

14 The Great Chief Justice

BRIAN MCGINTY

As the court of last appeal in all matters involving the Constitution, the United States Supreme Court may be the most powerful branch of the federal government. It has the authority to uphold or strike down federal and state legislation, overturn decisions by lower courts, and determine the rights of individuals. Consequently, as in the modern struggle over abortion, the court often stands at the center of national controversy.

You may be surprised to read in this selection that the court was not always supreme, that in the first decade of its existence it was a maligned junior branch of the federal government, ignored by lawyers and scorned by politicians. How did it change into the powerful deliberative body that we know today? As Brian McGinty points out, Chief Justice John Marshall made the nation's highest tribunal a court that is supreme in fact as well as in name. During his thirty-four years on the bench (from 1801 to 1835), Marshall, a dedicated Federalist, also read the basic tenets of federalism into American constitutional law: the supremacy of the nation over the states, the sanctity of contracts, the protection of property rights, and the superiority of business over agriculture.

If you fear you are about to read a dull and dreary essay on constitutional law, don't despair. McGinty's warm portrait of the chief justice personalizes the major currents of the period and captures Marshall the human being in vivid scenes. We see him doing his own shopping for groceries. He frequents taverns and grog shops (he loves wine so much that a colleague quips, "the Chief was brought up on Federalism and Madeira"). He even carries a turkey for a young man who is too embarrassed to do so in public. Marshall clashes repeatedly with Thomas Jefferson over fundamental political and constitutional issues. Later, Marshall tangles with Andrew Jackson in defending the treaty rights of the Cherokee Indians, a subject to be treated in more detail in selection 21.

*It was Marshall's court decisions, however, that had the biggest influence on his country. As McGinty says, Marshall's ruling in *Marbury v. Madison*, which established the principle of judicial review, was perhaps the most important decision ever to come from the United States Supreme Court. Judicial review empowered the Supreme Court to interpret the meaning of the Constitution and so to define the authority of the national government and the states. It helped ensure the flexibility of the Constitution—so much so that a document originally designed for a small, scattered, largely agrarian population could endure for two centuries, during which the United States became a transcontinental, then a transpacific urban and industrial nation. That the Constitution has been able to grow and change with the country owes much to John Marshall.*

GLOSSARY

ADAMS, JOHN Selection 7 examined the courageous defense that Adams provided the British soldiers accused in the so-called Boston Massacre. After the American Revolution, Adams served as minister to Great Britain, Washington's vice president, and president. After losing the

presidential election of 1800 to Jefferson, Adams nominated Marshall to the Supreme Court.

BURR, AARON Selection 13 told the riveting story of the famous duel in which Burr, while serving as vice president,

killed his rival Alexander Hamilton. In 1807, the discredited Burr became the first American citizen tried for treason. Marshall acquitted him of the charge of treason.

CHASE, SAMUEL Washington appointed Chase, a staunch Federalist, to the Supreme Court. Jefferson tried to remove Chase through the impeachment process for his partisan views, but the Senate acquitted him on the impeachment charges. Chase remained on the Supreme Court until his death in 1811.

DEMOCRATIC-REPUBLICANS Those individuals who believed in the views of Jefferson and who opposed Hamilton became known as Democratic-Republicans. They were supporters of France and believed in a strict interpretation of the Constitution that gave more power to the individual states and limited the influence of the new federal government.

ELLSWORTH, OLIVER An active participant at the Constitutional Convention, Ellsworth later became the third chief justice of the Supreme Court. In the waning days of his presidency, Adams nominated Marshall to replace Ellsworth on the Supreme Court.

FEDERALISTS See glossary in selection 10.

FLETCHER v. PECK (1810) In this case and in *Dartmouth College v. Woodward* (1819), the Supreme Court ruled that contracts were sacred and states could not overrule them. McGinty concludes that these decisions provided "important protection for the country's growing business community."

GIBBONS v. OGDEN (1824) Marshall upheld the power of Congress to regulate interstate commerce in this decision and rebuffed those who wanted to limit the authority of the federal government.

HAMILTON, ALEXANDER See glossary in selection 9.

HOLMES, OLIVER WENDELL One of America's most respected jurists and an admirer of Marshall, Holmes served on the Supreme Court from 1902 to 1932.

JAY, JOHN Jay was the first chief justice of the Supreme Court. He had earlier served as a diplomat during the American Revolution as president of the Continental Congress, and as one of the authors of the *Federalist Papers*.

MADISON, JAMES As Jefferson's secretary of state, Madison withheld the commissions of several minor federal judges and, thus, launched the series of events that produced the *Marbury v. Madison* decision. He was a leading figure during the American Revolution and at the

Constitutional Convention and followed Jefferson into the presidency, holding that office from 1809 to 1817.

MARBURY v. MADISON (1803) In this case, Marshall established the principle of judicial review that empowered the Supreme Court to interpret the Constitution and, thus, to define the authority of the federal government and the states. As McGinty concludes: "The rule of the case—that the courts of the United States have the right to declare laws unconstitutional—was immediately recognized as the cornerstone of American constitutional law, and it has remained so ever since."

MCCULLOCH v. MARYLAND (1819) In this case, the Supreme Court ruled that the authority of the federal government is superior to that of the individual states. Specifically, Marshall determined that the Bank of the United States was constitutional and that the state of Maryland could not tax it.

PATERSON, WILLIAM A New Jersey statesman and delegate to the Constitutional Convention, Paterson was an associate justice of the Supreme Court from 1793 until his death in 1806.

RUTLEDGE, JOHN The first governor of South Carolina and a delegate to the Constitutional Convention, Rutledge was the second chief justice of the Supreme Court.

STORY, JOSEPH A personal friend of John Marshall, Story served as an associate justice on the Supreme Court from 1811 to 1845.

WORCESTER v. GEORGIA (1832) In this case, Marshall's decision forbade the state of Georgia to violate the treaty rights of the Cherokees. A dissident faction of Cherokees signed the Treaty of New Echota (1836) that, nonetheless, resulted in the forcible removal of their tribe to present-day Oklahoma, the so-called "trail of tears" (see selection 21).

WYTHE, GEORGE A signer of the Declaration of Independence and a delegate to the Constitutional Convention, Wythe was America's first law professor. His distinguished students included John Marshall, Thomas Jefferson, and Henry Clay.

XYZ AFFAIR In 1798, John Adams sent John Marshall, Elbridge Gerry, and Charles Pinckney on a mission to meet with the French foreign minister Talleyrand. France had seized hundreds of American ships on the high seas, and this was an attempt to repair relations between the two countries. Negotiations broke down when French agents asked for a bribe. This resulted in a firestorm of anti-French sentiments and an undeclared war.

He was a tall man with long legs, gangling arms, and a round, friendly face. He had a thick head of dark hair and strong, black eyes—"penetrating eyes," a friend called them, "beaming with intelligence and good nature." He was born in a log cabin in western Virginia and never wholly lost his rough frontier manners. Yet John Marshall became a lawyer, a member of Congress, a diplomat, an advisor to presidents, and the most influential and respected judge in the history of the United States. "If American law were to be represented by a single figure," Supreme Court Justice Oliver Wendell Holmes, Jr., once said, "sceptic and worshipper alike would agree without dispute that the figure could be but one alone, and that one John Marshall."

To understand Marshall's preeminence in American legal history it is necessary to understand the marvelous rebirth the United States Supreme Court experienced after he became its chief justice in 1801. During all of the previous eleven years of its existence, the highest judicial court in the federal system had been weak and ineffectual—ignored by most of the nation's lawyers and judges and scorned by its principal politicians. Under Marshall's leadership, the court became a strong and vital participant in national affairs. During his more than thirty-four years as chief justice of the United States, Marshall welded the Supreme Court into an effective and cohesive whole. With the support of his colleagues on the high bench, he declared acts of Congress and of the president unconstitutional, struck down laws that infringed on federal prerogatives, and gave force and dignity to basic guarantees of life and liberty and property. Without John Marshall, the Supreme Court might never have been anything but an inconsequential junior partner of the executive and legislative branches of the national government. Under his guidance and inspiration, it became what

the Constitution intended it to be—a court system in fact as well as in name.

Born on September 4, 1755, in Fauquier County, Virginia, John Marshall was the oldest of fifteen children born to Thomas Marshall and Mary Randolph Keith. On his mother's side, the young Virginian was distantly related to Thomas Jefferson, the gentlemanly squire of Monticello and author of the Declaration of Independence. Aside from this kinship, there was little similarity between Marshall and Jefferson. A son of the frontier, Marshall was a backwoodsman at heart, more comfortable in the company of farmers than intellectuals or scholars. Jefferson was a polished aristocrat who liked to relax in the library of his mansion near Charlottesville and meditate on the subtleties of philosophy and political theory.

The contrast between the two men was most clearly drawn in their opposing political beliefs. An advocate of limiting the powers of central government, Thomas Jefferson thought of himself first and foremost as a Virginian (his epitaph did not even mention the fact that he had once been president of the United States). Marshall, in contrast, had, even as a young man, come to transcend his state roots, to look to Congress rather than the Virginia legislature as his government, to think of himself first, last, and always as an American. Throughout their careers, their contrasting philosophies would place the two men at odds.

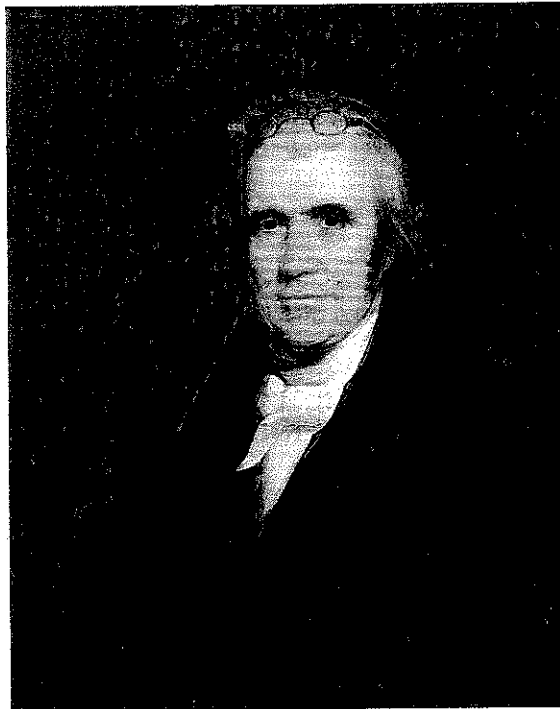
Marshall's national outlook was furthered by his father's close association with George Washington and his own unflinching admiration for the nation's first president. Thomas Marshall had been a schoolmate of Washington and, as a young man, helped him survey the Fairfax estates in northern Virginia. John Marshall served under Washington during the bitter winter at Valley Forge and later became one of the planter-turned-statesman's most loyal supporters.

Years after the Revolution was over, Marshall attributed his political views to his experiences as a foot soldier in the great conflict, recalling that he grew up "at a time when a love of union and resistance to the claims of Great Britain were the inseparable inmates of the same bosom—when patriotism

From "The Great Chief Justice," by Brian McGinty, *American History Illustrated* (September 1988), pp. 8-14, 46-47. Reprinted by permission of Cowles Magazines, publisher of *American History Illustrated*.

and a strong fellow feeling with our suffering fellow citizens of Boston were identical;—when the maxim ‘united we stand, divided we fall’ was the maxim of every orthodox American . . .” “I had imbibed these sentiments so [thoroughly] that they constituted a part of my being,” wrote Marshall. “I carried them with me into the army where I found myself associated with brave men from different states who were risking life and everything valuable 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.”

After Washington’s death, Marshall became the great man’s biographer, penning a long and admiring



Chester Harding's 1829 portrait captures the warmth and humanity of one of America's greatest justices. McGinty describes Marshall as "a tall man with long legs, gangling arms, and a round, friendly face. He had a thick head of dark hair and strong, black eyes—'penetrating eyes,' a friend called them, 'beaming with intelligence and good nature.'"

account of Washington’s life as a farmer, soldier, and statesman, expounding the Federalist philosophy represented by Washington and attacking those who stood in opposition to it. Jefferson, who detested Federalism as much as he disliked Marshall, was incensed by the biography, which he branded a “five-volume libel.”

Frontiersman though he was, Marshall was no bumpkin. His father had personally attended to his earliest schooling, teaching him to read and write and giving him a taste for history and poetry (by the age of twelve he had already transcribed the whole of Alexander Pope’s *Essay on Man*). When he was fourteen, Marshall was sent to a school a hundred miles from home, where future president James Monroe was one of his classmates. After a year, he returned home to be tutored by a Scottish pastor who had come to live in the Marshall house. The future lawyer read Horace and Livy, pored through the English dictionary, and scraped at least a passing acquaintance with the “Bible of the Common Law,” William Blackstone’s celebrated *Commentaries on the Laws of England*.

In 1779, during a lull in the Revolution, young Marshall attended lectures at the College of William and Mary in Williamsburg. He remained at the college only a few weeks, but the impression made on him by his professor there, George Wythe, was lasting. A lawyer, judge, and signer of the Declaration of Independence, Wythe is best remembered today as the first professor of law at any institution of higher learning in the United States. As a teacher, he was a seminal influence in the development of American law, counting among his many distinguished students Thomas Jefferson, John Breckinridge, and Henry Clay.

Marshall did not remain long at William and Mary. It was the nearly universal custom then for budding lawyers to “read law” in the office of an older lawyer or judge or, failing that, to appeal to the greatest teacher of all—experience—for instruction. In August 1780, a few weeks before his twenty-fifth birthday, Marshall appeared at the Fauquier County Courthouse where, armed with a license signed by

Governor Thomas Jefferson of Virginia, he was promptly admitted to the bar.

His first cases were not important, but he handled them well and made a favorable impression on his neighbors; so favorable that they sent him to Richmond in 1782 as a member of the Virginia House of Delegates. Though he retained a farm in Fauquier County all his life, Richmond became Marshall's home after his election to the legislature. The general courts of Virginia held their sessions in the new capital, and the commonwealth's most distinguished lawyers crowded its bar. When Marshall's fortunes improved, he built a comfortable brick house on the outskirts of the city, in which he and his beloved wife Polly raised five sons and one daughter (four other offspring died during childhood).

Marshall's skill as a lawyer earned him an enthusiastic coterie of admirers and his honest country manners an even warmer circle of friends. He liked to frequent the city's taverns and grog shops, more for conviviality than for refreshment, and he was an enthusiastic member of the Barbecue Club, which met each Saturday to eat, drink, "josh," and play quoits.

Marshall liked to do his own shopping for groceries. Each morning he marched through the streets with a basket under his arm, collecting fresh fruits, vegetables, and poultry for the Marshall family larder. Years after his death, Richmonders were fond of recalling the day when a stranger came into the city in search of a lawyer and found Marshall in front of the Eagle Hotel, holding a hat filled with cherries and speaking casually with the hotel proprietor. After Marshall went on his way, the stranger approached the proprietor and asked if he could direct him to the best lawyer in Richmond. The proprietor replied quite readily that the best lawyer was John Marshall, the tall man with the hat full of cherries who had just walked down the street.

But the stranger could not believe that a man who walked through town so casually could be a really "proper barrister" and chose instead to hire a lawyer who wore a black suit and powdered wig. On the day set for the stranger's trial, several cases were scheduled to be argued. In the first that was called,

the visitor was surprised to see that John Marshall and his own lawyer were to speak on opposite sides. As he listened to the arguments, he quickly realized that he had made a serious mistake. At the first recess, he approached Marshall and confessed that he had come to Richmond with a hundred dollars to hire the best lawyer in the city, but he had chosen the wrong one and now had only five dollars left. Would Marshall agree to represent him for such a small fee? Smiling good-naturedly, Marshall accepted the five dollars, then proceeded to make a brilliant legal argument that quickly won the stranger's case.

Marshall was not an eloquent man; not eloquent, that is, in the sense that his great contemporary, Patrick Henry, a spellbinding courtroom orator, was eloquent. Marshall was an effective enough speaker; but, more importantly, he was a rigorously logical thinker. He had the ability to reduce complex issues to bare essentials and easily and effortlessly apply abstract principles to resolve them.

Thomas Jefferson (himself a brilliant lawyer) was awed, even intimidated, by Marshall's powers of persuasion. "When conversing with Marshall," Jefferson once said, "I never admit anything. So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone. . . . Why, if he were to ask me if it were daylight or not, I'd reply, 'Sir, I don't know, I can't tell.'"

Though Marshall's legal prowess and genial manner won him many friends in Richmond, his political views did little to endear him to the Old Dominion's political establishment. While Jefferson and his followers preached the virtues of agrarian democracy, viewing with alarm every step by which the fledgling national government extended its powers through the young nation, Marshall clearly allied himself with Washington, Alexander Hamilton, and John Adams and the Federalist policies they espoused.

Marshall was not a delegate to the convention that met in Philadelphia in 1787 to draft a constitution for the United States, but he took a prominent part in efforts to secure ratification of the Constitution, thereby winning the special admiration of George

Washington. After taking office as president, Washington offered Marshall the post of attorney general. Marshall declined the appointment, as he did a later offer of the prestigious post of American minister to France, explaining that he preferred to stay in Richmond with his family and law practice.

He did agree, however, to go to Paris in 1798 as one of three envoys from President John Adams to the government of revolutionary France. He did this, in part, because he was assured that his duties in Paris would be temporary only, in part because he believed he could perform a real service for his country, helping to preserve peaceful relations between it and France during a time of unusual diplomatic tension.

After Marshall joined his colleagues Elbridge Gerry and Charles Pinckney in Paris, he was outraged to learn that the French government expected to be paid before it would receive the American emissaries. Marshall recognized the French request as a solicitation for a bribe (the recipients of the payments were mysteriously identified as "X," "Y," and "Z"), and he refused to consider it.

Thomas Jefferson, who was smitten with the ardor and ideals of the French Revolution, suspected that Marshall and his Federalist "cronies" were planning war with France to promote the interests of their friends in England. But the American people believed otherwise. When they received news of the "XYZ Affair," they were outraged. "Millions for defense," the newspapers thundered, "but not one cent for tribute!" When Marshall returned home in the summer of 1798, he was welcomed as a hero. In the elections of the following fall, he was sent to Congress as a Federalist representative from Richmond.

Jefferson was not pleased. He declined to attend a dinner honoring Marshall in Philadelphia and wrote worried letters to his friends. Though he deprecated his fellow Virginian's popularity, alternatively attributing it to his "lax, lounging manners" and his "profound hypocrisy," Jefferson knew that Marshall was a potentially dangerous adversary. A half-dozen years before the Richmonder's triumphal return from Paris, Jefferson had written James Madison a cutting letter about Marshall that included words he would

one day rue: "I think nothing better could be done than to make him a judge."

In Congress, Marshall vigorously supported the Federalist policies of President John Adams. Adams took note of the Virginian's ability in 1800 when he appointed him to the important post of secretary of state, a position that not only charged him with conduct of the country's foreign affairs but also left him in effective charge of the government during Adams's frequent absences in Massachusetts.

John Marshall's future in government seemed rosy and secure in 1800. But the elections in November of that year changed all that, sweeping Adams and the Federalists from power and replacing them with Jefferson and the Democratic Republicans.

After the election, but before Adams's term as president expired, ailing Supreme Court Chief Justice Oliver Ellsworth submitted his resignation. Casting about for a successor to Ellsworth, Adams sent John Jay's name to the Senate, only to have Jay demand that it be withdrawn. The thought of leaving the appointment of a new chief justice to Jefferson was abhorrent to Adams, and the president was growing anxious. He summoned Marshall to his office to confer about the problem.

"Who shall I nominate now?" Adams asked dejectedly. Marshall answered that he did not know. He had previously suggested that Associate Justice William Paterson be elevated to the chief justiceship, but Adams had opposed Paterson then and Marshall supposed that he still did. The president pondered for a moment, then turned to Marshall and announced: "I believe I shall nominate you!"

Adams's statement astounded Marshall. Only two years before, Marshall had declined the president's offer of an associate justiceship, explaining that he still hoped to return to his law practice in Richmond. "I had never before heard myself named for the office," Marshall recalled later, "and had not even thought of it. I was pleased as well as surprized [sic], and bowed my head in silence."

Marshall's nomination was sent to the Senate and promptly confirmed, and on February 4, 1801, he took his seat as the nation's fourth Chief Justice. As

subsequent events would prove, it was one of the most important dates in American history.

With Thomas Jefferson in the Executive Mansion and John Marshall in the Chief Justice's chair, it was inevitable that the Supreme Court and the executive branch of the government should come into conflict. Marshall believed firmly in a strong national government and was willing to do all he could to strengthen federal institutions. Jefferson believed as firmly in state sovereignty and the necessity for maintaining constant vigilance against federal "usurpations." In legal matters, Jefferson believed that the Constitution should be interpreted strictly, so as to reduce rather than expand federal power.

Marshall, in contrast, believed that the Constitution should be construed fairly so as to carry out the intentions of its framers. Any law or executive act that violated the terms of the Constitution was, in Marshall's view, a nullity, of no force or effect; and it was the peculiar prerogative of the courts, as custodians of the laws of the land, to strike down any law that offended the Supreme Law of the Land.

Jefferson did not question the authority of the courts to decide whether a law or executive act violated the Constitution, but he believed that the other branches of the government also had a duty and a right to decide constitutional questions. In a controversy between the Supreme Court and the president, for example, the Supreme Court could order the president to do whatever the Court thought the Constitution required him to do; but the president could decide for himself whether the Supreme Court's order was proper and whether or not it should be obeyed.

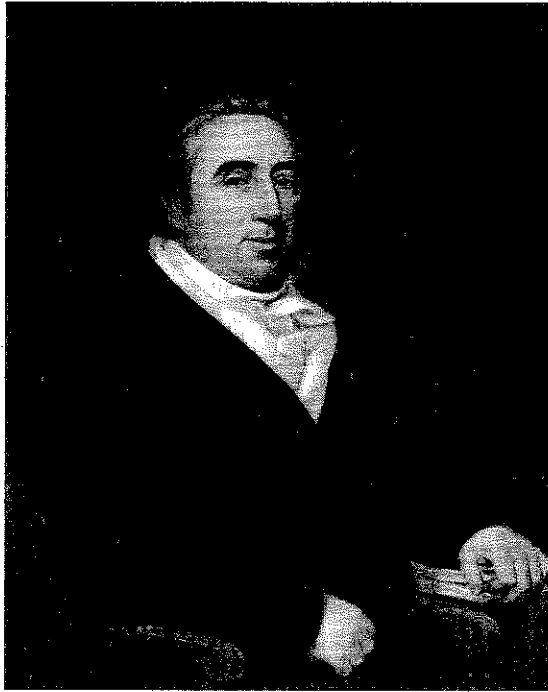
As he took up the duties of the chief justiceship, Marshall contemplated his role with uncertainty. The Supreme Court in 1801 was certainly not the kind of strong, vital institution that might have been expected to provide direction in national affairs. There were six justices when Marshall joined the Court, but none (save the Chief Justice himself) was particularly distinguished. One or two men of national prominence had accepted appointment to the Court in the first

eleven years of its existence, but none had remained there long. John Jay, the first Chief Justice, had resigned his seat in 1795 to become governor of New York. During the two years that John Rutledge was an associate justice, he had regarded the Court's business as so trifling that he did not bother to attend a single session, and he finally resigned to become chief justice of South Carolina. The Court itself had counted for so little when the new capitol at Washington was being planned that the architects had made no provision for either a courtroom or judges' chambers, and the justices (to everyone's embarrassment) found that they had to meet in a dingy basement room originally designed for the clerk of the Senate.

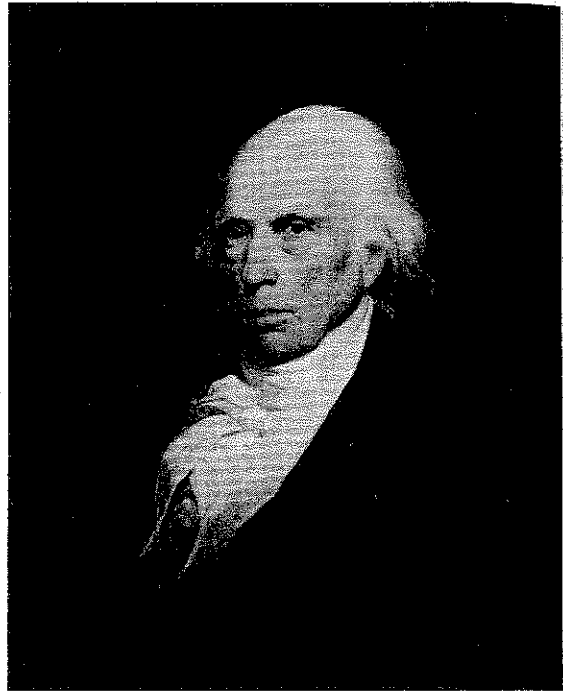
How could Chief Justice Marshall use his new office to further the legal principles in which he believed so strongly? How could he strengthen the weak and undeveloped federal judiciary when most of the nation's lawyers and judges regarded that judiciary as superfluous and unnecessary? How could he implement his view of the Supreme Court as the final arbiter of constitutional questions when the President of the United States—his old nemesis, Thomas Jefferson—disagreed with that view so sharply? It was not an easy task, but John Marshall was a resourceful man, and he found a way to accomplish it.

His opportunity came in 1803 in the case of *Marbury v. Madison*. William Marbury was one of several minor federal judges who had been appointed during the closing days of John Adams's administration. When Jefferson's secretary of state, James Madison, refused to deliver the commissions of their offices, the judges sued Madison to compel delivery. In 1789, Congress had passed a law granting the Supreme Court authority to issue writs of mandamus, that is, legally enforceable orders compelling public officials to do their legal duties. Following the mandate of Congress, Marbury and the other appointees filed a petition for writ of mandamus in the Supreme Court.

Marshall pondered the possibilities of the case. He was sure that Marbury and his colleagues were entitled to their commissions, and he was just as sure that



Attributed to Rembrandt Peale, Collection of the Supreme Court of the United States



Durand Ashier Brown/Collection of the New York Historical Society, USA/The Bridgeman Art Library International

William Marbury (left) and James Madison (right) were the key players in what McGinty concludes was “the single most important case ever decided in the United States Supreme Court.” Marbury v. Madison (1803) established the concept of judicial review that gave the courts the right to determine the constitutionality of laws. The ruling “was immediately recognized as the cornerstone of American constitutional law, and it has remained so ever since.”

Jefferson and Madison had no intention of letting them have them. He could order Madison to deliver the commissions, but the secretary of state would certainly defy the order; and, as a practical matter, the Court could not compel obedience to any order that the president refused to acknowledge. Such an impasse would weaken, not strengthen, the federal union, and it would engender unprecedented controversy. No, there must be a better way. . . .

All eyes and ears in the capitol were trained on the lanky Chief Justice as he took his seat at the head of the high bench on February 24, 1803, and began to read the Supreme Court’s opinion in *Marbury v. Madison*.

The evidence, Marshall said, clearly showed that Marbury and the other judges were entitled to their commissions. The commissions had been signed and

sealed before John Adams left office and were, for all legal purposes, complete and effective. To withhold them, as Jefferson and Madison insisted on doing, was an illegal act. But the Supreme Court would not order the secretary of state to deliver the commissions because the law authorizing it to issue writs of mandamus was unconstitutional: the Constitution does not authorize the Supreme Court to issue writs of mandamus; in fact, it prohibits it from doing so. And any law that violates the Constitution is void. Since the law purporting to authorize the Supreme Court to act was unconstitutional, the Court would not—indeed, it could not—order Madison to do his legal duty.

If historians and constitutional lawyers were asked to name the single most important case ever decided in the United States Supreme Court, there is little

doubt that the case would be *Marbury v. Madison*. Though the dispute that gave rise to the decision was in itself insignificant, John Marshall used it as a springboard to a great constitutional pronouncement. The rule of the case—that the courts of the United States have the right to declare laws unconstitutional—was immediately recognized as the cornerstone of American constitutional law, and it has remained so ever since.

More than a half-century would pass before the Supreme Court would again declare an act of Congress unconstitutional, but its authority to do so would never again be seriously doubted. Marshall had made a bold stroke, and he had done so in such a way that neither Congress, nor the president, nor any other public official had any power to resist it. By denying relief to Marbury, he had made the Supreme Court's order marvelously self-enforcing!

Predictably, Thomas Jefferson was angry. If the Supreme Court could not issue writs of mandamus, Jefferson asked, why did Marshall spend so much time discussing Marbury's entitlement to a commission? And why did the Chief Justice lecture Madison that withholding the commission was an illegal act?

The president thought for a time that he might have the Chief Justice and his allies on the bench impeached. After a mentally unstable federal judge in New Hampshire was removed from office, Jefferson's supporters in the House of Representatives brought a bill of impeachment against Marshall's colleague on the Supreme Court, Associate Justice Samuel Chase. Chase was a Federalist who had occasionally badgered witnesses and made intemperate speeches, but no one seriously contended that he had committed an impeachable offense (which the Constitution defines as "treason, bribery, or other high crimes and misdemeanors"). So the Senate, three quarters of whose members were Jeffersonians, refused to remove Chase from office. Marshall breathed a deep sigh of relief. Had the associate justice been impeached, the chief had no doubt that he himself would have been Jefferson's next target.

Though he never again had occasion to strike down an act of Congress, Marshall delivered opinions in many cases of national significance; and, in his capacity as circuit judge (all Supreme Court justices "rode circuit" in the early years of the nineteenth century), he presided over important, sometimes controversial, trials. He was the presiding judge when Jefferson's political arch rival, Aaron Burr, was charged with treason in 1807. Interpreting the constitutional provision defining treason against the United States, Marshall helped to acquit Burr, though he did so with obvious distaste. The Burr prosecution, Marshall said, was "the most unpleasant case which has been brought before a judge in this or perhaps any other country which affected to be governed by law."

On the high bench, Marshall presided over scores of precedent-setting cases. In *Fletcher v. Peck* (1810) and *Dartmouth College v. Woodward* (1819), he construed the contracts clause of the Constitution so as to afford important protection for the country's growing business community. In *McCulloch v. Maryland* (1819), he upheld the constitutionality of the first Bank of the United States and struck down the Maryland law that purported to tax it. In *Gibbons v. Ogden* (1824), he upheld federal jurisdiction over interstate commerce and lectured those (mainly Jeffersonians) who persistently sought to enlarge state powers at the expense of legitimate federal authority.

Though Marshall's opinions always commanded respect, they were frequently unpopular. When, in *Worcester v. Georgia* (1832), he upheld the treaty rights of the Cherokee Indians against encroachments by the State of Georgia, he incurred the wrath of President Andrew Jackson. "John Marshall has made his decision," "Old Hickory" snapped contemptuously. "Now let him enforce it!" Marshall knew, of course, that he could not enforce the decision; that he could not enforce any decision that did not have the moral respect and acquiescence of the public and the officials they elected. And so he bowed his head in sadness and hoped that officials other than Andrew Jackson would one day show greater respect for the nation's legal principles and institutions.

Despite the controversy that some of his decisions inspired, the Chief Justice remained personally popular; and, during the whole of his more than thirty-four years as head of the federal judiciary, the Court grew steadily in authority and respect.

Well into his seventies, Marshall continued to ride circuit in Virginia and North Carolina, to travel each year to his farm in Fauquier County, to attend to his shopping duties in Richmond, and to preside over the high court each winter and spring in Washington. On one of his visits to a neighborhood market in Richmond, the Chief Justice happened on a young man who had been sent to fetch a turkey for his mother. The youth wanted to comply with his mother's request, but thought it was undignified to carry a turkey in the streets "like a servant." Marshall offered to carry it for him. When the jurist got as far as his own home, he turned to the young man and said, "This is where I live. Your house is not far off; can't you carry the turkey the balance of the way?" The young man's face turned crimson as he suddenly realized that his benefactor was none other than the Chief Justice of the United States.

Joseph Story, who served as an associate justice of the Supreme Court for more than twenty years of Marshall's term as chief justice, spent many hours with the Virginian in and out of Washington. Wherever Story observed Marshall, he was impressed by his modesty and geniality. "Meet him in a stage-coach, as a stranger, and travel with him a whole day," Story said, "and you would only be struck with his readiness to administer to the accommodations of others, and his anxiety to appropriate the least to himself. Be with him, the unknown guest at an inn, and he seemed adjusted to the very scene, partaking of the warm welcome of its comforts, wherever found; and if not found, resigning himself without complaint to its meanest arrangements. You would never suspect, in either case, that he was a great man; far less that he was the Chief Justice of the United States."

In his youth, Marshall had been fond of corn whiskey. As he grew older, he lost his appetite for spirits

but not for wine. He formulated a "rule" under which the Supreme Court judges abstained from wine except in wet weather, but Story said he was liberal in allowing "exceptions." "It does sometimes happen," Story once said, "the Chief Justice will say to me, when the cloth is removed, 'Brother Story, step to the window and see if it does not look like rain.' And if I tell him that the sun is shining brightly, Judge Marshall will sometimes reply, 'All the better; for our jurisdiction extends over so large a territory that it must be raining somewhere.'" "You know," Story added, "that the Chief was brought up upon Federalism and Madeira, and he is not the man to outgrow his early prejudices."

In Richmond, Marshall held regular dinners for local lawyers, swapped stories with old friends, and tossed quoits with his neighbors in the Barbecue Club. An artist named Chester Harding remembered seeing the chief justice at a session of the Barbecue Club in 1829. Harding said Marshall was "the best pitcher of the party, and could throw heavier quoits than any other member of the club." "There were several ties," he added, "and, before long, I saw the great Chief Justice of the United States, down on his knees, measuring the contested distance with a straw, with as much earnestness as if it had been a point of law; and if he proved to be in the right, the woods would ring with his triumphant shout."

In 1830, a young Pennsylvania congressman and future president of the United States commented on Marshall's enduring popularity among his neighbors. "His decisions upon constitutional questions have ever been hostile to the opinions of a vast majority of the people in his own State," James Buchanan said, "and yet with what respect and veneration has he been viewed by Virginia? Is there a Virginian whose heart does not beat with honest pride when the just fame of the Chief Justice is the subject of conversation? They consider him, as he truly is, one of the great and best men which this country has ever produced."

Marshall was nearly eighty years old when he died in Philadelphia on July 6, 1835. His body was brought back to Virginia for burial, where it was met by the

longest procession the city of Richmond had ever seen.

In the contrast between proponents of strong and weak national government, Marshall had been one of the foremost and clearest advocates of strength. The struggle—between union and disunion, between federation and confederation, between the belief that the Constitution created a nation and the theory that it aligned the states in a loose league—was not finally resolved until 1865. But the struggle was resolved. “Time has been on Marshall’s side,” Oliver Wendell Holmes, Jr., said in 1901. “The theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, is now our cornerstone.”

Justice Story thought that Marshall’s appointment to the Supreme Court contributed more “to the preservation of the true principles of the Constitution than any other circumstances in our domestic history.” “He was a great man,” Story said. “I go farther; and insist, that he would have been deemed a great man in any age, and of all ages. He was one of those, to whom centuries alone give birth.”

John Adams and Thomas Jefferson both lived long and distinguished lives, but neither ever gave an inch in their differences of opinion over Marshall. Jefferson went to his grave bemoaning the “cunning and sophistry” of his fellow Virginian. Adams died secure in the belief that his decision to make Marshall chief justice had been both wise and provident. Years later, Adams called Marshall’s appointment “the pride of my life.” Time has accorded Thomas Jefferson a great place in the affections of the American people, but, in the controversy over John Marshall, the judgment of history has come down with quiet strength on the side of John Adams.

QUESTIONS TO CONSIDER

1 John Marshall and Thomas Jefferson were both Virginians and even distant relatives. Why do you feel

they differed so dramatically on most of the major issues that faced their new nation? How has McGinty’s article altered or expanded your view of the Thomas Jefferson you met in selection 8?

2 Why did Marshall have such great admiration for George Washington? Marshall became embroiled in the XYZ Affair when the new president, John Adams, sent him to Paris. Why did this controversial event cause a further rift with Jefferson?

3 *Marbury v. Madison* was a case of small immediate significance in 1803, a legal squabble over a few petty appointments. How did it turn out to have such enormous consequences for America’s governmental structure? What implications did Marshall’s legal actions have for the Supreme Court’s future, particularly when the court was pitted against a popular president?

4 In *Marbury v. Madison* and in a few other cases, Marshall, a staunch Federalist, wrote decisions unfavorable to his party’s interests. What elements in his character caused him to ignore party politics? Discuss the precedents that may have been set by his actions.

5 McGinty’s biography alternates episodes from Marshall’s famous legal career with anecdotes from his private life. Do you find this technique distracting, or does it help you understand Marshall more fully? What sort of man do the personal anecdotes reveal? Are these traits evident in Marshall’s long career as chief justice?

6 The founding fathers decided that Supreme Court justices should not be subject to election or reappointment. Does this article help you better understand the thinking behind that decision, and do you agree with its reasoning? Who had the most accurate vision of America’s future, John Marshall or Thomas Jefferson?