

MARYLAND AND THE CONSTITUTION OF THE UNITED STATES: AN INTRODUCTORY ESSAY

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INTRODUCTION

The State of Maryland and the attorneys who practice in it have played a profound role in the history of the Constitution of the United States. That relationship should not surprise anyone; after all, Maryland was one of the original thirteen states, and its proximity to the nation's capitol ensured that its lawyers would play an active role in the bar of the Supreme Court. Although the case names alone should make that history apparent—*McCulloch v. Maryland*,¹ *Brown v. Maryland*,² *Federal Baseball*³—I am not aware of a serious scholarly effort to bring that history to the attention of a large audience.⁴ This Essay presents a short version of that relation. It does not pretend to be comprehensive, but only provocative; I hope others will fill in the gaps.

This Essay analyzes the role the State and its citizens have played in constitutional development from several perspectives: constitutional Framers, Supreme Court Justices, individual attorneys, and specific pieces of litigation. I do not cover any area in depth, and for topics that are quite famous, I have assumed some prior knowledge on the reader's part. On other topics that are important, but little-known, such as Reverdy Johnson and the *Federal Baseball* litigation, I have perhaps provided more than the normal amount of information. Finally, much more attention has been placed on events in the first half-century of the Republic than on those that came later; the reasons are simple: Maryland was a far more important part of the nation in the early days than it is now, and today lawyers and Justices may live

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1. 17 U.S. (4 Wheat.) 316 (1819).

2. 25 U.S. (12 Wheat.) 419 (1827).

3. *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922).

4. The only previous effort that I know of is my own piece, William L. Reynolds & Jacob A. France, *The Supreme Court and Maryland Litigation*, 29 Md. B.J. 20 (1996). Legal history is not the only neglected part of Maryland history; the whole of which remains comparatively unknown.

in this State but have little real connection with it.⁵ In the end, this has been a labor of love, and so I have followed my heart on coverage.

I. THE FRAMERS

This Part briefly discusses the role that Maryland and its citizens played in federal constitutional development. The astute reader will note that almost all of the results were negative from a purely parochial state viewpoint. That is, the State, or its representatives, lost almost every case or argument. Although those losses were fortunate from my twenty-first century point of view, they do not cast the lawyers and government of Maryland in the best light. Fortunately, Marylanders won the two most important decisions in which they were involved: the impeachment of Justice Samuel Chase and the treason trial of Aaron Burr.

Few remember that this country has had two constitutional conventions. Everyone knows of the first, which was held in Philadelphia in the summer of 1787. There was a second “Convention,” however, which was held by Congress in Washington, D.C. from 1865 to 1870, and which worked significant changes in the original document. That convention proposed the “Civil War Amendments,” the Thirteenth through Fifteenth Amendments dealing primarily with the rights of newly freed slaves. Marylanders played significant roles in both.

A. *The Original Constitution*

Five Marylanders attended the Philadelphia Convention in 1787: Luther Martin, James McHenry, Daniel Carroll, Daniel of St. Thomas Jenifer, and John Mercer.⁶ The five delegates were bitterly divided over most things, but, as one historian has observed, “[d]espite all of their differences, the Maryland delegation banded together on one major issue—the protection of free trade.”⁷ Martin and Mercer walked out of the Convention before it ended, so only Carroll, Jenifer, and McHenry ended up voting for it. Three members of the delegation—Carroll, Jenifer, and Mercer—had little impact on the Convention and are not discussed here.

James McHenry is a bit more interesting for he maintained a journal throughout the proceedings that is now of substantial interest to

5. Think of the term “Washington Lawyer,” and consider *infra* note 30, concerning the status of Chief Justice Roberts as a Marylander.

6. The portraits of all of the delegates but Martin draw heavily on Eric Robert Papenfuse, *Maryland's Five Delegates to the Constitutional Convention of 1787*, in MARYLAND: UNITY IN DIVERSITY 39 (A. Franklin Parks & John B. Wiseman eds., 1990).

7. *Id.* at 45.

historians. McHenry, who was born in Ireland, also has been called the “peacemaker” among the split Maryland delegation (in the Convention each state voted as a unit).⁸ Unfortunately, McHenry missed most of the Convention. He later became Secretary of War under President Washington, and Fort McHenry is named for him.

Luther Martin (1748–1826) is the most important of the five delegates. I have written about Martin elsewhere,⁹ and a short biography appears later in this Essay.¹⁰ Martin was a prominent opponent of the Constitution, both during the Philadelphia Convention and as a leading Anti-Federalist during the ratification campaign. Martin also was not popular among his fellow delegates, for he seems to have been prolix to a really annoying degree.¹¹ Martin was at heart a litigator; that meant that his gifts lay in the form of critical analysis, rather than in working with others. One scholar has observed that Martin “belonged preeminently to the class of excellent critics.”¹² That is not to say that Martin’s role in 1787 was purely negative; it was under his influence, for example, that the Supremacy Clause entered the Constitution.¹³

Perhaps Martin’s most important contribution to the proceedings involved what history knows as the Great Compromise. The first and most important deadlock at the Convention involved representation; early on, the Virginia Plan was introduced, calling for proportional representation. That plan would have enhanced the power of the large states and was bitterly opposed by delegates from the small states. Martin was among those opponents, vociferous, prolix, and effective in his opposition. Eventually a committee, of which Martin was a member, worked out the solution—equality in the Senate and proportional representation in the House.

8. *Id.* at 43.

9. See William L. Reynolds II, *Luther Martin, Maryland and the Constitution*, 47 MD. L. REV. 291 (1987) (illustrating Martin’s influence on early American history and constitutional law). The standard authority on Martin is PAUL S. CLARKSON & R. SAMUEL JETT, *LUTHER MARTIN OF MARYLAND* (1970).

10. See *infra* Part VI.E.

11. Chief Justice Rehnquist indicated that Martin’s oratorical skills may have been more suited for juries than for constitutional delegates. See WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 25–26 (1992).

12. Ashley Mulgrave Gould, *Luther Martin*, in 2 *GREAT AMERICAN LAWYERS* 1, 11 (William Draper Lewis ed., 1907).

13. Edward Papenfuse, the Maryland State Archivist, suggests that Martin sponsored the Supremacy Clause in order to limit the power of the federal government. This was done by placing the exercise of national power under the restraints imposed by the new Constitution. Although we rarely think of the Supremacy Clause that way today, Martin’s reading has long been the accepted one.

Martin also proposed that Congress be empowered to end the slave trade or at least to impose a tax on it. He did so for several reasons; most prominent among them was that “it was inconsistent with the principles of the revolution and dishonorable to the American character to have such a feature in the Constitution.”¹⁴ When the South would not yield on the issue, a committee was formed to resolve the issue. Martin was a member of the committee, and he was “outraged” at the compromise reached by the committee and eventually adopted by the Convention.¹⁵

Another example of Martin’s positive contribution resulted from the fact that James Madison, in what seems today to have been a hare-brained proposal, had suggested that the veto power should be shared between the Executive and the Judiciary. Martin opposed this because it was a “dangerous innovation And as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws.”¹⁶ At one stroke, Martin had argued for judicial independence as well as for judicial review, a power largely unknown in the nation at the time.¹⁷ Both results, of course, have had dramatic significance in the life of this country.

B. The Civil War Amendments and Reconstruction

The passage of the Thirteenth, Fourteenth, and Fifteenth Amendments from 1865 to 1870 dramatically altered the constitutional landscape. During that period, Congress also adopted key legislation to further Reconstruction in the South; these laws included the Civil Rights Act of 1866 and the establishment of the Freedmen’s Bureau. A key leader in the Senate during this period was Reverdy Johnson,¹⁸ who was both a Senator from Maryland and the leading Supreme Court advocate of the day. (It is very difficult to imagine such a person today.)

Johnson was a moderate Democrat who wanted to go more slowly on many matters than the Radical Republicans wished. In this he was in accord with the policies of President Johnson. Although the Democrats were a small minority in Congress, Johnson, the Senator, had

14. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 364 (Max Farrand ed., Yale Univ. Press 1966) (1911) [hereinafter RECORDS].

15. Michael V. Hernandez, *A Flawed Foundation: Christianity’s Loss of Preeminent Influence on American Law*, 56 RUTGERS L. REV. 625, 695–96 (2004).

16. See RECORDS, *supra* note 14, at 76.

17. See Reynolds, *supra* note 9, at 300 & n.55.

18. More on Johnson’s life may be found *infra* Part VI.F.

great influence because of his widely recognized legal ability and because of his moderation in political rhetoric.

Although he was certainly racist in some of his views, he also believed in equality of treatment regardless of color.¹⁹ Perhaps his most famous utterance during the period concerned the Privileges and Immunities Clause of the Fourteenth Amendment: “I do not understand what will be the effect of that.”²⁰ That remark certainly was prophetic: Although the Clause has little practical meaning today, modern scholarship has seen it as the provision designed to incorporate the Bill of Rights against the states. The great lawyer knew what he was talking about.

II. THE IMPEACHMENTS

Almost as important as the Framers were the judges—the members of the Senate—in impeachment cases who were asked to look at the Constitution in a very different way. Like the Framers, impeachment judges can have a profound effect on the country’s constitutional order. Although there were a number of impeachments tried in the first century of the constitution, two stand out: the trials of Justice Samuel Chase and President Andrew Johnson. In both, the accused was acquitted. In both, that acquittal sustained the Framers’ notions of a strong sense of separation of powers. And both involved Marylanders.

A. *The Impeachment of Samuel Chase*

Chase’s biography and opinions are discussed later in this Essay.²¹ Chase, however, is famous not for his opinions, but for his impeachment.²² That event was part of a carefully orchestrated attack by Jefferson on the independence of the federal judiciary. Jefferson had begun with the successful impeachment and removal from office of Judge Pickering of New Hampshire for incompetence; clearly not a constitutionally required “Treason, Bribery, or other high Crimes and Misdemeanors.”²³ That broadening of the Constitutional definition led Jefferson’s supporters to attempt to get rid of Chase for various political and legal misdeeds. If that had worked, the federal judiciary

19. See STEINER, *supra* note 18, at 124 (noting that Johnson moved to strike racial distinctions from a bill that proposed a definition of citizenship).

20. David S. Bogen, *Slaughter-House Five: Views of the Case*, 55 HASTINGS L.J. 333, 370 (2003) (internal quotation marks omitted).

21. See *infra* Part III.B.

22. On Chase’s impeachment, see generally REHNQUIST, *supra* note 11.

23. U.S. CONST. art. II, § 4.

would have to worry that they served at the pleasure of the President. Our long history of judicial independence could have ended before it started.

Chase's troubles arose from his candor (that is, lack of tact) and his strong Federalist sympathies. The Articles of Impeachment cited several offenses such as charging a grand jury in a manner highly offensive to the Republicans and the manner in which he had conducted various trials. None could remotely be fitted within the constitutional definition of treason. The great historian Charles Warren noted: "The acts for which he was now to be impeached certainly did not arise out of corrupt or improper motives; neither were they intentionally arbitrary or illegal; . . . but they were undoubtedly such acts as a calm and scrupulous Judge would not have committed."²⁴ Fortunately, Chase's defense team was led by Luther Martin, and his defense of Chase was one of the pivotal moments in American constitutional history. Martin must have been magnificent, as many sources attest. Henry Adams wrote of Martin's final argument at the trial: "His argument at Chase's trial was the climax of his career; but such an argument cannot be condensed in a paragraph. Its length and variety defied analysis within the limits of a page, though its force made other efforts seem unsubstantial."²⁵

The Senate acquitted Chase, although a majority voted to convict.²⁶ The Supreme Court had withstood the strongest challenge to its independence that it ever was to receive.

B. The Impeachment of Andrew Johnson

The impeachment of Andrew Johnson for purely political reasons created a serious constitutional crisis; the fact that it took place in 1868, the same year that the Fourteenth Amendment was adopted, was not a coincidence. President Johnson was impeached because he viewed Reconstruction as a slow process. Many in Congress wished it to proceed apace, and that was why they had adopted the Amendment.

If the merits of that debate can be put to one side, however, the Johnson impeachment raised profound questions about the balance of powers among the three branches of government. If Congress

24. CHARLES WARREN, 1 *THE SUPREME COURT IN UNITED STATES HISTORY* 281-82 (1922).

25. HENRY ADAMS, *HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF THOMAS JEFFERSON* 458 (1986).

26. See Richard B. Lillich, *The Chase Impeachments*, 4 *AM. J. LEGAL HIST.* 49, 70 (1960) (noting that a majority of the Senate voted to convict Justice Chase on three of the eight articles of impeachment).

could remove a President for political reasons, then all Presidents would serve at the will of Congress. Our Republic would have become a parliamentary government. In other words, the Johnson impeachment was a reprise of that of Samuel Chase six decades earlier. In each, Congress sought to disturb the careful balance of power constructed among the three branches in the Constitution. With Chase, the judiciary had been the target; now it was the Executive.

Reverdy Johnson helped lead the fight to prevent congressional usurpation. He was one of the few Democrats in a heavily Republican Senate, and he was the leader of the Supreme Court bar. Johnson's biographer asserts that it was due to "him largely . . . that the President was acquitted."²⁷ Perhaps Johnson's greatest contribution was an "unanswerable" legal opinion that the President could not be removed from office for his alleged offenses.²⁸ Although the President barely survived the vote, survive he did, and it was more than a century later, under different circumstances, before another President was impeached and tried.

III. THE JUSTICES

The Constitution, as Chief Justice Hughes reminded us so famously, is what the Justices say it is.²⁹ Maryland has not been fortunate in either the number or quality of its Justices. Only five persons who were formed in the State have ascended to the nation's highest bench: Thomas Johnson, Samuel Chase, Gabriel Duvall, Roger Taney, and Thurgood Marshall.³⁰ Johnson served barely more than a year, and Duvall, although serving on the Court for almost a quarter cen-

27. See BERNARD C. STEINER, *THE LIFE OF REVERDY JOHNSON* 198 (1914).

28. *Id.* at 200.

29. "We are under a Constitution, but the Constitution is what the judges say it is. . . ." Charles Evans Hughes, Speech at Elmira (May 3, 1907), in *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* 144 (David J. Danelski & Joseph S. Tulchin eds., 1973).

30. This list is admittedly idiosyncratic: It does not include all Justices who were raised in Maryland (e.g., David Davis of Illinois, who grew up in this State, and whose cousin was a Congressman from Maryland, and John Campbell who was born in Baltimore and is buried here, but was educated in the South and was appointed to the Court from Alabama); nor does it necessarily include all who listed Maryland as their residence when they joined the Court, e.g., John Roberts. Indeed, Roberts has strong local connections with this state: His father managed the Bethlehem Steel Mill located in the Baltimore area in the early 1980s, and his parents and both sisters now live in the area. Robert Little, *Family Speaks of Being Proud of Brother, Son*, *BALT. SUN*, July 22, 2005, at 8A. Nevertheless, Roberts's legal career has always been centered in the District of Columbia, not in Maryland. Indeed, a search of the Westlaw database for the appellate courts of Maryland during the relevant time reveals only one case in which Roberts is listed as a participant.

Conversely, Thurgood Marshall listed his residence at the time of his appointment to the Court as New York, where he was then a judge on the Court of Appeals for the Second

ture, has been labeled the most insignificant Justice of all.³¹ Chase and Taney left behind strong negative opinion of their work, and only Marshall ended his tenure with a favorable reputation. Here are the five in varying degrees of detail.

A. *Thomas Johnson, 1791–1793*

Johnson, who served less than fifteen months on the Supreme Court, was appointed to it by President Washington.³² Johnson had served as Chief Judge of the General Court of Maryland (then the State's highest court), governor, and was a federal trial judge at the time of his appointment. His early resignation was due to his strong (and understandable) distaste for riding circuit.³³

B. *Samuel Chase, 1796–1811*

Also appointed by President Washington, Chase was the most controversial of the early members of the Supreme Court.³⁴ Chase had signed the Declaration of Independence and practiced admiralty law.³⁵ Like Johnson, Chase had been chief judge of the General Court of Maryland.³⁶ Chase is best remembered, of course, for the failed effort, led by President Jefferson, to remove him from office in 1805; the successful defense led by the ubiquitous Luther Martin did much to solidify the independence of the Supreme Court from political intrusion.³⁷

Apart from the impeachment, Chase is most famous for his separate opinion in *Calder v. Bull*,³⁸ a case involving a resolution by the

Circuit; but Marshall was born and raised in Baltimore, and maintained strong connections in this city during his tenure on the Court. I count him as a "Marylander."

31. See Irving Dilliard, *Gabriel Duvall*, in 1 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 241, 251 (Leon Friedman & Fred L. Israel eds., 1997) [hereinafter 1 JUSTICES].

32. The discussion in this section is drawn primarily from Herbert Alan Johnson, *Thomas Johnson*, in 1 JUSTICES, *supra* note 31, at 95.

33. See HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 75 (3d ed. 1992). The Justices "rode circuit" until shortly after the Civil War. Doing so meant, in the days before steamboats and railroads, literally riding throughout the various states of the circuit and acting as trial and appellate judges therein. It was a very onerous task, attested to by many complaints from those saddled (so to speak) with this task.

34. See JANE SHAFFER ELSMERE, JUSTICE SAMUEL CHASE 55–57 (1980) (describing the opposition to Chase's appointment).

35. *Id.* at 15.

36. *Id.* at 44.

37. See *id.* at 280–85, 297.

38. 3 U.S. (3 Dall.) 386, 386–95 (1798). Before John Marshall became Chief Justice, the Supreme Court, like the British courts, issued opinions *seriatim* (that is, each Justice

Connecticut legislature granting a new hearing in a probate matter.³⁹ Chase joined two other Justices in an inquiry into whether that grant violated the Ex Post Facto Clause of the new Constitution;⁴⁰ the three held that that Clause only applied to criminal matters,⁴¹ a reading that is still approved today. Separately, Chase, speaking only for himself, raised the question of whether a legislature could enact a valid law that transgressed fundamental principles even if it violated no explicit constitutional prohibition.⁴² Although Chase's writing is not very clear, Justice Iredell thought that Chase had said that the Court could invalidate legislation that violated what today we would call "natural law."⁴³ As read by Iredell, the Chase opinion has received much attention over the last generation as the first Supreme Court expression in the on-going debate over whether there is a natural law component to the Constitution.

C. Gabriel Duvall, 1811–1835

Duvall was appointed by President Madison following the death resignation of Justice Chase.⁴⁴ When Duvall resigned, President Jackson nominated Roger Taney as his successor.⁴⁵ The Senate declined to act on the Taney nomination, denying us the pleasant, although surely temporary, spectacle of a "Maryland seat" on the Court. (Taney was confirmed the next year to succeed Chief Justice Marshall.⁴⁶) Duvall may have spent twenty-four years on the Court, but he left little for posterity to ponder. His obscurity is underlined by the fact that he was the only Justice omitted from the first edition of the *Dictionary of American Biography*, and that there is no generally accepted spelling of the Justice's last name.⁴⁷ In looking through the cases that bear his

issued his own opinion). In other words, there was no "opinion of the Court." Another landmark opinion by Chase was *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), of which the great historian Edward S. Corwin remarked that it "remains to this day the most impressive assertion of the supremacy of national treaties over State laws." Irving Dilliard, *Samuel Chase*, in 1 JUSTICES, *supra* note 31, at 120, 128 (internal quotation marks omitted).

39. *Calder*, 3 U.S. at 386.

40. *Id.* at 390–95 (Chase, J.), 396–97 (Paterson, J.), 398–400 (Iredell, J.).

41. *Id.* at 390, 396, 399.

42. *Id.* at 387–88.

43. *See id.* at 398–99 (refuting the assertion of "speculative jurists" that the judiciary has the authority to invalidate a statute contrary to the principles of "natural justice").

44. The discussion in this section is drawn primarily from Dilliard, *supra* note 31. There is very, very little scholarship about Justice Duvall. He truly is obscure and, as is also true of Justice Johnson, the correct spelling of his last name is up for grabs. *See id.* at 243.

45. Frank Otto Gatell, *Roger B. Taney*, in JUSTICES, *supra* note 31, at 337, 343.

46. *Id.* at 343.

47. Dilliard, *supra* note 31, at 243, 251.

name, only two seem worth mentioning. In *Le Grand v. Darnall*,⁴⁸ the Court held in an opinion by Duvall that a devise of property to a slave from his master necessarily freed the slave, even in the face of a contrary Maryland statute;⁴⁹ and in *Mima Queen and Child v. Hepburn*,⁵⁰ Duvall dissented from an opinion by Marshall that excluded hearsay evidence that would have established the manumission of two slaves.⁵¹ These are not bad opinions to be remembered by.

D. Roger Brooke Taney, 1836–1864

Taney was the fourth Marylander on the Supreme Court among the first twenty-four Justices.⁵² (In those days we had our share and more of the Court.) In the almost century and a half since Taney's death, only Thurgood Marshall has made it to the Court from this State; and it has been almost half a century since Marshall's appointment. What that lacuna tells us about the political and legal life in this State, I will leave to the ruminations of others.⁵³

Taney had had a full professional life before joining the Supreme Court. Born on the Western Shore of Maryland, he was a graduate of Dickinson College. Taney first practiced in Frederick and then in Baltimore. He married the sister of Francis Scott Key. In politics he was first a Federalist and then a Democrat. He became Attorney General in the first Jackson administration and then interim Secretary of the Treasury. In the latter position, he led the fight against the renewal of the charter of the Bank of the United States.⁵⁴ When he was denied confirmation in that position, he retired to private practice in Baltimore. Shortly thereafter he was nominated and defeated for a position as Associate Justice. The next year, after John Marshall's death

48. 27 U.S. (2 Pet.) 664 (1829).

49. *Id.* at 670.

50. 11 U.S. (7 Cranch) 290 (1813).

51. *Id.* at 298–99 (Duvall, J., dissenting).

52. See generally WALKER LEWIS, WITHOUT FEAR OR FAVOR: A BIOGRAPHY OF CHIEF JUSTICE ROGER BROOKE TANEY (1965); CARL BRENT SWISHER, ROGER B. TANEY (1935).

53. There have been at least a few Marylanders who have turned down efforts to nominate them to the Court. An example is William Marbury. His son, who bore the same name, explained that his father turned down the offer from President Wilson for financial reasons. WILLIAM L. MARBURY, IN THE CATBIRD SEAT 53 (1988). The junior Marbury in his day was also one of the most prominent lawyers in the country; he is perhaps most famous as the lawyer for Alger Hiss in his defamation action against Whitaker Chambers. Marbury discusses that litigation in William L. Marbury, *The Hiss-Chambers Libel Suit*, 41 MD. L. REV. 75 (1981).

54. As a Marylander, Taney must have been aware of the criminal activity of the Baltimore branch of the Bank that had led to *McCulloch v. Maryland*. See Gatell, *supra* note 45, at 343.

and a bitter confirmation hearing, Taney was confirmed as Chief Justice.

Taney is famous (or infamous) for a number of reasons, but one of them is rarely mentioned today: He was the first Roman Catholic to sit on the Supreme Court, and the next, Edward White, was not named until 1894.⁵⁵ That Taney was Catholic was not surprising given Maryland's founding as a haven for English Catholics; what is somewhat surprising is the appointment of a Catholic Justice as early as 1836, an appointment that is surely a tribute to Taney's personal and legal abilities. What, if any, impact Taney's Catholicism had on his judicial life, I leave to others to discuss.

If Taney had left the Court before 1857, history would have had a favorable impression of him. John Marshall, his predecessor, had made the Constitution the law of the land; it was Taney who began the process of adapting the Constitution to changing societal needs. In *Charles River Bridge Co. v. Warren Bridge*,⁵⁶ for example, the Court made clear that the Contract Clause would not invalidate a State's reservation of the right to change the terms of a charter it had granted.⁵⁷ It was that decision that made possible the wholesale issuance of corporate charters a generation later—a development which helped open up the national economic revolution that followed the Civil War.⁵⁸

Unfortunately for Taney he was still on the Court in 1857 when it decided the *Dred Scott* case.⁵⁹ That complicated case had a dominant theme: may a slave who has been removed to a free state still be regarded as a slave once he has been returned to a slave state?⁶⁰ In other words, does the English principle, "once free, always free," apply in this country? Although there was no majority opinion, the separate opinion written by Taney received the most attention. Taney firmly answered that question.⁶¹ Among other things, Taney's opinion held that although blacks could be citizens of a state, they could not be citizens of the United States, and, therefore, lacked standing to sue in federal courts.⁶² Moreover, Congressional attempts to eliminate slavery in Missouri were unconstitutional under the Takings Clause of the

55. ABRAHAM, *supra* note 33, at 63.

56. 36 U.S. (11 Pet.) 420 (1837).

57. *Id.* at 540, 582.

58. See generally STANLEY I. KUTLER, *PRIVILEGE AND CREATIVE DESTRUCTION: THE CHARLES RIVER BRIDGE CASE* (The Johns Hopkins Univ. Press 1990) (1971).

59. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

60. See *id.* at 452.

61. See *id.* at 452–53 (stating that Scott remained a slave regardless of the fact that he entered Illinois, a state that prohibited slavery).

62. *Id.* at 404–05.

Fifth Amendment; as a result, the fabled Missouri Compromise was unconstitutional.⁶³ Dred Scott himself, in other words, remained a slave.⁶⁴

The *Dred Scott* decision, as everyone knows, was exceedingly unpopular in the North, and it is often said to have been a major cause of the Civil War. Taney's reputation has been overwhelmed by the decision, now generally regarded as the worst decision ever by the Supreme Court. Even Taney's strong attack on the abuse of executive power in *Ex Parte Merryman*,⁶⁵ has done little to change things. Perhaps recent events involving perceived abuses of executive power might bring more attention to Taney's good side.

E. Thurgood Marshall, 1967–1991

President Lyndon Johnson appointed Marshall to the Supreme Court, to overwhelming acclaim.⁶⁶ Marshall was the first black Justice, as he had been the first black Solicitor General (also appointed by President Johnson).⁶⁷ For a third of a century, Marshall, who worked for the famous "Inc. Fund,"⁶⁸ had been the leading lawyer in the struggle for civil rights, and his appointment to the Court highlighted and validated the revolution that he had worked so hard to achieve.

On the Court, Marshall worked hard to preserve and extend the freedoms he had helped to win as an advocate. He was a strong voice for the liberal wing, especially in cases involving criminal procedure and civil rights. Marshall argued tirelessly on behalf of equality and the downtrodden. He was ferocious in his never-wavering opposition to the death penalty, and he was eloquent in denouncing the rigid "two-tier" analysis of equal protection. Marshall's opinions could be

63. *Id.* at 432, 452.

64. The Court could have treated the case as a more routine choice-of-law problem. For an excellent discussion of choice of law and slavery, see Louise Weinberg, *Methodological Interventions and the Slavery Cases; Or, Night-Thoughts of a Legal Realist*, 56 MD. L. REV. 1316, 1323–26 (1997).

65. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487); see *infra* Part V.E.

66. Biographical information is *infra* at Part VI.G. I have placed it there because I consider Marshall more important as a lawyer than as a Justice.

67. Mark V. Tushnet, *Thurgood Marshall*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1497, 1507 (Leon Friedman & Fred L. Israel eds., 1997) [hereinafter 4 JUSTICES].

68. The full name of the group is the NAACP Legal Defense and Educational Fund, Inc. This is the litigation arm of the NAACP, and it has employed many outstanding and creative attorneys. Some examples other than Marshall are Constance Baker Motley and Jack Greenberg. The Inc. Fund's remarkable attorneys and their dedication to their task proved pivotal in the long Civil Rights struggle. For information on the Inc. Fund, see <http://www.naacpldf.org>.

quite passionate, but the shift to a more conservative Court in the 1970s left Marshall's eloquence frequently in dissent.

IV. THE GENERALS, BOTH ATTORNEY AND SOLICITOR

Although the discussion of Marylanders who had helped develop the Constitution in an official capacity is almost endless (think of the federal district and appellate judges, for example), let me mention a few who served their country as either Attorney or Solicitor General.

A. *Attorney General*

Six Marylanders have served as Attorney General of the United States, the nation's top legal office.⁶⁹ Although Maryland produced a fine crop of state Attorneys General in the nation's early years, the first real Marylander appointed to the post was William Pinkney in 1811.

1. *William Pinkney, 1811–1814*

Pinkney had led an active political life prior to his appointment.⁷⁰ He had been in the General Assembly of Maryland and the United States Congress, and had served as Mayor of Annapolis and Attorney General of Maryland. He also had served as Minister to Britain. After his stint as Attorney General, he became Ambassador to Russia and to the Court of the Two Sicilies (that is, the Bourdon regime based in Naples) and later a United States Senator. In short, Pinkney had a full and distinguished career, showing impressive abilities in many different capacities. He was perhaps the leading Supreme Court advocate of his day, and his landmark argument was on behalf of the United States in *McCulloch*.

2. *Roger Brooke Taney, 1831–1833*

Taney served for two years as President Jackson's Attorney General, leaving to become Secretary of the Treasury and then Chief Justice.⁷¹

69. I have not included William Wirt in this list. Wirt was my toughest exclusion call. He was born in Bladensburg, Maryland, but, after his schooling, he moved to Virginia where he achieved great professional success. He served as Attorney General from 1817 to 1829. After leaving that job, he moved to Baltimore where he died in 1834.

70. The discussion in this section is drawn primarily from Biographical Directory of the United States Congress: 1774–Present, William Pinkney, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=P000362> (last visited Aug. 10, 2007).

71. Taney's life is discussed *supra* at Part III.D.

3. *John Nelson, 1843–1845*

Not much is known about Nelson.⁷² He had served as a member of Congress for one term, and had been Charge d’Affaires in the Court of the Two Sicilies (as had Pinkney—was this position a Maryland sinecure in those days?), before becoming Solicitor General under President Tyler. During his two years in that post, he also served as Acting Secretary of State.

4. *Reverdy Johnson, 1849–1850*

Johnson was appointed by President Taylor (at the time, Johnson was serving in the United States Senate) and resigned when Fillmore became President.⁷³ His term as Attorney General was apparently quiet. Greater things lay ahead for Johnson.

5. *Charles Joseph Bonaparte, 1906–1909*

The grandson of a king (Jerome, the erstwhile King of Westphalia) and the great-nephew of an Emperor (Napoleon I), Bonaparte came from as illustrious a background as any American official.⁷⁴ His career was basically in private practice in Baltimore and in municipal and national reform movements. Theodore Roosevelt changed that when he made Bonaparte Secretary of the Navy in 1905 and, a year later, Attorney General. As was true of so many other office-holders from Maryland, his career did not prove controversial; it was during his tenure, however, that the FBI was created.

6. *Benjamin Civiletti, 1979–1981*

Civiletti graduated from The Johns Hopkins University and then the University of Maryland School of Law in 1961.⁷⁵ He joined the law firm of Venable, Baetjer & Howard where he worked until he was named Deputy Attorney General at the beginning of the Carter Administration. After Attorney General Griffin Bell resigned in 1979, Carter chose Civiletti to be the next Attorney General. His tenure in

72. The discussion in this section is drawn primarily from Biographical Directory of the United States Congress: 1774–Present, John Nelson, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=N000037> (last visited Aug. 10, 2007).

73. Johnson’s biography appears *supra* at Part I.B.

74. The discussion in this section is drawn primarily from Don Bloch, *Bonaparte Founded G-Men as Attorney General Under Theodore Roosevelt*, WASH. STAR, Aug. 18, 1935, http://www.fbi.gov/libref/historic/history/historic_doc/docstar.htm.

75. The discussion in this section is drawn primarily from Venable LLP, Benjamin R. Civiletti, http://www.venable.com/attorneys.cfm?action=view&attorney_id=14 (last visited Aug. 10, 2007).

office was primarily taken up with questions involving the Iranian hostage crisis. Civiletti left the office when Reagan became President and rejoined his old law firm (now known as Venable), which he managed for a number of years. He is still active in practice and pro bono activities.

B. Solicitor General

The Solicitor General is the nation's leading litigator, especially in the Supreme Court. The post was not created until 1870, and it was not until 1947 that the first Marylander served in the position.⁷⁶ The next but one Solicitor General was also from this State, and a few years later a third Marylander served as Solicitor General.⁷⁷ In the forty years since Thurgood Marshall left the position, however, no Marylander has been appointed to the position. That lacuna is certainly not due to a dearth of talent; in my own professional lifetime, I have known a number of lawyers from Maryland who would have made excellent Solicitors General. I believe it more likely that the lacuna is due to the fact that Maryland is decidedly not a Republican state (there has been a Republican ascendancy during most of that period, after all), and to the fact that Maryland is not a "battleground" state; as a result there is no reason for a President to curry political favor by appointing someone from this State to a high position.

1. Philip Perlman, 1947–1952

Perlman graduated from The Johns Hopkins University and attended the University of Maryland School of Law.⁷⁸ Perlman spent most of his life in public service, including several high offices in Maryland. Eventually, President Truman named him Solicitor General in 1947, where he served until 1952. After leaving office, Perlman returned to his native Baltimore where he practiced law until his death in 1960. Although not much is known of Perlman's personal life, we do know that he made a remarkable transition from segregationist to integrationist, a journey that mirrored that of the Democratic Party of

76. Seth P. Waxman, U.S. Solicitor General, "Presenting the Case of the United States As It Should Be": The Solicitor General in Historical Context, Address Before Supreme Court Historical Society (June 1, 1998), available at <http://www.usdoj.gov/osg/aboutosg/sgarticle.html>.

77. Walter J. Cummings, Jr. served as Solicitor General between Marylanders Philip B. Perlman (1947–1952) and Simon E. Sobeloff (1954–1956). Office of the Solicitor General, U.S. DOJ, Solicitors General of the United States, <http://www.usdoj.gov/org/aboutorg/sylist.html> (last visited Aug. 10, 2007).

78. See generally Garrett Power, *Public Service and Private Interests: A Chronicle of the Professional Life of Philip B. Perlman*, 4 J. S. LEGAL HIST. 61 (1995–1996).

Maryland, and, indeed, that of America itself, in the twentieth century.

2. *Simon Sobeloff, 1954–1956*

Sobeloff graduated from the University of Maryland School of Law in 1914.⁷⁹ Like Perlman, Sobeloff served in a number of important legal positions, although Sobeloff's offices were mainly legal rather than political—including United States Attorney for the District of Maryland and Chief Judge of the Court of Appeals of Maryland from 1952 until 1954. He was President Eisenhower's first Solicitor General, serving from 1954 until 1956. During that period, he presented the government's argument in *Brown v. Board of Education*⁸⁰ and other leading civil rights cases. Sobeloff was appointed to the United States Court of Appeals for the Fourth Circuit in 1956, where he eventually became Chief Judge. He died in 1973. At his death, Sobeloff was revered for his strong progressive positions on both civil rights and civil liberties.

3. *Thurgood Marshall, 1965–1967*

Marshall's life as an attorney is discussed later.⁸¹ He served as Solicitor General from 1965 until 1967, when President Johnson named him to the Supreme Court.

V. THE CASES

The State and its constituents, of course, have appeared before the Supreme Court many, many times. What follows is a description of some of the most famous of those decisions. Again, most of the key decisions are pre-Civil War, but there are a few up to the end of the twentieth century. Here is the somewhat idiosyncratic list of Maryland cases. All but one is from the Supreme Court; the other, *Pearson v. Murray*,⁸² was handed down by the Court of Appeals of Maryland. It is included not only because it is of critical importance, but also to remind us that state courts can play a pivotal role in constitutional adjudication.⁸³

79. The discussion in this section is drawn primarily from Office of the Solicitor General, U.S. DOJ, Simon E. Sobeloff, http://www.usdoj.gov/osg/aboutsg/sobeloff_simon_bio2.htm (last visited Aug. 10, 2007).

80. 347 U.S. 483 (1954).

81. See *infra* Part VI.G.

82. 182 A. 590 (Md. 1936).

83. See *id.* at 594 (finding the University of Maryland's admissions policies unconstitutional).

A. *McCulloch v. Maryland*⁸⁴

The Bank of the United States figures prominently in this story.⁸⁵ It was chartered by Congress in 1791, despite strong opposition from Thomas Jefferson and others to the effect that doing so exceeded the limited powers granted by the Constitution to the national government. The Bank's charter expired in 1811, and it was not renewed. The War of 1812, however, exposed serious problems in the nation's banking system, and a new Bank was chartered in 1816. It immediately became controversial in Maryland, where it was embroiled in disputes ranging from serious corruption (a common practice was for its officers to write checks drawn on the Bank to each other) to political favoritism. The General Assembly of Maryland quickly became fed up with the Bank, and it imposed a disabling state tax on all branches of the Bank located within the State. Litigation quickly ensued, and the Maryland courts upheld the State legislation.⁸⁶ The case then made it to the Supreme Court.⁸⁷

In one of his greatest opinions, Chief Justice Marshall struck down the Maryland legislation. First, the Court held that Congress had the power to charter a bank, even though the ability to do so was not listed among the enumerated powers. Instead, the power to charter is necessarily implied from the other powers given to Congress in the Constitution. Second, because "the power to tax involves the power to destroy,"⁸⁸ the State of Maryland could not tax the federal bank. In one stroke, therefore, Marshall had broadened the powers of Congress and helped insulate it from exercises of state power. And all because of crooked bankers in Maryland.⁸⁹

84. 17 U.S. (4 Wheat.) 316 (1819).

85. This section's discussion is drawn primarily from and the local background of the case is fully told in David S. Bogen, *The Scandal of Smith and Buchanan: The Skeletons in the McCulloch vs. Maryland Closet*, 9 Md. L.F. 125 (1985). Some of the principals are buried in Westminster graveyard, located right outside my office window. (Edgar Allan Poe is also buried there.)

86. See *McCulloch*, 17 U.S. at 317 (noting that the Court of Appeals of Maryland ruled in favor of the Maryland Legislature).

87. The case attracted a Hall of Fame list of attorneys: Daniel Webster, William Wirt, William Pinkney, and Luther Martin, among others. Bogen, *supra* note 85, at 125, 131. After the decision in *McCulloch*, while working on indictments of the malefactors in that case, Martin suffered an incapacitating stroke. *Id.* at 131.

88. *McCulloch*, 17 U.S. at 431.

89. The State was hardly through with crooked bankers, who have been a repeated scourge. For the latest episode involving savings and loan executives, see, for example, *Levitt v. Maryland Deposit Insurance Fund Corp.*, 505 A.2d 140 (Md. Ct. Spec. App. 1986).

B. *Brown v. Maryland*⁹⁰

This otherwise eminently forgettable case entered constitutional lore as the source of the “original package” doctrine: a state cannot tax imports from foreign countries while the imports remain in their original package and have not yet become part of the “common mass” of the property of the state. The opinion of Chief Justice Marshall is of fundamental importance in preventing the states from interfering with foreign trade, a primary concern of the Framers.

C. *Barron v. Baltimore*⁹¹

This seemingly insignificant case, like *Brown v. Maryland*, answered a fundamental question of constitutional law; it also achieved immense importance during the debates over the Civil War Amendments. The plaintiff in *Barron* complained that activities undertaken by the City of Baltimore had caused Baltimore harbor to silt up near his wharf and make it unusable;⁹² he alleged therefore that the City’s actions violated the Takings Clause of the Fifth Amendment of the United States Constitution (Maryland law did not provide a comparable protection to the property owner).

Chief Justice Marshall, writing in his usual imperial style, and with uncharacteristic brevity (for him), ruled that the provisions of the Bill of Rights did not restrain state actors.⁹³ He reasoned that the Framers had imposed sufficient restrictions on the States in Article I of the Constitution, and that there was no reason to add the Bill of Rights to that list of activities prohibited to the States. In other words, Marshall relied on structure and purpose rather than the fairly obvious plain meaning approach to reach a clearly right result.

Barron assumed especial importance during the Congressional discussion on the Civil War Amendments and the ensuing debates over whether those Amendments (the Thirteenth, Fourteenth, and Fifteenth) were intended to apply the provisions of the Bill of Rights to the States.

90. 25 U.S. (12 Wheat.) 419 (1827). *Brown* was argued for the State by Roger Taney, who had just been appointed Attorney General for the State, and Reverdy Johnson. This case was, until quite recently, a staple of the basic course in constitutional law. In the last twenty years or so, it has been dropped completely from the casebooks. I guess there is too much demand in those books today for the many obscure decisions involving Christmas displays on state property.

91. 32 U.S. (7 Pet.) 243 (1833).

92. Professor Garrett Power informs me that the wharf in question lay at the foot of Lancaster Street in Fell’s Point.

93. Roger Taney argued the case for the State of Maryland.

D. Ex parte Merryman⁹⁴

At the beginning of the Civil War, President Lincoln suspended the writ of habeas corpus. At that time, Baltimore was occupied by federal troops, and Fort McHenry, perhaps the most historic location in the State, became the prison for all sorts of bad eggs—at least from a Union point of view.⁹⁵ One of them was John Merryman, a lieutenant in the Rebel army imprisoned for treason and rebellion. Merryman then sued out a writ of habeas corpus, issued by Chief Justice Taney, the Circuit Justice sitting on Circuit in Baltimore. Taney issued the writ after the commander at Fort McHenry, citing Lincoln's suspension of the writ, refused to produce the body of Merryman so that the legality of his detention could be examined.

Taney, who certainly was brave enough, sent his opinion on the matter directly to the President, "in order that he might perform his constitutional duty, to enforce the laws, by securing obedience to the process of the United States."⁹⁶ Taney ended his opinion on a note of despair: "I have exercised all the power which the constitution and laws [of the United States] confer upon me, but that power has been resisted by a force too strong for me to overcome."⁹⁷

Taney's lament was well-placed. The dubious Presidential practice begun by Lincoln of suspending the Great Writ, as it is often called, has never been ruled upon by the Supreme Court, and, of course, it has become a significant issue in today's legal and political world.

E. Ex parte Siebold⁹⁸

Following the Congressional election of 1878, five Baltimore City election judges were convicted under federal law "for the offense commonly known as 'stuffing the ballot-box.'"⁹⁹ That offense, a recurrent problem in both local and federal elections, had been made illegal by Congress when it enacted the Enforcement Act of 1870.¹⁰⁰

94. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487). The material in this paragraph is primarily drawn from WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE* 32–39 (1998).

95. The military authorities were wary of Baltimore because it sympathized with the Rebels and several federal soldiers had earlier been killed in a riot in the City; in addition, the leaders of the State government were largely Confederate in their beliefs. A number of prominent political and secessionist-leaning types ended up in Fort McHenry as a result.

96. *Merryman*, 17 F. Cas. at 147.

97. *Id.* at 153.

98. 100 U.S. 371 (1880).

99. *Id.* at 379.

100. Enforcement Act of 1870, ch. 114, 16 Stat. 140, 140–46 (1870).

The Court, in an important opinion written by Justice Bradley, upheld the convictions.

The focal point of the opinion was the power of the federal government to regulate a “local” activity—voting.¹⁰¹ The Court held that the defendants had violated a duty owed to the national government which, therefore, could hold them accountable. *Siebold*'s recognition of an expansive federal power to regulate federal elections proved to be of great use during the Civil Rights movement. As was also true in *McCulloch*, corruption in Baltimore led to a broad expansion of federal power.

F. Federal Baseball¹⁰²

In the nineteenth century, there was only one “major” league of baseball, the National League. In 1901, however, that monopoly was broken when the American League was born, and within two years the two leagues had made peace and established a monopoly over the upper levels of the game. The Federal League of Baseball was begun in 1914 to challenge this cozy situation. The Federal League had eight teams, one of which was the Baltimore Terrapins. When peace was finally made between the upstart Federal League and major league baseball after the 1915 season, all of the teams from the Federal League except the one from Baltimore were given settlement money by the major leagues. The Terrapins then sued the major leagues for antitrust violations, and they recovered \$80,000 in (trebled) damages from the jury—a very large figure at the time.

101. *Siebold*, 100 U.S. at 386. The opinion also discussed the power of the Court to engage in appellate review of lower court habeas corpus decisions, a power which, in the post-Civil War era, needed some re-affirmation. *Id.* at 374–77.

102. *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). The senior William Marbury, discussed *supra* note 53, was one of the Terrapins' lawyers. The history of the Baltimore Terrapins and the Federal League is recounted in JAMES H. BREADY, *BASEBALL IN BALTIMORE* 125–29 (1998). Additional facts can be found in the lower court decision, *National League of Professional Baseball v. Federal Baseball*, 269 Fed. 681, 682–83 (D.C. Cir. 1921). I do not know why the Baltimore Terrapins brought their action in the District of Columbia, although I suspect it involved personal jurisdiction, something more difficult to achieve in those wonderful days before the advent of the long-arm statute.

Professional baseball has had a checkered history in Baltimore. The iconic “old Orioles” were champions of the National League in 1894–1897; the formation of the American League, however, led to the flight of that team. An American League team was then established in Baltimore, but it too left town in 1902 to become the New York Highlanders, a team later to be called the Yankees. Major league baseball did not return to Baltimore until 1954. See generally BREADY, *supra* at 219–24 (describing the rise of the American League Baltimore Orioles).

The Supreme Court reversed, however. In a unanimous opinion written by Justice Holmes, the Court held that baseball did not constitute interstate commerce, a jurisdictional prerequisite to application of the Sherman Act; “personal effort, not related to production,” he wrote, “is not a subject of commerce.”¹⁰³ Holmes’s opinion, like many of his later efforts, is unsatisfactory. There is virtually no analysis, and he makes no effort to fit the case within the elaborate fabric of the Court’s commerce clause jurisprudence. Perhaps the opinion only makes sense as a reflection of Holmes’s love for baseball, something he had played as a young man in the Civil War.

G. Pearson v. Murray¹⁰⁴

In 1935, Donald Murray applied for admission to the University of Maryland School of Law. A graduate of Amherst, Murray “met the standards for admission to the law school in all other respects, but was denied admission on the sole ground of his color.”¹⁰⁵ Murray then sued the law school for admission. This suit was the opening salvo of the long and ultimately victorious battle to integrate the nation’s schools brought by the NAACP and led first by Charles Houston and then by Thurgood Marshall. The strategy of the NAACP, which evolved during the period it was considering the case, was to attack segregated graduate education in moderate border states. To the surprise of many, Murray won, both in the Baltimore City trial court and then in the Court of Appeals of Maryland.¹⁰⁶ These decisions were

103. *Federal Baseball*, 259 U.S. at 209. In a sign of how times have changed, Holmes referred to the “elaborate discussion” of the interstate commerce issue by the court of appeals. *Id.* at 208. That discussion took up less than three pages in the Federal Reporter. Holmes’s opinion itself is not even three pages long, and, despite Holmes’s reputation for pithy excellence, the opinion is completely unacceptable in its reasoning.

104. 182 A. 590 (Md. 1936).

105. *Id.* at 590. Pearson was the President of the University of Maryland at the time of Murray’s application.

106. The trial decision was made by Judge Eugene O’Dunne (1875–1958), a native of Arizona and a 1900 graduate of this Law School. O’Dunne, who was a life-long critic of injustice, later ordered the desegregation of Baltimore’s public golf courses. See REPORT OF THE MD. STATE BAR ASS’N 18–20 (1960). A good description of the strategy by the NAACP and of the trial court proceedings can be found in RICHARD KLUGER, SIMPLE JUSTICE 185–93 (2d ed. 2004). Kluger notes that both Houston and Marshall were not surprised by the victory.

The opinion in the court of appeals was written by Chief Judge Carroll Bond (1873–1943). Bond graduated from Harvard University and then from this School in 1896, and he then served in the Spanish-American War. He was Chief Judge from 1924 to his death. He also wrote a fine history of the Court of Appeals of Maryland. Obituaries can be found at 7 MD. L. REV. 138 (1943), and N.Y. TIMES, Jan. 20, 1943, at 20. Bond’s middle name was Taney, but I can find no connection between him and the Chief Justice.

the first judicially ordered racial desegregation of public education in this country.¹⁰⁷

The court's reasoning in *Pearson* was straight-forward. It first observed that the Fourteenth Amendment's guarantees can be satisfied by separate but equal treatment of all classes. It then inquired into whether that was true in the case before it. That led to a two-part inquiry: Had the State established a law school for blacks that compared adequately with the existing white school; and, second, was there an adequate private law school alternative? The first question was quickly dispensed with; although the Maryland Legislature had passed legislation permitting a state law school for blacks, nothing had been done to achieve that end and, most important, no money had been appropriated. The state had created fifty scholarships by which black students could attend law schools elsewhere, but after comparing the total costs of attending the nearest private law school, Howard, the court concluded that attendance there was not a feasible financial alternative.

More interesting was the choice of remedy; the court rejected the option of ordering the creation of a separate school for blacks: "Compliance with the Constitution cannot be deferred at the will of the state. Whatever system it adopts for legal education now must further equality of treatment now."¹⁰⁸ The opinion makes clear that the state had done nothing towards creating such a school, and the likelihood of it doing so seemed remote. The only feasible option for Murray, therefore, was to order that he be admitted to this School immediately. By doing so, the court avoided the delays and excuses that were to plague later desegregation litigation.

One of the interesting features about *Pearson* is the tenor of the opinion. Although the court of appeals certainly knew that it was issuing a landmark opinion, no sense of history, of dramatic change, comes through. Instead, it reads as a fairly easy application of well-settled law. And although that was true on the surface, underneath the world had begun to change.¹⁰⁹ *Pearson* began that change.

Murray's lawyers in both courts were Thurgood Marshall and Charles Houston, the Dean of the Howard Law School, Marshall's mentor, and a driving force behind the desegregation movement. Marshall, of course, had been unable to go to law school at Maryland because it was segregated.

107. *But see* Piper v. Big Pine Sch. Dist., 226 P. 926, 928-29 (Cal. 1924) (ordering desegregation of public schools on behalf of Native Americans who had no schools to attend).

108. *Pearson*, 182 A. at 594.

109. Donald Murray began law school with the next entering class, and found no ill will among his new classmates; indeed, he found many supporters. KLUGER, *supra* note 106, at 193.

H. *Bell v. Maryland*¹¹⁰

Shortly after Rosa Parks and Martin Luther King jump-started the civil rights movement, a raft of sit-ins by college and high school students protesting segregated practices sprang up throughout the South. The movement quickly hit highly segregated Maryland. Sit-ins raised many legal issues; prominent among them was the question of whether police enforcement of private discrimination (e.g., by a restaurant seeking to enforce its own segregationist code) constituted “state action” under the Constitution.

That issue was squarely presented to the Supreme Court in *Bell*. Robert Bell¹¹¹ was one of a dozen black teenagers arrested at a restaurant in downtown Baltimore after they refused to leave the restaurant when requested to do so by a waitress. Their conviction for trespass eventually made it to the Supreme Court; that august body ducked the issue and remanded for further proceedings on decidedly spurious grounds. In other words, the Supreme Court did not want the convictions to stand, but it was unwilling to reverse them itself. Eventually, the Court of Appeals of Maryland figured out how to reverse the convictions.¹¹² Although statutory law has made the state action question largely irrelevant, we still do not know whether public enforcement of private discrimination, especially as practiced by a common carrier, constitutes an unconstitutional state action.

I. *Freedman v. Maryland*¹¹³

Following World War II, Maryland required that movies be approved by a Board of Censors before they could be shown to the public. The tenure of the Board coincided with interest in the Supreme Court, beginning in the 1950s, in questions involving obscenity and prior restraint in the form of censorship. The Court ultimately permitted obscene speech to be regulated, but insisted on the strictest procedural safeguards before the regulation could be imposed. The vehicle it chose to impose these procedures was *Freedman v. Maryland*.

110. 378 U.S. 226 (1964). See generally William L. Reynolds, *Foreword: The Legal History of the Great Sit-in Case of Bell v. Maryland*, 61 MD. L. REV. 761, 762 (2002) (“This Article explores the legal arguments and litigation strategies of that case [*Bell v. Maryland*], both in the Supreme Court and in the Court of Appeals of Maryland.”).

111. The case bears his name because Bell was the first of the defendants alphabetically. He is now the Chief Judge of the Court of Appeals of Maryland. At one time he sat on that court with Judges Robert Murphy and Larry Rodowsky, both of whom had worked in the office of the Attorney General of Maryland to uphold Bell’s conviction on appeal.

112. See Reynolds, *supra* note 110, at 789–91 (discussing the court’s reasoning).

113. 380 U.S. 51 (1965).

Freedman involved a decision by the owner of a movie theater not to seek approval of a film from the Maryland Board of Censors before showing the movie.¹¹⁴ His failure to seek prior review was a crime under Maryland law, and he was convicted for that failure. His case made it to the Supreme Court which held that any attempt to censor speech must follow specific rules to inhibit protected speech as little as possible. In particular, the Court found that the speaker has standing to challenge the censorship even if its conduct could be prohibited under a properly drawn law; any restraint must be for a specific, limited period of time; there must be immediate judicial review; the speaker must have the right to immediate judicial process, including an appeal; and the censor must go to court to suppress the speech, and it bears a heavy burden of proof when it does so.

The case may have been about pornography when it started, but it ended up setting rigorous standards that must be met by future attempts to regulate speech. *Freedman's* influence is felt whenever a state tries to censor speech.

VI. THE LAWYERS

Until the railroad made travel to Washington, D.C. easy, the Supreme Court bar was dominated by lawyers from the District of Columbia, Maryland, and Virginia.¹¹⁵ That domination was natural and was reinforced by the sophistication of the lawyers who lived between Baltimore and Richmond. Names like Wirt, Pinkney, Robert Goodloe Harper, and Philip Barton Key helped comprise the Maryland members of this group. Other lawyers who remained in the Capitol area for other reasons also enjoyed a decided advantage in competing for Supreme Court business. Daniel Webster is the most famous, of course. After the Civil War and the introduction of rail travel, the prevalence of Maryland lawyers in Supreme Court practice declined.

114. The movie in question was shown at the Rex Theater in Baltimore (see Charles Cohen, *Porn Free*, CITY PAPER, Oct. 11, 2000, <http://www.citypaper.com/news/story.asp?id=2463>), famous in local legal lore as the start of a romance that led to the decision in *Feige v. Boehm*, 123 A.2d 316, 323 (Md. 1956) (holding that a man could be held to a child maintenance contract even though it was later established by blood type that he could not be the baby's father).

The Board of Censors was abolished in 1981. Its chair for many years was Mary Avara, a grandmotherly figure who talked quite openly on television about the filth she saw and tried to keep the people of Maryland from viewing. The contrast between her demure appearance and her job was delightful.

115. That practice has not changed much over the past century and a half. There is a difference, however; although today's Supreme Court advocates may live in Fairfax County, Virginia, or Montgomery County, Maryland, they generally do not practice law in those jurisdictions, unlike their predecessors in the early nineteenth century.

Nevertheless, some maintained a very high level of proficiency; Reverdy Johnson is the best known of the Maryland lawyers in this group.

A. *Margaret Brent, 1601–1671*

Brent is generally considered the first female lawyer in America.¹¹⁶ Her well-documented abilities in a frontier society such as seventeenth century Maryland certainly were extraordinary. Brent, of course, had nothing to do with the Constitution of the United States, but I include her because her accomplishments in a hard-scrabble society stand as a permanent rebuke to Justice Bradley who, in his concurring opinion in *Bradwell v. Illinois*,¹¹⁷ wrote that under “the law of the Creator,” it was “[t]he paramount destiny and mission of woman . . . to fulfil the noble and benign offices of wife and mother.”¹¹⁸ If Justice Bradley had known of Margaret Brent, perhaps he would have found those words more difficult to write.

B. *Philip Barton Key, 1757–1815*

Key, who was a native of Cecil County, Maryland, had served in the British Army during the Revolution.¹¹⁹ Key is most famous, of course, for being the uncle of the famed songwriter, but he was active in Maryland politics and served in Congress. Key also was a member of the Fourth United States Circuit Court, and thus was one of the famous “Midnight Judges,” a group that also included William Marbury, who became quite famous himself.¹²⁰

C. *William Pinkney, 1764–1822*

Pinkney began his life as a successful politician, serving first in the Maryland Legislature and then in Congress.¹²¹ Later, he turned to the executive branch, where he was even more successful. He was a commissioner under the Jay Treaty to Britain. He was then Minister

116. See CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 52 (1911).

117. 83 U.S. (16 Wall.) 130 (1873).

118. *Id.* at 141 (Bradley, J., concurring).

119. This section draws on Key family papers, letters, and books with the Library of Congress, Maryland Historical Society, and New York Historical Society. See Biographical Directory of the United States Congress: 1774–Present, Philip Barton Key, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=K000159> (last visited Aug. 10, 2007).

120. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Marbury was a Marylander who achieved great, albeit reflective constitutional glory. See generally David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349 (1996).

121. See generally 2 GILBERT J. CLARK, LIFE SKETCHES OF EMINENT LAWYERS 204–18 (1895).

to Great Britain, Attorney General of the United States under President Madison (as Attorney General he drafted the Declaration of War against Great Britain in 1812), and fought in the Maryland militia during the War of 1812, receiving a wound at the Battle of Bladensburg. His life ended while he was serving as a United States Senator.

Pinkney argued his first case in the Supreme Court in 1806. He was very successful. The great historian of the Supreme Court, Charles Warren, reports that Pinkney argued half (23 of 46) of the cases listed in the eighth volume of Cranch's Reports.¹²² More important, he was one of only three lawyers to receive the title of leader of the Supreme Court bar.¹²³ Warren notes that Pinkney had his greatest impact in international cases.¹²⁴

Pinkney was much admired. Chief Justice Marshall wrote that "Mr. Pinkney was the greatest man I have ever seen in a court of justice."¹²⁵ Chief Justice Taney stated that "I have heard almost all the great advocates of the United States, . . . but I have never seen one equal to him."¹²⁶ Justice Story should have the last word. After Pinkney's three-day argument in *McCulloch*, Story wrote:

I never, in my whole life, heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments, were most brilliant and sparkling. . . . All the cobwebs of sophistry and metaphysics . . . he brushed away with a mighty besom.¹²⁷

All in all, a truly remarkable man and a great lawyer.

D. *Robert Goodloe Harper, 1765–1825*

Harper had an interesting career. Born in Virginia, he lived the first part of his adult life in South Carolina, where he was elected to Congress three times.¹²⁸ After he lost his Congressional seat in 1801, he moved to Baltimore and became the son-in-law of Charles Carroll, perhaps the wealthiest man in America and a signer of the Declaration of Independence. In Maryland, he served as a Major General in

122. WARREN, *supra* note 116, at 259–60.

123. STEINER, *supra* note 18, at 270. Reverdy Johnson was the second holder of this title from Maryland. In between was Daniel Webster.

124. 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 27 (1922).

125. WARREN, *supra* note 116, at 260.

126. *Id.*

127. *Id.* at 380.

128. See generally JOSEPH W. COX, *CHAMPION OF SOUTHERN FEDERALISM: ROBERT GOODLOE HARPER OF SOUTH CAROLINA* (1972).

the militia in the War of 1812 and became a United States Senator from Maryland. He also ran as a (losing) candidate for Vice President on the Federalist ticket in 1816. At the end, he was the leader of the old-line, “blue-light” Federalists.

After moving to Baltimore, Harper became a leading member of the Supreme Court bar. His name appears in more Supreme Court cases than any other name in the period between 1800 and 1815, many of them cases of the first importance.¹²⁹ Harper’s specialty was commercial and mercantile law. Perhaps his most important legal activity, however, occurred while he was in Congress and engaged in organizing the Mississippi territory; he secured the prohibition of the foreign slave trade in 1798, ten years before the Constitution permitted its abolition in the states.¹³⁰

E. Luther Martin, 1748–1826

Martin has appeared earlier in this Essay for his role at the Constitutional Convention and for his defense of Samuel Chase.¹³¹ Born in New Jersey and a graduate of Princeton, Martin moved to Baltimore as a young man and soon became the leading lawyer in the State. After service in the Philadelphia Convention, he became Attorney General of Maryland in 1778, a position he held until 1805, and then again from 1818–1822. As a lawyer he was known for his fondness for the bottle and his prolixity, but he must have been very good. The best description of Martin’s style comes from Henry Adams:

The bar of Maryland felt a curious mixture of pride and shame in owning that his genius and vices were equally remarkable. Rough and coarse in manner and expression, verbose, often ungrammatical, commonly more or less drunk, passionate, vituperative, gross, he still had a mastery of legal principles and a memory that over-balanced his faults, an audacity and humor that conquered ill-will.¹³²

He participated in many of the great decisions of the day, including, among the cases discussed earlier in this Essay, the impeachment of Samuel Chase and *McCulloch v. Maryland*. In the interest of brevity, I shall discuss only one more of his cases here, the treason trial of Aaron Burr.

129. WARREN, *supra* note 116, at 260–61.

130. BERNARD C. STEINER, *THE LIFE OF ROGER BROOKE TANEY* 397 (1922).

131. *See supra* notes 9–17, 25 and accompanying text.

132. ADAMS, *supra* note 25, at 458.

Aaron Burr was the notorious bad boy of the younger Revolutionary generation. In the long-disputed election of 1800, Burr became Jefferson's Vice President (to the satisfaction of neither), and in 1804 he managed to kill Alexander Hamilton, financial genius and unpleasant man, in a duel. Burr left office in 1805 and quickly became entangled in the loose talk and wild schemes concerning the future of the southwestern United States and the Spanish Empire. Despite the total absence of any hard evidence that Burr had been involved in treasonous activity, he was indicted for that crime and brought to trial in Richmond in 1807. The trial judge was John Marshall, sitting on Circuit, and Burr's lawyers were some of the best of the day, including, of course, Luther Martin.

The trial took place only two years after the barely failed attempt by the Republicans to impeach Samuel Chase, and that fact must have been much on Marshall's mind during the proceedings. Moreover, it was very clear that Jefferson eagerly sought the conviction of Burr. And Marshall's integrity was to be tried early for Martin demanded that the President produce certain letters in his possession that the defense thought were relevant. Jefferson refused,¹³³ but Marshall held to the law and ordered the letters to be turned over.¹³⁴ This ruling, of course, anticipated the famous *Watergate Tapes*¹³⁵ holding and established the basic constitutional doctrine that no man is "above the law."¹³⁶

Jefferson, outraged, tried to strike back. His target, however, was not Marshall but Martin; he suggested that Martin be indicted also, although fortunately nothing came of that idea. Memorably, however, Jefferson called Martin an "unprincipled and impudent federal bulldog,"¹³⁷ and it is by the tag "federal bulldog" that many know Martin today.¹³⁸

133. Martin, in his usual understated way, went after Jefferson at argument: "He [Jefferson] has let slip the dogs of war, the hellhounds of persecution, to hunt down my friend." Reynolds, *supra* note 9, at 311 n.121 (quoting 1 D. ROBERTSON, REPORTS OF THE TRIALS OF COLONEL AARON BURR 128 (Da Capo Press 1969)).

134. Marshall may have been helped in finding strength by Martin's reminder that the heavily political trial "require[s] fortitude in judges to perform their duty." *Id.* at 312-13 (quoting 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 502-03 (1919)).

135. *United States v. Nixon*, 418 U.S. 683 (1974).

136. *Id.* at 715.

137. Reynolds, *supra* note 9, at 312.

138. It will be recalled that Martin, as a delegate and opponent of ratification, had been an *anti-Federalist*. Now, less than two decades later, Jefferson is attacking him as the "federalist bulldog." *Id.* at 293. (Chase's politics made a similar journey.) What happened? One possibility is that Martin had become wealthy and that the Federalists were the party of the well-to-do. I think it more likely that Martin, the consummate lawyer, was merely reacting to the Republican attacks on his friends.

As for the trial, Marshall held the prosecution to a strict definition of the constitutional definition of treason, and the jury had to acquit. The trial is a great moment in American legal history. Here we have the President trying to force a conviction on very weak grounds and courageous resistance by a judge and the greatest lawyer of his day. Their success meant that these efforts would not be part of the American scene.

F. Reverdy Johnson, 1796–1876

Johnson early achieved professional success, often associated as a young lawyer with Roger Taney and even Luther Martin.¹³⁹ He was the co-editor of the seven volumes of the case reports from the Court of Appeals of Maryland known as “Harris and Johnson.” In argument, he relied on pure reason; citation and literary allusions were not known to him.¹⁴⁰ Johnson became a United States Senator in 1845, and resigned to serve briefly as Attorney General from 1849 until 1850. He then returned to an active practice. In 1863, the General Assembly of Maryland returned him to the United States Senate, where he served until 1868 at which point he became Ambassador to Great Britain.¹⁴¹

Johnson’s legal career was rich and diverse—and always successful. He was once associated with Abraham Lincoln in the McCormick reaper litigation (with Edwin Stanton as opposing counsel). He argued many important cases in the Supreme Court. Perhaps his most famous today is *Ex parte Garland*,¹⁴² involving the pardon power. Suffice it to say that he was the third and last person to earn the sobriquet, “leader of the American bar.”¹⁴³ But Johnson had lives other than his legal one. He was an accomplished politician and a diplomat. And he must have been a very good man. His biographer quotes from one of Johnson’s eulogists:

Reverdy Johnson was so consistently a gentleman, belonged so entirely to the statesmen of the better days of the Republic, that, when he finally retired from the Senate, he did so with respect and the confidence of both parties. Few men

139. See generally STEINER, *supra* note 18 (chronicling the life of Reverdy Johnson).

140. *Id.* at 17.

141. One of the fascinating tidbits I have learned in researching this Essay is how many of the lawyers from before the Civil War mentioned in these pages also had diplomatic careers. That says a lot about their quality.

142. 71 U.S. (4 Wall.) 333 (1866).

143. See WARREN, *supra* note 116, at 410.

have lived a life of such comparatively unbroken happiness, of such wholly unbroken integrity.¹⁴⁴

G. *Thurgood Marshall, 1908–1993*

Although Marshall served on the Supreme Court for twenty-four years, his most significant impact on his country was as an advocate. Born and raised in Baltimore, Marshall attended Lincoln University outside of Philadelphia.¹⁴⁵ After college, he learned that he could not attend the law school of the University of Maryland due to his race. He attended Howard Law School, instead. That proved to be very fortunate, for at Howard, he fell under the sway of Dean Charles Houston and joined the great desegregation effort, becoming Director of the NAACP Legal Defense and Education Fund. Marshall became the driving force behind this effort. His energy, skill, and humor led to great success. Marshall did not confine his work to appellate courts or offices in New York and Washington, but also traveled throughout the Deep South, still deeply segregated and too often violent. He achieved great success arguing in the Supreme Court, winning a number of landmark decisions.¹⁴⁶ Marshall's crowning glory as a lawyer was his argument and victory in *Brown v. Board of Education*.¹⁴⁷

In 1961, President Kennedy appointed Marshall to the Court of Appeals for the Second Circuit. He became Solicitor General in 1965. In 1967, President Johnson nominated him to be the first black Justice. Marshall retired in 1991 and died on January 24, 1993.

Marshall certainly was the most influential lawyer of the twentieth century. His courage, leadership, acumen, and moral force played a major role in bringing about the Civil Rights Revolution, a revolution all the more praiseworthy because it was a peaceful revolution. Maryland can be very proud that he was a native son.

CONCLUSION

Maryland and its attorneys had much influence on the federal Constitution in the first century of its existence. Since then, Mary-

144. STEINER, *supra* note 18, at 270.

145. He had interesting classmates at Lincoln, including Cab Calloway, the jazz great; Langston Hughes, the poet; and Kwame Nkrumah, the future president of Ghana.

146. For three examples of his victories, see *Smith v. Allwright*, 321 U.S. 649 (1944) (invalidating the all-white Texas primary); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (invalidating racially restrictive covenants); *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding segregated education unconstitutional).

147. 347 U.S. 483 (1954).

land's influence has waned, due primarily to its increasingly small fit within the rapidly growing Republic, but perhaps also due to a lack of political leadership in the State. Nonetheless, our constitutional history is rich; and while some of it may be of dubious heritage, there is also much that was good and even great.