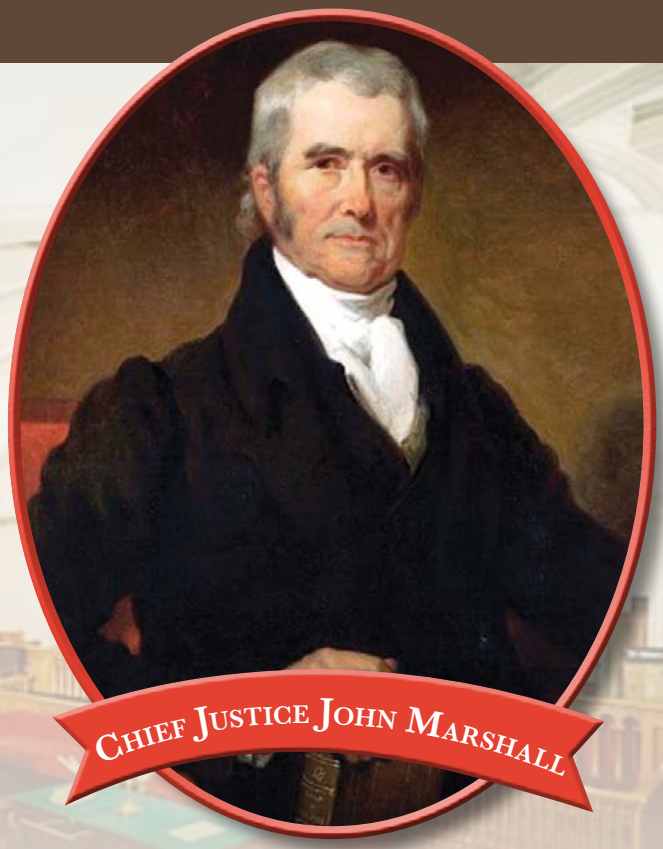
THE GREAT CHIEF JUSTICE

NEITHER THE CONSTITUTION NOR THE LAWS BUT JOHN MARSHALL MADE THE COURT SUPREME



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The Old Supreme Court Chamber, the meeting place of the United States Supreme Court between 1810 and 1860, is ocated in the basement of the United States Capitol. background

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THE GREAT CHIEF JUSTICE

Neither the Constitution nor the laws but John Marshall made the Court Supreme

BY FRED RODELL

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By every sensible standard, John Marshall deserves superbly his sobriquet of "the great Chief Justice." He deserves it, that is, by every standard save only the mincing and squeamish view of a "proper" judicial attitude that prevails in these milk-toast times. For, almost all that the man believed and lived and brought to life would be sheer anathema to those who honor his name in happy ignorance as they damn any current Justice who dares to do his current job with the same contempt for legalism, the same concern for the end product, the same conception of the Court as a stark political instrument, that marked the work of Marshall. Marshall was great because he saw the law as a servant, not as a master, of the functions and goals of government—and because he used the Court as a means to achieve the goals he was after, however he had to bend or twist the law to achieve them. Scorning past legal precedents to fabricate his own, turning tiny technical points into ringing and far-reaching political principles, making a mockery of the nice-Nelly notion of "judicial self-restraint" that contemporary scholars hold in such high esteem, he ran his Court with a realistic gusto as refreshing in retrospect as it would be deemed improper, even indecent, today. If ever a figure in U.S. history embodied in his career clear proof that ours is a government of men, not of laws, that figure is John Marshall, the great Chief Justice.

To say that a man was great is not to say that he was always wise, for greatness does not per force imply wisdom. There are many who still question the wisdom of much that Franklin Roosevelt did; there are few who would deny him a place among the great Presidents. The point is that Roosevelt used the powers of his high office to the full and, in doing so, greatly affected—for good or ill—the course of the nation. So did John Marshall. Looking at Marshall's greatness from another angle, there are many who would rate Holmes above him as the wisest Justice who ever sat on the Court. But Holmes was wise almost exclusively in dissent, where present ineffectiveness coupled with indignation often makes comparatively easy the eloquent expression of wisdom; by contrast, Marshall spoke almost exclusively with the authority of the Court behind him, so that his words were not merely something he said but official statements of what he and his Court—whether wisely or unwisely—effectively did.

IF EVER A FIGURE IN U.S. HISTORY EMBODIED IN HIS CAREER CLEAR PROOF THAT OURS IS A GOVERNMENT OF MEN, NOT OF LAWS, THAT FIGURE IS JOHN MARSHALL THE GREAT CHIEF JUSTICE.

What Marshall did, and well-nigh singlehanded—for the force and warmth of his personality swung even his political adversaries on the Court to his side—was to mold the government of a new nation to his own ideas of how that nation ought to be run. More than any other man, more than Washington or Jefferson or Lincoln, he put flesh on the skeletal structure, the bare bones of the Founding Fathers' Constitution—and put it there to stay. Most of what he did to steer for his own times and chart for the future the main course of the country's development, economically, socially, politically, is with us yet, 150 years later, courtesy of the precedents he set and the respect in which they are still held, and in this fact lies the real mark and monument of Marshall's greatness.

Marshall thought the nation ought to be run by a strong central government to which the states played strictly second fiddle. So the bulk of his most momentous decisions either enlarged the powers of the federal government—over finance, commerce, business affairs—by what is commonly called a "broad construction" of those words of the Constitution that list what the federal government may do, or else restricted and cut down, by a narrow interpretation of other constitutional language, the similar and sometimes conflicting powers of the states.

Marshall not only thought the nation should be run by a strong central government; he also thought the nation and its government should be run by and for his kind, his political and economic class—meaning, of course, the creditor-capitalists, the Federalists, the financial conservatives. And so, although most of his significant decisions can be read—and usually are—as sparked primarily by a disinterested preference for federal, as against state, control of national affairs, not one of those significant decisions fails to fit

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the pattern of protecting and fostering the long-range or short-run security of private property. From the wholesale endowing of corporations with the property rights of individuals to the repeated upholding of land claims or money claims clearly based, originally, on bribery or flagrant fraud, Marshall served not only honest investors but less scrupulous speculators well.

Thus an entertaining poser arises as to what John Marshall's political views and his legal leanings would have been had he lived and served on the Court in the middle of the Twentieth Century instead of at the beginning of the Nineteenth. For in Marshall's day the states were still the chief citadels of a "liberal" or "leveling" political philosophy, controlled by and responsive to the mass of the people, whereas the central government, even under Jefferson and his followers, was more respectful of property rights. In recent times the situation has been the precise reverse, so that solid citizens are now states'-righters and liberals put greater faith in the federal government, even under conservative auspices. Where, then, would Marshall stand, faced with a New Deal, a Fair Deal, or even a New Look, and unable to champion simultaneously a strong central authority and the interests of the creditor class? Would he love national power more or leveling laws less? The probable answer must stem from the ineluctable fact that Marshall, like the Founding Fathers, was an eminently practical man, far more concerned with down-to-earth political realities than with the abstractions of government theory, more bent on achieving results than expounding principles. So, paradoxical as it may sound, there is little doubt that John Marshall, for all the tremendous part he played in giving the federal government strength and supremacy back in the early Nineteenth Century, would be a states' rights advocate today. Except—and quite an exception—in one regard:

Just as Marshall, for practical reasons, wanted the federal government dominant over the states and worked successfully to make it so, he also wanted one branch of that government dominant over the other two branches—and for identical practical reasons. Nor would Marshall, if he were living now, have any cause to regret what is generally rated his greatest, and was surely his most complete and spectacular, political achievement. In establishing unshakably the supremacy of the judiciary over both the legislature and the executive—and this in the face of a series of Congresses and Presidents who were either explosively or seethingly hostile—Marshall built a bastion for the rights of property, no matter how careless of those rights the rest of the federal government might come to be, that has stood secure and firm through all the intervening years and that a contemporary Marshall would still approve, with pardonable pride. For it was under Marshall that the Supreme Court, officially and as a whole Court, first proclaimed and exercised the right of judicial review in its ultimate and most radical sense—by holding a part of an act of Congress unconstitutional. And from that most famous of all the famous Marshall decisions, in the case of Marbury v. Madison—a decision that drew the battle lines between the new Chief Justice and his bitter antagonist, President Jefferson—until, toward the close of his career, Marshall made the ruling that brought forth President Andrew Jackson's perhaps apocryphal but essentially accurate snort: "Well, John Marshall has made his decision; now let him enforce it" (and the decision was reluctantly obeyed nonetheless), Marshall forced on his foes and flaunted to the nation the doctrine of judicial supremacy.

MARSHALL, FOR PRACTICAL REASONS, WANTED THE FEDERAL GOVERNMENT DOMINANT OVER THE STATES AND WORKED SUCCESSFULLY TO MAKE IT SO, HE ALSO WANTED ONE BRANCH OF THAT GOVERNMENT DOMINANT OVER THE OTHER TWO BRANCHES—AND FOR IDENTICAL PRACTICAL REASONS.

The likely key to Marshall's unyielding economic conservatism, and perhaps to his dynamic drive as well, is the fact that, in the common phrase, he was a self-made man who came up the hard way. Like so many who fight their way to the top against original odds, he had scant sympathy for those less able or less fortunate or less determined whom he left behind and beneath; successful, respected, well-to-do by dint of his own efforts, he identified himself completely with the class to which he had climbed. His was a primitive, frontier childhood; his was the meagerest of formal educations, later supplemented by a couple of months of law lectures at William and Mary; his was the suffering through the awful winter at Valley Forge as a soldier in the Revolution. By persistence and native brilliance, he rose in both law and politics, hewing straighter and straighter, the farther he rose, to the Federalist line. As a young Virginia assemblyman and as a middle-aged U.S. congressman, he developed an impatient mistrust of legislatures, with their inefficiencies and their bending to the winds of popular will. As one of the trio of envoys to France who were offered French bribes, in the so-called

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XYZ Affair, he developed a contempt for revolutionary democracy, which had there run riot. Outstanding among the few whole-hog congressional supporters of President Adams' save-the-Federalist-Party policies, he was named secretary of state (he had earlier turned down a Supreme Court associate justiceship) until Ellsworth's timely resignation gave Adams the chance to choose as Chief Justice the man who was to prove the doughtiest Federalist of them all.

The Court of which Marshall took command, a Court which had been depreciated even below its original lowly status by Ellsworth's why-bother indifference to its operations and by Chase's rambunctious extrajudicial politicking, was regarded by most citizens with either apathy or scorn. The important thing was that Jefferson had been elected, the Republicans were in the saddle, and those federal judges who used to go around putting decent people in jail just for speaking their minds about politics would soon find out who was running the country now. Symbolic—and quite incredible today when the Court, in all its majestic dignity, meets in a marble temple that is one of the showplaces of Washington—was the fact that the architect of the new Capitol building had completely forgotten, or maybe deliberately failed, to provide a place for the Court to do its business. The great Chief Justice was sworn into office in a 24-by-30-foot committee room in the Capitol basement, politely furnished by the Senate for the Court's use. In that tiny chamber, Marshall and his five associates began to hear the cases that were to raise the Court to prestige and pre-eminence.

Marshall's associates, at the start, were of course all fellow Federalists. But within a few years, deaths plus the addition of a seventh Justice gave the Republicans an expanding beachhead on the high tribunal: and by 1811, a decade after Marshall took charge, five of the seven Justices were Republican-appointed, with only Bushrod Washington [the General's unimpressive nephew], due to last another eighteen years, hanging on with his Chief from the old Federalist days. Still, the gradual filling of the Court with presumable opponents of Marshall's political and legal views did not shift, until near the very end of Marshall's long tenure, the course of Supreme Court decisions. Indeed, except for William Johnson, the vastly underrated Justice who was Jefferson's first appointee and whose continuous if futile disagreement with many of Marshall's rulings made him the first great Court dissenter, and Joseph Story, the nominal Republican who immediately became Marshall's right-hand man, the other Justices of the Marshall era—forgotten names like Brockholst Livingston, Robert Trimble, Gabriel Duval—deserve scarcely so much as a passing mention in an account of the Court's history. Marshall was the Court—and they were his pawns, his puppets.

Original Supreme Court Chambers in the Capitol

Stark statistics tell part of the story. During Marshall's whole incumbency, his Court gave the full treatment, meaning a decision plus an opinion explaining it, to 1,106 cases; in 519, or almost half of these, Marshall wrote the Court's opinion; (a Chief Justice does well today to write one-eighth of the Court's opinions, and Vinson, for instance, did not come close to this fraction). Of the 1,106 cases, 62 dealt with the "meaning" of the Constitution, thus embodying, one way or another, the most important facet of judicial review—and Marshall spoke for the Court 36 of the 62 times. How completely he guided his colleagues, even when he did not himself speak for them, is shown by the fact that he dissented from only 9 of all the 1,106 decisions—or in less than one per cent of the cases, a figure incredibly low when viewed against the habitually split Supreme Court of the mid-Twentieth Century.

By what Marshall magic did Federalist doctrine not wither but flourish as the law of the land, long after the electoral interment of the Federalist party and the eventual extension of this shifted political sentiment to the judiciary? The answer lies partly—strange as it may sound—in the cozy living arrangements whereby the Justices, under an almost sacred ritual established by Marshall, were together not only at work but before and after working hours, in a pleasant routine that discouraged deep disagreement (Justices are human beings) and put a premium on friendly capitulation to the views of the most cogently articulate. The answer lies partly in the skill with which Marshall took advantage of this day-after-day intimacy to exploit, now patiently, now pointedly, his persuasive personality. The answer lies largely in that personality.

For Marshall made of his Court a sort of close-knit men's club, whose members lived and dined and wined with each other in the same Washington boardinghouse, wifeless while the Court was in session; and trudged together, through muddy or dusty streets, to and from their little courtroom in the Capitol basement; and did their most decisive work away from their official site of business, as legal discussion blended into political commentary or sheer social gossip and then drifted back to the cases,

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around the congenial board. In such close and common quarters, even more than in the stiffness of the formal consultation chamber, Marshall's easy eloquence was at its best. Republicans might come and Federalists go, but Marshall stayed king of the cloister.

He did not stay king by throwing his weight around, by parading his Chiefship to his officially slightly inferiors, nor by sternness and severity of manner. By contrast to the oft-imagined picture of Marshall as austere, autocratic, coldly impressive—as a stronger John Jay, a tougher Charles Evans Hughes—the man was a thoroughly likable, approachable, outgoing and easygoing figure in his relationships with people, blessed with a gangling, rough-cut charm that made personal friends out of political enemies. In the intimate theater of the Court, his strategic talents masked by his effortless magnetism served to win to his purposes, one by one, almost every new Justice who was sent up to do him battle. On the larger stage of national politics, the same strategic genius came into play at a different level. He needed every ounce of it to wage successful war against his most outspoken major antagonist, President Jefferson—to whom, by the irony of events, he had administered the oath of office.

It was Jefferson who threw down the gauntlet in his first Presidential message, where he offhandedly presented "to the contemplation of Congress" the existing federal court system "and especially that portion of it recently enacted"—meaning, as was apparent to all, the Federalists' Judiciary Act of 1801, under which the new circuit judgeships had been hastily set up and manned with Federalist judges. Not that the Republican Congress needed any such reminder; they not only repealed the Act but, slightly worried that Marshall's Court would declare the repeal unconstitutional (because of the guarantee of lifetime tenure for all federal judges) they actually closed down the Supreme Court for a year under their constitutional power to make "such regulations." Marshall obeyed this edict and bided his time; his first big chance, or challenge, had come to him a short while before.

This challenge stemmed from another last-minute move of Adams' outgoing Administration, in which he had appointed no less than 42 new justices of the peace for the District of Columbia but had done it so late that he had no time to make out their formal commissions. Jefferson, right after his inauguration, ordered his secretary of state, James Madison, to withhold a batch of these commissions, and four of the would-be J.P.'s—headed by a William Marbury who thus made his name a byword in Supreme Court annals—asked the Court to order or, in the legal term, "mandamus" Madison to deliver their commissions to them. A preliminary order of Marshall's was contemptuously ignored by Madison, and when Congress shut down the Court for a year the whole affair was still unfinished business, waiting to be settled when the Justices reconvened.

IN THE INTIMATE THEATER OF THE COURT, HIS STRATEGIC TALENTS MASKED BY HIS EFFORTLESS MAGNETISM SERVED TO WIN TO HIS PURPOSES, ONE BY ONE, ALMOST EVERY NEW JUSTICE WHO WAS SENT UP TO DO HIM BATTLE.

The case of Marbury v. Madison, seen in retrospect, ranks as the most important decision in all Supreme Court history—judged by its potency as a legal precedent, a guiding authority, a basis for linking new decisions to old. Yet the actual ruling was of practically no contemporary consequence, since the term for which President Adams had named Mr. Marbury a D.C.J.P. (D.C.J.P.'s are not lifetime federal judges) had just about expired by the time the ruling was made. This fact did not stop Marshall—who thoroughly understood the implicitly fundamental challenge to the judiciary which fairly bristled from the Jefferson-Madison course of action—from turning a tiny and almost academic immediate issue into a mighty and abiding principle of constitutional law. To do so, however, he had to face and hurdle a dilemma which would have stymied a man less imaginatively bold.

Marshall was well aware that if the Court ordered the delivery of the commissions to the Marbury quartet, the Administration would disregard this mandamus, leaving the Court helpless to enforce it and hence humiliated. He was also aware that if the Court bowed to the Administration by simply saying that Madison was within his rights in refusing the commissions, the judiciary would be publicly confessing its ignominious and perhaps irreparable submission to the executive. What Marshall did was a stroke of political genius, salted with lawyerly adroitness. He declared in ringing tones that Marbury and the rest were clearly entitled to their commissions; he excoriated Madison and especially Jefferson for not handing the commissions over; and then, in his master thrust, he held that the Supreme Court technically did not have the power to order the commissions delivered. To so hold, he had to take the audacious step that made Marbury v. Madison a milestone in the nation's history (though some might call it a millstone around

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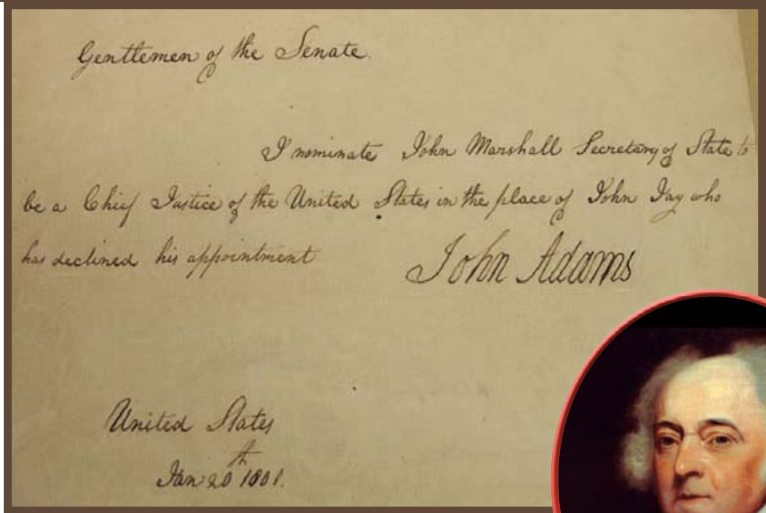
the nation's neck). Speaking for a unanimous Court, he ruled that the section of the old, original Judiciary Act of 1789 (not of 1801) which said the Supreme Court could issue such orders or "writs of mandamus"—and which had stood unchallenged and been used regularly for years—was a violation of the Constitution and therefore completely void.

Here was the first exercise by the Supreme Court as a whole of its controversial veto power over Congress, of its full right of judicial review. John Marshall, by fastening on a petty point of proper legal procedure in an essentially insignificant case, by attacking a harmless bit of a statute that had been enacted not by Republicans but by Federalists, by handing his political opponents, with magnificent opportunism, a strictly Pyrrhic victory (Marbury never got his commission), established the supremacy of the judiciary over the rest of the federal government. That supremacy still holds today.

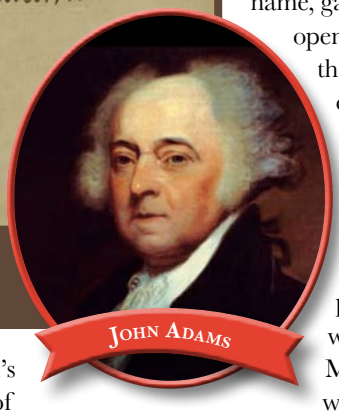

Gentlemen of the Senate

I nominate John Marshall Secretary of State to be a Chief Justice of the United States in the place of John Jay who has declined his appointment

John Adams

United States
Jan 20 1801

The 1801 nomination of John Marshall by John Adams.



In touting Marshall's eloquent defense, in Marbury v. Madison, of constitutions as read by judges against laws passed by legislatures, the customary adulatory accounts frequently overlook a few other interesting facts:

In the first place, his argument was not precisely puncture-proof; with no authoritative precedent to fall back on (he was creating it, not following it) he had to resort to theory and logic to prove his point; his theory was often quite one-sidedly inaccurate, as in his bland claim of universal agreement that constitutional words could automatically void legislative acts, a subject only recently hotly debated in the U.S. Congress; and his logic conveniently skipped the basic question whether judges were any better qualified than legislators or executives to interpret constitutions.

In the second place, Marshall's sincerity—or at least the depth of his conviction—was somewhat open to question. Only seven years earlier, in the course of arguing before the Supreme Court in defense of a Virginia statute which was under attack, he had insisted that "the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the constitution"—and of course the U.S. Constitution nowhere expressly gives such a right. It can at least be doubted whether Marshall, a practical and politically knowledgeable man, would have asserted the right of judicial review as strongly as he did in Marbury v. Madison if a Federalist Congress and Administration had just taken over and the judiciary had been overwhelmingly Republican.

In the third place, Marshall's decision in Marbury v. Madison, for all its doctrinal boldness, was actually, when considered in its context, quite cautious and not terribly courageous. Marshall did not say to Congress: You may not do something yourselves—such as set up an income tax or prohibit child labor. All he said was: You may not authorize us, the Supreme Court, to do something—namely, issue writs of mandamus.

Moreover, the less-than-bravery of Marbury v. Madison was underlined in a decision handed down within a week after the disposal of that celebrated case. The other case, Stuart v. Laird by name, gave the Court a wide-open opportunity to call the Republican repeal of the Federalists' 1801 Judiciary Act unconstitutional; indeed the Federalist press had been crowing, a bit prematurely, that this was precisely what Marshall's Court would do. Instead, the Court—with Marshall not sitting officially but clearly commanding his colleagues—decorously ducked the question of the repeal Act's constitutionality, in ruling that Supreme Court Justices could be made to sit in lower federal courts (the 1801 Judiciary Act had relieved them of this duty and the repeal Act had restored it) simply because they had been doing it for some fourteen previous years. Had precisely the same reasoning been used in Marbury v. Madison about the Court's power to issue writs of mandamus—which the Court had also been doing for several years—Marshall's most famous decision would have had to go the other way.

Thus, from every standpoint except immediate political expediency plus perhaps long-range political foresight, the great decision that nailed down Supreme Court dominance of the national government was a legal cripple. Lacking, perforce, any solid basis in precedent, vulnerable in theory and in logic, its central core of reasoning reversed within a week by another Court decision, Marbury v. Madison may seem scarcely worthy of the plaudits that have been heaped on it or the deference that has been paid it in the

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intervening century and a half. But both the plaudits and the deference, like the decision itself, and like every significant Supreme Court decision since, were and are rooted in politics, not in law. This only the ignorant would deny and only the naive deplore.

Marshall's confidence soon led him into another patently political battle with Jefferson in the trial of Aaron Burr for treason, over which trial Marshall presided in person. Burr, though a nominal Republican who had come close to wrangling the Presidency away from Jefferson when they were elected together in 1800 (the confusion of equal votes for President and Vice-President, with no preference stated, was cleared up afterward by the Twelfth Amendment to the Constitution), had of late been flirting with the Federalists, who were quite willing to make the most of his personal pique against Jefferson. When Burr was caught with an armed force, apparently preparing to start a revolt against the U.S. government with help from abroad, the Jefferson-hating Federalists tended to wink at this abortive undertaking and to side with Burr. Marshall sided with him in such a partisan way at his trial—tossing out evidence that might have convicted him, practically demanding his acquittal—that so conservative a senator as John Quincy Adams more than hinted, in a later Senate report on the case, that Marshall ought to be impeached.

Throughout these years, and especially after the Burr trial, all sorts of schemes were proposed in Congress with Administration backing to curb the power of the Justices—schemes ranging from an easy machinery for the removal of Justices without impeaching them to a limitation of their terms of office. None of these came to anything. But more than a decade after he left the White House, Jefferson—still smarting over his defeat at Marshall's hands, outraged that most of the Justices he had appointed had gone over to the enemy, battling away for his lifetime conviction that a last-word judicial autocracy was improper and evil—was still taking pot shots at the Court in general and John Marshall in particular. "An opinion," he wrote to a friend in 1820, "is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning."

THOMAS JEFFERSON WROTE ABOUT THE COURT AND JOHN MARSHALL IN PARTICULAR IN 1820, "AN OPINION IS HUDDLED UP IN CONCLAVE, PERHAPS BY A MAJORITY OF ONE, DELIVERED AS IF UNANIMOUS, AND WITH THE SILENT ACQUIESCENCE OF LAZY OR TIMID ASSOCIATES, BY A CRAFTY CHIEF JUDGE, WHO SOPHISTICATES THE LAW TO HIS MIND, BY THE TURN OF HIS OWN REASONING."

Though important decisions dotted the whole of Marshall's Chief Justiceship, spreading across the Administrations of five U.S. Presidents, the three cases usually deemed the most momentous, after Marbury v. Madison, were bunched within a five-year span from 1819 to 1824. Each of the three threw out as unconstitutional an act of a state legislature. Each, either directly or by the broad grounds on which it was based, was a boon to commercial and financial interests, a shot in the arm to expanding U.S. capitalism. Each was essentially political; each still stands as good law today; and each in its own way has had a major effect on the nation's development. The three cases are known as the Dartmouth College case, McCulloch v. Maryland, and Gibbons v. Ogden or, as it is sometimes called, the steamboat case.

Many who have heard the almost tearfully emotional peroration of Daniel Webster's plea to the Court in the Dartmouth College case ("It is … a small college—and yet there are those who love it") have no notion what the crying was all about nor what the subsequent shouting was all about after Webster's pathos, far more than his legal arguments, won the decision for his client. Yet historian Charles Beard called the Dartmouth College decision "a spectacular event more important in American educational history than the founding of any single institution of higher learning"—including, presumably, Harvard and Yale. And the legal ripples of Marshall's ruling, which rested in part on making an imaginary individual out of a corporation, spread far beyond the educational world.

Dartmouth, under a charter granted by King George III in the mid-Eighteenth Century, was run—as were and are so many colleges and universities—by a self-perpetuating board of trustees. Being self-perpetuating, the board was still heavily overweighted with rather old-fogy Federalists long after the nation, and the state of New Hampshire, had gone Republican. Sparked by an insurgent Republican group within the college, the New Hampshire legislature passed a law to pack the board with new, politically appointed members, and so turn

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Dartmouth into a sort of state university. It was to stymie this purely political move that the equally political old trustees hired the spellbinding Webster to take their case to the Supreme Court.

In order to sustain his academic fellow Federalists, John Marshall had to rule that a charter was the same as a contract (this was brand-new legal doctrine); that the promises made by the British Crown in granting the charter were still binding, despite the Revolution, on the state of New Hampshire (this was also new); and that therefore the New Hampshire statute was unconstitutional because it "impaired the obligation of contracts." By such tortuous and unprecedented legal argumentation, with an assist from Webster's sentimentality, Marshall managed to hold the fort for Dartmouth's Federalist trustees. In doing so, he also set the stage for the permanent and practically unregulated control of U.S. higher education, especially in the East, by private "corporations"—and thus gave a tremendous boost both to academic conservatism on one side (only the wealthy can afford to endow colleges) and to academic freedom-from-direct-political-pressures on the other.

Furthermore, Marshall's new doctrines, once proclaimed as the law of the land, could scarcely be limited—and were not meant to be limited—to corporations that ran colleges. Many types of business corporations, especially transportation companies with their canals and turnpikes and ferries and bridges, operated under government-granted charters, which now became inviolable contracts. As Marshall's biographer, Beveridge, put it, the decision in the Dartmouth College case gave new hope and confidence to "investors in corporate securities" and to the whole of "the business world." And so did McCulloch v. Maryland, decided at the same Supreme Court term.

The Bank of the United States, set up by Congress (for the second time) just after the War of 1812 to try to bring financial order out of the chaos of state-run banks, had been loaning money high-wide-and-handsomely to favored businesses and businessmen and then, as a depression came on, acting tough with smaller borrowers. Annoyed at this uneven-handedness, several states slapped heavy taxes on the branches of the U.S. Bank within their borders—taxes meant to drive

Statue of Chief Justice John Marshall in Washington DC

the branches out, or out of business—and among these states was Maryland. The U.S. Bank's Baltimore branch, with a cashier named McCulloch, refused to pay the tax and Maryland sued to collect it. (McCulloch's name, like Marbury's, was thus legally immortalized; forgotten is the incidental fact that Mr. McCulloch was later convicted of misappropriating over $3,000,000 of the branch's funds.)

With Daniel Webster again arguing the right-wing side of the case (as chief counsel for the U.S. Bank over a long period of years, he never lost them a decision before the Supreme Court), Marshall and his colleagues backed the Bank, and branded the Maryland tax—and all other similar state taxes—unconstitutional. To do this, Marshall had to write into the Constitution two separate and reaching-beyond-the-horizon political principles that the Founding Fathers never saw fit, or dared, to put in the words of the document. Before calling the tax unconstitutional, he had to make the Bank constitutional—for the list of Congress' powers nowhere includes the power to set up banks. What he did was to infer this unspecified power from Congress' specified control of U.S. currency, plus a couple of other clauses of the Constitution. He thus gave to the nation's charter of government a so-called "broad" interpretation and gave to the Congress a far-flung and flexible judicial benediction to go ahead with whatever extras it deemed necessary to supplement its narrowly listed powers—a slant toward the Constitution and toward Congress which men of Marshall's political stripe were to bitterly denounce when the New Deal rolled around more than a century later.

But granted the U.S. Bank was proper, what was improper about state taxes on its branches—inasmuch as the Constitution, though forbidding some kinds of state taxes, says nothing about these? Here Marshall pulled out of his judicial hat a fat new rule of government which was not even hung from some other rule written in the Constitution. He said, in effect, that since the Constitution creates a dual sovereignty—federal and state—it must mean that neither sovereign may destroy the legitimate activities of the other; and since, in the tricky key phrase of the whole decision, "the power to tax involves the power to destroy," therefore any state tax on any legitimate U.S. activity was unconstitutional. It is that same flat Marshallian logic that, even today, exempts the interest on state and city bonds from federal income taxes, and so makes those bonds a favorite investing refuge for the really rich. By saying far more than he had to say to decide the case, Marshall made

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of McCulloch v. Maryland the birthplace of two major principles of American law and government, both of them politically inspired and both of them full of political vitality ever since.

As in McCulloch v. Maryland, so too in Gibbons v. Ogden, five years later, Marshall expanded the powers of the federal government by reading what he wanted to read into the Constitution—and he did it again at the expense of the states.

Gibbons v. Ogden is also called the steamboat case: Ogden had bought an interest in Robert Fulton's old steamboat company, which years before had been given by the New York legislature a monopoly to run steamboats in the state, and Gibbons was ignoring this state grant and running a rival service in and out of New York City. Ogden sued to have Gibbons' boats permanently beached. (The names of Supreme Court cases always list first the man who took the case to the Court, meaning the one who lost in the lower court, regardless of whether he started the case originally.) By the logic of the Dartmouth College decision, it might seem that Marshall would have called the state-granted monopoly a contract, like Dartmouth's charter, and upheld Ogden's plea. But among other factors here was the poor and quite inadequate service provided by the monopoly, so that the commercial growth of New York City was being hindered, and not only the general public but almost all business interests wanted more and competitive steamboat lines.

Marshall satisfied everyone save Ogden and his friends by turning to the clause of the Constitution that gives Congress power to "regulate commerce … among the several states" and endowing it with a meaning that is scarcely in its words. Since Gibbons' steamboat service hit several New Jersey ports, it clearly involved commerce among the several states or, as it has come to be called, interstate commerce. What Marshall held was that the Constitution's grant to Congress of power to regulate interstate commerce withdrew all such power, by implication, from the states—even when Congress was not doing any regulating. Therefore, the steamboat monopoly had been an attempt on New York's part to poach on the federal government's preserves and, as such, was unconstitutional. Gibbons could keep right on running his steamboat line and so could anyone else who wanted to start another one. But infinitely more significantly, it was written into the law of the land that wherever Congress has specific power, the states have none (or, as Courts since Marshall have slightly modified it, practically none), despite the absence of any such exclusive rule from the words of the Constitution itself.

> IT IS THAT SAME FLAT MARSHALLIAN LOGIC THAT, EVEN TODAY, EXEMPTS THE INTEREST ON STATE AND CITY BONDS FROM FEDERAL INCOME TAXES, AND SO MAKES THOSE BONDS A FAVORITE INVESTING REFUGE FOR THE REALLY RICH.

Before, during, and after this trio of memorable decisions, Marshall's Court indulged in some considerably less admirable judicial work.… There were, for instance, the Yazoo land claims … based on the cheap "sale" of millions of acres of land by a Georgia legislature that was indubitably and confessedly bribed to sell it. Despite the quick repudiation of this "sale" by a subsequent and honest legislature, despite the fact that the claims had been brought up by speculators, mostly from New England, who counted on political influence to bring them a fast profit—despite all this, Marshall's Court ruled that the claims, though concededly conceived in fraud, were still perfectly valid and that the state of Georgia had to honor them. The get-rich-quick gamblers eventually collected close to five million dollars.

It was also under Marshall's aegis that the Court began to uphold—in a series of cases that came to total more than ninety—all sorts of patently phony claims to Florida or Louisiana land, based on forged "copies" or copies of "copies" of alleged grants from Spanish authorities just before the U.S. acquired these territories. It was under Marshall's aegis, too, after gold was discovered on Cherokee Indian land and Georgia whites tried to grab it by fair means or, for the most part, foul, that the Court in a trio of cases backed and filled, ducked the biggest and toughest problem, and ended up with the decision that led Andrew Jackson to invite Marshall to enforce it himself. So raw was the treatment of the Cherokees which Marshall blandly countenanced that his almost alter ego, Justice Story, after a rare dissent from a Marshall holding, blurted out in a letter to a friend: "Depend on it, there is a depth of degradation in our national conduct.… There will be, in God's Providence, a retribution for unholy deeds, first or last."

Under Marshall the Court began its long and sorry history, only very recently corrected in some part, of winking at, if not actively blessing, the illegal and often inhuman treatment of Negroes in the South. A slave owner himself, Marshall used all manner of technical, legalistic word tricks to evade real enforcement of the congressional outlawing of the slave trade; here, for once, he was not so anxious to uphold Congress' hand, presumably because he saw it as a threat, not a boon, to one well-propertied class. And when a couple of southern states

THE GREAT CHIEF JUSTICE

– CONTINUED –

passed laws banning free northern Negroes from crossing their borders, Marshall's passionate concern for exclusively federal control of interstate commerce did not carry over to this form of interstate movement. Justice Johnson, the one Court Republican who stood up against Marshall from the beginning, courageously branded one of these laws unconstitutional—as it clearly was—when it came before Johnson in a circuit court. Marshall not only declined to back up his colleague but wrote to Story in a tremendously revealing vein: "Our brother Johnson, I perceive, has hung himself on a democratic snag in a hedge composed entirely of thorny State-Rights in South Carolina.… You have, it is said, some laws in Massachusetts, not very unlike in principles to that which our brother had declared unconstitutional. We have its twin brother in Virginia; a case has been brought before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act." This, be it remembered, was the great "expounder of the Constitution," who was "escaping"—where human rights, not property rights, were at stake—from expounding it.

Because of the steady accretion of top government power in the judiciary under Marshall's benevolent despotism, sporadic efforts were made from Jefferson's Administration through Jackson's to cut the Justices down to democratic size. Proposals included limiting the terms of the Justices (Jefferson once suggested six years as enough), packing the Court with new members, giving the last word on constitutional issues to the Senate instead of the Court, requiring a five-out-of-seven vote to call a law unconstitutional, and the outright repeal of Section 25 of the Federalists' old 1789 Judiciary Act under which the Court had first taken on, and under which, technically, it was still exercising, the right of judicial review. That all these Court-hobbling schemes came to naught, despite Presidential backing for several of them, was due in large measure to Marshall's masterly overall long-range strategy.

> MARSHALL SERVED AS CHIEF JUSTICE FOR 34 YEARS, THE LONGEST TENURE OF ANY CHIEF JUSTICE. DURING HIS TENURE, HE HELPED ESTABLISH THE SUPREME COURT AS THE FINAL AUTHORITY ON THE MEANING OF THE CONSTITUTION.

For Marshall, after his initial announcement of the Court's supremacy over Congress in Marbury v. Madison—a decision which actually reduced in a minor way the Court's own power, not Congress'—never again called a congressional act unconstitutional. On the contrary, thirty-odd years' worth of his subsequent significant rulings tended toward enlarging the powers of Congress at the expense of the powers of the states. Why, then, should Congress want to restrict, by either simple statute or constitutional amendment, the very Court that was always championing and expanding Congress' own powers? For all the political hostility of most congressmen and senators, individually, to what Marshall and his Court were really doing in the regular and often ruthless protection of property rights, they were lulled or flattered into inaction against the Court by the protection-of-Congress phrases in which he cloaked his more immediate and more specific purposes. By the time later Congresses finally caught on to what Marshall had so dexterously done in his politico-economic shell game (the pea of top government power was under the Supreme Court shell, not the Congressional shell, all the while), later Supreme Courts had built so solidly and sonorously on Marshall's words that all efforts to override or undercut judicial supremacy were considered akin to treason.

This judicial supremacy, this rule by judges, was Marshall's major and most fundamental contribution to the American scheme of government—not that he created or first invented it, for he did not, but that he established it, emblazoned it into the unwritten Constitution, for the use of generations of Justices to come. Even more than his go-right-ahead encouragements to Congress and his stop-right-there strictures to state legislatures, the assured audacity with which he lifted his own branch of the federal government from neglect and contumely to respect and power helped fashion a cohesive, consolidated nation.

For 34 long years, John Marshall, at political odds with every Administration since his appointment save perhaps John Quincy Adams', had braved and bested the growing forces of liberal democracy, had blended boldness and subtlety, force and charm, selective logic and a sort of home-baked law, to stand his ground for the brand of conservative and essentially autocratic government in which he so deeply believed.

DOCUMENT

THE GREAT CHIEF JUSTICE

Founding Fathers, United States Constitution

http://www.archives.gov/exhibits/charters/print_friendly.html?page=constitution_transcript_content.html&title=The%20Constitution%20of%20the%20United%20States%3A%20A%20Transcription

WE THE PEOPLE OF THE UNITED STATES,
IN ORDER TO FORM A PERFECT UNION,
ESTABLISH JUSTICE, INSURE DOMESTIC TRANQUILITY,
PROVIDE FOR THE COMMON DEFENCE,
PROMOTE THE GENERAL WELFARE,
AND SECURE THE BLESSINGS OF LIBERTY
TO OURSELVES AND OUR POSTERITY,
DO ORDAIN AND ESTABLISH THIS CONSTITUTION
FOR THE UNITED STATES OF AMERICA.

The Constitution of the Untited States
(excerpts)

Article. I.

Section. 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 7.

All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8.

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

THE GREAT CHIEF JUSTICE

Founding Fathers, The United States Constitution

– Continued –

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings;—And to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9.

The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section. 10.

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State,--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

THE GREAT CHIEF JUSTICE

Founding Fathers, The United States Constitution

– Continued –

Section. 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Section. 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

Section. 1.

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;-- between a State and Citizens of another State,--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

THE GREAT CHIEF JUSTICE

Brutus No. 15, 1788

http://constitution.org/afp/brutus15.htm

The series of anti-federalist writing which most nearly paralleled and confronted The Federalist was a series of sixteen essays published in the New York Journal from October, 1787, through April, 1788, during the same period The Federalist was appearing in New York newspapers, under the pseudonym "Brutus", in honor of the Roman republican who was one of those who assassinated Julius Caesar, to prevent him from overthrowing the Roman Republic. The essays were widely reprinted and commented on throughout the American states. The author is thought by most scholars to have been Robert Yates, a New York judge, delegate to the Federal Convention, and political ally of anti-federalist New York Governor George Clinton. All of the essays were addressed to "the Citizens of the State of New York".

Brutus No. 15, 1788
(*excerpt*)

I[The] supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. …I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible…

Judges under this constitution will controul legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment. The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal which their errors may be corrected; and without advertising to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven…

If, therefore, the legislature pass any laws, inconsistent with the sense of judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature.

DOCUMENT

THE GREAT CHIEF JUSTICE

Alexander Hamilton, The Federalist No. 78

http://www.streetlaw.org/en/Page/280/The_Power_of_the_Judicial_Branch_The_Federalist_Number_78_and_the_AntiFederalist_78

When the Constitution was first written, many people supported it. However, there were some people who were opposed to it. The framers feared that not enough states would ratify it and decided to write a series of persuasive papers to influence people's opinion. They attempted to convince people that the structures and concepts in the Constitution were right for a country seeking to balance power between a national government, state governments, and the people. The series of articles written by Alexander Hamilton, James Madison, and John Jay, appeared in local newspapers under the pseudonym Publius. Later, these articles were compiled and published as a book called The Federalist Papers.

The Federalist No. 78
(excerpt)

WE PROCEED now to an examination of the judiciary department of the proposed government.

According to the plan of the convention, all judges who may be appointed by the United States are to hold their offices DURING GOOD BEHAVIOR. . . . In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary . . . may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two . . . that . . . the general liberty of the people can never be endangered from that quarter; I mean, so long as the judiciary remains truly distinct from both the legislative and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the

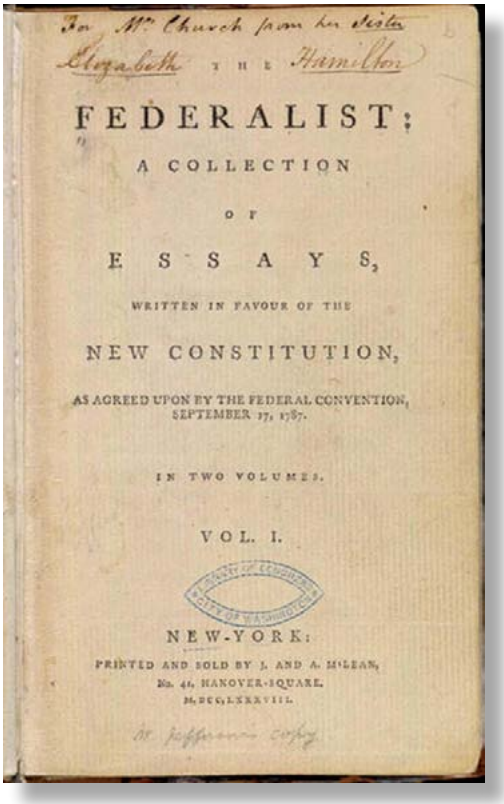
THE GREAT CHIEF JUSTICE

Alexander Hamilton, The Federalist No. 78

– Continued –

judiciary alone, but would have every thing to fear from its union with either of the other departments . . . and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.


For Mr. Church from her Sister Elizabeth THE Hamilton

FEDERALIST;

A COLLECTION

OF

ESSAYS,

WRITTEN IN FAVOUR OF THE

NEW CONSTITUTION,

AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787.

IN TWO VOLUMES.

VOL. I.

NEW-YORK:

PRINTED AND SOLD BY J. AND A. M'LEAN, No. 41, HANOVER-SQUARE.

M, DCC, LXXXVIII.

If it be said that the legislative body are themselves the constitutional judges of their own powers . . . it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their WILL to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both . . .If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established GOOD BEHAVIOR as the tenure of their judicial offices . . . The experience of Great Britain affords an illustrious comment on the excellence of the institution.

THE GREAT CHIEF JUSTICE

1st US Congress, Judiciary Act Of 1789

http://www.loc.gov/rr/program/bib/ourdocs/judiciary.html

The Judiciary Act of 1789, officially titled "An Act to Establish the Judicial Courts of the United States," was signed into law by President George Washington on September 24, 1789. Article III of the Constitution established a Supreme Court, but left to Congress the authority to create lower federal courts as needed. Principally authored by Senator Oliver Ellsworth of Connecticut, the Judiciary Act of 1789 established the structure and jurisdiction of the federal court system and created the position of attorney general. Although amended throughout the years by Congress, the basic outline of the federal court system established by the First Congress remains largely intact today.

Judiciary Act of 1789
(*excerpt*)

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.

SEC. 8. *And be it further enacted,* That the justices of the Supreme Court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to wit: "I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as , according to the best of my abilities and understanding, agreeably to the constitution, and laws of the United States. So help me God."

SEC. 13. *And be it further enacted,* That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

DOCUMENT

THE GREAT CHIEF JUSTICE

US Supreme Court Unanaimous Majority Opinion, Marbury v. Madison

http://billofrightsinstitute.org/blog/2012/10/15/marbury-v-madison-document-j-unanimous-majority-opinion-marbury-v-madison-1803/

Unanimous Majority Opinion

Marbury v. Madison 1803

(*excerpt*)

The authority … given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution…. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the Constitution, is void….

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each….

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty….

The United States Supreme Court building in Washington DC.

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.