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Book Review by David F. Forte

Securing the Constitution and Union

John Marshall and the Cases that United the States of America: Beveridge's Abridged Life of John Marshall, edited by Ronald D. Rotunda.
Twelve Tables Press, 642 pages, $38.95

Ronald d. rotunda, the prodigious legal authority who died last year at the age of 73, wrote the widely used course book *American Constitutional Law*, co-authored the six-volume *Treatise on Constitutional Law*, and wrote several other books and hundreds of articles over his career. A scholar of the first order, he was a friend to many in his field.

Fittingly, his last book is a tribute to Albert J. Beveridge's *Life of John Marshall*, the seminal analysis of the Great Chief Justice, the first of whose four volumes appeared in 1916. As a U.S. senator from Indiana between 1899 and 1911, Beveridge supported American expansionism, as well as national legislation on child labor and food inspection. A progressive Republican, he broke with the GOP in 1912 to support Theodore Roosevelt, the Progressive Party's presidential nominee. He attempted to re-enter electoral politics after Roosevelt's defeat, but never again held office. Instead he turned to history. But his progressive nationalism remained his guide, and it fueled his study of Marshall.

Beveridge's Pulitzer Prize-winning biography marked his finest and most lasting contribution to American public life. Rotunda's parting gift is to re-present Beveridge's classic work to us in a finely crafted abridgement and a beautiful specimen of the bookmaker's art, graced with a pleasant, elegant typescript handsomely laid out on substantial stock with ample margins for notes. It invites the eyes and the hands. Rotunda enhances Beveridge's text with informative introductions and explanatory footnotes, but leaves the dramatic rhythms and flow of Beveridge's style entirely intact.

In his treatment of marshall, beveridge replicates his own roiling political battles in which he pitted his progressive nationalism against a stubborn states' rights parochialism. He fashions Marshall's struggle into a dramatic narrative, where the stakes were of the highest order. With the pen as his sole weapon and against the onslaught of President Thomas Jefferson, Marshall placed the judiciary in an unrivaled position of authority, which Beveridge asserts saved the republic.

Without Marshall, Beveridge argues, the judiciary would have been a withered branch, unable to constrain either the executive or the Congress. John Jay had refused reappointment to be Chief Justice because he "had no desire to preside, yet again, over a Court lacking 'essential' attributes of 'Energy, weight, and Dignity.'" Without Marshall, the Jeffersonian notion of the Constitution as a compact of states would have taken root, leaving the Union without any principled basis to resist secession and disintegration.

Beveridge shapes his narrative as an epic contest between Marshall and Jefferson, in which his hero snatches an unexpected victory. With Jefferson as the foil, even Aaron Burr receives sympathetic treatment. When Burr and Jefferson received an equal number of electoral votes in the election of 1800, the decision of who would be president was thrown to the House of Representatives. There is a touch of real regret for Beveridge that Burr wasn't chosen over Jefferson. Beveridge claims that had Marshall, who was then John Adams's secretary of state, "openly worked for Burr, or even insisted upon a permanent deadlock," the Federalists would have achieved their main purpose in denying Jefferson the presidency, and Marshall would have stayed on as Burr's secretary of state. Beveridge also speculates that if there had been a deadlock, Marshall might have been chosen by the House as president or acting president, a possibility Jefferson himself nervously contemplated. But in the end, "[t]he proof is over-

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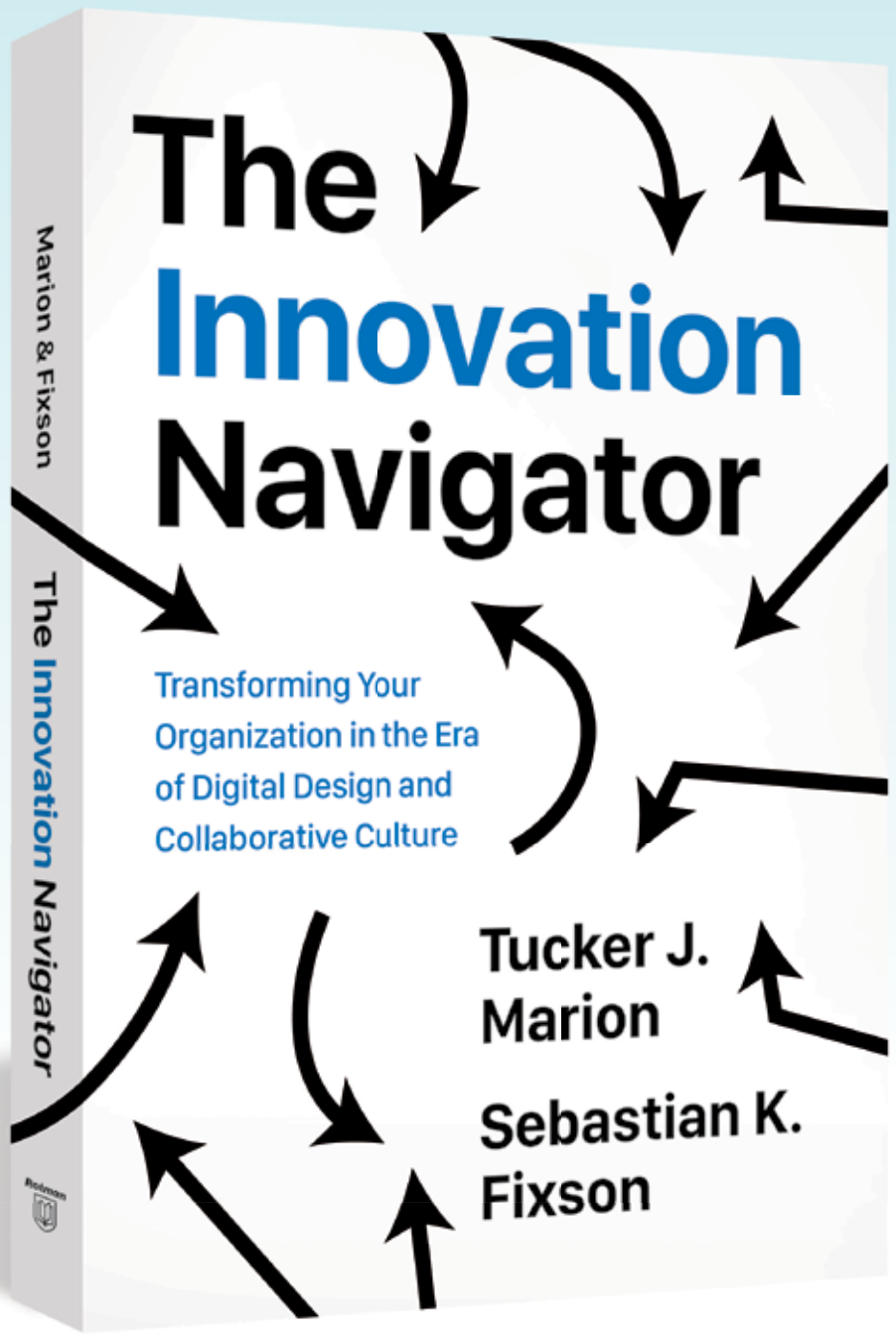

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whelming and decisive," writes Beveridge, that Burr's adamant refusal to co-operate with the Federalists and Jefferson's promises to Representative James Bayard and others that he would not turn out Federalist office holders gained the Virginian the presidency. In fact, although Beveridge doesn't say so, Bayard's forcing the Federalists in the House of Representatives to concede the election to Jefferson almost certainly averted a civil war.

And so, the two Olympian protagonists strode upon the pitch, each fated to be there by an odd concatenation of circumstances. Marshall became Chief Justice on the surprise resignation of Chief Justice Oliver Ellsworth in December 1800, and after John Jay had declined the post; Jefferson became president by the politically deft skills of a man against whom Jefferson would later turn the full fury of his wrath.

The centerpiece of the contest between Marshall and Jefferson was, of course, *Marbury v. Madison*, and Beveridge constructs a dramatic narrative to highlight Marshall's unexpected triumph. He begins with the Federalist Party's self-immolation in the 1800 election, both at the polls and in the House of Representatives. In 1801, the Federalists' loss was seen by few as permanent and the party fully expected that if it could hang on Jefferson charges of incompetency, partisanship, and revolutionary design, it would return to power. Only in hindsight can we see that their cause was doomed. But Beveridge, descending into melodrama, anachronistically sees the Federalist defeat in the light of their eventual withering away:

> So it came about that the party of Washington…went down forever in a welter of passion, tawdry politics, and disgraceful intrigue. All was lost, including honor. But no! All was not lost. The Judiciary remained.

The judiciary had, in fact, been strengthened by the Judiciary Act of 1801, passed in the final weeks of John Adams's administration. The new statute established separate circuit courts staffed by new circuit court judges, abolished circuit riding by the Supreme Court Justices—a relief begged for from the start—and reduced the Supreme Court to five members. The reduction in number was not, as Jeffersonian newspapers charged, to deny the incoming president an appointment when the first of the six remaining Justices resigned. Rather, the original number of six, contrived so there could be two Justices manning each of the original three circuits, was no longer necessary with the cohort of independent circuit court judges. Moreover, having an odd number of Justices prevented tie votes, so that Court rulings would settle disputes and clarify the law.

By establishing a separately staffed system of six circuit courts with 16 judges, the 1801 Act also relieved Supreme Court Justices from the ethically awkward duty of reviewing cases on which they had previously sat as circuit court judges. In addition, the law expanded federal jurisdiction in order to counter the Jeffersonian Republicans' growing commitment to states' rights. As Adams's closest adviser, Marshall had a primary role in recommending the men who were to fill the new judgeships. All were Federalists.

Personally, politically, and ideologically, the Judiciary Act and its cohort of exclusively Federalist circuit court judges enraged Jefferson. He resolved to repeal the law and bring the judiciary—the Federalists' last "stronghold," as he put it—to heel. Beveridge writes that Jefferson was confident of success. He understood how disciplined and loyal his party was in Congress, and how disorganized and ill-led the Federalists were. Although the 1800 election had been very close, the Republicans swept to a decisive victory in the House of Representatives and gained a majority in the Senate. What's more, Jefferson was a skilled political leader and had a highly competent cabinet, which, unlike the one Adams had inherited from Washington, was utterly loyal to their chief. The new president was a real threat to Marshall and the judiciary. "Thus, the Republican programme of demolition was begun," writes Beveridge. "Federalist taxes were, of course, to be abolished; the Federalist mint dismantled; the Federalist army disbanded; the Federalist navy beached." In fact, Secretary of the Treasury Albert Gallatin maintained the Hamiltonian financial structure; John Adams had already kept the army small; and Jefferson reduced the navy but kept its core and used it assertively against Barbary. Meanwhile, according to Beveridge, Marshall demonstrated his "audacity" by establishing "for the first time" the custom of announcing the court's decision as a single opinion—although, as Rotunda points out, it was Ellsworth who had originally attempted that reform. Marshall did, however, initiate the custom of the judicial conference after argument, through which a consensus could be formed.

Jefferson's bitterness towards the judiciary lay in the quite plausible belief that Federalist jurists had vigorously enforced the Sedition Act of 1798 in order to stifle Republican newspapers and keep him from winning the presidency. He pardoned those who had been convicted under the Sedition Act (and had Congress later remit the fines), and replaced federal marshals. Marshals impaneled grand juries, and grand juries brought indictments, including politicized indictments. By that act, whether he realized it or not, Jefferson helped to depoliticize the judiciary, something that his adversary Marshall would also press for as Chief Justice.

In december 1801, when his new Republican Congress met, Jefferson disarmingly suggested, "The judiciary system of the United States, and especially that portion of it recently erected, will of course present itself to the contemplation of Congress." Everybody knew what was coming. For months, Federalists had been penning essays defending the independence of the judiciary. Many thought Jefferson might try to impeach Justices. Beveridge darkly intones, "Thus by progressive stages the Supreme Court would be brought beneath the blade of the executioner and the obnoxious Marshall decapitated or compelled to submit."

In the debate over Republicans' plan to repeal the 1801 Act, the courts' ability to "check" the other departments of government was the central issue, even though the Act had said nothing about such a power. Senator Stevens Mason of Virginia disputed that the courts had that authority and feared that "this independence of the Judiciary" would become "something like supremacy." Senator John Breckinridge denied the right of judicial review altogether: "The Legislature have the exclusive right to interpret the Constitution, in what regards to the law-making power, and the judges are bound to execute the laws they make." James Bayard, now the Federalist leader in the House, threatened civil war if the independence of the judiciary were destroyed. The repeal bill, with every Republican vote behind it, passed in early March 1802. Because the question of judicial review had been central to the debate, the Republicans changed the calendar of the Supreme Court in order to deny it the opportunity throughout 1802 to exercise that putative power upon the Repeal Act itself.

In December 1801, shortly after Jefferson's message to Congress, Charles Lee, John Adams's former attorney general, had brought the case of *Marbury v. Madison*. The suit contested Jefferson's decision, taken immediately after his inauguration, to withhold commissions from federal justices of the peace who had been appointed by Adams.

On his way to describing the centrality of *Marbury v. Madison*, Beveridge makes a number of historical errors. He states that Jefferson had told Secretary of State James Madison not to deliver the Justice of the Peace commissions, when it was Levi Lincoln, Jefferson's attorney general, who was acting as secretary of state at the time. He blames Marshall for having failed to deliver the commissions: "Instead, he had, with his customary negligence of details, left them on his desk." But Marshall had followed normal procedure in leaving it to his chief clerk to deliver the commissions the next day, the day of Jefferson's inaugural. But by then, Marshall would only later learn, it was too late. Beveridge misses entirely the significance of the case being brought barely a week after Jefferson's message signaling the attempt to repeal the 1801 Judiciary Act. Marbury's suit was, in fact, not personal. It was designed to help stymie Jefferson's plan.

Missteps aside, Beveridge brings the tale of Marshall's success in *Marbury v. Madison* to its triumphant conclusion in a way that is now known to every student of constitutional law. He notes the Chief Justice's chagrin in having to enforce the Repeal Act while on circuit in 1802, contrasting that with his catapulting Marbury, a case of "no consequence," into totemic significance. He "praises" Marshall for devising a "pretext" for annulling section 13 of the Judiciary Act of 1789 (it was actually only a few words in that Section that Marshall found wanting). He also asserts (questionably) that Marshall's interpretation of Section 13 ran counter to the understanding of "the whole bench and bar."

Although scholars today can emphasize how much judicial review was expected at the time, how it had been explicitly defended by Hamilton in *The Federalist*, Beveridge persuasively argues that because the Repeal Act had been passed as an attack on the notion of judicial review, without *Marbury v. Madison*

> the power of the Supreme Court to annul acts of Congress probably would not have been insisted upon thereafter.... [H]ad he not then taken this stand, nearly seventy years would have passed without any question arising as to the omnipotence of Congress. After so long a period of judicial acquiescence in Congressional supremacy it seems likely that opposition to it would have been futile.

Beveridge's overpraise of Marshall comes very close to saying that by deliberately distorting the understanding of the Judiciary Act of 1789 in order to assert judicial review, Marshall made the Court the "ultimate arbiter as to what is and what is not law under the Constitution." In this reading, Marshall's opinion was, as Jefferson would claim, actually a usurpation: "Thus, by a coup as bold in design and as daring in execution as that by which the Constitution had been framed, John Marshall set up a landmark in American history so high that all the future could take bearings from it, so enduring that all the shocks the Nation was to endure could not overturn it." In Beveridge's era, "legal realism" was already well established in the law schools and infiltrating the judiciary, and may have influenced him. If, as he indicates, even the institution of judicial review was "made up law," why could not present-day courts enact their preferences with the same confidence and determination?

In the remaining chapters of Rotunda's abridgement, Beveridge continues to drive home his theme of judicial independence at the service of the nationalization of the Constitution. Politically, the impeachment and failed conviction of Justice Samuel Chase in 1805 was the turning point. John Quincy Adams wrote to his father that the articles of impeachment brought against Chase "contained in themselves a virtual impeachment of not only Mr. Chase but all the Judges of the Supreme Court." Senator William Giles, leader of the Republicans in the Senate, determined to use impeachment to punish Marshall and the Court for its effrontery in declaring unconstitutional an act of Congress, prompting Quincy Adams to write that the plan was to "have swept the supreme judicial branch clean at a stroke." In fact, the plan of impeachment had been set even before *Marbury* had been decided. Even so, Jefferson thought the federal impeachment process too dilatory, and desired an amendment that would allow the president to remove a judge from office simply "on the address of the two Houses."

Beveridge reminds us how real the impeachment danger was, and we now know that Jefferson was behind the whole business. In December 1803, when the House impeached District Judge John Pickering, who suffered from alcoholism and mental illness, the president rewarded three of the witnesses against Pickering with federal offices. Inside of an hour after the Senate convicted Pickering, the House passed articles of impeachment against Chase.

In his description of Chase's trial, Beveridge again praises Senate President Aaron Burr, serving out his last weeks as vice president. Despite the coy attempts of Jefferson and the Republicans to cultivate him, Burr, the despised assassin and indicted murderer of Hamilton, "conducted [the trial] with the dignity and impartiality of an angel, but with the rigor of a devil," a Washington newspaper reported. Beveridge describes the trial with the page-turning intensity of a modern suspense novel. When it came time for the vote, for the first time the Republican ranks in the Senate broke and Chase was acquitted. John Marshall, at last, was secure in his post.

Beveridge moves on to complete his view of Marshall's nationalization project, pausing in a chapter on Marshall and his colleague Associate Justice Joseph Story to describe in delightful detail Marshall's personality and political skills. Jefferson was succeeded by presidents who had opposed Marshall at one time or another—Madison, James Monroe, and Andrew Jackson—but the Chief Justice stayed on the Court for nearly 35 years. His persuasive personality and his immense power of reason turned virtually all new appointments to the bench into allies. He moved on to stabilize the nation's financial structure by strengthening the Contract Clause, enhance federal power by an expansive interpretation of the Necessary and Proper Clause, and free up commerce by disallowing state monopolies of transportation.

Through it all, Beveridge insists, Marshall kept his sights on preserving the Union. In Beveridge's eyes, he was the first progressive nationalist. Time and again, Marshall disputed the wrongheaded notion—launched by Jefferson in the Kentucky Resolution of 1798—that the Constitution was a compact of states. Even in the age of Jackson, Marshall upheld the rights of the Cherokee Indians against Georgia's predatory claims, while affirming national control over Indian affairs. Having feared that the Union was on the verge of dismemberment, Marshall rejoiced, however, at Andrew Jackson's strong opposition to South Carolina's Ordinance of Nullification.

At his death, John Marshall remained gloomy over the prospects of the Union. He would not have known, of course, how the Supreme Court would be turned by his successor, Roger Taney, into an instrument for its dissolution. Only a man even greater in wisdom, vision, commitment, and political astuteness than Marshall could have saved the Union then.

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