

A History of the Supreme Court

BERNARD SCHWARTZ

OXFORD UNIVERSITY PRESS
New York Oxford

1993

At least buildings had been erected for the Legislature and Executive. The same was not true of the Judiciary. When the Federal City was planned, the Supreme Court was completely overlooked and no chamber provided for it: "When the seat of government was transferred to Washington, the court crept into an humble apartment"² in what had been designed as a House Committee room.

The failure to provide adequate housing for the Supreme Court "provides further evidence that the Court was not regarded as an institution of great importance in the federal system."³ Indeed, the outstanding aspect of the Court's work during its first decade was its relative unimportance. When Marshall came to the central judicial chair in 1801, the Court was but a shadow of what it has since become. When he died in 1836, it had been transformed into the head of a fully coordinate department, endowed with the ultimate authority of safeguarding the ark of the Constitution.

Marshall it was who gave to the Constitution the impress of his own mind, and the form of our constitutional law is still what it is because he shaped it.⁴ "Marshall," declared John Quincy Adams at news of his death, "by the ascendancy of his genius, by the amenity of his deportment, and by the imperturbable command of his temper, has given permanent and systematic character to the decisions of the Court, and settled many great constitutional questions favorably to the continuance of the Union." It was under Marshall's leadership that the Supreme Court transmuted the federal structure created by the Founders into a nation strong enough to withstand even the shock of civil war. To quote Adams's not unbiased view again, "Marshall has cemented the Union which the crafty and quixotic democracy of Jefferson had a perpetual tendency to dissolve."⁵

Marshall's appointment as Chief Justice was one of the happy accidents that change the course of history. In the first place, had Justice Cushing not declined the appointment or had Chief Justice Ellsworth not made the arduous journey to France, there would have been no vacancy in the Chief Justiceship until well after President Adams's term had expired. After Chief Justice Ellsworth's resignation, the President offered his place to John Jay. The Senate confirmed the appointment and, had Jay accepted, there would, of course, still have been no place for Marshall on the Court. Jay, however, also refused the position both because he wanted to retire to his farm in Bedford, New York, and because his acceptance in "a System so defective 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."⁶

After Jay declined the Chief Justiceship, it was widely expected that the President would nominate Justice Paterson. Marshall later wrote, "On the resignation of Chief Justice Ellsworth I recommended Judge Paterson [*sic*] as his successor."⁷ Adams, however, refused to select him. According to Marshall, "The President objected to him, and assigned as his ground of objection that the feelings of Judge Cushing would be wounded by passing him and selecting a junior member of the bench."⁸ The real reason for

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Marshall Court, 1801-1836

On the north and south walls of the Supreme Court Chamber in Washington are carved two marble panels depicting processions of historical lawgivers. Of the eighteen figures on the panels only one is there because of his work as a judge, and he is the one American represented: John Marshall. This is more than mere coincidence, for it sharply illustrates a basic difference between the making of law in the United States and in other countries. The great lawgivers in other systems have been mighty monarchs of the type of Hammurabi and Justinian, divinely inspired prophets like Moses, philosophers such as Confucius, or scholars like Hugo Grotius and Sir William Blackstone. We in the United States have certainly had our share of the last two types of lawgiver—particularly among the men who drew up the organic documents upon which our polity is based. Significantly enough, however, it is not a Jefferson or a Madison who is depicted as *the* American lawgiver, but the great Chief Justice who, more than any one person, has left his imprint upon the development of our constitutional law.

Marshall's Appointment

In the autumn of 1800, not long before Marshall's appointment as Chief Justice, the United States Government moved to Washington, D.C. The new capital was still in the early stages of construction and except for the north wing of the Capitol and the still unfinished White House, there was, as a Congressman wrote, "nothing to admire but the beauties of nature."¹

Adams's refusal, however, was that, as a letter to Hamilton stated, "Either Judge Paterson or General Pinckney ought to have been appointed, but both those worthies are your friends."⁹ Adams was unwilling to consider any person in the Hamiltonian faction of his party.

Marshall himself tells us what happened next: "When I waited on the President with Mr. Jays letter declining the appointment he said thoughtfully 'Who shall I nominate now?' I replied that I could not tell, as I supposed that his objection to Judge Paterson remained. He said in a decided tone 'I shall not nominate him.' After a moments hesitation he said, 'I believe I must nominate you' . . . Next day I was nominated."¹⁰

The Marshall appointment was both completely unexpected and resented by Adams's own party, which believed that Judge Paterson should have been given the position. "With grief, astonishment & almost indignation," Jonathan Dayton, a Federalist Senator, wrote to Judge Paterson, "I hasten to inform you, that, contrary to the hopes and expectations of us all, the President has this morning nominated Gen. Marshall. . . . The eyes of all parties had been turned upon you, whose pretensions he knew were, in every respect the best, & who, he could not be ignorant, would have been the most acceptable to our country."¹¹

The feeling in the Senate against the nomination was so strong, Dayton went on, that "I am convinced . . . that they would do it [i.e., reject the nomination] if they could be assured that thereby *you* would be called to fill it." The Senate suspended the nomination for a week, but finding the President inflexibly opposed to Paterson and fearing, in Dayton's words, "that the rejection of this might induce the nomination of some other character more improper, and more disgusting,"¹² the Senate yielded and unanimously confirmed Marshall's appointment.

Judge Paterson had not wanted to be Chief Justice and went out of his way to praise the Marshall appointment. "Mr. Marshall," Paterson replied to Dayton, "is a man of genius, of strong reasoning powers, and a sound, correct lawyer. His talents have at once the lustre and solidity of gold."¹³ Paterson wrote to Marshall to the same effect in congratulating him on his appointment,¹⁴ and, Marshall writes, "I felt truly grateful for the real cordiality towards me"¹⁵ displayed by his new colleague.

Some time before Marshall's appointment, James Kent heard some friends of Hamilton say that Hamilton was in "every way, suited" to be Chief Justice. Kent, writing to Hamilton's wife about the incident, affirmed, "Of all this there could be no doubt." But, Kent concluded, Hamilton's "versatile talents, adapted equally for the bench & the bar, the field, the Senate house & the Executive cabinet, were fortunately called to act in a more complicated, busy & responsible Station."¹⁶

This estimate by the man who, next to Marshall, was then the nation's preeminent jurist, is still another indication of the low state of the early Supreme Court. All this, however, was to change after Marshall became Chief Justice. It was Marshall who established the role of the Supreme Court as the authoritative expounder of the Constitution, and it was he

who exercised this role to lay the legal foundations of a strong nation, endowed with all the authority needed to enable it to govern effectively.

Marshall's Background

On the morning of Jefferson's first inauguration, Marshall wrote to Charles C. Pinckney, "Of the importance of the judiciary at all times but more especially the present I am very fully impressed & I shall endeavor in the new office to which I am called not to disappoint my friends."¹⁷ Certainly, Marshall as Chief Justice was anything but a disappointment to his "friends." Years after John Adams had nominated Marshall to be Chief Justice, he said, "My gift of John Marshall to the people of the United States was the proudest act of my life. . . . I have given to my country . . . a Hale, a Holt, or a Mansfield."¹⁸

Almost two centuries later, no one doubts Marshall's preeminence in our law. "If American law," says Justice Oliver Wendell Holmes, "were to be represented by a single figure, skeptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall."¹⁹ Marshall's was the task of translating the constitutional framework into the reality of decided cases. He was not merely the expounder of our constitutional law; he was its author, its creator. "Marshall found the Constitution paper and he made it power," said James A. Garfield. "He found a skeleton, and he clothed it with flesh and blood."²⁰ What Justice Story termed "the extraordinary judgments of Mr. Chief Justice Marshall upon constitutional law"²¹ laid the foundation of our constitutional edifice. Ever since, that structure has been associated with the Marshall name and has remained the base upon which the American polity functions.

If we look to the background of the man himself, however, he certainly seemed ill equipped for the task to which he was ultimately called. One who reads the modest account of his early life in his famous autobiographical letter to Joseph Story is bound to be amazed at the meagerness of his education and training, both generally and in the law itself. His only formal schooling consisted of a year under the tuition of a clergyman, as well as another under a tutor who resided with his family. For the rest, his learning was under the superintendence of his father, who, Marshall concedes, "had received a very limited education."²²

His study for the Bar was equally rudimentary. During the winter of 1779-1780, while on leave from the Army, "I availed myself of this inactive interval for attending a course of law lectures given by Mr. Wythe, and of lectures of Natural philosophy given by Mr. Madison then President of William and Mary College."²³ He attended law lectures for less than three months²⁴—a time so short, according to his leading biographer, that, in the opinion of the students, "those who finish this study [of law] in a few months, either have strong natural parts or else they know little about it."²⁵ We may doubt, indeed, whether Marshall was prepared even to take full advantage of so short a law course. He had just fallen in love with his wife-

to-be, and his notebook (which is preserved) indicates that his thoughts were at least as much upon his sweetheart as upon the lecturer's wisdom.²⁶

Shakespeare, according to Alfred North Whitehead, wrote better poetry for not knowing too much. It may appear paradoxical to make the same assertion with regard to the greatest of American judges, for judicial ability normally depends, in large measure, upon the depth of legal learning. It must, however, be emphasized that Marshall's was not the ordinary judicial role. Great judges are typically not radical innovators. "I venture to suggest," states Justice Felix Frankfurter, "that had they the mind of such originators, the bench is not the place for its employment. Transforming thought implies too great a break with the past, implies too much discontinuity, to be imposed upon society by one who is entrusted with enforcing its law."²⁷

Marshall's role, on the other hand, was as much that of legislator as judge. His was the task of translating the constitutional framework into the reality of decided cases. As one commentator puts it, "[H]e hit the Constitution much as the Lord hit the chaos, at a time when everything needed creating."²⁸ The need was for formative genius—for the transfiguring thought that the judge normally is not called upon to impose on society. Had he been more the trained lawyer, thoroughly steeped in technical learning and entangled in the intricacies of the law, he might not have been so great a judge; for his role called for the talent and the insight of a statesman capable of looking beyond the confines of strict law to the needs of a vigorous nation entered upon the task of occupying a continent.

One aspect of Marshall's education should not be overlooked, though it was far removed from the traditional type of schooling. This was his service as a soldier of the Revolution. It was, his biographer informs us, his military experience—on the march, in camp, and on the battlefield—that taught Marshall the primary lesson of the necessity of strong, efficient government: "Valley Forge was a better training for Marshall's peculiar abilities than Oxford or Cambridge could have been."²⁹ Above all, his service with Washington confirmed in him the overriding loyalty to an effective Union. Love of the Union and the maxim "United we stand, divided we fall," he once wrote, were "imbibed . . . so thoroughly that they constituted a part of my being. I carried them with me into the army . . . in a common cause believed by all to be most precious, and where I was confirmed in the habit of considering America as my country and Congress as my government."³⁰ In his most powerful opinions, it has been well said, Marshall appears to us to be talking, not in terms of technical law, but as one of Washington's soldiers who had suffered that the nation might live.

When all is said and done, nevertheless, an element of wonder remains as we contemplate Marshall's work. The magisterial character of his opinions marching with measured cadence to their inevitable logical conclusion has never been equaled, much less surpassed, in judicial history. Clarity, conciseness, eloquence—these are the Marshall hallmarks, which made his

opinions irresistible, combined as they were with what Edward S. Corwin termed his "tiger instinct for the jugular vein,"³¹ his rigorous pursuit of logical consequences, his power of stating a case, his scorn of qualifying language, the pith and balance of his phrasing, and the developing momentum of his argument. His is the rare legal document whose words can be read and meaning understood by the layman as well as the learned practitioner. And all this from a man almost without formal schooling, either in literature or the law. Were we not historically certain of the fact, we might have as much doubt that such an individual, possessed as he was only of raw genius and the courage to use it, really wrote the masterful opinions that served as the doctrinal foundation of a great nation as some have expressed with regard to the authorship by an unschooled Elizabethan actor of the supreme literary products of the English language.

The Chief Justice

The Supreme Court met for the first time in Washington on February 2, 1801. Since only Justice Cushing was present, the Court *Minutes* state, "A sufficient number of Justices [was] not . . . convened to constitute a quorum"³² and the Court was adjourned. A quorum was present on the rainy winter morning of February 4 and the Court proceeded to the business of the day: the swearing in of the new Chief Justice, who then took his seat upon the bench.

Aside from Marshall's induction, the February 1801 Term saw little done by the Court. Nor did the press take much notice either of the new Chief Justice's appointment or of the sessions at which he first presided. The February 5, 1801, issue of the *National Intelligencer*, then the leading Washington newspaper, noted only "The Justices of the Supreme Court have made a court, Marshall, Cushing, Chase, and Washington."³³ The lack of press interest illustrates both the Court's low prestige at the time and the fact that it had not yet begun to play its important role in the constitutional structure.

The Court's lack of prestige was strikingly shown by the fact that, as seen, no chamber was provided for it when the new capital was being built. Instead, soon after it convened, the House resolved "[t]hat leave be given to the Commissioners of the City of Washington to use one of the rooms on the first floor of the Capitol for holding the present session of the Supreme Court of the United States."³⁴ A similar resolution was passed by the Senate.

The room assigned to the Court pursuant to these resolutions was one of the first-floor committee rooms, under the south end of the hall assigned to the House of Representatives. The room measured thirty to thirty-five feet; it had two windows. The chamber was heated by a fireplace set in the wall. Where the bench was located has not been ascertained.³⁵ We do know, however, that the bench was not raised—a feature present in most courtrooms. The room itself, Benjamin Latrobe, the architect of the Cap-

itol, wrote to Madison, was only half finished and "meanly furnished, very inconvenient."³⁶

Here, in the bare quarters of Committee Room 2, the Court sat when Marshall took his seat. The new Chief Justice was a commanding figure in the courtroom—tall, erect, though slightly ungainly if not awkward. His black hair was tied in a queue, after the fashion of the day, but his clothes were frequently disheveled, his appearance anything but that of a man impressed with his high station. William Wirt tells us that, "in his whole appearance, and demeanor; dress, attitudes, gesture; sitting, standing or walking; he is as far removed from the idolized graces of lord Chesterfield, as any other gentleman on earth."³⁷

In the courtroom, according to Joseph Story, Marshall's outstanding characteristic was the "quiet, easy dignity" with which he presided. "You heard him," Story wrote, "pronounce the opinion of the Court in a low, but modulated voice, unfolding in luminous order every topic of argument, trying its strength, and measuring its value, until you felt yourself in the presence of the very oracle of the law."³⁸

Marshall's accomplishments as Chief Justice were directly related to his overriding conception of law. To Marshall, the law was essentially a social instrument—with the Constitution itself to be shaped to special and particular ends. The Constitution was not to be applied formalistically; it must be applied in light of what it is for. Marshall never doubted that the overriding purpose behind the organic instrument was to establish a nation that was endowed with all the necessary governmental powers. Marshall, wrote John Quincy Adams in his diary at the Chief Justice's death, "settled many great constitutional questions favorably to the continuance of the Union. Marshall has cemented the Union."³⁹

The key to the Marshall conception is his seminal dictum: "[W]e must never forget that it is a *constitution* that we are expounding."⁴⁰ Justice Frankfurter once termed this the "most important, single sentence in American Constitutional Law." It set the theme for constitutional construction—that the Constitution is not to be read as "an insurance clause in small type, but a scheme of government . . . intended for the undefined and unlimited future."⁴¹

Just after Marshall assumed his Court seat, Charles Cotesworth Pinckney complained in a letter that "attempts are making to construe away the Energy of our Constitution, to unnerv[e] our Government, & to overthrow that system by which we have risen to our present prosperity."⁴² Marshall's Court tenure was devoted to defeating these attempts. It is customary to designate a particular Supreme Court by the name of its Chief Justice. Such designation was more than formalism when Marshall presided over the Court. From the time when he first took his judicial place to his death thirty-four years later, it was emphatically *the Marshall Court* that stood at the head of the judiciary. Throughout his judicial career, Marshall's consistent aim was to use the Supreme Court to lay the constitutional foundation of an effective nation. Before this aim could be realized, the prestige and

power of the Court itself had to be increased, for the bench to which Marshall was first appointed could hardly hope to play the positive role in welding the new nation that the great Chief Justice conceived.

As soon as Marshall began to discharge his duties as head of the highest Court, Beveridge's classic biography informs us, "he quietly began to strengthen the Supreme Court."⁴³ Before Marshall, the Court followed the English practice of having opinions pronounced by each of the Justices. "For the first time," says Beveridge, "the Chief Justice disregarded the custom of the delivery of opinions by the Justices *seriatim*, and, instead, calmly assumed the function of announcing, himself, the views of that tribunal."⁴⁴ Marshall did so in the very first case decided by his Court. "Opinions of the Court" were made the primary vehicle for announcing decisions, with the opinion in virtually all important cases delivered by the Chief Justice himself.⁴⁵

The change from a number of individual opinions to the Court opinion was admirably suited to strengthen the prestige of the fledgling Court. Marshall saw that the needed authority and dignity of the Court could be attained only if the principles it proclaimed were pronounced by a united tribunal. To win conclusiveness and fixity for its decisions, he strove for a Court with a single voice. How well he succeeded is shown by the reception accorded Justice William Johnson, who sought to express his own views in dissent. "During the rest of the Session," he plaintively affirmed in a letter to Jefferson, "I heard nothing but lectures on the indecency of judges cutting at each other, and the loss of reputation which the Virginia appellate court had sustained by pursuing such a course."⁴⁶

Yet, though American constitutional decisions have thus, since Marshall's innovation, been the offspring of the Supreme Court as a whole, it is important to bear in mind that their expression is individual. As Justice Frankfurter said, "The voice of the Court cannot avoid imparting to its opinions the distinction of its own accent. Marshall spoke for the Court. But *he* spoke."⁴⁷ And this enabled him to formulate in his own way the landmarks of American constitutional law.

Judicial Review

The first such landmark was, of course, *Marbury v. Madison* (1803),⁴⁸ where Marshall asserted for the judicial department the power needed to enable it to forge the constitutional bonds of a strong nation. In 1974, Chief Justice Burger circulated a draft opinion in which he referred to "the power of judicial review first announced by this Court under the authority of Article III in *Marbury*."⁴⁹ In a July 18, 1974, letter to the Chief Justice, Justice Byron R. White objected to the draft's implication that *Marbury v. Madison* had created judicial review. "Because I am one of those who thinks that the Constitution on its face provides for judicial review, especially if construed in the light of what those who drafted it said at the time or later, I always wince when it is inferred that the Court created the power

or even when it is said that the 'power of judicial review [was] first announced in *Marbury v. Madison*.' . . . But perhaps this is only personal idiosyncrasy."⁵⁰

Despite the White disclaimer, there is no doubt that it was *Marbury v. Madison* that made judicial review positive constitutional doctrine. It was the decision in that case that established the power of the Supreme Court to rule on the constitutionality of a congressional act. *Marbury v. Madison* arose out of the passage of the Judiciary Act of 1801 during the last days of John Adams's Federalist Administration. As seen in the last chapter, that law provided for the appointment of a large number of new federal circuit judges. A second law, passed a few days later, established courts in the District of Columbia, with the judges there also to be appointed by the outgoing President. The bills angered the Jeffersonians, who were about to assume office. In the words of the pro-Jefferson *Philadelphia Aurora*, they would allow Adams, in his last days in the Presidency, to provide "sinecure places and pensions for thorough going Federal partisans." That, of course, was the intention of Adams, who wished to fill the judiciary with men who would carry on Federalist principles. As Henry Adams put it, "the Federalists felt bound to exclude Republicans from the bench, to prevent the overthrow of those legal principles in which, as they believed, national safety dwelt."⁵¹

Acting under the new laws, President Adams appointed over fifty men—all right-thinking Federalists. Among them, selected as a justice of the peace for the District of Columbia was a member of a prominent Maryland family, a banker and large landowner named William Marbury.

The Senate confirmed the appointees, and the outgoing President signed their commissions of office. It was now the job of the Secretary of State, John Marshall—who had just been appointed and sworn in as Chief Justice—to place the Great Seal of the United States on the commissions and deliver them. Because of the pressure of last-minute duties, Marshall overlooked delivering the commissions of the justices of the peace and the new President, Thomas Jefferson, ordered his Secretary of State, James Madison, not to deliver them.

Marbury then brought an action for mandamus against Madison, asking the court to order Madison to deliver his commission. Marbury brought the action directly in the Supreme Court under section 13 of the Judiciary Act of 1789, which gave the Court original jurisdiction in mandamus cases against federal officials.

The case appeared only to raise the question of whether the Court could issue a mandamus against the Secretary of State. Seemingly, the Court could either disavow having such power over the Executive branch and dismiss Marbury's application, or it could order Madison to deliver the commission to him. The first course would have meant abdicating the essentials of "The judicial Power" conferred on the Court by the Constitution. But the second course would have been no better. While it would have declared the Court's authority to hold the Executive to the law, it

would have remained only a "paper declaration," for the Court would have no power to enforce its mandate.

That Marshall was able to choose neither course was a tribute to his judicial statesmanship. He escaped from the dilemma by ruling that section 13 of the Judiciary Act was unconstitutional on the ground that, since the original jurisdiction conferred upon the Supreme Court by the Constitution was exclusive, it could not be enlarged by congressional law. Thus the Court could deny Marbury's application, not because the Executive branch was above the law (Marshall's opinion, on the contrary, contained a strong repudiation of that claim), but because the Court itself did not possess the original jurisdiction to issue the writ that Marbury requested.

To reach that decision and rule that the congressional law was invalid, the Court was asserting that it had power to review the constitutionality of acts of Congress. From a strategic point of view, the Court could not have chosen a better case through which to declare that power. Since its decision did not rule in favor of Marbury, there was nothing that would bring on a direct conflict with the Jefferson Administration.

More than that, the assertion of the greatest of all judicial powers—review of laws—was made in a case that ruled against authority that had been granted to the Court. The Jeffersonians found it hard to attack the decision in which the Court declined—even from Congress—a jurisdiction to which it was not entitled by the Constitution. "To the public of 1803," Charles Warren tells us, "the case represented the determination of Marshall and his Associates to interfere with the authority of the Executive, and it derived its chief importance then from that aspect." On the other hand, "To the lawyers of today, the significance of Marshall's opinion lies in its establishment of the power of the Court to adjudicate the validity of an Act of Congress—the fundamental decision in the American system of constitutional law."⁵²

Marbury v. Madison is the great case in American constitutional law because it was the first case to establish the Supreme Court's power to review constitutionality. Indeed, had Marshall not confirmed review power at the outset in his magisterial manner, it is entirely possible it would never have been insisted upon, for it was not until 1857 that the authority to invalidate a federal statute was next exercised by the Court.⁵³ Had the Marshall Court not taken its stand, more than sixty years would have passed without any question arising as to the omnipotence of Congress. After so long a period of judicial acquiescence in congressional supremacy, it is probable that the opposition then would have been futile.

To be sure, Marshall in *Marbury* merely confirmed a doctrine that was part of the American legal tradition of the time, derived from both the colonial and Revolutionary experience. One may go further. Judicial review was the inarticulate major premise upon which the movement to draft constitutions and bills of rights was ultimately based. The doctrine of unconstitutionality had been asserted by Americans even before the first written constitutions, notably by James Otis in his 1761 attack on general

writs of assistance⁵⁴ and by Patrick Henry in 1763 when he challenged the right of the Privy Council to disallow the Virginia Two-penny Act.⁵⁵ The Otis-Henry doctrine was a necessary foundation, both for the legal theory underlying the American Revolution and the constitutions and bills of rights that it produced.

The doctrine could, however, become a principle of positive law only after independence, when written constitutions were adopted that contained binding limitations, beyond the reach of governmental power. Judicial review started to become a part of the living law during the decade before the adoption of the Federal Constitution. Cases in at least five states between 1780 and 1787 involved direct assertions of the power of judicial review.⁵⁶ Marshall himself could affirm, in his *Marbury* opinion, not that the Constitution establishes judicial review, but only that it "confirms and strengthens the principle."⁵⁷ Soon after the Constitution went into effect, further assertions of review authority were made by a number of federal judges, including members of the Supreme Court sitting on circuit. In addition, the first Supreme Court itself, as we saw in the last chapter, decided cases such as *Hylton v. United States*,⁵⁸ which were based upon its possession of review power. Hence, when Madison introduced the proposed amendments that became the Federal Bill of Rights, he could recognize expressly that the new guarantees would be enforced by the courts. For Madison, as for his compatriots generally, judicial review was an implicit aspect of the constitutional structure.

That Marshall's opinion in *Marbury v. Madison* was not radical innovation does not at all detract from its importance. The great Chief Justice, like Jefferson in writing the Declaration of Independence, may have merely set down in clear form what had already been previously declared. Yet, as Marshall's biographer observes, Thomas Jefferson and John Marshall as private citizens in Charlottesville and Richmond might have written declarations and opinions all their lives, and today none but the curious student would know that such men had ever lived.⁵⁹ It is the authoritative positions which those two Americans happened to occupy that have given immortality to their enunciations. If Marshall's achievement in *Marbury v. Madison* was not transformation but only articulation, what has made it momentous is the fact that it was magisterial articulation as positive law by the highest judicial officer of the land.

Marshall's *Marbury* reasoning is a more elaborate version of that used by Hamilton in *The Federalist*, No. 78. But it was Marshall, not Hamilton, who elevated that reasoning to the constitutional plane, and he did so in terms so firm and clear that the review power has never since been legally doubted. As the encomium of a leading constitutional scholar puts it, "There is not a false step in Marshall's argument." Instead, his "presentation of the case . . . marches to its conclusion with all the precision of a demonstration from Euclid."⁶⁰

In Marshall's *Marbury* opinion, the authority to declare constitutionality flows inexorably from the judicial duty to determine the law: "It is

emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must 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 the judicial duty."⁶¹ One may go further and say that judicial review, as declared in *Marbury v. Madison*, has become the sine qua non of the American constitutional machinery: draw out this particular bolt, and the machinery falls to pieces.

Addressing the court in the 1627 *Five Knights' Case*, the Attorney General, arguing for the Crown, asked, "Shall any say, The King cannot do this? No, we may only say, He will not do this."⁶² It was precisely to ensure that in the American system one would be able to say "The State cannot do this" that the people enacted a written Constitution containing basic limitations upon the powers of government. Of what avail would such limitations be, however, if there were no legal machinery to enforce them? Even a Constitution is naught but empty words if it cannot be enforced by the courts. It is judicial review that makes constitutional provisions more than mere maxims of political morality.

Review Power over States

To hold as Marshall did in *Marbury v. Madison* that the Supreme Court can review the constitutionality of acts of Congress is, however, to lay down only half of the doctrine of judicial review. According to a noted statement by Justice Holmes, indeed, it is the less important half. "I do not think," he asserted, "the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperilled if we could not make that declaration as to the laws of the several states."⁶³ The power to pass on the validity of state legislation is a necessary part of the review power if the Constitution is truly to be maintained as supreme law throughout the country.

In was in the 1810 case of *Fletcher v. Peck*⁶⁴ that the Supreme Court first exercised the power to hold a state law unconstitutional. In ruling that a Georgia statute violated the Contract Clause of the Constitution, Marshall, who delivered the opinion, declared categorically that the state could not be viewed as a single, unconnected sovereign power, on whom no other restrictions are imposed than those found in its own constitution. On the contrary, it is a member of the Union, "and that Union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several states, which none claim a right to pass."⁶⁵

In *Fletcher v. Peck*, Marshall, in Beveridge's description, laid the second stone in the structure of American constitutional law. Yet even this was still not enough to enable the Supreme Court to maintain the Constitution as the supreme law of the land. In addition to the power to review the validity

of legislative acts of both the nation and the states, review power over the judgments of the state courts is also necessary. In a system in which state judiciaries coexist with those of the nation, vested with equal competence to pronounce judgment on constitutional issues, it is essential that their judgments be subjected to the overriding control of the highest tribunal. The review power over state courts is necessary if the Supreme Court is to uphold national supremacy when it conflicts with state law or is challenged by state authority.

The appellate power of the Supreme Court over state court decisions, in order to harmonize them with the Constitution, laws, and treaties of the United States, was established in two memorable decisions by the Marshall Court. The first was rendered in 1816 in *Martin v. Hunter's Lessee*.⁶⁶ That case arose out of the refusal of the highest court of Virginia to obey the mandate issued by the Supreme Court in an earlier case in which the Virginia court's decision had been reversed on the ground that it was contrary to a treaty of the United States. The Virginia judges had asserted that they were not subject to the highest bench's appellate power "under a sound construction of the constitution of the United States" and ruled that the provision of the first Judiciary Act which "extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the constitution of the United States."

The Supreme Court, in an opinion by Justice Story, categorically rejected the holding that it could not be vested with appellate jurisdiction over state court decisions. Marshall did not deliver the opinion because a personal interest in the case led him to decline to participate. There is no doubt, however, that Story's opinion was strongly influenced by the Marshall view on judicial power. Beveridge tells us, indeed, that it was commonly supposed that Marshall "practically dictated" Story's opinion.⁶⁷ Be that as it may, the opinion was certainly one that, save for some turgidity of language, the great Chief Justice could have written.

Five years later, in the case of *Cohens v. Virginia*,⁶⁸ Marshall was given the opportunity to demonstrate that such was the case. Defendants there had been convicted in a Virginia court of violating that state's law prohibiting the sale of lottery tickets. They sought a writ of error from the Supreme Court on the ground that, since the lottery in question had been authorized by an act of Congress, the state prohibitory law was invalid since it conflicted with federal law. Again it was claimed that the highest Court had no appellate power over the state courts. With typical force, Marshall declared that such an argument was contrary to the Constitution. The states, he affirmed, are not independent sovereignties; they are members of one great nation—a nation endowed by the basic document with a government competent to attain all national objects. "The exercise of the appellate power over those judgments of the state tribunals which may contravene the constitution or laws of the United States, is, we believe, essential to the attainment of those objects."⁶⁹ Let the nature and objects of the Union be considered, let the great principles on which the constitutional framework

rests be examined, and the result must be that the Court of the nation must be given the power of revising the decisions of local tribunals on questions which affect the nation.

According to Marshall's biographer, the opinion in *Cohens v. Virginia* is "one of the strongest and most enduring strands of that mighty cable woven by him to hold the American people together as a united and imperishable nation."⁷⁰ Certain it is that Marshall's masterful opinion conclusively settled the competence of the high bench to review the decisions of state courts. Since *Cohens v. Virginia*, state attempts to make themselves the final arbiters in cases involving the Constitution, laws, and treaties of the United States have been doomed to defeat before the bar of the highest Court.

With the decision in *Cohens v. Virginia*, the structure of judicial power erected by the Marshall Court was completed. The authority of the judicial department to enforce the Constitution against both the national and state governments became an accepted part of American constitutional law. All governmental acts, whether of the nation or the states, now had to run the gamut of review by the Supreme Court to determine whether they were constitutional. And that Court itself was now the veritable supreme tribunal of the land, for it was vested with the last word over the state, as well as the federal, judiciaries.

National Power

For Marshall, judicial review, like law itself, was a means not an end. The end was the attainment of the goal intended by "the framers of the Constitution, who were his compatriots"⁷¹—an effective national government endowed with vital substantive powers, the lack of which had rendered the Articles of Confederation sterile. Judicial review was the tool that enabled Marshall to translate this goal into legal reality.

To Marshall, the overriding end to be served by our public law was nationalism in the broad sense of that term. The law was to be employed to lay down the doctrinal foundations of an effective nation. That end was attained through a series of now-classic decisions that had two principal aims: to ensure that the nation possessed the powers needed to enable it to govern effectively; and to ensure federal supremacy vis-à-vis state powers.

The key case in this respect was *McCulloch v. Maryland*,⁷² decided in 1819. It established the doctrine of implied powers in our constitutional law, resolving in the process the controversy between those who favored a strict and those who favored a broad construction of the Necessary-and-Proper Clause of the Constitution. That clause, after enumerating the specific powers conferred on Congress, authorizes it "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." Conflicting approaches had been taken to the clause by Jefferson and Hamilton. Jefferson had adopted a strict view,

emphasizing the word *necessary* in the clause: it endowed the Federal Government only with those powers indispensable for the exercise of its enumerated powers. The broader Hamilton view maintained that to take the word in its rigorous sense would be to deprive the clause of real practical effect: "It is essential to the being of the National Government, that so erroneous a conception of the meaning of the word *necessary* should be exploded."⁷³

In *McCulloch v. Maryland*, Marshall adopted the broad Hamiltonian approach. The case itself presented the same issue on which Jefferson and Hamilton had differed—the constitutionality of the Bank of the United States, established by Congress to serve as a depository for federal funds and to print bank notes. Under pressure from its state banks, Maryland imposed a tax upon the federal bank's Baltimore branch and then brought suit in a state court against James William McCulloch, the branch's cashier, when he refused to pay the Maryland tax. The state won its suit; but the Federal Government, facing similar taxes in other states, appealed to the Supreme Court.

To decide whether the Maryland tax law was constitutional the Court had to decide whether Congress had the power to charter the bank. In relying upon the Necessary-and-Proper Clause for an affirmative answer, Marshall relied directly upon the reasoning of Hamilton's *Bank Opinion*. If the establishment of a national bank would aid the government in the exercise of its granted powers, the authority to set one up would be implied. "Let the end be legitimate," reads the key sentence of the Marshall opinion, "let it be within the scope of the constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."⁷⁴

This passage is essentially similar to the "criterion of what is constitutional" contained in Hamilton's *Bank Opinion*. Once again, however, it was Marshall, not Hamilton, who made the implied powers doctrine an accepted element of our constitutional law and finally put to rest the view that the Necessary-and-Proper Clause extended only to laws that were indispensably necessary.

Marshall himself, writing extrajudicially, stressed that if the rejected view "would not absolutely arrest the progress of the government, it would certainly deny to those who administer it the means of executing its acknowledged powers." Indeed, Marshall asserted, "[T]he principles maintained by the counsel for the state of Maryland . . . would essentially damage the constitution, render the government of the Union incompetent to the objects for which it was instituted, and place all powers under the control of the state legislatures."⁷⁵ Or, as it was put in a Marshall letter to Justice Story, "If the principles which have been advanced on this occasion were to prevail, the Constitution would be converted into the old confederation."⁷⁶

Marshall used *McCulloch v. Maryland* not only to ensure that the

nation had the powers needed to govern effectively; he used it also to cement the federal supremacy declared in article VI. Having decided, as just seen, that Congress had the power to charter the Bank of the United States, the Court then had to determine whether Maryland might tax the bank. The Marshall opinion answered the question of state power with a categorical negative. Since the bank was validly established by Congress, it followed logically that it could not be subjected to state taxation.

The national government, declared Marshall, "is supreme within its sphere of action. This would seem to result necessarily from its nature." National supremacy is utterly inconsistent with any state authority to tax a federal agency. "The question is, in truth, a question of supremacy; and if the right of the states to tax the means employed by the general government be conceded the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation."⁷⁷

Federal supremacy, to Marshall, meant "that the states have no power, by taxation or otherwise, to retard impede, burden, or in any manner control, the operations of the Federal Government, or its agencies and instrumentalities."⁷⁸ It also meant that federal action, if itself constitutional, must prevail over inconsistent state action. This second meaning was developed in *Gibbons v. Ogden* (1824).⁷⁹ The decision there held that New York statutes which had granted an exclusive license to use steam navigation on the waters of the state were invalid so far as they applied to vessels licensed under a federal statute to engage in coastwise trade. According to Marshall's opinion, "[T]he laws of New York . . . come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him." In such a case, "[T]he acts of New York must yield to the law of Congress; and the decision [below] sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous. In every such case, the act of Congress . . . is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it."⁸⁰

Commerce Power

The same expansive approach to federal authority can be seen in the *Gibbons v. Ogden* opinion on the most important substantive power vested in the Federal Government in time of peace: the power "[t]o regulate commerce with foreign nations, and among the several States."⁸¹ The need to federalize regulation of commerce was one of the principal needs that motivated the Constitutional Convention of 1787. Yet the delegates there were interested mainly in the negative aspects of such regulation, concerned as they were with curbing state restrictions that had oppressed and degraded the commerce of the nation. It was Marshall, in *Gibbons v. Ogden*, who first constructed the commerce power in a positive manner, enabling it to be fashioned into a formidable federal regulatory tool.

visions may not have been the same, both the great Chief Justice and his lifelong antagonist looked at the law as an instrument to serve the needs of the new nation.

Jefferson could write of "the rancorous hatred which Marshall bears to the government of his country."⁹⁰ The truth is that each man had a different conception of what the American polity should become. Marshall saw all too acutely that the Jeffersonian theme was sweeping all before it. "In democracies," he noted in 1815, "which all the world confirms to be the most perfect work of political wisdom, equality is the pivot on which the grand machine turns." As he grew older, Marshall fought the spread of the equality principle, notably in the Virginia Convention of 1829-1830. For, as he saw it, "equality demands that he who has a surplus of anything in general demand should parcel it out among his needy fellow citizens."⁹¹

Yet if Marshall's last effort—against the triumph of Jacksonian democracy—was doomed to failure, his broader battle for his conception of law was triumphantly vindicated. One the least conversant with our public law knows that it is the Marshall conception of the Constitution that has dominated Supreme Court jurisprudence, particularly during the present century. But the same has also been true of the Marshall concept of private law. The Marshall Court decisions adapting the common law to the needs of the expanding market economy led the way to the remaking of private law in the entrepreneurial image. Free individual action and decision became the ultimate end of law, as it became that of the society itself. The law became a prime instrument for the conquest of a continent and the opening of the economy to men of all social strata. Paradoxically perhaps, it was Marshall, opponent of Jefferson-Jackson democracy though he may have been, whose conception of law furthered opportunity and equality in the marketplace to an extent never before seen.

3

Taney Court, 1837-1864

"Imagine a Court . . . conducting its business not in a massive building but in a basement room of an unfurnished Capitol."⁹² One familiar with the marble temple in which the highest bench now sits will find it hard to picture the dingy quarters which that tribunal occupied during its early years. We saw in Chapter 2 that when the new capital was built, no chamber had been built for the Supreme Court. Instead, when the Government moved to Washington, the Court had to hold its sessions in a House committee room on the first floor of the Capitol. When the Capitol north wing was rebuilt in 1809, the Court moved to a new courtroom underneath the reconstructed Senate Chamber. After the British burned the Capitol in 1814, the Court moved to temporary quarters for five years. They were back in their basement courtroom for the 1819 Term.

That courtroom was almost as unimpressive as the committee room in which the Court first sat. In the first place, as a newspaper described it, "The apartment is not in a style which comports with the dignity of that body, or which wears a comparison with the other Halls of the Capitol . . . it is like going down cellar to reach it." Second, the paper complained, it was "a room which is hardly capacious enough for a ward justice." Hence it lacked the dignity appropriate for a puisne court, much less for the highest Court of the land. "Owing to the smallness of the room," the same article tells us, "the Judges are compelled to put on their robes in the presence of the spectators, which is an awkward ceremony, and destroys the effect intended to be produced by assuming the gown."⁹³

Even the elevated bench that adds to a court's dignity was lacking.

Marshall's Jurisprudence

More than any other jurist, Marshall employed the law as a means to attain the political and economic ends that he favored. In this sense, he was the very paradigm, during our law's formative era, of the result-oriented judge. More than that, the law which he thus used was, in major part, molded as well as utilized by him. That is all but self-evident as far as Marshall's public-law decisions are concerned. The constitutional principles Marshall proclaimed in his cathedral tones were, in large part, principles of his own creation.

Marshall was undoubtedly one of the greatest legal reasoners. But his ability in that respect only masked the fact that he was the author as well as the expounder of his legal doctrines. His public-law opinions were based on supposedly timeless first principles which, once accepted, led, by unassailable logic, to the conclusions that he favored. "The movement from premises to conclusion is put before the observer as something more impersonal than the working of the individual mind. It is the inevitable progress of an inexorable force."¹⁸⁰

Even Marshall's strongest critics were affected by the illusion. "All wrong, all wrong," we are told was the despairing comment of one critic, "but no man in the United States can tell why or wherein."¹⁸¹

It is not generally realized that Marshall also followed his instrumentalist approach in nonconstitutional cases. The common assumption has been that the Marshall Court was not a great common-law court and that its head was anything but a master of the common law. Thus it has often been pointed out that, in the Marshall-Story correspondence, there are requests from the Chief Justice for advice on various nonconstitutional issues. Now it is certainly true that Marshall never approached such issues with the mastery he displayed in his public-law opinions. Yet it unduly denigrates Marshall's legal ability to assume that he was a mere slouch as far as private law was concerned.

Such denigration of Marshall's legal ability has unfortunately not been uncommon. But "the fact is that he was a brilliant attorney whose expertise extended to both domestic and international law."¹⁸² Few men have come to the Supreme Court with Marshall's legal experience. His legal education, we saw, have been limited, but his years of practice had made him a leader of the Virginia bar and his cases covered the whole gamut of private law, particularly property and commercial law. Marshall's conception of private law was, of course, based primarily upon the common law. The young Marshall had been given a copy of Blackstone by his father, one of the original subscribers to the American edition, and the common law became the basis of his jurisprudence. During his brief study at William and Mary under George Wythe, Marshall wrote almost two hundred pages of manuscript notes, which were intended as a summary of the common law as it was then practiced in Virginia.¹⁸³

Marshall had no doubt that American law had a common-law foundation. "My own opinion," he wrote in 1800, "is that our ancestors brought with them the laws of England both statute and common law, so far as they were applicable to our situation." With the Revolution and adoption of the Federal Constitution, "the common and statute law of each state remained as before and . . . the principles of the common law of the state would apply themselves to magistrates."¹⁸⁴

To Marshall as to other common lawyers, the law was essentially judge-made law. That was why he placed such stress upon the role of the judge and the need for judicial independence and prestige. "That in a free country," he declared to Story, "any intelligent man should wish a dependent judiciary, or should think that the constitution is not a law for the court . . . would astonish me." Much of his hostility toward Jefferson was based upon Marshall's belief that Jefferson "looks of course with ill will at an independent judiciary."¹⁸⁵ During the Chase impeachment proceedings, Marshall asserted to the beleaguered Justice, "The present doctrine seems to be that a Judge giving a legal opinion contrary to the opinion of the legislature is liable to impeachment."¹⁸⁶

But the judicial role was to Marshall plainly a means, not an end. The judge was to use his independence and prestige to mold the law in accordance with the needs of American society. In public law, the goal was to lay down constitutional principles that would give effect to the Marshall nationalistic vision. In private law, the end was both the protection of property rights and their expansion to permit them to be used to foster the growing entrepreneurial economy. Common-law principles were to be adapted, not transported wholesale in their English form. Both property and commercial law began to receive their modern cast, as a common law appropriate to the new nation's situation was being developed.

Oliver Wolcott once described Marshall as "too much disposed to govern the world according to rules of logic."¹⁸⁷ Marshall the logician is, of course, best seen in his magisterial opinions, which, to an age still under the sway of the syllogism, built up in broad strokes a body so logical that it baffled criticism from contemporaries.¹⁸⁸ To Marshall, however, logic, like law, was only a tool. Indeed, the great Chief Justice's opinions may be taken as an early judicial example of the famous Holmes aphorism: "The life of the law has not been logic: it has been experience."¹⁸⁹ Marshall, more than any early judge, molded his decisions to accord with "the felt necessities of the time." If this was often intuitive rather than conscious on his part, the intuitions were those that best furthered his notion of the public interest.¹⁹⁰

For Marshall, then, the Constitution was a tool, and the same was true of the common law. Both public law and private law were to be employed to lay down the doctrinal foundations of the polity and economy that served his nationalistic vision of the new nation. Compared to Jefferson, the Marshall vision may have been a conservative one. Yet though their