of the mass and involuntary deportation of slaves to Africa?
- Is he even somehow endorsing that policy or a variant of it, now, rather than the goal of continued work toward a more perfect union?
- What are we to think of this sort of appraisal, coming as it does in 2018 and beyond, during a time of great upheaval in regard to the treatment of immigrants in this country?
- If Marshall stood for the expulsion of African slaves, how considered was this viewpoint? How moral was it?⁹⁵

There is a deep level of irresponsibility in Paul's commentary on the subject, even as he dutifully concedes that Marshall, "like Jefferson, was guilty of hypocrisy—fighting for liberty in the Revolutionary War while denying it to others."⁹⁶ And having crossed the threshold by writing a biography that does not merely describe history, but casts judgment upon history in admiring terms, Paul cannot take refuge in the argument that the past cannot be judged by the standards of the present.⁹⁷ Paul's credibility as an historian and public intellectual must therefore be assessed against his own conclusions about Marshall, their foundation in fact and good scholarship, and a defensible application of values.

According to Paul, for Marshall, "the struggle for human dignity was experienced in the cases he won, in his support of African colonization, in his defense of the federal power to end slavery, and in the humanity and respect he showed to the least among us in his quotidian routines."⁹⁸ Paul's treatment of Marshall's career as Chief Justice confirms this conclusion. His biography follows the standard treatment of Marshall's contributions to private and public law in discussing famous cases such as *Marbury v. Madison*⁹⁹ and *Cohens v. Virginia*.¹⁰⁰ Paul casts these decisions as seminal moments in the history of the nation and Marshall,

⁹⁵ For some recent commentary on ancient sources discussing the treatment of foreigners as a separate virtue, see HOMER, *THE ODYSSEY* 24–26 (Emily Wilson trans., W. W. Norton & Co. 1st ed. 2018) (discussing *Xenia*, or "guest-friendship," and its moral, historical, and literary standing in Ancient Greece); see also Rebecca Newberger Goldstein, *The Odyssey and the Other*, *THE ATLANTIC* (Dec. 2017), <https://www.theatlantic.com/magazine/archive/2017/12/the-odyssey-and-the-other/544110/> [<https://perma.cc/AQ6F-ZFXD>] (discussing the same).

⁹⁶ PAUL, *supra* note 4, at 53.

⁹⁷ RICHARD J. EVANS, *IN DEFENSE OF HISTORY* 15 (1st Am. ed. 1999) (attributing this perspective to German historian Leopold von Ranke).

⁹⁸ PAUL, *supra* note 4, at 53.

⁹⁹ 5 U.S. (1 Cranch) 137 (1803).

¹⁰⁰ 19 U.S. (6 Wheat.) 264 (1821).

as a courageous stabilizing force, as their author.¹⁰¹ His book devotes very little space to the substantial debate over the importance of Marshall's most famous decisions, despite a substantial corpus of material on the subject.¹⁰² Paul also does not appear to be aware of commentary arguing, more generally, that the United States Supreme Court has played a pernicious role in the life of our nation over its history, in part, because of the very power of judicial review associated with Marshall's jurisprudence.¹⁰³

In other words, Paul has written an entire book about Marshall and, yet, has failed to acknowledge the substantial debate about his contributions to American law.¹⁰⁴ Paul's description of cases involving slavery—the most important legal and political issue facing the nation in the nineteenth century—is very limited. He devotes some space to the case known as *The Antelope*,¹⁰⁵ in which the United States resolved the fate of slaves discovered aboard an American vessel that was engaging in illegal trafficking by a process amounting to a lottery: dispensing freedom to some and casting others back to slavery, nearly at random.¹⁰⁶ Apologizing for his subject's performance in this context, Paul concluded that:

Personally, Marshall viewed slavery and the slave trade as an abomination. Marshall's decision in [*The*] *Antelope* betrayed this conviction. Why did he step back from the opportunity to affirm an emerging principle of international law outlawing the slave

¹⁰¹ See PAUL, *supra* note 4, at 256–59 (discussing *Marbury*) and 339–47 (discussing *Cohens*).

¹⁰² See, e.g., Klarman, *supra* note 8; see also Keith E. Whittington & Amanda Rinderle, *Making a Mountain Out of a Molehill? Marbury and the Construction of the Constitutional Canon*, 39 HASTINGS CONST. L.Q. 823, 824–25 (2011) (suggesting that *Marbury* became prominent because of references to it in *Brown v. Board of Education*, even as it was given very little attention in the nineteenth century).

¹⁰³ See, e.g., IAN MILLHISER, *INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED* xiii (2015). As Millhiser describes:

The justices . . . have routinely committed two complementary sins against the Constitution. They've embraced extra-constitutional limits on the government's ability to protect the most vulnerable Americans, while simultaneously refusing to enforce rights that are explicitly enshrined in the Constitution's text. And they paved a trail of misery as a result.

Id.

¹⁰⁴ Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 788 (1999) (“These revisionist scholars contend that the origins of judicial review can best be located in the years following the Marshall Court, in the post-Civil War era at the end of the nineteenth century.”).

¹⁰⁵ *The Antelope*, 25 U.S. (12 Wheat.) 546 (1827); *The Antelope*, 24 U.S. (11 Wheat.) 413 (1826); *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

¹⁰⁶ See PAUL, *supra* note 4, at 352–61.

trade? Marshall could surely see the arc of history bending in that direction.¹⁰⁷

This last conclusion about Marshall's perspective comes with no supporting citation.¹⁰⁸

Perhaps more remarkable, given that he is an international historian who jumped into the task of judicial biography-writing, Professor Paul appears unaware of the work of Chief Justice Marshall's contemporary in Great Britain, Lord Mansfield.¹⁰⁹ In the *Somerset case*¹¹⁰—Mansfield's most famous case as England's chief judicial magistrate—Mansfield ruled against the interests of slavery, granting habeas corpus relief to a man seized by American slavers who brought him ashore in England and then sought to reassert ownership over him.¹¹¹ While his ruling on slavery, rendered in 1772, occurred in a society that remained committed to the trade, Mansfield opined:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory: it's so odious, that nothing can be suffered to support it but positive law.¹¹²

Historians have postulated that this decision supported the cause of abolitionism generally and was used by coordinate courts to promote freedom in Great Britain.¹¹³

¹⁰⁷ PAUL, *supra* note 4, at 361 (footnote omitted).

¹⁰⁸ *See id.*

¹⁰⁹ Marshall admired Mansfield. *See* NORMAN S. POSER, LORD MANSFIELD: JUSTICE IN THE AGE OF REASON 397 (2013). Poser writes:

Chief Justice John Marshall of the United States Supreme Court, a Federalist in party politics, disagreed with Jefferson, calling Mansfield "one of the greatest Judges who ever sat on any bench, [and] who has done more than any other to remove those technical impediments which grow out of a different state of society, [and] too long continued to obstruct the course of substantial justice."

Id. That fact should not be confused with an effort to offer Mansfield as a model in his own right. *See id.* at 297–98 ("Long after deciding the *Somerset* case, Mansfield continued to regard black slaves not as human beings having inalienable rights but as chattels—personal property that their owners could dispose of as they wished."). Poser goes on to detail a decision in which Mansfield gives a bloodless description of slaves thrown overboard by slavers in terms equivalent to lost property. *Id.*

¹¹⁰ *Somerset v. Stewart*, (1772) 98 Eng. Rep. 499 (K.B.).

¹¹¹ *Id.* at 510.

¹¹² *Id.*

¹¹³ POSER, *supra* note 109, at 298 (asserting that "[a]lthough the *Somerset* decision did not end slavery or the slave trade . . . it provided support for the growing abolitionist sentiment" and "[l]ess than two weeks after the decision[,] led to a ruling freeing a slave from bondage before Scottish courts); *see also* William M. Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86, 88 (1974) ("*Somerset* is a fascinating milestone in Anglo-

Paul does not assess Marshall against this backdrop, though it is clear that Marshall shied away from similar displays in his own jurisprudence. Instead, he explains Marshall's decisions by hypothesizing that Marshall "believed obedience to the law trumped moral judgments. According to this view, Marshall saw judges as neutral referees merely applying fixed legal rules."¹¹⁴ This conclusion also comes unaccompanied by any citation to a case, letter, or other writing written by Marshall on the subject.¹¹⁵

Paul further speculates that Marshall sought to shore up the United States against the domestic threat of disunion between the sections and threats from foreign powers offended by the prosecution of foreigners and their property in the United States courts, citing other Marshall biographers (though not Finkelman or other skeptics who have criticized Marshall)—his assertion is entirely derivative of these prior works.¹¹⁶ He does not discuss the numerous cases in which Marshall decided the fate of slaves seeking freedom from slavery, though scholars other than Finkelman have addressed the issue.¹¹⁷ Paul does not address what Marshall's personal papers reveal about his relationship to slavery—facts that Finkelman uncovered in his simultaneous study of Marshall. His treatment of the African slave trade jurisprudence further fails to account for important cases decided by the Marshall Court that are described by Professor Finkelman.¹¹⁸

Other scholars have argued that Marshall's true concern as a jurist was the establishment of a stable legal environment for the protection of property rights. "The belief that property ownership was essential for self-government and political liberty had long been a central premise of Anglo-American constitutionalism" in the

American legal history It was a . . . benchmark in the development of the law of personal liberty.").

¹¹⁴ PAUL, *supra* note 4, at 361–62 (footnote omitted).

¹¹⁵ *See id.*

¹¹⁶ *See* PAUL, *supra* note 4, at 470 n.59 (citing NEWMYER, *supra* note 8; SMITH, *supra* note 8).

¹¹⁷ *See* NEWMYER, *supra* note 8, at 424–34; *see also* Leslie Friedman Goldstein, *Slavery and the Marshall Court: Preventing "Oppressions of the Minority Party"?*, 67 MD. L. REV. 166, 175 (2007). According to Goldstein:

During the Marshall Court years, issues concerning slavery arose in the following contexts: (1) property disputes between white people over particular slaves, which the Court handled according to rules that would have applied to other chattel property; (2) lawsuits by slaves claiming their freedom on one or another ground; and (3) questions of criminal law once federal law banned the export and import of slaves.

Id. (footnotes omitted) (collecting and tabulating slavery cases).

¹¹⁸ *See, e.g.*, FINKELMAN, *supra* note 18, at 58–75 (describing *Mima Queen v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813); *Scott v. Negro Ben*, 10 U.S. (6 Cranch) 3 (1810); *Scott v. Negro London*, 7 U.S. (3 Cranch) 324 (1806); *Telfair v. Stead's Ex'rs*, 6 U.S. (2 Cranch) 407 (1805)).

era of the Marshall Court.¹¹⁹ An analysis of these perspectives as they relate to Marshall's true record on slavery would provide the sort of window into Marshall's jurisprudence that Paul is unable to provide. At least one scholar has suggested that Marshall's failure to address slavery may have been the product of concern for his own personal well-being, having observed the reaction of South Carolina to one colleague's anti-slavery rulings.¹²⁰

Professor Paul does not address Marshall's expansive view of property, and he is unaware of Marshall's own investment in human property. Had he done so, he would have had to contend with comparing Marshall to more courageous judicial figures. Marshall's concern for his own personal well-being, safety, and professional reputation, for instance, could be compared to the federal judges who risked personal and professional retaliation to further the cause of freedom and equality in the United States.¹²¹

Paul's failure to acknowledge and address this perspective renders him incapable of squaring the pathbreaking nature of the *Dartmouth College case*—protecting the provinces of private corporate law—on the one hand, with Marshall's resistance to the freedom of human beings on the other. Ultimately, his failure to address these features of Marshall's personal history and jurisprudence in a manner consistent with its treatment by other historians—and Professor Finkelman's specifically—deeply undermines Paul's conclusion that Marshall “had the courage of his imagination, the wisdom to find common ground, and the grace to hold

¹¹⁹ Ely, Jr., *supra* note 44, at 1025.

¹²⁰ See Roper, *supra* note 88, at 532–34. Roper explains:

William Johnson's public stand further complicated matters. Without challenging the institution of slavery, the South Carolinian courageously protested the failure to accord slaves due process in the summary and frequently hysterical proceedings that followed in the wake of the Denmark Vesey incident.

...

....

.... The protest following the decision caused Marshall to write Story of Johnson's plight, and of his own escape via a Falstaffian tactic from a similar situation.

Id.

¹²¹ See, e.g., Robert C. McFadden, *Frank M. Johnson Jr., Judge Whose Rulings Helped Desegregate the South, Dies at 80*, N.Y. TIMES (July 24, 1999), <https://www.nytimes.com/1999/07/24/us/frank-m-johnson-jr-judge-whose-rulings-helped-desegregate-the-south-dies-at-80.html> [<https://perma.cc/D239-DUUF>] (describing a federal district judge who enforced anti-segregation laws despite personal and professional threats); see also GILBERT KING, *DEVIL IN THE GROVE* (2012) (describing the heroic lawyering of Thurgood Marshall as he defended accused black citizens in the American South despite the life-threatening environment created by the surrounding white population).

together a fragile union.”¹²²

III. PROFESSOR FINKELMAN’S MORE TRUTHFUL HISTORICAL RECKONING AS AN UNVARNISHED ASSESSMENT OF MARSHALL

Professor Finkelman’s much shorter book is much longer on engagement with primary source historical records, even though it not only addresses Chief Justice Marshall, but also two other historical figures: Justice Joseph Story and Chief Justice Roger Taney. *Supreme Injustice* is not, in fact, a biography of Marshall, and it does not seek to present him as a complete man. It is a book that focuses on Marshall’s relationship with slavery as a legal institution, offered in the face of two centuries of praise for a monumental jurist.¹²³ Surveying Marshall’s personal papers, Finkelman’s book finds in Marshall a man devoted to slavery and to trafficking in human lives to promote the interests of his family and their holdings.¹²⁴ Unlike Paul, Finkelman does the traditional work of the historian, relying upon historical materials revealed in his notes to track Marshall’s personal behavior.

With reference to Marshall’s personal papers, Finkelman reveals that Marshall bought, sold, and devised scores of slaves from his younger years as an attorney through his later years as Chief Justice.¹²⁵ In the process, Professor Finkelman demonstrates that “[t]he Great Chief Justice was constantly in the business of buying, giving away, and sometimes selling slaves.”¹²⁶ Professor Finkelman therefore undercuts the inaccurate portraits of Marshall painted by his most well-known biographers, whose views are adopted uncritically by Paul. As Finkelman writes:

It is simply wrong to claim that Marshall “experienced slavery primarily” as an urban slave owner or “was never involved in large-scale agriculture” or “had no significant holdings” of slaves. Nor can we accept the claim that “it is doubtful that he traded in slaves.”¹²⁷

¹²² See PAUL, *supra* note 4, at 440. See generally Tuchman, *supra* note 94, at 39 (“Text after text in American History is published every year, each repeating on this question more or less what his predecessor has said before, with no further enlightenment.”).

¹²³ See, e.g., Barry Friedman, *The Myth of Marbury*, in ARGUING MARBURY V. MADISON 65 (Mark Tushnet ed. 2005) (“It is often said that in *Marbury v. Madison*, the greatest judicial decision ever rendered, the legendary Chief Justice John Marshall created the power of judicial review.” (footnotes omitted)).

¹²⁴ FINKELMAN, *supra* note 18, at 36–48.

¹²⁵ *Id.* at 42–46.

¹²⁶ *Id.* at 47.

¹²⁷ *Id.* at 47 n.43, (citing NEWMYER, *supra* note 8, at 434; SMITH, *supra* note 8, at 162, 164–68).

At an event sponsored by the John Marshall Foundation at the Virginia Museum of History and Culture, Professor Finkelman, while discussing his book before an audience, shed greater light on how he drew these startling conclusions.¹²⁸ During his address, Finkelman described a series of commonsense tasks in which he engaged as an historian, which his predecessors, quite astonishingly, had failed to perform despite undertaking the project of attempting to capture Marshall's life and jurisprudence.¹²⁹ When the subject of his novel approach to Marshall arose in the context of the discussion, Finkelman explained: "I'm the first one to do it because other historians have not done it."¹³⁰ The task involved reading John Marshall's will carefully and following the sources and locations of Marshall's wealth.¹³¹ This reading revealed that Marshall owned and transacted a far greater number of slaves than any of Marshall's prior biographers had reported.¹³²

Professor Finkelman's discovery of these facts surprised him so much that he felt obliged to test his discoveries through communication with other historians:

I was so startled by this that I wrote a couple of paragraphs and sent it to other Marshall scholars and said, "Can I be right?" Because it's very weird. You spend your whole life doing history. You're reading books that your friends have written. . . . I can't be right and you're all wrong. . . . One of the things we see is, within my profession there are people who are so in love with their subject or so blinded by their desire to reach a certain conclusion that they don't want to follow the evidence where the evidence takes you.¹³³

He would have to level the same critique at Professor Paul. To bolster his claim that Marshall was a civil libertarian in disguise, Paul writes: "[t]he relationship between Marshall and [Robin] Spurlock was remarkable, and it seems likely that Spurlock made a strong impression on Marshall's views about African Americans and slavery."¹³⁴ Professor Finkelman notes, however, that Marshall would only manumit Spurlock at the end of Marshall's life if Spurlock agreed to leave Virginia.¹³⁵ If Spurlock wished to remain in Virginia, it would have required him to

¹²⁸ See *Supreme Injustice: Slavery in the Nation's Highest Court*, YOUTUBE (May 21, 2018), <https://www.youtube.com/watch?v=Oyy9ZwmlMnQ> [<https://perma.cc/FR2J-2X4N>].

¹²⁹ See *id.* (00:32:45–00:33:30).

¹³⁰ See *id.* (00:32:40–00:32:45).

¹³¹ See *id.* (00:33:00–00:37:00).

¹³² See *id.*

¹³³ See *id.* (00:35:01–00:36:15).

¹³⁴ PAUL, *supra* note 4, at 49.

¹³⁵ FINKELMAN, *supra* note 18, at 43.

engage an attorney to argue his case and could have cast him into poverty.¹³⁶ Moreover, notwithstanding Marshall's long-standing personal relationship with Robin Spurlock, his papers reveal Spurlock to be an inveterate and cruel racist who, appearing before the Virginia legislature, argued that free black citizens in Virginia were a blot on society and should be repatriated to other lands.¹³⁷ Worse, Marshall's personal records demonstrate that he thought very little about separating families in order to advance his own family's interests.¹³⁸

Professor Finkelman also rebuts notions that Marshall had a clean jurisprudential record with regard to slavery by simply entering a few search terms into a computerized database in an effort to review whether Marshall participated in decisions involving the issue.¹³⁹ In surveying Marshall's judicial decisions, Finkelman finds a jurist famous for his judicial creativity who contributed little of it to advancing the cause of freedom for slaves or alleged slaves.¹⁴⁰

These tendencies are perhaps on starkest display in cases involving suits for freedom brought by individuals whose appeals were heard by the Marshall Court in the early nineteenth century. In those decisions, readers first see Marshall loosen evidentiary standards in violation of a statute's language to rule against an alleged slave.¹⁴¹ Readers then see Marshall deploy a formalistic approach to the rule against hearsay in favor of a slaveholder in one case, while loosening evidentiary requirements against a slave challenging his bondage in another.¹⁴²

In one striking example of such judicial decision-making—the case of *Scott v. Negro Ben*¹⁴³—Marshall dispensed with a statutorily mandated element of proof to rule in favor of a slaveholder who sought to justify his importation of a slave into Maryland against the slave's suit for freedom.¹⁴⁴ Indeed, when presented with two possible constructions of the statute—one that would have affirmed the trial court's

¹³⁶ *Id.* at 43–44.

¹³⁷ *Id.* at 51.

¹³⁸ *Id.* at 45.

¹³⁹ See *Supreme Injustice*, *supra* note 128 (00:37:22–00:38:10).

¹⁴⁰ FINKELMAN, *supra* note 18, at 107–10 (“John Marshall is rightly seen as one of the most innovative jurists in our history. . . . When human liberty was at stake he was less engaged.”); see *Supreme Injustice*, *supra* note 128 (00:37:30–00:40:00) (describing how Marshall decided all of the cases involving slavery that he authored against slaves and reversed three jury verdicts rendered in the interests of slaves by juries comprised entirely of white men).

¹⁴¹ See *infra* pp. 36–37.

¹⁴² See *infra* pp. 36–37.

¹⁴³ 10 U.S. (6 Cranch) 3 (1810).

¹⁴⁴ *Id.* at 6–7.

decision to free the man and one that would cast him back into litigation over his freedom—Marshall provided a pro-slavery construction. According to Marshall:

The great object of the [statutory] proviso [at issue in the case] was to permit persons, actually migrating into the state of Maryland, to bring with them property of this description which had been within the United States a sufficient time to exclude the danger of its being imported into America for the particular purpose. The great object of the provision was, that the fact itself should accord with this intention. *The manner in which that fact should be proved was a very subordinate consideration.* Certainly the provisions of the law ought not to be so construed as to defect its object, unless the language be such as absolutely to require this construction.¹⁴⁵

This decision appears to be the ancestor of another notoriously racist decision in the area of statutory construction—the much-decried *Holy Trinity Church case*¹⁴⁶ in which the United States Supreme Court invoked the same absurdity doctrine, declaring that the United States is a “Christian nation” and that other religions were “impostors.”¹⁴⁷

By contrast, in the 1813 case *Mima Queen v. Hepburn*¹⁴⁸—decided only three years after *Scott v. Negro Ben*—Marshall affirmed the D.C. Circuit’s refusal to take deposition testimony regarding the heritage of plaintiffs seeking freedom.¹⁴⁹ These same depositions were successfully admitted in earlier freedom petitions by Queen relatives in Maryland state court proceedings—a decision affirmed by the Court of Appeals of Maryland, the state’s highest court.¹⁵⁰ In *Mima Queen*, where a slaveowner’s property interests were placed at risk, the manner in which a fact was

¹⁴⁵ *Id.* (emphasis added).

¹⁴⁶ *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

¹⁴⁷ *Id.* at 460, 471 (“The language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity.”); see also William S. Blatt, *Missing the Mark: An Overlooked Statute Redefines the Debate over Statutory Interpretation*, 104 NW. U. L. REV. COLLOQUY 147, 150–51 (2009) (describing textualist critique of this “intentionalist” decision in *Holy Trinity*).

¹⁴⁸ 11 U.S. (7 Cranch) 290 (1813).

¹⁴⁹ *Id.* at 293, 296–97.

¹⁵⁰ *Id.* at 298 (Duvall, J., dissenting) (“[T]he issue may be proved by hearsay evidence, if the fact is of such antiquity that living testimony cannot be procured. Such was the opinion of the judges of the general Court of Maryland, and their decision was affirmed by the unanimous opinion of the judges of the High Court of Appeals in the last resort, after full argument by the ablest counsel at the bar. I think the decision was correct.”); Summary of the *Mima Queen* case, O SAY CAN YOU SEE: EARLY WASHINGTON, D.C., LAW & FAMILY, <http://earlywashingtondc.org/cases/oscsys.caseid.0011> [<https://perma.cc/A4D7-GLLZ>] (last visited Feb. 28, 2019) (“The D.C. Court disallowed as evidence some critical testimony about . . . Queen’s origins and status in depositions taken in the 1790s in Maryland cases brought by Queen relatives.”).

to be proved became paramount.¹⁵¹ The hearsay testimony at issue established that the plaintiff descended from a free ancestor.¹⁵² Marshall applied the hearsay prohibition expansively to exclude evidence that could not be obtained except through hearsay—information about a person who was dead and whose contemporaries were dead.¹⁵³ The decision includes the following revealing articulation of principle as Finkelman recites in his book:

If the circumstance that the eye witnesses of any fact be dead should justify the introduction of testimony to establish that fact from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained.¹⁵⁴

This observation provoked the dissent of Justice Gabriel Duvall, who noted that freedom challenges must often depend on testimony that could not be provided by live witnesses and that Marshall's broad prohibition rendered such testimony an impossibility in the run of cases.¹⁵⁵ According to Duvall:

[P]eople of color from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection. A decision that hearsay evidence in such cases shall not be admitted, cuts up by the roots all claims of the kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom, perhaps never, occur.¹⁵⁶

These decisions, and others Finkelman highlights in his survey of Marshall's jurisprudence, demonstrate how Marshall deployed law to buttress slave-owning interests to the detriment of freedom and are difficult to square with reference to neutral principles or precedent.¹⁵⁷ And while legal historians largely have ignored these decisions, recent scholarship demonstrates that they took place within an area of law of great importance to antebellum America: the status of humans as slaves or citizens before American courts.¹⁵⁸

Finkelman also surveys Marshall's decisions on the slave trade and finds him to have ruled in favor of the freedom of the slave traders in each instance where

¹⁵¹ *Id.* at 296 (majority opinion).

¹⁵² *Id.* at 294–95.

¹⁵³ *Id.* at 296.

¹⁵⁴ FINKELMAN, *supra* note 18, at 63–64 (quoting *Mima Queen*, 11 U.S. (7 Cranch) at 296).

¹⁵⁵ *Mima Queen*, 11 U.S. (7 Cranch) at 298 (Duvall, J. dissenting).

¹⁵⁶ *Id.* at 299.

¹⁵⁷ *See, e.g.*, FINKELMAN, *supra* note 18, at 67 (describing the Marshall Court's use of hearsay evidence to deprive a slave of freedom in *Mason v. Matilda*, 25 U.S. (12 Wheat.) 590 (1827)).

¹⁵⁸ *See generally* TWITTY, *supra* note 92, at 244–74 (describing and charting the volume of litigation in the middle sections of the country regarding the status of slaves challenging bondage in American courts).

Marshall reviewed prosecutions of this illegal activity.¹⁵⁹ During his address at the Virginia Museum of History and Culture, Professor Finkelman combined all of this evidence to hypothesize about Marshall's slavery jurisprudence as follows:

I can imagine John Marshall sitting in his chambers thinking about this man whose mother has been declared free by Maryland courts. . . . And Marshall is saying, I could have bought this guy in Washington, D.C. . . . And I don't want to lose my slaves merely because I did not know that the slave I was buying was not a slave . . . It's not a pretty picture.¹⁶⁰

The picture that Professor Finkelman draws of Marshall is of a jurist who embraced views more consistent with those articulated by Chief Justice Taney's decision in *Dred Scott*—that slaves and freed blacks could never obtain status as legal citizens under the United States Constitution. In his *Dred Scott* decision, Taney answered these legal questions for everyone in Marshall's shoes—slave-owners subject to the instability of interstate travel and a nation divided with regard to the legal status of slavery. Indeed, Finkelman forces us to imagine that Taney's approach was only a more virulent and outspoken ideological strand of judicial racism than Marshall's more diplomatic effort to infect American jurisprudence with de jure racism. References to Marshall as a legal authority require us to assess him in a manner reflecting all that this accurate depiction implies about Marshall's jurisprudential approach and moral value system.

CONCLUSION

Professor John Hart Ely dedicated his great twentieth century contribution to constitutional law, *Democracy and Distrust*, to Chief Justice Earl Warren, stating, “[y]ou don’t need many heroes if you choose carefully.”¹⁶¹ In *Without Precedent*, Professor Paul has very clearly chosen Chief Justice Marshall as his hero, and his biography reflects his great admiration of Marshall as a figure whose accomplishments extended beyond his role as Chief Justice. However, he has done so in a manner that perpetuates untruths about Marshall and his contemporaries and dishonors the memories of humans harmed by Marshall.

¹⁵⁹ See FINKELMAN, *supra* note 18, at 27–28; see also *Supreme Injustice*, *supra* note 128 (00:42:30–00:43:27).

¹⁶⁰ *Supreme Injustice*, *supra* note 128 (00:45:02–00:45:43).

¹⁶¹ JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* v (1980); see also Harold Hongju Koh, *Choosing Heroes Carefully*, 58 STAN. L. REV. 723 (2004) (providing an example of the benefits of admiring worthy legal thinkers). See generally John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974) (“The Chief did something that few will ever do: he did what he set out to do. And that was to make the American Dream more broadly accessible than it had ever been before.”).

Alternatively, in *Supreme Injustice*, Professor Finkelman infuses the historical record on Marshall with forensic information and facilitates a truthful accounting of history with respect to an American figure we have mythologized. Notwithstanding the plaudits heaped upon Professor Paul by renowned legal academics, Professor Finkelman's shorter book is the better and more defensible contribution to the fields of American law and American history, even as it deeply undermines the standing of a figure of monumental importance to both. It is a book worthy of our attention as we continue to appraise, assess, and deploy as authority the monuments of our past.