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John Marshall The Chief Justice

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JOHN MARSHALL, "THE CHIEF JUSTICE"†

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We commemorate this year the 200th anniversary of the birth of John Marshall, our most renowned Chief Justice.

Born 1755, in what is now Fauquier County, Virginia, John Marshall was nominated by President John Adams, unanimously confirmed, and on January 31, 1801, at the age of 45, commissioned as our fourth Chief Justice. If President Adams had done nothing else, he could rest his fame upon that single act.

In Marshall's day, the judges usually boarded in the same house and dined together. It was their custom to allow themselves wine ouly when it was raining. But the Chief Justice was brought up, as was said in jest, on Federalism and Madeira. Occasionally on a sunshiny day, he would say "Brother Story, will you step up to the window and see if there are signs of rain?" Reluctantly Story would be obliged to report there was none. Thereupon the Chief Justice would reply cheerfully: "Well, this is a very large territory over which we have jurisdiction and I feel sure it is raining in some part of it."

There are many other anecdotes which describe Marshall, the man, the patriot, the statesman. But today I would like to speak of Marshall, the Chief Justice, and the distinction with which he graced this office for 34 years until his death in 1835.

His significant contributions in strengthening our constitutional structure were many: in securing for the judiciary its rightful place of equal dignity with the legislative and executive branches; in establishing judicial review of both federal and state laws; in laying the foundation for a strong national government of laws and making it supreme in its field; in giving the commerce clause a construction which permitted and stimulated the unhampered growth of the country; in assuring continued stability of the country by protection of personal and property rights from governmental trespass; and in his exposition of the rights of nations under international law.

Above all these lasting achievements, Marshall's outstanding contribution was to make the judiciary a respected, independent and coordinate branch of our Government.

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* See Contributors' Section, Masthead, p. 105, for biographical data.

When Marshall took his seat as Chief Justice of the United States in 1801, the prestige of the Court was so low that it was difficult to obtain a leading lawyer to take the position.

John Jay had hesitated to accept the position of Chief Justice when Washington offered it to him in 1789. Subsequently he resigned to become a candidate for Governor of New York. Jay later refused reappointment because the national judiciary was hopelessly weak and Congress was unwilling to relieve the justices of the onerous duty of sitting in the circuit courts. Upon Jay's resignation, the position was offered to both Patrick Henry and William Cushing and refused by both. Rutledge resigned as Associate Justice to become Chief Justice of the Supreme Court of South Carolina. Harrison of Maryland chose to select a chancellorship of Maryland in preference to a seat on the Court.

The inferior position to which the Court had sunk was shown in other ways. When the Government moved to Washington in 1800, there was extravagant provision made for both the executive and legislative departments but the judiciary was treated indifferently. Until 1819 it had no home of its own. After opening its first term, the Senate consented to accommodate the Supreme Court in one of its committee rooms. This was an undignified room 24 by 30 feet in size on the first floor of the Capitol. The Supreme Court was later pushed into a basement room, which was described as a "mere potato hole of a place." At first, it did not even have a reporter. Before Marshall became Chief Justice, its reports were published as an appendix to the reports of the Supreme Court of Pennsylvania. During its first three years, the Court had decided no cases on their merits. During its first eleven years it had disposed of no more than 40 cases.

In sum, the Supreme Court in 1801 had neither funds, patronage, prestige, nor adequate quarters. But of all essential things, it lacked leadership most. The prior Chief Justices had not even devoted their full time to the work of the Court. Since each Justice read his own opinion—even if in basic accord on the reasoning and conclusion—it brought into prominence points of disagreement thus creating in the public mind the impression that the judiciary was weak and disunited.

The people being traditionally hostile to authority were also none too friendly to federal judges. They resented particularly their enforcement of the revenue collecting authority and the hated sedition laws which deprived them of liberty of speech and press.

Thus, as Marshall came to the bench, there was no popular support for the Supreme Court or for that matter any part of the federal courts.

In addition, Marshall had to contend with hostility in both the legis-

lative and executive branches of the Government. Marshall stood for the party of conservatism, of order, of centralized authority. Jefferson, inaugurated in 1801, was leader of the opposition forces and a strong exponent of states' rights. Most of all, he distrusted the national courts, fearing their encroachment on his executive powers, and the liberties of the people. The Congress, composed of staunch supporters of state power, were equally opposed to a powerful federal judiciary which might whittle down the sovereign rights of the states. It was in this unfavorable and foreboding setting that Marshall took his seat as Chief Justice. The occasion soon arose to assert the independence of the Court and Marshall was quick to make the most of it.

The case arose in this way. Just before his term expired, President Adams appointed forty-two persons to be justices of the peace for the counties of Washington and Alexandria in the District of Columbia. These commissions were confirmed by the Senate. Although the commissions were sigued and sealed, they were not delivered. After Jefferson was inaugurated as President, he directed Madison, then Secretary of State, to issue commissions to twenty-five of the persons appointed by Adams but to withhold the commissions from the other seventeen.

Marbury and three others whose commissions were withheld applied to the Supreme Court for a writ of mandamus compelling Madison to deliver their commissions.

At the time the case of *Marbury v. Madison*[1] was finally heard in 1803, the Supreme Court exercised jurisdiction under the Act of 1789. This Act of Congress conferred authority upon the Court to entertain a mandamus suit. However, while the Constitution conferred upon the Supreme Court original jurisdiction in specified cases, a suit for mandamus was not one of those specifically mentioned.

Marshall realized that if he directed Madison to deliver the commission and the latter ignored the order, the executive and judicial departments would have been in direct conflict. In this situation, the advantage lay with the executive branch since the Court had no physical means of compelling execution of its order. Marshall also knew that if the Court were unable to enforce its order, it would soon be the laughing stock of the nation. On the other hand, Marshall was aware that if the Court dismissed the case, it might be urged that it had done so for lack of authority to invalidate acts of Congress. Faced with these unsatisfactory alternatives, Marshall prevailed on his associates to declare the Act of 1789 invalid on the ground that it conferred jurisdiction upon

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

the Supreme Court to issue writs of mandamus contrary to the Constitution.

Having decided that the Act of Congress was repugnant to the Constitution, the next question was whether the Court was nevertheless obliged to give the Act effect. This proposition Marshall declared was "an absurdity too gross to be insisted on."[2] He stated that it was "emphatically the province and duty of the judicial department to say what the law is";[3] that "if both the law and constitution apply to a particular case . . . the court must determine which of these conflicting rules governs the case,"[4] and if the two collide the Constitution must be supreme over the laws of Congress. The Constitution expressly stated that the supreme law of the land shall be the Constitution itself and only those laws of the United States which shall be made "in pursuance" of the Constitution. Thus, Marshall concluded, the Constitution "confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument."[5]

By this decision, Marshall established for all time the authority of the federal courts to pass on the validity of acts of Congress.

Today we are surprised that anyone would have even questioned the authority of the Federal Court to declare an Act of Congress to be invalid. But in early days our lawyers were trained in English law under which Parliament was almost omnipotent. There were no precedents for the holding in this or in other countries. The contrary view was widely held by men of stature such as Jefferson who felt that each department of government should pass on its own exercise of authority. Jefferson and his supporters therefore looked upon the decision as a despotic usurpation of power by the Court. Today we realize there would be little, if anything, left of our constitutional rights, if the courts were not our guardians against invalid legislation.

There was another principle announced in *Marbury v. Madison* which had far-reaching importance. The Court speaking through its Chief Justice said that mandamus was an appropriate legal remedy to compel a government official to perform a specific legal duty which was neither political nor discretionary in character. Marshall aptly observed that the assertion of this principle characterized "a government of laws, and not of men."[6] As this principle has been applied by our courts, no man

[2] Id. at 177.
[3] Ibid.
[4] Id. at 178.
[5] Id. at 180.
[6] Id. at 163.

in this country is so high that he is above the law, no official may defy the law, and all officers of the government from the highest to the lowest are bound by it.

This decision and those that followed established the Supreme Court as the protector of the fundamental law, and of the rights and liberties guaranteed by the Constitution. The power thus exercised remains today as one of our greatest bulwarks against tyrannical action either by the legislative or executive departments.

Marbury v. Madison was the first great step in restoring the prestige and dignity of the Court. It also marked a procedural departure for the Court. For the first time in its history the Court began its new practice of announcing its rulings through one justice, and in the majority of its important constitutional decisions thereafter the opinions were delivered by Marshall himself.

With firmer footing thus established and Marshall's inspiring leadership, the Supreme Court was called on to resolve one of its most vexing and difficult problems. This was the task of reconciling federal supremacy within its sphere under the Constitution with the reserved rights of the states.

Marshall's experiences at Valley Forge had taught him that our country could never be strong so long as the nation's needs were subordinated to local and sectional interests. It was his abiding ambition to see the proud, independent states welded together into what, in 1868, Chief Justice Chase best described as "an indestructible Union, composed of indestructible States."[7]

His opportunity to help cement the union of states and to achieve greater stability for the nation arose in *McCulloch v. Maryland*.[8] Here the primary question was whether the State of Maryland was empowered to tax the notes issued by the Baltimore Branch of the Bank of the United States. The other question was whether the national government had authority to charter the Bank and to permit it to establish branches within the State.

In order to understand the significance of this case, we must consider it in its setting. The first Bank of the United States was established in 1791. It was conservatively managed. It had been a powerful, restraining influence on speculation and loose financing practices. It had helped immeasurably to stabilize the national currency. But it was precisely because of its pervasive influence throughout the country and

[7] Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

[8] 17 U.S. (4 Wheat.) 316 (1819).

its high standards that it produced many enemies among state and private banks where practices were loose and reckless.

As a result of hostility to it the Bank lost its charter in 1811, and it was not until 1816 that it was rechartered. In the period in which it was out of existence, wildcat banking had become the common practice throughout the nation. The abuses were great, and the social evils almost disastrous. Bank charters were issued wholesale, so free from restrictions as to constitute little more than licenses to plunder the people. Money was borrowed on the most liberal terms. There was wide speculation in land and in every kind of venture. When the speculative bubble burst, the banks found that they had far more paper outstanding than they could ever redeem. It also turned out that many of these local banks had resorted to every conceivable method of fraud in issuing this paper. The usual consequences followed. The banks repudiated the paper. There was universal bankruptcy. Business stagnated and came to an end. There was unemployment, distress, pauperism, and crime.

The general public looked about for a scapegoat and placed the responsibility on the Bank of the United States. Many state legislatures took drastic action in attempts to interfere with the operation of the National Bank. This was done through laws outlawing any but state banks and through excessive taxes to discourage national branches. It was in this hostile climate that *McCulloch v. Maryland* was heard in 1819. Three days after the extended arguments were completed, Marshall spoke for a unanimous Court upholding the authority of Congress to charter and control the Bank as a federal agency, denying the right of the state to interfere with the Federal Government by taxing such an agency, and ruling the state tax to be invalid.

First, Marshall took up the state's argument that it could tax the Bank of the United States, a federal institution. The State of Maryland claimed that the powers of the federal government had been delegated by the states, who alone are sovereign; and, therefore, the federal power must be exercised in subordination of the states. Rejecting this contention, Marshall declared that: "The Government of the Union . . . is, emphatically and truly, a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised . . . for their benefit."[9] Speaking for the Court, Marshall proclaimed for all time that "the government of the Union, though limited in its powers, is supreme within its sphere of action. . . . It is the government of all; . . . it represents all, and acts for all."[10]

[9] Id. at 404-05.

[10] Id. at 405.

Marshall also overruled the state's argument that the United States lacked power to charter the Bank or to establish branches within the states since the Constitution did not specifically confer this authority. True, the enumerated powers did not refer to "bank" or "incorporation." But power was granted to lay and collect taxes; to raise and support armies and navies. And Congress had the power to make all laws "necessary and proper" for carrying the powers expressly granted into execution. Now what was meant by the word "necessary," Marshall asked?

He recognized that where the happiness and prosperity of a nation so vitally depend on the proper execution of powers that are granted, the means must be ample for that purpose. This was a Constitution he declared "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[11] Finally, Marshall summed up the matter with this guiding principle:

> Let the end be legitimate, 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.[12]

Having found that Congress had authority to incorporate the Bank of the United States, the Court then concluded that the state within which the Bank was established could not tax it. As Marshall declared in words now so well known: " . . . [T]he power to tax involves the power to destroy."[13]

If the state could tax the Bank, Marshall argued, it could tax the mail, the mint, patent rights, judicial process. It could tax all the means employed by the Goverument to such an extent that it would soon defeat the ends of goverument. The American people did not intend this, Marshall said. "What the Constitution has joined together, let no State put asunder."

The importance of this decision was immediate and widespread. Reaction differed widely with support in the north and east and condemnation in the west and south where there was greater financial distress. As we now know, in upholding the powers of the National Bank, Marshall gave impetus to more conservative banking, to stabilization of the national currency, and to facilitation of sounder trade and exchange practices throughout the country.

With the passing of the years, Marshall continued to counsel the people to avoid their disastrous passion for pulling in several different di-

[11] Id. at 415.
[12] Id. at 421.
[13] Id. at 431.

rections and thus inviting ruin. He seized the opportunity in *Cohens v. Virginia*[14] to stress this point. The question was whether the Supreme Court had jurisdiction to reverse the judgment of a state court where a federal question was involved. In a unanimous decision for the Court, Marshall upheld the authority of the United States courts to review and revise state judgments which were contrary to the Constitution and laws of the United States.

In reaching this conclusion, Marshall sharply rejected the contention of the State of Virginia that the decision of the various state courts on matters involving construction of the Federal Constitution and federal laws should be final, and that the Constitution did not make the federal courts the ultimate arbiters in such cases.

In memorable language, recalling that the Constitution was "framed for ages to come,"[15] Marshall pressed home the lesson of unity and strength through the over-all direction of a central government in matters of national concern, by saying:

> The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist, without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states.[16]

Consider for a moment what confusion and chaos would have prevailed in our country if there were as many interpretations of our Constitution as there are states, without a court of last resort like our Supreme Court to resolve intense conflicts. An act would be lawful under our Constitution in one state, and illegal when one stepped over the boundary into another state. Reprisal and resort to hostile means rather than the peaceful forum of the Court would have been inevitable. Obviously the Constitution would have been a dead letter in many of its important applications if Marshall had not maintained its supremacy over conflicting state legislation and state court rulings.

There was still another essential link to be forged in creating a single, indivisible nation. It required interstate and foreign commerce to be placed under the complete control of Congress, free from interference and discrimination by the states. *Gibbons v. Ogden*,[17] decided in 1824, gave Marshall the opportunity to expound upon the scope of national

[14] 19 U.S. (6 Wheat.) 264 (1821).
[15] Id. at 387.
[16] Id. at 380.
[17] 22 U.S. (9 Wheat.) 1 (1824).

authority and the limitations upon the states implied in the power conferred upon the Congress, "to regulate Commerce with foreign Nations and among the Several States." It was Marshall's own opinion that this decision did more to knit the American people into a united nation than any other one force in our history, except war.

In *Gibbons v. Ogden,* the New York legislature had granted an exclusive right to Livingston and Fulton to navigate the waters of the state by steam vessels. Those who violated this grant ran the risk of having their boats forfeited. The holders of the exclusive right sought to enjoin Gibbons from operating his steamships between New Jersey and New York. The Court of Appeals for the State of New York sustained the monopoly grant in face of Gibbons' contention that it was repugnant to the "commerce" clause of the Constitution, and contrary to the Acts of Congress regulating the coastwise trade. Marshall decided against the monopoly upon the ground that it was in conflict with the Acts of Congress regulating the coasting trade.

In reaching this decision, Marshall gave the widest possible range to the words "commerce" and "regulate." They are as broad as the exigencies which require protection of interstate commerce from any outside interference, he concluded.

This decision had far-reaching consequences. The principles laid down in the case became integral to our whole constitutional framework and furthered the cause of federal supremacy in a vital area of national activity.

The economic consequences of setting aside the monopoly were equally great. Piqued at the exclusive New York grant, Connecticut, New Jersey, and Ohio had already engaged in retaliatory legislation. Apprehension over monopoly controls was also rising in the west. Commercial wars, barriers, and tension of this kind which contributed to national disunity and discord were precisely the defects of the league of states that the framers of the Constitution had intended to avert. This was the happy precedent by which the entire country grew.

Our vast interstate and foreigu commerce has since been left unfettered. Commerce on land, water, rail, telegraph, and telephone knows no state lines, barriers, border duties, or retaliatory measures such as have hindered commerce abroad all these years. Marshall's wisdom and foresight gave great momentum to the development of all forms of interstate transportation and communication, and tended to bind together all the states into one united, harmonious nation. In our country, unlike others, it was not the strength of the sword which has held us together, but merely the strength of the Constitution.

Although Marshall's decision involving the commerce clause was directed to removing all barriers to free trade between the states, as well as between the nation and foreign countries, he never lost sight of the need for accommodating competing demands of state and national interests.

As a Virginian, Marshall realized that the states alone could most effectively regulate local problems because they had the intimate knowledge and practical experience to deal with diverse and unique local conditions. Thus, while Marshall did not hesitate to strike down state regulation of interstate commerce, he gave every encouragement to appropriate exercise by the states of their police powers in safeguarding vital local interests, such as health, safety, welfare, and property.

There was one other matter of significance which seriously engaged the continuing interest and attention of Marshall. It was his profound respect for property rights. There were sound reasons for his interest. He knew that protection of property was indispensable to the protection of human rights. The history of revolution in France had taught Marshall that a nation's stability depended in large measure on adequate protection of a citizen's property rights. He was fully aware that the framers of the Constitution were intensely concerned about property rights. Based on bitter experience during colonial days, they took the precaution in the Constitution, even prior to the amendments, of barring the states from enacting laws impairing the obligation of contracts.

In the *Dartmouth College* case,[18] decided in 1819, Marshall gave effect to this key provision of the Constitution. Marshall, speaking for the Court, held that the charter of the college was a contract which could not be materially altered nor revoked by the State of New Hampshire without the consent of the college.

The impact of this decision upon the states was thereafter avoided by express reservation permitting revision or revocation of a grant. But the principles laid down were of lasting value.

This decision was of particular significance to the country's educational and business development. It put private institutions of learning and charity out of the reach of state legislative and executive despots. It gave corporate investors a sense of security in their investments. This was of particular importance at a time when there was already underway the westward march of development from the Alleghenies to the Pacific. Development of natural resources in the states called for capital from both domestic and foreign investors. Investments into these unexplored fields were encouraged because the decision allayed fears of investors

[18] Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

that the states would repudiate their contracts and other obligations. The decision also lent considerable stability to commercial transactions generally and inspired confidence throughout the business world. It taught the people that faith once pledged could not be breached by state legislation or other state action. In addition, the decision strengthened the allegiance of investors and businessmen to the national government.

As Marshall lay the foundation for a granite-like constitutional structure at home, he was mindful as well of the need for asserting the integrity and strength of our young nation in its foreign relationships.

Again and again, the Court in decisions by Marshall insisted that this nation must abide by the rules of the game which prevailed in the field of international law if it was to find acceptance among the family of nations. Regardless of the administration in power, Marshall insisted on strictest fidelity of the United States to the provisions of treaties, upon the honest observance by neutrals of their international duties, and upon the doctrine of the equality of nations. As he said in the *Antelope* case:[19] "No principle . . . is more universally acknowledged than the perfect equality of nations. . . . [N]o nation can . . . make a law of nations. . . ."[20] International law having been incorporated into American jurisprudence, Marshall took every opportunity to expound and expand it as usage, custom, equity, and natural justice required. His opinions found favor in the judgment of the civilized world, and enhanced his reputation both at home and abroad. They helped also to maintain the foreign relations of our country on a high and honorable level and contributed greatly to the preservation of peace with other nations.

In these many ways, Marshall courageously and cogently established principles and precedents upon which the integrity and ordered growth of the nation have always rested; upon which human rights have been protected; upon which our freedom has been preserved. Indispensable to these favorable conditions for securing "the Blessings of Liberty to ourselves and our Posterity" was an independent judiciary which Marshall inspired, exercising all its great powers with self-restraint, fearlessly and without regard to public clamor or passion.

In the courtroom of the Supreme Court there is a beautifully carved stone frieze. It teaches that law is an age-old product of human experience. On the south wall there are nine law givers who lived before Christ. These are Menes, Hammurabi, Moses, Solomon, Lycurgus, Solon, Draco, Confucius, and Octavian. On the north wall there are nine equally great legal leaders who lived after Christ—Justinian, Mohammed,

[19] 23 U.S. (10 Wheat.) 66 (1825).

[20] Id. at 122.

Charlemagne, King John of England, St. Louis of France, Hugo Grotius, Blackstone, Napoleon, and John Marshall.

By this signal and unprecedented honor, the people of America memorialized John Marshall. He stands side by side with the greatest lawmakers that mankind has ever produced. How well their lofty tribute accords with the words of Mr. Justice Holmes who once said: " . . . if American law were to be represented by a single fignre, sceptic and worshipper alike would agree without dispute that the fignre could be but one alone, and that one John Marshall."[21]

[21] Supplement, 178 Mass. 619, 627 (1901); also reprinted in Holmes, Speeches 87, 90 (1934).