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How Not to Imitate John Marshall

Lewis H. LaRue
Washington and Lee University School of Law, laruel@mac.com

How Not to Imitate John Marshall

Lewis Henry LaRue*

My paper is supposed to be a comment on Gordon Wood's paper, but I am uncomfortable describing what will follow as a commentary. As all academics know, the ritual of commentary all too often is unattractive. The commentator usually begins with false flattery, saying that he has "learned much from the illuminating paper by the distinguished presenter," but then the savagery begins. As Professor Genovese once remarked, these types of academic affairs are Hobbesian by being "nasty and brutish without the saving grace of being short."[1]

However, you will note that my fellow commentators and I will depart from this well-established custom, and we will not perform the prescribed ritual slaughter. Charles Hobson has presented to you the elegant intellectual reasons that would bar a fellow historian such as he from engaging in the customary savagery.[2] My reasons are far more earthy and crude. I have stolen ideas from Professor Wood for many years now, carried these ideas into the classroom, and passed them off on my students as though they were my own. It is too late for me to turn around and to declare that the goods I have stolen are defective, and even if it were not too late, it would be dishonorable.

I. The Topic

Because it makes no sense for me to refute what Professor Wood has presented, I would like instead to write a footnote to his paper, asking a

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* Alumni Professor of Law, Washington and Lee University School of Law. The author presented this speech as a commentary to Gordon Wood's Oliver Wendell Holmes Devise Lecture, delivered on October 9, 1998, at the Washington and Lee University School of Law.

1. RACE AND SLAVERY IN THE WESTERN HEMISPHERE: QUANTITATIVE STUDIES 531 (Stanley L. Engerman & Eugene D. Genovese eds., 1975). Speaking on interdisciplinary conferences, Genovese wrote: "Despite the professed commitment to interdisciplinary work on all sides, these meetings have more often than not resembled a Hobbesian state of nature rather than a community in peaceful coexistence and equilibrium . . . [by being] nasty and brutish without the saving grace of being short . . . ." *Id.*

2. *See generally* Charles F. Hobson, *The Origins of Judicial Review: A Historian's Explanation*, 56 WASH. & LEE L. REV. 811 (1999) (explaining merits of Wood's way of examining history).

question that will honor both Wood and his topic, John Marshall. My question is whether we can or should attempt to imitate Marshall. To put the question more precisely, do we hope that our lawyers and judges will imitate Marshall? With a question such as this, one knows in advance that the answer will include both a yes and a no; only a fool could imagine that an exclusive either/or could be possible. Instead, we must pick and choose, asking what elements of the man we would like to copy and what we must merely admire without being able to reproduce it in our own lives.

Saying both yes and no by drawing distinctions between what we might admire versus what we might imitate can be tricky. When we lawyers must make distinctions, our habit is to search for precedents, that is, to find examples of someone who has done the same. The closest example of which I know is the witty remark of an author who stated that one of the lessons he learned from his Catholic boyhood was that one should "emulate, not imitate" the saints.[3] At first blush, the rationale behind this maxim might seem to differ wildly from my topic. This maxim arose from the fact that the word "saints" most often appeared in the phrase "saints and martyrs," which, according to some of my friends who were raised Catholic, was a staple phrase of the ritual. Because no one could rationally wish to be a martyr and because the standard phrase suggested that the two categories went together, the phrase led to the conclusion that one should not try to be a saint. The case of Marshall may not parallel that of St. Sebastian and his confreres,[4] but the burden of this paper is that we also should apply this maxim to Marshall by not imitating him. Imitating Marshall of course creates no risk of martyrdom; therefore the question arises why I cite this phrase. I do so because the maxim is also a joke, and like most jokes, it conceals a deeper theological point. The maxim is a witty joke because it draws a distinction between emulating and imitating that our ordinary idiom does not draw. The relevant theology goes beyond the common sense dictates of prudence and rationality, both of which counsel against trying to be a martyr. According to doctrine, one does not avoid seeking the status of martyr merely to save one's skin. If driven into a corner, one must accept one's fate. But to seek out martyrdom is to sin; it is one version of the sin of pride. Furthermore, under this theology, perhaps the same doctrine would apply to the case of seeking to be a saint.[5]

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3. I can no longer remember the source of this maxim.

4. *See* THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1477 (3d ed. 1997) (noting that iconography of St. Sebastian customarily shows him bound to tree with arrows shot into his side).

5. I am sure that the actual content of the relevant theology is far richer and more complex than I have suggested, but this is not the venue to explore theological niceties.

The sin of pride, as traditionally viewed, is one of those sins that is uniquely intellectual. Indeed, one might say that it is a disease of the mind. Therefore, I wish to ask whether it is possible to imagine a purely secular counterpart to the theological doctrines that lie behind the maxim that I cited. When we look at Marshall's life and career, they contain much to admire. But I also suggest that there are parts of Marshall's life and career that we should not try to imitate. If we do try to imitate them, it will be because we suffer from a disease of the mind, albeit a subtle disease and perhaps one that is a secular counterpart to the theological account of the sin of pride.

II. The Thesis

Let us then look at Marshall and ask what we might aspire to emulate and what we should avoid. We would all hope to emulate, I think, the grace of Marshall's character; he was, by all accounts, a man of great charm.[6] But I suspect that "hope" is the right verb because most of us cannot succeed in emulating this side of his character. Perhaps we can emulate his learning[7] if to do so only requires that we be less lazy, but one also could say that most of us lack the necessary mental equipment. And when we have positions of leadership, though our own are mostly small positions compared with the large positions that he held, we might hope to emulate his ability to be a unifying leader.[8] Once again, I suppose that we will fail to carry it off, but surely we can be permitted to hope. As to these three matters – his grace, his learning, his leadership – we can say yes, but we should not be too sanguine about our chances for succeeding.

We should also say yes to Marshall's professional achievements. The necessities of our profession bind us who are lawyers to honor Marshall's judicial opinions. Our peers revere his opinions as fundamental landmarks in the corpus of our jurisprudence, and we take them to be governing precedents. Following precedents is the fundamental form of imitation in the law, and so we imitate Marshall when we cite his opinions. To be sure, it could be a bold claim to say that we know how to follow Marshall's precedents. When we cite him, it could well be that we generally misuse what he wrote. However,

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6. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 17, 142, 160-61, 193, 264, 286-87, 402 (1996) (providing some examples of Marshall's character and appeal).

7. For an apt summary of the current scholarship on Marshall's learning, see CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW xiii-xiv (1996). For another apt illustration of Marshall's learning, see SMITH, *supra* note 6, at 260-62 (giving example of Marshall's ability to clarify debate in Congress).

8. Perhaps the most dramatic episode that testifies to Marshall's abilities to reach across party lines is Patrick Henry's endorsement of Marshall when Marshall ran for Congress. *See* SMITH, *supra* note 6, at 248-49 (recounting Henry's support for Marshall).

I wish to set aside the problem of whether we accurately use Marshall's precedents because I do not wish to digress into the merits of current disputes in constitutional law.[9] For today, it is enough to note that those who disagree about the meaning of Marshall's precedents agree on the more fundamental matter which is that we should follow them.

Yet when we honor and admire these precedents, how far should we go? Should we attempt to emulate his style and his rhetoric? Imagine a judge who said, "I cannot be Marshall, but at least I can try to sound like him." Would we assert that this hypothetical judge had made the right choice? And should a professor who sometimes teaches legal writing, as I do, set up a traveling course, go from circuit to circuit, and offer to teach judges the secrets of Marshall's style? I think not, and this assertion is my thesis: We should not attempt to emulate Marshall's rhetorical style.

III. An Alternative Understanding of Style

Alas, these words "style" and "rhetoric" are too thin, too weak. I suspect that you will judge they do not bear the weight that I put upon them. To most, style is a relatively trivial matter; substance, content, is what matters. I understand this sentiment, and indeed, I agree. Let me affirm my assent in the strongest possible terms: the content of a judicial opinion *is* more important than the style of the statement. I gladly will repeat this assertion in many different ways. The substance of a judicial opinion, the doctrines that a judge propounds, the results of decisions, the impact on people's lives – all of these are more important than the style of the opinion. Results are important because judges must decide cases; making a decision promptly and getting it right is the fundamental priority of the job.[10] And by the way, on these matters of substance, of results, of impact, let us honor Marshall. He was one of the greats. But yet, we need to consider whether the common distinction between style and content is sound.

My concessions of the previous paragraph – that the substance of an opinion is more important than its style – rest on a common assumption that defines style as that which is not content. If one accepts this general premise,

9. Marshall engaged in a pseudonymous newspaper controversy over the implications of his *McCulloch* decision. As Professor Gunther noted in his edition of this debate, Marshall denied in these articles the far-ranging congressional power that modern judges have constructed on the basis of *McCulloch*. *See* Gerald Gunther, *Introduction* to JOHN MARSHALL'S DEFENSE OF *McCULLOCH V. MARYLAND* 1, 18-21 (Gerald Gunther ed., 1969) (stating that Marshall did not believe that Congress had unlimited power to achieve enumerated ends). See generally the debates among the Justices in *United States v. Lopez*, 514 U.S. 549 (1995) (discussing scope of Congress's authority under Commerce Clause).

10. To cite an example from the recent past, I would honor Justice Douglas because his instincts were sound, even though his opinions seem shabby to me.

then the concession seems inevitable. Indeed, one would have to be mad to claim that style is more important than substance, if the general premise were true. But as the reader already may have guessed, I think that this common assumption is too simple, too quick.

One way to challenge the commonplace assumption that style is sharply distinct from content (or substance) is to argue that each affects the other. There may be a conceptual distinction, but there is also a causal connection. Someone who believes that a connection exists between style and substance also would believe that style can generate substance and that different styles can generate different substances. I am sympathetic to the claim that style can generate substance, but I do acknowledge the difficulty of investigating the empirical and historical questions of how our styles work on our minds. It is not easy to prove anything about the relationship between style and substance. How much a person's style of writing and talking shapes that person's way of thinking and how much, in turn, the way of thinking shapes the subsequent thoughts is an enormously difficult set of questions. (Professor Wood, by the way, has struggled with these questions, albeit that he may prefer to phrase the matter differently. Anyone who has read Professor Wood knows that he has studied carefully the rhetoric of the Revolutionary generation, that he has propounded theses about the relationships between its rhetoric and its politics, and that his theses are both brilliant and controversial.[11])

However, in this paper, I will not speculate on causal matters. Were I not ignorant, I would; but I am, so I will not. I do not know whether Marshall's style of writing is causally linked (be it as cause or as effect) to the substance of his decisions. To be sure, I do have some intuitions and hunches about such matters. I believe that the style of one's rhetoric does limit the thoughts that one can think, and consequently, one should not try to emulate another's style, even when one is imitating a first class exemplar such as Marshall. To put the matter as concretely and as bluntly as I possibly can, I have a hunch that anyone who tries to imitate Marshall's style will end up talking like a fool and thinking stupid thoughts. Marshall did not talk like a fool, and he did not think stupid thoughts. However, we cannot be clones of Marshall; if we try to imitate him, the results will be disastrous. Unfortunately, I cannot prove my hunch.

Yet if I cannot prove that style affects substance, why do I bother talking about it? Why might style be important? One cannot begin to answer such questions without trying to clarify the topic. When I talk about style, what am I talking about? When I say that one should not try to copy Marshall's style,

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11. For a concise statement of Professor Wood's approach to such questions, see the preface to one of his most famous books, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at vii-ix (1969).

what do I mean? To quote a learned book that Francis-Nöel Thomas and Mark Turner wrote on the topic of style: "Style is a word everybody uses, but almost no one can explain what it means."[12] Despite the difficulty of definition, it does seem clear enough that every prose utterance, whether written or spoken, has a particular style, and furthermore, this style can be (or so I will argue) important. Not every issue of style is important, but some are.

Consider first the proposition that style is inevitable in that every prose utterance has a particular style. Prose can be artless, but it cannot be styleless. To take a trivial example, consider the typeface of that which you are reading. In the precomputer days, before choosing a typeface became a pull down menu in a computer program, most of us never noticed the typeface of that which we read, although a garish or an unreadable example sometimes disturbed us. Today, a far greater number of people have become moderately sophisticated in the arcane topic of how a typeface can affect a reader's judgment of a text. Of course, no one today would be tempted to imitate the typeface that Marshall's printer used,[13] and furthermore, the importance of a typeface is mostly negative. The garish distracts, and the excellent goes unnoticed. However, the style of a typeface is not intellectually important, and so it is unlike the stylistic matters that I wish to discuss when I talk about Marshall's style.

Perhaps a more vivid example of the inevitability of style is the accent with which one speaks. How many people grow up knowing that they speak with an accent? For the most part, one simply speaks, absorbing the vowel intonation and the phrasal rhythms of the place where one lives. People do not grow up thinking that they speak English with an accent; they think that they are speaking English. But in time, if observant, people gain the ability to pick out region and class from a voice. And someone like myself, who grew up in the Appalachian coalfields of the southernmost county in West Virginia, is sure to learn lessons about the relevance and inevitability of style. I learned early that people judge others by their accents. I learned that before I finish my first sentence, any true New Yorker – one who has that gritty pride so characteristic and admirable of those who live in our first city – will have concluded that I am a dimwit. However, an accent, like a typeface, has a mostly negative importance aside from its sociological importance as a marker of class and region. Accent is not intellectual; the accent that one speaks does not affect the thoughts that one can think.

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12. FRANCIS-NÖEL THOMAS & MARK TURNER, CLEAR AND SIMPLE AS THE TRUTH: WRITING CLASSIC PROSE 9 (1994).

13. In Marshall's day, the letter "s" was printed differently in the middle of a word, and we have a hard time distinguishing the "long-s" from "f." The word "case" looks like "cafe" to our eye, and it confuses us.

One should not make too much of these two examples; they are unimportant intellectually. But the two examples are ideal for illustrating the common assumption about style with which I started – that style is that which is not content.[14] Typeface and accent are neutral to content. Can one generalize from these two examples? The phrase "that which is not content" is negative, so it is useful to ask whether a positive definition exists. When one speaks of a typeface or an accent, one refers to visible or audible features of written or spoken prose. We can generalize from this fact; the commonplace assumption about style is that style is some visible or audible feature of prose. In talking about style, I wish to go beyond such matters, even though many people seem to imagine that to talk about style is to talk about the surface features of prose. The visible surface is, I think, the place to start when one inquires into an author's style, but one should not end there. Yes, one can start any discussion of style with the surface features of the author's prose, and if one does, there seems to be no limit to the number of surface features that one can identify – punctuation, rhythm, metaphors, sentence structure, and so forth. With so many possible surface features to talk about, one can build an elaborate description. Yet even though the surface of the prose is a logical place to start, the starting place need not be the ending place. One need not define style in terms of these surface features. Instead, one can use the surface as evidence of something behind the surface.

Although I wish to go behind the surface, it is worth emphasizing that those who focus on the surface features of prose are neither shallow nor misguided. For example, Judge Posner, in a recent article, spoke in these terms,[15] and Posner is no shallow thinker. Consider the following paragraph:

> This notion of style as the range of options for encoding the paraphrasable content of a writing is useful for my purposes, as is the related notion of style as "good" writing. Once we acknowledge that there are different ways to "write up" an idea or other message, we open up the possibility that there is a better and a worse way. We enter the domain of handbooks of style, which contain all sorts of useful precepts that judges – and their ghostwriters, the law clerks – regularly ignore. Such precepts as: go easy on adjectives, adverbs, italics, and other modifiers, qualifiers, and intensifiers; alternate (irregularly, not metronome style) long and short sentences; don't end a paragraph with a preposition; don't use agentless passives; go easy on parenthetical and other qualifying phrases; try to begin and end sentences with important words, because the first and the last positions in a sentence are the most emphatic; avoid jargon and clichés; punctuate for

14. *See supra* Part III (stating commonly assumed definition of style).

15. *See generally* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995) (defining and critiquing judicial writing styles).

> clarity rather than to conform to grammarians' fusty rules for the placement of commas and other punctuation marks; be clear; go easy on quotations, especially long block quotations; pay some attention to the music of one's sentences; don't bust a gut to avoid ever splitting an infinitive; disregard deservedly obscure and unobserved rules, such as never begin a sentence with "But" or "And."[16]

In this passage, Judge Posner ably summarizes the advice one can read in the standard manuals, and because he is a scrupulous scholar, his footnotes cite the relevant manuals. Judge Posner's view of style is perfectly reasonable, but there is an alternative view of the matter that he does not consider. For his purposes he did not need to, but for mine, the alternative view is important.

If one goes behind the surface, the clues that are on the face of text are evidence of important matters such as how the author regards the reader, what the author is trying to do, and so forth. For example, does the author regard the reader as a fool whom he or she needs to whip into shape or does the author regard the reader as an equal? Does the author imagine that he or she is conversing with the reader or is lecturing to the reader? Is the tone that of a missionary who hectors the heathens or that of a friend who wishes to offer a gentle reminder of that which should not be forgotten?

If I may put the matter somewhat abstractly, one legitimately may regard style as either a "property" or a "relation." A property is a trait that we attribute to an object. When we think of prose style as a property, we take the prose to be the object, and we assign to it some quality that is visible to our observations ("The sentences are short."[17]) or else is a summary of a series of such observations ("The paragraphs are turgid."). Alternatively, a relation is a predicate that attributes a connection as existing between several objects. When we think of style as a relation, we take the relevant objects to be the writer, the reader, and the text, and we infer an invisible relationship as holding among these three. ("The author of this article respects the reader's intelligence."[18]) In short, one can say that style is a term that we can use to describe the terms of the contract between the writer and the reader.

The Thomas and Turner book that I cited above is an intelligent discussion of some of the different relationships that a writer can establish with a reader.[19] Furthermore, the authors illuminate ways in which these differences can characterize different styles. In their book, Thomas and Turner discuss

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16. *Id.* at 1424 (citations omitted).

17. In this example, the object is sentences, and the quality predicated of that object is short.

18. In this example, the three objects are author, article, and reader's intelligence, and the relationship that holds among them is respect.

19. *See supra* note 12 (citing CLEAR AND SIMPLE AS THE TRUTH).

such different styles as the classic, the plain, the reflexive, the practical, the contemplative, the romantic, the prophetic, and the oratorical.[20] They do not define these styles by surface features. Instead, they distinguish among them by the various types of relationships the writer adopts.[21] For example, one of the many different styles that Thomas and Turner discuss is the classic style, which gets its modern prestige from Descartes and Pascal.[22] (George Bernard Shaw and Oscar Wilde, two Irishmen, are perhaps the most distinguished practitioners of this style in English.[23])

Thomas and Turner distinguish between the classic style and the plain style by contrasting the assumptions that each style makes about how difficult it is to have access to the truth.[24] A classic prose stylist such as Descartes or Shaw writes as though his only motive for writing is to present the truth. He assumes that the reader is an intellectual equal and that the occasion is informal, rather like a conversation.[25] A plain prose stylist also might make these assumptions. However, the plain style differs from the classic style in that one who writes in the plain style believes that the truth is the common possession of us all, and consequently, the author makes a rather different value judgment about sophistication and refinement. For the plain style, sophistication and refinement are vices; for the classic, they are virtues.[26] For the adherent of plain style, sophistication is unnecessary and likely to be dangerous; common wisdom comes through most clearly when presented most plainly. But the classic stylist suspects that common wisdom may be only common illusion. One who adheres to the classic style believes that achieving the truth is like avoiding sin – it requires vigilance and hard work.[27] Consequently, although the world of the classic style is a republic of equals, it has an aristocratic cast that is wholly lacking from the plain style.

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20. *See* THOMAS & TURNER, *supra* note 12, at 72-103 (contrasting classic style with other styles).

21. *See id.* at 15, 27-71 (discussing attitudes of classic style and classic stance on elements of style such as truth, presentation, scene, cast, thought, and language).

22. *See id.* at 15, 16, 27-29 (explaining prominence of classic style among French authors and examining Descartes's work as example).

23. *See id.* at 157-58, 159-61, 201 (analyzing writings of Shaw and Wilde as examples of classic style).

24. *See id.* at 76-78 (explaining that plain style is egalitarian and views truth as everyone's possession, in contrast to classic style, which is more elitist and requires individuals to validate common wisdom through experience).

25. For a fuller description, see THOMAS & TURNER, *supra* note 12, at 27-71, in which the authors exhaustively analyze the classic style.

26. *See id.* at 76-78 (contrasting classic and plain styles).

27. *See id.* at 161-63 (quoting Descartes, who asserts that differences among individuals arise from how they apply their common sense and sound minds).

In the preceding paragraph, I have offered an example of the sort of analysis that Thomas and Turner would have one make when thinking about style, but the point of my using their distinction between plain and classic as an example is not to persuade one that the details of their distinctions are sound.[28] Instead, the point is to have both a concrete example of what I mean by stylistic analysis that goes beyond the surface of the text and also to give some indication of why stylistic analysis may be important. Recall how Thomas and Turner distinguish the plain style from the classic style: The styles differ on whether truth is difficult and rare or plain and simple.[29] Choosing between these two positions is obviously a major intellectual decision. One need not choose consciously which stance to take, but failing to choose does not mean escaping a stance. If one fails to choose, one stumbles into a stance, and having stumbled, one is likely to wobble inconsistently. Without a conscious choice, vacillation and confusion are likely, but neutrality is impossible.

To summarize, one's description of an author's style can focus on visible features of the prose, or it can infer what stance the author takes in relationship to certain issues. If these relationships are important, then style is important. For example, the author may be trying to manipulate the reader. (Or perhaps the author hopes to alarm, to persuade, to inform, or to accomplish one of many other possibilities.) Unfortunately, any particular description can be controversial because it may not be obvious whether an author simply is informing or is being an alarmist. Furthermore, these descriptive words are also evaluative words, and moral judgments are controversial, especially in a fractured culture such as ours. Consequently, I wish to reassure the reader that no one should feel any obligation to agree with what follows. Reasonable minds can differ.

IV. Criticism of Marshall's Style

I hope that the above makes clear enough what my thesis is – when Marshall writes, he establishes a relationship with the reader that one ought not try to imitate. If the thesis is clear enough, it is now appropriate to present the argument in favor of it. Let me start by quoting two qualified observers. The first quote comes from an apocryphal story attributed to Randolph of Roanoke. Randolph was a brilliant eccentric who was also one of Marshall's most implacable political opponents. According to the story, after having read a Marshall opinion with which he disagreed, Randolph once remarked: "Wrong,

28. I think they are indeed sound in their judgments, but the point of citing them is rather different.

29. The choice between the two need not be rigid. One can believe that some truths are plain and some are rare.

all wrong; but no man in the United States can tell why or wherein."[30] Randolph put his finger on one remarkable quality of Marshall's prose: it is powerful yet also opaque.[31] By opaque, I mean that his prose resists analysis. I willingly cede to Marshall the right to enjoy the power of opacity, but I do not wish modern judges to claim such privileges.

James Boyd White captured an analogous aspect of Marshall's rhetoric when he observed that Marshall's opinion in *McCulloch v. Maryland*[32] "seems to be less an interpretation of the Constitution than an amendment to it . . . continuous with the original text."[33] But do we want our modern judges and justices to write in a style that is "continuous with the original text" – to claim an authority equal to the text – or would we prefer them to be more modest? Needless to say, I have no authority to decide the matter, but I am entitled to have an opinion and to voice it. If I had my way, our judges would be considerably more modest than they are.

The quotations from Randolph and White illustrate my sense of the problem, but let me go further and offer some generalizations. Let me give three reasons why a modern judge cannot imitate Marshall's style. So as to make the analysis as concrete as possible, let me quote a well-known passage from Marshall's justly famous opinion in *McCulloch v. Maryland*:

> If any one proposition could command the universal assent of mankind, we might expect it would be this – that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the state legislatures, and the officers

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30. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 33 (1976).

31. My experience in teaching Marshall's opinions corroborates Randolph's judgment. For example, from time to time I ask the class whether they find Marshall's prose harder to read than the prose of modern opinions. When I remember to ask, the answer is always yes.

32. 17 U.S. (4 Wheat.) 579 (1819).

33. JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTION AND RECONSTRUCTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY 263 (1984). By the way, I caution the reader that White's overall evaluation of Marshall is far more favorable than mine because White believes that the variety of different types of arguments that Marshall offers us constitutes a mother lode of cultural riches.

> of the executive and judicial departments of the states shall take the oath of fidelity to it.[34]

The passage is classic Marshall. I admire it without reservation, but I would condemn to everlasting perdition[35] any modern judge who attempted to imitate it. Let us start by carefully isolating the "surface" of this passage. The paragraph begins with a flourish of trumpets and drums:

> If any one proposition could command the universal assent of mankind, we might expect it would be this – that the government of the Union, though limited in its powers, is supreme within its sphere of action.[36]

For Marshall to begin a paragraph this way is both similar to and different from the customary practice of judicial prose. It is common for judges to begin a paragraph by stating the conclusion that the paragraph supports. Indeed, those who teach rhetoric and composition often advise their students to start each paragraph with a topic sentence. Yet it seems fair to say that Marshall's topic sentence is rather extreme in the aggressiveness of its statement. One who disagrees seems cast out beyond the pale of mankind. The sentence does not present a mere conclusion. Marshall's topic sentence seems more like an axiom that cannot be questioned.[37]

The two sentences following the opening sentence appear to justify the conclusion of the first sentence:

> This would seem to result necessarily from it nature. It is the government of all; it powers are delegated by all; it represents all, and acts for all.[38]

In these two sentences, Marshall writes that the proposition ("limited in its powers" yet "supreme within its sphere") follows from the "nature" of the "government of the Union" and summarizes that nature in a sentence of four clauses, each of which ends with the word "all." The repetitive use of the word "all" gives Marshall's third sentence a powerful rhythm that reinforces its sense. The sense of these two sentences is that the "nature" of the government is that it is a government of "all." The hidden premise is that the national government has a "nature" from which one can argue, and further, that John Marshall knows what that nature is.[39]

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34. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 579, 601 (1819).

35. This threat is totally idle because I have not been granted the Keys to the Kingdom.

36. *McCulloch*, 17 U.S. at 601.

37. One can object to the relationship that the writer establishes when the writer seems to assert that the reader cannot question what is written.

38. *McCulloch*, 17 U.S. at 601.

39. Marshall's implicit claim to know the "nature" of the Constitution need not establish an unfair relationship with the reader, although it may. It all depends upon what sort of claim

Marshall reinforces the assertion that "the government of the Union" is the government of "all" by a shrewd political judgment, which he uses to drive home his central point about the supremacy of "the government of the Union":

> Though any one State may be willing to control its operations, no State is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts.[40]

This shrewd political judgment – which obviously is sound – makes the argument more persuasive than it would be without it. One is brought down from the world of theory into the world of practice. This is no ivory tower argument; this argument does not "smell of the lamp."

Marshall's derivation of "supreme within its sphere of action" finds corroboration in turning to the text of the Constitution and reading what it says:

> But this question is not left to mere reason: the people have, in express terms, decided it, by saying, "this constitution, and the laws of the United States, which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.[41]

This final sentence still stuns me, even after years of rereading it. Is it comic or is it an outrage that Marshall decides first, reads last?[42]

The power of Marshall's rhetoric (that to which Randolph and White alluded) may conceal the logic of the paragraph, but I think that the logic is the key to Marshall's characteristic way of thinking about the Constitution. Marshall puts all questions of constitutional law into the context of political economy, and he displays an inclination to deduce answers to constitutional questions from broad theories. With some hyperbole, it could be said that one of Marshall's characteristic intellectual moves is to propound axioms of political economy,[43] to deduce from them the content of an ideal constitution, and to turn next to the actual text of our own Constitution, whereupon he discovers (surprise! surprise!) that our written Constitution is in fact the ideal

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he makes about the source of his knowledge, and it seems to me that various readers can interpret Marshall differently on this matter.

40. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 579, 601 (1819).

41. *Id.*

42. One often finishes a modern opinion believing that a modern judge has done the same, decided first and read second, without being as candid as Marshall was. But to say that a practice is pervasive is not to establish that the practice is justifiable.

43. Marshall does not use the word "axiom" in the passage quoted, although he does so elsewhere. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 257, 286 (1821) (stating "that the judicial power of every well-constituted government must be coextensive with the legislature, and must be capable of deciding laws . . . [is] a political axiom").

constitution that he had deduced.[44] Today, such an argument would, or at least should, draw laughter. Deduction is no longer viewed as having the power to pull such large rabbits out of such small hats.

Furthermore, there is a serious moral and philosophical objection to proceeding by way of deduction, even if it were more powerful in generating conclusions than Marshall seems to think. The objection starts by noting that the axioms of political economy from which Marshall reasons are perhaps not morally or philosophically legitimate. From where do these axioms come? One might suppose that the question a judge should ask is a considerably narrower question. One can argue that a judge should not work from assumptions derived from abstract axioms; instead, a conscientious judge should ask what assumptions the Constitution makes.[45]

Finally, let us look at Marshall's method as a problem of style and distinguish it from the issues of logic and substance that I have just raised. As a matter of substance, one can object to the axioms of political economy from which Marshall makes his deductions. As a matter of logic, one can object that his deductions do not go through, even if his axioms are sound. But as a matter of style, one can object to the relationship that Marshall the writer establishes with us, his readers. Note that his argument is a logical deduction from the "nature" of a constitution, yet he does not present the argument in the calm and transparent manner that we expect from a logical argument. Instead, he wraps the deduction in a rhetorical flourish of trumpets and drums. One could say that Marshall is cheating by combining these two forms of rhetoric and that by cheating, he does not respect the reader as he should. One who stands in awe of Marshall will not complain that Marshall has treated the reader unfairly, and thus my objection will not persuade everyone. If one is inclined to genuflect, then my comments will seem obtuse. In short, my argument does not purport to compel by logical force. We are each free to establish those relations with others, living or dead, that we wish to establish. The choices are fundamentally ethical choices, and I cannot make such choices for others. All I can do is point out what the ethical stakes seem to be.

However, someone who accepts the relevance of my remarks also might doubt their cogency. One can defend Marshall by noting that his axiomatic

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44. For a more nuanced description of Marshall's axiomatic method, see G. EDWARD WHITE, *supra* note 30, at 33. See also White's quotation from Jefferson, who said: "When conversing with Marshall, I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone." *Id.* at 12.

45. Judges are not the sole practitioners of this vice; scholars also sin. For a good discussion, see Thomas D. Eisele, *Taking Our Actual Constitution Seriously*, 95 MICH. L. REV. 1799 (1997), in which Eisele dissects Ronald Dworkin's "moral interpretation" of the Constitution. In his article, Eisele shows how Dworkin has imposed his theory on the Constitution instead of drawing it from the Constitution.

method is merely one version of a universal phenomenon: We all bring assumptions to the task when we interpret a legal document, be it a deed or a constitution. An innocent reading may be possible, but it is exceedingly rare and is unlikely to be acute. Consequently, Marshall's reading of the Constitution in the light of the axioms of political economy can be defended as inevitable. Furthermore, he does state his axioms, which makes him more honest than many. And finally, one might excuse or even justify him for wrapping his axioms in the thunder of trumpets and drums. One could see this heightened rhetoric merely as a marker of his intensity.

I am not persuaded by this defense of Marshall because I do not think that his practice of spelling out his assumptions by way of axioms corresponds to the analogous modern practice of specifying one's theory of a matter. At the most everyday and pedestrian level, trial lawyers commonly use the phrase "theory of the case" for their thesis of how to fit a particular case into the framework of the law. And all lawyers, whether they be academics or practitioners, offer what they call theories to describe the framework of the law, to explain why courts decided a set of cases as they did, or perhaps to justify as well as to explain. Finally, lawyers not only offer accounts of how a case might fit into the background and how the background coheres, they also propose principles to guide the future. Because one who proposes guidelines for the future also wants to propose principles that will generate a consistent course of decisions, lawyers often use the word "theory" to characterize a set of logically consistent normative principles. A theory must be logically consistent, whereas an ordinary set of normative principles need not be. Normative advice often leaves to the recipient the practical task of deciding which competing principle should govern which occasions.[46] Only when normative advice becomes tight enough to cohere do we call the advice a theory.

Within the legal profession, these uses of the word "theory" are commonplace, and it would be strange indeed to criticize Marshall for having theoretical ambitions. Is there a difference between Marshall's axioms and our profession's theories? There is: A person presents an argument in support of a theory but simply assumes an axiom. If one reads an axiom that should be denied, one might as well close the book because to deny an axiom is to put oneself outside the discourse that the axiom generates. My summary for my first generalization, my first reason for saying that modern judges should not imitate Marshall's style, is that Marshall's axioms seem unlike our modern theories in that his axiomatic method entails that the reader accept a relationship of either submission or exclusion, not equality.

The second reason that modern judges cannot write as Marshall did is that they labor under the burden of two hundred years of precedent. Marshall

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46. Compare "look before you leap" with "he who hesitates is lost."

did not have a vast body of precedent which he had to honor. In *McCulloch*, the relevant precedent was mostly political, not legal.[47] The backlog of precedents that a modern judge must confront creates a problem that may be analogous to the problem that eighteenth century judges had with statutes.

As Professor Wood points out in his lecture, Mansfield and Blackstone understood one of the chief problems of eighteenth century jurisprudence to be the rationalizing of the mass of statutes that Parliament produced.[48] The judges of our own day have a comparable problem, which the outpouring of administrative regulation and judicial opinions makes worse. Those who sit on the Supreme Court must confront a vast body of judicial precedent within the area of constitutional law alone. Responsible judges must be honest about what they are doing, and if they intend to depart from precedent, they must say what they are doing and must explain why they are doing it. We should not underestimate the difficulty of the problem of precedent; only a true Candide could imagine that the mass of constitutional precedents that our judges must confront are consistent. Indeed, we can characterize our judicial precedents by adjectives similar to those that Wood used to characterize eighteenth century statutes: ill-considered, hasty, poorly crafted, and so forth.[49] One wonders who will be the Mansfield? Whoever he or she may or will be, one can suppose that the judicial style that will enact the wondrous task of showing us how to conquer precedent will not be Marshall's style.

Marshall's style may be defensible as a way of reading the Constitution, but it is not well-adapted to the job of working with precedent. When one confronts the text of the Constitution, one necessarily brings assumptions to it. It may be objectionable hyperbole to call one's assumptions "axioms," but even so, one must bring assumptions to the text. However, modern judges normally do not confront the text directly; they read it through a layer of precedents, and most observers believe that they have a duty to respect the precedents. One cannot honor precedent by proceeding axiomatically. Instead, one proceeds by the method that Rawls calls "reflective equilibrium."[50] One begins

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47. *But see* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 162-63 (1985) (pointing out one relevant precedent that Marshall failed to cite).

48. *See* Gordon S. Wood, *The Origins of Judicial Review Revisited, Or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 799-800 (1999) (explaining how Blackstone and Mansfield shaped relationship between Parliament and judiciary).

49. *See id.* at 791 (characterizing eighteenth century legislation).

50. *See* JOHN RAWLS, *Some Remarks About Moral Theory*, *in* A THEORY OF JUSTICE 46, 46-53 (1971) (explaining assertion that "the best account of a person's sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium"). By the way, Rawls makes it clear that he did not invent this method, but he does deserve credit for giving the method an apt name and an accurate description.

with the cultural stock of general principles and particular judgments that mark out right from wrong. One next undertakes a process of analysis, testing the principles against the judgments. The testing refines the principles and trims the judgments, purging the errors in each. Of course, I recognize here the same fact that I recognized in stating my first objection. Just as I have no right to decide whether others wish to genuflect in awe toward Marshall or to meet him as an equal, I also have no right to declare which philosophical method others should accept. We all have the equal right to make our own choice of method.

Finally, I suggest to you that Marshall speaks in the voice of a prophet, and yet I think that we should shudder (or so I will contend) when a modern judge speaks in the voice of a prophet. When I use the word prophet, I allude to the archetypal case of the prophetic voice, to the books that have been called Scripture. If one thinks of exemplars such as Amos, Isaiah, and Jeremiah, one can note that the most striking fact about their voices is that the prophets of old did not speak in their own voices, and they did not offer their own judgments. Instead, they spoke the words that God put in them and reported the judgments of the Almighty. And indeed, when I reflect back on Marshall's prose and distinguish those passages that seem most characteristic and unique to him, it seems to me that Marshall is nowhere more like Marshall than when he is most like Moses. Although we can grant to Marshall the privilege of speaking like Moses, I think that no subsequent judge can claim such a privilege.

Return to the paragraph that I have cited as classic Marshall.[51] It moves deductively, but it does not create the impression (the reader's response) that deductive logic creates. It seems more scriptural than logical; both scripture and logic claim to be inexorable, but they do so in different ways. Logic demands questioning, and its transparency is also a claim that it is invulnerable. One who writes in the logical mode has a very simple contract with the reader; the logician promises to conceal nothing and to say nothing that is not obvious. To be sure, a logical argument can be difficult and subtle so that the reader may face a severe challenge. In the contract, the logician makes stern demands on the reader, but in return, the logician promises to lay all of the cards face up on the table and to make no moves that are not in the rule book. If the logician plays the game correctly, then victory is as straightforward and inexorable as knowing that four-of-a-kind beats a full house. But the prophet claims to bring a message that one cannot resist because of whom it is from. When Moses carried down the tablets, he did not argue that they were correct or binding because they were to be deduced from the "nature" of being. He simply pronounced them correct, and so too does Marshall. Indeed, I am inclined to say that the miracle of Marshall's prose is the elusive combination that he constructs of the axiomatic and the prophetic. And if I am right that

51. *See supra* text accompanying note 34 (quoting Marshall's opinion in *McCulloch v. Maryland*).

the most stunning feature of his genius is this combination of the axiomatic and the prophetic, then this alone is reason enough for a modern judge to eschew imitation. The rest of my arguments are totally unnecessary. Anyone who would try to imitate would risk being judged a fool, not a genius.

I also think that it may be this combination of the axiomatic and the prophetic that provoked Randolph of Roanoke and James Boyd White to make their analogous, yet different, judgments.[52] When a mighty prophet speaks, we mortals cannot say "why or wherein" they might have erred. One can respond to the axiomatic by saying "wrong, wrong, all wrong," but when the axiomatic is wrapped into the prophetic, one is disabled from criticizing the axioms. Perhaps this is the secret source of Randolph's frustration. Recall further that White characterized John Marshall's voice as seeming "continuous with the original text" of the Constitution.[53] One can say the same of prophets and logicians. Each of the major prophets spoke in a voice that seems continuous with all of the scripture that preceded him, and every example of a logical proof speaks in the same voice as that of all of the logical proofs that precede it.

As I have said, we should resist the voice of the prophet, but why? What is wrong with a judge speaking like a prophet? I do not mean to outlaw the modern prophet. Martin Luther King so spoke, and I have no objection to his mode of speaking. But there is a distinction. Marshall's prophetic voice resembles Moses, not Jeremiah. He is laying down the law and delivering it from on high. His is not the prophetic voice that speaks from outside the hallways of power, speaking truth to power. He is not saying that power is unjust or oppressive; he does not plea for the widow and the orphan. Indeed, no one should expect a judge to speak like Jeremiah. Judges are priests, not prophets. They are members of the structure of power, and when they try to speak like an Amos, they almost always sound faintly ridiculous. However, a judge does not sound ridiculous when speaking like Moses, which raises the question of whether it is fair to say that Marshall sounds like Moses.

In order to move the analysis forward, one must broaden and generalize the category of prophet, and I would like to do so by quoting from the Thomas and Turner book that I already have cited.[54] First, Thomas and Turner identify the prophetic style by distinguishing it from the classic style.[55] Recall that part of the contract between the reader and the writer of classic prose is a symmetry with respect to truth.[56] Prophetic style differs.

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52. *See supra* notes 30-33 and accompanying text (quoting Randolph's and White's comments on Marshall's opinions).

53. *See supra* note 33 and accompanying text (quoting White).

54. *See supra* note 12 (citing CLEAR AND SIMPLE AS THE TRUTH).

55. *See* THOMAS & TURNER, *supra* note 12, at 95-97 (explaining that classic style differs from prophetic because reader of prophetic style cannot verify writer's experiences).

56. *See supra* notes 24-26 and accompanying text (discussing classic style).

> Despite a shared affinity for unqualified assertion, classic style has very little in common with the prophetic or oracular style because the prophetic style cannot place the reader where the writer is. The reader cannot verify through his own experience what the writer experiences. Classic style does not depend upon powers that are divine or that are available only to special people, or powers whose availability is subject to some agency that human beings do not control or understand. Prophetic style, on the other hand, depends entirely upon such powers.[57]

Marshall does not claim divine power. Furthermore, to the extent that he proceeds deductively from axioms of political economy, he is in fact proceeding in a classic manner. Anyone can inspect axioms, and deduction proceeds by publicly known rules. True enough, but I insist that the experience of reading through a logical argument is totally unlike the experience of working through one of Marshall's opinions. Yet even if my caveat about the reader's experience is granted, still it is true that Marshall claims no divine power, and so the label of prophet may not seem to fit.

Thomas and Turner state that our modern world has secular analogues to prophecy, and they broaden the category to include much that may give one pause.[58] As they point out, one of the few moderns who fit the ancient definition of a prophet is William Blake.[59] Even so, they would extend the category, and I must acknowledge that the extension might not persuade the reader.

> The poet, painter, engraver, and printer, William Blake, is one of the few widely admired modern writers to make extensive use of prophetic style in something like its prototypical form. But prophetic style is not confined to the sacred literature of Ancient Israel or an occasional genius-crackpot like Blake. It has its modern form on all those occasions in which a writer claims to be a channel for impersonal and normally inaccessible truth. The writer makes claims to authority, but not to his own authority and not to the kind of authority that is available to others. "History tells us" (and, tacitly, "I am history's spokesman") is a common anthem of politicians and of those mysterious channels of wisdom who write opinion columns in newspapers; prophetic style is used by jurists who on occasion claim to speak the judgment of principles or of long-dead foundation jurists; it is the style of all those innumerable spokesman [sic] who tell us what "tradition," "common sense," or "common decency" demand and of those slightly less numerous spokesman [sic] who tell us what fashions state or what eras or epochs tell us.[60]

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57. THOMAS & TURNER, *supra* note 12, at 95.

58. I confess that I had not thought to apply the category "prophet" to Marshall until I had read these pages in Thomas and Turner. The fundamental issue is whether extending the category of prophet, as they suggest that we should do, helps more than it hurts.

59. THOMAS & TURNER, *supra* note 12, at 96.

60. *Id.* at 96-97.

My interpretation of the preceding paragraph from Thomas and Turner is that the key issue is authority. The writer claims to know something that the reader does not know yet. This claim to know is a claim of authority. One can ask what the terms are of the contract between the reader and the writer on the issue of authority. One possible term would be that the writer promises the reader to say only what the writer actually has observed (or more probably, only what the author reasonably can infer from these observations). If this is the contract, there is asymmetry as to knowledge but symmetry as to authority. If I, the reader, was not present and so did not observe, then I do not have knowledge that the writer has. Consequently, there is asymmetry of knowledge. But I, the reader, have the same capacity to observe that the writer has. Had I been there, I could have seen for myself. Because I was not there, I have to decide whether I wish to trust this particular writer. If I would trust my own observations, and if I believe that the writer is no less trustworthy than I am, then to that degree the writer has the same sort of authority that I have. Consequently, there is symmetry of authority.

Is a judge like the writer who reports what anyone could have seen? One must tread cautiously in pursuing this point. Let me quote again the key passage from Thomas and Turner because it is necessary to draw some careful distinctions:

> [The prophetic style] has its modern form on all those occasions in which a writer claims to be a channel for impersonal and normally inaccessible truth. The writer [of the prophetic style] makes claims to authority, but not to his own authority and not to the kind of authority that is available to others.[61]

I think that we should recognize that the judge must adopt some elements of the prophetic style while rejecting others. The judge, like the prophet, must make a claim to authority that is not his own authority. Many of our citizens and scholars expect the judicial voice to be impersonal (to that extent like a prophet), and this expectation seems reasonable. But on the other hand, the truths that a judge speaks should not be inaccessible. When judges rest their judgments on precedent, we can test their conclusions by reading the precedents for ourselves because the books are equally accessible to us. When they cite statutes, they cite a publicly available source. But when Marshall appeals to the "nature" of the Constitution, how do I check out his vision? Is Marshall's stance analogous to the stance of Thomas and Turner's paradigm secular prophet of modern times, the person who reports that History (instead of the God of Israel) "tells us" what we should do and think?

I reject those who purport to speak in the name of History, even as I recognize that many of my fellow citizens do not seem to share my revulsion.

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61. *Id.* at 97.

Among other faults, such a claim is an egregious form of the sin of pride against which the maxim "emulate, note imitate" warns.[62] But in fairness to Marshall, it does seem that what he does is distinguishable. On some days he strikes me as posturing illegitimately as a prophet, yet on other days he strikes me as being dispassionately reasonable. All told, I think that my objection may not be to Marshall himself but to the way in which his successor judges do not know how to preserve the balance that he so precariously set for himself. The overtones of illegitimate prophecy, with which Marshall flirts yet keeps in control, seem to go out of control in weaker minds. Marshall set a bad example even though he acted well.

V. Coda

Let me end on a different note. In my book on constitutional law,[63] which Professor Wood has been kind enough to cite,[64] I examine the rhetoric of two famous Marshall opinions, *Marbury v. Madison* and *McCulloch v. Maryland*.[65] Why do they persuade? I do believe that Marshall's opinions have the power to persuade. Consequently, we should attempt to question ourselves, asking why they have persuaded us. We owe it to ourselves to understand, but once we have understood, what should we do next? I admire Marshall's achievements. His persuasion was valuable, and it helped create what we value – judicial review and national power. But in my analysis of his most famous cases, I nowhere said, "Go thou and do likewise." Indeed, in my last chapter, I held up a very different sort of model, Norman Maclean's *Young Men and Fire*, as a better model for how one should write.[66] But in case I was too allusive, let me say now: One should not try to imitate Marshall's prose; instead, imitate Maclean.

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62. *See supra* text accompanying notes 3-5 (explaining that we should emulate but not imitate saints and martyrs).

63. L. H. LARUE, CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY (1995).

64. *See* Wood, *supra* note 48, at 806 n.99.

65. *See* LARUE, *supra* note 63, at 42-92 (explaining *Marbury* as "The Story of Limits" and *McCulloch* as "The Story of Growth").

66. *See id.* at 129-53 (discussing NORMAN MACLEAN, YOUNG MEN AND FIRE: A TRUE STORY OF THE MANN GULCH FIRE (1992)).