



## Without Precedent: John Marshall's Constitutionalism

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**Abstract:** This paper examines how the Supreme Court established its identity as the ultimate judicial authority in the U.S. and convinced Americans to acknowledge the supremacy of the Constitution. John Marshall, Chief Justice of the United States from 1801 to 1835, was instrumental in transforming an institution to which the Founding Fathers had given relatively little thought into a pillar of the nation. The paper divides Marshall's Supreme Court tenure into three periods: (a) a first decade of "crisis" following the 1800 election; (b) the "golden age" from 1811 to about 1824, during which the Court reached its zenith as a champion of constitutional nationalism; and (c) a final decade of partial retreat due to states' rights opposition to federal power and a new political order created by Andrew Jackson. Marshall created the legal concepts that now form the basis of American constitutional law during an era without precedent. Even today, the Court's definitive ability to grant civil rights (*Brown v. Board of Education*), take away those rights (*Dobbs v. Jackson's Women's Health Organization*), and determine, with finality, the substance of American law is a result of Marshall's impact on the Court.

**Keywords:** Law, Judicial Authority, Constitutionalism, Supreme Court, Federal Power

### 1. INTRODUCTION

The 1790s were a formative time for the political and constitutional history of the United States. As the newborn country attempted to find its place in a hostile world where England and France competed for commercial and imperial domination, foreign policy questions aggravated American domestic tensions.<sup>1</sup> Federalists, following in the footsteps of Edmund Burke, saw domestic social unrest, notably the Whiskey Rebellion, as inextricably linked to the French Revolution. On the other hand, the new faction formed around Madison and Jefferson, the Jeffersonian Republicans, viewed the Federalists as a beachhead of English corruption, which the United States fought to eliminate through its independence.<sup>2</sup> During the American Revolution, Americans united to form a nation. Now, they were divided on the type of nation they had built. By the end of the decade, the divisions had solidified into embryonic political parties, which posed a threat to the young republic and its new Constitution.<sup>3</sup>

More troubling, putting the words of the Constitution into practice proved to be a challenging task. The necessities of governing, rather than calming conflicts over constitutional issues, only escalated the debate over what the Constitution meant and who was in control of the process of interpretation.<sup>4</sup>

The new nation faced these perplexing questions: Could the sovereign people, newly organized into political parties, comprehend the significance of the rule of law? Could widespread localism-based state rights be accommodated by the national institutions established by the Constitution?<sup>5</sup>

As the nation's fourth Chief Justice and a witness in the turbulent 1790s, John Marshall faced the difficult task of legitimizing a new nation to an American people whose sense of citizenship was tied to their home state.<sup>6</sup> Such acclimatization would be a gradual process, but Marshall used the jurisprudence of the U.S. Supreme Court to help bind Americans to their new republican nation.

<sup>1</sup> RK Newmyer, *John Marshall and the heroic age of the Supreme Court*, (LSU Press, 2007), 70.

<sup>2</sup> *Ibid.*,

<sup>3</sup> *Ibid.*,

<sup>4</sup> *Ibid.*,

<sup>5</sup> *Ibid.*,

<sup>6</sup> Clyde H. Ray, *John Marshall's Constitutionalism*. (SUNY Press, 2019), 110.

Marshall also used the U.S. Constitution to solidify the legitimacy of the Supreme Court. By the time he arrived on the Court in 1801, Marshall had mastered the art of compromise; during his thirty-four years on the bench, he carved out a pragmatic path between opposing ideologies and frequently sacrificed his own preferences for the sake of consensus.<sup>7</sup> Marshall's devotion to the Constitution and to defining the Supreme Court's legitimacy throughout the early nineteenth century was demonstrated by these deliberate compromises.

In addition to interpreting the new Constitution, Marshall also explained the rule of law to an audience that was skeptical of the framers' accomplishments.<sup>8</sup> Marshall never allowed the nation to forget that it was the Constitution he was expounding.<sup>9</sup> Article III, which created the Supreme Court and defined federal judicial power, did not elevate the federal courts to a position of superiority over the state courts. The two entities were to coexist. Nonetheless, many viewed the establishment of a new court system as a threat to state sovereignty.<sup>10</sup> Marshall brought the sense of dignity that its previous occupant, John Jay, had complained the Supreme Court lacked.<sup>11</sup> Regardless of what he and his fellow judges thought behind the scenes, the large number of unanimous decisions they issued gave the Court and its decisions strength and credibility.<sup>12</sup>

Marshall consolidated the Court into one body rather than six or seven individuals. He successfully brought legitimacy to the new Court and established it as the Constitution's final arbiter. Marshall's constitutionalism therefore was a frontier in U.S. history, for his ideas about federalism and constitutional interpretation enabled the young nation to overcome its fragile, uncertain origins as an experiment in republican government.

## 2. ORIGINS: A "PRINCIPLED SOLDIER" IN THE CONSTITUTIONAL WAR

Born into the Virginia gentry, John Marshall served his nation first as a soldier in the Revolutionary War. He fought in several battles and endured the winter at Valley Forge, an experience that permanently molded Marshall and laid the foundation of his political and judicial career.<sup>13</sup>

The war influenced Marshall's ideas on governance. The Continental Congress and the thirteen state governments were unable to provide the troops with adequate support and the near collapse of the army convinced Marshall that the Articles of Confederation were unworkable. He concluded that only a strong central government with the ability to tax, regulate commerce, and mobilize an army could defend the nation effectively.<sup>14</sup>

The war revealed the perils of state self-interest and fierce localism.<sup>15</sup> George Washington expended as much energy fighting the British army as he did the powerless Congress and the self-centered states. Marshall grew to believe and embody what Edmund Burke so eloquently articulated about revolutionary America: "that no men could act with effect, who did not act in concert; that no men could act in concert, who did not act in confidence; that no men could act with confidence, who were not bound together by common opinions, common affections, and common interests."<sup>16</sup>

After the war, constitutional debates took place at the national and state level, and, John Marshall served in the Virginia ratification convention to approve the new federal Constitution.<sup>17</sup> Federalists, including James Madison and Marshall, believed that a strong federal government would bolster the country's economy and protect property rights against the majority's popular will. Antifederalists, such as Patrick Henry and George Mason, were concerned that a strong federal government would

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<sup>7</sup>Joel Richard Paul, *Without Precedent: Chief Justice John Marshall and His Times*. (Penguin, 2018), 481.

<sup>8</sup>Ray, *John Marshall's Constitutionalism*, 9.

<sup>9</sup>*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-37 (1819).

<sup>10</sup>J. E. Smith, *John Marshall: Definer of a nation*, (Macmillan, 1996), 237.

<sup>11</sup>Richard Brookhiser, *John Marshall: The Man Who Made the Supreme Court*, (Hachette UK, 2018), 266.

<sup>12</sup>*Ibid.*, 267.

<sup>13</sup>Paul, *Without Precedent: Chief Justice John Marshall and His Times*, 19.

<sup>14</sup>Paul, *Without Precedent: Chief Justice John Marshall and His Times*, 20.

<sup>15</sup>Newmyer, *John Marshall and the heroic age of the Supreme Court*, 47.

<sup>16</sup>From a 1770 speech by Edmund Burke, in Richard Hofstadter, *The idea of a party system: the rise of legitimate opposition in the United States, 1780-1840*. (Univ of California Press, 1969), 32.

<sup>17</sup>Paul, *Without Precedent: Chief Justice John Marshall and His Times*, 47.

threaten liberty and state sovereignty.<sup>18</sup> The Antifederalists seemed to have an edge in the debate; during the ratification process, the Constitution appeared to be in trouble in Virginia, and the convention's fate was uncertain.<sup>19</sup> "So small ... was the majority in favour," Marshall wrote, "that had the influence of character been removed, the intrinsic merits of the instrument would not have secured its adoption."<sup>20</sup> Patrick Henry was more direct: "I am satisfied 4/5 of our Inhabitants are opposed to the new Scheme of Government,"<sup>21</sup> he wrote to General John Lamb.

Discussion concerning the federal judiciary was central to the Virginia convention and Marshall's comprehensive analysis made the provisions of Article III appear reasonable and acceptable.<sup>22</sup> He described the Supreme Court as the defender of the Constitution and individual liberty. Marshall reprimanded Antifederalists for assuming that a national judiciary would become the compliant instrument of an authoritarian central government. Marshall stated that the Constitution limited the powers of Congress: "If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void."<sup>23</sup>

The future chief justice's acute understanding of legal procedure exploited the Antifederalists' weaknesses.<sup>24</sup> His acquaintance with Virginia's legal system considerably exceeded that of Mason and Henry, and he brilliantly rejected Mason's accusations point-by-point.

Despite the ultimate ratification of the Constitution, conflict over the national judiciary would continue over the following seventy-five years. As an officer in the Continental Army, Marshall contributed to independence. As a delegate to the Virginia ratification convention, he helped establish the federal government.<sup>25</sup> Having fought for the nation and helped to construct it, he would become the chief interpreter and defender of its Constitution.

### 3. THE PRE-MARSHALL COURT AND ITS BELEAGUERED CHIEF JUSTICE, 1801-1810

In January 1801, when President John Adams offered John Jay the U.S. Supreme Court seat that ultimately went to John Marshall, Jay declined. In a letter to Adams, Jay declared that he was "perfectly convinced" that the Supreme Court "would not obtain the energy, weight, and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."<sup>26</sup>

As Jay's confession to Adams suggested, contemporaries did not view the pre-Marshall Court as the august body we consider it to be today. Significant statesmen of the 1790s, including Charles C. Pinckney, Edward Rutledge, Alexander Hamilton, and Patrick Henry, declined to be appointed to the Court, while some persons who were appointed withdrew to accept other positions.<sup>27</sup> John Jay resigned from the Court to become governor of New York and later declined reappointment. John Rutledge left the Court after two years to become chief justice of the South Carolina Court.<sup>28</sup>

The early Supreme Court was a work in progress, creating a new national tribunal based on the precedent and procedure of English law and custom. The Supreme Court, along with the majority of state courts, first adopted the English-style traditional seriatim approach for its decision, meaning that every judge offered his own opinion—the justices did not speak collectively. This constrained the Court's authority by generating significant confusion and instability in the law.<sup>29</sup>

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<sup>18</sup>Ibid., 48.

<sup>19</sup> Smith, *John Marshall: Definer of a nation*, 206.

<sup>20</sup> John Marshall, *The Life of George Washington*. (Liberty Fund, 2012), 242.

<sup>21</sup> Isaac Q Leake, *Memoirs of the Life and Times of General John Lamb*, (1850), 307.

<sup>22</sup> Smith, *John Marshall: Definer of a nation*, 235.

<sup>23</sup> Ibid., 239, and Charles F. Hobson, ed. *The Papers of John Marshall: Vol XII: Correspondence, Papers, and Selected Judicial Opinions, January 1831-July 1835, with Addendum, June 1783-January 1829*, (UNC Press Books, 2012), 277.

<sup>24</sup> Smith, *John Marshall: Definer of a nation*, 240.

<sup>25</sup> Ibid., 248.

<sup>26</sup> Leonard Baker, *John Marshall: A life in law*, (Macmillan, 1981), 352.

<sup>27</sup> Scott Douglas Gerber, *The Supreme Court Before John Marshall*, (U. St. Thomas LJ, 2018), 30.

<sup>28</sup> Ibid.,

<sup>29</sup> M. T. Henderson, *From seriatim to consensus and back again: A theory of dissent*, (The Supreme Court Review no. 1, 2007), 308.

The weakness of the Court was further compounded by the unfavorable reception of some of its earliest rulings. The response to the Court's opinion in *Chisholm v. Georgia*<sup>30</sup> exemplified this early antagonism towards the Court.<sup>31</sup> According to the *Chisholm* decision, a state is not immune from lawsuits initiated by private citizens; yet the state of Georgia disagreed. In response, Georgia legislators reacted by proposing a constitutional amendment to limit the ability of federal courts to consider cases brought against states by people of other states.<sup>32</sup> It was a significant blow to the institutional authority of an already weakened Court.

In 1801, Marshall joined a Supreme Court dominated by Federalists, who held the majority on the bench until 1810. During his first years as chief justice, Marshall and his colleagues faced not only the embarrassments and difficulties of its first years, but the Court was also embroiled in a conflict with Thomas Jefferson's administration, called "the judiciary crisis."<sup>33</sup> The ways in which Chief Justice Marshall led the Court through this critical period set the tone for his tenure and established patterns that persisted throughout his years on the bench.

Facing a Republican electoral takeover, Federalists enacted the 1801 Judiciary Act, establishing new circuit courts and reducing the number of Supreme Court justices from six to five.<sup>34</sup> Due to this increase in federal court power, Republicans saw the act as partisan legislation. Adams's end-of-term appointment of sixteen Federalists to the newly constituted judgeships only bolstered this perception.<sup>35</sup> Republicans saw the federal courts as having lost all appearance of independence and impartiality, and had instead become a tool of the Federalists and thus an instrument of party politics.<sup>36</sup>

Marshall's immediate goal was to rebuild the federal judiciary's tarnished reputation by strategically retreating from the aggressive, partisan posture it had previously exhibited.<sup>37</sup> However, things worsened before they improved. A Federalist-appointed justice of the peace for the District of Columbia sued for a writ of mandamus, a common law command to compel the Jefferson administration to deliver his commission.<sup>38</sup> This created a challenge for the new Chief Justice, as Jefferson's administration would not carry out the Court's commands.

Chief Justice Marshall announced the Court's ruling in February 1803, affirming that William Marbury, the petitioner seeking his appointment, had a legal right to his commission but the Court had no jurisdiction to give him this remedy. Section 13 of the 1789 Judiciary Act seemingly authorized Marbury to seek his writ of mandamus in the Supreme Court as a trial court, rather than on appeal. However, the Court declared this provision to be unconstitutional because it conflicted with its constitutionally authorized original jurisdiction outlined in Article III. Thus, to give Marbury redress would be to expand the Court's original jurisdiction beyond what the Constitution allowed. It was a principle, Marshall said, "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."<sup>39</sup>

*Marbury* was a triumph of the law over politics. Marshall turned a hopeless situation into an overwhelming victory. Marshall's conclusion satisfied both parties: the Federalists got the notional prize of hearing that Marbury was entitled to his commission, while the Republicans gained a great victory with the dismissal of the case.<sup>40</sup> The actual winner, however, was the Supreme Court and the Constitution itself.

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<sup>30</sup> *Chisholm v. Georgia*, 2 U.S. 419 (1793).

<sup>31</sup> Henderson, *From seriatim to consensus and back again: A theory of dissent*, 308.

<sup>32</sup> *Ibid.*,

<sup>33</sup> Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, (U.Pa. L. Rev. 154, 2005), 1426.

<sup>34</sup> Paul, *Without Precedent: Chief Justice John Marshall and His Times*, 261.

<sup>35</sup> Smith, *John Marshall: Definer of a nation*, 510.

<sup>36</sup> Charles Warren, *The Supreme Court in United States History. Vol. 1.* (Little, Brown, 1926), 164.

<sup>37</sup> Hobson, *Defining the Office: John Marshall as Chief Justice*, 1427.

<sup>38</sup> Smith, *John Marshall: Definer of a nation*, 253.

<sup>39</sup> *Marbury v. Madison*, 5 US 137, 179 (1803).

<sup>40</sup> Smith, *John Marshall: Definer of a nation*, 544.



It greatly aided the Court's legitimacy that *Marbury* was a case of judicial self-denial, of declining jurisdiction granted by Congress. *Marbury v. Madison* thus amounted to a declaration of independence by the Supreme Court, an announcement of withdrawal from the political realm.<sup>41</sup>

Furthermore, Marshall's decision in *Marbury* is the first occasion during his tenure that he specifically addressed the significance of constitutions for uniting groups of individuals with dissenting ideas. Marshall's constitutionalism is helpful for comprehending the impact of a constitution as a source of shared meaning and a common political lexicon.<sup>42</sup>

This unification extended to his fellow justices on the bench, as Marshall moved away from seriatim opinions to adopt a single opinion among the justices, a deliberate departure from the conventional norms of legal practice.<sup>43</sup> Marshall recognized the benefits of a single statement to lend weight and authority to the Supreme Court's judgments, thus encouraging legal certainty and consistency. The public would now come to view the Court as a cohesive, autonomous institution whose decisions were the result of serious deliberation and consensus.<sup>44</sup> The Court's authority and renown would grow, and the Chief Justice would become the personification of its stature and dignity.<sup>45</sup>

Once firmly established, the single majority opinion persisted throughout John Marshall's tenure. It gave the impression that the judges were united when, in reality, they were divided.<sup>46</sup> Unless it was stated that the opinion was "unanimous," the number in the majority was unknown. The internal dynamics of this collegial institution encouraged Justices who disagreed with the majority to remain silent.<sup>47</sup>

Marshall not only ensured that the Supreme Court spoke with a unified voice, but also that the majority of the time, that voice was his. In thirty-five years, he gave over 500 of the Court's estimated 1106 recorded opinions and over sixty percent of its constitutional rulings.<sup>48</sup>

#### 4. THE GOLDEN AGE, 1811-1824

By 1811, five of the seven Justices on the Supreme Court were appointed by Republican presidents, but party affiliations were relatively trivial on the court. More important were the forces binding the justices together: their common heritage as members of the Revolutionary generation, their devotion to the Constitution and union, and their belief that law and courts were essential to the functioning of government and society.<sup>49</sup> Following the War of 1812, a wave of nationalism helped the Supreme Court achieve its highest level of internal unity and stability, as well as making its most lasting contributions to the Constitution.<sup>50</sup>

The economically turbulent years of the late eighteenth century served as the background for one of Marshall's grandest and most influential decisions in *McCulloch v. Maryland*. When the First Bank of the United States' twenty-year license ended in 1811, the Republican Congress, which had long viewed the national bank with suspicion, successfully prevented its renewal.<sup>51</sup> The financial hardship of the War of 1812, however, reminded the nation of the need for an efficient economic system, and a second Bank of the United States was re-chartered in 1816 during a period of postwar nationalist enthusiasm.<sup>52</sup> Within three years of its re-incorporation, the Bank was widely recognized as a major contributor to the nation's postwar economic growth.

By late 1818, however, the majority of Americans had turned against the Bank. To compensate for the downturn in American commodity prices abroad, many branches were required to recall loans more rapidly.<sup>53</sup> Local resentments were further heightened by cases of fraud, and general mismanagement

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<sup>41</sup> Hobson, *Defining the Office: John Marshall as Chief Justice*, 1430.

<sup>42</sup> Ray, *John Marshall's Constitutionalism*, 15.

<sup>43</sup> Hobson, *Defining the Office: John Marshall as Chief Justice*, 1443.

<sup>44</sup> *Ibid.*,

<sup>45</sup> *Ibid.*,

<sup>46</sup> *Ibid.*, 1444.

<sup>47</sup> *Ibid.*,

<sup>48</sup> *Ibid.*, 1445.

<sup>49</sup> *Ibid.*, 1431

<sup>50</sup> *Ibid.*,

<sup>51</sup> Ray, *John Marshall's Constitutionalism*, 54.

<sup>52</sup> *Ibid.*,

<sup>53</sup> *Ibid.*, 55.

by branch officials that frequently went unreported to or unpunished by federal authorities.<sup>54</sup> By 1819, a number of state legislatures had attempted to limit the Bank's authority in their respective states by passing legislation. Maryland was one of these states; it targeted the Bank by levying a banknote tax or a \$15,000 yearly fee on the activities of all non-state-chartered banks.<sup>55</sup> James McCulloch, the cashier of the Baltimore branch of the Second Bank of the United States, refused to pay either amount to the state, prompting Maryland to sue the Bank.<sup>56</sup> The main questions before the Supreme Court were whether the Bank was constitutional, and if so, could the state of Maryland tax the Bank, a creation of Congress?

In *McCulloch v. Maryland*, the Marshall court constitutionalized Alexander Hamilton's long-ago articulated doctrine of implied powers to defend Congress's power to incorporate a national bank and the Supremacy Clause to deny a state's right to tax the bank.<sup>57</sup> Marshall announced that "the Court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." Marshall finished, "We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the Bank of the United States, is unconstitutional and void."<sup>58</sup>

The *McCulloch* decision was a resounding affirmation of national supremacy. Marshall's remarks have been regularly invoked by subsequent Supreme Court judgments to justify the extension of national authority at the states' expense.<sup>59</sup> For instance, the high tide of constitutional nationalism continued through the 1824 term, with *Gibbons v. Ogden* and *Osborn v. Bank of the United States*. In *Gibbons*, Marshall expounded the Commerce Clause for the first time in voiding New York's laws establishing a monopoly on steam navigation of the state's waterways.<sup>60</sup> In *Osborn*, the Chief Justice struck down Ohio's attempt to tax the national bank while protecting Congress's powers.<sup>61</sup>

*McCulloch v. Maryland* was one of the most important cases in the history of the Supreme Court. The issues Marshall addressed—the scope of federal power, the limits of state sovereignty, the nature of the Union, and the principles by which the Constitution should be interpreted—remain relevant today, and the answers he provided have molded the nation's development for almost two centuries.<sup>62</sup> In *McCulloch*, the Constitution, not the states, represented the nation's highest legal authority. The Constitution was the governing lever, not the political branches or even the Supreme Court.<sup>63</sup> Marshall once again showed his overarching commitment to the Constitution.

Despite the fact that such decisions in favor of national power enraged states' rights advocates, the opposition to the Court was sporadic and local, never gaining ascendancy in the country at large.<sup>64</sup> The overall peace between states and the federal government testified to both the American people's underlying agreement to preserve the integrity of the Supreme Court and Chief Justice Marshall's leadership in transforming the Supreme Court into a tribunal of high prestige and authority.<sup>65</sup>

## 5. STRATEGIC CONCESSIONS, 1825-1835

Until the mid-1820s, all significant cases required the Supreme Court to perform the delicate task of determining the limits on state power. During its final decade, the Marshall Court moved away from the elevated nationalism of its golden years and toward a more conciliatory posture toward the

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<sup>54</sup> Ibid.,

<sup>55</sup> Ibid., 56.

<sup>56</sup> Ibid.,

<sup>57</sup> *McCulloch v. Maryland*, 17 U.S. 316, 406-37 (1819).

<sup>58</sup> Ibid.,

<sup>59</sup> Smith, *John Marshall: Definer of a nation*, 728.

<sup>60</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 221.

<sup>61</sup> *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) at 867-68.

<sup>62</sup> Smith, *John Marshall: Definer of a nation*, 732.

<sup>63</sup> Ray, *John Marshall's Constitutionalism*, 87.

<sup>64</sup> Hobson, *Defining the Office: John Marshall as Chief Justice*, 1434.

<sup>65</sup> Smith, *John Marshall: Definer of a nation*, 716.

states.<sup>66</sup> In large measure this was a concession to shifting circumstances, to a new political reality in the nation at large and on the Court itself. For his part, Chief Justice Marshall showed sufficient flexibility to embrace political expediency to the extent necessary to maintain the Court's vitality and effectiveness.<sup>67</sup>

Marshall was concerned that Andrew Jackson's presidential campaign incited an insidious spirit in the American populace. Since Jackson's 1824 loss to John Quincy Adams, his Democratic followers had engaged in a never-ending campaign against the president and his heir apparent, Henry Clay, the secretary of state.<sup>68</sup> The masses were "animated with the most hostile feelings towards each other,"<sup>69</sup> Marshall wrote. This new political phenomenon polarized the country by region. Marshall thought that it "threatens the most serious danger to the public happiness. The passions of men are enflamed to so fearful an extent, large masses are so embittered against each other, that I dread the consequences."<sup>70</sup> He feared that the Constitution would not survive during the Jackson administration.

During these years, the Court's internal unity also began to deteriorate, as evidenced by the increase of separate and dissenting opinions. Marshall was unable to maintain his prior control over a Court undergoing transformation due to the arrival of new members.<sup>71</sup> Following the deaths of Henry Brockholst Livingston and Thomas Todd, Smith Thompson and Robert Trimble joined the Court. The deaths of Bushrod Washington and Robert Trimble in 1829 vacated two positions. President Andrew Jackson appointed John McLean and Henry Baldwin to these seats at the 1830 Term.<sup>72</sup>

The Court continued to issue rulings overturning state laws, but dissents had now subdued the Court's former nationalist voice. In the 1830 case of *Craig v. Missouri*,<sup>73</sup> for instance, Marshall only managed a narrow majority to decide that state loan office certificates were unconstitutional "bills of credit."<sup>74</sup> In that case, Justices Johnson, Thompson, and McLean each issued separate dissenting opinions, leaving Marshall to worry about the likelihood of continuing to supervise state courts under section 25 jurisdiction in the future.<sup>75</sup>

Ironically, the Court exercised unity over cases protecting state commerce. In the 1829 case *Willson v. Black Bird Creek Marsh Co.*<sup>76</sup>, the Supreme Court unanimously ruled that Delaware's legislation enabling the construction of a dam over a navigable creek was a valid exercise of regulatory power that did not conflict with Congress's jurisdiction to control commerce.<sup>77</sup> In the 1830 case *Providence Bank v. Billings*<sup>78</sup>, the Supreme Court held unanimously that the legislature of Rhode Island imposing a tax on companies did not violate the Constitution's Article I, section 10 Contract Clause.<sup>79</sup>

Finally, in *Barron v. Baltimore*, Marshall's final constitutional case, the Justices rejected a Baltimore wharf owner's attempt to invoke the "takings" clause of the Fifth Amendment to obtain compensation for damage to his property.<sup>80</sup> According to Marshall, the Bill of Rights was meant to limit federal authority rather than state action. Unless explicitly mentioned, the Constitution's powers and prohibitions applied only to the federal government; therefore, "the fifth amendment must be understood as restraining the power of the general [federal] government, not as applicable to the states."<sup>81</sup>

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<sup>66</sup> Hobson, *Defining the Office: John Marshall as Chief Justice*, 1435.

<sup>67</sup> *Ibid.*,

<sup>68</sup> Paul, *Without Precedent: Chief Justice John Marshall and His Times*, 261.

<sup>69</sup> Lester J. Cappon, *The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams*, (UNC Press Books, 2012), 387.

<sup>70</sup> *Ibid.*, 391.

<sup>71</sup> Hobson, *Defining the Office: John Marshall as Chief Justice*, 1435.

<sup>72</sup> *Ibid.*,

<sup>73</sup> *Craig v. Missouri*, 29 U.S. 410 (1830).

<sup>74</sup> Hobson, *Defining the Office: John Marshall as Chief Justice*, 1436.

<sup>75</sup> *Ibid.*,

<sup>76</sup> *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. 245 (1829).

<sup>77</sup> Hobson, *Defining the Office: John Marshall as Chief Justice*, 1436.

<sup>78</sup> *Providence Bank v. Billings*, 29 U.S. 514 (1830).

<sup>79</sup> Hobson, *Defining the Office: John Marshall as Chief Justice*, 1436.

<sup>80</sup> *Barron v. Baltimore*, 29 U.S. (4 Pet.) 514, 564-65 (1830).

<sup>81</sup> *Ibid.*,

Marshall was cognizant of the fragility of the American constitutional government. In addition, he acknowledged the Constitution's primary role in uniting the American people against governmental dominance.<sup>82</sup>In *Barron*, Marshall did not change his opinion as a political thinker. At the center of an increasingly polarized country under the debates of state sovereignty, and at the end of his lifetime of public service, it was still the Constitution.<sup>83</sup>

### 6. LEGACIES

After Marshall's death in 1835, the nation mourned the loss of the chief justice with the same solemnity and affection with which it had lamented Washington's passing.<sup>84</sup> Justice Joseph Story called him "the greatest and wisest man of this country." and suggested his epitaph should read "Here lies the expounder of the Constitution."<sup>85</sup>Even President Jackson conceded that "in the revolutionary struggles for our national independence, the opinions of John Marshall . . . gave him a rank amongst the greatest men of his age."<sup>86</sup>

In his final years on the Supreme Court, Marshall's optimism toward a Constitution-based union diminished. In the 1830s, tensions between the states and the federal government were on the verge of exploding.<sup>87</sup> Extreme partisanship reached an all-time high. In 1832, as his term on the Supreme Court was coming to an end, he projected gloomily to his close friend and colleague, Joseph Story, that "the union has been preserved thus far by miracles, and that cannot continue."<sup>88</sup>Marshall believed his career efforts to construct a national identity based on the Constitution had failed when he died in Philadelphia in 1835.

With the nation on the verge of the Civil War, Marshall's prognosis cannot be disputed. His successor, Chief Justice Roger Taney, delivered the infamous *Dred Scott v. Sandford*<sup>89</sup> decision in 1857 and drove the union toward civil war. Senator Charles Sumner said that "judicial baseness" had reached its nadir in that decision,<sup>90</sup> but, thanks to Marshall's legacy, it could not be permanently dissipated. John Marshall had laid down a marker, an upper boundary of legitimacy and respect, which the Court could and would reach once again.

A century later, the Supreme Court continued to uphold his legacy. In *Cooper v. Aaron*, the Court held that states must obey federal court's orders mandating desegregation.<sup>91</sup> It was an overwhelmingly popular decision, restating and affirming once more the idea of constitutional supremacy and the essential principle, acknowledged by John Marshall as essential to the nation, that the Supreme Court provides the ultimate interpretation of the Constitution.<sup>92</sup>

In the time of partisan rancor, John Marshall serves as a reminder to Americans that the Constitution is an authority for national policy and a source of unity.<sup>93</sup> His jurisprudence of constrained nationalism, a legal frontier in the history of the United States, introduced all Americans to the fundamental and permanent significance of the rule of law in a republic. Washington died, Hamilton died, the Federalist Party died. But for thirty-four years, Marshall stood his ground on the Supreme Court, displaying the steady firmness and tenacious discharge of duty that had riveted him when he first saw it at White Marsh outside Philadelphia when he was twenty-two years old.<sup>94</sup>

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<sup>82</sup>Ray, *John Marshall's Constitutionalism*, 109.

<sup>83</sup> *Ibid.*, 116.

<sup>84</sup>Paul, *Without Precedent: Chief Justice John Marshall and His Times*, 493.

<sup>85</sup>Warren, *The Supreme Court in United States History. Vol. 1.*, 813.

<sup>86</sup> Jackson to Horace Binney, September 18, 1835, *Jackson Papers*, Library of Congress.

<sup>87</sup>Ray, *John Marshall's Constitutionalism*, 113.

<sup>88</sup>Hobson, ed. *The Papers of John Marshall: Vol XII: Correspondence, Papers, and Selected Judicial Opinions, January 1831-July 1835, with Addendum, June 1783-January 1829*, 247.

<sup>89</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

<sup>90</sup> Paul Finkelman, *Supreme injustice: Slavery in the nation's highest court*, (Harvard University Press, 2018), 173

<sup>91</sup> *Cooper v. Aaron*, 358 U.S.1 (1958).

<sup>92</sup>Christopher W Schmidt, *Cooper v. Aaron and Judicial Supremacy*, (UALR L. Rev. 41, 2018), 273.

<sup>93</sup> *Ibid.*, 131.

<sup>94</sup>Brookhiser, *John Marshall: The Man Who Made the Supreme Court*, 270.



Marshall would be somewhat surprised that the document he protected has persisted after overcoming major challenges. In the midst of persistent partisan turmoil and animosity, he continued to cite the Constitution as the basis for national policy and a source of national unity.<sup>95</sup> His political philosophy teaches all Americans about the constitution and the fundamental and enduring significance of the rule of law for modern citizens.

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<sup>95</sup>Ray, *John Marshall's Constitutionalism*, 113.