STATE OF OHIO
FRANKLIN COUNTY /S.

CASE NOS. 06.2079 AND 06.2081

THE OHIO SUPREME COURT

(BOARD OF COMMISSIONERS)

IN RE: LEVERT K. GRIFFIN. PLTF. APLT. AND REL..
POB 22142. AKRON. OH 44302.. VERSES.

AUGUSTIN F. O'NEIL. ESQ. REG. NO. 0021157
511 N. MAIN ST. AKRON. OH 44310. AND....

LAWRENCE R. SMITH. ESQ.. REG. NO. 0029026 1
ONE CASCADE PLZ.. 7TH. FL.. AKRON. OH 44308,

DEFTS.. APLEES.. RES...

RECEIVED
DEC 06 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

RELATOR. APPELLANT. PLAINTIFF LEVERT K. GRIFFIN
MOTION FOR ENTRY FOR ALLEGE UNAUTHORIZE
PRACTICE OF LAW LODGED AGAINST BOTH ATTORNEYS
LAWYER INCAPTIONED AS ABOVE SEE HENCE EXHIBIT #"B" & "C"

NOW COMES. RELATOR. APPELLANT. PLAINTIFF LEVERT K. GRIFFIN. HEREBY PRAY FOR RELIEF UPON TO WHICH RELIEF CAN BE GRANTED. A MOTION FOR ENTRY FOR ALLEGE UNAUTHORIZE PRACTICE OF LAW LODGED AGAINST BOTH ATTORNEYS LAWYER INCAPTIONED AS ABOVE SEE HENCE EXHIBIT #"B" & "C"

FILED
DEC 07 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

PENDING:
1.) APPEAL AS OF RIGHT
2.) TRANSMITTAL OF RECORD ORDER

LEVERT SHOW CAUSE ORDER FOR REL, AND
DEMANDED TAX FREE AT ALL COST THIS REQUEST WERE
GOV BAR R. V § 6(F). PENDING ADJUDICATIVE RELIEF CIV P. RL. 55(a)(b)
GOVERN UNDER THE AUTH.. SUP CT RL. PROC FOR THE GOV OF THE BAR OF OHIO
RL. VII. UNAUTHORIZED PRACTICE OF LAW. AND GOV BAR R. VII § 8(B)(C)(1)
ET SEQ. INTER ALIA..

FILED
DEC 06 2006
MARCIA J. MENGEL, CLERK
SUPREME COURT OF OHIO

IT IS SO ORDERED
IT IS SO PRAYED
SO HELP ME MY DEAR GOD'S ALMIGHTY ALLIA

RESPECTFULLY SUBMITTED.
Levert K. Griffin John Baptist II
SECOND IN COMMAND OF OUR PERSONAL SAVIOR AND
LORD JESUS CHRIST "YASHUA."

ST JOHN. 6:0. RA. CA.

PROPOSE ISSUE FOR REVIEW

WHETHER OR NOT DID RESPONDENT JOINTLY AND OR SEVERALLY AS AGAINST THE PEACE AND DIGNITY OF THEIR OFFICE CAUSE UNDUE BURDEN AND HARDSHIP IN THE ATTORNEY CLIENT RELATIONSHIP PENDING AS OF RIGHT APPEAL APPEAL OF A MOVANT. [EXHIBIT # "B"]

ARGUMENT TO THE LAW

YOU I REQUEST THE ADJUDICATION WORKING ON TIME SUB NOM. STATUTATION OF LIMITATIONS THE HEARING IT IS AXIOMATIC BECAUSE BOTH LAWYERS TOOK TO THE AFFIRMATIVE THEY FAILED. SEE RELATOR LEVERT'S OHIO SUPREME COURT DOCKET FOR BOTH RESPONDENTS. AUGUSTIN AND LAWRENCE i.e. ON 11.9.06. 11.13.06/11.20.06/11.28.06/. (PENDING A "MTN FOR DEFAULT JUDGMENT) AND (INJUNCTIVE RELIEF) INTERALIA.. EXHIBIT "B" (T. CASE NO. 99 8 1995. M.J. GUI)

WHEREFORE ISSUE OUT A ORDER FOR PLTF.. APLT.. REL.. LEVERT AND AGAINST DEFTS. APLEES. RES.. AND ANY OTHER RELIEF WHICH IS PROPERLY SERVED FOR ENTRY. FOR SHOW CAUSE WHY A HEARING SHOULD NOT BE HELD FOR THE ALLEGED UNAUTHORIZE PRACTICE OF LAW. BEFORE THIS BOARD OF COMMISSIONERS ORC 2301.20 FOR THE "PUBLIC RECORD" DOCTRINE SEE THE PENDING PROPOSITION OF LAW INTRO.

IT IS SO ORDERED
IT IS SO PRAYED
SO HELP ME MY DEAR GOD'S ALMIGHTY ALLAH. LETTER NO. 1 / TO BD. & COMMRS. ON SUPRA 43215. COL. OH.

PROOF OF SERVICE

TO THE CLK. TO THE CRT.. TO THE BOARD OF COMMRS. FOREGOING REG U.S. GOV'T MLS AND TO LAWRENCE R. SMITH. ESQ. ONE CASCADE PLZ.. AKRON. O. 44308 AND TO AUGUSTIN F. O'NEIL. ESQ. 511 N. MAIN ST. AKRON. O. 44310 THIS DEC 4. 2006. CRIM R. SS. 28 USC §§ 1915(a)(1)/(3) GRIFFIN'S PENDING USE BILL 2006. 28 USC § 1746.

Lawrence K. Griffin

ST JOHN GO(R). SUPRA § 5. QUORUM OF PANEL OR BOARD

DIANA ZALESKI

STATE OF OHIO }
COUNTY OF SUMMIT } ss

2006 DEC -4 PM 12:04

CASE No. CV 2005. 11. 6574

SUMMIT COUNTY
CLERK OF COURTS

COURT OF COMMON PLEAS (CIVIL DIVISION)

HON JURIST JUDITH L. HUNTER.

APPLICATION OF:

LEVERT K. GRIFFIN. PLTF. APLT. REL.,

v.

LAWRENCE R. SMITH, ESQ., ET AL.,

DEFT., APELEE. RES.,

MOTION FOR ENTRY TO VACATE A ORDER AND HOLD IN ABEYANCE PENDING OHIO SUPREME COURT CASE NOS. 06.1971 HERE AS EXHIBIT # "C"

NOW COMES. PLTF. APLT. REL., DR LEVERT K. GRIFFIN. HEREBY PRAY FOR RELIEF UPON TO WHICH RELIEF CAN BE GRANTED. A MOTION FOR ENTRY TO VACATE A ORDER AND HOLD IN ABEYANCE PENDING OHIO SUPREME COURT CASE NOS. 06.1971 HERE AS EXHIBIT # "C".

IT ISS ORDERED
IT IS SO PRAYED
SO HELP ME MY DEAR GOD'S ALLAN.

VERY TRULY YOURS. John
RESPECTFULLY SUBMITTED
Levert K. Griffin Jr. Ph.D. (60/B).
PO BX 72142
AKRON, OH 44302

NOTE: AIN'T NO SENSE TO GO TO THE DEVIL COURT OF LYNNE. SLABUGH. CAN I GET A MEN? WOULD ANYONE FORCE A COVERUP IN THIS CASE? WE GONNA GET TO THE TRUTH. I LEAT THE DOOR OPEN

SERVICE

TO THE CRT TO THE CLK TO PROSECUTOR OFFICE OF SHERRI B. WALSH. ESQ (LPA) 53 UNIVERSITY AVE. AKRON, OH 44308. AND TO LAWRENCE R. SMITH, ESQ. ONE CASCADE PLZ., AKRON, OH 44308 THIS DEC 4. 2006. CRIM. R. 55. 42 28 USC § 1746. IS THEIR ANY OBJECTIONS (TIME) STATUTATIONS OF LIMITATIONS WE CLASS MUST REMEMBER THOSE TO THE BOTTOM OF HER FEET ☥ AMEN!!!

ST. JOHN 6(B). WE SHOULD ESTABLISH A HOUSE BILL FOR THIS WRITTER. (HSB. 1(2006))

DIANA ZALESKI

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

2006 NOV 29 PM 3:27

SUMMIT COUNTY CLERK OF COURTS

LEVERT K. GRIFFIN	)	CASE NO.: CV 2005-11-6574
Plaintiff	)	
	)	JUDGE HUNTER
vs.	)	ORDER
LAWRENCE R. SMITH	)	
Defendant	)	

This matter comes before the Court on Motion of Plaintiff Levert K. Griffin to vacate numerous fines, court costs, and restitution in the Cases of CV 2005-10-6398, CV 2005-11-6574, and apparently an unspecified criminal case(s). As to CV 2005-10-6398 and the unspecified criminal case(s), this Court does not have the authority to vacate said costs and fines. As to the costs relating to the present case, the Court finds Plaintiff's Motion not well taken and it is denied.

So Ordered.

Levert's Exhibit #"C"

Judy Hunter
JUDGE JUDY HUNTER

pending Sup Ct. case no. 2006.2081 and 06.1762 9th Dist CA. #23350
RE: ENTRY FOR ORDER TO HOLD IN ABEYANCE:
1.) LIMITED TO ORC 2305.11(A)

cc: Levert K. Griffin, pro se
Attorney Lawrence R. Smith, pro se.

Pending Sup Ct #06.1871
Sent to Summit Cty Pros Atty Office.

Where for this Horse Bill
How many Signatures
will I need for
will we need answer
Demand #1

DIANA ZALESKI
2003 FEB -3 PM 2:35
SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

DOMESTIC RELATIONS DIVISION

SUMMIT COUNTY, OHIO

- - -

SHAWNETTE DAVIS,	)	CASE NO. 99 08 1975
Plaintiff,	)	MAGISTRATE GUI
	)	
vs.	)	TRANSCRIPT OF
	)	PROCEEDINGS
	)	
LEVERT GRIFFIN,	)	JUDGE JOHN QUINN
Defendant.	)	

- - -

On behalf of the Plaintiff:
Pro Se;
On behalf of the Defendant:
LAWRENCE SMITH, Attorney at Law

- - -

BE IT REMEMBERED that this cause came on to be heard before the Honorable Janice Gui, Magistrate, Domestic Relations Division, Court of Common Pleas, Summit County, Ohio, on June 21, 2002, this being a transcript of said proceedings from cassette tape 570.

- - -

Gary A. Maharidge,
Registered Professional Reporter

Sup Ct case nos. 06-2079 and 06-2081 Relator Exhibit "B"

1 P-R-O-C-E-E-D-I-N-G-S
2 THE MAGISTRATE: This is Case Number
3 99-08-1975, Shawnette Davis versus Levert
4 Griffin. This case is convened for hearing
5 -- you may sit down -- on June 21, 2002.
6 Both on the parties are here. Both
7 Attorney Smith, who is representing Mr.
8 Griffin. There is a number of motions
9 filed here. I'm not -- not really sure
10 what Mrs. Davis was served with and what we
11 are going ahead on. I see she was served.
12 Can you help me with this, Mr. Smith?
13 MR. SMITH: Your Honor, I -- this is
14 what I believe was served. Your Honor, I
15 know from a letter that I received on May
16 10th from Deborah J. Monaco, judicial
17 attorney, that the motion for attorney's
18 fees, court costs and motion for relief of
19 judgment that Mr. Griffin filed was served
20 on the -- on Ms. Davis. Also that we have
21 filed a copy of the original motion.
22 THE MAGISTRATE: Okay, well, that
23 would be considered by the Judge, wouldn't
24 it?
25 MR. SMITH: What's that, ma'am?

1 THE MAGISTRATE: Relief from
2 judgment?
3 MR. SMITH: Oh, absolutely, your
4 Honor.
5 THE MAGISTRATE: Yeah, right.
6 MR. SMITH: My understanding is that
7 the Judge is going -- is holding ruling on
8 that.
9 THE MAGISTRATE: Okay.
10 MR. SMITH: But I'm just telling you
11 what you asked me, what motions we believed
12 --
13 THE MAGISTRATE: Right.
14 MR. SMITH: -- we believe got
15 served.
16 THE MAGISTRATE: Well, then, none of
17 the other motions that would be heard by me
18 were served?
19 MR. SMITH: No, they were all served,
20 your Honor. Those are just the most recent
21 ones. The ones that I asked --
22 THE MAGISTRATE: Because I'm only
23 showing service on one thing and that was
24 on May 24th.
25 MR. SMITH: Your Honor, Mr. Griffin

1 had served every motion filed in this case
2 on Ms. Davis. Also, our office had every
3 motion filed representing this case.
4 (Discussion off the record.)
5 MR. SMITH: We have that, all of them
6 were served. All motions were served on
7 May 31st. I mean that's when they were
8 received. They were filed May 24th, served
9 on May 31st. I know that my office, again,
10 filed motions subsequent to that so that
11 she would have notice of those.
12 THE MAGISTRATE: Okay. You mean you
13 sent them yourself?
14 MR. SMITH: No. My -- my office went
15 down -- allegedly went to the courthouse
16 and had that done, but I know Mr. Griffin
17 -- he has copies of receipts in front of
18 me.
19 THE MAGISTRATE: There are only two
20 things that are on this -- well, we know
21 there is this one that said they sent to
22 him by mistake. And then after, I see one
23 served to her on May 24th and another one
24 that was issued June 17th, but there is no
25 service on it. In any event, if we can

1 determine what it is that we are hearing
2 today and if Ms. Davis --
3 MR. SMITH: Right.
4 THE MAGISTRATE: -- acknowledges that
5 she knows about this claim we can go ahead
6 with it. So what is it that we were
7 supposed to be hearing today? A motion
8 filed when?
9 (Discussion off the record.)
10 MR. SMITH: Your Honor, it's the
11 original motion that he had filed.
12 THE MAGISTRATE: But you are telling
13 me what date that was because I have got so
14 many things in here.
15 MR. SMITH: I -- you know, your
16 Honor, I have one May 6th of 2002 --
17 MS. DAVIS: I'm sorry, your Honor.
18 MR. SMITH: May 6th of 2002.
19 THE MAGISTRATE: Well, that wasn't
20 the first one, but maybe that's the one you
21 want her, I don't know.
22 MR. SMITH: I think that's the one --
23 it is a continuation of that motion, your
24 Honor.
25 THE MAGISTRATE: It is for attorney

1 fees and cost of court with interest.
2 MR. SMITH: That is correct, your
3 Honor.
4 THE MAGISTRATE: And relief from
5 judgment? I thought that's the one that
6 the Judge was going to hear?
7 MR. SMITH: Your Honor, the relief
8 from judgment I think needed to take
9 evidence as to whether or not what property
10 had been under the original judgment had
11 been taken care of. There was some errors
12 on whether or not a diamond ring had been
13 transferred and what the cost of the
14 repairs, which she granted that there were
15 cost of repairs when she heard it, your
16 Honor. But there was -- I don't think any
17 estimate of how much it was. And all I was
18 going to do is put on for the record how
19 much -- it is in the motion if -- did you
20 receive -- excuse me. Did you receive a
21 copy of the motion?
22 (Discussion off the record.)
23 MS. DAVIS: What repair bills? I
24 know when we got a divorce the Judge made a
25 decision and what he got and what mine was

1 mine and what his was his. I have no idea
2 why I'm here today, and I have no idea why
3 this man won't leave me alone.
4 I have came here before. I filed --
5 got a restraining order against him. He
6 has violated constantly. He refuses to --
7 he refuses to leave me alone, and I have no
8 idea why I'm here today. And I'm sick and
9 tired of him keep bothering me, threatening
10 my life several times, and he consistently
11 bothering me.
12 Not too long ago he has stole my mail
13 and called my sister in Canada, and all I
14 want him to do is to leave me alone. I
15 have a restraining order against the man,
16 and he will not leave me alone, your
17 Honor. And that is why I am here today. I
18 owe him nothing, he owes me nothing. I
19 have moved on, and he needs to move on and
20 leave me alone. I have nothing for him.
21 THE MAGISTRATE: Well --
22 MR. SMITH: Whatever this Court wants
23 to do we will proceed in which this Court
24 believes is necessary.
25 THE MAGISTRATE: Ms. Davis --

1 MS. DAVIS: Yes, your Honor?
2 THE MAGISTRATE: -- would you come
3 forward, please, and tell me if you ever
4 got this item here that is filed on May
5 6th.
6 MS. DAVIS: I brought the one that I
7 have, your Honor. I will show you.
8 THE MAGISTRATE: Oh, okay. Good.
9 MS. DAVIS: This is one that I
10 received.
11 THE MAGISTRATE: And that's a --
12 okay. Thank you.
13 Now, I see the decree refers to a
14 separation agreement, but there is no
15 agreement attached to the decree. Anybody
16 have a copy of the separation agreement?
17 MS. DAVIS: I didn't bring a copy of
18 my divorce papers, but I do have it.
19 MR. SMITH: Your Honor, I do not
20 believe there was a copy of the separation
21 agreement because there wasn't one. There
22 was a hearing. I have a transcript.
23 MS. DAVIS: There was one.
24 THE MAGISTRATE: This decree says --
25 MS. DAVIS: There was one.

1 THE MAGISTRATE: Was filed January
2 the 26th, 01. And it says, number two, the
3 separation agreement signed by both parties
4 is incorporated and made an order of this
5 Court.
6 MR. SMITH: Then I'm not familiar
7 with (inaudible).
8 (Discussion off the record.)
9 MR. SMITH: May I confer with my
10 client just for a second, your Honor?
11 THE MAGISTRATE: Uh-huh.
12 MR. SMITH: Obviously, I am in a
13 hearings, I have no clue what went on
14 preceding (inaudible).
15 (Discussion off the record.)
16 MR. SMITH: Your Honor, I believe as
17 you were talking to the hearing of -- and I
18 have it as of the 20th day of September,
19 2000, was a hearing in which the Court made
20 a determination about the separation
21 agreement. And I believe at that hearing
22 and subsequent to that hearing, she found
23 that it was in error.
24 THE MAGISTRATE: Well, the final
25 entry for divorce says what I just stated.

1 I don't know about anything being in error
2 on September 20. The final entry refers to
3 three days of trial on September 20,
4 October 20 and November 21. Okay? And
5 then they say, number two, it says the
6 separation agreement signed by both parties
7 is incorporated and made an order of this
8 Court.
9 And then it talks about the rings,
10 says plaintiff shall keep her home free and
11 clear of any claims of the defendant. Each
12 party shall keep his/her separate property
13 free and clear of any claims of the other.
14 But as I say, there is -- there is no
15 agreement attached to it. Did you say you
16 had a copy of the separation agreement, Ms.
17 Davis?
18 MS. DAVIS: I have a copy of the
19 divorce, the final divorce, your Honor.
20 THE MAGISTRATE: Okay. Well, what is
21 this separation agreement that she refers
22 to and apparently there is some litigation
23 about? Nobody knows?
24 MS. DAVIS: It was -- when we got
25 separated before, we -- he came over to my

1 house and he signed the separate -- the
2 separation agreement and I was with Mr. --
3 Mr. Zurz.
4 THE MAGISTRATE: Okay, where is it?
5 MS. DAVIS: (Inaudible) it should be
6 here.
7 (Discussion off the record.)
8 THE MAGISTRATE: Okay. So in -- I
9 don't see anything in this decree about any
10 repair of water, termite damage, anything
11 about personal property, including a
12 queen-sized bed, et cetera, any -- I just
13 don't see anything in the decree about any
14 of these claims that he -- that you raised,
15 Mr. Griffin, unless they are in the
16 separation agreement which nobody has.
17 MR. SMITH: Your Honor, I'm going to
18 refer just for the Court on the original
19 motion he filed that he -- he put in the
20 original motion. He attached a copy of the
21 transcript.
22 THE MAGISTRATE: Is that the
23 agreement.
24 MR. SMITH: No, no.
25 THE MAGISTRATE: And I am --

1 MR. SMITH: No, you had asked
2 concerning this --
3 (Discussion off the record.)
4 MR. SMITH: On page 11, the Court
5 says --
6 THE MAGISTRATE: Which motion? What
7 is the date of this?
8 MR. SMITH: This would be, your Honor
9 -- this is the May 6th filing, your Honor.
10 THE MAGISTRATE: Right, that's what I
11 was looking at.
12 MR. SMITH: All right. And it's got
13 a copy of the motion in the back of it. It
14 would be a copy, copy of the transcript.
15 The transcript page is exhibit number 9 G.
16 Exhibit G would be page 9.
17 THE MAGISTRATE: Okay.
18 MR. SMITH: The Court says: Now
19 would he want a wedding dress? O'Neil: I
20 don't know. And there is a queen-sized
21 bed, there is a dresser, there is two kids'
22 bed, there is an air conditioner, there is
23 a computer system with desk, there is a
24 vacuum cleaner, a fax machine, thirty-two
25 inch TV, water cooler, continues on.

1 (Discussion off the record.)
2 MR. SMITH: Right. Okay, please. On
3 page 10 of that, Ms. Davis says: Yes, he
4 can have them. He can have those.
5 THE MAGISTRATE: Okay.
6 MR. SMITH: Continuing on page 12,
7 you know -- no, I'm sorry, your Honor. I
8 passed it. No, I'm sorry, page 12, the
9 Court: I want somebody to take these three
10 sheets of paper. We can check them out,
11 tell me what's been done to the house. I
12 mean -- I mean, please say what he has paid
13 for them. I don't want this man -- then I
14 want this man deposed. I will leave the
15 record open.
16 THE MAGISTRATE: Okay.
17 MR. SMITH: So if --
18 THE MAGISTRATE: This --
19 MR. SMITH: At least those issues you
20 brought up.
21 THE MAGISTRATE: Right, but this is
22 not a court order obviously.
23 MR. SMITH: Correct. I agree. I
24 didn't say that.
25 THE MAGISTRATE: And, in fact -- and,

1 in fact, there were two more days of
2 hearing after this.
3 MR. SMITH: Correct.
4 THE MAGISTRATE: And, you know, the
5 -- the Court order is in the final entry.
6 MR. SMITH: I understand that.
7 THE MAGISTRATE: All right. It
8 refers to a document that they both served
9 that neither of them have. And the Court
10 doesn't have. I mean, I -- I don't know --
11 MR. SMITH: The only suggestion that
12 I would have is obviously it is in my best
13 interest to have that document because this
14 Court needs that document, that I will find
15 that document wherever it may be in this
16 massive file. I don't presently have it,
17 have never had it. And I will reschedule
18 this hearing at a future date.
19 THE MAGISTRATE: Because we had Doug
20 Williams and --
21 MR. SMITH: We had three attorneys,
22 your Honor.
23 THE MAGISTRATE: Right.
24 MR. SMITH: There have been attorneys
25 --

1 THE MAGISTRATE: At the end, there
2 was only one attorney on the case.
3 MR. SMITH: Gus O'Neil.
4 THE MAGISTRATE: Right. But at the
5 end he is apparently representing himself.
6 MR. SMITH: Correct. Your Honor,
7 believe me, and Mr. -- Mr. Griffin is
8 representing himself for 95 percent of this
9 case, and I agreed just to try to help him
10 out in the situation, and one of the ways I
11 will do that is to make sure that the Court
12 gets the information it needs, and the
13 Court needs the information of the
14 separation agreement, and I will get it for
15 the Court. And I will try to layout in the
16 next motion that gets filed exactly what
17 Mr. Griffin wants, exactly what he has to
18 -- where it is in the docket that it
19 corresponds to, and I will apologize to the
20 Court for not having those prepared at this
21 time.
22 THE MAGISTRATE: Okay. Do you have
23 any idea what he is talking about, Mrs.
24 Davis.
25 MS. DAVIS: I have no idea, your

1 Honor. I just want this man to leave me
2 alone.
3 THE MAGISTRATE: I understand. Mr.
4 Smith, when you get these items, I think
5 that it would be useful to, you know,
6 confer with Ms. Davis on them.
7 MR. SMITH: Not a problem.
8 THE MAGISTRATE: Let her know what
9 they are and, you know, so she has some
10 idea what's going on. Do you have any --
11 does either one of you remember what you
12 agreed to when this agreement -- I mean, I
13 -- Judge Nicely refers to something that
14 we signed. I'm sure she must have seen
15 something.
16 MR. GRIFFIN: Okay, now --
17 MS. DAVIS: Yeah.
18 MR. GRIFFIN: May I speak?
19 THE MAGISTRATE: Uh-huh.
20 MR. GRIFFIN: It was a side-bar
21 stipulation that she give me 40,000. That
22 was a side-bar stipulation.
23 THE MAGISTRATE: Mr. Griffin, again
24 -- please, Ms. Davis, there is nothing
25 funny about this.

1 MS. DAVIS: I'm sorry, your Honor.
2 THE MAGISTRATE: Okay. Again, what
3 is enforceable and what counts is the
4 order. Okay? The only thing that's in the
5 order is about these rings and refers to a
6 separation agreement which you don't
7 apparently have, Mr. Griffin, and neither
8 does your ex-wife.
9 MR. SMITH: At least as to the rings,
10 your Honor, it will be -- it is conceded
11 that the rings -- apparently the ring is
12 still being helped by -- it is being held
13 by the court reporter.
14 MR. GRIFFIN: And I'd like to get it.
15 MR. SMITH: And that ring should be
16 transferred at least to Mr. Griffin.
17 MR. GRIFFIN: Yeah.
18 THE MAGISTRATE: Yes. Did you get
19 your ring?
20 MS. DAVIS: I did get it, your
21 Honor.
22 THE MAGISTRATE: Okay. I hope --
23 that's a long time for her to have kept a
24 diamond ring.
25 MR. SMITH: I understand, your

1 Honor.
2 THE MAGISTRATE: But --
3 MR. SMITH: I will prepare an order.
4 THE MAGISTRATE: Well, I would
5 suggest, Mr. Smith, that you go back and
6 talk to Nadine and -- okay.
7 MR. SMITH: See how we are doing.
8 THE MAGISTRATE: Yeah.
9 MR. SMITH: I shall do that. Thank
10 you, your Honor.
11 THE MAGISTRATE: So -- okay. I'm
12 going to have to reschedule it, and I know
13 that this probably distresses you, Mrs.
14 Davis.
15 MS. DAVIS: Yes, it does, your Honor.
16 THE MAGISTRATE: But obviously, you
17 know, I can't do anything without this
18 agreement, and I think that Mr. Smith will
19 work with you, and, I don't know, pending
20 what the agreement says it may not --
21 MR. SMITH: Absolutely, your Honor.
22 THE MAGISTRATE: -- may not be coming
23 back on her. I don't know.
24 MR. SMITH: Absolutely, your Honor.
25 THE MAGISTRATE: But --

1 MS. DAVIS: I can get the separation
2 agreement.
3 THE MAGISTRATE: All right. If you
4 get it before you hear from Mr. Smith, why
5 don't you contact him? Do you have a card
6 for her?
7 MR. SMITH: No, your Honor, but I
8 have -- I don't think I do. Unfortunately
9 I do not have one. I will write it up for
10 her.
11 THE MAGISTRATE: Okay.
12 MR. SMITH: I will even give her my
13 home phone number, your Honor.
14 THE MAGISTRATE: All right. Anything
15 you want to communicate about this case,
16 Mr. Griffin, you do it through Mr. Smith,
17 okay?
18 MR. GRIFFIN: Yes, your Honor.
19 MS. DAVIS: Thank you for saying
20 that, your Honor.
21 MR. SMITH: My home number and my
22 home -- and the work address.
23 MS. DAVIS: Okay.
24 (Discussion off the record.)
25 THE MAGISTRATE: Okay, how about

1 September the 6th?
2 MR. SMITH: Yes, ma'am.
3 THE MAGISTRATE: At ten?
4 MR. SMITH: Yes, ma'am.
5 THE MAGISTRATE: That okay with you?
6 MS. DAVIS: Yes, your Honor.
7 THE MAGISTRATE: Okay. Now --
8 MR. SMITH: Do you have the docket?
9 THE MAGISTRATE: If you got it worked
10 out --
11 MR. SMITH: Correct, your Honor.
12 THE MAGISTRATE: -- you can submit an
13 entry. You don't need to come.
14 MR. SMITH: Thank you, your Honor.
15 THE MAGISTRATE: But I just want to
16 tell you, Mr. Smith, because it is not
17 intuitive, that submitting an agreed entry
18 does not cancel the hearing.
19 MR. SMITH: I understand that, your
20 Honor.
21 THE MAGISTRATE: Okay?
22 MR. SMITH: They have told me that
23 before.
24 THE MAGISTRATE: So if you would have
25 somebody call the assignment clerk to

1 cancel it, if you can work it out.
2 MR. SMITH: I shall do that, your
3 Honor.
4 THE MAGISTRATE: And --
5 MR. SMITH: It is counter-intuitive.
6 But I shall do that.
7 THE MAGISTRATE: I know, I mean I
8 have had it happen so many times. That's
9 why I mention it and our calendars right
10 now are pretty crowded, so --
11 MR. SMITH: And I will try to free up
12 space if I believe we will not need that
13 hearing.
14 THE MAGISTRATE: Okay.
15 MR. SMITH: Thank you, your Honor.
16 MS. DAVIS: Thanks, your Honor.
17 (Whereupon tape 570 concludes.)
18
19
20
21
22
23
24
25

DIANA ZALESKI
2003 FEB -3 PM 2:35
SUMMIT COUNTY
CLERK OF COURTS

1 C-E-R-T-I-F-I-C-A-T-E

2

3 STATE OF OHIO)

4) SS:

5 SUMMIT COUNTY)

6

7 I, Gary A. Maharidge, do hereby

8 certify that I reported in stenotype from a

9 cassette tape the proceedings had and the

10 testimony taken in the foregoing-entitled

11 matter, being a Transcript of Proceedings,

12 and I do further certify that the

13 foregoing-entitled Transcript of

14 Proceedings, consisting of 21 pages,

15 together with the exhibits, although not

16 constructively attached thereto, is a full,

17 true and accurate record of said matter and

18 Transcript of Proceedings to the best of my

19 ability.

20

21

22 GARY A. MAHARIDGE, RPR

23 Notary Public in and for
the State of Ohio

24

25 My Notary Expires December 16, 2003

IN RE: GRIFFIN, REL., V. SMITH AND O'NEIL, RES., [SHOW CAUSE ORDER CONT]
OH SUP CT. AND CBD OF COMMRS \ #06.2079.2081

APPENDIX

ITEMS

WRIT OF MANDAMUS
(SEE MARBURY V. MADISON, 1803)

CRIMINATION. Malloy, a convicted felon on probation, was ordered to testify in a judicial inquiry into gambling activities. He refused to answer any questions concerning the crime for which he had been convicted, and he was held in contempt. Connecticut's highest court, relying on TWINING V. NEW JERSEY (1908) and ADAMSON V. CALIFORNIA (1947), ruled that Malloy's invocation of the Fifth Amendment right had no constitutional basis in the state and that the Fourteenth Amendment did not extend the right to a state proceeding.

The Supreme Court reversed on the ground that the "same standards must determine whether an accused's silence in either a federal or a state proceeding is justified." Had the inquiry been a federal one, said Justice WILLIAM J. BRENNAN for a 5–4 majority, Malloy would have been entitled to refuse to answer because his disclosures might have furnished a link in a chain of evidence to connect him to a new crime for which he might be prosecuted. The Court held that "the Fifth Amendment exception from compulsory self-incrimination is also protected by the Fourteenth against abridgment by the States." *Twining* and *Adamson,* which had held to the contrary, were overruled, although the specific holding in *Adamson* relating to comments on the accused's failure to testify was not overruled until GRIFFIN V. CALIFORNIA (1965). Thus, *Malloy* stands for the DOCTRINE that the Fourteenth Amendment protects against state abridgment the same right that the Fifth protects against federal abridgment. Justices BYRON R. WHITE and POTTER STEWART did not expressly dissent from this doctrine; they contended, rather, that Malloy's reliance on his right to silence was groundless on the basis of the facts. Justices JOHN MARSHALL HARLAN and TOM C. CLARK opposed the incorporation of the Fifth Amendment right into the Fourteenth.

LEONARD W. LEVY

Print December 2, 2026 - Rewrite of "C.1" Sup Ct #06-2019 & 06-2081

MANDAMUS, WRIT OF

(Latin: "We command.") A writ of mandamus is a judicial order to a lower court or to any agency or officer of any department of government, commanding the performance of a nondiscretionary act as a duty of office for the purpose of enforcing or recognizing an individual right or privilege. (See MARBURY V. MADISON, 1803.)

LEONARD W. LEVY

ST. JOHN GO.

patent to. ORC/296.40.3250 | in the time of Malitz in a State immune from prosecution

MANN ACT
36 Stat. 825 (1910)

Congress sought to suppress prostitution in the so-called White Slave Act under the commerce power. Anyone transporting or aiding the transportation of a woman in INTERSTATE or FOREIGN COMMERCE "for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl" to such immoral acts was guilty of a FELONY. Persuasion to cross state lines for these purposes "whether with or without her consent" was likewise a felony. Another section doubled the already stiff penalties (five years imprisonment or $5,000) in cases involving women under eighteen years of age. The act also authorized the Commissioner-General of Immigration to "receive and centralize information concerning the procuration of alien women and girls" for such purposes and required brothel-keepers to file statements regarding alien employees, exempting the keepers from prosecution for "truthful statements."

In HOKE V. UNITED STATES (1913) the Supreme Court sustained congressional power to enact the law under the COMMERCE CLAUSE, relying squarely on CHAMPION V. AMES (1903): "Congress, as an incident to [the commerce power] may adopt not only means necessary but convenient to its exercise, and the means may have the quality of police regulations."

DAVID GORDON

MANN-ELKINS ACT
36 Stat. 539 (1910)

The ELKINS ACT of 1903 and the HEPBURN ACT of 1906, as well as the decisions they prompted, had reinvigorated the Interstate Commerce Commission (ICC) after disastrous Supreme Court decisions such as INTERSTATE COMMERCE COMMISSION V. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. (1897). The Mann-Elkins Act granted the ICC, for the first time, the power to set original rates; it also authorized the commission to suspend applications for proposed rate increases until it had ascertained their reasonableness. Despite the statute's vesting the commission with such powers, determinations of reasonableness would still be subject to the extraordinarily flexible guidelines of the FAIR RETURN rule laid down in SMYTH V. AMES (1898). The act placed the ICC firmly in control by shifting the BURDEN OF

PROOF on the question of reasonableness from the commission to the carriers. In addition, the act revived a prohibition against LONG HAUL–SHORT HAUL DISCRIMINATION, except where specifically allowed by the commission. The act also brought telephone, telegraph, and cable lines under ICC JURISDICTION. A unanimous Supreme Court sustained many of the act's provisions in *United States v. Atchinson, Topeka & Santa Fe Railroad* (1914).

DAVID GORDON

MANSFIELD, LORD

See: Murray, William

LENAR'S, (APP. "I") CASE NO. 05.11.6574 + CA #22770

MAPP v. OHIO

367 U.S. 643 (1961)

Mapp v. Ohio brought to a close an abrasive constitutional debate within the Supreme Court on the question whether the EXCLUSIONARY RULE, constitutionally required in federal trials since 1914, was also required in state criminal cases. *Mapp* imposed the rule on the states.

WOLF V. COLORADO (1949) had applied to the states the FOURTH AMENDMENT's prohibition against UNREASONABLE SEARCHES, but it had not required state courts to exclude from trial evidence so obtained. *Mapp*'s extension of *Wolf* was based on two considerations. First, in *Wolf* the Court had been persuaded by the rejection of the exclusionary rule by most state courts; by 1961, however, a narrow majority of the states had independently adopted the rule. Second, the *Wolf* majority was convinced that other remedies, such as suits in tort against offending officers, could serve equally in deterring unlawful searches; time, however, had shown that such remedies were useless. "Nothing can destroy a government more quickly than its failure to observe its own laws," wrote Justice TOM C. CLARK for the Court, "or worse, its disregard of the charter of its own existence."

In *Mapp v. Ohio* the Court asserted emphatically that the exclusionary rule was "an essential part" of the Fourth Amendment and hence a fit subject for imposition on the states despite "passing references" in earlier cases to its being a nonconstitutional rule of evidence. Yet, in some hazy phrasing, the opinion also suggested that the Fifth Amendment's RIGHT AGAINST SELF-INCRIMINATION was the exclusionary rule's constitutional backbone. Equally confusing was the Court's characterization of the rule as "the most important constitutional privilege" (that is, personal right) guaranteed by the Fourth Amendment while at the same time pointing to the rule's deterrent effect as justification for its imposition. More recently, the Court has settled on deterrence as the crucial consideration, and thus has refused to apply the rule in situations, such as GRAND JURY proceedings in CALANDRA V. UNITED STATES (1974), where in the Court's view the deterrent effect is minimal.

Three dissenters, in an opinion by Justice JOHN MARSHALL HARLAN, expressed "considerable doubt" that the federal exclusionary rule of WEEKS V. UNITED STATES (1914) was constitutionally based and argued that, in any event, considerations of FEDERALISM should allow the states to devise their own remedies for unlawful searches.

(Unlike the well-entrenched federal exclusionary rule, which has gone well-nigh unchallenged on the Court from the beginning, controversy concerning the rule for the states has continued unabated, both on and off the Court, since *Mapp* was decided.)

JACOB W. LANDYNSKI

MARBURY v. MADISON

1 Cranch 137 (1803)

Marbury has transcended its origins in the party battles between Federalists and Republicans, achieving mythic status as the foremost precedent for JUDICIAL REVIEW. For the first time the Court held unconstitutional an act of Congress, establishing, if only for posterity, the doctrine that the Supreme Court has the final word among the coordinate branches of the national government in determining what is law under the Constitution. By 1803 no one doubted that an unconstitutional act of government was null and void, but who was to judge? What *Marbury* settled, doctrinally if not in reality, was the Court's ultimate authority over Congress and the President. Actually, the historic reputation of the case is all out of proportion to the merits of Chief Justice JOHN MARSHALL's unanimous opinion for the Court. On the issue of judicial review, which made the case live, he said nothing new, and his claim for the power of the Court occasioned little contemporary comment. The significance of the case in its time derived from its political context and from the fact that the Court appeared successfully to interfere with the executive branch. Marshall's

most remarkable accomplishment, in retrospect, was his massing of the Court behind a poorly reasoned opinion that section 13 of the JUDICIARY ACT OF 1789 was unconstitutional. Though the Court's legal craftsmanship was not evident, its judicial politics—egregious partisanship and calculated expediency—was exceptionally adroit, leaving no target for Republican retaliation beyond frustrated rhetoric.

Republican hostility to the United States courts, which were Federalist to the last man as well as Federalist in doctrine and interests, had mounted increasingly and passed the threshold of tolerance when the Justices on circuit enforced the Sedition Act. (See ALIEN AND SEDITION ACTS.) Then the lame-duck Federalist administration passed the JUDICIARY ACT OF 1801 and, a week before THOMAS JEFFERSON's inauguration, passed the companion act for the appointment of forty-two justices of the peace for the DISTRICT OF COLUMBIA, prompting the new President to believe that "the Federalists have retired into the Judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased." The new Circuit Court for the District of Columbia sought in vain to obtain the conviction of the editor of the administration's organ in the capital for the common law crime of SEDITIOUS LIBEL. The temperate response of the new administration was remarkable. Instead of increasing the size of the courts, especially the Supreme Court, and packing them with Republican appointees, the administration simply repealed the Judiciary Act of 1801. (See JUDICIARY ACTS OF 1802.) On taking office Jefferson also ordered that the commissions for the forty-two justices of the peace for the district be withheld, though he reappointed twenty-five, all political enemies originally appointed by President JOHN ADAMS.

Marbury v. Madison arose from the refusal of the administration to deliver the commissions of four of these appointees, including one William Marbury. The Senate had confirmed the appointments and Adams had signed their commissions, which Marshall, the outgoing secretary of state, had affixed with the great seal of the United States. But in the rush of the "midnight appointments" on the evening of March 3, the last day of the outgoing administration, Marshall had neglected to deliver the commissions. Marbury and three others sought from the Supreme Court, in a case of ORIGINAL JURISDICTION, a WRIT OF MANDAMUS compelling JAMES MADISON, the new secretary of state, to issue their commissions. In December 1801 the Court issued an order commanding Madison to show cause why the writ should not be issued.

note

The Republicans lost the house of rep in congress 2007 term start

A congressman reflected the Republican viewpoint when saying that the show-cause order was "a bold stroke against the Executive," and JOHN BRECKINRIDGE, the majority leader of the Senate, thought the order "the most daring attack which the annals of Federalism have yet exhibited." When the debate began on the repeal bill, Federalists defended the show-cause order, the independence of the judiciary, and the duty of the Supreme Court to hold void any unconstitutional acts of Congress. A Republican paper declared that the "mandamus business" had first appeared to be only a contest between the judiciary and the executive but now seemed a political act by the Court to deter repeal of the 1801 legislation. In retaliation the Republicans passed the repealer and altered the terms of the Court so that it would lose its June 1802 session and not again meet until February 1803, fourteen months after the show-cause order. The Republicans hoped, as proved to be the case, that the Justices would comply with the repealer and return to circuit duty, thereby averting a showdown and a constitutional crisis, which the administration preferred to avoid.

By the time the Court met in February 1803 to hear arguments in *Marbury,* which had become a political sensation, talk of IMPEACHMENT was in the air. A few days before the Court's term, Federalists in Congress moved that the Senate should produce for Marbury's benefit records of his confirmation, provoking Senator James Jackson to declare that the Senate would not interfere in the case and become "a party to an accusation which may end in an impeachment, of which the Senate were the constitutional Judges." By no coincidence, a week before the Court met, Jefferson instructed the House to impeach a U.S. District Court judge in New Hampshire, and already Federalists knew of the plan to impeach Justice SAMUEL CHASE. Jefferson's desire to replace John Marshall with SPENCER ROANE was also public knowledge. Right before Marshall delivered the Court's opinion in *Marbury,* the Washington correspondent of a Republican paper wrote: "The attempt of the Supreme Court . . . by a mandamus, to control the Executive functions, is a new experiment. It seems to be no less than a commencement of war. . . . The Court must be defeated and retreat from the attack; or march on, till they incur an impeachment and removal from office."

note

Marshall and his Court appeared to confront unattractive alternatives. To have issued the writ, which was the expected judgment, would have been like the papal bull against the moon; Madison would have defied it, exposing the Court's impotence, and the

upcoming marshall's Court

Republicans might have a pretext for retaliation based on the Court's breach of the principle of SEPARATION OF POWERS. To have withheld the writ would have violated the Federalist principle that the Republican administration was accountable under the law. ALEXANDER HAMILTON's newspaper reported the Court's opinion in a story headed "Constitution Violated by President," informing its readers that the new President by his first act had trampled on the charter of the peoples' liberties by unprincipled, even criminal, conduct against personal rights. Yet the Court did not issue the writ; the victorious party was Madison. But Marshall exhibited him and the President to the nation as if they were arbitrary Stuart tyrants, and then, affecting judicial humility, Marshall in obedience to the Constitution found that the Court could not obey an act of Congress that sought to aggrandize judicial powers in cases of original jurisdiction, contrary to Article III of the Constitution.

The Court was treading warily. The statute in question was not a Republican measure, not, for example, the repealer of the Judiciary Act of 1801. Indeed, shortly after *Marbury*, the Court sustained the repealer in STUART V. LAIRD (1803) against arguments that it was unconstitutional. In that case the Court ruled that the practice of the Justices in sitting as circuit judges derived from the Judiciary Act of 1789, and therefore derived "from a contemporary interpretation of the most forcible nature," as well as from customary acquiescence. Ironically, another provision of the same statute, section 13, was at issue in *Marbury*, not that the bench and bar realized it until Marshall delivered his opinion. The offending section, passed by a Federalist Congress after being drafted by OLIVER ELLSWORTH, one of the Constitution's Framers and Marshall's predecessor, had been the subject of previous litigation before the Court without anyone having thought it was unconstitutional. Section 13 simply authorized the Court to issue writs of *mandamus* "in cases warranted by the principles and usages of law," and that clause appeared in the context of a reference to the Court's APPELLATE JURISDICTION.

Marshall's entire argument hinged on the point that section 13 unconstitutionally extended the Court's original jurisdiction beyond the two categories of cases, specified in Article III, in which the Court was to have such jurisdiction. But for those two categories of cases, involving foreign diplomats or a state as a litigant, the Court has appellate jurisdiction. In quoting Article III, Marshall omitted the clause that directly follows as part of the same sentence: the Court has appellate jurisdiction "with such exceptions, and under such regulations as the Congress shall make." That might mean that Congress can detract from the Court's appellate jurisdiction or add to its original jurisdiction. The specification of two categories of cases in which the Court has original jurisdiction was surely intended as an irreducible minimum, but Marshall read it, by the narrowest construction, to mean a negation of congressional powers.

In any event, section 13 did not add to the Court's original jurisdiction. In effect it authorized the Court to issue writs of *mandamus* in the two categories of cases of original jurisdiction and in all appellate cases. The authority to issue such writs did not extend or add to the Court's jurisdiction; the writ of *mandamus* is merely a remedial device by which courts implement their existing jurisdiction. Marshall misinterpreted the statute and Article III, as well as the nature of the writ, in order to find that the statute conflicted with Article III. Had the Court employed the reasoning of *Stuart v. Laird* or the rule that the Court should hold a statute void only in a clear case, giving every presumption of validity in doubtful cases, Marshall could not have reached his conclusion that section 13 was unconstitutional. That conclusion allowed him to decide that the Court was powerless to issue the writ because Marbury had sued for it in a case of original jurisdiction.

Marshall could have said, simply, this is a case of original jurisdiction but it does not fall within either of the two categories of original jurisdiction specified in Article III; therefore we cannot decide: writ denied, case dismissed. Section 13 need never have entered the opinion, although, alternatively, Marshall could have declared: section 13 authorizes this Court to issue such writs only in cases warranted by the principles and usages of law; we have no jurisdiction here because we are not hearing the case in our appellate capacity and it is not one of the two categories in which we possess original jurisdiction: writ denied, case dismissed. Even if Marshall had to find that the statute augmented the Court's original jurisdiction, the ambiguity of the clause in Article III, which he neglected to quote, justified sustaining the statute.

Holding section 13 unconstitutional enabled Marshall to refuse an extension of the Court's powers and award the judgment to Madison, thus denying the administration a pretext for vengeance. Marshall also used the case to answer Republican arguments that the Court did not and should not have the power to declare an act of Congress unconstitutional, though he carefully chose an inoffensive section of a Federalist statute that pertained merely to writs of mandamus. That he gave his doctrine of judicial review the

To Chief Justice Thomas Marshall, Re: Marbury v. Madison, Case #06-1971, Nov 22, 06

For The Chief Justice Eyes Only

support of only abstract logic, without reference to history or precedents, was characteristic, as was the fact that his doctrine swept way beyond the statute that provoked it.

If Marshall had merely wanted a safe platform from which to espouse and exercise judicial review, he would have begun his opinion with the problems that section 13 posed for the Court; but he reached the question of constitutionality and of judicial review at the tail-end of his opinion. Although he concluded that the Court had to discharge the show-cause order, because it lacked jurisdiction, he first and most irregularly passed judgment on the merits of the case. Everything said on the merits was OBITER DICTA and should not have been said at all, given the judgment. Most of the opinion dealt with Marbury's unquestionable right to his commission and the correctness of the remedy he had sought by way of a writ of mandamus. In his elaborate discourse on those matters, Marshall assailed the President and his cabinet officer for their lawlessness. Before telling Marbury that he had initiated his case in the wrong court, Marshall engaged in what EDWARD S. CORWIN called "a deliberate partisan *coup.*" Then Marshall followed with a "judicial *coup d'état,*" in the words of ALBERT J. BEVERIDGE, on the constitutional issue that neither party had argued.

The partisan *coup* by which Marshall denounced the executive branch, not the grand declaration of the doctrine of judicial review for which the case is remembered, was the focus of contemporary excitement. Only the passages on judicial review survive. Cases on the REMOVAL POWER of the President, especially concerning inferior appointees, cast doubt on the validity of the dicta by which Marshall lectured the executive branch on its responsibilities under the law. Moreover, by statute and by judicial practice the Supreme Court exercises the authority to issue writs of mandamus in all appellate cases and in the two categories of cases of original jurisdiction. Over the passage of time *Marbury* came to stand for the monumental principle, so distinctive and dominant a feature of our constitutional system, that the Court may bind the coordinate branches of the national government to its rulings on what is the supreme LAW OF THE LAND. That principle stands out from *Marbury* like the grin on the Cheshire cat; all else, which preoccupied national attention in 1803, disappeared in our constitutional law. So too might have disappeared national judicial review if the impeachment of Chase had succeeded.

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Marshall himself was prepared to submit to review of Supreme Court opinions by Congress. He was so shaken by the impeachment of Chase and by the thought that he himself might be the next victim in the event of Chase's conviction, that he wrote to Chase on January 23, 1804: "I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the judge who has rendered them unknowing of his fault." The acquittal of Chase meant that the Court could remain independent, that Marshall had no need to announce publicly his desperate plan for congressional review of the Court, and that *Marbury* remained as a precedent. Considering that the Court did not again hold unconstitutional an act of Congress until 1857, when it decided DRED SCOTT V. SANDFORD, sixty-eight years would have passed since 1789 without such a holding, and but for *Marbury,* after so long a period of congressional omnipotence, national judicial review might never have been established.

LEONARD W. LEVY

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MARCHETTI v. UNITED STATES
390 U.S. 39 (1968)
GROSSO v. UNITED STATES
390 U.S. 62 (1968)
HAYNES v. UNITED STATES
390 U.S. 85 (1968)
UNITED STATES v. UNITED STATES COIN & CURRENCY
401 U.S. 715 (1971)

In *Marchetti* and *Grosso* the Supreme Court, in opinions by Justice JOHN MARSHALL HARLAN from which only Chief Justice EARL WARREN dissented, held that

the RIGHT AGAINST SELF-INCRIMINATION constituted an ironclad defense against a criminal prosecution for failure to register as a gambler pursuant to federal gambling statutes or to pay federal occupational and EXCISE TAXES on gambling. The Court overruled *United States v. Kahriger* (1953) and *Lewis v. United States* (1955), which had held that the Fifth Amendment right could not be asserted by professional gamblers because the federal gambling laws did not compel self-incrimination. In those earlier cases the Court reasoned that the right was inapplicable to prospective acts: a gambler had the initial choice of deciding whether to continue gambling at the price of surrendering his right against self-incrimination, or cease gambling and thereby avoid the need to register and pay the taxes. In 1968 the Court found its earlier reasoning "no longer persuasive."

Justice Harlan explained how the statutes worked. A gambler had an obligation to register annually with the Internal Revenue Service as one engaged in the business of accepting wagers. He paid a $50 occupational tax plus an excise tax of ten percent on the gross amount of all bets. He had to keep daily records of all bets and reveal those records to IRS inspectors. The issue posed by such congressional requirements was not whether the United States may tax gambling, for the unlawfulness of an activity did not preclude its taxation. The issue, rather, was whether the registration, record-keeping, and tax provisions whipsawed gamblers into confessing criminal activities. Federal and state laws made gambling illegal, and the IRS made available to law enforcement agencies the identities of those who complied with the gambling statutes. Gamblers therefore confronted substantial hazards of self-incrimination. On pain of punishment for not complying, they had to provide prosecutors with evidence of their guilt.

Marchetti was convicted of failing to register and pay the occupational tax, Grosso for failing to pay that tax and the excises. Reversing their convictions, the Court distinguished their cases from those in which a criminal had failed to file income tax returns for fear of self-incrimination and another in which the government had required record keeping from persons not engaged in an inherently suspect activity. The mere filing of a tax return, required of all, or the failure to keep routine business records did not identify anyone as a suspect of a crime. In *Haynes*, the Court ruled that a person possessing a sawed-off shotgun is suspect and therefore cannot be compelled to register his weapon, under the National Firearms Act, because of the hazard of self-incrimination. In *United States Coin & Currency* a 5–4 Court applied the *Marchetti* reasoning to a forfeiture proceeding involving property used to violate federal gambling laws.

LEONARD W. LEVY

MARKETPLACE OF IDEAS

The "marketplace of ideas" argument in FIRST AMENDMENT jurisprudence was first enunciated in Justice OLIVER WENDELL HOLMES's dissenting opinion in ABRAMS V. UNITED STATES (1919):

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. . . . While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purpose of the law that an immediate check is required to save the country.

Holmes's stirring words recall similar but distinct passages from John Milton and John Stuart Mill. Extravagant as Holmes's passage is, it is in significant respects more careful than the implications of Milton's rhetorical question: "[W]ho ever knew truth put to the worse, in a free and open encounter?" Holmes did not claim that truth always or even usually emerges in the marketplace of ideas. Holmes's claim was more confined—that the best test of truth is the competition of the marketplace.

On the other hand, Milton spoke of a free and open encounter; Holmes spoke of the competition of the marketplace. A recurrent problem in First Amendment cases is that these two notions are not the same. Those who seek access to the broadcast media, as in RED LION BROADCASTING V. FCC (1969), or to powerful newspapers, as in MIAMI HERALD PUBLISHING CO. V. TORNILLO (1974), argue that the competition of the marketplace is not free and open. They urge that truth cannot emerge in the market if the gatekeepers do not let it in. A more general criticism of the Holmes position is that the claim that the marketplace is the best test of truth cannot itself be tested without an independent test of truth, yet the argument by its terms denies any superior test of truth that is independent of the marketplace.

These criticisms aside, the question arises whether the marketplace argument overvalues truth. Holmes's view that the expression of opinion should be free until an immediate check is needed to "save the country" has never been adopted by the Supreme Court. Advocacy of illegal action, for example, may be restricted when it is directed to and likely to incite or produce imminent lawless action, whether or not the country itself is endangered. Indeed, if the marketplace argument extends to facts as well as opinions, it is clear that showings far more pedestrian than Holmes's proposed requirements are sufficient to justify repression. The expression of factual beliefs can be restricted in order to protect reputation or privacy, and, in the commercial sphere, to further any substantial government interest.

Nonetheless, the marketplace argument has been a powerful theme in First Amendment law. For example, some defamatory facts and all defamatory opinion are protected in order to guarantee the breathing space we need for robust, uninhibited, and wide-open debate. Ironically, however, the marketplace argument serves to restrict speech as well as to protect it. "Under our Constitution," said the Court in GERTZ V. ROBERT WELCH, INC. (1974), "there is no such thing as a false idea," yet obscenity is divorced from speech protection because it is thought to be unnecessary for the expression of any idea. At bottom, First Amendment methodology is grounded in a paradox. Government must be restrained from imposing its views of truth. But government itself determines when this principle has been abandoned.

STEVEN SHIFFRIN

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MARRIAGE AND THE CONSTITUTION

Although the constitutional "right to marry" was not securely confirmed by the Supreme Court until its decision in ZABLOCKI V. REDHAIL (1978), the Court had spoken of the freedom to marry as a FOURTEENTH AMENDMENT "liberty" as early as MEYER V. NEBRASKA (1923). Two WARREN COURT decisions had also laid the foundations for SUBSTANTIVE DUE PROCESS protections of marriage. GRISWOLD V. CONNECTICUT (1965) had recognized a RIGHT OF PRIVACY for the marital relationship, and LOVING V. VIRGINIA (1967) had struck down a MISCEGENATION law not only as an unconstitutional RACIAL DISCRIMINATION but also as a due process violation. The *Loving* opinion was explicit enough in speaking of the "freedom to marry," but doubt lingered that the Court meant to carry the principle beyond the racial context of the decision.

Zablocki ended the doubt. The Court held invalid, on equal protection grounds, a law forbidding a resident to marry without a judge's approval when he or she had court-ordered child support obligations. The judge could not approve the marriage unless support payments were kept current and the children were unlikely to become public charges. Some concurring Justices thought the law defective on due process grounds. *Zablocki*'s importance turns not on this doctrinal distinction but on its explicit recognition of marriage as a FUNDAMENTAL INTEREST, requiring STRICT SCRUTINY by the courts of direct and substantial governmental interference.

Just two months earlier, however, in *Califano v. Jobst* (1977), the Court had upheld a portion of the SOCIAL SECURITY ACT terminating disability benefits for a disabled dependent child of a wage earner when the child married a person not entitled to benefits under the act, even though that person was also disabled. Much of the discussion in *Zablocki*'s several opinions was devoted to *Jobst*. The majority distinguished *Jobst* as lacking the "directness and substantiality of the interference with the freedom to marry" present in *Zablocki*. The message was clear: interferences with marriage would demand justification in proportion to their degrees of severity. In *Zablocki* as in *Jobst* a money cost was attached to marriage; in *Zablocki* that cost would be prohibitive in most cases covered by the law.

This version of judicial interest-balancing seems likely to uphold such state restrictions on marriage as blood tests, reasonable age requirements, and insistence on a mentally retarded person's ability to understand the nature of the marriage relationship, even when those restrictions are strictly scrutinized. On principle, the state's power to prohibit POLYGAMY or to deny homosexual couples marriage or some comparable status seems more vulnerable to attack. It would be unrealistic, however, to expect an extension of the constitutional right to marry to homosexuals in the near future. (See SEXUAL PREFERENCE AND THE CONSTITUTION.) And recognition of a constitutional right to multiple marriage is a poor bet even for the distant future.

The extension of constitutional protection to other intimate relationships more closely resembling tradi-

tional marriage is already at hand. *Griswold's* "privacy" protections have been effectively extended to the unmarried in EISENSTADT V. BAIRD (1972) and CAREY V. POPULATION SERVICES INTERNATIONAL (1977). Some states continue to recognize common law marriage, and others have concluded that support obligations may attach to the partners to some informal unions, once the unions end. As the number of unmarried couples living together increases, and as the incidents of unwed union come to resemble those of traditional marriage, formal marriage itself is more clearly seen in its expressive aspects, as a statement of commitment. In these circumstances it makes good sense to think of the right to marry as, in part, a FIRST AMENDMENT right.

KENNETH L. KARST

(SEE ALSO: *Freedom of Intimate Association.*)

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MARSH v. ALABAMA
326 U.S. 501 (1946)

When a person sought to distribute religious literature on the streets of a company town, the Supreme Court, 5–3, upheld her FIRST AMENDMENT claim against the owner's private property claims. Stressing the traditional role of free speech in town shopping districts open to the general public, Justice HUGO L. BLACK for the Court noted that, aside from private ownership, this town functioned exactly as did other towns which were constitutionally forbidden to ban leafleting. *Marsh* served as the basis for the later attempt, aborted in HUDGENS V. NLRB (1976), to extend First Amendment rights to users of privately owned SHOPPING CENTERS.

MARTIN SHAPIRO

MARSH v. CHAMBERS
463 U.S. 783 (1983)

A 6–3 Supreme Court sustained the constitutionality of legislative chaplaincies as not violating the SEPARATION OF CHURCH AND STATE mandated by the FIRST AMENDMENT. Chief Justice WARREN E. BURGER for the Court abandoned the three-part test of LEMON V. KURTZMAN (1971) previously used in cases involving the establishment clause and grounded his opinion wholly upon historical custom. Prayers by tax-supported legislative chaplains, traceable to the FIRST CONTINENTAL CONGRESS and the very Congress that framed the BILL OF RIGHTS, had become "part of the fabric of our society." Justice JOHN PAUL STEVENS, dissenting, asserted that Nebraska's practice of having the same Presbyterian minister as the official chaplain for sixteen years preferred one denomination over others. Justices WILLIAM J. BRENNAN and THURGOOD MARSHALL, dissenting, attacked legislative chaplains generally as a form of religious worship sponsored by government to promote and advance religion and entangling the government with religion, contrary to the values implicit in the establishment clause—privacy in religious matters, government neutrality, freedom of conscience, autonomy of religious life, and withdrawal of religion from the political arena.

LEONARD W. LEVY

MARSHALL, JOHN
(1755–1835)

John Marshall, the third CHIEF JUSTICE of the Supreme Court (1801–1835), is still popularly known as the "Great Chief Justice" and the "Expounder of the Constitution." He was raised in the simple circumstances of backwoods Virginia, but his mother was pious and well educated and his father was a leader of his county and a friend of GEORGE WASHINGTON. Even though Marshall had little formal education, his extraordinary powers of mind, coupled with equity and good humor, made him a natural leader as a young soldier of the Revolution, as a member of the Richmond bar (then outstanding in the country), and as a general of the Virginia militia. He became nationally prominent as a diplomat, having outwitted the wily Charles Talleyrand while negotiating with France's Directory (1797–1798), and as a legislator, having supported Washington's FEDERALISM first in the Virginia Assembly (1782–1791, 1795–1797) and then in the House of Representatives (1799–1800). In June 1800 President JOHN ADAMS named Marshall to replace the Hamiltonian John Pickering as secretary of state, and in January 1801, after the strife-ridden Federalists' epochal defeat, appointed him Chief Justice when JOHN JAY, the first Chief Justice, declined to preside again over "a system so defective."

From its inception Marshall had defended the Con-

stitution. His experience in Washington's ragtag army had made him a national patriot while rousing his disgust with the palsied Confederation. At the crucial Virginia ratifying convention (June 1788) he replied in three important speeches to the fears of PATRICK HENRY and other Anti-Federalists. The proposed Constitution, he argued, was not undemocratic, but a plan for a "well-regulated democracy." It set forth in particular the great powers of taxing and warring needed by any sound government. The state governments would retain all powers not given up expressly or implicitly; they were independently derived from the people. A mix of dependence upon the people and independence and virtue in the judges would prevent federal overreaching. If a law were not "warranted by any of the powers enumerated," Marshall remarked prophetically, the judges would declare it "void" as infringing "the Constitution they are to guard." Two other nonjudicial interpretations of the Constitution are notable. In 1799 Marshall wrote a report of the Virginia Federalists defending the constitutionality of the ill-famed Sedition Act of 1798 (a law he nevertheless had opposed as divisive in the explosive political atmosphere surrounding the French Revolution). If the NECESSARY AND PROPER CLAUSE authorizes punishment of actual resistance to law, he argued, it also authorizes punishment of "calumnious" speech, which is criminal under the COMMON LAW and prepares resistance. A speech to Congress in 1800, once famous in collections of American rhetoric, defended the President's power required by JAY'S TREATY to extradite a British subject charged with murder on a British ship. Because the criminal and the location were foreign, Marshall argued, the question was not a case in law or equity for United States courts; although a treaty is a law, it is a "political law," the execution of which lies with the President, not the courts. The judiciary has no political power whatever; the President is "the sole organ of the nation in its external relations."

As Chief Justice, Marshall raised the office and the Supreme Court to stature and power previously lacking. After having two Chief Justices in eleven years, the Court had Marshall for thirty-four, the longest tenure of any Chief Justice before or since. Individual opinions SERIATIM largely ceased, and dissents were discouraged. The Court came to speak with one voice. Usually the voice was Marshall's. He delivered the OPINION OF THE COURT in every case in which he participated during the decisive first five years, three-quarters of the opinions during the next seven years, and almost all the great constitutional opinions throughout his tenure. Marshall's captivating and equable temper helped unite a diverse group of justices, many appointed by Republican Presidents bent on reversing the Court's declarations of federal power and restrictions of state power. In the face of triumphant Jeffersonian Republicans, suspicious of an unelected judiciary stocked with Federalists, Marshall was wary and astute. His Court never erred as the JAY COURT did in CHISHOLM V. GEORGIA (1793), which had provoked the ELEVENTH AMENDMENT as a corrective. Nor did he cast antidemocratic contentions in the teeth of the Jeffersonians or their Jacksonian successors, thus to provoke (as had Justice SAMUEL CHASE) IMPEACHMENT proceedings. Marshall's judicial opinions encouraged grave respect for law, treated the Constitution as sacred and its Founding Fathers as sainted men, and fashioned a protective and compelling shield of purpose, principle, and reasoning.

His crucial judicial accomplishment was MARBURY V. MADISON (1803), which laid down the essentials of the American RULE OF LAW. Judges are to oversee executive and legislature alike, keeping the political departments faithful to applicable statutes, to the written Constitution, and to "general principles" of law protecting individual rights and delimiting the functions of each department. A series of important decisions secured individual rights, especially the right to acquire property by contract, against state and general governments. UNITED STATES V. BURR (1807) expounded a narrow constitutional definition of TREASON and made prosecution difficult. STURGES V. CROWNINSHIELD (1819) set strict standards for voiding debts by bankruptcy. FLETCHER V. PECK (1810) and DARTMOUTH COLLEGE V. WOODWARD (1819) enforced as judicially protected contracts a state's sale of land and a state's grant of a corporate charter. Finally, several of Marshall's most famous opinions elaborated great powers for the national government and protected them from state encroachment. MCCULLOCH V. MARYLAND (1819) sustained Congress's authority to charter a bank and in general to employ broad discretion as to necessary and proper means for carrying out national functions. GIBBONS V. OGDEN (1824), the steamboat case, interpreted congressional power under the COMMERCE CLAUSE to protect a national market, a right of exchange free from state-supported monopoly. COHENS V. VIRGINIA (1821) eloquently defended Supreme Court review of state court decisions involving FEDERAL QUESTIONS.

The presupposition of Marshall's CONSTITUTIONAL-

ISM was that the Constitution is FUNDAMENTAL LAW, not merely a fundamental plan, written to impose limits, not just to raise powers, and designed to be permanent, not to evolve or to be fundamentally revised. Interpretation is to follow the words and purposes of the various provisions; amendment is for subordinate changes that will allow "immortality" to the Framers' primary work. Marshall called a written constitution America's "greatest improvement on political institutions." It renders permanent the institutions raised by popular consent, which is the only basis of rightful government. Besides, the American nation was fortunate in its founding: it benefited from a remarkable plan, from a fortunate ratification in the face of jealousy and suspicion in states and people, and from the extraordinary firmness of the first President. Washington had settled the new federal institutions and conciliated public opinion, despite the "infinite difficulty" of ratification and a crescendo of attacks upon his administration as monarchic, aristocratic, and anglophile. So Marshall argued in the penetrating (if somewhat wooden) *Life of George Washington,* a biography he condensed into a schoolbook to impress on his countrymen the character and political principles of "the greatest man in the world."

Marshall understood the Constitution to establish a government, not a league such as that created by the ARTICLES OF CONFEDERATION. The new government possessed sovereign powers of two sorts, legal (the judicial power) and political (legislative and executive). The special function of judges is to apply the law to individuals. It is a power extensive although not, Marshall consistently said, political or policy-oriented. Judicial JURISDICTION extends as far as does the law: common law, statute law, Constitution, treaties, and the law of nations (which Marshall influenced by several luminous opinions). In applying the law to individuals, courts are to care for individual rights, the very object of government in general. By "nature" or by "definition," courts are "those tribunals which are established for the security of property and to decide on human rights." Such rights are contained either in explicit constitutional provisions and amendments, or in "unwritten or common law," which the Constitution presupposes as the substratum of our law (and which Marshall thought was spelled out in traditional law books, such as Sir WILLIAM BLACKSTONE's *Commentaries on the Laws of England*). In short, courts are to construe all law in the light of the rights of person and property that are the object of law—as well as in the light of the constitutional authority of the other branches.

Marshall was fond of contrasting the Americans' "rational liberty," which afforded "solid safety and real security," with revolutionary France's "visionary" civic liberty, which had led to a despotism "borrowing the garb and usurping the name of freedom." While trying AARON BURR, Marshall repeatedly noted the "tenderness" of American law for the rights of the accused. His *Life of Washington* mixes praise of FREEDOM OF SPEECH and of conscience with attacks on religious persecution. Yet Marshall also said that morals and free institutions need to be "cherished" by public opinion; he would not suppose that a free MARKETPLACE OF IDEAS insures progress in public enlightenment. He did suppose that a rather free economic marketplace would lead to progress in national wealth. Marshall defended property rights in the sense of rights of contract or vested rights, rights that vest under contract and originate in a right to the fruits of one's labor and enterprise. By protecting industrious acquisitions the judiciary fosters the dynamic economy of free enterprise. Rational liberty is prudent liberty, which breeds power as well as wealth: the "legitimate greatness" of a "widespreading, rising empire," extending from "the Ste. Croix to the Gulph of Mexico, from the Atlantic to the Pacific." By directly securing the rights of property, courts indirectly secure the "vast republic."

While courts are "the mere instruments of the law, and can will nothing," or at most possess a legal discretion governed by unwritten principles of individual rights, the executive and legislature enjoy broad political discretion for the safety and interrelation of all. President and Congress are indeed subordinate to the Constitution of ENUMERATED POWERS and explicit restrictions. Marshall did not follow ALEXANDER HAMILTON, and would not have followed some later Supreme Courts, in inferring a plenary legislative power. His arguments, however, take aim at enemies on the other flank, at Jeffersonian strict constructionists who allowed only powers explicit in the Constitution or necessarily deduced from explicit powers. A constitution of government is not a "legal code," Marshall replied, and its enumerated powers are vested fully and encompass the full panoply of appropriate means. In *McCulloch,* Marshall set forth the core of the American doctrine of SOVEREIGNTY: the need for great governmental powers to confront inevitable crises. Maryland had placed a prohibitive tax on a branch of the national bank, and its counsel denied federal authority to charter a bank (a power not explicit in the Constitution). Ours is a constitution, Marshall replied, "intended to endure for ages to come, and, consequently,

to be adapted to the various *crises* of human affairs." Armies must be marched and taxes raised throughout the land. "Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive?" In a similar spirit Marshall defended an executive vigorous in war and FOREIGN AFFAIRS and able to overawe faction and rebellion at home. He struck down, as violating Congress's power to regulate commerce among the states, state acts imposing import taxes or reserving monopolistic privileges. The arguments are typical. Great powers are granted for great objects. A narrow interpretation would defeat the object: the words must be otherwise construed. Thus a nation is raised. Individual enterprise, a national flow of trade, and the bonds of mutual interest breach barriers of state, section, and custom. The machinery of government is geared for great efforts of direction and coercion. The national sovereign, limited in its tasks, supreme in all means needed for their accomplishment, rises over the once independent state sovereignties. Marshall acknowledged the states' independent powers as well as the complexities of federalism: America was "for many purposes an entire nation, and for others several distinct and independent sovereignties." He tried above all to protect the federal government's superior powers from what the Framers had most feared, the encroachments of the states, more strongly entrenched in the people's affections.

Like virtually all of the Framers, Marshall was devoted to popular government. Yet SHAYS' REBELLION of western Massachusetts farmers (1786–1787) had made him wonder whether "man is incapable of governing himself." He thought the new Constitution a republican remedy for the flaws of republican government, and for some time he thought constitutional restraints might suffice to rein the people to sound government. Marshall's republicanism encompassed both representative government and balanced government. The people are to grant their sovereignty to institutions for exercise by their representatives. A more substantial, virtuous, and enlightened Senate and President would balance the more popular House of Representatives, the dangerous house in a popular republic. Marshall came to be troubled by a decline in the quality of American leaders, from the great statesmen of the Revolution and founding, notably Washington, to the "superficial showy acquirements" of "party politicians." He came to be deeply disheartened by the tumultuous growth of democratic control, inspired by THOMAS JEFFERSON and consummated by ANDREW JACKSON. A "torrent of public opinion," inflamed by the French Revolution, aroused the old debtor and STATES' RIGHTS party during Washington's administration. It led to democratic societies, set up to watch the government, and then to a legislature that conveyed popular demands without much filtering. Marshall had anticipated that Jefferson would ally himself with the House of Representatives, and become leader of the party dominating the whole legislature, thus increasing his own power while weakening the office of President and the fundamentals of balanced government. During Jackson's terms (1828–1836), with the presidency transformed from a check on the majority to the tribune of the majority, Marshall favored reduction of its power, a tenure limited to one term, and even selection of the President by lot from among the senators. He called his early republicanism "wild and enthusiastic democracy," and came to doubt that the constitutional Union could endure in the face of resurgent sectionalism and populism.

The eventual dissolution of political balances made crucial Marshall's decisive accomplishment as he and Jefferson began their terms of office: the confirmation of the judiciary as interpreter and enforcer of the fundamental law. Although Marshall's opinion in *Marbury* denied that courts can exercise political power, it gave courts power to circumscribe the forbidden sphere, to determine the powers of legislatures and executives. Marshall's argument for this unprecedented judicial authority recalled "certain principles . . . long and well established." In deciding cases judges must declare what the law is. The Constitution is the supreme law. Judges must apply the Constitution in preference to statute when the two conflict—else the Constitution is not permanent but "alterable when the legislature shall please to alter it." The argument established the Supreme Court as enforcer of the constitutional government central to America's constitutional democracy. Marshall pointed to the horrors of "legislative omnipotence," only inconspicuously bestowing on courts a ruling potency as the voice of the Constitution. Marshall's opinion, the object of intense scrutiny ever since, was faithful to the CONSTITUTIONAL CONVENTION's supposition that there will be some JUDICIAL REVIEW of statutes and to its suspicion of democratic legislatures. It did not confront certain difficulties, notably those of a Supreme Court (like the TANEY COURT in DRED SCOTT V. SANDFORD, 1857) whose decisions violate the principles of the Constitution. Marshall's judicial reasonings were his attempt to keep judges, and his country, from violating the Constitution that preserves those principles.

ROBERT K. FAULKNER

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MARSHALL, THURGOOD (1908–)

Thurgood Marshall, the first black Justice of the Supreme Court, was born in Baltimore in 1908. After graduation from Lincoln University in Pennsylvania, Marshall attended Howard University Law School. Graduating first in his class in 1933, Marshall became one of CHARLES H. HOUSTON's protégés. He began practice in Baltimore, where he helped revitalize the local branch of the National Association for the Advancement of Colored People (NAACP). Houston, who had become special counsel to the NAACP in New York, was developing a program of litigation designed to attack segregated education in the South; Marshall joined the NAACP staff as Houston's assistant in 1936.

Of all the Justices who have served on the Supreme Court, Marshall has the strongest claim to having contributed as much to the development of the Constitution as a lawyer as he has done as a judge. At the start of his career, race relations law centered on the SEPARATE BUT EQUAL DOCTRINE. In his initial years at the NAACP, Marshall brought a number of lawsuits challenging unequal salaries paid to black and white teachers in the South. After Marshall succeeded Houston as special counsel in 1938, he became both a litigator and a coordinator of litigation, most of it challenging segregated education. He also successfully argued a number of cases involving RACIAL DISCRIMINATION in the administration of criminal justice before the Supreme Court. When social and political changes during World War II led to increased black militancy and support for the NAACP, Marshall was able to expand the NAACP's legal staff by hiring an extremely talented group of young, mostly black lawyers. Although he continued to conduct some litigation, Marshall gradually assumed the roles of appellate advocate and overall strategist. Relying on his staff to generate helpful legal theories, he selected the theory most likely to accomplish the NAACP's goals. This process culminated in the five lawsuits decided by the Supreme Court as BROWN V. BOARD OF EDUCATION (1954). Marshall had used his staff to develop these cases and the legal theory that segregation was unconstitutional no matter how equal were the physical facilities. After the Supreme Court held that segregation was unconstitutional and that it should be eliminated "with ALL DELIBERATE SPEED," Marshall and the NAACP staff devoted much of their attention to overcoming the impediments that southern states began to place in the way of DESEGREGATION. These impediments included school closures and investigations and harassment of the NAACP and its lawyers.

Marshall left the NAACP in 1961, having been nominated by President JOHN F. KENNEDY to a position on the UNITED STATES COURT OF APPEALS for the Second Circuit. His confirmation to that position was delayed by southern opposition for over eleven months. During Marshall's four years on the Second Circuit, he wrote an important opinion holding that the DOUBLE JEOPARDY clause applied to the states, anticipating by four years the position that the Supreme Court would adopt in BENTON V. MARYLAND (1969), a decision written by Justice Marshall. He also urged in dissent an expansive interpretation of statutes allowing persons charged with crimes in state courts to remove those cases to federal court. (See CIVIL RIGHTS REMOVAL.) Marshall was nominated as solicitor general by President LYNDON B. JOHNSON in 1965. He served as solicitor general for two years, during which he supervised the disposition of criminal cases imperiled by illegal WIRETAPPING. Johnson appointed him in 1967 to succeed Justice TOM C. CLARK on the Supreme Court.

Justice Marshall's contributions to constitutional development have been shaped by the fact that for most of his tenure his views were among the most liberal on a centrist or conservative Court. As he had at the NAACP, and as have most recent Justices, Marshall relied heavily on his staff to present his views forcefully and systematically in his opinions.

For a few years after Marshall's appointment to the Court, he was part of the liberal bloc of the WARREN COURT. Despite the tradition that newly appointed Justices are not assigned important majority opinions, Justice Marshall wrote several important free speech opinions during his first two years on the Court. In STANLEY V. GEORGIA (1969), he held that a state could not punish a person merely for possessing

Portrait

obscene materials in his home; the only justification for such punishment, guaranteeing a citizenry that did not think impure thoughts, was barred by the FIRST AMENDMENT. AMALGAMATED FOOD EMPLOYEES UNION V. LOGAN VALLEY PLAZA (1968) recognized the contemporary importance of privately owned SHOPPING CENTERS as places of public resort, holding that centers must be made available, over their owners' objections, to those who wish to picket or pass out leaflets on subjects of public interest. PICKERING V. BOARD OF EDUCATION (1968) established the right of public employees to complain about the way in which their superiors were discharging their responsibilities to the public.

With the appointment of four Justices by President RICHARD M. NIXON, Justice Marshall rapidly found himself in dissent on major civil liberties issues. *Stanley* was limited by *United States v. Reidel* (1971) to private possession and not extended to what might have seemed its logical corollary, acquisition of obscene material for private use. *Logan Valley Plaza* was overruled in HUDGENS V. NATIONAL LABOR RELATIONS BOARD (1976), and *Pickering* was limited by a relatively narrow definition of complaints relating to public duties in *Connick v. Myers* (1983). Marshall became part of a small liberal bloc that could prevail only by attracting more conservative members, who could be kept in the coalition by allowing them to write the majority opinions. In the series of death penalty cases, for example, Justice Marshall stated his conclusion that capital punishment was unconstitutional in all circumstances, but when a majority for a narrower position could be found to overturn the imposition of the death penalty in a particular case, he joined that majority.

Thus, after 1970, Marshall rarely wrote important opinions for the Court regarding FREEDOM OF SPEECH, CRIMINAL PROCEDURE, or EQUAL PROTECTION. Two of his opinions in cases about the PREEMPTION of state law by federal regulations, *Jones v. Rath Packing Co.* (1977) and *Douglas v. Seacoast Products* (1977), seem likely to endure as statements of general principle. More often he was assigned to write opinions in which a nearly unanimous Court adopted a "conservative" position. For example, in *Gillette v. United States* (1971), Justice Marshall's opinion for the Court rejected statutory and constitutional claims to exemption from the military draft by men whose religious beliefs led them to oppose participation in some but not all wars. Undoubtedly because of his race and because of his desire to see a majority support positions helpful to blacks, Marshall rarely wrote important opinions in cases directly implicating matters of race, although he did write two significant dissents, one defending AFFIRMATIVE ACTION in REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE (1978), and another emphasizing blacks' lack of access to political power in MOBILE V. BOLDEN (1980). But Justice Marshall's major contributions have come in areas where the experience of race has historically shaped the context in which apparently nonracial issues arise.

Marshall occasionally received the assignment in important civil liberties cases. His opinion in POLICE DEPARTMENT OF CHICAGO V. MOSLEY (1972) crystallized the equality theme in the law of freedom of speech. There he emphasized the importance for free expression of the rule that governments may not regulate one type of speech because of its content, in a setting where speech with a different content would not be regulated: "[G]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . . Selective exclusions . . . may not be based on content alone, and may not be justified by reference to content alone." Unless it were prohibited, discrimination based on content would allow governments, which ought to be controlled by the electorate, to determine what the electorate would hear. Although the *Mosley* principle is probably stated too broadly, because differential regulation of categories of speech such as OBSCENITY or COMMERCIAL SPEECH is allowed, still it serves as a central starting point for analysis, from which departures must be justified.

His opinion in *Memorial Hospital v. Maricopa County* (1974) synthesized a line of cases regarding the circumstances in which a state might deny benefits such as nonemergency medical care for INDIGENTS to those who had recently come to the state. If the benefit was so important that its denial could be characterized as a penalty for exercising the RIGHT TO TRAVEL, it was unconstitutional.

Because of the relatively rapid shift in the Court's composition, most of Justice Marshall's major contributions to the constitutional development have come through dissents. Several major dissenting opinions by Justice Marshall have helped shape the law of equal protection. The opinions criticize a rigid approach in which classifications based on race and a few other categories are to be given STRICT SCRUTINY while all other classifications must be "merely rational." Marshall, in dissents in DANDRIDGE V. WILLIAMS (1970) and SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ (1973), offered a more flexible approach. He argued that the courts should examine legislation that affects different groups differently by

taking into account the nature of the group—the degree to which it has been discriminated against in the past, the actual access to political power it has today—and the importance of the interests affected. Under this "sliding scale" approach, a statute differentially affecting access to WELFARE BENEFITS might be unconstitutional while one with the same effects on access to public recreational facilities might be permitted. A majority of the Court has not explicitly adopted the "sliding scale" approach, but Justice Marshall's sustained criticisms of the rigid alternative have produced a substantial, though not entirely acknowledged, acceptance of a more nuanced approach to equal protection problems.

As *Logan Valley Plaza* showed, Justice Marshall has urged, usually in dissent, an expansive definition of those actors whose decisions are subject to constitutional control. In JACKSON V. METROPOLITAN EDISON CO. (1974) the majority found that the decision of a heavily regulated utility to terminate service for nonpayment was not "state action" under any of the several strands of that DOCTRINE. Justice Marshall's dissent argued that state involvement was significant when looked at as a whole and, more important, pointed out that on the majority's analysis the utility could, without constitutional problems, terminate service to blacks. On the assumption, confirmed in later cases, that the result is incorrect, Justice Marshall's argument effectively demonstrated that the "state action" doctrine is actually a doctrine about the merits of the challenged decision: if it is a decision that the Justices believe should not be controlled by the Constitution, there is no "state action," whereas if it is a decision that the Justices believe should be controlled by the Constitution, there is state action.

Finally, after joining the seminal opinion in GOLDBERG V. KELLY (1968), which held that the Constitution defined the procedures under which public benefits, the "new property" of the welfare state, could be taken away, Justice Marshall dissented in later cases where the Court substantially narrowed the scope of *Goldberg*. His position, in cases such as BOARD OF REGENTS V. ROTH (1972), has been that everyone must be presumed to be entitled to those benefits, and that the presumption can be overcome only after constitutionality-defined procedures have been followed.

In most of the areas of law to which Justice Marshall's opinions have made significant contributions the linked strands of race and poverty appear. Discrimination by nominally private actors and suppression of speech on racial issues have played an important part in the black experience. Similarly, wealth and poverty as grounds for allocating public resources are classifications closely linked to race. Justice Marshall's desire to adopt a more flexible approach to equal protection law stems from his awareness that only such an approach would allow the courts to address difficulties that the ordinary routines of society cause for the poor. For example, his dissent in *United States v. Kras* (1973) objected to the imposition of a fifty dollar filing fee on those who sought discharges of their debts in bankruptcy. But it would be misleading to conclude that Thurgood Marshall's most important role in constitutional development was what he did as a Justice of the Supreme Court. Rather it was what he did as a lawyer for the NAACP before and after the decision in *Brown v. Board of Education*.

MARK V. TUSHNET

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In *Marshall* the Supreme Court held unconstitutional a congressional enactment authorizing Occupational Safety and Health Administration inspectors to conduct WARRANTLESS SEARCHES of employment facilities to monitor compliance with regulations. PROBABLE CAUSE for a warrant can, however, be satisfied on a lesser showing than that required in a search for criminal EVIDENCE.

JACOB W. LANDYNSKI

MARSHALL COURT
(1801–1835)

In 1801 the Supreme Court existed on the fringe of American awareness. Its prestige was slight, and it was more ignored than respected. On January 20, 1801, the day President JOHN ADAMS nominated JOHN MARSHALL for the chief justiceship, the commissioners of the DISTRICT OF COLUMBIA informed Congress that the Court had no place to hold its February term. The Senate consented to the use of one of its committee rooms, and Marshall took his seat on February 4 in a small basement chamber. At the close of 1809, Benjamin Latrobe, the architect, reported that the basement had been redesigned to enlarge the courtroom and provide an office for the clerk and a library room for the Justices. In 1811, however, Latrobe re-

ported that the Court "had been obliged to hold their sittings in a tavern," because Congress had appropriated no money for "fitting up and furnishing the Court-room. . . ." After the British burned the Capitol in 1814 Congress again neglected to provide for the Court. It held its 1815 term in a private home, and for several years after met in temporary Capitol quarters that were "little better than a dungeon." The Court moved into permanent quarters in 1819. In 1824 a New York correspondent described the Court's Capitol chamber: "In the first place, it is like going down cellar to reach it. The room is on the basement story in an obscure part of the north wing. . . . A stranger might traverse the dark avenues of the Capitol for a week, without finding the remote corner in which Justice is administered to the American Republic." He added that the courtroom was hardly large enough for a police court.

The Supreme Court, however, no longer lacked dignity or respect. It had become a force that commanded recognition. In 1819 a widely read weekly described it as so awesome that some regarded it with reverence. That year THOMAS JEFFERSON complained that the Court had made the Constitution a "thing of wax," which it shaped as it pleased, and in 1824 he declared that the danger he most feared was the Court's "consolidation of our government." Throughout the 1820s Congress debated bills to curb the Court, which, said a senator, the people blindly adored—a "self-destroying idolatry." ALEXIS DE TOCQUEVILLE, writing in 1831, said: "The peace, the prosperity, and the very existence of the Union are vested in the hands of the seven Federal judges. Without them, the Constitution would be a dead letter. . . ." Hardly a political question arose, he wrote, that did not become a judicial question.

Chief Justice Marshall was not solely responsible for the radical change in the Court's status and influence, but he made the difference. He bequeathed to the people of the United States what it was not in the political power of the Framers of the Constitution to give. Had the Framers been free agents, they would have proposed a national government that was unquestionably dominant over the states and possessed a formidable array of powers breathtaking in flexibility and scope. Marshall in more than a figurative sense was the supreme Framer, emancipated from a local constituency, boldly using his judicial position as an exalted platform from which to educate the nation to the true meaning, his meaning, of the Constitution. He wrote as if words of grandeur and power and union could make dreams come true. By the force of his convictions he tried to will a nation into being.

He reshaped the still malleable Constitution, giving clarification to its ambiguities and content to its omissions that would allow it to endure for "ages to come" and would make the government of the Union supreme in the federal system. Marshall is the only judge in our history whose distinction as a great nationalist statesman derives wholly from his judicial career. Justice OLIVER WENDELL HOLMES once remarked, "If American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall." That the Court had remained so weak after a decade of men of such high caliber as JOHN JAY, OLIVER ELLSWORTH, JAMES WILSON, JAMES IREDELL, WILLIAM PATERSON, and SAMUEL CHASE demonstrates not their weakness but Marshall's achievement in making the Court an equal branch of the national government.

Until 1807 he cast but one of six votes, and after 1807, when Congress added another Justice, but one of seven. One Justice, one vote has always been the rule of the Court, and the powers of anyone who is Chief Justice depend more on the person than the office. From 1812, BUSHROD WASHINGTON and Marshall were the only surviving Federalists, surrounded by five Justices appointed by Presidents Thomas Jefferson and JAMES MADISON; yet Marshall dominated the Court in a way that no one has ever since. During Marshall's thirty-five-year tenure, the Court delivered 1,106 opinions in all fields of law, and he wrote 519; he dissented only eight times. He wrote forty of the Court's sixty-four opinions in the field of constitutional law, dissenting only once in a constitutional case. Of the twenty-four constitutional opinions for the Court that he did not write, only two were important: MARTIN V. HUNTER'S LESSEE (1816), a case in which he did not sit, and OGDEN V. SAUNDERS (1827), the case in which he dissented. He virtually monopolized the constitutional cases for himself and won the support of his associates, even though they were members of the opposing political party.

Marshall's long tenure coincided with the formative period of our constitutional law. He was in the right place at the right time, filling, as Holmes said, "a strategic place in the campaign of history." But it took the right man to make the most of the opportunity. Marshall had the character, intellect, and passion for his job that his predecessors lacked. He had a profound sense of mission comparable to a religious "calling." Convinced that he knew what the Constitution should

mean and what it was meant to achieve, he determined to give its purposes enduring expression and make them prevail. The Court was, for him, a judicial pulpit and political platform from which to address the nation, to compete, if possible, with the executive and legislative in shaping public opinion.

Marshall met few of the abstract criteria for a "great" judge. A great judge should possess intellectual rectitude and brilliance. Marshall was a fierce and crafty partisan who manipulated facts and law. A great judge should have a self-conscious awareness of his biases and a determination to be as detached as human fallibility will allow. In Marshall the judicial temperament flickered weakly; unable to muzzle his deepest convictions, he sought to impose them on the nation, sure that he was right. He intoxicated himself with the belief that truth, history, and the Constitution dictated his opinions, which merely declared the law rather than made the law. A great judge should have confidence in majority rule, tempered by his commitment to personal freedom and fairness. Marshall did not think men capable of self-government and inclined to favor financial and industrial capitalism over most other interests. A great judge should have a superior technical proficiency, modified by a sense of justice and ethical behavior beyond suspicion. Marshall's judicial ethics were not unquestionable. He should have disqualified himself in MARBURY V. MADISON (1803) because of his negligent complicity. He overlooked colossal corruption in FLETCHER V. PECK (1810) to decide a land title case by a doctrine that promoted his personal interests. He wrote the opinion in MCCULLOCH V. MARYLAND (1819) before hearing the case. Marshall's "juridical learning," as Justice JOSEPH STORY, his reverent admirer and closest colleague, conceded, "was not equal to that of the great masters in the profession. . . ." He was, said Story, first, last, and always, "a Federalist of the good old school," and in the maintenance of its principles "he was ready at all times to stand forth a determined advocate and supporter." He was, in short, a Federalist activist who used the Constitution to legitimate predetermined results. A great judge should have a vision of national and moral greatness, combined with respect for the federal system. Marshall had that—and an instinct for statecraft and superb literary skills. These qualities, as well as his activism, his partisanship, and his sense of mission, contributed to his inordinate influence.

So too did his qualities of leadership and his personal traits. He was generous, gentle, warm, charming, considerate, congenial, and open. At a time when members of the Court lived together in a common boarding house during their short terms in Washington, his charismatic personality enabled him to preside over a judicial family, inspire loyalty, and convert his brethren to his views. He had a cast-iron will, an astounding capacity for hard work (witness the number of opinions he wrote for the Court), and formidable powers of persuasion. He thought audaciously in terms of broad and basic principles that he expressed axiomatically as absolutes. His arguments were masterful intellectual performances, assuming that his premises were valid. Inexorably and with developing momentum he moved from an unquestioned premise to a foregone conclusion. Jefferson once said that he never admitted anything when conversing with Marshall. "So sure as you admit any position to be good, no matter how remote from the conclusion he seeks to establish, you are gone." Marshall's sophistry, according to Jefferson, was so great, "you must never give him an affirmative answer or you will be forced to grant his conclusion. 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.'" Marshall could also be imperious. He sometimes gave as the OPINION OF THE COURT a position that had not mustered a majority. According to one anecdote, Marshall is supposed to have said to Story, the greatest legal scholar in our history, "That, Story, is the law. You find the precedents."

The lengthy tenure of the members of the Marshall Court also accounts for its achievements. On the pre-Marshall Court, the Justices served briefly; five quit in a decade. The Marshall Court lasted—BROCKHOLST LIVINGSTON seventeen years, THOMAS TODD nineteen, GABRIEL DUVALL twenty-four, WILLIAM JOHNSON thirty, Bushrod Washington thirty-one, and Marshall outlasted them all. Story served twenty-four years with Marshall and ten more after his death; SMITH THOMPSON served fifteen years with Marshall and eight years after. This continuity in personnel contributed to a consistent point of view in constitutional doctrine—a view that was, substantially, Marshall's. From 1812, when the average age of the Court's members was only forty-three, through 1823—twelve successive terms—the Court had the same membership, the longest period in its history without a change, and during that period the Marshall Court decided its most important cases except for *Marbury*.

Marshall also sought to strengthen the Court by inaugurating the practice of one Justice's giving the opinion of the Court. Previously the Justices had delivered their opinions SERIATIM, each writing an opinion

in each case in the style of the English courts. That practice forced each Justice to take the trouble of understanding each case, of forming his opinion on it, and showing publicly the reasons that led to his judgment. Such were Jefferson's arguments for seriatim opinions; and Marshall understood that one official opinion augmented the Court's strength by giving the appearance of unity and harmony. Marshall realized that even if each Justice reached similar conclusions, the lines of argument and explanation of doctrine might vary with style and thought of every individual, creating uncertainty and impairing confidence in the Court as an institution. He doubtless also understood that by massing his Court behind one authoritative opinion and by assigning so many opinions to himself, his own influence as well as the Court's would be enhanced. Jefferson's first appointee, Justice Johnson, sought to buck the practice for a while. He had been surprised, he later informed Jefferson, to discover the Chief Justice "delivering all the opinions in cases in which he sat, even in some instances when contrary to his own judgment and vote." When Johnson remonstrated in vain, Marshall lectured him on the "indecency" of judges' "cutting at each other," and Johnson soon learned to acquiesce "or become such a cypher in our consultations as to effect no good at all." Story, too, learned to swallow his convictions to enhance the "authority of the Court." His "usual practice," said Story, was "to submit in silence" to opinions with which he disagreed. Even Marshall himself observed in an 1827 case, by which time he was losing control of his Court, that his usual policy when differing from majority was "to acquiesce silently in its opinion."

Like other trailblazing activist judges, Marshall squeezed a case for all it was worth, intensifying its influence. For Marshall a constitutional case was a medium for explaining his philosophy of the supreme and FUNDAMENTAL LAW, an occasion for sharing his vision of national greatness, a link between capitalism and CONSTITUTIONALISM, and an opportunity for a basic treatise. Justice Johnson protested in 1818, "We are constituted to decide causes, and not to discuss themes, or digest systems." He preferred, he said, to decide no more in any case "than what the case itself necessarily requires." Ordinary Justices decide only the immediate question on narrow grounds; but Marshall, confronted by some trivial question—whether a justice of the peace had a right to his commission or whether peddlers of lottery tickets could be fined—would knife to the roots of the controversy, discover that it involved some great constitutional principle, and explain it in the broadest possible way, making the case seem as if the life of the Union or the supremacy of the Constitution were at stake. His audacity in generalizing was impressive; his strategy was to take the highest ground and make unnerving use of OBITER DICTA; and then, as a matter of tactics, almost unnoticeably decide on narrow grounds. *Marbury* is remembered for Marshall's exposition of JUDICIAL REVIEW, not for his judicial humility in declining JURISDICTION and refusing to issue the WRIT OF MANDAMUS. COHENS V. VIRGINIA (1821) is remembered for Marshall's soaring explication of the supremacy of the JUDICIAL POWER OF THE UNITED STATES, not for the decision in favor of Virginia's power to fine unlicensed lottery ticket peddlers. GIBBONS V. OGDEN (1824) is remembered for its sweeping discourse on the COMMERCE CLAUSE of the Constitution, not for the decision that the state act conflicted with an obscure act of Congress.

Marshall's first major opinion, in *Marbury,* displayed his political cunning, suppleness in interpretation, doctrinal boldness, instinct for judicial survival, and ability to maneuver a case beyond the questions on its face. Having issued the show cause order to Madison, the Court seemingly was in an impossible position once Jefferson's supporters called that order a judicial interference with the executive branch. To decide for Marbury would provoke a crisis that the Court could not survive: Madison would ignore the Court, which had no way to enforce its decision, and the Court's enemies would have a pretext for IMPEACHMENT. To decide against Marbury would appear to endorse the illegal acts of the executive branch and concede that the Court was helpless. Either course of action promised judicial humiliation and loss of independence. Marshall therefore found a way to make a tactical retreat while winning a great strategic victory for judicial power. After upbraiding the executive branch for violating Marbury's rights, Marshall concluded that the Court had no JURISDICTION in the case, because a provision of an act of Congress conflicted with Article III. He held that provision unconstitutional by, first, giving it a sweeping construction its text did not bear and, second, by comparing it to his very narrow construction of Article III. Thus he reached and decided the great question, not argued by counsel, whether the Court had the power to declare unconstitutional an act of Congress. By so doing he answered from the bench his critics in Congress who, now that they were in power, had renounced judicial review during the debate on the repeal of the JUDICIARY ACT OF 1801. Characteristically Marshall relied on no precedents, not even on the authority of THE FEDERALIST #78. Significantly, he chose

a safe act of Congress to void—section 13 of the JUDICIARY ACT OF 1789, which concerned not the province of the Congress or the President but of the Supreme Court, its authority to issue writs of mandamus in cases of ORIGINAL JURISDICTION. But Marshall's exposition of judicial review was, characteristically, broader than the holding on section 13. Jefferson, having been given no stick with which to beat Marshall, privately fumed: "Nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them," he wrote in a letter. "The opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but also for the Legislature and Executive also, in their spheres, would make the judiciary a despotic branch."

The Court did not dare to declare unconstitutional any other act of Congress which remained hostile to it throughout Marshall's tenure. STUART V. LAIRD (1803), decided shortly after *Marbury*, upheld the repeal of the Judiciary Act of 1801. (See JUDICIARY ACTS OF 1802.) A contrary decision would have been institutionally suicidal for the Court. Marshall's opinion in *Marbury* was daring enough; in effect he courageously announced the Court's independence of the other branches of the government. But he was risking retaliation. Shortly before the arguments in *Marbury*, Jefferson instructed his political allies in the House to start IMPEACHMENT proceedings against JOHN PICKERING, a federal district judge; the exquisite timing was a warning to the Supreme Court. Even earlier, Jeffersonian leaders in both houses of Congress openly spoke of impeaching the Justices. The threats were not idle. Two months after *Marbury* was decided, Justice Chase on circuit attacked the administration in a charge to a GRAND JURY, and the House prepared to impeach him. Senator WILLIAM GILES of Virginia, the majority leader, told Senator JOHN QUINCY ADAMS that not only Chase "but all the other Judges of the Supreme Court," except William Johnson, "must be impeached and removed." Giles thought that holding an act of Congress unconstitutional was ground for impeachment. "Impeachment was not a criminal prosecution," according to Giles, who was Jefferson's spokesman in the Senate. "And a removal by impeachment was nothing more than a declaration by Congress to this effect: you hold dangerous opinions, and if you are suffered to carry them into effect, you will work the destruction of the Union. We want your offices for the purposes of giving them to men who will fill them better."

Intimidated by Chase's impending impeachment, Marshall, believing himself to be next in line, wrote to Chase that "impeachment should yield to an APPELLATE JURISDICTION in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault." Less than a year after his *Marbury* opinion the fear of impeachment led an anguished Marshall to repudiate his reasoning and favor Congress as the final interpreter of the Constitution. Fortunately the greatest crisis in the Court's history eased when the Senate on March 1, 1805, failed to convict Chase on any of the eight articles of impeachment. Marshall and his Court were safe from an effort, never again repeated, to politicize the Court by making it subservient to Congress through impeachment.

The Court demonstrated its independence even when impeachment hung over it. In *Little v. Barreme* (1804) Marshall for the Court held that President Adams had not been authorized by Congress to order an American naval commander to seize a ship sailing from a French port. Justice Johnson on circuit vividly showed his independence of the President who had appointed him. To enforce the EMBARGO ACTS, Jefferson had authorized port officers to refuse clearance of ships with "suspicious" cargoes. In 1808 Johnson, on circuit in Charleston, ordered the clearance of a ship and denounced the President for having exceeded the power delegated by the Embargo Acts. Jefferson could not dismiss as partisan politics Johnson's rebuke that he had acted as if he were above the law. Justice Brockholst Livingston, another Jefferson appointee, also had occasion in 1808 to show his independence of the President. Jefferson supported a federal prosecution for TREASON against individuals who had opposed the embargo with violence. Livingston, who presided at the trial, expressed "astonishment" that the government would resort to a theory of "constructive treason" in place of the Constitution's definition of treason as levying war against the United States and he warned against a "precedent so dangerous." The jury speedily acquitted. After the tongue-lashing from his own appointees, Jefferson won an unexpected victory in the federal courts in the case of the brig *William* (1808). Federal district judge John Davis in Massachusetts sustained the constitutionality of the Embargo Acts on commerce clause grounds. Davis, a lifelong Federalist, showed how simplistic was Jefferson's raving about judicial politics.

The evidence for the Court's nonpartisanship seems plentiful. For example, Justice Story, Madison's appointee, spoke for an independent Court in *Gelston*

v. Hoyt (1818), a suit for damages against government officials whose defense was that they had acted under President Madison's orders. Story, finding no congressional authority for these orders, "refused an extension of prerogative" power and added, "It is certainly against the general theory of our institutions to create discretionary powers by implication. . . ."

On the other hand, the Court supported the theory of IMPLIED POWERS in *McCulloch v. Maryland* (1819), which was the occasion of Marshall's most eloquent nationalist opinion. *McCulloch* had its antecedent in *United States v. Fisher* (1804), when the Court initially used BROAD CONSTRUCTION to sustain an act of Congress that gave to the government first claim against certain insolvent debtors. Enunciating the DOCTRINE of implied powers drawn from the NECESSARY AND PROPER CLAUSE, Marshall declared that Congress could employ any useful means to carry out its ENUMERATED POWER to pay national debts. That the prior claim of the government interfered with state claims was an inevitable result, Marshall observed, of the supremacy of national laws. Although a precursor of *McCulloch*, *Fisher* attracted no opposition because it did not thwart any major state interests.

When the Court did confront such interests for the first time, in UNITED STATES V. JUDGE PETERS (1809), Marshall's stirring nationalist passage, aimed at states that annulled judgments of the federal courts, triggered Pennsylvania's glorification of state sovereignty and denunciation of the "unconstitutional exercise of powers in the United States Courts." The state called out its militia to prevent execution of federal judgments and recommended a constitutional amendment to establish an "impartial tribunal" to resolve conflicts between "the general and state governments." State resistance collapsed only after President Madison backed the Supreme Court. Significantly, eleven state legislatures, including Virginia's, censured Pennsylvania's doctrines and endorsed the Supreme Court as the constitutionally established tribunal to decide state disputes with the federal courts.

The *Judge Peters* episode revealed that without executive support the Court could not enforce its mandate against a hostile state, which would deny that the Court was the final arbiter under the Constitution if the state's interests were thwarted. The episode also revealed that if other states had no immediate stake in the outcome of a case, they would neither advance doctrines of state sovereignty nor repudiate the Court's supreme appellate powers. When Virginia's high court ruled that the appellate jurisdiction of the Supreme Court did not extend to court judgments and that section 25 of the Judiciary Act of 1789 was unconstitutional, the Marshall Court, dominated by Republicans, countered by sustaining the crucial statute in *Martin v. Hunter's Lessee* (1816). Pennsylvania and other states did not unite behind Virginia when it proposed the constitutional amendment initiated earlier by Pennsylvania, because *Martin* involved land titles of no interest to other states. The fact that the states were not consistently doctrinaire and became aggressive only when Court decisions adversely affected them enabled the Court to prevail in the long run. A state with a grievance typically stood alone. But for the incapacity or unwillingess of the Court's state enemies to act together in their proposals to cripple it, the great nationalist decisions of the Marshall Court would have been as impotent as the one in *Worcester v. Georgia* (1832). *Worcester* majestically upheld the supreme law against the state's despoliation of the Cherokees, but President ANDREW JACKSON supported Georgia, which flouted the Court. Even Georgia, however, condemned the SOUTH CAROLINA ORDINANCE OF NULLIFICATION, and several state legislatures resolved that the Supreme Court was the constitutional tribunal to settle controversies between the United States and the states.

The Court made many unpopular decisions that held state acts unconstitutional. *Fletcher v. Peck*, which involved the infamous Yazoo land frauds, was the first case in which the Justices voided a state act for conflict with the Constitution itself. *Martin v. Hunter's Lessee*, which involved the title to the choice Fairfax estates in Virginia, was only the first of a line of decisions that unloosed shrill attacks on the Court's jurisdiction to decide cases on a WRIT OF ERROR to state courts. In *McCulloch* the Court supported the "monster monopoly," the Bank of the United States chartered by Congress, and held unconstitutional a state tax on its Baltimore branch. In *Cohens* the Court again championed its supreme appellate powers under section 25 of the Judiciary Act of 1789 and circumvented the ELEVENTH AMENDMENT. In STURGES V. CROWNINSHIELD (1819) the Court nullified a state bankruptcy statute that aided victims of an economic panic. In GREEN V. BIDDLE (1821) the Court used the CONTRACT CLAUSE when voiding Kentucky acts that supported valuable land claims. In OSBORN V. BANK OF THE UNITED STATES (1824) it voided an Ohio act that defied *McCulloch* and raised the question whether the Constitution had provided for a tribunal capable of protecting those who executed the laws of the Union from hostile state action.

When national supremacy had not yet been established and claims of state sovereignty bottomed state statutes and state judicial decisions that the Court overthrew, state assaults on the Court were inevitable, imperiling it and the Union it defended. Virginia, the most prestigious state, led the assault which Jefferson encouraged and SPENCER ROANE directed. Kentucky's legislature at one point considered military force to prevent execution of the *Green* decision. State attacks were vitriolic and intense, but they were also sporadic and not united. Ten state legislatures adopted resolutions against the Marshall Court, seven of them denouncing section 25 of the 1789 Act, which was the jurisdictional foundation for the Court's power of judicial review over the states. In 1821, 1822, 1824, and 1831 bills were introduced in Congress to repeal section 25. The assault on the Court was sharpest in the Senate, whose members were chosen by the state legislatures. Some bills to curb the Court proposed a constitutional amendment to limit the tenure of the Justices. One bill would have required seriatim opinions. Others proposed that no case involving a state or a constitutional question could be decided except unanimously; others accepted a 5–2 vote. One bill proposed that the Senate should have appellate powers over the Court's decisions.

Throughout the 1820s the attempts to curb the Court created a continuing constitutional crisis that climaxed in 1831, when Marshall despondently predicted the repeal of section 25 and the dissolution of the Union. In 1831, however, the House, after a great debate, defeated a repeal bill by a vote of 138–51; Southerners cast forty-five of the votes against the Court. What saved the Court was the inability of its opponents to mass behind a single course of action; many who opposed section 25 favored a less drastic measure. The Court had stalwart defenders, of course, including Senators DANIEL WEBSTER and JAMES BUCHANAN. Most important, it had won popular approbation. Although the Court had enemies in local centers of power, Americans thrilled to Marshall's paeans to the Constitution and the Union and he taught them to identify the Court with the Constitution and the Union.

A perceptible shift in the decisions toward greater tolerance for state action also helped dampen the fires under the Court in Marshall's later years. The coalition that Marshall had forged began to dissolve with the appointments of Justices Smith Thompson, JOHN MCLEAN, and HENRY BALDWIN. BROWN V. MARYLAND (1827), MARTIN V. MOTT (1827), AMERICAN INSURANCE COMPANY V. CANTER (1828), WESTON V. Charleston (1829), CRAIG V. MISSOURI (1830), and the CHEROKEE INDIAN CASES (1832) continued the lines of doctrine laid down by the earlier Marshall Court. But the impact of new appointments was felt in the decisions of *Ogden v. Saunders* (1827), WILLSON V. BLACKBIRD CREEK MARSH COMPANY (1829) and PROVIDENCE BANK V. BILLINGS (1830). In Marshall's last decade on the Court, six decisions supported nationalist claims against seventeen for state claims. During the same decade there were ten decisions against claims based on VESTED RIGHTS and only one sustaining such a claim. The shift in constitutional direction may also be inferred from the inability of the Marshall Court, because of dissension and illness, to resolve CHARLES RIVER BRIDGE V. WARREN BRIDGE, MAYOR OF NEW YORK V. MILN, and BRISCOE V. BANK OF KENTUCKY, all finally decided in 1837 under Marshall's successor against the late Chief Justice's wishes. Before his last decade the only important influence on the Court resulting from the fact that Republicans had a voting majority was the repudiation of a FEDERAL COMMON LAW OF CRIMES.

What was the legacy of the Marshall Court? It established the Court as a strong institution, an equal and coordinate branch of the national government, independent of the political branches. It established itself as the authoritative interpreter of the supreme law of the land. It declared its rightful authority to hold even acts of Congress and the President unconstitutional. It maintained continuing judicial review over the states to support the supremacy of national law. In so doing, the Court sustained the constitutionality of the act of Congress chartering the Bank of the United States, laying down the definitive exposition of the doctrine of implied powers. The Court also expounded the commerce clause in *Gibbons v. Ogden* (1824), with a breadth and vigor that provided the basis for national regulation of the economy generations later. Finally, the Court made the contract clause of the Constitution into a bulwark protecting both vested rights and risk capital. *Fletcher* supported the sanctity of public land grants to private parties, encouraging capital investment and speculation in land values. NEW JERSEY V. WILSON (1812) laid down the doctrine that a state grant of tax immunity constituted a contract within the protection of the Constitution, preventing subsequent state taxation for the life of the grant. DARTMOUTH COLLEGE V. WOODWARD (1819) protected private colleges and spurred the development of state universities; it also provided the constitutional props for the expansion of the private corporation by holding that a charter of incorporation

is entitled to protection of the contract clause. The Marshall Court often relied on nationalist doctrines to prevent state measures that sought to regulate or thwart corporate development. Just as national supremacy, judicial review, and the Court's appellate jurisdiction were often interlocked, so too the interests of capitalism, nationalism, and judicial review were allied. Time has hardly withered the influence and achievements of the Marshall Court.

LEONARD W. LEVY

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MARSHALL PLAN

At the Harvard University commencement exercises on June 5, 1947, Secretary of State George C. Marshall proposed that the United States undertake a vast program of postwar economic aid to assist the countries of Europe to rebuild from World War II. Neither Secretary Marshall nor President HARRY S. TRUMAN offered any constitutional authority for such a program, although some members of Congress, led by Senator ROBERT A. TAFT of Ohio, contended that the expenditure could not be justified under either the FOREIGN AFFAIRS power or the TAXING AND SPENDING POWER. Acting on the initiative of the United States, sixteen European nations formed the Organization of European Economic Cooperation (OEEC) which in turn issued a report setting forth Europe's collective needs and resources. The Soviet Union and other East European countries were invited to participate, but declined. Thereafter, on April 3, 1948, foll
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MARTIAL LAW

See: Civil–Military Relations and the Co

MARTIN, LUTHER
(1748–1826)

Luther Martin represented Maryland in
nental Congress and signed the DECLARAT
DEPENDENCE. He was attorney general o
from 1778 to 1805 and one of the early
the American bar. Martin also represente
at the CONSTITUTIONAL CONVENTION
where he was a leader of the small-state
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Now Bob Taft Jr. Term Ends Jan 7. 2008 / deputized by Public Demand

Encyclopedia of the American Constitution