Editor's Note

The following essays were presented at the Supreme Court as a lecture series between October 11 and November 6, 2001. The program was designed to celebrate the 200th anniversary of John Marshall's appointment to the Supreme Court.

Remarks on the 200th Anniversary of the Accession of John Marshall as Chief Justice*

LOUIS H. POLLAK and SHELDON HACKNEY

May it please the Court:

It was a day in mid-January 1801. John Adams, the President of the United States, was conferring with the Secretary of State, John Marshall. President Adams, a Federalist who had been defeated for re-election, had much to do before turning over executive authority to his successor, Thomas Jefferson, a Republican, in early March. The President's most important remaining chore was to select and install a new Chief Justice to succeed Oliver Ellsworth, the third Chief Justice, who had resigned a few weeks before. On receipt of Ellsworth's resignation, the President had at once written, tendering the post, to his old friend John Jay, the first Chief Justice, who had left the bench five years before to become Governor of New York and who was now at the close of his second term. Concurrent with his letter to Jay, the President had sent Jay's name to the Senate, which had quickly confirmed the nomination. But Jay did not respond to the President's letter for some time. And when the letter came, it was in the negative. When Jay was Chief Justice, he had felt strongly that the Judiciary Act of 1789 had imposed on the Justices of the Supreme Court burdensome responsibilities of circuit-riding that were not compatible with the Supreme Court's appellate responsibilities. In the years since leaving the Court, Jay had not changed his mind:

> Expectations were . . . entertained that [the Judiciary Act] would be amended as the public mind became more composed and better informed; but those expectations have not been realized nor have we hitherto seen convincing indications of a disposition in Congress to realize them. On the contrary, the efforts repeatedly made to place the Judicial Department on a proper footing have proved fruitless. I left the Bench per-

> fectly convinced that under a system so defective, it would not obtain the energy, weight, and dignity which are essential to its affording due support to the National Government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence, I am induced to doubt both the propriety and the expediency of returning to the Bench, under the present system; especially as it would give some countenance to the neglect and indifference with which the opinions and remonstrances of the Judges on this important subject have been treated.[1]

Years later, John Marshall recalled his conversation with John Adams:

> When I waited on the President with Mr. Jay[']s letter declining appointment he said thoughtfully, "Who shall I nominate now"? I replied that I could not tell, . . . After a few moments hesitation he said, "I believe I must nominate you". I had never before heard myself named for the office and had not even thought of it. I was pleased as well as surprised, and bowed in silence.[2]

Notwithstanding some initial resistance from senators of the "High Federalist" faction of the President's own party, Secretary of State Marshall's nomination as Chief Justice was confirmed a week after he was nominated, on January 27, 1801. And on February 4, at the Court's first sitting in Washington, in Committee Room 2—the room in the not-yet-finished Capitol assigned to the Supreme Court and also to the circuit and district courts of the District of Columbia—John Marshall was sworn in as the fourth Chief Justice of the United States. Marshall was an unpretentious man. Perhaps he did not mind that the courtroom was, in the words of Benjamin Latrobe, the architect of the Capitol, "a half-finished committee room meanly furnished and very inconvenient."[3] Eschewing the elaborate robes—whether academic regalia or the scarlet and ermine derivative from the King's Bench—of his colleagues, Marshall adopted the plain black worn by judges of the Virginia Court of Appeals[4] and which your honors wear today. Change had come to the Court.

The Marshall Court did more than change costumes. The Court changed its way of speaking. Under Marshall's leadership, the English practice of seriatim opinions was abandoned and the Court took to speaking with one voice—and, in the great majority of cases, that voice was the voice of John Marshall. Sometimes there were concurring and dissenting opinions, but until the later years of Marshall's unparalleled thirty-four years in the center chair, opinions other than that of the Court were infrequent.

Under Marshall, the voice of the Court was not only a single voice but a voice that took on new strength and direction. In 1803, only two years after Marshall became Chief Justice, *Marbury v. Madison*[5]—the first of Marshall's great trilogy—was decided. The magisterial opinion announced—and exercised—the authority of the judicial branch to sit in judgment on the validity of an act of Congress and to set aside an act not in conformity with the Constitution. But Marshall did not announce the opinion in his courtroom. He announced it in the living room of Stelle's Hotel, the boarding house that constituted the local lodgings of the Justices.[6] For a few weeks in the winter of 1803, the Justices held court in their lodgings so that Justice Chase, who was unwell, would not have to journey some hundreds of yards to the Capitol.

The second and third opinions in the Marshall trilogy were, of course, *McCulloch v. Maryland*[7] and *Gibbons v. Ogden*.[8] *McCulloch* validated Congress's establishment of the Bank of the United States, announced that the words "necessary and proper"—describing

congressional authority to enact laws implementing the expressly delegated powers—were words not of limitation but of enlargement of Congress's authority, and, finally, invalidated Maryland's attempt to tax this instrumentality of federal power. It was in *McCulloch* that Marshall said: "[W]e must never forget that it is a *constitution* we are expounding"[9]—the pronouncement characterized by Justice Frankfurter as "that most important, single sentence in American Constitutional Law."[10] (It may be noted that Marshall announced the Court's opinion only three days after the nine days of oral argument were concluded.)

In *Gibbons v. Ogden*, Marshall explored Congress's commerce power, describing it with a breadth that has made it the principal basis for federal legislative authority—and of concomitant limits on state authority—to this very day.

When Marshall died in 1835—having survived his great antagonist, Jefferson, by just short of a decade—there was, to be sure, widespread recognition that what the Chief Justice had accomplished was of great consequence. But the full weight of his achievement was not generally understood until the centennial of his appointment. February 4, 1901, was celebrated as John Marshall Day by the American Bar Association. Chief Justice Fuller addressed the House of Representatives. Here in Philadelphia, the Pennsylvania Bar Association conducted a parade to Musical Fund Hall, and one of the justices of the Pennsylvania Supreme Court made a speech.[11] And, in Boston, the Supreme Judicial Court, presided over by the chief justice of Massachusetts—Oliver Wendell Holmes, Jr.—entertained a motion from the bar. Holmes took note of "the fortunate circumstance that the appointment of Chief Justice fell to John Adams, instead of to Jefferson a month later, and so gave it to a Federalist and loose constructionist to start the working of the Constitution."[12] Holmes went on:

> The setting aside of this day in honor of a great judge may stand to a Virginian for the glory of his glorious State; to a patriot for the fact that time has been on Marshall's side, and that the theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, and Lincoln died, is now our corner-stone. To the more abstract but farther-reaching contemplation of the lawyer, it stands for the rise of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheard-of authority and duty.[13]

Holmes also said:

> [W]hen I consider his might, his justice, and his wisdom, I do fully believe that if American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be one alone and, that one, John Marshall.[14]

John Marshall gave life to the original document drafted here in Philadelphia. But that original document—notwithstanding Marshall's interpretations—was fatally flawed, for it presumed the permanent legitimacy of slavery. Only a civil war could remove the flaw. As the second Marshall, Justice Thurgood, put it, writing in 1987 on the occasion of the bicentennial of the Constitution, "[T]he true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not."[15]

Your Honors, I bring to your attention the fact that, a century ago yesterday, the parade to Musical Fund Hall was not the only Philadelphia event that celebrated the centen-

nial of John Marshall's installation as Chief Justice. The Court of Appeals held a session at which a motion was presented by the Chancellor of the Law Association of Philadelphia. The record of what transpired is cast in bronze on the plaque on the third floor of this courthouse. Perhaps when the current renovation of the first floor of the courthouse is complete, the plaque can be moved to the first floor, for all who have business in this courthouse to read. The legend on the plaque is as follows:

UPON FEBRUARY 4TH, 1901
BEING THE ONE HUNDREDTH
ANNIVERSARY OF THE DAY UPON
WHICH
JOHN MARSHALL
TOOK HIS SEAT AS CHIEF JUSTICE OF
THE SUPREME COURT OF
THE UNITED STATES
THE CHANCELLOR OF THE LAW
ASSOCIATION OF PHILADEPHIA
ON BEHALF OF
THE LAW ASSOCIATION OF
PHILADELPHIA
THE LAWYERS CLUB OF
PHILADELPHIA
THE PENNSYLVANIA BAR
ASSOCIATION
THE DEPARTMENT OF LAW OF THE
UNIVERSITY OF PENNSYLVANIA
ACTING FOR THE MEMBERS OF THE
BAR OF THE
SUPREME COURT AND OTHER
COURTS OF PENNSYLVANIA
MOVED THE UNITED STATES CIRCUIT
COURT OF APPEALS
FOR THE THIRD CIRCUIT
THEN SPECIALLY CONVENED
TO ENTER UPON ITS RECORD
A MINUTE
EXPRESSING THEIR APPRECIATION
OF HIS CHARACTER AND WORK
AND IT WAS THEREUPON
SO ORDERED

Chief Judge Becker, I move the Court of Appeals to reaffirm its order of a century ago. And, Chief Judge Giles, I move the District Court to adopt that century-old order as its order from today forward.

Louis H. Pollak

We meet to commemorate the 200th anniversary of a small event with large consequences: the swearing-in of John Marshall as the fourth Chief Justice of the Supreme Court of the United States. This is also the 300th anniversary of the Charter of Liberties, the frame of government that William Penn granted his colony. It not only continued the liberty of religious conscience that Penn had guaranteed from the outset of the colony in 1682, but also provided a powerful representative assembly, a huge step forward in self-rule that foreshadowed the American Revolution. The two events are connected in our history by a bell.

On the fiftieth anniversary of the Charter of Liberties, in 1751, the Pennsylvania Assembly commissioned a bell that was to hang in the State House that we now call Independence Hall. The bell now rests on Independence Mall to inspire hundreds of thousands of tourists a year, and it bears an inscription, put there at the direction of the eighteenth-century Speaker of the Assembly: "Proclaim LIBERTY throughout all the land unto all the inhabitants thereof." This comes from Leviticus (25:10). Moses is reporting that God has directed Israel to allow the land to lie fallow every seventh year. After "a week of years"—seven times seven years—the nation is to observe a jubilee year, during which all debts are to be forgiven, property returned to original owners, and slaves freed. 1751 was the Jubilee Year of the Charter of Liberties. It is the biblical admonition to free the slaves that abolitionists in the 1830s noticed; they began using the bell as their emblem and referring to it as the Liberty Bell. It is that bell that was rung on July 8, 1776, to announce the first public reading of the Declara-

tion of Independence that had been approved four days earlier.

At that moment in 1776, John Marshall was twenty years old, and he was a dedicated patriot. He fought throughout the Revolutionary War and suffered through the winter at Valley Forge with his hero, George Washington, an experience that deepened his commitment to the new nation. After his military service, he became a successful lawyer and was elected to the Virginia Assembly in 1787, from which vantage point he supported the work being done here in Philadelphia to craft a new constitution providing a stronger national government. He was a leader in the ratification struggle in Virginia. No doubt his fervent nationalism had been deepened by the sacrifices of the Revolution, but it probably owed something, too, to his birth and rearing on the Virginia frontier, one of fifteen children in a well-connected but not wealthy family. It is frequently true that people on the fringes of society, either geographically or otherwise, see a strong central government as the protector of liberties and opportunities.

For several years after the new government was in being, Marshall resisted politics and a number of calls to national service. Finally, he accepted an appointment, with C. C. Pinckney and Elbridge Gerry, to a commission whose task it was to try to reach an accord with revolutionary France, of which he was enormously suspicious. When he was approached for a bribe, he refused and reported the notorious XYZ Affair to President John Adams. His correct and honorable behavior enhanced his national reputation.

After declining a seat on the Supreme Court, Marshall was elected to the House of Representatives, a measure of the relative status of those two branches of the federal government at the time. In Congress, he was a leader of the moderate Federalists and a supporter of President Adams against the Jeffersonian Republicans on the left and the wing of the Federalists led by Alexander Hamilton on the right. In the crisis caused by the fact that the election of 1800 produced a tie between Thomas Jefferson and his supposed vice-presidential running mate, Aaron Burr, Marshall, who was then Secretary of State and a close advisor to President Adams, played a moderating role that helped Jefferson to be elected in the House of Representatives.

History is full of ironies and unintended consequences. When, in January, John Jay turned down Adams' offer of the center chair on the Supreme Court, Adams turned to Marshall. Thus it was that Marshall, barely a month in office as the new Chief Justice, administered the oath of office on March 4, 1801, to his second cousin, Thomas Jefferson, whom he despised and thoroughly distrusted.

As it has turned out, the nation has drawn the best from each of these two enemies. The myth of Jefferson has continued to inspire our faith in democracy and in individual liberties. From Marshall, however, we have taken a vision of strong central government disciplined by a fundamental law the final interpreter of which is the Supreme Court. The rule of law, our bulwark against tyranny and the unifying force in a society constantly under the pressure of centrifugal forces, could not have been better served.

When Marshall entered upon his duties as Chief Justice in 1801, the Supreme Court was lightly regarded. There had not even been space provided for it in the plans for the new Capitol building in Washington. At the end of Marshall's tenure, thirty-four years later, the Court was a respected coequal branch of government. During that period, the Court decided 1,106 cases, and Marshall wrote the opinions in 519 of them—almost half. He dissented only nine times. In fact, such was the skill of Marshall's leadership that there were not many dissents at all. He dominated the Court through his unequaled power of persuasion, his congenial manner, and his shrewd sense of policy. As a nation, we are much in his debt.

Two major themes can be found in Marshall's jurisprudence: judicial supremacy and

the sanctity of contract. He left his beneficent mark on the substance of the law, as well as upon the institution of the Supreme Court. To historians, it has seemed providential that Marshall was the Chief Justice during the formative years of our nation.

At the age of seventy-nine and in failing health, Marshall came to Philadelphia for medical treatment. It was unsuccessful. He died on July 6, 1835. As his funeral cortege made its way through the city on July 8, the Liberty Bell that had rung on July 8, 1776 pealed again in honor of the great jurist.

Sheldon Hackney

ENDNOTES

*These remarks were made on February 5, 2001, at a special joint session of the United States Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania, commemorating the bicentennial (one day before) of John Marshall's accession as Chief Justice. Chief Judge Edward R. Becker of the Court of Appeals and Chief Judge James T. Giles of the District Court presided over the session.

[1]Charles Warren, **The Supreme Court in United States History** (1922) vol. I, 173.

[2]John Marshall, **An Autobiographical Sketch** (John Stokes Adams, ed., 1937) 30.

[3]Jean Edward Smith, **John Marshall: Definer of a Nation** (1996) 285.

[4]*Ibid.*

[5]5 U.S. (1 Cranch) 137 (1803).

[6]Smith, *supra* note 3, at 319.

[7]17 U.S. (4 Wheat.) 316 (1819).

[8]22 U.S. (9 Wheat.) 1 (1824).

[9]17 U.S. (4 Wheat.) at 406.

[10]**Felix Frankfurter Reminisces** (Harlan B. Phillips, ed., 1960) 166.

[11]These and others among the numerous celebratory events of February 4, 1901, are noted in Michael Kammen, **A Machine That Would Go of Itself** (1986) 210.

[12]Oliver Wendell Holmes, Jr., "John Marshall," in Max Lerner, **The Mind and Faith of Justice Holmes** (1943) 382–384.

[13]*Id.* at 385.

[14]*Ibid.*

[15]Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," 101 *Harv.L.Rev.* 1, 5 (1987).

The Supreme Court Before John Marshall

ROBERT LOWRY CLINTON

It is an honor to have been asked to contribute to these essays commemorating the Supreme Court of the United States under the Chief Justiceship of John Marshall. Between 1801 and 1835, the Marshall Court made the lion's share of the "landmark" decisions that laid the foundations of American constitutional law. Since that time, the Supreme Court has become the world's most prestigious judicial institution. It is a beacon of liberty for people and nations everywhere.

A large share of the credit for the success of this great institution is due the Marshall Court. During the Marshall era, the judicial branch was established as a coequal branch of the national government. When John Jay was offered the seat that Marshall ultimately took, he declined the post in January 1801. In a letter to President John Adams, Jay stated that he was "perfectly convinced" that the Court "would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."[1] Yet by the end of the Marshall era, the Court had obtained both that "energy, weight, and dignity" and the "public confidence and respect" whose absence Jay had bemoaned and which has sustained the Court ever since.

Just as credit for the success of the Supreme Court must go to Marshall and his colleagues, a large share of credit for the success of the Marshall Court is due Marshall himself. As Chief Justice William H. Rehnquist noted in the Supreme Court Historical Society's 2001 Annual Lecture, during the 1790s the principal impact of the Court was that of deciding, in the last resort, which of two litigants would win a particular lawsuit.[2] The Court had not yet realized or embraced its full constitutional role. As the Chief Justice also noted, Marshall changed all that. Marshall was able to do this because he had a remarkable ability to reason cogently and to write clearly, because he possessed uncommon political skill

in administering the Court, and because he had a powerful vision of the Constitution.

We must, however, be cautious. Marshall has become an icon, and iconic figures are often honored more as myth and legend than as reality. They have the potential to distort our historical vision. A number of such myths have obscured or distorted our view of the Marshall Court in particular and of the early Supreme Court in general. I would like to focus in this essay on one of these myths: the widely held belief that the Marshall Court's accomplishments were largely unprecedented. This view holds that Marshall's achievements—such as the establishment of judicial review—were acts of creation *ex nihilo*, rather than extraordinarily powerful expositions of constitutional developments already well under way. Complementing this widely held belief has been a corresponding devaluation of the pre-Marshall Court.

Yet nothing in law or history is really unprecedented, and the Marshall Court is no exception, however long Marshall's shadow. It is therefore appropriate to revisit the pre-Marshall era. It is the era in our judicial history closest to the Founding itself, forming a bridge between the Constitution and the Marshall Court. It is the era in which the federal judiciary was founded and established, which encompasses the first decade of the Supreme Court's existence, and in which the legal status of the Constitution was first raised, discussed, and debated from the Bench. To ignore or otherwise devalue the pre-Marshall Court is, in the end, to fail to understand the Marshall Court itself, and to fail to understand the Marshall Court is to fail to understand American constitutional history and the subsequent history of the Supreme Court.

Reasons Why We Have Devalued the Work of the Pre-Marshall Court

There are many reasons why modern historians have ignored or devalued the contributions of the pre-Marshall Court to our legal and constitutional traditions. Most of these reasons have to do with the distinctively modern habit of reading concerns of the present into those of the past. There follows a corresponding neglect of the need to try to understand people and institutions of bygone days as they understood themselves. We excuse our indulgence in this habit by presuming that, since "later is better" and we are more "modern" than they, we must know better how to evaluate what they did and what they experienced than they would even if they were alive today. But the concerns and beliefs of Americans in both the pre-Marshall and Marshall eras were very different from ours. If we really want to understand the Court in either of those eras, we must consider those concerns and beliefs.

Let us first look briefly at the actual work of the pre-Marshall Court. First, as Chief Justice Rehnquist noted in his recent lecture, the Court decided only sixty cases in the first decade of the new republic.[3] Since courts are in the business of deciding cases, this means that the opportunities for the Court to assert itself as a coequal branch of the national government in the 1790s were severely limited.

Second, as noted by William R. Casto, during the 1790s the fledgling United States consisted of a handful of semisovereign states on the Atlantic seaboard.[4] They were surrounded by hostile foreign powers with designs on territory in the New World. International affairs were the paramount concern. This was reflected in the distribution of cases decided by the Jay and Ellsworth Courts, nearly 60 percent of which involved national security concerns. After 1800, the center of gravity of the new nation began to shift to the West. The distribution of cases decided by the Court—as well as the focus of our law—began to shift as well. Since cases involving national security considerations in the 1790s mostly involved admiralty and maritime law, treaty construction, and the like, the early Court was necessarily preoccupied with an in-

ternational law rooted in the common law of Western Europe (*ius gentium*), which was itself rooted in natural law (*ius naturale*). As we moved west, we became more insular and more isolated. Our law became increasingly domesticated and thus moved farther away from the internationalism and legal naturalism of the earlier period.

Third, we must remember that the Court in the 1790s was not a "constitutional" court in the sense in which the modern Supreme Court has become such a court. The present Court's prestige is largely a result of its special connection with the Constitution. If it is not the Constitution's "sole" or "ultimate" interpreter, it has certainly become its "main" interpreter. This intimate connection between the Court and the Constitution is, in turn, largely a result of the Court's power to disregard or invalidate laws that it deems to be inconsistent with the Constitution. This authority we now call "constitutional judicial review."

In the 1790s this power—though it had been discussed and perhaps even exercised—was not well established in the sense of being fully reasoned and adequately integrated into the standing law. This was to be Marshall's work. Thus, the pre-Marshall Court had no such intimate relation to the Constitution. There were few opportunities to establish such a relation. If the Court decided only a few cases generally, it decided even fewer constitutional ones. It was not perfectly clear in the beginning just how the Court would deal with the handful of constitutional cases that did arise. For a court to establish an intimate relation with any newly minted written instrument, there needs to be a settled legal theory that justifies the court's deciding cases under that instrument in the first place and then supplies the interpretive principles that will guide the court's decisions. Let us look very briefly at the handful of constitutional cases that were decided by the pre-Marshall Court.

Constitutional Cases Decided by the Pre-Marshall Court

In six cases decided by the pre-Marshall Court, national laws were challenged but upheld. In *Penhallow v. Doane's Administrators* (1795), the Court affirmed a federal district court's award of damages for failure to respect a 1783 decision of an appellate court that had been established by Congress in 1780 to render judgments in capture cases.[5] The authority of Congress to empower this tribunal to review state court decrees had been challenged as "unconstitutional." In *Hylton v. United States* (1796), the Court upheld a federal tax on carriages against a challenge that the tax was "direct" and thus required apportionment "among the several States . . . according to their respective numbers."[6] In separate opinions, several of the Justices explicitly asserted the Court's power to invalidate unconstitutional laws. In *Wiscart v. D'Auchy* (1796), the Court upheld the authority of Congress to make "exceptions" to its appellate jurisdiction.[7] In *Hollingsworth v. Virginia* (1798), the Court rejected the argument that congressional submission of the Eleventh Amendment was invalid because it had not been submitted to the President for approval.[8] In *Turner v. Bank of North America* (1799) and *Mossman v. Higginson* (1800), the Court upheld a statute limiting the diversity jurisdiction of the federal circuit courts.[9]

In two instances, national laws were challenged but not upheld by the Court. In the first of these, *Hayburn's Case* (1792), five Justices on circuit refused to enforce an act of Congress that authorized judges to perform administrative duties subject to review by the Secretary of War and by Congress.[10] In *United States v. Yale Todd*, unreported at the time, the Court apparently held that payments awarded to Revolutionary War pensioners under the statute disregarded in *Hayburn* were invalid if awarded by judges acting in an administrative capacity.[11] In the *Correspondence of the Jus-*

tices (1793), the Court refused to render an advisory opinion requested by the President and Secretary of State, holding that such an opinion would be "extrajudicial" and thus would violate the "lines of separation drawn by the Constitution between the three departments of the government."[12]

In at least three cases, the Court either upheld or invalidated state laws against constitutional challenges or on constitutional grounds. In *Calder v. Bull* (1798), the Court upheld a Connecticut act ordering a new trial in a probate dispute, against the claim that the law was *ex post facto*.[13] Again, several Justices asserted the Court's power to disregard unconstitutional laws; and Justices Chase and Iredell engaged in an exchange of views concerning the proper basis for doing so. In *Cooper v. Telfair* (1800), the Court refused to set aside a Georgia statute on the ground of its alleged repugnancy to the state's constitution.[14] On the other hand, a state law was clearly invalidated on Supremacy Clause grounds in *Ware v. Hylton* (1796), where the Court held that a Virginia statute contravened the 1783 Treaty of Peace with Great Britain.[15]

In the only other significant constitutional case of the decade, *Chisholm v. Georgia* (1793), the Court assumed original jurisdiction of an action brought by a citizen of South Carolina against the state of Georgia.[16] The Court's decision on the jurisdictional question was subsequently reversed by the adoption of the Eleventh Amendment; and the amendment was given a broad reading in *Hollingsworth* (1798), where the Court dismissed all pending suits filed against states by citizens of other states.[17]

Discussion of the Cases

What may we conclude from this brief review of the pre-Marshall Court's constitutional work? First, in *Hayburn, Todd* and the *Correspondence of the Justices*, the Court began to establish firm judicial authority in separation-of-powers cases, at least when the integrity of the judicial function was at stake. In these cases, the Court laid groundwork for *Marbury v. Madison* (1803), in which the Court would rule that Congress could not add to the Court's original jurisdiction.[18] *Marbury* was the only case in which the Marshall Court invalidated or disregarded an act of Congress.

Second, aside from *Hayburn, Todd*, and the *Correspondence*, each of which involved attempts by Congress or the President to get the Court to do things that all the Justices believed were outside the judicial function, the Court upheld national law in all the other challenges. The Marshall Court would do likewise in every such instance save that in *Marbury*.

Third, the Court began to establish judicial authority in Supremacy Clause cases, not flinching when called upon to assert the supremacy of a national treaty over a conflicting state law in *Ware v. Hylton*. Marshall would later do the same with respect to the supremacy of national law in cases like *Gibbons v. Ogden* and *McCulloch v. Maryland*.[19]

Fourth, the Court began to lay a foundation for the important doctrine of "political questions," first suggesting the doctrine in its refusal to decide whether a treaty had been broken in *Ware v. Hylton*. The political questions doctrine would later be suggested again in *Marbury*, especially in Marshall's distinction between the "ministerial" and "discretionary" acts of executive officers.[20]

Fifth, the Court began to establish the presumption of constitutionality when reviewing challenged laws. This launched an approach that would turn out to be one of the most important in subsequent constitutional litigation.

Sixth, the Court strengthened the initial authority of written constitutionalism in its repeated assertions of the Constitution's basis in natural justice and the social compact. Since we now tend to take the written Constitution for granted, it is wise to remember that, in the decade before Marshall, such an attitude would have been impossible. No written constitution designed to govern an entire na-

tion had ever existed. Thus the mere "writtenness" of the Constitution would not have seemed as integral to its existence and meaning in the 1790s as it does to us today.

Constitutionalism Ancient and Modern

To see more clearly just how the problems facing the pre-Marshall Court might have looked, a brief digression on the nature of constitutionalism is in order. The first thing to note is that constitutionalism is universal for rational beings; everybody has one. That is because all individuals—just like all polities—have to govern themselves in some way or another. Some do it well, some do it badly; but all must do it—if only by default. For example, we are all familiar with individuals who try hard to govern their passions and appetites by reason; and we are equally familiar with individuals who allow themselves to be driven by those same desires, aversions, appetites, and emotions. We frequently refer to these different types as possessing or exhibiting distinctive "constitutions."

The earliest—and still one of the best—systematic excursions into constitutional theory was provided by Plato in books 8 and 9 of the **Republic**.[21] In this section of his great work, Plato classifies different types of constitutional regimes: aristocracies, timocracies, oligarchies, democracies, and tyrannies. Alongside each of these regime types, Plato provides a corresponding analysis of a prototypical individual that best characterizes each type. Indeed, the whole purpose of Plato's study of political constitutions is to cause his readers to see more clearly the individual constitutions that these regimes rest upon and require for their support. A tyrannical regime produces or encourages the development of tyrannical or authoritarian characters in society by promoting the values that would tend to support such a regime. A democratic regime produces or encourages the development of democratic or libertarian characters in society, again by promoting the values that would tend to support that kind of regime. And so on through all the other types. The point is that all political constitutions are, in the end, founded upon individual constitutions. Even under anarchy—a type of "regime" that Plato did not discuss but that Thomas Hobbes later did, calling it the "state of nature"[22]—individuals are presumed to have chosen the default position of being ruled by their own desires and aversions, rather than by institutions designed to advance common interests, however these interests are defined.

The key point is this: all individuals and all societies have constitutions, but individuals never write them down. Societies never really wrote them down either until the American Founders did it in 1787. This is the situation in which the Justices of the Supreme Court found themselves during the Court's first decade. What they knew of political constitutionalism was exactly what we know now about individual constitutionalism. Political constitutions are universal, yet no one had ever written one down—certainly not on the scale of a nation-state.

They knew mainly British constitutionalism, which involved a set of customs, conventions, and traditions that had been somewhat effective in controlling arbitrary exertions of power by kings and parliaments on the other side of the Atlantic. It had not been as effective on this side. The Founders knew that the English successes were not unmixed even on the English side; they were stained with the blood of men like Thomas Becket and Thomas More. The Founders also realized that trying to control a government by a set of unwritten traditions would be very different than trying to control a government by a set of written instructions. A written document begs for interpretation in a way that a set of unwritten traditions does not even allow. The Justices had been given a twenty-page document. That document established a new sovereign national government that included their very offices. It vested in that sovereign government brand new powers. And, as James Madison had

taught in the *Federalist*, it obliged that sovereign government to control itself![23]

The unprecedented task confronting the Court in its first decade was that of interpreting this new written constitution so as not to disturb the settled, existing framework of the law. How was the Court to accomplish this? Would the Constitution be treated as a legal document, subject to the same interpretive rules that govern statutes, contracts, wills, and the like? If not, then how would the instrument be made effective in its object of controlling the government? On the other hand, if the Constitution was to be subject to traditional rules of interpretation or construction, a task naturally performed by courts, then how would that other objective—to enable the government to control the governed—be fully assured? Might not the courts overreach and possibly impair the ability of the other branches of government to exercise their powers effectively?

The solution was finally reached by the Marshall Court in its establishment of judicial review in *Marbury v. Madison* and its subsequent development in other cases. This solution effectively allowed the government to control the governed via an expansive reading of national power. At the same time, it allowed the Constitution to control the government in a limited range of important cases touching upon the rights of individuals, the separation of powers, and the judicial function. But this solution had to be developed; and the pre-Marshall Court did its part, largely by serving as a jurisprudential conduit for the interpretive principles that would later guide Marshall and his colleagues in their successful effort to "legalize" the Constitution. The pre-Marshall Court, steeped in the law of nations, natural law, and common law, drew heavily from all these sources in its constitutional opinions. These opinions emphasized the intimate relation between the Constitution and other sources in the legal tradition. In doing so, the pre-Marshall Court paved the way for the more definite and elaborate constitutional resolutions of the Marshall Court, "vouchsafing" the written constitution by embedding it in an ongoing constitutional tradition.

Classical Legal Naturalism and the Interpretive Tradition

In order to understand more fully the continuity between the pre-Marshall and Marshall Courts, it is necessary to attend more closely to the jurisprudential worldview that both Courts shared. This worldview has often been referred to as the Declaratory Theory of Law, but it is really a tradition, not a theory. The tradition has ancient roots but was given its modern formulation by seventeenth- and eighteenth-century jurists such as Hugo Grotius, Samuel Pufendorf, Emmerich de Vattel, and William Blackstone. The tradition contrasts sharply with later ideologies such as skepticism, positivism, and utilitarianism, all of which came into prominence in the United States only *after the Civil War*. I prefer to call this tradition a "natural law" or "naturalistic" interpretive tradition, because its proponents viewed natural law not simply as a collection of universally valid substantive moral principles grounded in human nature, but also as an interpretive approach. Antebellum constitutional jurisprudence was based on this tradition. According to Carl M. Dibble, this model disappeared from the American scene and from American law writing after the Civil War.[24] It has since been largely ignored by contemporary legal historians and commentators. This disappearance has had an enormous impact on our contemporary understanding of the early Supreme Court.

The declaratory theory of law and the naturalistic interpretive tradition formed the horizon within which the pre-Marshall and Marshall Courts understood the judicial function and its limitations. The theory originates in the belief that the substance of the law *pre-exists* its "declaration" by courts or other authoritative interpreters. It ascribes to the law an underlying essence or unity—a "*ratio legis*," or "reason of the law"—that tran-

scends any and all particular applications. According to Lord Coke, "legal rules are many but legal reason is one."[25] Blackstone, too, adopts this conception of the law's unity, holding that *lex non scripta*—the unwritten law—is knowable by the application of reason to legal experience; and that precedents found to be "absurd" or "unjust" are not merely "bad law"—they were never "law" at all.[26] Blackstone also clearly distinguishes between laws "declaratory of natural rights and duties" and laws "determinative of things indifferent," adding that for acts *mala in se* (acts that are "wrong in themselves"), the municipal or positive law adds *nothing* to the obligation stemming from natural or divine law.[27]

Presupposing the intelligible reality of the *objects* of legal experience, the "reason of the law" renders legal experience normative. Without this objectivity, in which judges "discover" the law rather than "make" it, law becomes merely an instrument of power. If the law has an underlying essence, a core of truth that must be discovered and declared by courts and other authoritative interpreters, then there must be rules of interpretation that are designed to assist in the ascertainment of this underlying essence. The jurists who expounded the naturalistic interpretive tradition that characterized judicial decision-making in the pre-Marshall and Marshall eras formulated a number of such rules for construing written instruments. These rules were premised on the belief that interpreters should explore the intention of the lawgiver—in the words of Blackstone—"by signs the most natural and probable."[28] In one of Blackstone's formulations, these signs include: (1) the *words*—in their customary, usual, general, or popular use; (2) the *context*—allowing comparison of words with other words in the same law or in similar laws, if that is required for clarity; (3) the *subject matter*—allowing consideration of what the law is about; (4) the *effects and consequences*—allowing "a little" deviation from literal understanding if "absurdity" is produced by that understanding; and (5) the *reason and spirit*—the cause, object, or "end" of the law.[29]

It is important to note here that these rules are classical in origin and appear to have been agreed to by all the commentators comprising the naturalistic interpretive tradition. In the five-part formulation just noted, Blackstone relies upon Pufendorf, canon law, Cicero, and the Twelve Tables of Roman Law. A brief look at the formulations of Grotius and Vattel reveal a similar pattern. In a formulation almost identical to Blackstone's, Grotius says that "The measure of correct interpretation is the inference of intent from the most probable indications."[30] After characterizing the interpretive process as one of discovery aimed at detecting the designs of the lawgiver in a trail of probable indications, Grotius then lists these indications: (1) the words—understood in their natural sense; (2) the implications—considering whether contradictions are produced by using the natural sense; (3) the subject matter, the effect, and the connection—from which conjectures may be derived as to meaning.[31]

Vattel regarded the rules of interpretation as fully derivable from the natural law and the morality implied by it. Noting the moral motive in legal interpretation, he bases the necessity of legal interpretation on the need to frustrate "the views of him who acts with duplicity," and announces several maxims "calculated to repress fraud, and to prevent the effect of its artifices."[32] He then articulates a bundle of interpretive principles that includes all those mentioned by Blackstone and Grotius, with some additions: (1) the words in their customary use; (2) suitability to the subject matter; (3) avoidance of absurd conclusions, whether physical or moral; (4) consideration of the context of the discourse; (5) the need to harmonize the law and to avoid readings that would render portions of it surplusage; (6) the reason of the law—its motive, object, or end; and (7) adherence to the intention of the lawgiver in preference to his words, since good faith adheres to the intention, whereas fraud "insists on the terms."[33]

Summarizing the formulations of Blackstone, Grotius, and Vattel, we can say these things: (1) For all three commentators, the will, or intention, of the lawgiver is the law. (2) All assert that discernment of intent must begin from a consideration of the words used by the lawgiver to express the law. (3) All assert that general custom and common usage are the standards to be employed for resolving ambiguities in the meaning of the words used by the lawgiver. (4) All declare or strongly suggest that the context of that portion of the law being interpreted—its relation to other parts of the same law—is relevant for determination of its meaning; that is, that laws should be harmonized. (5) All emphasize that the object, end, or purpose of the law—the "mischief" that it was enacted to overcome—is crucial for determining its meaning. (6) All allow consideration of effects or consequences of the law only when its terms, as commonly understood, would yield an absurdity in its application.

Let me expound a bit further on the jurisprudential worldview captured in these six principles. First, legal interpretation is conceived as a process of *discovery*. Second, the method of discovery consists in looking for *signs*. Third, the signs looked for are signs of *conscious purpose*. Fourth, the conscious purposes are the *designs of lawgivers*, revealed either in words or in acts from which meanings reasonably may be inferred. Fifth, the conscious lawgiving purposes that are discovered by interpreters are constrained or limited purposes embedded within a pre-existent *corpus juris* (body of law) and must be *harmonized* with the discoveries of other authoritative interpreters of the legal tradition. This harmony must exist with respect both to the internal structure of the law and to its external moral, or equitable, basis. In sum, the law is explicitly conservative, rational, just, and real, a set of conscious purposes revealed by a trail of authoritative signs reflecting more or less successful attempts by lawgivers to capture an essential legal reality that finds its source beyond the law.

Demise of the Naturalistic Interpretive Tradition

It goes without saying that we no longer see the legal world in the way just described. This is due largely to the onset and acceptance of several ideologies that were essentially unknown in the time of the Marshall and pre-Marshall Courts.

The first of these modern ideologies is legal positivism. Although the roots of positivism in the law are certainly much older, its formulation as a comprehensive theory was accomplished by the English philosopher John Austin in the 1830s and became generally acceptable in the United States only in the late nineteenth and early twentieth centuries.[34] Although Austin formulated his analysis as a jurisprudence of positive law, without denying the existence or importance of other categories of legal experience such as divine or natural law, his philosophical descendants have tended to advance legal positivism as a hardened ideological position, denying legal status to any rules except those "posited" as commands of a temporal sovereign with power to visit evil upon disobedient subjects. Under this approach, law is no longer conceived as a quest for social order rooted in human nature, in which courts must discover the "reason of the law" and then "declare" it when deciding cases. The declaratory theory at the heart of the naturalistic interpretive tradition of the early Supreme Court gives way to the positivist idea of the judge as a "lawmaker."

The onset of legal positivism ultimately led to the demise of the declaratory theory and the naturalistic interpretive tradition that supported it. The interpretive approaches of the great jurisprudential exponents of the modern law of nations and modern natural law were all formulated in order to aid courts in the discovery of "reason of the law." If judges are lawmakers, then the judicial process is a process of creation or invention; and there is no longer any need for courts to follow a highly structured complex of rules designed to spur

recovery of nonobvious meanings in written legal instruments.

In the twentieth century, the underlying interpretive logic of legal positivism has worked itself out in two different and somewhat conflicting directions. One of these strands is found in the linguistic philosophy of postmodern deconstructionism, which denies that written texts have any meaning at all save that which interpreters read into them. This view has been influential in contemporary debates over the appropriate way to interpret the Constitution, among other things. The other strand has taken the form of legal pragmatism, or "instrumentalism," arguably the dominant view of law throughout most of the twentieth century. Eric Voegelin describes a sophisticated variant of this strand of "analytical legal positivism" in his critique of the "pure theory" of his teacher Hans Kelsen, in which

> the lawmaking process acquires the monopoly of the title "law.". . . Kelsen's hierarchy culminates in a hypothetical basic norm that orders the members of society to behave in conformity with the norms deriving ultimately from the Constitution. The power structure articulated in the constitution is the origin of the legal order. . . . The law and the state, then . . . are two aspects of the same normative reality. . . . Whatever power establishes itself effectively in a society is the law-making power . . . whatever rules it makes are the law. The classic questions of true and untrue, of just and unjust order do not belong in the science of law or, for that matter, in any science at all.[35]

The second of the modern ideologies, closely related to legal positivism and strongly complementing it, is mechanistic materialism, which came to prominence in the Gilded Age. Materialism is the view that all is matter and that everything explicable must be explained by physical causes. It is an ancient worldview, but its modern formulation originated in the philosophy of Thomas Hobbes in the mid-seventeenth century.[36] According to David M. Rosenthal, in Hobbes' view

> [a]ll objects of whatever sort are no more than complex collections of moving particles, and all their properties are more or less complicated motions of these component particles. Hobbes urged that sensations of living things are no more than motions in the sense organs caused by some chain of movements initiated by the object perceived. Mental events of other kinds, such as thoughts and memories, were regarded by Hobbes in a similar fashion. The relations of cause and effect that mental events have to other events are to be explained on the same mechanical principles that govern all movements of adjacent bodies.[37]

Whatever their influence two centuries later, Hobbes's views were anathematized by the English legal profession; and their influence on the English legal system is arguably invisible prior to the Judicatory Reform Acts of 1873 and 1875.[38] The reception of Hobbesian ideas on this side of the Atlantic was even less favorable. Early American common lawyers, trained largely (and often solely) by the reading and rereading of Blackstone's **Commentaries**, shared the view of their English counterparts that the basis of law was immemorial custom: cumulative tradition developed and refined by habitual exercise, discoverable by the use of reason, and pointing to a more comprehensive legal reality that transcends particular societies and legal cultures. In short, both the English common lawyers and the American Founders they influenced so strongly were inveterate legal immaterialists.

All this changed with the publication of Charles Darwin's **Origin of Species** in

1859.[39] Modern historians have largely ignored the profound relation between Darwin and Hobbes. Yet it was Darwin that made good Hobbes's promise of a mechanistic political science by specifying the mechanism of natural selection accompanied by random variation to account for the rise and development of biological organisms. Much as Hobbes had tried to account for the movements of the human psyche by positing a random motion of particles in the brain, Darwin tried to account for biological diversity by positing undirected natural physical processes as the basis for evolutionary change. Since human beings are biological organisms, it is but a short step from the evolution of individual organisms to the evolution of human societies—Hobbes's primary concern.

The price of this move to materialism, a price that would be paid by later generations, was the rejection of teleology. This rejection further entails a fundamental change in our view of human nature and human society. Human beings are no longer seen as creatures imprinted with the image of a creator. We are no longer beings possessing a "nature" or an "inclination" to seek and to know the author of our being. We are no longer beings who act in accordance with behavioral precepts or virtues that are implied by the existence and action of that author. We have no "final cause," no *telos*, end, or purpose. Instead, human beings are regarded as "products" of an unguided developmental process that is material in origin and thus essentially mundane, and law is regarded as a semicoherent train of commands articulating the largely unconscious or half-conscious drives of dominant ruling passions and material interests.

The implications of such a view for social organization and legal institutions were immediate and devastating. For example, in American law, biological Darwinism was soon complemented by an embellishment known as "social Darwinism," a worldview that regards society as an organized competitive struggle for economic survival. Those most "fit" for the struggle both cause and reap the benefits of their unrestrained economic activity, while those "less fit" flounder or perish. In the late nineteenth and early twentieth centuries, the Supreme Court's flirtation with this theory caused the temporary uprooting of much of the constitutional jurisprudence of the early Supreme Court—a jurisprudence that had been firmly supported by common-law and natural-law foundations—substituting in its place a truncated "natural law" that is perhaps best described as a "law of the jungle."

The third of the modern ideologies stems from the Progressive revision of American constitutional history, accomplished in the early decades of the twentieth century.[40] The Progressive historians—looking to the future, not to the past, in their writing of history—devalued and distorted much of the Court's early history, as well as much of the history of the Founding itself. The Founders were recast by the Progressives as a dominant socioeconomic elite bent on safeguarding wealth and social position. The early Supreme Court, consisting entirely of Federalists, was to be the judicial organ of this dominant class—the institution that would construct and develop legal safeguards for its members and their property.

Along with this new view of the Constitution and the early Court came a new view of John Marshall and of his most famous decision as well. Responding to assertions by leaders of the American bar and business communities that had claimed Marshall's authority to support Gilded Age doctrines such as dual federalism and substantive economic due process, legal progressives revised the history of *Marbury v. Madison* (1803), claiming that Marshall had, in *Marbury*, illegitimately appropriated the power of judicial review so that he could use that power to protect the property interests of the wealthy against depredation by the states.[41] According to this reinterpreted *Marbury*, a clever Chief Justice outfoxed President Thomas Jefferson in a

high-stakes political game, winning constitutional supremacy for his beleaguered third branch of government.[42]

Marshall's most prominent Progressive Era biographer summed up this version of *Marbury v. Madison* by calling Marshall's actions "a coup as bold in design and as daring in execution as that by which the Constitution had been framed."[43] The view suggested by this reading of *Marbury*, which I have elsewhere referred to as the "Marbury Myth," holds that the landmark decisions of the Marshall Court were founded—at bottom—upon an unwarranted usurpation of legislative authority by the Court, were "politically motivated," and essentially "unprecedented." In so holding, the Progressive historians contributed mightily to the devaluation of the pre-Marshall Court; since if Marshall's contributions were "unprecedented," then they could hardly have been founded upon the decisions of an earlier era.

The fourth and final modern ideology that I shall mention is "behavioralism," a methodological orientation that has been the chief contribution of political science to misunderstanding of the early Supreme Court. The origins of behavioralism may be found in the call for a "value-free" social science in the late nineteenth century.[44] Since the 1950s, it has been the dominant research paradigm in the social sciences. As currently practiced, behavioralism is a reductionist enterprise that attempts to understand human activity by observing, quantifying, and aggregating discrete instances of "behavior" without reference to the ends or purposes of such behavior. Ostensibly appropriating the methods and assumptions of the physical sciences in order to create a value-free social or political science, the behavioralist carves up sociopolitical reality and examines it in piecemeal fashion. Research is conducted in the blind hope that something important will "turn up" of its own accord.

The problem is that, in research as in other endeavors, things usually do not just turn up unless somebody is looking for them. When one is trying to understand the causes of human action, the things one looks for will most often be either conscious purposes or unconscious motives. The classical worldview, in virtually all its dimensions from Aristotle down through the ages, regards conscious ends or purposes to be the wellspring of human activity. In classical ethics and political science, human nature is oriented or inclined to the *summum bonum*—the moral and intellectual goods of the virtuous and contemplative life.[45] In classical jurisprudence, law is conceived as a rule and measure, ordering and measuring the good society in such a way as to allow pursuit of the highest good by individuals.

Thus, classical jurisprudence is a teleological jurisprudence. But since behavioralists rule out teleology, they cannot really look to conscious purposes for orientation of the research enterprise. From this comes the incessant drive of public-law scholars in political science to discover unconscious motives to explain judicial behavior. In other words, court decisions are not really based on the reasoned jurisprudential doctrines announced in written judicial opinions; rather, these doctrines are merely a "cover" for personal preferences or predilections that are themselves the product of murky unconscious or semiconscious forces in the judicial psyche. If this approach is problematic when used to study the modern Supreme Court—which, after all, is at least a post-Freud, post-Marx, post-Weber, post-Beard Court—how much more problematic must it be when applied to an antebellum Court, the judges of which would have regarded the doctrines of all the above-mentioned luminaries as flatly absurd.

Reasons for Misunderstanding of the Early Supreme Court

General acceptance of positivism, materialism, progressivism, and behavioralism has affected a monumental change in American atti-

tudes toward law and government during the last century. Our immersion in the jurisprudence that follows from these beliefs has taken us far from the constitutional jurisprudence of antebellum courts. If we believe that constitutions and laws are mere tools of powerful political or economic interests, then it will be hard not to read early Supreme Court opinions as if they were apologies for such interests. If we believe that laws are merely the "commands" of a sovereign, then we will think it either naive or disingenuous for Chief Justice Marshall to run on about the majestic generalities of the Constitution as if they could be thought about apart from the concerns of the moment. If we think that all is matter, then we will think that when Justices Paterson and Chase talk about the sanctity of private property, their "real" concern must have been the "property" and not the "sanctity." If we think of constitutional cases as political "games" rather than principled controversies, then we will have difficulty taking seriously the high-toned discussions in many of Marshall's or Story's opinions.

If we do not believe that objective truth exists, then it is not likely that we will end up believing that there is any such thing as "correct" constitutional interpretation. In the end, we will probably stop thinking about "interpretation" at all, and start thinking about "creativity." If we believe that novelty is the measure of creativity, then we will find a way to regard the opinions of the early Court as either "creative" or "anachronistic." If we think of the pre-Marshall Court's opinions as "anachronistic," then we will inevitably think Marshall's opinions "creative." If we think of Marshall's opinions as "creative," then we will be compelled to think of the pre-Marshall Court's opinions as "anachronistic." If we think that judges do not "discover" law but instead "make" it, then we will read the early Court's opinions as legislation. Some will find that it legislated well. Others will find that it legislated badly. If we believe that judges make decisions based not on law but rather on the basis of nonlegal "preferences," then we will look for—and no doubt "find"—other, "baser" unconscious motives lurking between the lines of the early Court's opinions.

What I am suggesting is this: We have seriously compromised our ability to understand the constitutional jurisprudence of the early Supreme Court by not paying sufficient attention to the interpretive tradition inherited by the early Court and the beliefs that supported that tradition. This means that we read the opinions of the early Court as exercises in judicial lawmaking, rather than as attempts to discover and declare a pre-existing constitutional consensus. We read these cases as if they had been decided by judges who believed that the normative force of law is derived solely from the command of a sovereign, rather than from a dictate of reason. We read the cases as if they had been decided by judges who believed that society was inevitably and continually "progressing" to a better state and that their role as judges was to help society get there as fast as possible. We read the cases as if they had been decided by judges who were monistic materialists and thus believed that the social good was quantitative in character and that economic motives determined the law of the Constitution. The judges of Marshall's time believed none of these things.

The Pre-Marshall Court Revisited

I would like to close this essay with an example that illustrates one of the ways in which the pre-Marshall Court has been misunderstood through the application of contemporary jurisprudential perspectives. Though the Justices of the pre-Marshall Court were not afraid to confront constitutional issues and to exercise constitutional authority, they are often alleged by modern commentators to have been uncertain about the *basis* for this authority.[46] For example, several Justices on the pre-Marshall Court asserted that they would invalidate a law on constitutional grounds only when the constitutional violation was "clear"—suggesting

a "textual" basis for judicial review.[47] On the other hand, some of the Justices asserted that laws violating "natural equity" or "natural justice" might also run afoul of the Constitution, suggesting an "extratextual" basis for judicial review.[48] Let us look for a moment at these two approaches.

The "clear case" or "doubtful case" rule is a variation—in fact, a reversal—of William Blackstone's Tenth Rule of Statutory Construction, which was itself a variation on Lord Coke's famous suggestion in *Dr. Bonham's Case* that courts might be entitled to disregard laws that violate natural justice, or "common right and reason."[49] Blackstone, living under a regime of legislative supremacy, agreed—but only if the violation was *unclear*, so that the court would be in doubt as to whether the legislature intended the violation or not. In other words, if Parliament *clearly* meant to violate natural justice, then no court could stand in the way.[50]

Rejecting Blackstonian legislative supremacy, several Justices on the pre-Marshall Court reversed Blackstone's rule, declaring instead that a court was entitled to disregard a statute only if the act "clearly" violated the Constitution.[51] If the violation was "doubtful," then the court was obligated to enforce the act. While the rationale for this approach is obvious enough on the surface, its theoretical basis was shaky. The pre-Marshall Court never really explained why its vision of constitutional conflict should be regarded as "more clear" than that of Congress or the President. The approach would have to rest upon something like a general belief that courts can more accurately discern "clear" violations of the Constitution than other agencies of government can. While such a belief has since come to be widely held, it was not widely held in the late eighteenth century.

Ultimately, the "clear case" approach foundered upon the rock of unclarity and gave way to Marshall's solution in *Marbury v. Madison*. According to Marshall's *Marbury* opinion, the Court's vision is not necessarily superior to that of others; it is just that the Constitution is law, and the Court must declare the law in order to decide cases. Marshall's answer is based on the theory that a written constitution is subject to judicial interpretation just like any other law, and that since a constitution is a law of "superior obligation," a court is not merely entitled, but obliged, to enforce it.[52]

The second approach suggested by the pre-Marshall Court in constitutional interpretation has sometimes misleadingly been called a "natural law" approach. Under this approach, the Court would be entitled to disregard not merely laws that clearly violate the written constitution, but also laws that contravene natural rights, or fundamental principles of the social compact, that are regarded as embodied in the constitutional text. Although some commentators have charged pre-Marshall Court Justices with engaging in this kind of extratextual judicial review,[53] Matthew J. Franck has demonstrated persuasively that they really did not do so.[54] What some Justices did do was insist that the Constitution was not merely an isolated text, but rather was fully grounded in a larger order of things that find ultimate expression in the phrase "rule of law." In the end, any suggestion of extratextual constitutional interpretation by Justices on the pre-Marshall Court—such as that by Justice Chase in *Calder v. Bull*,[55] challenged for unclarity by Justice Iredell in that same case[56]—was destined to give way to Marshall's insistence that the Constitution itself would be the touchstone of American constitutional law.

In the late nineteenth century, this "natural law" approach again played a role in constitutional interpretation. However, by that time, the natural-law theories subscribed to by earlier generations had given way to a truncated form joined with other late-nineteenth century ideologies such as social Darwinism and mechanistic materialism. Consequently, we tend to misunderstand the early Court's "natural law" talk precisely because we read it as if that Court viewed natural law in the manner of the late-nineteenth-century Court. We

should remember that the natural-law tradition in which the early Court was steeped was one developed in the absence of written constitutional instruments. The onset of written constitutions created a problem concerning the basis for government accountability, interposing the written constitution between government and an already existing legal tradition.

Plato Revisited

For a moment, let us return to Plato's constitutional anthropomorphism and do a little thought experiment. Remember that all individuals have constitutions, just like polities do. Suppose Congress gets fed up with all the groundless decisions that Americans seem to make. In an effort to force individuals to regularize and articulate their decision-making processes, Congress enacts a law requiring every American to make explicit their individual constitutions by writing them down—just like the Framers did for a whole society in 1787. Each of these individual constitutions would have to contain all the rules by which we make our everyday decisions. They can be no more than two pages long. They must be kept on file at the newly created Department of Constitutional Government in Washington. Imagine next that we were required to apply these documents via our internal judicial branch of self-government (our "judgment"), and that we had to write down each exercise of judicial authority in an "opinion" stating the reasons why we had interpreted our personal constitution the way we did in each instance. These opinions would have to be kept on file for possible use in lawsuits because the law would also provide that any injury resulting from failure to follow one's constitution gives rise to a cause of action in tort.

Consider for a moment what might happen. As the lawsuits began to multiply, each of us would start experiencing tension between what we "wrote" in our original document and what we actually "meant" or "intended" when we wrote it. Once that tension was made explicit, we would immediately begin "interpreting" our constitution in accord with our "meanings" or "intentions" rather than "boxing ourselves in" with our words. We would begin to see our constitution as a set of intended meanings and then rightly begin to regard the words as indicators of those meanings, rather than as wooden formulae that confine the meanings. We would instinctively—and quite properly—feel that our "real" or "true" constitutions were what we meant, not merely what we said.

This is exactly the situation that the pre-Marshall Court was in. Its decisions and opinions become easily understandable if we attend to the fact that the Justices regarded the Constitution as an attempt to capture a "true" underlying set of meanings or principles that necessarily *pre-exists* its articulation in words, rather than as a wooden set of "made-up" formulas or rules. It becomes easier to understand the interplay of text, tradition, common law, and natural justice in these opinions, as efforts to "find" or "discover" the "true" constitutional principle underlying the text. We have to remember that the Justices of the pre-Marshall Court believed that their job was to "find" and then "declare" the law. That law always pre-existed any written text, whether constitution, statute, will, or contract. This meant that the law was higher than judges and courts and that judges and courts might get it wrong.

When we look back at the opinions of the pre-Marshall Justices and find, for example, Justice Paterson threatening to invalidate a law because, in his opinion, that law violated the sanctity of contracts, natural equity, the common law, the state constitution, and the federal Constitution all at the same time, we are understandably frustrated. Being good legal positivists, and thus believing that when a court makes a constitutional decision it is making law, we ask: "Which is it?" We want to know the jurisprudential basis for the court's constitutional decision in much the same way that we

want to know the constitutional basis for the legislature's decision to enact a statute.

But this question would not have made sense to the Justices on the old Court. They did not believe that the Court was making the law when it decided a case—even a constitutional case. They would not have been overly concerned with whether a particular decision was rooted in text, tradition, logic, or just plain common sense. For them, a judge was engaged in a process of discovering a law that already existed and was what it was, whether they liked it or not. The overriding concern would have been with getting it right, not following a particular methodology. If you are looking for a treasure buried on the ocean floor, you will not be overly concerned with whether you get to it via a U.S. Geological Survey map or one left drawn for posterity by Captain Hook or Peter Pan. What counts is that you get to it! Indeed, if you can find maps by the Survey, Captain Hook, and Peter Pan, and all agree on where the treasure is, you would probably not stop to argue with yourself about whose map-making methodology was better. Rather, you would conclude that they all must be pretty good because each confirmed the others. If you were called upon to justify your decision to sail to the other side of the planet in search of the treasure, you would surely not fail to mention this confluence of all three authorities.

So when we read Justice Paterson's opinion in *Van Horne's Lessee v. Dorrance* (1795), we should not be surprised or chagrined to find him appearing to have based a decision upon the express texts of both the U.S. and Pennsylvania constitutions, a "natural, inherent, and inalienable" right of "acquiring, possessing and protecting property," and "sacred principles of the social compact."[57] In his view, if the law in question did not violate all of these, it probably did not violate any of them. This does not mean that Justice Paterson was "confused" about the basis of the Court's authority. Neither was he engaging in "extratextual" judicial review, or basing his decision on "natural law." He was merely looking for the "true" sense of the law—a treasure that he knew to be out there somewhere; and he was using all the tools that were available to aid him in his search. If the federal and state constitutions, natural right, God, and the social compact all pointed in the same direction, then so much the better for Justice Paterson's decision.

Conclusion

Justice Oliver Wendell Holmes once said that the study of history is not merely a duty but also a necessity. Nowhere is this observation more apropos than in the study of constitutional and legal history. Human beings and human institutions are essentially historical beings. Legal and constitutional development are, by nature, historical processes. We come to understand ourselves only through careful—and often painful—attention to our respective pasts. We can do it in no other way. The study of history is required for any form of human understanding. It might even be said that history is what makes or defines us as human. We are the beings that have a history because we are the only beings that have pasts that we try to understand by reasoned self-reflection. We are somehow able to transcend the moment and render the past intelligible. History has a transcendent character, according to which events, beliefs, and practices gain significance only as the result of reflective experiences that go beyond the mere happenings themselves to embrace their pattern and meaning. History is literally a triumph of "mind" over "matter."

Returning one last time to Plato's constitutional anthropomorphism: Each of us as individuals, if we want to live well, must return to our individual pasts from time to time, suspending our beliefs in the present so as to remember what we believed in the past. We must do this in order to collect ourselves in the present and reset our paths to the future. This ability to "transcend" ourselves—to remember our pasts and remember how different we were, yet

somehow remain the same and retain our identities—is what makes us "constitutional" beings that have "constitutional histories."

Just as our individual constitutions preserve our coherence and our identity across large stretches of time, so does the American Constitution preserve the identity and coherence of our Republic across even larger stretches of time. This means that when we do our constitutional history, we must do more than merely chronicle the events of bygone eras. We must try to understand what the people who lived in those eras actually believed, what their fundamental principles were. If we do not, we will invariably and inevitably interpret their events and experiences as if they believed what we believe, as if their fundamental principles were ours. We can hardly help believing what we believe; but we honor this great institution, the Supreme Court, more by suspending our beliefs when we do our history and telling the truth about our ancestors than by reading their history through the fog of our present concerns.

As was brought home to us in our most tragic disaster on September 11, 2001, we live in an age in which American institutions are under savage attack by persons who believe in resolving disagreements by violence, rather than by law. If we are to counter successfully the threat to civilized constitutional order posed by such persons, there is no better place to start than by telling and retelling the truth of American constitutionalism to ourselves and to the world. The story we tell must be the truth, the whole truth, and nothing but the truth.

During the bicentennial commemoration of the Marshall Court that is now upon us, we honor the legacy of that Court to which we owe so much not by idolizing it, thereby devaluing the Court and the tradition that preceded it, for that is not the truth. Rather, we honor the Marshall Court best by remembering—if only for a moment—that it built well upon the foundation of a great tradition that is part of the ongoing historic struggle to realize, in full, the rule of law.

ENDNOTES

[1]John Jay, "Letter to John Adams," quoted in Leonard Baker, **John Marshall: A Life in Law** (New York: Macmillan, 1974), p. 352.

[2]William H. Rehnquist, "The Supreme Court in the Nineteenth Century," *Journal of Supreme Court History* 27 (2002), p. 1.

[3]*Ibid.*

[4]William R. Casto, **The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth** (Columbia: University of South Carolina Press, 1995), pp. 2–3.

[5]*Penhallow v. Doane's Administrators*, 3 Dall. 54 (1795).

[6]*Hylton v. United States*, 3 Dall. 171 (1796).

[7]*Wiscart v. D'Auchy*, 3 Dall. 321 (1796).

[8]*Hollingsworth v. Virginia*, 3 Dall. 378 (1798).

[9]*Turner v. Bank of North America*, 4 Dall. 8 (1799); *Mossman v. Higginson*, 4 Dall. 12 (1800).

[10]*Hayburn's Case*, 2 Dall. 409 (1792).

[11]*See United States v. Ferreira*, 13 How. 40, at 52-53 (1852).

[12]*Correspondence of the Justices* (August 8, 1793). *See* David P. Currie, "The Constitution in the Supreme Court, 1789–1801," *University of Chicago Law Review* 48 (1981): 819–885, p. 829.

[13]*Calder v. Bull*, 3 Dall. 386 (1798).

[14]*Cooper v. Telfair*, 4 Dall. 14 (1800).

[15]*Ware v. Hylton*, 3 Dall. 199 (1796).

[16]*Chisholm v. Georgia*, 2 Dall. 419 (1793).

[17]*Hollingsworth v. Virginia*, 3 Dall. 378 (1798).

[18]*Marbury v. Madison*, 1 Cranch 137 (1803).

[19]*Gibbons v. Ogden*, 9 Wheat. 1 (1824); *McCulloch v. Maryland*, 4 Wheat. 316 (1819).

[20]*Marbury v. Madison*, 1 Cranch 137 (1803).

[21]Plato, **The Republic**, translated by G. M. A. Grube (Indianapolis: Hackett Publishing Co., 1981), reprinted in **Readings in Classical Political Thought**, edited by Peter J. Steinberger (Indianapolis: Hackett Publishing Co., 2000), pp. 166–317.

[22]*See* Thomas Hobbes, "Leviathan, or, Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil," in **Great Books of the Western World**, vol. 23, edited by Robert Maynard Hutchins (Chicago: Encyclopaedia Britannica, 1952), pp. 39–283, especially part I.

[23]*The Federalist*, number 51, in **Great Books of the Western World**, volume 43, edited by Robert Maynard Hutchins (Chicago: Encyclopaedia Britannica, Inc., 1952), pp. 29–259, at p. 163.

[24]Carl M. Dibble, "The Lost Tradition of Modern Legal Interpretation" (1994), unpublished essay prepared for delivery at the 1994 Annual Meeting of the American Political Science Association; on file with author.

[25]James R. Stoner, Jr., **Common Law and Liberal Theory: Coke, Hobbes, and the Origins of American**

Constitutionalism (Lawrence: University Press of Kansas, 1992), p. 54.

[26]William Blackstone, **Commentaries on the Laws of England**, 4 vols. (Chicago: University of Chicago Press, 1979, first published 1765–1769), vol. 1, p. 70.

[27]*Ibid.*, p. 54.

[28]Christopher Wolfe, **The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law** (New York: Basic Books, 1986), p. 18.

[29]Blackstone, **Commentaries**, vol. 1, pp. 59–61.

[30]Hugo Grotius, **De Juri Belli Ac Pacis Libri Tres** [The Law of War and Peace in Three Books], translated by Francis W. Kelsey (Oxford: Clarendon Press, 1925), p. 409.

[31]*Ibid.*, pp. 409–411.

[32]Emmerich de Vattel, **The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns**, 4th ed. (1811), bk. 2, p. 244.

[33]*Ibid.*, pp. 248–262. For a fuller discussion of Vattel's principles of interpretation, as well as those of Grotius, Blackstone, Coke, and Hale, *see* Robert Lowry Clinton, "Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence," *The John Marshall Law Review* 33 (2000): 935–971, especially pp. 945–959.

[34]*See generally* John Austin, **The Province of Jurisprudence Determined** (London: John Murray, 1832). For a fuller discussion of Austin's jurisprudence, in contrast with classical jurisprudence, *see* Robert Lowry Clinton, **God and Man in the Law: The Foundations of Anglo-American Constitutionalism** (Lawrence: University Press of Kansas, 1997), especially chapter 11.

[35]Eric Voegelin, "The Nature of the Law and Related Legal Writings," in **The Collected Works of Eric Voegelin** (Baton Rouge: Louisiana State University Press, 1991), vol. 27, p. 28.

[36]*See generally* Hobbes, **Leviathan**, especially part I.

[37]David M. Rosenthal, ed., **Materialism and the Mind-Body Problem** (Indianapolis: Hackett Publishing Co., 1987), p. 8.

[38]*See, e.g.,* Sir Matthew Hale, "Reflections by the Lrd. Chiefe Justice Hale on Mr. Hobbes his Dialogue of the Lawe," reprinted in Sir William Holdsworth, **A History of English Law**, 3d ed., vol. 5, pp. 500–513 (London: Nethuen & Co., 1945) (reflecting contemporaneous views on Hobbes' legal thought). On the Judicature Acts and their relation to the common law tradition, *see generally* Frederic William Maitland, **The Forms of Action at Common Law: A Course of Lectures** (Cambridge, UK: Cambridge University Press, 1936).

[39]Charles Darwin, "The Origin of Species by Means of Natural Selection," in **Great Books of the Western World**, ed. Robert Maynard Hutchins (Chicago: Encyclopaedia Britannica, Inc., 1952), vol. 49, pp. 1–251.

[40]*See generally* Charles A. Beard, **An Economic Interpretation of the Constitution of the United States** (New York: Macmillan, 1935); J. Allen Smith, **The Spirit of American Government** (Cambridge, MA: Belknap Press, Harvard University Press, 1965, first published 1907); Vernon L. Parrington, **Main Currents in American Thought**, 2 vols. (New York: Harcourt, Brace & Co., 1927).

[41]*See* Robert Lowry Clinton, ***Marbury v. Madison* and Judicial Review** (Lawrence: University Press of Kansas, 1989), chapter 11.

[42]*See* Robert Lowry Clinton, "Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of *Marbury v. Madison*," *American Journal of Political Science* 38 (1994): 285–302.

[43]Albert J. Beveridge, **The Life of John Marshall**, 4 vols. (Boston: Houghton Mifflin Co., 1916), vol. 3, p. 142.

[44]*See* Eric Voegelin, **The New Science of Politics** (Chicago: University of Chicago Press, 1952), especially pp. 1–26.

[45]*See* Aristotle, **Nicomachean Ethics**, translated by D. P. Chase (Mineola, NY: Dover Publications, 1998); Thomas Aquinas, **On Human Nature**, edited by Thomas S. Hibbs (Indianapolis: Hackett Publishing Co., 1999).

[46]*See, e.g.,* Sylvia Snowiss, **Judicial Review and the Law of the Constitution** (New Haven, CT: Yale University Press, 1990).

[47]*Ibid.*, p. 60. *See Hylton v. United States*, 3 Dall. 171 (1796); *Calder v. Bull*, 3 Dall. 386 (1798); *Cooper v. Telfair*, 4 Dall. 14 (1800).

[48]*Ibid.*, p. 68. *See Van Horne's Lessee v. Dorrance*, 2 Dall. 304 (1795).

[49]Coke said that "[I]n many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such act to be void." *Dr. Bonham's Case*, 8 Coke's Reports 107, at 118 (1610).

[50]Blackstone's language is this: "If an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that; because it is unreasonable that any man should determine his own quarrel. But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons; there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no." Blackstone, **Commentaries**, vol. 1, p. 91.

[51]*See* cases cited in note 47, above.

[52]*Marbury v. Madison*, 1 Cranch 137, at 176-177 (1803).

[53]*See*, e.g., Leonard W. Levy, **Original Intent and the**

Framers' Constitution (New York: Macmillan, 1988), especially pp. 130–132.

[54]Matthew J. Franck, **Against the Imperial Judiciary: The Supreme Court vs. the Sovereignty of the People** (Lawrence: University Press of Kansas, 1996) (hereafter **Imperial Judiciary**), part II, especially chapter 6.

[55]*Calder v. Bull*, 3 Dall. 386, at 387 (Chase, J.) (1798). *See* Franck, **Imperial Judiciary**, pp. 116–125.

[56]*Calder v. Bull*, 3 Dall. 386, at 398 (Iredell, J.) (1798). *See* Franck, **Imperial Judiciary**, pp. 125–127.

[57]*Van Horne's Lessee v. Dorrance*, 2 Dall. 304, esp. at 307–316 (Paterson, J.) (1795). *See also* Franck, **Imperial Judiciary**, pp. 114–116.

Marbury v. Madison and the Establishment of Judicial Autonomy[1]

WILLIAM E. NELSON

My topic is *Marbury v. Madison*,[2] the 1803 Supreme Court case that we understand to be the progenitor of judicial review—the doctrine allowing courts to hold acts of Congress unconstitutional. My claim is that *Marbury* was actually about something larger. It was about maintaining a balance between two concepts, democracy—the idea expressed by Lincoln in the Gettysburg Address of government of the people, by the people, and for the people;[3] and the rule of law—the idea expressed by John Adams in the Massachusetts Constitution of 1780 that ours is a government of laws and not of men.[4]

Virtually all Americans believe in both concepts—one, that the people make the law, and two, that law somehow transcends mere human will and incorporates ultimate principles of right. So defined, however, the two concepts are potentially in tension with each other. My claim this evening will be that for nearly two centuries, *Marbury v. Madison* provided a set of distinctions that enabled Americans to keep both the concept of democracy and the concept of the rule of law at the base of their constitutional theory.

This claim, in turn, has three components. First, we need to understand that John Marshall, by deciding *Marbury*, did not direct how we today should resolve the tensions we face between democracy and the rule of law. He couldn't possibly have done that because he, like us, could not predict what would happen two centuries in the future. All he could know—all we can know—is what has happened in the past; all he could do—all we can do—is use knowledge of the past to try to control events in the present. The future, for Marshall like us, was beyond both knowledge and control.

Thus, if we want to appreciate the insight that Marshall's opinion in *Marbury v. Madison* can provide us, we need to proceed to the second component of my claim—we need to understand what *Marbury* meant to Marshall. Only then can we turn to the third compo-

nent—understanding in broad outline how change that has occurred since *Marbury* has partially transformed its meaning, leaving it both different and the same as the case decided by John Marshall.

It is to the second component—what *Marbury* meant in its time—that I now want to turn. Understanding what Marshall decided in *Marbury* requires, in turn, that we begin with the government, law, and society of eighteenth-century Virginia—where Marshall was born and raised and from which he derived his ideas and values. We need to appreciate that eighteenth-century Virginia, unlike America today, was not governed by a ubiquitous bureaucracy with clear chains of command reaching upward to central political authorities. There were no police, state or local, no department of motor vehicles, no highway department, no state education bureaucracy. There was no colonial equivalent, on any level of government, of the Internal Revenue Service or the Social Security Administration.[5]

Because there was no modern bureaucracy, the judiciary and the officials like sheriffs responsible to it were the primary link between a colony's central government and its outlying localities. The judiciary alone could coerce individuals by punishing crimes and imposing money judgments. Courts also apportioned and collected taxes, supervised the construction and maintenance of highways, issued licenses, regulated licensees' businesses, and administered the Poor Law.[6] As one member of Congress observed in an end-of-the-century recapitulation, "[o]ther departments of the Government" may have been "more splendid," but only the "courts of justice [came] home to every man's habitation."[7]

But even though courts possessed vast jurisdiction, no one believed that judges possessed policy-making prerogatives of the sort that we assume Congress and the President possess today. It was a commonplace, as Josiah Quincy of Massachusetts argued in 1770, that courts merely dispensed justice according to law, which was thought to be "*founded in principles, that are permanent*, uniform *and* universal."[8] John Adams similarly believed that "every possible Case" ought to be "settled in a Precedent leav[ing] nothing, or but little to the arbitrary Will or uninformed Reason of Prince or Judge."[9] James Otis, Jr., another Massachusetts revolutionary, even argued during the 1760s that legislation "contrary to eternal truth, equity, and justice" would be void, since "the supreme power in a state . . . [was] *jus dicere* only, . . . [while] *jus dare*, strictly speaking, belong[ed] only to GOD."[10] Thus, even before the late eighteenth-century adoption of written constitutions, arguments were being made, in the words of a 1775 New York pamphlet, that "something must exist in a free state, which no part of it can be authorised to alter or destroy."[11]

Prior to the American Revolution, few colonials imagined that social change was possible and nearly everyone assumed that life would go on essentially as it had for decades. Society was seen as a stable organism that grew and maintained itself of its own accord. It followed from this view of society that no one in government needed to make choices about the direction that law, government, and the society ought to take. Of course, bad people might threaten the health and stability of the organism: foreign monarchs often threatened its destruction by war, and criminals and other evil people posed menaces to its peace and stability at home. The king had the duty to make the decisions needed to protect the realm from foreign threats, and his courts performed the task of doing justice to malefactors at home. But doing justice did not entail policy choice; it necessitated only the enforcement of traditional, customary values, such as property, stability, community, and morality, which were embedded deeply within existing common law.[12]

It is also essential to emphasize that in doing justice, courts did not coerce the good people of a community; on the contrary, they worked harmoniously with those people to

protect and defend the embedded values that most people of the community took for granted. The judges who directed county- and colony-wide courts were prominent local and colonial leaders, but they were leaders who had power only to guide, not to command. For juries rather than judges spoke the last word on law enforcement in nearly all, if not all, of the eighteenth-century American colonies. Colonial judges could not enter a judgment or impose any but the most trivial of penalties without a jury verdict. And, in the cases in which they sat, eighteenth-century American juries, unlike juries today, usually possessed the power to find both law and fact.[13]

In American courts of today, judges give juries charges or instructions on the law, and if a jury fails to follow its instructions, its verdict, except for a verdict acquitting a defendant charged with a crime, will be set aside. Eighteenth-century American judges, in contrast, often did not give clear instructions. Lawyers assumed, as did John Adams, that "[t]he general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange[d] themselves . . . [were] well enough known to ordinary Jurors,"[14] and thus juries were directed that, as to many matters, they "need[ed] no Explanation [since] your Good Sence & understanding will Direct ye as to them"[15] and that they should "do justice between the parties not by any quirks of the law . . . but by common sense as between man and man."[16] In Virginia, in particular, one commentator who reviewed eighteenth-century practice observed that there were "numerous cases" in which the jury "retired without a word said by the court upon the subject" of the case.[17]

Instructions were also ineffective because they were often contradictory. One potential source of contradiction was counsel, who on summation could argue the law as well as the facts. Most confusing of all was the court's charge. Nearly every court in eighteenth-century America sat with more than one judge on the bench, and it appears to have been the general rule for every judge who was sitting to deliver a charge if he wished to do so. Sometimes judges were not unanimous.[18]

Of course, whenever jurors received conflicting instructions, they were left with power to determine which judge's interpretation of the law and the facts was correct. Even when the court's instructions were unanimous, however, juries could not be compelled to adhere to them. Once jurors had received evidence on several factual issues and on the parties' possibly conflicting interpretations of the law, a court could compel them to decide in accordance with its view of the case only by setting aside any verdict contrary either to its statement of the law or to the evidence. By the 1750s English courts, upon motion of the losing party, would set aside such a verdict and order a new trial, but eighteenth-century American jurisdictions did not follow English practice.[19]

It accordingly seems safe to conclude that juries normally had the power to determine law as well as fact in both civil and criminal cases. Statements by three of the most eminent lawyers in late eighteenth-century America—John Adams, Thomas Jefferson, and John Jay—buttress this conclusion. In the early 1770s, Adams observed in his diary that it was "not only . . . [every juror's] right but his Duty . . . to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court."[20] In 1781–1782, Thomas Jefferson painted an equally broad picture of the power of juries over the law in his *Notes on Virginia*. "It is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges," Jefferson wrote. "But this division of the subject lies with their discretion only. And if the question relate to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact."[21] And, as late as 1793, John Jay, sitting as Chief Justice of the United States, informed a civil jury that it had "a right to take upon yourselves

to judge of both, and to determine the law as well as the fact in controversy." "[B]oth objects," Jay concluded, "are lawfully, within your power of decision."[22]

The power of juries to determine law as well as fact reveals a great deal about government and society in eighteenth-century America. In particular, the power of juries reveals that government officials simply lacked effective power to coerce people to obey the law. If an official failed by himself to coerce a recalcitrant person, he could not call for the aid of a substantial body of force other than fellow members of the community, organized as the militia; if the militia was on the side of the recalcitrant person, it would not, of course, aid the official. Thus, the only way for officials to ensure enforcement of the law was to obtain local community support for the law, and the best way to obtain that support was to permit local communities to determine the substance of the law through legal institutions such as the jury. In hindsight, this power of local communities to determine the substance of the law appears quite democratic.[23]

However, the second reality that the law-making power of juries reveals is the fixed and certain nature of the law. If law had been uncertain and individual jurors had manifested differing opinions about its substance, it would have been impossible for jurors to have decided cases after receiving rudimentary or conflicting instructions, or even no instructions at all. The law-finding power of juries suggests ineluctably that jurors came to court with shared preconceptions about the substance of the law.[24] This point was explicitly made in the 1788 Connecticut case of *Pettis v. Warren*.[25] In a black slave's suit for freedom, one juror was challenged for having a pre-existing opinion "'that no negro, by the laws of this state, could be holden a slave.'" Affirming the trial court's overruling of the challenge, the Connecticut supreme court held that "[a]n opinion formed and declared upon a general principle of law, does not disqualify a juror to sit in a cause in which that principle applies." Indeed, the court observed that the jurors in every case could "all be challenged on one side or the other, if having an opinion of the law in the case is ground of challenge." Jurors, the Connecticut court believed, were "supposed to have opinions of what the law is," since they sat as "judges of law as well as fact."[26]

One might infer further that jurors came to the court with similar preconceptions about the law, at least as it applied to disputes that frequently came before them. Indeed, one cannot escape this inference without abandoning all efforts to understand how eighteenth-century government functioned. If jurors came to court with different and possibly conflicting opinions about substantive law, one would expect to find, first, that juries had difficulty reaching unanimous verdicts and that mistrials due to hung juries were correspondingly frequent, and second, that different juries at different times would reach different, perhaps inconsistent verdicts, thereby making the law so uncertain and unpredictable that people could not plan their affairs.[27]

In fact, no such evidence exists. On the contrary, the available evidence suggests that juries had so little difficulty reaching verdicts that they often heard and decided several cases a day. No one in the mid-eighteenth century complained about the inconsistency of jury verdicts, and as soon as such complaints were heard in the century's last decade, the system of jury law-finding began to disintegrate.[28]

One final inference must be drawn. We know that eighteenth-century juries mirrored the white, male, landholding, and taxpaying population. It follows that, if jurors shared similar ideas about the substance of the law, then a body of shared ideas about law must have permeated a large segment of the population of every territory over which a court that sat with a jury had jurisdiction. Colonial government may have been able to derive policies from and otherwise function on the basis of those shared values.[29]

Colonial communities, in short, were si-

multaneously democratic and governed by fixed laws. A word must be said about how such a system of governance was possible. Those who have lived amidst the twentieth-century cacophony of conflicting interests may find it difficult to imagine how a government could act only on the basis of shared values. The eighteenth-century Anglo-American world, however, was sufficiently different from our own so that government in that era might have so functioned.

The key difference was that colonial politics existed within an established constitutional structure that colonials could not control. Parliament, in which colonials had no direct voice, alone possessed the power to decide many fundamental social and economic issues, and for the first sixty years of the eighteenth century it was willing to abide by decisions reached in the preceding century that were often favorable to the colonies. Thus, much of the grist for genuine political conflict was removed from the realm of imperial politics; absent a radical restructuring of the Anglo-American system, there was simply no point in building a political organization around the issue of whether, for example, Anglicans would be tolerated in Massachusetts or whether Americans would be free to trade with French Canada without restriction.[30]

Provincial politics were not radically different. Colonial legislatures were under American control, but they could not effectively enact legislation that significantly altered the structure of colonial society, since such legislation would almost always be vetoed by a colonial governor or by London. As a result, colonial legislation usually consisted of mere administration: raising and appropriating small amounts of tax money, distributing the even smaller amounts of government largess, and legislating as necessary to keep the few governmental institutions functioning. Even when provincial political conflict occurred, it rarely involved important social issues.[31]

The coming of independence, however, significantly reshaped American politics. Independence introduced a new political style in stark contrast to the mid-eighteenth-century style of government by consensus. Over the course of the next several years, the Continental Congress had to raise and support an army, appoint commanding generals, negotiate with foreign powers, and govern the vast territories in the trans-Appalachian West that the United States acquired from Great Britain in the 1783 peace treaty acknowledging American independence. In performing these tasks, Congress and other national officials had to make choices among possible policies that were in conflict with each other—choices that favored some American interests over others and thus could not be made on the basis of principles or values with which nearly everyone agreed.[32]

These national issues impacted local politics. Most significant of all were the divisions in local communities resulting from the Revolutionary struggle itself, as citizens who identified themselves as Patriots came into conflict with Loyalists, those who remained committed to the cause of Parliament and the Crown. These conflicts sundered communities and often resulted in the exile of Loyalists and the confiscation of their properties.[33]

Little changed with the coming of peace. In order to obtain independence and secure British evacuation of all outposts in the newly recognized American territories, Congress had agreed in the 1783 treaty that individual British creditors would suffer no impediments to the collection of debts owed to them by Americans. But several states refused to honor this provision in the treaty and placed various impediments in the path of British creditors. Prospective lenders in Great Britain, knowing they would face future impediments as creditors, responded by tightening credit, while the British government reacted by refusing to evacuate outposts in the western portions of the new United States that the 1783 treaty had obligated it to surrender. As a result, Americans seeking to borrow money found it more difficult and expensive to do so, and those seeking to settle or otherwise exploit the West

found the British army and its Indian allies in their path.[34]

These actions by several American states, by British lenders, and by the British government created political divisions in local American communities that would endure into the early nineteenth century. On the one side were debtors who did not want Congress to interfere with state policies that made debt collection more difficult. Pitted against them were pioneers who found the British blocking their westward movement and business entrepreneurs seeking to borrow funds to expand their operations; they wanted a stronger national Congress that could compel the states to obey the peace treaty.[35]

Above all, independence destroyed the constitutional order that had existed for a century in the British North American world. No longer were fundamental questions such as the distribution of power among various levels of government, the continuance of religious establishments, and the freedom of American merchants to trade abroad resolved by an imperial law that the colonies had little direct power to control. Independence compelled Americans to resolve such questions anew, often on a national rather than a local basis. Independence meant that newly independent Americans, unlike their colonial ancestors, would routinely need to make choices among competing policies and, as a result of those choices, structure the world in which they wanted to live. The post-Revolutionary generation's grapplings with these questions portended social discord in both state and national politics and, during the last two decades of the eighteenth century, provoked some of the most vituperative conflict that has ever occurred in American political history.[36]

The revolutionary struggle and the attainment of independence also transformed American society and politics ideologically. In discarding British rule and reconstituting their governments, Americans proclaimed that all law springs from popular will as codified in legislation. If the people could remake their government, it followed, the *Maryland Journal* declared in 1787, that the law-making power of the people must be "original, inherent, and unlimited by human authority,"[37] while the *Connecticut Courant* wrote that there was "an original, underived and incommunicable authority and supremacy in the collective body of the people to whom all delegated power must submit and from whom there is no appeal."[38]

This concept of legislation as the creation of new law by the people or their representatives proved practically significant after independence because groups such as religious dissenters and westward expansionists used it to promote their interests. Before the Revolution, policies imposed by London had tended to restrict westward expansion and to require that dissenters support established churches. Once independent Americans could formulate their own policies, however, both religious dissenters and westward expansionists campaigned to revise established policies. Legislatures frequently responded by changing inherited rules and practices, and in the process changed themselves as well. By enacting new law, legislatures reinforced the ideology of popular lawmaking power and forged an active, creative legislative process in lieu of one that had depended on the derivation of rules from preexisting shared principles.[39]

This transformation occurred, however, in a society unprepared to abandon blithely the pre-Revolutionary ideal that human law must conform to fundamental principles of divine or natural law. The older ideal persisted throughout the late 1770s and the 1780s. Post-Revolutionary Americans continued, in the words of Alexander Hamilton, to believe in "eternal principles of social justice"[40] and to object to legislation "founded not upon the principles of Justice, but upon the Right of the Sword" and for which "no other Reason [could] be given . . . than because the Legislature had the Power and Will to enact such a Law."[41] Thinkers like James Madison, arguing at the time of the Constitutional Convention for a congressional

power to negate state legislation, noted in a letter to George Washington that America needed "some disinterested & dispassionate umpire" to control "disputes between different passions & interests in the State[s]."[42]

The conflict between advocates of the people's transcendent power to make law and adherents of older notions of the inherent rightness and immutability of law emerged with sharp clarity in a series of state-court cases during the 1780s and 1790s establishing the doctrine of judicial review. In a New York case, *Rutgers v. Waddington*,[43] for example, the "supremacy of the Legislature . . . *positively* to enact a law" was pitted against "the rights of human nature" and the "law of nature."[44] Similarly, in *Trevett v. Weeden*,[45] a Rhode Island act that penalized without jury trial anyone who refused to accept the state's paper currency was challenged as "contrary to the laws of nature" and violative of the "fundamental right" of "trial by jury."[46]

But, as late as the early 1790s, the line between believers in popular sovereignty and believers in supreme fixed principles was rarely so plainly drawn. One could still believe simultaneously in the people's power to make law and in the immutability of the principles underlying law. Although it appreciated and accepted popular lawmaking, the Revolutionary generation did not abandon older notions that law made by the people must not violate rights that Americans had proclaimed immutably theirs in the struggle with England. New and old ideas coexisted as the Revolutionary generation, believing in the people's inherent goodness, simply assumed that all laws made by the people would be consistent with fundamental rights.[47]

As the 1790s progressed, however, this ambivalent legal ideology proved merely transitory and diverged into two clearer, more coherent points of view. One sought to resolve all issues according to the will of the people, while the other sought to resolve them according to fixed principles of law. The appearance of these competing ideologies was closely related to the division in American politics in the 1790s between the Federalists, who generally viewed law as a reflection of fixed and transcendent principles, and the Republicans, who considered it the embodiment of popular will.[48]

Historians generally agree that the first truly national political organizations arose in the mid-1790s in response to the French Revolution and the signing of Jay's Treaty with Great Britain. These two events forced Americans to choose sides in the worldwide struggle between Britain and France that began in 1793, and for many the choice posed difficult ideological issues. Some Americans found themselves horrified by the excesses of the French Revolution during the early 1790s and by its culmination in the politically driven executions of the Reign of Terror; others, while not approving of the death and violence, remained convinced that the French republican movement would ultimately warrant American sympathy. Similarly, some thought that John Jay paid too high a price for British withdrawal from the Northwest Territory when he agreed in his treaty to have the federal government, in return, pay Revolutionary-era debts still owed to British creditors.[49]

The political divisions of the mid-1790s reflected ideological concerns as well. For example, the Federalists saw in Jefferson and the Republicans many of the threats to religion, to life, and to property that they found so horrifying in French revolutionaries. The election of 1800, according to one Federalist campaign tract, would require voters to select either "GOD—AND A RELIGIOUS PRESIDENT; or impiously declare for JEFFERSON—AND NO GOD!!!"[50]

This widespread Federalist concern over Jefferson's lack of traditional religious belief gained credence from the efforts of prominent elements in the Jeffersonian coalition in states such as Massachusetts and Virginia to pull down the state-supported churches that those colonies had erected at the time of their earliest settlements.[51] For people who lived in an

age that had had little experience with societies that had maintained their stability without the assistance of such established churches, it was plausible to fear, as did a Federalist preacher in one 1800 election sermon, that if "the restraints of religion [were] once broken down, as they infallibly would be, by leaving the subject of public worship to the humors of the multitude, . . . we might well defy all human wisdom and power to support and preserve order and government in the State[s]."[52]

If the Federalists were convinced that conferral of power upon Republicans would subvert morality and lead to violence and anarchy, the Republicans were equally convinced that, if allowed to retain power, the Federalists would subvert republican liberties and rule autocratically. These fears of a Federalist conspiracy to pervert American liberties came to a climax during the administration of President John Adams, who held office from 1797 to 1801. It was during his term that Congress for the first time in American history imposed a direct tax, voted to establish a standing army and navy, and adopted the Alien and Sedition acts, pursuant to which Jeffersonian editors were sent to jail for criticizing government policies.[53]

In short, clear-cut party divisions had emerged by the second half of the 1790s. On one side stood the Republicans, avowing, in the words of James Madison, "the doctrine that mankind are capable of governing themselves"[54] and accused by their opponents of scheming "to introduce a new order of things as it respects *morals* and *politics*, *social* and *civil* duties."[55] Opposite them stood the Federalists, claiming, in the words of the *New England Palladium*, to preserve "that virtue [which] is the only permanent basis of a Republic"[56] and accused of attempting to restore monarchical government.[57]

These two competing political theories were deeply rooted in still-fresh American political experiences; they responded to ardently felt political needs. Republicans in 1800 could look back upon a quarter-century of fervid political activity during which a majority of the people had transformed the American constitutional landscape. In light of this, Republicans could plausibly hold that the popular majority would secure revolutionary improvements in government through continued exertion.[58]

Federalists, on the other hand, looked back on a different governmental tradition. They focused upon the workings of local government, which, even after twenty-five years of revolutionary transformation, continued to function without falling under the arbitrary control of those in positions of power. Federalists recognized a tradition, that is, of government by customary norms whose validity all right-thinking people accepted. That such traditional government seemed under attack in 1800 and unable to resolve every political issue was not startling; eighteenth-century government-by-consensus had always been somewhat unstable and unequipped to resolve all problems. Nevertheless, it had succeeded in many matters, and even its partial success offered hope to those in 1800 who dreaded government solely by majority will.[59]

Marbury v. Madison[60] came before the Supreme Court immediately after the conflict between these two approaches to politics had come to a head in the election of 1800, in which Thomas Jefferson defeated John Adams's reelection bid. The election unfortunately did not put an end to partisanship. Within a few months, partisan Federalist leaders of the lame-duck Congress that met in December 1800 promptly enacted the Judiciary Act of 1801, which revamped the lower federal judiciary.[61]

It is essential to appreciate how the Judiciary Act of 1801 upset a series of compromises, made at the Constitutional Convention and in the First Congress, between those who had wanted no federal courts and those who wanted an extensive judicial system. Specifically, the act gave federal courts jurisdiction to hear all cases involving questions of federal law, and, in addition, lowered from

$500 to $100 the minimum amount of money that a plaintiff had to claim in order to bring a federal suit.

As a result of these changes, many more Americans could have been summoned into federal courts. Moreover, the 1801 act made those courts more efficient. In particular, it created sixteen new circuit judges, who collectively would have had a substantially greater capacity to determine lawsuits than the six Supreme Court judges who had been riding circuit under the 1789 act.[62]

The Judiciary Act of 1801 became law on February 13—less than three weeks before John Adams's term as President expired. Undaunted, Adams managed to appoint and obtain Senate confirmation for the sixteen new circuit judges, all of them Federalists, as well as for several judges of courts, newly created by an act of February 27, 1801, in the District of Columbia. Unfortunately, Secretary of State Marshall was unable to deliver the commission for one of the new justices of the peace for the District, a certain William Marbury, before the end of President Adams's term, and James Madison, the new Secretary of State, refused to make the uncompleted delivery. Upon his refusal, Marbury brought a suit for a writ of mandamus[63] against Madison in the Supreme Court, and thus the case of *Marbury v. Madison* began.[64]

But before the Court could hear the case, Congress, now under the control of the Jeffersonian Republicans, intervened and passed the Judiciary Act of 1802, which repealed the Judiciary Act of 1801. Cases pending in the new circuit courts established under the 1801 act were transferred by the 1802 legislation back to the old circuit courts that had existed under the 1789 act. Congress also postponed the next Term of the Supreme Court until 1803 so that the Court could not rule on the constitutionality of the 1802 act before the act went into effect.[65]

Nonetheless, in one case so transferred, *Stuart v. Laird*,[66] the defendant argued that the 1802 repeal act, and hence the transfer of his case, was unconstitutional. When his argument was rejected in the lower court, he appealed to the Supreme Court. Decided only six days after *Marbury*, *Stuart* became, in effect, a companion case in determining the legitimacy of the judicial policies of both Federalists and Republicans during the transition from the Adams to the Jefferson administration.[67]

Marbury v. Madison and *Stuart v. Laird*, both decided in 1803, thus created the possibility of a direct confrontation between the Federalist judiciary left over from the Adams administration and the new Jeffersonian Congress. In such a confrontation, Congress would have been very much on the offensive. As one Republican newspaper, the *Boston Independent Chronicle*, warned in 1803, any attempt "of federalism to exalt the Judiciary over the Executive and Legislature, and to give that favorite department a political character & influence" would "terminate in the degradation and disgrace of the judiciary."[68] However, Chief Justice Marshall, by nature a compromiser, was not inclined to take up this Republican challenge and generate a clash with President Jefferson and his Republican Congress.[69]

John Marshall had no propensity to turn *Marbury* and *Stuart* into instances of judicial review of the sort that the Jeffersonians feared. Although Chief Justice Marshall was prepared, as he wrote, to "disregard" the pressures of partisan politics when they were "put in competition with . . . his duty" to uphold the law, and always kept in mind the desirability of adjudicating at least some matters by a nonmajoritarian standard, he and his fellow Federalist Justices, with the possible exception of Justice Samuel Chase, were not elitist antidemocrats. They appreciated the need to steer clear of partisan controversy and not to challenge unnecessarily legislation enacted by democratic majorities. As Marshall's private correspondence with his colleagues in the opening years of the 1800s indicates, the Chief Justice and his colleagues were fully aware of "[t]he consequences of refusing to

carry . . . into effect" a law enacted by a popular majority.[70]

Marshall and the other Justices, in short, strove to reconcile popular will and legal principle, not to make one either superior or subservient to the other. They had no intention of behaving as the Supreme Court ultimately would in *Cooper v. Aaron*,[71] where the Court for the first time in its history explicitly announced that it possessed exclusive power to interpret the Constitution. Unlike the Justices in *Cooper*, Marshall and his colleagues did not declare themselves to be the ultimate arbiters of the nation's constitutional policy choices, with power to bind coordinate branches of government to their judgments of constitutionality and thereby invalidate popularly supported legislative politics inconsistent with the constitutional values they favored. *Marbury v. Madison* and *Stuart v. Laird* were much narrower decisions.[72]

John Marshall and the other Federalist Justices achieved their narrow goals in *Marbury* and *Stuart* by distinguishing between the domain of law and the domain of politics. Indeed, the foundation of Marshall's constitutional jurisprudence is the distinction between political matters, to be resolved by the legislative and executive branches in the new democratic, majoritarian style, and legal matters, to be resolved by the judiciary in the government-by-consensus style that had prevailed in most eighteenth-century American courts. Marshall, of course, invented neither style, nor did he first apply the latter to the adjudicatory process. His creative act was to use the distinction between law and politics to circumscribe, however imperfectly, the extent to which the political, majoritarian style could engulf all government, as it was threatening in 1800 to do.[73]

Merely announcing a line between law and politics does not, of course, fully differentiate the legal from the political. It is also necessary to put content into the line by articulating consistent and precise criteria for identifying matters appropriately decided by the legal method. We need to examine both *Marbury v. Madison* and *Stuart v. Laird* in considerable detail to appreciate how John Marshall and his fellow Justices accomplished this difficult task.[74]

Marshall began the *Marbury* opinion with a narrow and technical ruling—that President Adams's signature on Marbury's commission completed Marbury's appointment to the office of justice of the peace and entitled him to the delivery of his commission. This ruling was especially important, however, because for lawyers of Marshall's generation a right to an office was analogous to a right to land or other property. It meant that Marbury possessed a vested legal right to his commission, and it led the Chief Justice to the second issue in his opinion—whether Marbury had a remedy for the deprivation of the right.[75]

Marshall recognized the difficulty of this question, for he acknowledged, as he had once told his constituents, that the people, and hence their agents in the political branches of government, must sometimes be free to act unbound by fixed legal principles. Accordingly, his central task in *Marbury* was to specify when law bound the political branches and when it did not. To do so, he and the Court distinguished between political matters, such as foreign policy, as to which the legislature and executive were accountable only to the electorate, and matters of individual rights, which the courts would protect by adhering to fixed principles.[76] In Marshall's own words, "political" subjects "respect[ed] the nation, not individual rights" and were governed by a political branch whose decisions were "never . . . examinable by the courts" but "only politically examinable."[77]

In contrast, there were cases where "a specific duty [was] assigned by law, and individual rights depend[ed] upon the performance of that duty." In such cases involving "the rights of individuals," every officer of government was "amenable to the laws for his conduct; and [could not] at his discretion sport away . . . vested rights . . . ," and a person such

as Marbury who possessed a vested right was entitled to a remedy. In Marshall's own words, "The very essence of civil liberty certainly consist[ed] in the right of every individual to claim the protection of the laws, whenever he receives an injury."[78]

Thus, William Marbury was entitled to some remedy for deprivation of his right to office. But was he entitled to the particular remedy he had sought—a writ of mandamus issued by the Supreme Court of the United States in a suit commenced before it? The Judiciary Act of 1789 authorized the Court to issue writs of mandamus, but the judiciary article of the Constitution presented a problem, in that it limited the original jurisdiction of the Supreme Court to specified categories of cases, of which mandamus was not one. In order for the Court to issue the writ, it thus would have to reach one of two conclusions: either that Congress had power to grant original jurisdiction to the Supreme Court in cases in which the Constitution denied it, or that an action for mandamus in the Supreme Court was not the commencement of an original proceeding but a form of appeal from the official against whom the writ was being sought.[79]

It is noteworthy that Marbury's counsel did not press the argument that by granting mandamus in a suit commenced before it, the Supreme Court exercised its original jurisdiction over original matters not specified in the Constitution. Instead, he mainly argued that the Court exercised appellate jurisdiction when issuing mandamus in a proceeding commenced before it. According to the thrust of his argument, which flowed from an accurate reading of *Federalist No. 81*, "the word 'appellate' [was] not to be taken in its technical sense, . . . but in its broadest sense, in which it denotes nothing more than the power of one tribunal" to have "by reason of its supremacy . . . the superintendence of . . . inferior tribunals and officers, whether judicial or ministerial."[80] In 1803, when the concept of appeal had not yet assumed its relatively narrow and precise modern meaning, that argument was plausible, and a court anxious to grant Marbury relief could easily have accepted it.[81]

However, accepting the argument would have contradicted Marshall's distinction between matters of political discretion and matters of legal right, for it would have frequently led the Court to "revis[e] and correct the proceedings in a cause already instituted"[82] in the executive branch and might thereby have brought before the Court all the issues, both of law and of fact, that the executive branch had previously considered. Such review might have continually presented the Court with political questions of executive motive. To avoid this danger and to ensure that the court serve as the purely legal institution he envisioned, Marshall had to consider a mandamus against officials, as distinguished from a mandamus against lower-court judges, as an original action in which the court granting the writ could confine the action's scope to properly legal rather than political matters. Thus, he had to reject the claim that mandamus was a direct appeal from the executive to the Supreme Court.[83]

That brought Chief Justice Marshall to the issue of whether Congress could grant the Supreme Court jurisdiction that the Constitution denied it. Marshall's answer, of course, was that Congress could not, and he accordingly declared unconstitutional Congress's grant of jurisdiction to the Court, in the Judiciary Act of 1789, to issue original writs of mandamus.[84]

This recourse to judicial review will strike many listeners as perhaps even more political than granting the writ to Marbury would have been. But Marshall did not understand judicial review as we do today. For Marshall and his colleagues on the Supreme Court, judicial review neither required nor permitted judges to exercise policy discretion. At no point in the opinion did Marshall invoke the language of natural rights, nor did he rely on precedent or other prior judicial authority. In fact, he cited only one case in his entire opinion. In short, Marshall never relied upon principles that ei-

ther were made by or required interpretation by judges.[85] On the contrary, the principles that he found fundamental acquired their authority from the "original right" of the people "to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness."[86] For Marshall and his colleagues, judicial review merely required comparison of fundamental principles incorporated by the people into the written text of the Constitution, which in the case of *Marbury* conferred original jurisdiction on the Supreme Court only in specified categories of cases and declared its jurisdiction to be appellate in all other cases, with the text of legislation, which gave the Court original jurisdiction over a category not within the Constitution's specifications.[87]

Of course, the propriety of exercising the power of judicial review was not without doubt prior to *Marbury v. Madison*. Still, whatever ambiguity may have existed, the Marshall Court's assumption of the power of judicial review was hardly unprecedented. No one, of course, wanted the Court to assume policy-making powers. But the Chief Justice gave adequate reassurance that it would not when he announced that the Court would consider only legal and not political issues and then struggled, in those portions of the *Marbury* opinion that we now tend to ignore, to articulate a standard that would minimize the Court's political involvement.[88]

In sum, the distinction between legal and political decisionmaking runs throughout the *Marbury* opinion and is essential to our understanding of the case. It explains, for example, how Marshall could plausibly believe that judicial review involved, not an exercise of political discretion by the Court, but merely a juxtaposing of statute with Constitution to see if they conflicted. When the Court could resolve a case according to seemingly fixed principles, rather than transient policies, Marshall believed judicial review fell on the law side of the distinction and involved merely the judiciary's judicial protection of immutable, individual rights. In contrast, a case that required the Court to choose among transient policies or otherwise to exercise political discretion was not, in Marshall's estimation, an appropriate case for judicial review.

The distinction between law and politics outlined in *Marbury* gained force six days later from the Court's disposition of the other case pending before the Court that questioned the constitutionality of an act of Congress. *Stuart v. Laird* passed upon the Republicans' Judiciary Act of 1802, which repealed the Federalists' Judiciary Act of 1801.[89]

Federalists had contended in Congress that the 1802 Act was unconstitutional because it deprived judges appointed under the 1801 Act of the lifetime tenure guaranteed by Article III, Section 1 of the Constitution. The 1802 Act was also said to be unconstitutional because it required Supreme Court Justices to sit as trial judges in circuit courts, thereby conferring an original jurisdiction that, the argument contended, only the Constitution could confer. *Marbury*, we ought to recall, had been decided on an almost identical ground.[90]

Nonetheless, the Marshall Court sustained the 1802 Act. The apparent inconsistency between *Marbury* and *Stuart*, however, masks a deeper consistency in the Court's approach. Significantly, the Court in *Stuart* never faced the contention that would have most troubled it: that the 1802 Act unconstitutionally deprived judges of a right to hold office. That contention would have involved issues of legally enforceable private rights, but it was not even raised, for Stuart was not one of the judges deprived of office; he was merely a litigant objecting to the transfer of his case from a court constituted under the 1801 Act to a court constituted under the 1802 Act. His complaint raised no issue of fundamental private rights, only issues of Congress's political power to organize the lower federal courts.[91]

There were two such issues. First, could Congress require a litigant to pursue his remedies in one court rather than another? As Marshall would suggest twenty-four years later in

Ogden v. Saunders,[92] the legislature clearly could control remedies. Second, could Congress require Supreme Court Justices to ride circuit and thereby exercise an original jurisdiction not enumerated in the Constitution?[93]

Marbury had decided, of course, that Congress could not expand the Supreme Court's original jurisdiction, but *Stuart* could be distinguished from *Marbury*, in that the 1802 Judiciary Act required individual Justices, not the full Court, to exercise original jurisdiction. Further, as Justice Paterson explained for the unanimous Court, the 1802 Act merely confirmed "practice and acquiescence" by Supreme Court Justices "commencing with the organization of the judicial system." Such practice and acquiescence "afford[ed] an irresistible answer" to the claim of unconstitutionality; it was a "practical exposition . . . too strong and obstinate to be shaken or controlled," and "indeed fixed the construction" of the Constitution. The fact that the Justices had performed the circuit duties imposed under the 1789 Judiciary Act put "the question . . . at rest."[94] In *Marbury*, on the other hand, no strong public sentiment, precedent, or established practice stood in the way of holding that the Constitution's language prohibited the issuance of mandamus as a matter of original jurisdiction.

But a more fundamental fact distinguished *Marbury* from *Stuart*. By invalidating the Republican-sponsored Judiciary Act of 1802, the Marshall Court would have embroiled itself in a political contest with Congress and the President that it might not have survived. If the Court was to withdraw from politics, as Marshall had said in *Marbury* it would, it had to capitulate to legislative judgments upon such politically controversial issues as the constitutionality of the 1802 Act.[95]

Accordingly, the Court sustained the act. By contrast, the only way to avoid the politics behind *Marbury* had been to construe the Constitution in a way to which few would object and thereby invalidate section 13 of the 1789 Judiciary Act. To have issued a writ of mandamus to James Madison as Secretary of State would have thrust the Court into a political crisis. The Court's only other option—to hold on substantive grounds that Marbury had no right to the mandamus—would have denied some individuals access to the courts to enforce their legal rights. In short, to maintain Marshall's compromise—that courts would protect legal rights but refrain from adjudicating political questions—the Court had to decide both *Marbury* and *Stuart* as it did.[96]

Thus, in two of the earliest cases decided by the Supreme Court following the 1800 election, Chief Justice John Marshall and the other Federalist Justices on the Court publicly addressed the task of reconciling popular will, which had provided the basis for the Jeffersonian-Republican victory in the election, and immutable principles, in which they, as well as many fellow citizens, continued to place their faith. As such, *Marbury* and *Stuart* were central to the process of differentiating law from politics and declaring that the Supreme Court would abstain from the exercise of political judgment.[97]

Although many historians will disagree, I remain convinced that judicial review took root in early nineteenth-century America only because Marshall and his contemporaries believed, at some level, that the principles underlying constitutional government were nonpolitical—that is, that those principles existed independently of the will of the judges who applied them as well as the will of the political actors who flouted them. Of course, their belief was largely unarticulated, since they found its articulation as difficult as we find it to spell out our comparable beliefs. But, at the same time that the principles underlying *Marbury* were largely unarticulated, they also were unproblematic, because political elites, the only people who discussed such issues, accepted the Justices' views. When elements of the elite did not agree with the Marshall Court's views, as, for instance, on issues of the scope of federal and state powers, the Court refused to act in an independent political fashion and to impose its

own views but merely enforced the legislation that had been adopted by the majority of the Congress.[98]

It is essential to emphasize, however, that by eschewing independent political decision-making, the Court did not entirely remove itself from the political process. Cases as politically controversial as *Marbury* and *Stuart* still continued to find their way onto the Supreme Court's docket, and the Court continued to decide them. The Justices also continued to behave strategically, as Marshall had in *Marbury*, where in dictum he proclaimed the Court's authority to enforce the law and lectured the President for violating it and then turned to the less controversial doctrine of judicial review as the foundation for a judgment acceptable both to the President and to Congress. But until it invalidated the Missouri Compromise in *Scott v. Sandford*[99] some fifty-four years after *Marbury*, the Court never struck down a legislative policy judgment for which a substantial nationwide political majority had voted and to which many voters in the polity still adhered. In that sense, the Marshall Court in *Marbury v. Madison* took itself out of politics.[100]

As soon as the Supreme Court had handed down its decisions in *Marbury v. Madison* and *Stuart v. Laird*, most political observers recognized the importance of the two cases. Both Federalist and Republican newspapers took note of the decisions and apprised readers of their significance. On the whole, they also approved of Marshall's efforts. Although President Jefferson in later years would privately criticize the *Marbury* decision, he did not criticize it at the time the decision came down. Likewise, there was no criticism from Congress, which happened to be in session at the time of the decision. Similarly the Republican press, while giving extensive coverage to the decision, refrained from attacking it, while the Federalist press was, of course, supportive. Although the Marshall Court would later decide contentious issues and become engulfed in controversy, there was a general consensus that the Court had correctly decided both *Marbury v. Madison* and *Stuart v. Laird*. Only the political fringes of the Jeffersonian and Federalist parties had any doubts about the two decisions.[101]

Why, we need to ask, did *Marbury* and *Stuart* seem so important and at the same time generate so little controversy? Several explanations come to the surface, such as the Court's announced withdrawal from politics and the widespread acceptability of a nonpolitical doctrine of judicial review. But the main reason for *Marbury's* widespread acceptability, in my view, was the idea implicit in the opinion that courts should use law to protect private property. Such protection of property—an ideal at the core of John Marshall's jurisprudence—appealed to politically active Americans, most of whom either owned private property or expected to own it at some point in their lives. No organized or identifiable groups or parties had yet formed to urge redistribution of wealth, and thus, when judges struck down statutes that took or regulated property without providing compensation, their decisions seemed nonpolitical. The scope of state power over private property was not yet a politically divisive one in the early nineteenth century, but one for which judges could find answers by reference to broadly shared beliefs about the nature of republican government.[102]

As one surveys the cases between about 1790 and 1820 involving claims that state statutes violated state constitutions or that federal statutes violated the Federal Constitution, a persistent pattern emerges. The pattern discloses that by 1820 the courts had begun to hold legislation unconstitutional with some frequency, but that their working understanding of the scope of their constitutional activity was sufficiently different from ours that, although we term their activity judicial review, we must not lose sight of the difference.[103]

Early nineteenth-century courts, unlike our own, still sought to leave—and in fact succeeded in leaving—to legislatures the resolu-

tion of conflicts between organized social interest groups. Once a legislature had resolved a conflict in a manner having widespread public support, judges would in practice view the resolution as that of the people at large, even though one or more organized groups continued to oppose it, and would give it conclusive effect, at least as long as a finding of inconsistency with the Constitution was not plain and unavoidable. Judges of the early nineteenth century, such as John Marshall, unlike judges of today, did not see judicial review as a mechanism for protecting minority rights against majoritarian infringement. Early judicial review rested instead upon a perception that, as to some issues, "the people" were a politically homogeneous and cohesive body possessing common rights, such as property, that courts had a legal obligation to protect.[104]

But the consensus underlying the early nineteenth-century practice of judicial review could not endure. As the circle of politically active Americans expanded during the course of the century, constitutional principles, especially principles about the sanctity of private property, became the subject of political debate. Farmers and urban laborers began to demand that the property of the wealthy be regulated and even redistributed. With this demand, Marshall's line between law and politics became blurred, and some new foundation for judicial review was needed.[105] That foundation was laid in the late 1930s when the Court ceased giving real scrutiny to congressional legislation regulating the economy but began strictly scrutinizing invasions of personal rights. As I have shown in a recent book entitled *The Legalist Reformation*, the concept elaborated in footnote 4 of *Carolene Products*—that the rights of discrete and insular minorities merit special judicial protection—was not politically controversial when Justice Stone announced it; indeed, the principle of protecting minorities appeared to be precisely what distinguished America from Nazi Germany. Accordingly, it served as a legal basis for judicial review at the very time that judicial protection of property rights, which once had seemed apolitical, had become politicized.[106]

It is now time to conclude. The main point I have tried to make is that the power of the Supreme Court to review the constitutionality of legislation has always rested on a perception that the Court is engaged in legal, as distinguished from political, decisionmaking. In the Marshall era, protecting property was the Court's quintessentially legal task; in more recent times, it has been the protection of minority rights. In all times, the power of the Court has rested on the differentiation of law from politics.

It is a differentiation, however, that is now being challenged. At least since Robert Bork's classic 1971 article on the First Amendment,[107] critics from the right have questioned whether the Court's rights-protective jurisprudence is truly apolitical; meanwhile, critical legal studies scholars on the left have argued that all law is merely politics.[108] Thus, the foundational principle of American constitutionalism—the differentiation of law from politics—may be crumbling. I leave it to others to decide whether to shore up this foundation or to construct something new in its place. I ask only that we honor John Marshall for elaborating the bedrock principle on which we have grounded American constitutionalism for the past two centuries and on which his successors, perhaps, will continue to ground it for centuries to come.

ENDNOTES

[1]This lecture was derived mainly from William E. Nelson, ***Marbury v. Madison*: The Origins and Legacy of Judicial Review** (Lawrence, Kan.: University Press of Kansas, 2000), and William E. Nelson, "The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence," *Michigan Law Review*, 76 (1978), 893.

[2]1 Cranch (5 U.S.) 137 (1803). For classic interpretations of the case by Progressive historians, *see* Albert J. Beveridge, **The Life of John Marshall** (Boston: Houghton Mifflin, 4 vols., 1916–1919); Felix Frankfurter, **The Commerce Clause under Marshall, Taney and Waite**

(Chapel Hill, N.C.: University of North Carolina Press, 1937); and Charles Warren, **The Supreme Court in United States History** (Boston: Little Brown, 2 vols., 1922). For more recent interpretations in the same mold, *see* Robert G. McCloskey, **The American Supreme Court** (Chicago: University of Chicago Press, 1960); J. M. Sosin, **The Aristocracy of the Long Robe: The Origins of Judicial Review in America** (Westport, Conn.: Greenwood Press, 1989); and Christopher L. Eisgruber, "John Marshall's Judicial Rhetoric," *1996 Supreme Court Review* (Chicago: University of Chicago Press, 1997), 439. Most recent scholarship, however, tends to place the *Marbury* decision in the context of late eighteenth- and early nineteenth-century politics and ideas as elaborated by historians such as Bernard Bailyn, **The Ideological Origins of the American Revolution** (Cambridge, Mass.: Harvard University Press, 1967); John Phillip Reid, **Constitutional History of the American Revolution** (Madison, Wis.: University of Wisconsin Press, 1995); and Gordon S. Wood, **The Creation of the American Republic, 1776–1787** (Chapel Hill, N.C.: University of North Carolina Press, 1969). *See* Robert Lowry Clinton, ***Marbury v. Madison* and Judicial Review** (Lawrence, Kan.: University Press of Kansas, 1989); Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (Lawrence, Kan.: University Press of Kansas, 1996); Sylvia Snowiss, **Judicial Review and the Law of the Constitution** (New Haven: Yale University Press, 1990); Larry D. Kramer, "Foreword: We the Court," *Harvard Law Review*, 115 (2001), 4; James M. O'Fallon, "Marbury," *Stanford Law Review*, 44 (1992), 219.

[3]Gettysburg Address, in Henry Steele Commager and Milton Cantor, eds., **Documents of American History**, I (Englewood Cliffs, N.J.: Prentice Hall, 10th ed., 1988), 107, 110.

[4]Massachusetts Bill of Rights, 1780, in Commager and Cantor, eds., **Documents of American History**, I, 107, 110.

[5]*See* Nelson, ***Marbury v. Madison***, 10–13.

[6]*See id.*

[7]*Annals of Congress*, 18 (1802), 110 (remarks of Senator Hillhouse).

[8]Josiah Quincy's Argument for the Defense in *Rex v. Wemms* (1770), in L. Kinvin Wroth and Hiller B. Zobel, eds., **Legal Papers of John Adams**, III (Cambridge, Mass.: Harvard University Press, 1965), 160.

[9]Lyman H. Butterfield, ed., *The Diary and Autobiography of John Adams*, I (Cambridge, Mass.: Harvard University Press, 1961), 167.

[10]James Otis, "The Rights of the British Colonies Asserted and Proved," in Bernard Bailyn, ed., **Pamphlets of the American Revolution, 1750–1776**, I (Cambridge, Mass.: Harvard University Press, 1965), 454.

[11]*The Crisis, Number XI* (New York, 1775), 81–87, quoted in Gordon S. Wood, **The Creation of the American Republic, 1776–1787** (Chapel Hill, N.C.: University of North Carolina Press, 1969), 266.

[12]*See* Nelson, ***Marbury v. Madison***, 10–15.

[13]*See* Nelson, "Eighteenth-Century Background," 904–917.

[14]Wroth and Zobel, eds., **Legal Papers of John Adams**, I, 230.

[15]Grand Jury Charge, 1759, in Cushing Papers, vol. I, quoted in William E. Nelson, **Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830** (Cambridge, Mass.: Harvard University Press, 1975), 26.

[16]Quoted in Wood, **Creation of American Republic**, 297.

[17]*Commonwealth v. Garth*, 3 Leigh 761, 30 Va. 825, 838 (General Ct. 1831) (Leigh's amicus curiae brief).

[18]*See* Nelson, "Eighteenth-Century Background," 911–12.

[19]*See ibid.*, 913–16.

[20]Wroth and Zobel, eds., **Legal Papers of John Adams**, I, 230.

[21]Thomas Jefferson, **Notes on the State of Virginia** (Richmond, Va: J. Randolph ed., 1853), 140.

[22]*Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794).

[23]*See* Nelson, ***Marbury v. Madison***, 19–21.

[24]*See ibid.*, 21.

[25]Kirby 426 (Conn. Sup. Ct. 1788).

[26]*Ibid.*, 427.

[27]*See* Nelson, ***Marbury v. Madison***, 21–22.

[28]*See ibid.*, 22.

[29]*See ibid.*, 22–23.

[30]*See* Nelson, "Eighteenth-Century Background," 922.

[31]*See ibid.*, 922–23.

[32]*See* Nelson, ***Marbury v. Madison***, 28–30.

[33]*See ibid.*, 30.

[34]*See ibid.*, 30–31.

[35]*See ibid.*, 31.

[36]*See ibid.*, 31–32.

[37][Baltimore] *Maryland Journal*, February 20, 1787, quoted in Wood, **Creation of the American Republic**, 371.

[38][Hartford] *Connecticut Courant & Weekly Intelligence*, August 12, 1783, p. 2, col. 3.

[39]*See* Nelson, "Eighteenth-Century Background," 925.

[40]Hamilton's Second Letter from Phocion, 1784, in Harold C. Syrett and Jacob E. Cooke, eds., **Papers of Alexander Hamilton**, III (New York: Columbia University Press, 1962), 550.

[41]Petition of Salem, October 12, 1784, quoted in Wood, *Creation of the American Republic*, 406 n.22.

[42]James Madison to George Washington, April 16, 1787, in Gaillard Hunt, ed., **The Writings of James Madison**, II (New York: G. P. Putnam, 1901), 346.

[43](N.Y. Mayor's Ct. 1784), in American Historical Asso-

ciation, **Select Cases of the Mayor's Court of New York City 1674–1784** (Washington, D.C.: American Historical Association, Richard B. Morris ed., 1935), 302.

[44]*Ibid.*, 312, 323.

[45]James Varnum, **The Case, Trevett Against Weeden** (Providence, R.I., 1787).

[46]*Ibid.*, 11, 29.

[47]*See* Nelson, "Eighteenth-Century Background," 928.

[48]*See ibid.*, 928–929.

[49]*See* Nelson, ***Marbury v. Madison***, 38.

[50]Campaign placard, quoted in John C. Miller, **The Federalist Era 1789–1801** (New York: Harper Bros., 1960), 265 n.34.

[51]*See* Nelson, "Eighteenth-Century Background," 929–930.

[52]Election Sermon by Phillips Payson, quoted in Isaac Backus, "Government and Liberty Described and Ecclesiastical Tyranny Exposed," in William G. McLoughlin, ed., **Isaac Backus on Church, State, and Calvinism** (Cambridge, Mass.: Harvard University Press, 1968), 353.

[53]*See* Nelson, "Eighteenth-Century Background," 930.

[54]James Madison to Edmund Randolph, September 13, 1792, in Hunt, ed., **Writings of James Madison**, VI, 118.

[55]Daggett, "Sunbeams May Be Extracted from Cucumbers, but the Process Is Tedious" (1799), in Gordon S. Wood, ed., **The Rising Glory of America** (Boston: Northeastern University Press, 1971), 184.

[56][Boston] *New-England Palladium*, April 1, 1806, p. 2, col. 3, quoted in James M. Banner, **To the Hartford Convention** (New York: Knopf, 1970), 26.

[57]*See* Nelson, "Eighteenth-Century Background," 931.

[58]*See ibid.*

[59]*See ibid.*, 931–32.

[60]5 U.S. (1 Cranch) 137 (1803).

[61]*See* Nelson, ***Marbury v. Madison***, 54.

[62]*See ibid.*, 54–57.

[63]A writ of mandamus (which obtains its name from the Latin verb, "mandamus," which in translation means, "we order") is a document issued by a court which orders a defendant, in this case Secretary of State Madison, to perform a specified act, in this case to deliver a commission, on behalf of a specified plaintiff, in this case William Marbury.

[64]*See* Nelson, ***Marbury v. Madison***, 57.

[65]*See ibid.*, 58.

[66]5 U.S. (1 Cranch) 299 (1803).

[67]*See* Nelson, ***Marbury v. Madison***, 58.

[68][Boston] *Independent Chronicle*, March 10, 1803.

[69]*See* Nelson, ***Marbury v. Madison***, 58.

[70]Letters of John Marshall to William Patterson, April 6, 9 and May 3, 1803, quoted in Charles Warren, **The Supreme Court in United States History** (Boston: Little, Brown, 1922), 270.

[71]358 U.S. 1 (1958).

[72]*See* Nelson, ***Marbury v. Madison***, 59.

[73]*See ibid.*

[74]*See ibid.*, 60.

[75]*See ibid.*

[76]*See ibid.*, 60–61.

[77]5 U.S. (1 Cranch) at 166.

[78]*Ibid.*

[79]*See* Nelson, ***Marbury v. Madison***, 61.

[80]5 U.S. (1 Cranch) at 147–48.

[81]*See* Nelson, ***Marbury v. Madison***, 61–62.

[82]5 U.S. (1 Cranch) at 175.

[83]*See* Nelson, ***Marbury v. Madison***, 62.

[84]*See ibid.*, 62–63.

[85]*See ibid.*, 63.

[86]5 U.S. (1 Cranch) at 176.

[87]*See* Nelson, ***Marbury v. Madison***, 64–67

[88]*See ibid.*, 67.

[89]*See ibid.*, 67–68.

[90]*See ibid.*, 68.

[91]*See ibid.*

[92]25 U.S. (12 Wheat.) 213, 353 (1827) (dissenting opinion).

[93]*See* Nelson, ***Marbury v. Madison***, 68.

[94]5 U.S. (1 Cranch) at 309.

[95]*See* Nelson, ***Marbury v. Madison***, 69.

[96]*See ibid.*

[97]*See ibid.*, 69–70.

[98]*See ibid.*, 70.

[99]60 U.S. (19 How.) 393 (1857).

[100]*See* Nelson, ***Marbury v. Madison***, 70–71.

[101]*See ibid.*, 72.

[102]*See ibid.*, 72–76.

[103]*See ibid.*, 76–82.

[104]*See ibid.*, 82–83.

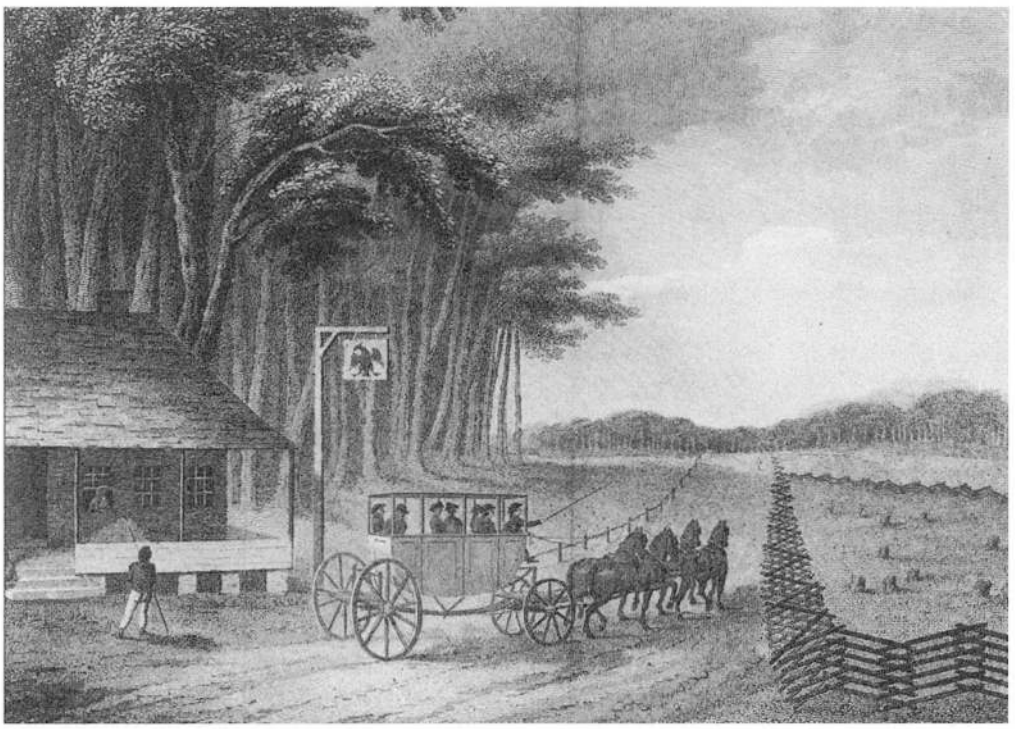
[105]*See ibid.*, 83.

[106]*See* William E. Nelson, **The Legalist Reformation: Law, Politics, and Ideology in New York, 1920–1980** (Chapel Hill, N.C.: University of North Carolina Press, 2001), 119–47.

[107]Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal*, XLVII (1971), 1.

[108]*See* John Henry Schlegel, "Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies," *Stanford Law Review*, XXXVI (1984), 391, 411. For a critique, *see* "William Nelson Replies to Robert Gordon," *Law and History Review*, VI (1988), 157, 161–168.

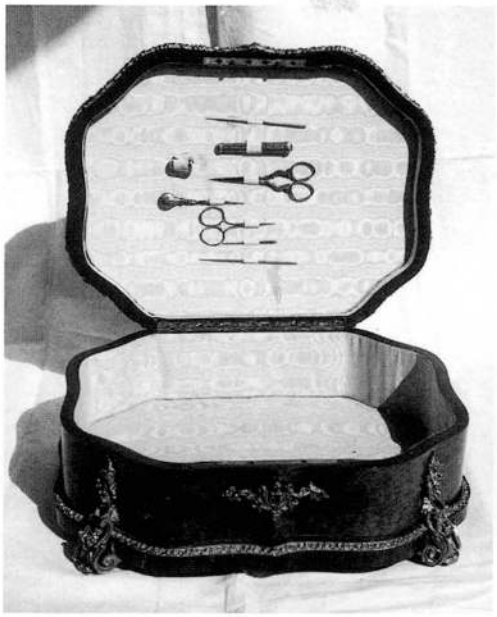
John Marshall served in Virginia's House of Delegates and maintained a prestigious legal practice in Richmond. This 1798 watercolor by Benjamin Latrobe shows Richmond from the South.



Marshall was one of several Southern lawyers who accompanied Isaac Weld, the artist who drew this painting, on a stagecoach journey in the 1790s.

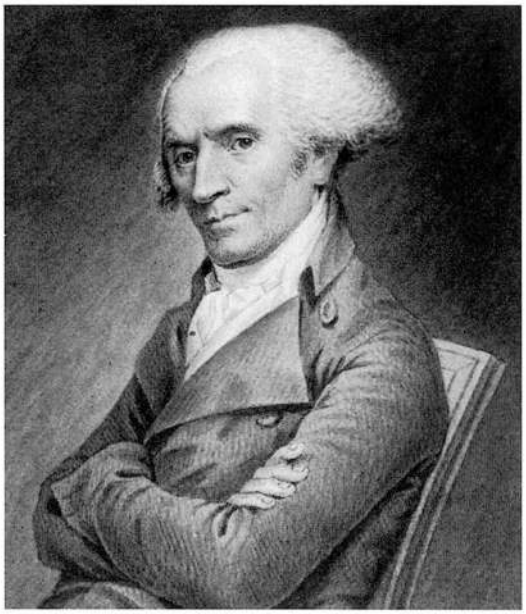
John Marshall's wife, Mary Willis Ambler, known as Polly, was the daughter of the state treasurer of Virginia. Although she suffered from a neurotic disorder and was an invalid in later years, her husband's affection for her remained constant. They had ten children together, raising six to adulthood.

John Marshall fought as an officer in the Revolution, almost freezing during the exceptionally cold and snowy winter of 1777–1778. This 1866 print shows President Washington greeting the Committee of Congress at Valley Forge.

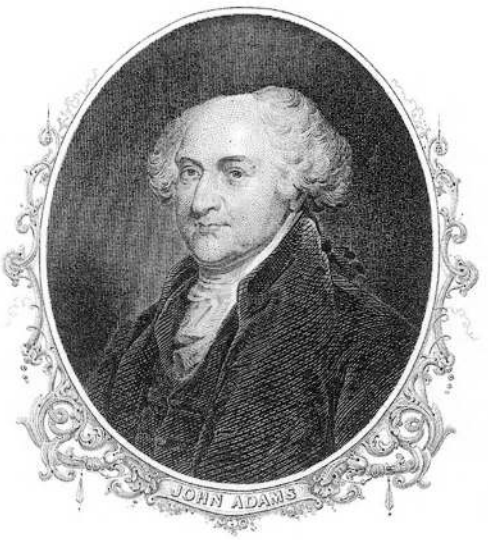


A sewing box and an easy chair from the John Marshall House (below) in Richmond. Although born in a log cabin on the Virginia frontier, Marshall lived in this house from 1790 to 1835. It was opened to the public in 1913.

Sent on a mission to France to reduce hostilities and avert war, John Marshall, Elbridge Gerry, and Charles Cotesworth Pinckney were asked by agents of Talleyrand, the foreign minister, for a $250,000 bribe and a $10 million loan to France before they would even consider holding talks. This anti-French cartoon depicts the insulted Americans refusing to pay the five-headed French Directory, while revolutionaries feast on frogs in the shadow of a guillotine.



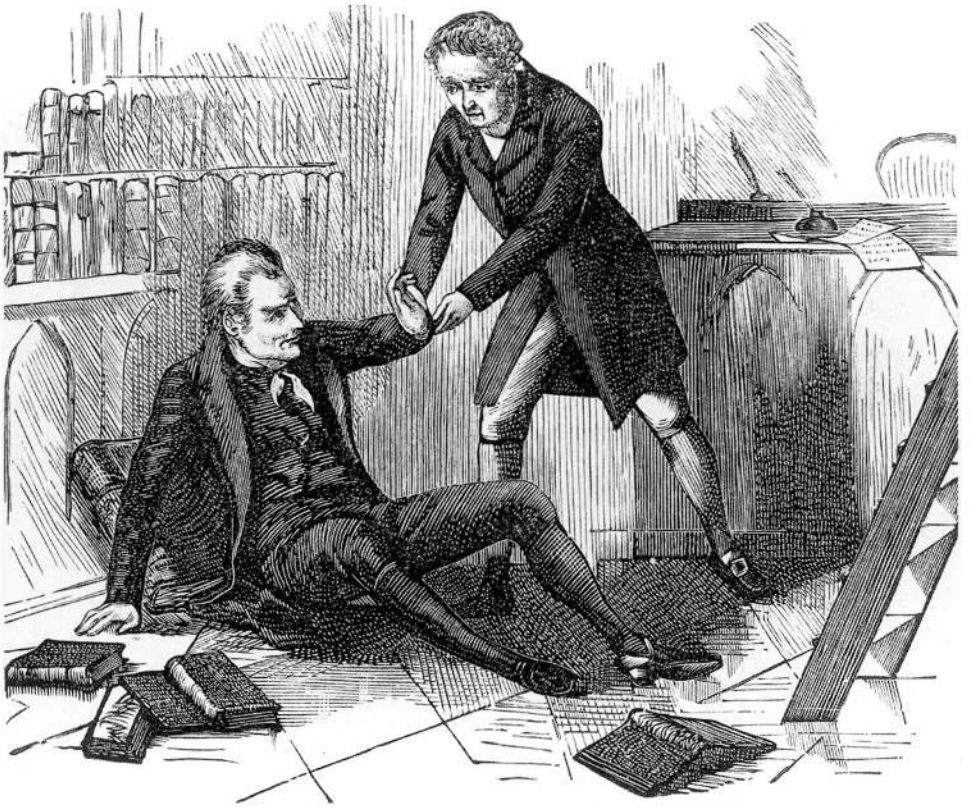
Charles Coteswoth Pinckney (left) was a respected lawyer and political leader in Charleston who played a prominent role in drafting the US Constitution. He and Elbridge Gerry (right) served with John Marshall on the ill-fated diplomatic mission to Paris in 1798.



Outgoing President John Adams (left) sought several qualities in his choice for a successor to Chief Justice Ellsworth: the candidate had to be a staunch Federalist, loyal to Adams, knowledgeable about the law, youthful, and brilliant of mind. Adams ultimately chose Marshall, his Secretary of State, who was preparing to return to his law practice in Richmond.

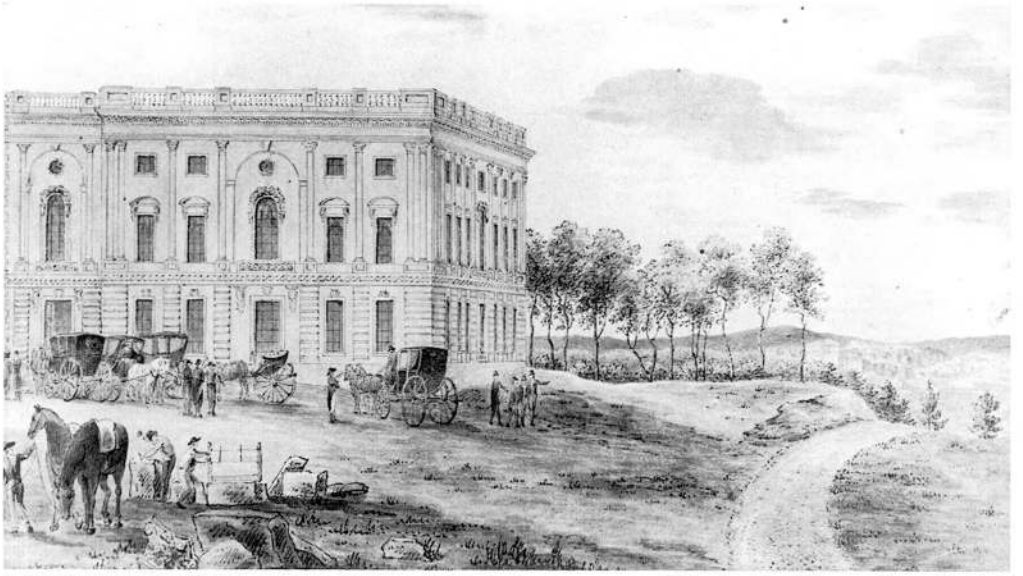
CHIEF JUSTICE MARSHALL.

John Marshall held dapper young lawyers spellbound for nearly an hour at a stop at a Virginia tavern during his circuit-riding days. The Chief Justice's dress was habitually bedraggled (witness his tattered knee breeches), but his speech was always elegant and persuasive. One traveler conceded that trying to describe Marshall's eloquence "would be an attempt to paint the sunbeams."



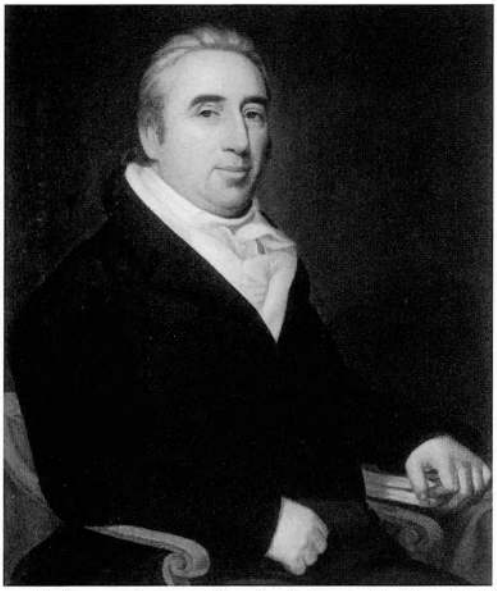
"COMPLETELY FLOORED."

When an attendant rushed to help the Chief Justice after a fall from a stepladder in the law library, Marshall quipped "I was . . . floored." He relished jokes and good humor.

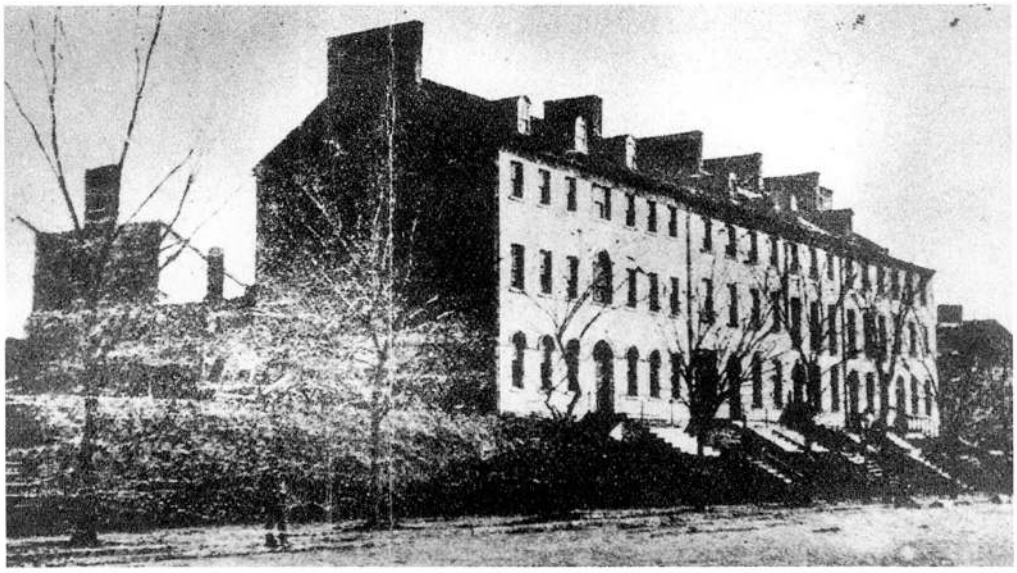


A federal tax on carriages, such as those awaiting their passengers outside the Capitol, was the subject of *Hylton v. United States* (1796). The carriage tax was sustained, after a debate about the revenue-raising power of the new national government.

The Sedition Act, which made it a crime to criticize the US government or its leaders, became law in 1798 and was repealed in 1801. Of the twenty-five people arrested under the act, one was Representative Matthew Lyon of Vermont, shown in this contemporary cartoon attacking a fellow member of Congress.



"Midnight appointee" William Marbury, whose suit against James Madison led to the landmark *Marbury v. Madison* decision in 1803. John Marshall's opinion in the case established the Court's authority to review the constitutionality of acts of Congress.



The Stelle Hotel (above) was the site where John Marshall delivered the Court's watershed opinion in *Marbury v. Madison*. He and the Associate Justices were boarding at the hotel at the time and held court there in the winter of 1803 so that an ailing Justice Chase would not have to travel to the Capitol.

Georgia legislators burned property contracts that had been made by a previous, corrupt legislature authorizing the sale of 33 million acres in the Yazoo area (present-day Mississippi and Alabama). According to traditional accounts, a magnifying glass was used to focus the sun's rays and start the fire, symbolizing divine intercession. When the case (*Fletcher v. Peck)* came before the Supreme Court in 1810, Marshall showed the Court's commitment to the security of contracts and property rights under the Constitution.

Maryland sued cashier James McCulloch of the Baltimore branch of the Bank of the United States when he ignored a Maryland law levying a heavy tax against the Bank's branches, which was intended to close them. The state argued that the Constitution does not say that Congress can charter a bank, but the Supreme Court ruled that the Bank was lawful, holding for the first time that "implied powers" in the Constitution enable Congress to enact laws "on which the welfare of a nation essentially depends."

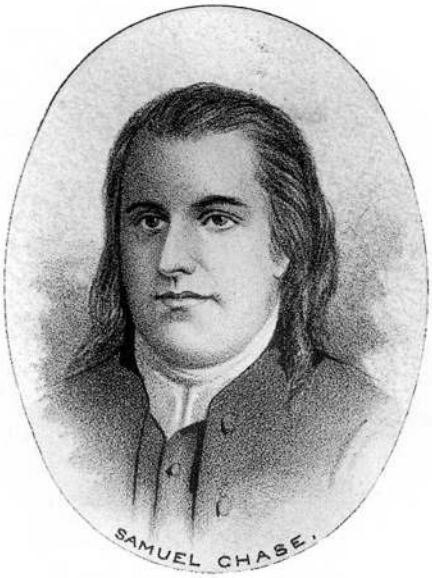
The lawsuit of one-time partners in a steamboat shipping business, Thomas Gibbons (left) and Aaron Ogden (right), led to a landmark Commerce Clause decision in 1824. John Marshall's opinion for the Court defined commerce and stated that Congress has the power to regulate interstate commerce.

Samuel Morse executed this huge painting depicting an evening session of the House of Representatives in 1822. The Justices of the Supreme Court are seated on the dais on the far side of the chamber. This is the only representation that exists of the collective members of the Marshall Court.

Justices of the Marshall Court

William Cushing 1790–1810

William Paterson 1793–1806



Samuel Chase 1796–1811

Bushrod Washington 1799–1829

Alfred Moore 1800–1804

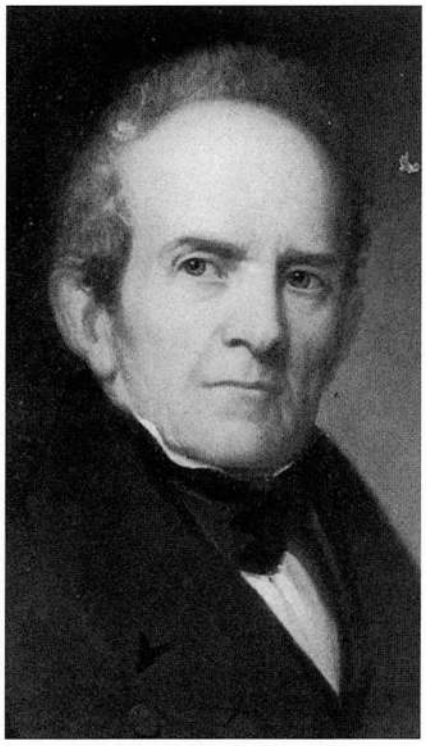
William Johnson 1804–1834

Henry Brockholst Livingston 1807–1823

Thomas Todd 1807–1826

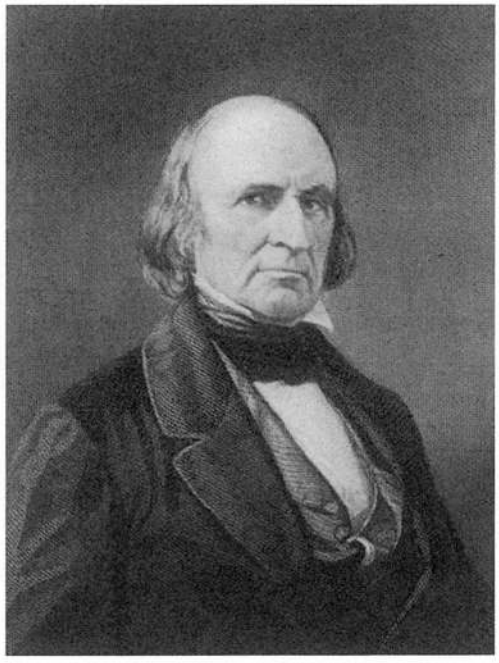
Gabriel Duval 1811–1835

Joseph Story 1812–1845



Smith Thompson 1823–1834

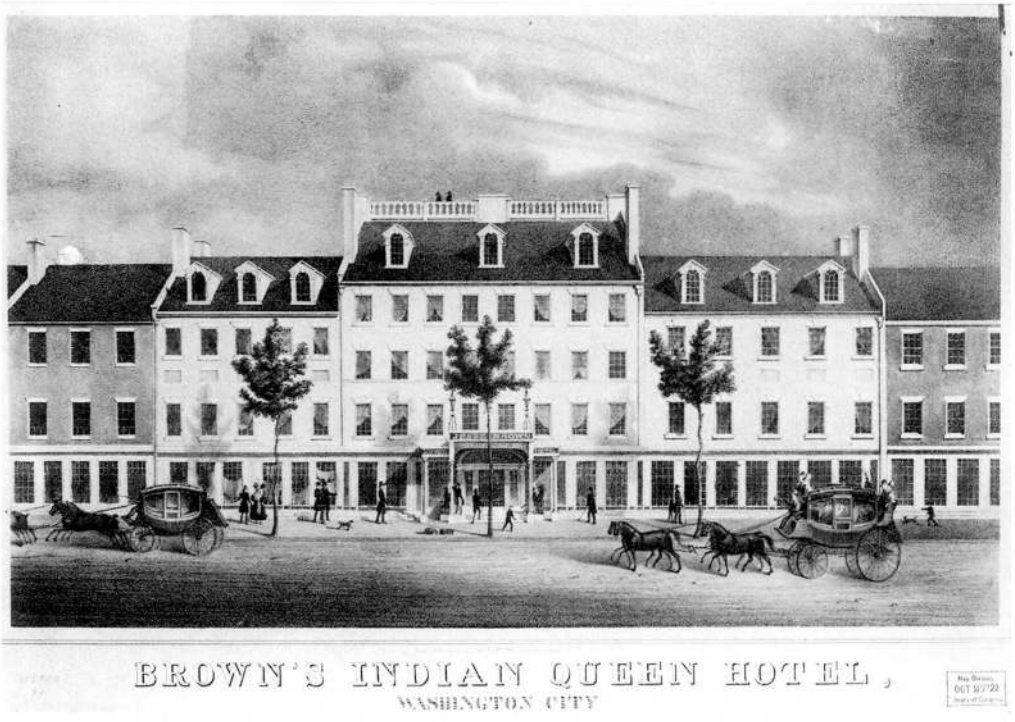
Robert Trimble 1826–1828



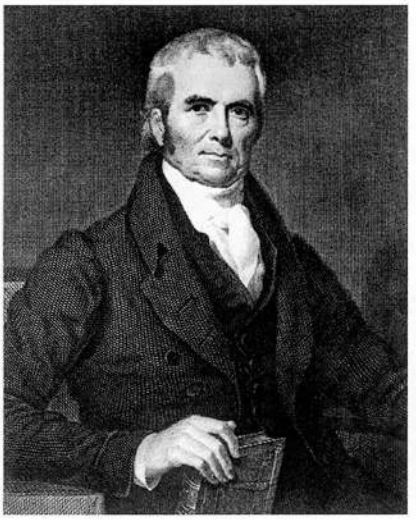
John McLean 1830–1861

Henry Baldwin 1830–1844

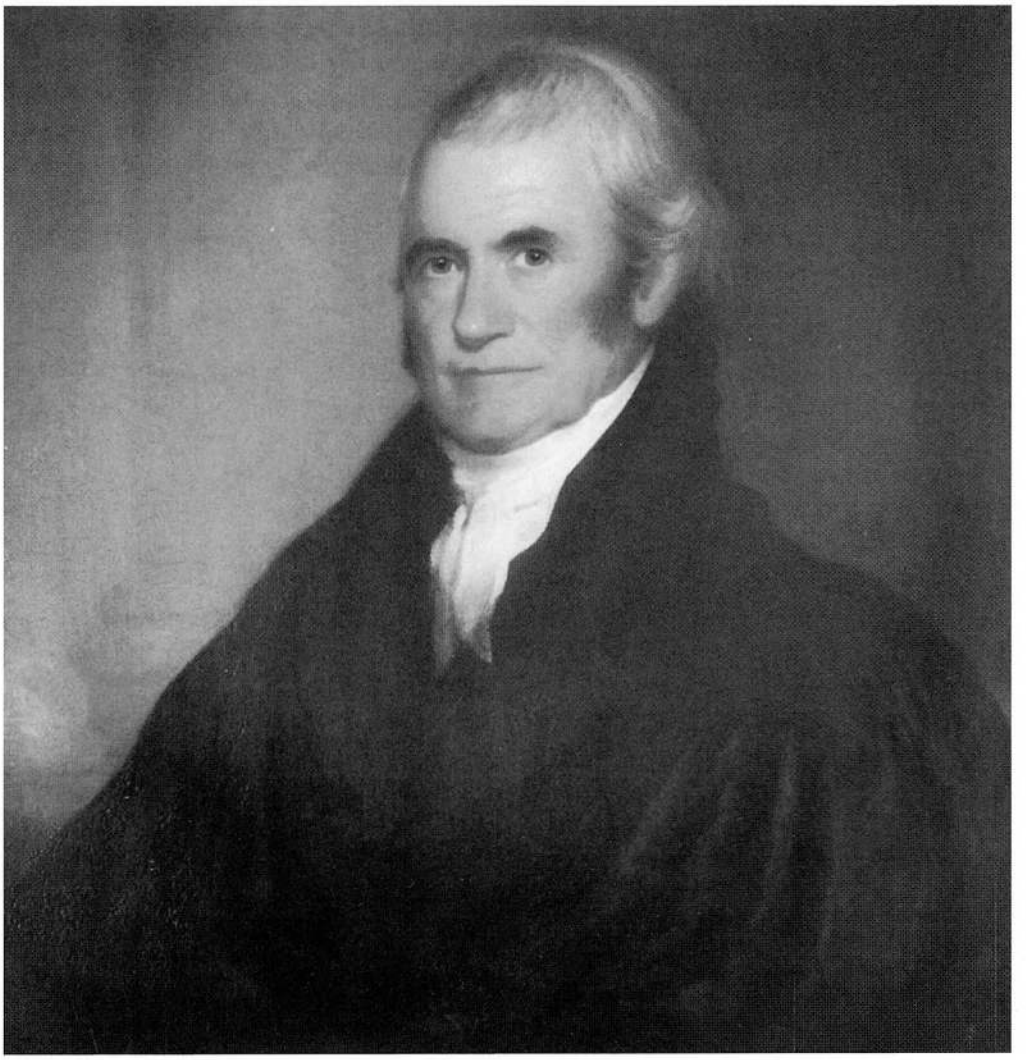
James M. Wayne 1835–1867



Most Justices took meals together at Brown's Indian Queen Hotel in the early 1800s, a cozy situation that bred camaraderie and courtesy. This arrangement also helped the Justices to speak with one unified voice under Chief Justice John Marshall.



This 1833 engraving by Asher B. Durand shows the Chief Justice in 1833. The oil portrait below by John Blennerhassett Martin was completed the following year. Marshall posed for this portrait in 1834, about a year before his death at 79. He left behind a more prestigious Court than he inherited, thanks to the force of his logic and his powers of persuasion.



Such is the stature of the fourth Chief Justice that when the US Postal Service issued a stamp in February 1990 commemorating the bicentennial of the first meeting of the Supreme Court, it selected Marshall, who was not appointed to the Court until 1801, eleven years after its initial meeting

John Marshall and the Creation of a National Government

MICHAEL W. MCCONNELL

At the beginning of the twenty-first century, 200 years after his appointment to the Supreme Court of the United States, John Marshall is an iconic figure. Albert Beveridge, his first great biographer, observed: "He has become a kind of mythical being, endowed with virtues and wisdom not of this earth. He appears to us as a gigantic figure looming, indistinctly, out of the mists of the past."[1] He holds special meaning for us who are lawyers, judges, and students of the law. He is *our* Founder. For many of us, he is our hero. He is the one who showed that law—no less than war, legislation, administration, or popular leadership—is central to the creation of a national government, and even to the creation of a people. I doubt there is a judge—or wannabe judge—in the country who does not, in some way, try to take John Marshall as his model.

In his day, Marshall was regarded as a champion of conservative values. He distrusted direct democracy and favored checks and balances against democratic excess. He protected vested rights against the incursions of populist legislatures. He also stood up for civil liberties—as in his opposition to the Alien and Sedition acts—and saw no fundamental difference between civil rights and property rights. He was sharply critical of the French Revolution. He favored strong central government, a strong executive, an independent judiciary shielded from popular opinion, and a strong military. His jurisprudence bore striking similarity to the political program of the Whig Party of John Quincy Adams and Henry Clay—which, not surprisingly, infuriated their politically more successful opponents, the Jeffersonian Republicans and the Jacksonian Democrats.

Yet despite this background, today he is claimed and admired by people across the political spectrum. For example, take a look at the Web page of the American Constitution Society. This is a new—and quite welcome—organization of law students and lawyers that hopes to become the left-wing counterweight to the Federalist Society. According to its Web

page, its goal is to counter what it calls the "dominant" conservative vision of law that "pervades" academic scholarship, judicial interpretation, and legislative and executive decisionmaking. Yet John Marshall, the pillar of the Federalist-Whig conservative establishment in his day, is at the top of its list of Supreme Court Justices who "embody" its anti-conservative jurisprudential ideals.[2]

In his own time, Marshall did not enjoy such universal esteem. It is difficult to appreciate his greatness unless we understand why he was controversial as well as why he was admired. In his day, Marshall was excoriated for his conservative politics, for his antipopulist view of the judicial function, for his nationalism, and above all for his ability to disguise his supposedly partisan purposes behind a beguiling screen of legalism.

No less a figure than Thomas Jefferson complained that "the state has suffered long enough . . . from the want of any counterpoise to the rancorous hatred which Marshal [sic] bears to the government of his country, and from the cunning and sophistry within which he is able to enshroud himself."[3] To John Tyler, Jefferson wrote that in Marshall's hands, "the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice."[4] There were two basic themes of Jeffersonian's attack: (1) that Marshall promoted a movement toward consolidated government at the expense of state authority, and (2) that he promoted the power of unelected and unaccountable courts at the expense of elected officials. Thus, in a letter to former Secretary of the Treasury Albert Gallatin in 1820, Jefferson complained that "the steady tenor" of the Court has been to "break down the constitutional barriers between the coordinate powers of the States and of the Union."[5] To another associate, Jefferson described the judiciary under Marshall as a "subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric."[6] Combining the issues of federal power and judicial overreach, Jefferson commented that "The legislative and executive branches may sometimes err, but elections and dependence will bring them to rights. The judiciary branch is the instrument which, working like gravity, without intermission, is to press us at last into one consolidated mass."[7] Jefferson generally believed that the powers of the federal government could go no further than those expressly enumerated in Articles I and IV of the Constitution and that constitutional judgments were ultimately the responsibility of the people, not of an unelected, aristocratic, and unaccountable judiciary. Of course, it is precisely those features of Marshall's jurisprudence—nationalism and the rejection of states' rights, and affirmation of judicial authority in the face of popular opposition—that so attract his newfound friends in the modern academy.

I believe that neither Marshall's Jeffersonian detractors in his own lifetime nor his American Constitution Society admirers today do John Marshall justice. Marshall was not a single-minded advocate of federal or judicial power. To be sure, at a time when the centrifugal forces of sectionalism—fueled by slavery and by agrarian and Jeffersonian ideology—threatened to undermine the necessary authority of the national government, Marshall strongly and decisively tilted the other way. But he did so, not in the name of an all-powerful national government, but in defense of a constitutional structure in which the national government was vested by the people with substantial but limited authority. Much of Marshall's statesmanlike genius consisted in defending national power by reassuring the people that the Constitution provides a bulwark against consolidation as much as it does against disintegration. And Marshall never came close to asserting judicial supremacy over the political branches of government. He conceived of judicial review as a power to be

exercised sparingly. In his entire career, Marshall voted to invalidate only one, relatively unimportant statute of Congress as unconstitutional.

He insisted on the authority of the political branches to resolve constitutional issues within their jurisdiction. And even within the appropriate scope of judicial review, he deferred to the judgments of Congress, especially when Congress had carefully considered the constitutional arguments and had reached a stable consensus over time. Marshall did not view constitutional law as a substitute for politics, or as a solution to all injustice. As he wrote for the Court in *Providence Bank v. Billings*:

> [T]he constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against . . . unwise legislation generally.[8]

Who was John Marshall? What were the characteristics of his legal method? And what role did he play in the creation of a national government?

Personal History and Characteristics

John Marshall was born in 1755, on the Virginia frontier.[9] He and Jefferson were distant cousins, both descending from the great Randolph clan of Virginia. But the resemblance in backgrounds stops there. Marshall's grandmother had been disowned by the family, and his father was the successful son of a small farmer. Marshall spent much of his early career scrambling to make a living and became a substantial land speculator. He thus had an orientation to the frontier and to those who had to make their own fortunes, rather than to the Virginia aristocracy.

He served as a junior officer in the American Revolution under General Washington, who was his lifelong hero. Historians tell us that one of the most formative experiences of his life was that awful winter at Valley Forge, when the army struggled by without blankets, meat, flour, or shoes.[10] When, years later, as Chief Justice, he explained the utility of a national bank for collecting taxes and providing pay and supplies to the troops, we hear the echo of that winter of privation with Washington at Valley Forge. As an old man, Marshall commented that as a result of serving in the Revolution "with brave men from different states who were risking life and everything valuable in a common cause, . . . I was confirmed in the habit of considering America as my country, and Congress as my government." He said he "had imbibed these sentiments so [thoroughly] that they constituted a part of my being."[11]

During and after Washington's presidency, Marshall was Washington's close political associate. Washington offered him positions as Attorney General and as Ambassador to France, which Marshall declined, and later twisted his arm to persuade him to run for Congress, where in a single term he became the leader of the Washington-Adams wing of the Federalist Party. Marshall wrote Washington's first great biography. He delivered the eulogy to Washington in the Congress of the United States and, with the Speaker of the House, led Washington's funeral procession from the congressional meeting-place to the church. Vice President Thomas Jefferson, by the way, refused to attend.[12]

An account of his career as a diplomat and architect of American foreign policy as Secretary of State would occupy a lecture in itself. He also served in such positions as state legislator, delegate to the Virginia ratifying convention, municipal official, acting state attorney general, and brigadier general in the

Virginia militia. By the time of his appointment to be Chief Justice, he had held just about every possible position in public life except that of judge.

Marshall's appearance was not impressive. One acquaintance described him, shortly after his appointment to the Court, as "tall, meager, emaciated; his muscles relaxed, and his joints so loosely connected, as . . . to destroy everything like elegance and harmony in his air and movements."[13] His dress was simple, perhaps even shabby. In one amusing incident, he was hanging about the farmers' market in Richmond doing some shopping when a visiting gentleman, mistaking him for a servant, offered him a coin to carry a turkey home for him. Marshall obliged and accepted the coin, later commenting that "we were going the same way" and that it was only "neighborly" to help.[14]

A religious skeptic, Marshall could not accept the divinity of Christ. Nonetheless, he was instrumental in raising funds for Richmond's Memorial Church, purchased a pew, and attended regularly.[15]

Marshall was a devoted husband, father, and grandfather. His beloved wife, Polly, was weak and sickly for much of their adult lives, and Marshall shocked his contemporaries by doing housework and domestic shopping to ease her burden. Feminist Harriet Martineau, who knew Marshall well, wrote after his death that he "carried to his grave a reverence for women, as rare in its kind as in its degree."[16]

Though he possessed a small number of slaves, Marshall was an officer in the Virginia branch of the American Colonization Society, an organization devoted to emancipation of slaves and their conveyance to Liberia; he worked for the improved treatment of slaves and was particularly vigilant in defending the rights of former slaves.[17] On the Court, he described the slave trade as "contrary to the law of nature" and stated that "every man has a natural right to the fruits of his own labor" and that "no other person can rightfully deprive him of those fruits, and appropriate them against his will."[18] Nonetheless, he upheld the institution of slavery and rendered decisions in favor of slave-owners when he judged that the law was on their side.

We often think of him as somber and austere. In fact, he was humorous and convivial, quick to laugh. At the Virginia ratifying convention, he was a match for Patrick Henry in the fine art of schmoozing wavering delegates over a glass in the tavern. He cofounded the Barbecue Club in Richmond, where he continued to drink rum, eat barbecue, and play quoits on Saturday afternoons until the end of his life. Theodore Sedgwick described Marshall as "indolent" and "attached to pleasure, with convivial habits strongly fixed."[19] Reading many descriptions by contemporaries, I am struck by how frequently the word "indolent" is attached to him. He seems to have cultivated a relaxed manner, like a laid-back California undergraduate. But in fact he arose before dawn, and had usually completed a day's work by noon.[20]

With a few exceptions, Marshall got along well even with his political adversaries. He and Henry clashed at the Virginia ratifying convention, but served as co-counsel in several important cases in the years afterward. Marshall and James Monroe were close friends at college and bunkmates in the army, though they found themselves on opposite sides of the fight over ratification and later over many other political issues. He and James Madison remained friends despite decades of political conflict. Among the exceptions were Jefferson and Judge Spencer Roane, both of whom added personal dislike to political disagreement. The abstemious Jefferson criticized what he called Marshall's "lax lounging manners"—a reference to Marshall's ease at the tavern.[21]

Marshall's natural sociability played a large part in building the Supreme Court as a collegial institution. Under Marshall's leader-

ship, the members of the Court roomed in the same boarding house and discussed cases over meals in the evening. This contributed mightily to their ability to meld their differences into united opinions of the Court, which in turn greatly enhanced the authority of the Court's decisions. The Marshall Court thus avoided the spectacle of acrimonious dissents and separate opinions that so often feature in the decisions of the Court today.

Let me share a wonderful story from Jean Edward Smith's biography:

> President Josiah Quincy of Harvard, a friend of Story's, once accompanied the Justice to Washington. When Quincy inquired about the city, Story warned him that "I can do very little for you there, as we judges take no part in the society of the place. We dine once a year with the President, and that is all. On other days we take our dinner together, and discuss at table the questions which are argued before us. We are great ascetics, and even deny ourselves wine, except in wet weather."
>
> Quincy reports that Story paused at that point, as if thinking that the act of mortification he had mentioned placed too severe a tax upon human credulity, and presently added: "What I say about the wine, sir, gives you our rule; but it does sometimes happen that the Chief Justice will say to me, when the cloth is removed, 'Brother Story, step to the window and see if it does not look like rain.' And if I tell him that the sun is shining brightly, Judge Marshall will sometimes reply, 'All the better; for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere.'"[22]

Today's Supreme Court might do well to adopt this practice of sharing a glass of madeira, at least when it is raining.

On January 20, 1801, after John Adams had been defeated for reelection but before Jefferson had been sworn into office, Adams nominated Marshall to be the fourth Chief Justice of the Supreme Court (as the office was then called). A week later, Marshall was confirmed unanimously by the Senate. It is noteworthy that, despite a pitch of partisan division rarely exceeded in our history—including a disputed election and a lame duck President—not only Marshall but all three of Jefferson's subsequent nominees to the Supreme Court were confirmed unanimously, without delay.

At the time of his appointment, the prestige of the Supreme Court as an institution was very low. John Jay, the first Chief Justice, had resigned to accept the office of Governor of New York. Invited by Adams to take on the job again in 1800, Jay declined, citing the failure of the Court to "acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."[23] It was not a good enough job for Jay.

Marshall served as Chief Justice of the United States for almost thirty-five years, spanning the terms of five Presidents. Over the course of those years, the Court rendered 1,100 decisions, 519 of them written by Marshall himself. Marshall dissented only eight times. Many of these decisions remain among the greatest in our constitutional history.[24] Examine the curriculum of any constitutional law class in the country and you will see the mark that Marshall's Court made on the development of the law. By the end of Marshall's long career, the Court was no longer held in low esteem. President Andrew Jackson, with whom Marshall had clashed repeatedly, delivered Marshall's eulogy:

> I have always set a high value upon the good he had done for his country.

> The judicial opinions of John Marshall were expressed with the energy and clearness which were peculiar to his strong mind, and gave him a first rank among the greatest men of his age.[25]

Of course, the most lasting tribute to Marshall was not Jackson's eulogy, but his opinions in the **U.S. Reports**, which continue to set the framework for much of our constitutional law. It would be impossible even to attempt to canvass this vast body of work in a single lecture, and you will be relieved to know that I will not even try. Instead, I invite you to take a look at one characteristic Marshall decision, one that many historians consider his most important and one that has been misunderstood as often as it has been quoted: *McCulloch v. Maryland*.[26]

The legal issue in *McCulloch* is easy to state. The Congress of the United States had established a national bank, with branches in cities across the country, including Baltimore, Maryland. The legislature of that state—like the legislatures of many states—resented this federal creation and sought to inhibit its operations by imposition of a special tax of one to two percent on the issuance of its notes, or $15,000 a year. The bank refused to pay.

This raised two issues. First, did Congress have the power to incorporate the bank? Note that nowhere in Article I, Section 8 of the Constitution is Congress given such a power. Indeed, a motion to give Congress the power of incorporation was defeated at the Constitutional Convention. If Congress has such a power, it must be implied—and the idea of "implied" powers raised fears of federal overreaching. If powers can be implied, what is the limit? Second, assuming that the bank itself was constitutional, did Maryland have the constitutional power to impose a tax? What was the constitutional standing of federal entities within a state?

The political context is somewhat harder for us to appreciate at a distance of 180 years. It may seem to be a musty old argument, without much relevance to us today. But the real drama of *McCulloch v. Maryland*, and its contribution to the creation of a national government, cannot be grasped without a recognition of the place of the bank debate in certain perennial questions of American politics.

It may fairly be said that, as of 1819, when *McCulloch* was argued and decided, the status of the Bank of the United States was the longest-running and most hotly contested question in American politics—more so, at that time, than slavery. In his biography of Washington, Marshall expressed the view that the bank debate—more than any other domestic issue—was responsible for crystallizing American politics into the two contending parties, Federalist and Republican. From the first bank debate in 1790 forward, opposition to the bank was a central credo of the Jeffersonian Republicans. Many of the issues raised by the bank remain disputed in other guises today.

There were several interrelated reasons for this intense controversy over the bank. First was the abstract question of constitutional principle: What is the reach of federal power? Is federal power defined and limited by the expressed enumerations in Article I and Article IV—or does it go beyond them? The idea of implied powers was nothing new. That had been the basis of Hamilton's defense of the Bank way back in 1790. Indeed, it had been the basis for defense of the Bank of North America, a predecessor institution, under the Articles of Confederation. But it remained problematic, because no one could discern its practical limits. As Jefferson wrote in response to the *McCulloch* decision:

> Congress are authorized to defend the nation. Ships are necessary for defence [sic]; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning

> who has ever played at "This is the House that Jack Built?" Under such a process of filiation of necessities the sweeping clause makes clean work.[27]

It is well to remember that much the same "process of filiation of necessities" that supported the implied power of Congress to establish a national bank would also support the program of canals, roads, and other internal improvements that was the platform of the newly emerging Whig Party and that at this juncture was thought unconstitutional by Monroe and Madison, the leading Republicans. The principle of the bank was thus at the very heart of contemporary partisan divisions.

Second was the symbolic significance of banks in the cultural-ideological conflict of the day. This is a complicated matter, and I am not a social historian, but the division looked something like this: Two visions of America were in competition. One was an agrarian and populist vision of an America of independent yeoman farmers and mechanics. The other was a cosmopolitan vision of America as a great commercial republic. There may be echoes of this division in today's fights over globalization, Wal-Mart, and the family farm. The agrarian vision was based on an idea of republican virtue as independence and a primitive form of the labor theory of value, which treated commercial middlemen and the payment of interest as parasites on the real value-generating activity of labor. Banks—especially the Bank of the United States—were a symbol of this evil. John Taylor of Caroline described banking as "a fraud whereby labour suffers the imposition of paying an interest on the circulating medium." He said that "In the history of our forefathers we recognize three political beasts, feeding at different periods upon their lives, liberties, and properties. Those called hierarchical and feudal aristocracy, to say the worst of them are now the instruments of the third"—meaning banks.[28]

Third, and relatedly, banks and other corporations were thought incompatible with a democratic social order. According to the 1785 report of the Pennsylvania Assembly, which repealed the charter of the Bank of North America, "[T]he accumulation of enormous wealth in the hands of a society who claim perpetual duration will necessarily produce a degree of influence and power which can not be entrusted in the hands of any set of men whatsoever without endangering the public safety."[29] The attack on the Bank of the United States was thus part of a wider hostility to the accumulation of capital in corporate form.

To read *McCulloch v. Maryland*, you might think that the Bank of the United States was an agency of the federal government. It was not: it was controlled by private investors and was not accountable to the public. There were widespread reports of favoritism to insiders and other skullduggery. Perhaps more serious is the fact that the Bank of the United States first extended loose credit in 1817 and then drastically cut back in 1819, ruining many state banks in the process. This coincided with a collapse in commodity prices, which sent the economy into a depression. The Bank of the United States thus appeared to wield enormous power, and if its lawyers were right, the states were powerless to regulate it. Again, the resentment and fear of multinational corporations today may provide something of a parallel.

Fourth, a national bank presented serious and damaging competition to politically well-connected local banks. Especially if it were exempt from state regulation and taxation, the Bank of the United States would gain local business at the expense of local banks. National bank notes would drive state bank notes out of circulation. As Madison observed, a national bank "would interfere so as indirectly to defeat a state bank at the same place" and would "directly interfere with the rights of states to prohibit as well as to establish banks."[30] Naturally, state legislatures were more responsive to the competitive needs of

state banks than they were to the national advantages of a national bank.

Thus, when *McCulloch* came to the Court in 1819, it was a political hot potato. It was the centerpiece of partisan division. For the Court to decide in favor of the Bank of the United States would confirm for its critics that the Court was an arm of Federalist-Whig politics. For the Court to decide against the bank would be a blow against all the principles Marshall held dear. Three days after the oral argument, Marshall delivered a unanimous decision in favor of the bank and against the power of the state to tax it.

What does *McCulloch* tell us about those two issues that troubled Jefferson, the role of the federal judiciary and the scope of national power? The first and most striking feature of this opinion, I think, is something it does *not* do: It does not cite a single Supreme Court precedent. Contrast this to a modern decision, in which lawyers and the Court quote copiously from earlier decisions. Sometimes it seems even the most obvious propositions require the support of an array of footnotes.

And Marshall's failure to cite Supreme Court precedent cannot be explained by any lack of it. Fourteen years before, in *United States v. Fisher*,[31] the Court had upheld Congress's power to give claims of the United States priority in the disposition of insolvent estates, on the basis of an exposition of implied powers almost identical to that in *McCulloch*.[32] The key passage in *Fisher* is as follows:

> In construing [the Necessary and Proper] clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution.[33]

That, of course, is also the animating principle of *McCulloch*. This failure to cite available precedent is reminiscent of Marshall's opinion for the Court in *Marbury v. Madison*,[34] in which he did not trouble to cite the several earlier cases in which the Court had engaged in constitutional judicial review, not even the one case in which he himself had appeared as an advocate in the Supreme Court. Note that there is a difference between not referring to precedents and not following them. I am not saying that Marshall had no respect for the principle of *stare decisis*, but it was his apparent view that an opinion of the Court has more authority if it proceeds from fundamental principles and from the constitutional text than if it seems to rest on the authority of prior decisions.

This leads to a second striking feature of the decision: while it does not rely on judicial precedent, it *does* rely on precedent set by the political branches of government, even on this constitutional question. The constitutionality of the Bank of the United States, Marshall wrote, "can scarcely be considered as an open question." The principle "was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department in cases of peculiar delicacy, as a law of undoubted obligation."[35] Marshall emphasized that the Congress and the executive had debated and resolved the constitutional question. It "did not steal upon an unsuspecting legislature, and pass unobserved." Rather, after full and fair debate, both in Congress and in the executive cabinet, the arguments in favor "convinced minds as pure and as intelligent as this country can boast."[36] That was a reference to George Washington. To Mar-

shall, Washington's judgment was better than any judicial precedent.

Marshall embraced what is sometimes called "the doubtful question" or "clear mistake" rule later championed by James Bradley Thayer. Marshall put it this way: that on a "doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned," the courts ought to be guided by "the practice of the government."[37] To those who see Marshall as the symbol of judicial supremacy, this must come as some surprise. The constitutional duty of judicial review was not questioned. Marshall expressly noted that what he called a "bold and daring usurpation" of power might be resisted even "after an acquiescence still longer and more complete than this."[38] But in *McCulloch*, Marshall stood in the camp of what we now call "judicial restraint": the view that the judiciary should not lightly overturn the actions of representative bodies—especially when those bodies themselves gave attention to the constitutional question and when their decision has been reflected in a course of practice over a number of years.

Nor was *McCulloch* the only Marshall Court decision to emphasize the constitutional role of the other branches of government. In *Stuart v. Laird*[39]—a case scarcely less politically explosive than *McCulloch*—the Court upheld the Judiciary Act of 1802, a statute passed by the new Jeffersonian majority abolishing lower federal courts established at the end of the Adams administration. Many Federalists considered this an assault on the principle of an independent, life-tenured judiciary, and deemed the return to circuit-riding by Supreme Court Justices a violation of the appellate nature of their jurisdiction. Without truly answering the constitutional arguments, the Court simply observed that "[P]ractice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.... Of course, the question is at rest, and ought not now to be disturbed."[40]

It is fair to say, then, that Marshall tempered his affirmation of the *authority* of the courts with a style of judicial review that gave substantial respect and deference to the other branches of government. At later points in our history, judges were sometimes less inclined toward deference, and less likely to credit the constitutional judgments of Congresses or Presidents.

This brings us to the question of federal-state balance of power. Once again, Marshall adopted a view that, while affirming the wide scope of federal authority, also recognized the limitations on that power. Marshall did not suggest that the scope of federal authority is whatever Congress says it is. He did not treat the question of allocation of power between states and the federal government as a political question, to be left entirely to the give and take of national politics, as the Court would later hint in *Garcia v. San Antonio Metropolitan Transit Authority*.[41] "This government is acknowledged by all," Marshall wrote, "to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. . . . We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended."[42] He made clear:

> Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision, come before it, to say that such an act is not the law of the land.[43]

I wish to emphasize here that the genius of Marshall's jurisprudence lies precisely in giving due credit to the just fears and principles

of those on the opposing side. In this way, he situated the Court in the moderate center of American constitutional politics. He did not allow himself to be an advocate of consolidation, but instead advocated a fair and generous reading of the powers entrusted to Congress.

Marshall was at his most persuasive in explaining why—contrary to Jefferson—it would not be possible to read the powers granted to Congress in a narrow and exclusive fashion. His examples are telling. The federal government is not expressly granted the power to pass criminal laws, save in the cases of counterfeiting, piracy and felonies on the high seas, and offences against the law of nations. Yet all admit that Congress must have the power to punish violations of its laws—not as an end in itself, as a full criminal code, but as a means of executing the enumerated powers. Congress also has the power "to establish post-offices and post-roads." Surely this must include, by implication, the "power and duty of carrying the mail along the post-road, from one post-office to another." And "from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail."[44] From these examples, and more like it, Marshall infers that Congress must have a choice of "means for carrying into execution all sovereign powers."[45]

And Marshall drew further support from the wording of the Necessary and Proper Clause and of the Tenth Amendment, which reads "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." He noted that the Framers of this provision deliberately omitted the word "expressly," which had appeared in the otherwise identical provision in the Articles of Confederation before the word "delegated," thus implying that the powers of Congress need not be "express" to be delegated.[46]

Equally persuasive, in my opinion, is Marshall's application of these principles to the national Bank itself:

> Throughout this vast republic, from the St. Croix to the Gulph [sic] of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, *that* raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous, and expensive?[47]

In this passage we hear the voice of the veteran of Valley Forge, who saw his fellow soldiers die of cold, starvation, and disease, not from the bullets of the British, but from the inability of the Congress under the Articles of Confederation to raise money and to provide shoes, clothing, blankets, and food. To a veteran of Valley Forge, nationalism and patriotism naturally went hand in hand.

I must say, however, that I find the second part of the *McCulloch* opinion—the part about the Maryland tax—less persuasive. The "great principle" on which the Bank of the United States's immunity from state taxation rested, according to Marshall, was "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them."[48] He went on:

> That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another.[49]

It thus followed that if Congress had the power to create the bank without leave of the states, the states must not have the power to

destroy it through taxation or unfriendly legislation.

There are at least three things wrong with this analysis. First, it disregards the significance of the very Supremacy Clause upon which the argument is said to rest. Under the Supremacy Clause, Congress has the power to shield the Bank of the United States from state taxation and to preempt state laws that might interfere with its efficient operations. But to say that Congress has the *authority* to immunize the bank from state taxation is a far cry from saying that the Constitution *requires* such immunity. Why not leave this issue to Congress?

Second, and relatedly, the principle seems to go too far. The rationale of this holding, for one thing, seems to apply symmetrically to federal taxation of state entities as well as to state taxation of federal entities—a conclusion that Marshall denied in *McCulloch*, but that the Court embraced not long thereafter. By the middle of the century, *McCulloch* had spawned an elaborate, rigid, and ultimately unworkable doctrine of intergovernmental tax immunities, which was overruled in 1939. Marshall never explained why some lesser principle—such as a prohibition of discriminatory taxes—would not suffice to protect national interests.

Finally, and most significantly, the Court never explained why the principle of federal government immunity from state taxation should extend to an essentially private corporation such as the Bank of the United States. Only a small part—20 percent—of the bank's stock was owned by the federal government; for the most part, the bank was a private, profit-making enterprise. Counsel for Maryland repeatedly emphasized this fact in their arguments to the Court, and I am sorry to say that Marshall gave this argument the worst possible rebuttal: no rebuttal at all. Marshall wrote:

> If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government.[50]

But the Bank of the United States was not like the post office or the courts. It was a privately owned, for-profit corporation. It is difficult to understand why it should *not* be taxed and regulated by the states in which it operated.

To sum up, let us return to Jefferson's charges against Marshall: that he aggrandized the power of the courts and of the national government. In a sense, Marshall was guilty of both—but only in a sense. Marshall's exercise of judicial review was tempered by deference to the constitutional judgments of coordinate bodies within their jurisdiction. Modern myth to the contrary, this was not particularly controversial even at the time. *McCulloch* was much more controversial a decision than was *Marbury*. And note that in *McCulloch*, the Court was criticized not for exercising the power of judicial review, but for failing to strike down an act of Congress.

As to the powers of the national government, Marshall was undoubtedly a nationalist in an era of extreme states-rights agitation. But his constitutional ideal was one not of national domination, but rather of balance—in his terminology, "equipoise." "The constitution has . . . established that division of power which its framers, and the American people, believed to be most conducive to the public happiness and to public liberty. The equipoise thus established is as much disturbed by taking weights out of the scale containing the powers of the [federal] government, as by putting weights into it," Marshall wrote in defense of his decision in *McCulloch*. "His hand is unfit to hold the state balance who occupies

himself entirely in giving a preponderance to one of the scales."[51]

Moreover, recent studies of Marshall's jurisprudence have emphasized that his nationalist vision was not so much of a strong, interventionist national *government* as of a unified commercial *nation*.[52] National institutions—including the federal courts—were important not so much to the regulation and control of American life as to the guaranteeing of property rights and the rule of law against the populist, changeable, and often foolish actions of state legislatures. The two most prominent examples in anyone's list of nationalist decisions on the part of the Marshall Court would be *McCulloch* and *Gibbons v. Ogden*.[53] But what were they about? *McCulloch* insulated a privately owned and controlled bank from state interference, and *Gibbons v. Ogden* permitted a private steamship company to defy a state-imposed monopoly. These decisions are truly of a piece with *Dartmouth College*, *Fletcher v. Peck*, *Sturges v. Crowninshield*,[54] and the other decisions typically classed as protections for vested property rights.

It would therefore be a mistake—a historical anachronism—to treat John Marshall as if he were an early version of a New Dealer or the precursor of modern judicial activism, whether of the left or of the right. People of all ideological stripes can—and should—find much to admire in Marshall, but if they take him honestly, they will find much to challenge their current convictions.

Nonetheless, we all still revere John Marshall. I think that is because, beyond issues of Federalist and Republican, Whig and Democrat, beyond issues of judicial review and the precise balance between federal and state power, beyond capitalist and agrarian notions of republican virtue, Marshall was above all an American. His role in the creation of our national identity must be an inspiration to any American patriot. If George Washington founded the nation, and Abraham Lincoln held it together at the time of its greatest peril, John Marshall was the man who kept the idea of Union alive when the forces of sectionalism were gathering their strength. For that he deserves our admiration and our thanks.

When I was asked to deliver this lecture and assigned the topic of "John Marshall and the Creation of a National Government," no one could have foreseen that between the asking and the delivering, a band of terrorist fanatics would cause us to ask once again what it means to be a nation, and would cause Americans of all political dispositions to draw together in a unity I had not seen before in my lifetime. I think John Marshall would understand and appreciate that impulse to unity. Listen to these words from Marshall—my personal favorites—from his opinion in *Cohens v. Virginia*:

> In war we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and for many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent.[55]

Thanks in no small part to Chief Justice Marshall, that description continues to be true.

ENDNOTES

[1]Albert J. Beveridge, 1 **The Life of John Marshall** v (1916).

[2]American Constitution Society for Law and Policy, Our Goals. Available online at http://www.americanconstitutionsociety.org/goals.htm (last accessed July 11, 2002).

[3]Letter from Thomas Jefferson to James Madison, May 25, 1810, reprinted in 3 **The Republic of Letters: The Corre-**

spondence between Thomas Jefferson and James Madison 1776–1826 1631 (J. M. Smith, ed., 1995).

[4]Letter from Thomas Jefferson to John Tyler, May 26, 1810. Available online at http://etext.lib.virginia.edu/etcbin/toccer-new2?id=JefLett.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=202&division=div1 (last accessed July 11, 2002).

[5]Letter from Thomas Jefferson to Albert Gallatin (December 26, 1820), in 12 **The Works of Thomas Jefferson** 185–189 (P. Ford, ed., 1904–1905).

[6]Letter from Thomas Jefferson to Thomas Ritchie (December 25, 1820), in 12 *id.* at 175–179.

[7]Letter from Thomas Jefferson to Archibald Thweat (Jan. 19, 1821), in 12 *id.* at 196–197.

[8]29 U.S. (4 Pet.) 514, 563 (1830).

[9]For these biographical details, I have relied principally on three sources: Jean Edward Smith, **John Marshall: Definer of a Nation** 62–65 (1996); Beveridge, **Life of Marshall**, *supra* note 1; and R. Kent Newmyer, **John Marshall and the Heroic Age of the Supreme Court** (2001).

[10]*See* Smith, **John Marshall**, at 62–65; Beveridge, 1 **Life of John Marshall**, *supra* note 1, at 108–147.

[11]John Marshall, **An Autobiographical Sketch** 9–10 (John Stokes Adams, ed., 1937).

[12]Smith, *supra* note 10, at 256.

[13]William Wirt, **The Letters of a British Spy** 95 (1803).

[14]Smith, *supra* note 10, at 376.

[15]*Id.* at 406.

[16]Harriet Martineau, **Retrospect of Western Travel** 150 (1838), quoted in Jean Edward Smith, "Marshall Misconstrued: Activist? Partisan? Reactionary?," 33 *John Marshall L. Rev.* 1109, 1123 (2000).

[17]Newmyer, *supra* note 10, at 414–437, contains a thorough and balanced discussion of Marshall's involvement with and views on slavery.

[18]*The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825).

[19]Quoted in Smith, *supra* note 10, at 264.

[20]*See id.* at 329.

[21]Quoted in *id.* at 161.

[22]*Id.* at 403 n.*, quoting Josiah Quincy, **Figures of the Past** 189–190 (1883).

[23]Quoted in Smith, *supra* note 10, at 283.

[24]For an interesting dissenting view, see Michael J. Klarman, "How Great Were the 'Great' Marshall Court Decisions?", 87 *Va. L. Rev.* 1111 (2001).

[25]Quoted in Smith, *supra* note 17, at 1128–1129.

[26]17 U.S. (4 Wheat.) 316 (1819).

[27]Letter from Thomas Jefferson to Edward Livingston, April 30, 1800, in 9 **Works of Thomas Jefferson**, *supra* note 6, at 132–133.

[28]Quoted in B. Hammond, **Banks and Politics in America** 36 (1957).

[29]*Id.* at 13.

[30]Speech by James Madison, 1st Cong., 3d Sess., Feb. 2, 1791, reprinted in 6 **Writings of James Madison** 19 (G. Hunt, ed. 1906).

[31]6 U.S. (2 Cranch) 358 (1805).

[32]*See* David P. Currie, **The Constitution in the Supreme Court, 1789–1888**, 162 (1985).

[33]6 U.S. at 395.

[34]4 U.S. (1 Cranch) 137 (1803).

[35]17 U.S. at 401.

[36]*Id.* at 402.

[37]*Id.* at 401.

[38]*Ibid.*

[39]4 U.S. (1 Cranch) 299 (1803).

[40]*Id.* at 309. Marshall himself did not participate in the decision, because he had been on the lower court panel that decided the case. The Court affirmed Marshall's decision.

[41]469 U.S. 528 (1985).

[42]17 U.S. at 405, 421.

[43]*Id.* at 423.

[44]*Id.* at 417.

[45]*Id.* at 418.

[46]*Id.* at 406–407.

[47]*Id.* at 408.

[48]*Id.* at 426.

[49]*Id.* at 431.

[50]*Id.* at 432.

[51]John Marshall, writing as "A Friend of the Constitution," June 30–July 15, 1819, reprinted in G. Gunther, ed., **John Marshall's Defense of *McCulloch v. Maryland*** 155, 160 (1969).

[52]*See* Newmyer, *supra* note 10, at 318–319.

[53]22 U.S. (9 Wheat.) 1 (1824).

[54]17 U.S. (4 Wheat.) 581 (1819); 10 U.S. (6 Cranch) 87 (1810).

[55]19 U.S. (6 Wheat.) 264, 413–414 (1824).

John Marshall's Associate Justices

HENRY J. ABRAHAM

My fascination with, and indeed love for, the Supreme Court of the United States and its Justices began in my teens—a long, long time ago—and it has never wavered. Like other youthful and some not-so-youthful students and observers of the Court, I grew up thinking that John Marshall was our first Chief Justice, and that he wrote all of the Court's opinions. Ultimately, it became fortuitously clear that he was not our first but fourth (counting John Rutledge's unconfirmed service of a little more than four months in the center chair) and that Marshall did *not* write all of his Court's opinions, just most of them, including a healthy majority of cases at constitutional law. Thus, of the 1,215 cases his Court handled during his long tenure of thirty-four and a half years—exceeded, to date, only by Justice Douglas's thirty-six and a half and Justice Field's thirty-four and three-quarters—Marshall penned 519. He wrote thirty-six of the sixty-two that were decided on constitutional grounds, dissenting only once. He completely dominated his Court, effectively "Marshalling" it. One example is John Adams's first appointment, Bushrod Washington, George Washington's favorite nephew, who served with Marshall for twenty-five of his thirty-one years on the Court. He disagreed with the Chief only thrice, and thus was commonly referred to as Marshall's second vote. In his long tenure on the Court, Washington wrote only seventy majority opinions, two concurrences, and but one formal dissent.

No wonder, then, that the fifteen Associate Justices who served with Marshall during his reign from 1801 to 1835 are hardly well known to even a majority of the involved polity, with the exception of the great Joseph Story and William Johnson, the Court's first important dissenter. It is apposite to note here an observation by Johnson's biographer, Professor Donald G. Morgan, who quoted a letter dated December 10, 1822, that Johnson wrote to Thomas Jefferson, the President who had appointed him in 1804:

> While I was on our state bench I was accustomed to delivering seriatim opinions in our appellate court, and was not a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote. But I remonstrated in vain; the answer was he is willing to take the trouble and it is a mark of respect to him. I soon however found out the real cause. Cushing was incompetent. Chase could not be got to think or write—Patterson [sic] was a slow man and willingly declined the trouble, and the other two judges you know are commonly estimated as one judge.[1]

The contemporary overall lack of acquaintance with the jurisprudence and even the personae of the other thirteen Associate Justices who sat on the Court two centuries or more ago probably accounts for the fact that the seven or so rating/ranking surveys of all Justices conducted by law-school deans and professors of law, history, and political science between 1960 and the present (in two of which, including the first, I had the privilege of participating), all of which evince a remarkable and indeed gratifying concurrence in their judgments of judicial performance, broadly agree on the relative insignificance of the on-Bench service of those thirteen. On the other hand, the Chief Justice, of course, was unanimously accorded a ranking of "great"—indeed, in the first survey he was the sole Justice to receive that accolade from all sixty-five of the participating evaluators. Brandeis was second with sixty-two and Holmes was third with sixty-one; Story was also accorded the top appraisal, and Johnson a "near great." Of the other thirteen Associate Justices on Marshall's Court, eleven were viewed as "average" (Cushing, Paterson, Chase, Washington, Livingston, Todd, Duvall, Thompson, McLean, Baldwin, and Wayne), while Moore and Trimble came in as "below average" (along with pre-Marshall's Barbour, Woods, and Howell Jackson). None was rated as a "failure," that designation being reserved for eight twentieth-century Justices: Van Devanter, McReynolds, Butler, Byrnes, Burton, Vinson, Minton, and Whittaker.

The fifteen Associate Justices who served with John Marshall were appointed by six Presidents: three by Washington, two by John Adams, three by Jefferson, two by Madison, one each by John Quincy Adams and Monroe, and three by Jackson. Politically, they were majoritarianly marginally Democratic, chiefly due to Charlottesville's Mr. Jefferson and his poli-philosophical offspring, Madison and Monroe. It might have been easy for that trio of Virginia Presidents involved in the fifteen appointments to finger several prominent Virginia lawyers for the high Court, but geographic diversity played an infinitely more prominent role in the selection of putative Supreme Court members then than it does today, or in fact since Theodore Roosevelt was the first President publicly and firmly to reject it as a major criterion for eligibility. Yet at the dawn of our Republic it mattered prominently, and the resolve of the first six Presidents to have a geographically representative Court resulted in the following appointments: two each from Kentucky, Maryland, Massachusetts, and New York, and one each from seven other states: Georgia, New Jersey, North Carolina, Ohio, Pennsylvania, South Carolina, and Virginia. The latter state's George Washington's three Justices came from Massachusetts, New Jersey, and Maryland; Massachusetts's John Adams's two were from Virginia and North Carolina; Virginia's Jefferson's three from South Carolina, New York and Kentucky; Virginia's Madison's two from Maryland and Massachusetts; Virginia's Monroe's one from New York; Massachusetts's John Quincy Adams's one from Kentucky; and Tennessee's Jackson's three from Ohio, Pennsylvania, and Georgia. Ergo, no President chose one from his

home state. Apropos of presidential selections of putative Justices, we hear a great deal about so-called "litmus tests." Yet none of our forty-two Presidents has been as avowedly specific in invoking such tests as was our first, George Washington. All fourteen of his nominees, of whom twelve were confirmed and eleven served, met his septet of criteria *cum* litmus tests, to which he adhered religiously and predictably: (1) support and advocacy of the Constitution; (2) distinguished service in the Revolution; (3) active participation in the political life of state or nation; (4) prior judicial experience on or litigation in lower federal or state tribunals; (5) either a "favorable reputation with his fellows," as Washington put it, or personal ties with the President himself; (6) geographic suitability; and (7) "love of our country."

I hope that you will bear with me as I take a brief summary look at a handful of the fifteen who served with John Marshall. Chronologically senior in terms of appointment was William Cushing, the last of the initial group of five Justices chosen by President Washington in 1789 and the oldest at 57-plus. He came to the Court with considerable judicial and legislative experience in Massachusetts, as well as having been successfully active in securing his state's ratification of the Constitution and its abolition of slavery. While sitting as an Associate Justice on the Court, he became Washington's second choice to succeed John Jay in the center chair (the first, John Rutledge, having failed of confirmation 14:10). The Senate approved Cushing, but, then sixty-four years old, he pleaded advanced age, ill health, and a disinclination to take on what he viewed as the Chief Justice's "additional burdens." Thus, he opted for continued service as an Associate Justice until his death fourteen years later. Not a particularly joyful camper on the Court and, like his Brethren, distinctly unhappy with the hated chores of circuit-riding, Cushing wrote only nineteen opinions in his almost twenty-one years there. However, three of those nineteen constituted support of highly significant pre-Marshall holdings in 1793, 1796, and 1798, the first case addressing conflict between state sovereignty and federal jurisdiction and resulting in the Eleventh Constitutional Amendment barring federal jurisdiction in cases against the states by citizens of another or foreign state (*Chisholm v. Georgia, Ware v. Hylton* and *Calder v. Bull*[2]). Painfully brief—no great worker, Cushing—these represented one of the prevailing seriatim opinions in these cases by the fervent champion of judicial review. Although by no means universally so, Cushing's record on the Court has often been generally regarded as negative. In the words of one of his observers: "William Cushing served longer with minimal effect than any of the fourteen Supreme Court justices whose terms overlapped his."[3]

Born in Ireland but soon a New Jersey resident and Princeton graduate, 47-year-old William Paterson was appointed by Washington in 1793 while serving as a U.S. senator from New Jersey, where he had been state chancellor as well as attorney general. He had been a foremost leader in the Constitutional Convention who, among other contributions, offered the small-state or New Jersey Plan for equal representation of all states in the national legislature. It was Paterson, second only to Oliver Ellsworth, who labored assiduously for the adoption of the Judiciary Act of 1789, which implies the power of judicial review that was so vital to Washington's hope for a strong federal judicial system. The first nine sections of the significant statute, establishing federal district and circuit courts, were in Paterson's handwriting. During his thirteen years on the Court, he proved to be a fervent Federalist as well as a staunch philosophical Hamilton ally. Like Cushing, he was in the controlling seriatim opinions—such opinions being the custom prior to John Marshall's Chief Justiceship—in *Ware v. Hylton* and *Calder v. Bull,* and, together with Samuel Chase and James Iredell, wrote another one in the significant 1796 case of *Hylton v. United States.*[4] That holding, anticipating Marshall's seminal

1803 *Marbury v. Madison*[5] decision establishing the Court's power of judicial review, implicitly recognized such a power by upholding Congress's authority to enact a carriage tax against a major constitutional challenge. *Ware v. Hylton* established the supremacy of national treaties over state laws, and *Calder v. Bull* held that the Constitution's prohibition against passing ex post facto laws extended only to criminal cases, *not* to civil ones. Like Cushing, Paterson loathed circuit-riding and seemed to be almost pleased when a serious circuit-riding-induced injury truncated that chore in 1804, probably contributing to his failing health and death two years later.

When the Senate rejected Washington's selection of Rutledge as Chief Justice in late 1795, the President's initial choice was Maryland's 54-year-old chief justice, Samuel Chase. A signer of the Declaration of Independence, a hero of the Revolution, and a key member of the Continental Congress—although not a supporter of the Constitution (he campaigned against it and *The Federalist Papers*)—the acid-tongued, outspoken, cantankerous but brilliant Chase had to settle for a vacant Associate Justice seat in 1796. Washington felt strongly that Chase's service to the cause of independence simply justified the latter's selection. Although Chase had begun to temper his criticisms of the Constitution and indeed become a vocal, zealous supporter of the Union, once on the high Bench he immediately began to make a specialty of denouncing democracy and condemning the principles of the Republican Party. He rendered himself thoroughly obnoxious to the latter. Thus, to cite just a few examples, as soon as he joined the Court he predicted gratuitously, while charging a Baltimore grand jury, that under Jefferson "our republican constitution will sink into a mobocracy, the worst of all possible governments"[6]; and he charged Jefferson, both before and after his election as President in 1800–1801, with "seditious attacks on the principles of the Constitution." For these and similarly imprudent assaults launched from both on and off the Bench, the House of Representatives impeached Samuel Chase on grounds of eight articles of "high crimes and misdemeanors" by a vote of 73:32 in March 1804—the sole impeachment on record to date against a Justice of the Supreme Court of the United States. Fortunately for the tenets of judicial independence and the separation of powers, when the Senate voted on the charges brought by the House on March 1, 1805, enough Republicans joined the Federalists to acquit the controversial figure 19:15 on the most grievous charge, six of the other seven not even receiving a simple majority, let alone the necessary two-thirds to convict. Although, as Irving Dilliard put it cryptically, "One Samuel Chase on the Supreme Court of the United States may be said to have been enough,"[7] Chase did make notable jurisprudential contributions during his fifteen years on the Court, such as his persuasive *seriatim* opinions in the important rulings in the aforementioned *Ware v. Hylton* and *Calder v. Bull*.

President John Adams's second appointee, Alfred Moore, resigned from the Marshall Court because of ill health in 1804 after barely four, but by all accounts unremarkable, years of service. Although only 49 years of age, he, like most of his contemporaries, was worn out by the hated, arduous circuit-riding obligations. Though Moore was a distinguished and successful lawyer, his short on-Court career made "scarcely a ripple in American judicial history."[8] He delivered but one opinion, a *seriatim* one in an admiralty case in 1800.[9]

The departure of the loyal Federalist enabled President Jefferson to make the first of his three Democrat-Republican appointments, all designed to redress the sway of his arch political rival, distant cousin John Marshall, whose mind Jefferson referred to as that "gloomy malignity." His choice devolved on a 32-year-old young attorney in private practice, William Johnson, a Charleston native and Princeton graduate who had already been a judge of the South Carolina Supreme Court.

Johnson was the sole member of the Marshall Court to stand up to the Chief consistently, despite the gradual addition of seven Democrat-Republican kindred political members who would soon become quasi-Marshallians. He also stood up to Jefferson when he deemed that appropriate. Johnson wrote what scholars regard as the first *real* dissenting opinion on the Court in 1805.[10] Viewed broadly as the earliest practitioner of formal dissents, he penned one-half of the Supreme Court's dissenting opinions during his three decades on the high Bench, all but one of these during Marshall's tenure. He also wrote significant concurring opinions, such as his often-quoted one in *Gibbons v. Ogden*,[11] the famed New York Steamboat Case of 1824, in which Marshall pronounced the plenary power of Congress over interstate and foreign commerce. Johnson's concurrence pleaded for an even broader articulation of that national power, one still very much at issue in our own day. Only the Chief Justice and Justice Story authored more opinions during the Marshall era than the hard-working, energetic Johnson, who penned 112 majority, 21 concurring, 34 dissenting, and 5 *seriatim* opinions. He was a major contributor to the development of constitutional jurisprudence as well as to the developing nature of the judicial process in our governmental constellation. He richly merits the approbation bestowed upon him by the pages of history.

Last, but assuredly not least, of the quintet to which the dictates of time and prudence limit me for today's purposes is the great Joseph Story, Madison's second and last appointment, late in 1811, to fill the seat of William Cushing, who had died in the fall of 1810. The President had first selected Jefferson's able first-term Attorney General, Levi Lincoln of Massachusetts, but despite the Senate's enthusiastic confirmation, Lincoln, citing poor eyesight, refused to accept his commission. Madison then nominated New England's prominent Democrat-Republican leader, Alexander Woolcott of Connecticut, but the Senate's Federalists, citing "extreme partisanship both in and out of office," rejected him decisively 24:9. Nor was the by-now-exasperated Madison's third try, John Quincy Adams, his minister to Russia, willing to serve, despite the Senate's unanimous bipartisan confirmation of John and Abigail Adams's son, who pleaded "insufficient legal acumen." Actually, Adams had a distinct distaste for the judicio-legal process, which he viewed as "taxing and dull." He had bigger fish to fry—acute political ambition. Madison decided to pout for seven months and then turned to the youthful Story, a Massachusetts legal whiz, Harvard graduate in 1798 at 19 years of age, a nominal Democrat-Republican, yet a close friend of John Marshall, who had given every indication of leaning toward federalism and economic proprietarianism.

Jefferson was not amused by his disciple's choice, a man who, among other (to the ex-President) unacceptable actions, had refused to support Jefferson's Embargo Act of 1807. The sage of Monticello flew into a veritable rage, pronouncing Story a "pseudo-Republican," a "political chameleon," and an "independent political schemer,"[12] and he warned Madison that Story was an "inveterate Tory, who would 'out-Marshall'" Marshall in his nationalist-Federalist and propertarian jurisprudence. He did! The Senate, although less than enchanted with the nominee, was eager to terminate what had become an appointment charade and confirmed the eighth of Dr. Elisha Story's seventeen children *viva voce*, without a roll call, three days after Madison sent his name over. At a mere 32 years of age, a month-and-a-half younger than Johnson, he was the youngest appointee ever to attain the Court, a record that undoubtedly stands securely. (William O. Douglas, at age 40, would be the third youngest.)

Story's appointment proved to be one of the most fortuitous in the history of Court and Country. In terms both of intellectual leadership and of jurisprudential commitment, he was an outstanding Justice. Standing with Marshall for almost a quarter of a century, and

continuing for another decade after Marshall's death in 1835 until his own in 1845, Story was arguably perhaps even more determined than the Chief to further the national posture in the face of mounting storm signals to the Union. Obviously, Story—who strongly disliked both Jefferson and Jackson—was neither a democrat nor a confirmed majoritarian, and thus he personified the intellectual antithesis of the Democrat-Republican creed, notwithstanding his formal political adherence label. Yet the role this towering common-law jurist played in the stabilization of the Republic and in its growth and security was second only to Marshall's. It would be futile as well as unproductive to endeavor to pinpoint the "most significant" among the 270 Court majority opinions he penned—he participated in 1,340 cases and wrote thirteen dissents and one concurrence. Most observers agree, nonetheless, that among the most influential—if not *the* most—was his authorship of *Martin v. Hunter's Lessee*, which he delivered for the Court in 1816[13] and which delighted John Marshall. Challenged in the case was a key section of the Judiciary Act of 1789 that enabled the U.S. Supreme Court to review *state* judicial rulings interpreting federal laws and the federal Constitution. Not only did Story uphold the contested section of the Act in his learned, lengthy, and eloquent opinion, but he ruled that it represented a constitutionally mandated obligation. No wonder that the Chief Justice was pleased with this seminal expansion of federal judicial power.

Story left lasting monuments to constitutionalism, nationalism, and legal scholarship with his famed lectures at the Harvard School of Law, where he served as the Dane Professor while a member of the Court, his cosponsorship (with Chancellor James Kent of New York) of the American equity system, his work on copyrights and patents, and his elucidation of property, trust, partnership, insurance, commercial, and maritime law. Unlike his dalliances with poetry, his seminal *Commentaries on the Constitution of the United States*—published in three volumes in 1833, repeatedly republished since, and still available in an abridged one-volume form—remains an indispensable work in the study of constitutional law and history. Story's treatises went through seventy-one editions, and he continues to hold the record as the most frequently published Supreme Court Justice to date. He was indubitably one of the Court's giants.

If not all, or even none, of the other fourteen Associate Justices who served with Marshall merit that accolade—and, with the possible exception of William Johnson, they do not—they nonetheless deserve well of the Republic. All had served faithfully in state and/or federal legislative capacities; all had some prior judicial experience on lower federal and/or state courts; the first eight had participated actively in the Revolution; the first nine were delegates to their state and/or the national constitutional conventions; all either were or became supporters of the Constitution of 1787; all gave their weary bodies to circuit-riding; all had practiced law following college and legal training; all loved their home states and their fledgling nation; and, after all, they were members of the Supreme Court of the United States under Marshall's defining universe and constellation of the judicial authority of the United States.

Whatever one's view of the achievements of the early Justices may be, they testify to the crucial role the now 108 Justices have performed so remarkably well in the Court's more than 211 years of life. They provide proof positive of promises fulfilled and achievements rendered. Indeed, notwithstanding the often tiresome and not infrequently self-serving (albeit exasperating) sniping that has sporadically characterized the Court's existence—sniping that has regrettably, although hardly surprisingly, emanated most loudly from prestigious centers of learning located near bodies of water on both our East and the West coasts—it has, I submit with conviction and affection, generally been, in James Madison's hopeful plea, "a bench happily filled." His

wish, expressed in 1787, has stood the test of time admirably.

ENDNOTES

[1]**Justice William Johnson, The First Dissenter: The Career and Constitutional Philosophy of a Jeffersonian Judge** (Columbia: University of South Carolina Press, 1954), pp. 181–82. The reference was to "Marshall's second vote"—that is, Bushrod Washington.

[2]2 U. S. (2 Dall.) 419, 3 U.S. (3 Dall.) 199, and 3 U.S. (3 Dall.) 386, respectively.

[3]See Donald O. Dewey, "William Cushing," in Melvin I. Urofsky, ed., **The Supreme Court Justices: A Biographical Dictionary** (New York: Garland Publishing Co., 1994), p. 127.

[4]3 U.S. (3 Dall.) 171 (1796).

[5]5 U.S. (1 Cranch) 137 (1803).

[6]As quoted in Samuel Eliot Morison, Henry Steele Commager, and William E. Leuchtenburg, **The Growth of the American Republic**, 6th ed. (New York: Oxford University Press, 1969), vol. 1, p. 346.

[7]Irving Dilliard, "Samuel Chase," in Leon Friedman and Fred L. Israel, eds., **The Justices of the United States Supreme Court 1789–1978: Their Lives and Major Opinions** (New York: Chelsea House Publishers, 1980), vol. 1, p. 197.

[8]Leon Friedman, "Alfred Moore," in Friedman and Israel, **The Justices of the United States Supreme Court 1789–1978**, p. 279.

[9]*Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

[10]*Huidekoper's Lessee v. Douglass*, 7 U.S. (3 Cranch) 1 (1805). Actually, it was Thomas Johnson (1791–1793) who dissented in the first case in which opinions were delivered formally: *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402 (1792).

[11]22 U.S. (9 Wheat.) 1 (1824).

[12]See R. Kent Newmyer, "A Note on the Whig Politics of Justice Joseph Story," 48 *Mississippi Valley Historical Review* (December 1961), p. 482.

[13]14 U.S. (1 Wheat.) 304 (1816).

Remembering the Great Chief Justice

CHARLES F. HOBSON

From the moment he departed mortal life in July 1835, John Marshall secured a place of first rank in the American pantheon. Joseph Story, his close friend and brother judge, pronounced him "a great man"—not just a great man of his time but "a great man in any age, and of all ages...one of those, to whom centuries alone give birth." Although uttered in the fulsome language of eulogy, Story's verdict, coming from one who knew Marshall intimately over many years, rings true. Indeed, added Story, Marshall was not one of those celebrated men who "appeared greatest at a distance" and whose "superiority vanished on a close survey"; rather, "it required some degree of intimacy fully to appreciate his powers; and those who knew him best, and saw him most, had daily reason to wonder at the vast extent and variety of his intellectual resources."[1]

Today, two hundred years after his appointment as Chief Justice of the Supreme Court of the United States, Marshall's reputation remains as high as ever, resting on a solid foundation that is virtually resistant to iconoclastic attack. Both the public at large and especially the fraternity of lawyers and judges hold Marshall in reverent regard. Even academics—law professors, political scientists, and historians, whose business it is to study American constitutional law and history—acknowledge his greatness. In any ranking of American jurists, Marshall is always listed among the "greats" and usually heads the list.[2] It is true, of course, that Marshall's reputation benefited from the perception that he was on the "right" side of history. The Constitution is still the framework of our government and our fundamental law; the federal union and government brought into existence by the Constitution have endured, stronger and more powerful than Marshall could possibly have imagined; and the Supreme Court continues to sit here in Washington, enjoying unquestioned authority to expound and pronounce the law of the Constitution. The enduring suc-

cess of our Constitution and government—and particularly the flourishing state of the judicial branch—are attributed in no small measure to Marshall. He was there at the beginning—when the federal government was in its infancy, when the details of the Constitution began to be filled in, when the Constitution first entered the court system as a law to be expounded and applied in the ordinary course of adjudicating cases, and when the Supreme Court first began to acquire its identity as the interpreter and guardian of the Constitution and arbiter of the federal system.

Marshall, then, is a "father" or "founder"—the father of the Supreme Court, the founder of American constitutional law—or, as Story dubbed him, "the Expounder of the Constitution of the United States."[3] Indeed, so large does Marshall's shadow loom over the early years of the Supreme Court that many Americans mistakenly assume he was the first Chief Justice, rather than the fourth. The U.S. Postal Service literally gave its stamp of approval to this assumption back in February 1990, when it issued a commemorative of the bicentennial of the first meeting of the Supreme Court. Do you recall whose image was on that twenty-five-cent stamp? Not that of John Jay, the first Chief Justice. This audience, to be sure, does not need to be reminded that there was a Supreme Court, there was a constitutional law, before Marshall, and that the Historical Society sponsors a documentary edition devoted to the Court's first decade.

Long ago, Marshall left the realm of history and entered the realm of myth and symbol. Perhaps Story began the myth-making process, but it was carried to completeness by the outpouring of hagiography that occurred during the 1901 centennial and especially by the publication of Albert J. Beveridge's four-volume biography in 1919.[4] More than anyone else, Beveridge established the heroic image of Marshall as a colossus who bestrode history and shaped it according to his prescient vision and will. As depicted by Beveridge, Marshall was no mere jurist who created a powerful Supreme Court, but the epic hero of American nationalism who interpreted the Constitution to bring about the development of a mighty nation-state and the triumph of capitalism. Alternative or opposing narratives of American history did not dispute Beveridge's portrait of a dominant and dominating Chief Justice but simply reversed Marshall's role from hero to villain, making him responsible for yoking the Constitution upon the backs of the American people, frustrating their democratic aspirations and allowing the wealthy and propertied classes to run roughshod over the masses. Thus, opponents have joined partisans in building the Marshall legend. Marshall's reputation for possessing nearly superhuman powers of reasoning, for instance, comes in part from Thomas Jefferson, who once reportedly remarked: "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. So great is his sophistry you must never give him an affirmative answer or you will be forced to grant his conclusion. Why, if he were to ask me if it were daylight or not, I'd reply, 'Sir, I don't know, I can't tell.'"[5]

The heroic image of Marshall has proved remarkably persistent, despite scholarship that has brought him back into history. Because of what the Supreme Court became, because of what the nation became, we still tend to magnify the accomplishments of one man and his Court. But this foreshortening distorts the historical process and obscures the true significance of Marshall's long tenure as Chief Justice of the United States. Marshall himself certainly had no sense of his own greatness—or, if he did, he wore it very lightly. He did not brood about his place in history. He was the most modest and unassuming of men. His whole being and manner of conducting his life speak to this utter lack of self-importance. Consider, for example, that Marshall made no systematic attempt to preserve his personal papers—indeed, took positive action to destroy them or use them as waste paper. Or consider

the epitaph he drew up a few days before he died: "John Marshall, son of Thomas and Mary Marshall, was born the 24th of September, 1755; intermarried with Mary Willis Ambler, the 3d of January, 1783; departed this life the [6th of July, 1835]." (Contrast this simple statement with the epitaph drawn a decade earlier by Marshall's Monticello kinsman.) Examples could be multiplied: the Chief Justice, doing the family marketing in Richmond, once volunteering to carry a turkey home for a young dandy who lamented not having a servant with him for the purpose; or, on circuit in Raleigh, North Carolina, gathering wood in the early morning to make up his own fire at the inn of his frugal landlord; or at a game of quoits, down on his hands and knees (with his coat off), carefully measuring the contested distance between quoit and meg—a scene that to a visiting Frenchman illustrated "the real beauty of republicanism."[6] Marshall's unaffected manner was well summed up by a New England visitor in 1826: "There is consistency in all things about him—his house, grounds, office, himself, bear marks of a primitive simplicity and plainness rarely to be seen combined."[7]

I do not mean to suggest that Marshall was not ambitious, that he did not aspire to fame. I have no doubt that he hoped to be ranked with the great judges of English history, as John Adams so ranked him when he wrote in 1825 that it was "the pride of my life that I have given to this nation a Chief Justice equal to Coke or Hale, Holt or Mansfield."[8] But Marshall was perfectly content to entrust his reputation to future generations. He died thinking that history had long since passed him by, that his career had been a failure—perhaps a noble one, but a failure nonetheless. He did not think the Constitution would survive or that a union that, as he remarked in 1832, had been "prolonged thus far by miracles" would last.[9] And, of course, he was right. The Civil War stands as devastating testimony to the failure of the experiment in federal union that the Framers had devised in 1787 and that Marshall strove to preserve. Marshall could not know that the union would be reestablished and flourish stronger and more consolidated than ever before. But, in a real sense, it was a new union, a new nation, a new Constitution, a new Supreme Court that emerged after 1865. Indirectly, to be sure, we can link Marshall to these developments. Across this great divide in our history, his constitutional opinions shone like a beacon to inspire subsequent generations in the process of nation-building and institutional development. Still, the principles and purposes that animated Marshall were not really the same as those of latter-day nationalists and jurists, who expanded the scope of national power and of judicial review in ways that he could not possibly have foreseen or even conceived of.

Republicanism

In this bicentennial remembrance, I want to present Marshall as he saw himself, in his own time and place. His working life spanned the years from the Revolution to the age of Jackson. He was a man of the eighteenth century who retained his eighteenth-century habits of mind and sensibility as he confronted the new and rather frightening world of nineteenth-century America. He witnessed the transformation of the essentially patrician, deferential, and communal society of the late eighteenth century into the essentially egalitarian, democratic, and individualistic society of the early nineteenth century. More briefly, we can describe this as the transition from republicanism to democracy. Republicanism was radical, egalitarian, and democratic in its implications. In overthrowing the monarchical regime, however, many American revolutionaries envisioned a republican order that largely retained ancient notions of hierarchy and deference. They believed in "popular" government in the sense of a fairly widespread voting franchise (among white males owning at least some property), but assumed that government itself would continue to be the preserve of the

"better sort," gentlemen of sufficient property, education, and leisure to enable them to govern wisely and virtuously. But the radical egalitarianism of the Revolution undermined this patrician republican order almost from the outset. The Constitution of 1787 was an attempt to shore up and strengthen the deferential republic, but in this respect it proved to be a partial and temporary success.

Throughout his life, Marshall steadfastly adhered to the principles, beliefs, and values of the old republic—the balanced government of the Constitution, the wise and virtuous leadership of disinterested statesmen, and the respectful obedience by the citizenry to government and laws. He was different from you and me. He did not share our modern notions of democracy and equality. He accepted as a given that society was hierarchical, which of course did not prevent him from mixing easily and familiarly with his social inferiors. With dire foreboding, he saw the orderly republic of the founders give way to the volatile mass democracy of the age of Jackson. This new kind of rough-and-tumble democratic politics alarmed him. With the 1828 election that brought Jackson and his party to power fresh in his mind, Marshall worried that contests for the presidency had become more or less permanent campaigns, constantly agitating party passions, promoting bitter recriminations, and undermining the tranquility essential for wise and orderly government. They posed, as he said, "the most serious danger to the public happiness. The passions of men are enflamed to so fearful an extent, large masses are so embittered against each other, that I dread the consequences. The election agitates every section of The United States, and the ferment is never to subside...The angriest, I might say the worst passions are roused and put into full activity."[10]

These words, written in 1830, capture the essence of Marshall's eighteenth-century brand of republicanism.[11] His skepticism about popular government, his dread of unchecked democracy, bespoke a pessimistic view of human nature—a view derived from his experience as a combat soldier in the Continental army and as a participant in the first experiments in republican government during the 1780s, and one that was confirmed by the worldwide revolutionary ferment set in motion by the French Revolution. Human nature exhibited a perpetual contest that pitted "reason and judgment" against the "passions"—a contest in which the former nearly always yielded to the superior influence of the latter. This fact did not bode well for popular self-government. Marshall accordingly adopted a chastened and sober republicanism, what he called a "well-regulated Democracy," as embodied in the Constitution. Republican government could work tolerably well, he believed, so long as it operated with a system of checks and balances that reinforced the natural moderating effects of self-interest and so long as it produced leaders of excellent character, distinguished for sound and discriminating judgment and disinterested attachment to the public interest—men like George Washington, for example.

Marshall clung to the classical republican belief that enlightened statesmen could identify and pursue a single public interest even as he recognized that competing and clashing interests were inevitable concomitants of free and popular governments. The idea that society was nothing more than a collection of completely self-absorbed individuals and groups and that politics was an arena of scrambling, selfish interests was abhorrent to him. This is what he saw America becoming in 1830, and he did not like what he saw. He continued to hold onto a concept of virtue that in some measure required disinterested attachment to the common good of society—if not by the whole citizenry, then at least by the leadership of the republic. Virtue, fortified by proper constitutional arrangements, could continue to be the animating principle of the American republic.

At the same time, Marshall recognized that popularly elected legislatures, so riven by faction, were not, by themselves, up to the job

of maintaining the virtuous republic. They required assistance—and, on occasion, supervision—from the executive branch and from the judiciary to mitigate the pernicious effects of factional politics. As Chief Justice, Marshall consciously endeavored to foster an image of the Supreme Court as a disinterested umpire standing above the partisan fray, a repository of wisdom and virtue, where reason, reflection, judgment, and disinterestedness continued to hold sway.

One cannot stress too much the degree to which the American Revolution, culminating in the adoption of the Constitution, was the defining epoch of Marshall's life. Much of what he did and wrote as Chief Justice was rooted in his experiences as a Continental soldier and as a postwar legislator and lawyer in Virginia. In an important sense, his constitutional judgments reflected that old-fashioned republicanism he believed the Framers meant to preserve and fortify in the instrument of 1787. This is most clearly seen in that line of cases in which he expounded the clause in Article I, section 10 of the Constitution, prohibiting the states from passing laws "impairing the Obligation of Contracts." The Contract Clause was the Marshall Court's principal weapon with which to restrain state interference with property rights. To Marshall, the Contract Clause epitomized a Constitution the true character of which lay as much in its abridgment of state powers as in its granting of powers to the federal government. In the contract cases, we see Marshall at his most Madisonian—that is, he was trying to carry out what James Madison believed to be an essential purpose of the Constitution: to prevent the flagrant abuses of private rights committed by state legislatures that were so prevalent in the 1780s.

As a member of the Virginia legislature in the 1780s, the future Chief Justice (as he recalled in an autobiographical memoir) followed the lead of Madison on all the public issues of the day, praising him as "the enlightened advocate of Union and of an efficient federal government."[12] This was the time when Madison formulated his brilliant insight, so memorably expressed in *The Federalist* no. 10, that the real threat to republican government was the ease with which parties and factions could become majorities and effect their mischievous objects by legislation. Once in control, these majorities remorselessly trampled upon the private rights of individuals and minorities. He had in mind laws authorizing the government to issue paper money ("bills of credit") and make it a legal tender for public and private debts, laws that permitted citizens to offer specific property instead of money in payment of debts, and laws that provided for payment of debts in installments and that postponed executions for debts. The problem was that legislatures were deciding questions of private right—that is, essentially, legal questions—under circumstances in which the litigant was being "a judge in his own cause." "[W]hat are many of the most important acts of legislation," asked Publius-Madison in *The Federalist* no. 10, "but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens? And what are the different classes of legislators but advocates and parties to the causes which they determine?" Justice or concern for the public good could never "hold the balance" when, for example, a majority faction of creditors or debtors passed a law concerning private debts.[13]

Marshall's expositions of the Contract Clause were infused with perceptions he formed as a postwar Virginia legislator and colleague of James Madison. Consider, for example, *Fletcher v. Peck,* the first of the great Contract Clause decisions.[14] In 1795, the Georgia legislature sold 35 million acres of its Yazoo lands (most of present-day Alabama and Mississippi) to several New England land companies; these companies, in turn, hastily sold the lands to third parties throughout the country. The next year, 1796, after it was revealed that all but one of the

Georgia legislators had exchanged their votes for shares in the land companies, a newly elected legislature rescinded the sale. When the case came up for decision in 1810, Chief Justice Marshall for the Court disallowed the act rescinding the Yazoo sale. He ruled that the state's grant of land was a contract protected by the Constitution; the rescinding act of 1796 impaired the obligation of that contract and was therefore void.

Before disposing of the case on the basis of the Contract Clause, Marshall discussed the actions of the Georgia legislature in terms similar to those used by Madison in the 1780s. In rescinding the sale, said Marshall, the Georgia legislature had acted as "its own judge in its own case." It had taken away rights that had vested under the act of sale, the rights of innocent third-party purchasers. If the legislature presumed the right to decide a matter of title, that is, a judicial question, then (he said) "it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal." A court of equity might set aside the Yazoo sale as fraudulent, but only as between the original parties; it would not disregard "the rights of third persons, who are purchasers without notice, for a valuable consideration." But the Georgia legislature had not followed the rules; therefore, in rescinding the sale, it had exerted "a mere act of power in which it was controlled only by its own will."[15] In the 1780s, before the adoption of the Constitution and the Contract Clause, Georgia and the other states could get away with such acts of power, but no longer; they were now restrained by the law of the Constitution.

This "republican" concern was uppermost in other opinions as well, in which Marshall explicitly linked the Contract Clause to the evils of state legislative politics in the 1780s. State interferences with contracts, he said, was a "mischief" that "had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government."[16] Marshall wrote these words in 1827, but they could have been written by Madison in 1787.

Nationalism

Having considered how republicanism informed Marshall's jurisprudence in cases in which he applied the Contract Clause to invalidate state laws, let me turn to another theme: nationalism. As with republicanism, Marshall employed his nationalist principles to enforce the Constitution's abridgment of state sovereignty. Again, if we are to understand Marshall's nationalism, we need to fix our attention on that formative decade of the 1780s—formative in the development of the United States and formative in the development of the future Chief Justice's principles and beliefs. In 1831, Marshall wrote to John Quincy Adams that he had "always thought the interval between the conclusion of our revolutionary war and the adoption of our present constitution the most interesting and the most instructive portion of our history."[17]

In his autobiographical memoir, Marshall traced his nationalism to his service in the Continental army, where (he said), he was associated "with brave men from different states who were risking life and everything valuable in a common cause." This experience, he added, confirmed him "in the habit of considering America as my country, and Congress as my government."[18] As an officer who saw action at Brandywine Creek, Germantown, Monmouth, and Stony Point and endured the winter encampment at Valley Forge, Marshall had a visceral understanding of what a weak central government meant. His partiality to union and nationalism hardened into an unwavering conviction during the 1780s, as the re-

turn of peace exposed the dangerous weaknesses of a Confederation government that lacked the power to tax or to impose a uniform commercial policy. He was never an advocate of national power for its own sake, however, but only as a means to preserve and consolidate the newly won independence of the United States and to promote the commercial prosperity of the American people. The impotent Confederation portended political and commercial anarchy, disunion, and eventual loss of independence, as the individual American states would inevitably become subservient to European powers.

At the core of Marshall's nationalist outlook was a deep-rooted anxiety about the perilous position of the United States in a hostile world. That American security, independence, and, ultimately, liberty required a strong and energetic general government was an axiom Marshall never doubted, and he operated on the assumption that the Constitution conferred the requisite powers to accomplish these objects. He regarded the adoption of the Constitution as a transforming moment, a rare, almost miraculous occasion on which the American people exercised their sovereignty to create a new constitutional framework. The Constitution represented the people's conscious, deliberate repudiation of a confederal "league" of sovereign states in favor of a "nation of states" based on the principle of national supremacy. That the Constitution provoked bitter opposition and was approved only after a closely contested campaign for ratification merely confirmed its nature as a radical break with the immediate past.

This constitutional settlement of 1787 was, by definition, precarious. The equilibrium it established between the federal and state governments was in constant danger of breaking down in the direction of the states. In the American federal system as Marshall understood it, centrifugal force was much stronger than centripetal. If the republic was to perish, it would not be "by the overwhelming power of the national government; but by the resisting and counteracting power of the state sovereignties."[19] By itself, the Constitution could not prevent this from happening. Everything depended on how that instrument was interpreted. There was the ever-present possibility of backsliding, of transforming the Constitution by construction into a compact resembling the discarded Articles of Confederation. To Marshall, this was an interpretative heresy that must be combated with all the weapons at his command. It is this defensive quality of Marshall's nationalism that bears emphasis. As Marshall learned from Madison, one of the chief advantages of a strong and energetic general government was its capacity to act as a steadying counterweight to the state governments. In the great "federalism" cases, those that involved the competing claims of the general and state governments, Chief Justice Marshall saw himself not as positively augmenting federal power but as resisting what he regarded as the superior force of state sovereignty.

Take *McCulloch v. Maryland,* for example, which upheld Congress's power to incorporate a national bank.[20] With its eloquent affirmation of the doctrine of implied powers and the principle of national supremacy, its reading of the Constitution as conferring on Congress broad discretion to determine the extent of its express powers, *McCulloch* is the great nationalizing opinion par excellence. Later generations of legislators and jurists invoked its lofty language to justify the expansion of national power that occurred in the late nineteenth and twentieth centuries, and rightly so. In the context of 1819, however, the opinion has an undeniable defensive flavor to it. True, it was an affirmation of national power, but one made for the purpose of enabling the general government to exercise its powers effectively—specifically, to deny the state of Maryland's power to tax the national bank. Recollect the Chief Justice's famous aphorism, uttered in the second part of the opinion: "That the power to tax involves the power to destroy; that the power to destroy may defeat

and render useless the power to create."[21] Maryland's tax (and Maryland was not the only state laying a tax on the bank at this time) was a prime example of state aggression on federal authority, an illustration of those powerful centrifugal tendencies that constantly threatened to dissolve the union. Although the opinion is justly celebrated for enunciating the doctrine of implied *federal* powers, equally important was its application of the principle of national supremacy to demonstrate the existence of implied restrictions on *state* powers.

The defensive aspect of *McCulloch* is also evident in its use of "broad" construction—sometimes called "liberal" or "loose" construction (terms that Chief Justice Marshall never used). Marshall did not so much affirm a "broad" construction of Congress's powers as reject the restrictive construction adopted by Maryland's counsel to deny Congress's power to create a national bank. In upholding such a power, Marshall was not being aggressively or gratuitously nationalistic, but was responding to and refuting a construction that he believed would emasculate the general government and prevent it from carrying out the important objects entrusted to it.

The same is also true of another illustrious opinion, *Gibbons v. Ogden,* in which Marshall for the Court gave an expansive reading of the clause of the Constitution conferring on Congress the power to regulate interstate and foreign commerce.[22] No part of the Constitution has proved a more fertile source of national power than the Commerce Clause. Upon this constitutional foundation Congress erected the federal regulatory state that emerged in the twentieth century. Not surprisingly, *Gibbons* has been cited as the leading precedent for this development. Again, however, its principal significance at the time lay in limiting the exercise of state power—in this case, the state of New York's monopoly on steamboat navigation on its waters. In fact, the situation in regard to steamboat navigation in the 1820s was reminiscent of the retaliatory commercial restrictions enacted by the states under the Articles of Confederation. In reaction to New York's monopoly, some states passed laws forbidding steamboats licensed by New York to navigate their waters, while others began to grant their own steamboat monopoly rights.

As in *McCulloch,* counsel for the New York monopoly relied on strict construction—in this instance, to minimize the reach of the Commerce Clause in order to assert a concurrent power in the states to regulate commerce. Once again, Marshall felt compelled to go on the defensive, devoting a good portion of his opinion to denying the validity of the concurrent power doctrine. At the conclusion of *Gibbons,* he again animadverted upon strict construction and its baneful consequences: "Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use."[23] This passage nicely captures the tenor of Marshall's nationalism, which was to protect and defend the general government against persistent antifederal forces that imperiled the "more perfect Union" formed by the Constitution of 1787.

As Marshall saw things in the early nineteenth century, the federal government was almost constantly under siege from state aggression. And the national judiciary was periodically the focus of this aggression, most notably in the aftermath of the *McCulloch* decision in 1819. The Supreme Court and its Chief Justice were bitterly denounced for the bank decision, nowhere more angrily than in the Chief Justice's native state of Virginia. Marshall was so alarmed by the attack that he made an extraordinary extrajudicial foray into

newspaper polemics to defend the decision and the Court, carefully hiding his identity behind the pseudonym "A Friend of the Constitution." He viewed the anti-Court agitation as the entering wedge of a broader assault on the Constitution and the union itself aimed at its most vulnerable point. The Court's attackers, he wrote, "like skilful engineers, batter the weakest part of the citadel, knowing well, that if that can be beaten down, and a breach effected, it will be afterwards, found very difficult, if not impracticable, to defend the place. The judicial department, being without power, without patronage, without the legitimate means of ingratiating itself with the people, forms this weakest part; and is, at the same time, necessary to the very existence of the government, and to the effectual execution of its laws."[24] Throughout the 1820s and 1830s, the Chief Justice experienced a continuing sense of the Court's vulnerability, as bills were regularly introduced in Congress to reduce or eliminate the Court's appellate jurisdiction over the state courts and its authority to pronounce state laws unconstitutional. Thanks in no small part to Marshall's great prestige and superb political skills, none of these bills was enacted into law. In any list of the achievements of his Chief Justiceship, simply *preserving* the institution of the Supreme Court intact must rank high.

Constitutional Law

Republicanism and nationalism shaped Marshall's constitutional thinking before he became Chief Justice and continued to do so throughout his years on the Bench. As a jurist, he fused constitutionalism and law into something we call constitutional law. Time permits only a brief consideration of this topic, which indeed deserves a lecture of its own.

As with republicanism and nationalism, it is instructive to look at Marshall's experience before he became Chief Justice. In the two decades prior to his appointment, Marshall practiced law in the higher courts of Virginia. There his ideas about law and judicial power developed and matured. There he mastered the principles and doctrines of English common law and equity and the rules and methods of statutory construction. When the time came after 1801, he turned to these familiar principles and methods—the only ones he knew—and applied them to the novel, almost virgin, field of constitutional law. Equally important, as a practitioner in the courts of Edmund Pendleton and George Wythe, the future Chief Justice learned that judicial discretion and judicial independence were necessary to insuring that republican government could be both orderly and just.[25]

We should keep in mind that the emergence of an independent judiciary in the new republican order after 1776 was an unanticipated, even surprising, development. Thomas Jefferson, the idealistic republican revolutionary and lawgiver, did not foresee an enlarged role for judges in his reform plans for Virginia; indeed, he wanted to rein in judicial discretion. He envisioned a republican code that would be rational, clearly understood, and easily applied by judges who would be tightly tethered to the text of the law. A judge, said Jefferson, should be "a mere machine."[26] The example of Lord Mansfield, the great English jurist who used judicial discretion to rationalize and systematize the commercial law, was an anathema to Jefferson. Suffice to say, things did not work out as Jefferson hoped. Judicial discretion not only survived but flourished in America, because faction-ridden republican legislatures enacted so much confusing, contradictory, and unjust legislation. In time, American judges would extend discretion to the practice of measuring ordinary laws against written constitutions. And soon Jefferson would discover that an American Mansfield presided over the American Supreme Court.[27]

By melding law and constitutionalism, by appropriating the Constitution as the judiciary's special preserve, Marshall made the Supreme Court into a major player when it might well have remained a minor appendage

of government, a really distant third behind Congress and the executive branch. He staked out the judiciary's claim to expound and apply the law of the Constitution in the same way that courts interpret common law and statutes in their accustomed role of adjudicating legal disputes. On this disarming premise, Marshall helped to lay the foundation for the judiciary's rise to being one of the three capital powers of government. I say "disarming" because Marshall made it seem like the most natural, most ordinary, even inevitable thing in the world that courts should expound and apply constitutions. In *Marbury v. Madison*, he stated that the Constitution was "a rule for the government of *courts*, as well as of the legislature."[28] As he framed the issue, judges could not ignore the Constitution but were duty bound to enforce it by disallowing laws repugnant to it. But there was nothing inevitable about this development; there were other possibilities, other paths that might have been taken. True, Americans at that time had no trouble in thinking of constitutions as "law"—but not really the kind of law that operated in the court system. Constitutions were "fundamental law," meaning foundational political law, the framework of government. Marshall took things a step further. By applying the methods of statutory interpretation to the Constitution, he "legalized" it: that is, he likened it to ordinary law, made it amenable to routine exposition and implementation.[29]

In no sense did Marshall accomplish this object by some kind of judicial coup d'état. He did not impose a controversial institution upon an unwilling citizenry; he did not, by some kind of legal legerdemain, lull an unwary public into entrusting guardianship of the Constitution to unelected Justices with lifetime commissions. History does not work that way. The emergence of judicial power in the United States during Marshall's day and the tremendous expansion since that time did not and could not come about as a result of judicial usurpation. It occurred with the full and willing acceptance—even complicity—of the American people. Marshall clearly understood that the judiciary would always be the weakest branch, that its effectiveness depended on gaining the acquiescence of the legislative and executive branches and, ultimately, of the people. Whatever power the Supreme Court enjoyed would be a moral power based on its ability to persuade. Marshall greatly enhanced the institutional strength of the judiciary by shrewdly tapping the American people's undoubted reverence for the Constitution. He carefully nurtured the Court's claim to be the peculiar guardian of the Constitution while cultivating its image as a tribunal that impartially pronounced "law" and stayed clear of "politics." Today, two hundred years after Marshall's appointment, the Supreme Court continues to draw on his legacy: the reservoir of good will—the accumulated moral capital —that he built up during his three decades as Chief Justice of the Supreme Court of the United States.

ENDNOTES

[1]Joseph Story, "Life, Character, and Services of Chief Justice Marshall," in William W. Story, ed., **The Miscellaneous Writings of Joseph Story** (1852; New York, 1972 reprint) (hereafter Story, "Life, Character, and Services of Chief Justice Marshall," in Story, ed., **Miscellaneous Writings**), 685.

[2]*See* John V. Orth, "John Marshall and the Rule of Law," *South Carolina Law Review* 49 (1998): 633 and sources cited there.

[3]Story, "Life, Character, and Services of Chief Justice Marshall," in Story, ed. **Miscellaneous Writings**, 694.

[4]John F. Dillon, ed., **John Marshall: Life, Character and Judicial Services** (3 vols.; Chicago, 1903); Albert J. Beveridge, **The Life of John Marshall** (4 vols.; Boston, 1916–1919).

[5]Charles R. Williams, **The Life of Rutherford Birchard Hayes** (2 vols.; Boston, 1914), 1: 33, quoting Hayes's diary entry recording Story's opinion of Marshall.

[6]Henry Howe, **Historical Collections of Virginia** (Charleston, SC, 1846), 266; Sallie Ewing Marshall, "Chief Justice John Marshall," *Magazine of American History* 12 (1884): 69; Margaret E. White, ed., **A Sketch**

of Chester Harding, Artist (Boston, 1929), 147; "Chief Justice Marshall," *Southern Literary Messenger* 2 (February 1836): 189.

[7]Herbert B. Adams, **The Life and Writings of Jared Sparks, Comprising Selections from His Journals and Correspondence** (2 vols.; Boston, 1893), 1: 422.

[8]John Adams to Marshall, August 17, 1825, in Charles F. Hobson et al., eds., **The Papers of John Marshall** (Chapel Hill, NC, 2000), 10: 197.

[9]Marshall to Joseph Story, September 22, 1832, Story Papers, Massachusetts Historical Society.

[10]Marshall to James Hillhouse, May 26, 1830, in Charles F. Hobson et al., eds., **The Papers of John Marshall** (Chapel Hill, NC, 2002), 11: 377.

[11]For a fuller consideration of Marshall's republicanism, *see* Charles F. Hobson, **The Great Chief Justice: John Marshall and the Rule of Law** (Lawrence, KS, 1996) (hereafter Hobson, **Great Chief Justice**), 16–25.

[12]John Marshall, **An Autobiographical Sketch by John Marshall**, John Stokes Adams, ed. (Ann Arbor, MI, 1937) (hereafter Marshall, **Autobiographical Sketch**), 8.

[13]*The Federalist* no. 10, in Clinton Rossiter, ed., **The Federalist Papers** (New York, 1961), 79–80.

[14]*Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810).

[15]10 U.S. (6 Cranch) 133.

[16]*Ogden v. Saunders,* 25 U.S. (12 Wheat.) 213, 354–355 (1827).

[17]Marshall to John Quincy Adams, Oct. 3, 1831, Adams Papers, Massachusetts Historical Society.

[18]Marshall, **Autobiographical Sketch,** 9–10.

[19]Story, "Life, Character, and Services of Chief Justice Marshall," in Story, ed., **Miscellaneous Writings,** 684.

[20]*McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316 (1819).

[21]17 U.S. (4 Wheat.) 431.

[22]*Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824).

[23]22 U.S. (9 Wheat.) 222.

[24]Marshall, "A Friend of the Constitution," no. 1 [June 30, 1819], in Charles F. Hobson et al., eds., **The Papers of John Marshall** (Chapel Hill, NC, 1995), 8: 318.

[25]Hobson, **Great Chief Justice,** 29–43.

[26]Jefferson to Edmund Pendleton, Aug. 26, 1776, in Julian P. Boyd, ed., **The Papers of Thomas Jefferson** (Princeton, N J, 1950), 1: 505.

[27]In the early 1790s, Jefferson was more worried that Marshall might get into Congress and cause Federalist mischief. "I think nothing better could be done than to make him a judge," he suggested at the time. Jefferson to James Madison, June 29, 1792, quoted in Donald O. Dewey, **Marshall versus Jefferson: The Political Background of *Marbury v. Madison*** (New York, 1970), 36.

[28]*Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 179–80 (1803).

[29]Gordon S. Wood, "The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less," *Washington and Lee Law Review* 56 (1999): 787, 797–809.

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