1947


Edward Joseph Snyder
Loyola University Chicago

Follow this and additional works at: https://ecommons.luc.edu/luc_theses

Part of the History Commons

Recommended Citation

This Thesis is brought to you for free and open access by the Theses and Dissertations at Loyola eCommons. It has been accepted for inclusion in Master's Theses by an authorized administrator of Loyola eCommons. For more information, please contact ecommons@luc.edu.

This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 License. Copyright © 1947 Edward Joseph Snyder
THE FEDERALIST PHILOSOPHY OF GOVERNMENT AS
REFLECTED IN THREE IMPORTANT CONSTITUTIONAL DECISIONS OF JOHN MARSHALL

by

EDWARD JOSEPH SNYDER, S. J., B. S. S.

A THESIS SUBMITTED IN PARTIAL FULFILMENT
OF THE REQUIREMENTS FOR THE DEGREE
OF MASTER OF ARTS IN LOYOLA
UNIVERSITY

AUGUST
1947
VITA AUCTORIS

Edward Joseph Snyder, S. J., was born in Elizabeth, N. J., November 1, 1918. He received his elementary training at St. Catherine's Grammar School, Hillside, N. J. He attended St. Benedict's Preparatory School, Newark, N. J., and was graduated from Pingry School, Elizabeth, N. J., in 1937.

Upon receiving the Degree of Bachelor of Social Sciences at Georgetown University, Washington, D. C., in 1941, he entered the Society of Jesus at St. Andrew's Novitiate, Poughkeepsie, N. Y. In the Fall of 1944 he began his Philosophic Studies at West Baden College, at the same time entering the Graduate School of Loyola University as a candidate for the Degree of Master of Arts in History.
<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>INTRODUCTION</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td>II</td>
<td>THE HISTORICAL AND POLITICAL SETTING OF MARSHALL'S THREE MOST IMPORTANT CONSTITUTIONAL DECISIONS</td>
<td>6</td>
</tr>
<tr>
<td>III</td>
<td>THE CONSTITUTIONAL INTERPRETATION OF THE THREE DECISIONS</td>
<td>29</td>
</tr>
<tr>
<td>IV</td>
<td>THE THREAD OF FEDERALISM IN MARSHALL'S CONSTITUTIONAL DECISIONS</td>
<td>48</td>
</tr>
<tr>
<td>V</td>
<td>THE MAIN SOURCES FOR MARSHALL'S CONSTITUTIONAL DECISIONS</td>
<td>61</td>
</tr>
<tr>
<td>VI</td>
<td>CONCLUSION</td>
<td>79</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td></td>
<td>82</td>
</tr>
</tbody>
</table>
CHAPTER I
INTRODUCTION

The peculiar position of the Judiciary in the United States is a source of wonderment and an occasion of comment for Constitutional Law students the world over. Alexis de Tocqueville claimed that the Judiciary was the distinguishing note of American Democracy. The reason for this statement and the essence of the distinction lies in the fact that American judges founded their decisions on the constitution and not on mere laws.\(^1\) This implies that a constitution is something above other laws, that it has a note of supremacy and that governmental activity has its source and its legality from a conformity with the Constitution. Naturally someone or some group has to interpret the Constitution. In this country, from its infancy, this task fell to the courts. Their main job was to point out whether this or that law conformed with the Supreme Law of the land embodied in the Constitution. This is quite different from the system in England. For there the Parliament is supreme and is the chief source of

\(^1\) A. de Tocqueville, *Democracy in America*, A. A. Knopf, New York, 1945, 1, 100
authority. Its supremacy is unquestioned and its word is law. When this principle of Parliamentary supremacy was forced upon the colonies before the Revolution, they bucked like fiery colts and in so doing brought down the wrath of the English. For anyone who would not accept so fundamental a British political principle was no Britisher at all, but a rebel. Instead of looking to Parliament, the Colonists looked to the charters and claimed that these and the King were their source of authority and guide in political action. These charters stipulated the powers the Colonial legislatures were to exercise and preserved for posterity the written agreement between the King and the Colonists. It is a matter of history that the Colonial legislatures were subject to Judicial review from the time of their settlement. If a Colonial legislature violated a charter provision, such a violation was declared unconstitutional by the colonial courts. These judgments, in turn, could be appealed to the Privy Council in England. This august body had an auxiliary group called the Committee on the Privy Council for Appeals, whose function equaled that of the Supreme Court today. This body set the stage for one of the most important constitutional cases in American Constitutional History, *Marbury v. Madison*, 1803, which shall be discussed at
The constitutional charter of Connecticut, for example, read that any law of its legislature "should not be contrary to laws of England". Connecticut, however, passed a law which stated that the oldest son should receive a double portion of inheritance, while all other children should receive an equal share. This, of course, was quite at variance with the law of primogeniture in England which insisted that the oldest son receive the entire share of the inheritance. A Judge Winthrop died and his children shared his property according to the law of Connecticut. But the oldest son was not satisfied with the apportionment and took his complaint to court. His plea was rejected in the Courts of Connecticut, where the case of Winthrop v. Lechmere went down in history in favor of the State of Connecticut. Winthrop hastened to the Committee of the Privy Council on Appeals, which body decided that the legislative act of Connecticut on inheritance had violated the Connecticut charter and therefore was unconstitutional.

With this judicial tradition, it is not surprising

---

2 B. J. Hendrick, Bulwark of the Republic, Little, Brown and Co., Boston 1937, 95
3 Ibid., 95
to find that the framers of the constitution intended that the courts should exercise final jurisdiction on the constitutionality of legislative acts of Congress. Four outstanding authors of American Constitutional History, quoted at length throughout this paper, show us more conclusively how many of the framers were of this precise mentality.4 Professor Edward C. Corwin gives us a complete resume of the attitude of the men of the Convention of 1787 on this subject. He says:

Nor can there be much doubt that the members of the convention were also substantially agreed that the Supreme Court was endowed with the further right to pass upon the constitutionality of acts of Congress. The available evidence strictly contemporaneous with the framing and ratification of the Constitution show us seventeen of the fifty-five members of the Convention asserting the existence of this prerogative in unmistakable terms and only three using language that can be construed to the contrary. More striking than that, however, is the fact that these seventeen include fully three fourths of the leaders of the Convention, four of the five members of the Committee of Detail which drafted the Constitution and four of the five members of the Committee of Style which gave the Constitution its final form.5

4 They include Albert Beveridge, Charles Beard, Professor Edward S. Corwin and Charles Warren. Those who are opposed include Louis Boudin, Chief Justice Walter Clark and William Trickett.

To many students of American History, the change in American governmental officials from the conservative element of Washington, James Wilson and John Adams, to the liberal spirit of Jefferson, Madison,6 and Jackson, has been an enigma. There is a difficulty in understanding how our way of life could continue more or less the same under the influence of men whose fundamental political tenets were so different. This study will attempt to show that the unity of American life from 1787 to 1835 was mainly due to the conservative principles of the Federalist Party; more in particular, it will deal with the man who was chiefly responsible for building this spirit of national unity from the blueprints of the Constitution. We will see how the Marbury Case, the McCulloch Case and the Dartmouth College Case, along with other related cases, the living monument to the genius of John Marshall, Chief Justice of the Supreme Court from 1801 until 1835, preserved the spirit of national unity throughout America.

6 Ibid., 12
CHAPTER II
THE HISTORICAL AND POLITICAL SETTING
OF MARSHALL'S THREE MOST IMPORTANT CONSTITUTIONAL DECISIONS
MARBURY V. MADISON

The year 1800 found two opposing forces striving for leadership in the American government. The Federalist party was one force. It controlled the reins through the steady hands of John Adams, second President of the United States, and John Marshall, Secretary of State and soon to be appointed Chief Justice of the Supreme Court. The Federalists favored a policy of strong national government, as was evidenced by Adams' Alien and Sedition Acts. Hamilton, too, from his writings in the Federalist, can be categorized as an advocate of strong national government. This party voiced its sentiments in the famous Kentucky and Virginia Resolves written by Thomas Jefferson and James Madison respectively. These men were chiefs of the opposition; they strongly advocated the right of the individual state to interpret the constitutionality of Congressional acts.

When it became evident, after the elections of 1800,
that the Federalists had suffered a crushing defeat at the polls, last minute preparations were made by the Federalists to saddle the country with a judiciary that favored a strong central government. 1

The Federal Court during this adolescent stage of the Constitution was probably the most unpopular branch of the Federal government. The life tenure of the judges, the presumption of the Courts to pass on the constitutionality of the law, and the arrogance of some of the federal judges irritated the Republicans. More than that, there was real hostility to the courts as such. The general poverty, the poor markets, the want of a sound financial system, the Republican sentiments of freedom and equality of men, and the jealousy of the National Government that had seated Jefferson, made the whole machinery of the courts hateful to the dominant element in politics. There had been unanimous dissatisfaction with the Judiciary Act of 1789. Some go so far as to say it pleased only one man, Ellsworth, the author of the bill. 2 The Federalists now prepared to nullify this act by proposing a bill of their own. The Supreme Court was no longer to go on cir-

2 Beveridge, III, 53
cuit. Six circuit and twenty-two district courts were established and new judgeships created. On February 27, 1801, a new act conferring forty-two justiceships for the District of Columbia and Alexandria was passed. The Senate confirmed the appointment on March 3, and "on that night the commission was signed by Adams and sealed by Marshall, then Secretary of State and newly appointed Chief Justice." But the commissions were not delivered. Craigmyle says that "by an inadvertence" they were not delivered. Beveridge is more explicit, and gives adequate proof that due to Marshall's "customary negligence of details, he failed to deliver the commissions to the appointees. Instead... he left them on his desk..." When Jefferson was inaugurated, he directed Madison, as Secretary of State, to issue commissions to twenty-five of the persons appointed by Adams, but to withhold the commissions from the other seventeen. This action was held by all to be erroneous, but still the President refused to comply.

Among those whose commissions were withheld were

3 Ibid., 4
4 T.S. Craigmyle, John Marshall in Diplomacy and Law., C. Scribner's Sons, New York, 1933, 113
6 Ibid., 160
7 Craigmyle, 113
William Marbury, Dennis Ramsey, Robert Townshend and William Harper. These four men applied to the Supreme Court for a writ of mandamus, compelling Madison to deliver their commissions. The other thirteen did not join in the suit, apparently considering the office of Justice of the Peace too insignificant to be worth the expense of litigation.8

When the application of Marbury and his associates came before Marshall, he assumed jurisdiction, and in December, 1801, issued the usual rule to Madison, ordering him to show cause at the next term of the Supreme Court why the writ of mandamus should not be awarded against him. Soon afterwards, Congress abolished the June session of the Supreme Court. When the Court again opened in February, 1803, the case of Marbury v. Madison was still pending.

Marshall was determined to make use of his seemingly unimportant litigation to establish an essential power of the Supreme Court in the country, namely, to declare invalid acts of Congress that violate the Constitution.9 The unimportance of Marbury's commission is emphasized by

8 Beveridge III 160
9 Ibid., III
Craigmyle. He claims that the issue between the litigants "was only a trivial affair". Mr. Beveridge tells us that so far as practical results were concerned, the case of *Marbury v. Madison* was "of no consequence whatever to anyone".

It is to be noted that the aid of the Court was invoked on the ground that an act of Congress authorized that Court "to issue writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed by or persons holding office under the authority of the United States". 10

Two questions were involved in this case, according to the seeing eye of John Marshall. The first was whether the authority thus given to the Supreme Court by the act to issue writs of mandamus to public officers was warranted by the Constitution. The second was a corollary of the first. If the authority was not warranted, was the court competent to declare void the act which undertook to confer the authority. 11

The decision of the case turned on the point whether

11 Ibid., 181
the Supreme Court had power to issue a writ, inasmuch as the Constitution gave to the court no original jurisdiction in such a case. The Judiciary Act, in so far as it attempted to increase the jurisdiction, conflicted with the Constitution and was void. The actual decision, then, was against Marbury and limited and restrained the Court from exercising the power Congress had granted to it. What stung Jefferson and the Republicans however, was Marshall's opinion on the illegality of the writ. Jefferson considered this "writ of mandamus" as an insult to the president and the symbol of "judicial arrogance".12 Such a contrast to anticipated procedure on the part of Marshall in declaring the writ void was a blow to the hopes of Jefferson. For the leader of the Republican party and the choice of the people had concocted a plan to eliminate undemocratic Federalism entirely from the American government. The influence of the Nationalist leaders had been reduced to a minimum by the will of the majority in both the executive and legislative branch of the government. The judicial branch now was the only hope of men like Adams, Marshall and James Wilson, who were using all their ingenuity to preserve the spirit of the leaders of the Federal Con-

12 Hendrick, 182
vention in the new government of the United States. Jefferson reasoned that since the majority indicated their will in the elections of 1800, and since the essence of democracy was in doing the will of the majority, was it not inconsistent to have the spirit of the nation blocked by the federal judges? Jefferson had taken the first step in the process of elimination by refusing to send the commissions to seventeen justices appointed by Adams. After that, he and the party were ready to take a slightly more drastic step. By a series of impeachments it was possible to remove important Federalist judges and fill their shoes by appointing judges of the Republican creed. The process started at the beginning of the Congressional session of 1803 when the House impeached John Pickering, Judge of the United States District Court for the District of New Hampshire. The spirit was catching, for the newly elected Republican House in Pennsylvania impeached Judge Alexander Allison. Now Anti-federalists were setting their hearts on the removal of Samuel Chase from the bench.

Jefferson's reasoning regarding the Marbury Case was logical. Marshall naturally would decide the case in favor of Marbury, so that as many Federal appointees might hold office as was possible. But his decision would boomerang, for in attempting to secure the reign of the Fed-
eralists in the judiciary, Marshall would give grounds for impeachment, lose the key position for the Federalists, and go down in ignominious judicial defeat.

Marshall was aware that he was liable to impeachment. However there was something he feared even more than impeachment, and that was the man Jefferson would appoint in his place, Roane of Virginia, a dyed in the wool Republican. Without a doubt the principles of Federalism, to which he was devoting his life, would give way to those of Republican State Sovereignty. Under this pressure Marshall conceived the greatest Supreme Court solution in our history. He stunned Jefferson because in one sense, he solved the case in Jefferson’s favor. Jefferson complained about the writ of mandamus. This writ was the sign of judicial arrogance - and Marshall in Marbury v. Madison denied the power of the Supreme Court to use such a writ and thus sided with Jefferson. But herein lay the genius of the solution because in admitting this point at the same time he denied the power of Congress to confer such jurisdiction on the Supreme Court. And in denying Congress' power to confer such a jurisdiction, Marshall secured for posterity the right of the Supreme Court to pass on the constitutionality of acts of Congress. The tables were
completely overturned. Jefferson had to scuttle his plans while the Federalist flag waved victoriously in the wind.

**McCulloch v. Maryland**

The First Bank of the United States, designed by Alexander Hamilton, functioned well during the first twelve years of its existence. It was managed according to high banking standards, and contributed its share in maintaining the national credit.\(^{13}\) It served as a clearing house for the government and, without cost, transacted all business pertaining to the funds of the government. The First Bank of the United States did not yield to the temptation of overspeculation but kept a level head in the execution of its functions and duties. But despite this rather envious record, there arose an antagonistic attitude towards this national corporation. This spirit was concomitant with the coming of the Republicans to power. Jefferson insisted that the project was unconstitutional. Madison in the first Congress had opposed the bill to incorporate the First Bank of the United States. According to him, Congress had no power to create corporations.\(^{14}\) However, as Mr. Beveridge remarks, the greatest objection to a

\(^{13}\) Beveridge, IV, 171

\(^{14}\) Ibid., 172
national bank was that it was a monopoly inconsistent with free institutions.\textsuperscript{15}

Jefferson voiced his opinion against the national bank twelve years after its institution, and in the third year of his presidency. He said:

This institution is one of the most deadly hostility \textit{sic} existing against principles and forms of our Constitution. An institution like this penetrating by its branches every part of the Union, acting by command and in phalanx, may in a critical moment, upset the government... What an obstruction could not this Bank of the United States with all its branch banks, be in time of war?\textsuperscript{16}

The fact that two thirds of the Bank's stock was owned in England did not add to its popularity with Americans.\textsuperscript{17} Unconstitutionality and "foreign ownership" were pet phrases of the agents and friends of state banks.\textsuperscript{18}

The state banks, eager for the profits of the National Bank and its branches, "chafed under the wise regulation of their note issues..."\textsuperscript{19} The Virginia State Bank, for example, practically had a banking monopoly and was eager to become the depository of national funds.\textsuperscript{20} Besides,

\begin{enumerate}
\item \textsuperscript{15} Ibid., 172
\item \textsuperscript{16} Ibid., 172
\item \textsuperscript{17} Ibid., 172 (ff.)
\item \textsuperscript{18} Ibid., 172
\item \textsuperscript{19} Ibid., 173
\item \textsuperscript{20} Ibid., 174
\end{enumerate}
Federalists were in charge of these National Banks and their branches, while Republicans controlled the reins of the government. At the same time, the state banks had control of the newspapers, and had successfully stirred up considerable antagonism against their rival, the National Bank.

On the very threshold of the War of 1812, the National Bank was voted down by a majority of one vote in the Senate and House. While foreign ships steamed out of New York Harbor with large quantities of specie belonging to foreign banks, restrictions on state banks were released. Within a short time, these same state banks abused their liberty and were operating "with unrestrained license".21

Two years of war without a National Bank forced the administration to admit that if it were going to conduct the war successfully, it had to have another Bank of the United States. But when it came to a concrete plan of execution, the Republican administration was "stymied". Then, when the war was over, Madison "timidly" suggested that Congress set up another National Bank, in order that the country might once more enjoy the benefits of a

21 Ibid., 176
"uniform currency".22

By 1816 the country found itself in a deplorable financial condition. The nation was flooded with a debased paper currency, issued by hundreds of banks which were free from restraint as well as irresponsible. The nation was still prostrate because the war had disrupted her commerce and curtailed her production. As a result the National Bank advocates had little trouble in incorporating a United States Bank to effect the resumption of specie payments and to establish a stable paper currency. But the economic disaster was not to be so easily remedied. Specie payments were resumed and the volume of debased currency lessened but the Bank was hated as badly as ever. It was blamed for the increasing depression and hard times.23

On April 10, 1816, the Second Bank of the United States was chartered, but this time a majority of the directors were Republicans. In that year there were 246 state banks, whereas in 1811, there were about 80 of these banks, and only 3 in 1800.24 In 1816, 21 banks were chartered in the thinly populated state of Ohio. In 1818, 43 new banks were authorized in Kentucky. All

22 Ibid., 180
23 Cotton, 302
24 Beveridge, IV 178
kinds of companies like "bridge companies, manufacturing companies and mercantile companies" were authorized to issue bills. Private banks sprang up and did business without any restraint. "Nothing more was necessary to start a banking business than plates, presses and paper". 25 Notes current in one part of the country were refused or taken at a large discount in another. Beveridge quotes Niles to the effect that there were not "half a dozen banks in the United States that are able to pay their debts as they are payable". 26 Beveridge quotes the same authority as saying that in August, 1818 "the notes of at least one hundred banks in the United States are counterfeited". 27

Into such a picture stepped the Second Bank of the United States. In the beginning it was guilty of many blunders and of corruption; it over-issued and increased inflation; it lavishly accommodated borrowers; in many cases branch officers and directors issued notes as recklessly as did some of the state banks. 28

Yet these branches did refuse to accept bills of

25 Ibid., 192
26 Ibid., 194
27 Ibid., 196
28 Ibid., 197
notoriously unsound local banks, while they accumulated an enormous amount of state bank bills. They were well disposed to extend unending indulgence to the state banks and other borrowers, but they were finally compelled by the parent bank to demand payment of loans and redemption of bills of local banks which they held. When the branch banks carried out their orders, those sections of the country paid most dearly where the excesses of state banking were most notorious, for in those sections the collection of debts came like the plague in the night.

On August 28, 1818, the branches were directed to refuse all notes except their own. Thus the bank "like an abandoned mother...bastardized its offspring", said the critics of the National Bank, among whom could be included all state banks and most of the people. The National Bank was reducing the currency while the state banks and the people were clamoring for more currency. Bankruptcy showed its face on the horizon like a dreaded disease. Once more Mr. Beveridge quotes Niles: "Never...have any...laws been more productive of crime than the insolvent laws of Maryland". One issue of the

29 Ibid., 199
30 Ibid., 201
Federal Gazette (Maryland) contained six columns of bankruptcy notices.31

In 1818 John Quincy Adams testified that:

Our greatest real evil is the question between debtor and creditor, into which the banks have plunged us deeper than would have been possible without them. The bank debtors are everywhere so numerous and powerful that they control the newspapers throughout the Union and give the discussions a turn extremely erroneous and prostrate every principle of political economy.32

The states seemed to have one weapon against what many people sincerely thought was their enemy. That was taxation. They would tax the Second Bank of the United States out of existence. The blows against sovereign states should be warded off by weapons appropriate to such states.33

Indiana's first Constitution prohibited any bank chartered outside the state from doing business within its borders. Shortly after the National Bank opened its doors in 1817, Maryland passed an act taxing the Baltimore branch $15,000.00 annually. Seven months later the legislature of Tennessee enacted a law that any bank

31 Ibid., 201
32 Ibid., 205
33 Ibid., 207
chartered under its authority would pay $50,000.00 each year for the privilege of banking in that state. A month later Georgia placed a special tax on the Second Bank of the United States and so did Illinois, North Carolina, Kentucky and Ohio.34 Such legislation seemed to forecast the extinction of the Second Bank of the United States. But laws and great documents, as well as great men, are the fruit of crises, and this financial crisis was not an exception, for it produced the masterpiece of judicial decision known as the McCulloch v. Maryland Case.

The actual case of McCulloch v. Maryland arose out of an attempt on the part of the State of Maryland to tax the operations of the branch bank of the United States in the city of Baltimore. The State of Maryland in 1818 passed an act requiring all notes issued by banks not operating by authority of the State to be issued on stamped paper.35 If these requirements were not met, a tax of $15,000.00 had to be paid. The Baltimore Branch Bank issued its notes on unstamped paper and at the same time refused to recognize the authority of the State of

34 Ibid., 207
35 Cotton., 302
Maryland, by refusing to pay the $15,000.00 tax. On May 8, 1818, James William McCulloch, the cashier of the Baltimore Branch Bank was sued for the "recovery of the penalties prescribed by the State of Maryland". The case centered around the constitutionality of the act of the State of Maryland as applied to the National Branch Bank in Baltimore. The case came directly before the Supreme Court "on appeal" or on an "agreed case". We shall examine the case more in detail on pages 43 to 47 and 72 to 78.

TRUSTEES OF DARTMOUTH COLLEGE V. WOODWARD

On December 13, 1769, Eleazar Wheelock was granted a charter for his school by John Wentworth, Royal Governor of the Province of New Hampshire. The charter established Dartmouth College for the education of Indians to be governed by "one body corporate and politic" by the Trustees of Dartmouth College. The Trustees were given a completely free hand in conducting the institution; Wheelock was made President of the College and given power to appoint his successor. The charter stipulated that the

36 Beveridge, 283
37 Cotton, 302
38 Beveridge, IV, 224
"trustees and their successors forever, or the major part of any seven or more of them convened" were to make all laws, rules and regulations for the College. They were also given the power to remove and choose a President of the College and fill any vacancy on the Board of Trustees occasioned by death, removal or any other cause. Dartmouth College was established and governed for nearly a half a century under this charter. In 1799, Eleazar Wheelock died; he willed that John Wheelock, his son, should succeed as President.

In 1793, Nathaniel Niles, a lawyer, was elected one of the Trustees. He had studied theology under Dr. Joseph Bellamy, who had engaged in bitter religious controversies with the elder Wheelock, for Bellamy was a Congregationalist, Wheelock a Presbyterian. Niles and the younger Wheelock inherited these religious differences from tutor and parent. Niles gradually acquired superior influence over the Trustees and thereafter, no friend of President Wheelock was elected to the Board. Wheelock, perturbed by the new turn of events, drew down upon himself the wrath of the Board when he asked the state legislature to investigate the conduct of the College. The people of the state instinctively took sides over this controversy regarding the only college in their state. Pamphlets were the means
chosen by both sides to express their feelings and to win support. Wheelock himself was the first to plead his cause. When another pamphlet appeared in favor of the Wheelock faction, in quick order two appeared in favor of the opposition. These pamphlets naturally found their way among the people and helped to bring the controversy to a head. On August 26, 1815, the Trustees removed Wheelock from office. Reverend Francis Brown of Yarmouth, Maine, was elected Wheelock's successor by the same Board two days later.

The political parties soon found themselves on opposing sides, the Federalists leaning to the side of the Trustees, the Republicans to the side of Wheelock. Then, with the election of William Plumer, an anti-federalist to the governorship of New Hampshire, and the securing of a majority in the legislature by the Republicans, a new political turn occurred. Governor Plumer, in his message to the legislature said that he detected a monarchical tinge in the charter of Dartmouth College, which he thought hostile to free government. Since Dartmouth College was founded for the public good, Plumer argued that the state had every right to amend and improve its charter.39 As a result of this message the legislature

passed an act changing the name of Dartmouth College to Dartmouth University, increased the Trustees from 12 to 21, and created a Board of Overseers with veto power over the acts of the Trustees. When the old Trustees refused to recognize these new provisions, the Governor and his council of state set up a new university.

In the meantime two members of the old Trustees went to work drawing up a defense of their position. These men, Thomas W. Thompson and Asa MacFarland by name, really foreshadowed the work of Daniel Webster when they based their argument on the fact that Dartmouth College was the result of a contract between the State and the twelve trustees. This contract entitled the Trustees to rights and privileges which the State was bound to respect.

The final step in the controversy and the beginning of the Dartmouth College Case, began when William H. Woodward, Secretary and Treasurer of Dartmouth College, who had in his possession the original charter, the College seal, and the record books, sided with the University. The Trustees of the College sued him for what they claimed was their property. By mutual agreement between the litigants, the case was taken to the Court of Appeals of the State of New Hampshire. Then the Dartmouth College
Trustees, losing the case in the Superior Court of New Hampshire, appealed to the Supreme Court of the United States. The Superior Court of Appeals had decided against the College on the basis that a corporation whose "franchises are exercised for public purposes, is a publick corporation" and that a gift to such a corporation "is in reality a gift to the publick". The Court claimed that the office of Trustee of Dartmouth College was as much a public trust as the office of governor or judge. Chief Justice Richardson, in delivering his opinion said that it was against sound policy "to place great institutions of learning within the absolute control of a few individuals and out of the control of the sovereign power..."

Immediately the case was taken to the Supreme Court of the United States by Writ of Error which assigned the violation of the National Constitution by the College Acts as the ground for appeal. Daniel Webster and Joseph Hopkinson of Philadelphia argued the case for the College Trustees, while John Holmes, a Representative in Congress from Massachusetts, and William Wirt, Attorney-General

---

40 Haines, 391
41 Beveridge, IV 236
of the United States, appeared for the University. The case began on March 10, 1818.

Showing that Dartmouth College was an eleemosynary corporation, Webster went as far back as the Magna Carta to show the protection to which such a corporation was entitled. He hit against the right of New Hampshire in legislating against Dartmouth College, by asking the question: "What is the meaning of the words 'no state shall pass any...law impairing the obligation of contracts'"? 42 Webster went on to show that Madison was on the side of the College. In the Federalist, Number 44, Madison clearly stated that "such laws (impairing the obligation of contracts) are contrary to the first principles of the social compact, and to every sound principle of legislation". 43 Madison went on to say that "our own experience has taught us...that additional fences should be built against spoliations of personal security and private rights". 44 Further authority was the Supreme Court itself in the Fletcher v. Peck Case when it declared that "a grant is a contract,...and a grant by a state is also a contract, as

42 Ibid., 245
44 Ibid., 245
much as the grant of an individual". 45

At eleven o'clock on March 13, 1818, the morning after the argument was concluded, Marshall announced that because of the indecision of some of the judges, the case had to be continued. Finally, after a deliberation of three days, the Chief Justice announced that the Court had decided that the agreement between the State of New Hampshire and the Trustees of Dartmouth College was a contract "the obligation of which cannot be impaired without violating the Constitution of the United States". 46
CHAPTER III

THE CONSTITUTIONAL INTERPRETATION OF THE THREE DECISIONS

Charles Grove Haines in his recent book, The Role of the Supreme Court in American Government and Politics from 1789-1835, devotes a portion of his first chapter to the process of judicial interpretation. Since some of his opinions laid down in this section are opposed to those we shall try to demonstrate in this essay, it will help to clarify our position by quoting from Mr. Haines. The keynote of Mr. Haines' theory regarding the process of judicial interpretation is found on the title page of the book. There he quotes Chief Justice Hughes as saying: "We are under a Constitution, but the Constitution is what the Judges say it is". In giving his reader the meaning of words in judicial decisions, Mr. Haines quotes Chief Justice Holmes as saying:

A word is not a crystal, transparent and unchanged, it is the skin of living thought and may vary greatly in color and content according to the circumstance and time in which it is used.\(^1\)

Finally he gives us a set of opposing quotations, one from Chief Justice Marshall and the other from Justice Cardozo.

\(^1\) Haines, 28.
Justice Cardozo denies the contention of Marshall that the judge has no will in any case except the "will of the law", when he observes that:

he (Marshall) gave to the Constitution of the United States the impress of his own mind; and the form of our constitutional law is what it is because he moulded it while it was still plastic and malleable in the fire of his own intense convictions.2

Our duty is to go one step farther and to show that Marshall's intense convictions were nothing more than the spirit of the conservative element that was so influential in the Federal Convention of 1787. We shall try to show that these two apparently opposing quotations are really in agreement, for Marshall's intense convictions were the same as the spirit of the predominating element of the convention and therefore the "will of the law". And in place of the conviction that the "Constitution is what the Judges say it is", we shall give evidence from John Marshall's three cases treated in the first chapter, that Marshall favored Justice Sutherland, who, when speaking about the words of the Constitution, said; "Their meaning is changeless; it is only their application which is extensible".3

2 Ibid., 39
3 Ibid., 40
Alexis de Tocqueville, keen student of American governmental institutions, in his book, *Democracy in America*, notes some characteristics of judicial power in general. One of them is the duty of arbitration. "But", he says, "rights must be contested in order to warrant the interference of a tribunal. As long as a law is uncontested, the judicial authority is not called upon to discuss it..."\(^4\) Chief Justice Marshall above all else, was a Federalist. He lived that he might make operative the federal principles laid down in the Convention of 1787, reiterated and developed in the Federalist Papers of Hamilton, and echoed in the debates leading up to the Judiciary Act of 1802. His mind was a practical one, and a patient one. He must bide his time and wait for the psychological opening to put into execution the fundamental tenets of the Federalist party. Since "as long as a law is uncontested, the Judicial authority is not called on to discuss it", Marshall had to use every bit of intellectual acumen to see in cases that came before his court, an opportunity to advance his cause.\(^5\)

However, before we look into the particular cases that did so much to establish a national government in the

---

\(^4\) de Tocqueville, 99
\(^5\) Haines, 43
United States, let us see what the political contestants were fighting about during the infancy of our American Republic.

G. K. Chesterton would have taken great delight in a study of the principles of Federalism and Republicanism during the formative years of American democracy, for he relished paradoxes. We are about to see how opposing fundamental theories of government, postulated on the one hand by Hamilton, James Wilson and John Marshall and on the other by Jefferson, Randolph and Sherman, constitute the body and soul of our political heritage. Hamilton, interested in property rights and bent on safeguarding minority claims, would eliminate the insecurity of the minority by creating "a will in the community independent of the majority". Safety, discipline, prosperity and happiness would be part of our society, provided there existed a system of laws, supreme in their nature, with their source in the people, yet irresponsible to the ephemeral and sometimes contradictory desires of the people. An aristocratic democracy, a government of all the citizens, for all the citizens, by the most capable of the citizens, was what the Federalist wanted for the United States. We shall see how the Federalist champions

6 Haines, 197
pooled their interests to stamp an indelible mark of "national" in the spirit of our political tradition.

Hamilton's contribution to the Federalist Stock Company was a clear cut notion of the importance of fixed national institutions in the preservation of a sound financial system. This conviction was embodied in his cabinet opinion on the establishment of a National Bank, a document which caused President Washington to decide in favor of the Bank, contrary to the suggestions of two other cabinet members, Jefferson and Randolph.\(^7\) Wilson's interests in the Company were represented by a masterful defense of the "consolidated government" in the Pennsylvania State Convention, immediately following the Federal Convention, as well as by public speeches, pamphlets, and lectures which boosted the Federalist cause. John Marshall, refusing to gamble on the will of the majority because of the American people's refusal to pay their debts to England at the end of the Revolutionary War, and because of the fear of popular revolt due to Shay's Rebellion, cast his lot with the Federalists and enhanced their cause by giving them the greatest judicial mind the Supreme Court has ever had.\(^8\)

An aristocratic democracy, but nevertheless a real

---


\(^8\) Corwin, 231
democracy, was the preoccupation of the early Federalists. All government had its source in the people, all government was executed for the people and by the people. The Constitution was the document, the instrument through which the people declared their will in carrying the spirit of democracy into practice. This Constitution was the supreme law of the land and lent stability to life. In order that it might remain a supreme law, and not subject to the weaknesses of men, checks and balances and independence of departments were essential. But government, if it were to secure stability for society, must have the means within its power to protect minority rights like property rights and private contracts. To insure such a vital protection, which John Locke had said was the prime function of government, a unique twist was given to the function of the Judiciary. It was to be the bulwark of our democracy, the protector of vested rights. Like the "General Will" of Rousseau, which forced the minority to be free by forcing it to conform to the "General Will", the Judiciary, by its complete independence and remoteness from the people, came to their aid when disputes arose over their interests and pointed the way to truth by a calm, deliberate and reasonable interpretation of their rights and duties. A perfectly impersonal and unbiased interpretation
was necessary for stability, economic prosperity and community peace. It is the genius of the American governmental system that de Tocqueville says distinguishes American democracy from other democracies. Based, as the Jeffersonian Republicans claim, on the most undemocratic of principles, the judicial right of interpreting the Constitution is the salient characteristic of the democracy of democracies, the American democracy.

Jeffersonian Republicans, on the other hand, detested the implication that the majority could not look after its own interest. Such a statement smacked of aristocracy and monarchy according to them and should have no part in American political life. This group, although it had its Hegel and Fichte in men like Jefferson and Madison, lacked its Hitler to carry its philosophic principles into practical realities. So Jefferson and Madison and Randolph tried to play a double role. They looked for a bulwark against anti-republican tendencies in the state governments. In the state governments they saw a check on the national power as well as a means to prevent undue influence from a "monster" national government that would

---

9 de Tocqueville, 100
override the rights of its master, the people, just like Frankenstein did his own master. Repulsive to the Republicans was the disrespectful attitude toward the majority, whose will, according to Jefferson, was law. He was not interested so much in the stability of government as he was in insuring the dominance of the will of the majority. Such general phrases as, equal and exact justice to all men, honest friendships with all nations, support of state governments in all their rights, freedom of religion and freedom of the press were the strongholds of democracy.

In such generalities did the Jeffersonian Republicans communicate their political message to the world. But while they shouted from the housetops that faith in the will of the majority was the salvation of democracy, the well organized minority of Federalists went about carefully securing the rights of minorities. The inviolability of contracts was made secure by the Dartmouth College Case; a promise of a stable currency was looked for after the McCulloch Case. The right of the states to interpret the Constitution and to preserve the spirit of the Constitution, a trump card in the hand of the Republicans, was defeated by the Marbury v. Madison and Fletcher v. Peck cases. Although the Republicans managed consistently to win
majorities in both the House and the Senate, nevertheless the Federalist chiefs quietly went about sowing the seeds of a strong national government. Of course, the American public were not unaware to the situation. They were attracted by the high sounding phrases of the Republicans and enjoyed the pat on the back regarding the integrity of the majority, but they also knew that the boon to industry and commerce after the Dartmouth College Case in 1819 did not flow from these same general principles. American democracy was functioning for the interests of the majority through those acts that secured the rights of minorities. The paradox is brought into the open when we remember that the Republicans had undisputed control of the executive and legislative branches of the government, and a majority on the Supreme Court Bench in the year 1819, yet the McCulloch Case, decided unanimously by the Supreme Court Judges, interpreted the case in conformity with the spirit of Hamilton's Cabinet Letter to Washington of February 23, 1791 on the doctrine of implied powers. So, while the Jeffersonians drank deeply of the spirit of the French Revolution, Liberty, Equality and Fraternity and fascinated the American citizens to the extent of paying

10 Lodge, III, 494
dividends at the polls, the Conservatives gave vitality to a more sober, more wise, more practical and more efficient democracy by passing on to posterity a national tradition of unity that proved its metal when tested in the fire of the Civil War.

Now let us draw closer to the battlefield and watch the thrusts and parries of the political swordsmen. In 1802 the Federalists suffered a crushing blow when the Republicans, pushing through the Repeal Act of 1802, voted against the supervisory power of the Judiciary over the National Legislature. The debates in Congress which preceded the Repeal Act were the warning signal for the momentary end of the Federal principle of judicial supremacy. Jefferson and his party were out to stifle the new Judiciary Act of 1801 and to render ineffective the swan song of the Federalist's champion, President Adams. The point at issue, and the target at which the Repeal Act was aimed, was the power of the Supreme Court to annul acts of Congress. With this stumbling block out of the way, America would be a real democracy, and the flag of Republicanism, so becoming to the dignity of man, would wave victoriously in the wind. Once again the two parties were drawing swords in anticipation of a later day when swords of steel would replace the sharp thrusts of words. However,
this Repeal Act did more than sink the enemy ship, for it laid the foundation for the Marbury decision, which turned the seeming Republican victory into unexpected defeat. There were few arguments in the Marbury case that were not used on the floor of Congress by the Federalists in their uphill battle to save Federalist principles. As Beveridge notes, all the reasons Marshall gave one year later in the Marbury Case were given during the fight over the Judiciary Act of 1801.11

On January 6, 1802, Senator John Breckenridge, capable exponent of Republican democracy, voiced a fundamental tenet of Jefferson's constitutional creed, when he said that the Legislature, as far as law making power is concerned, have exclusive right, while the Judges have an obligation to carry out the laws they make. But Gouverneur Morris, a member of the Federal Convention, challenged such a statement. He remarked that according to Republican doctrine, "the moment the Legislature... declare themselves supreme, they become so...and the constitution is whatever they choose to make it".12

James H. Bayard, who won the award for most skillful

11 Beveridge, III, 75.
12 Ibid., 71.
swordsman for the losers, said in a prophetic tone:
"Destroy the independence of the National Judiciary and the moment is not far when this fair country is to be desolated by Civil War." 13

John Randolph of Roanoke, one of the three full time members of the Federal Convention of 1787 who did not sign the Constitution, led the House in quashing the Federalist judicial principle. 14 He argued that "the proper restraint of the legislature was not found in a pretended power of the Judiciary to veto legislation, but in the people themselves, who at the ballot box could apply the constitutional corrective". 15 This, he claimed as a "true check". Every other one was at variance with the principle that a free people are capable of self-government. In general, the sentiments of the Republicans in the debate, though sometimes not quite so forceful, may be summed up in the words of Jefferson in a letter to Mr. Jarvis, on September 28, 1820, when he wrote that "to consider the judges as the ultimate arbiters of all constitutional questions... would place us under the despotism of an oligarchy". 16

13 Ibid., 82
14 At this time the House was Republican two to one, while the Senate had a Republican majority (cf. Beveridge, III, 72.)
15 Ibid., 85
16 Ibid., 144
The upshot of the debate was a repeal of the Judiciary Act of 1801. But the defeat was a blessing in disguise for it made Marshall see the exigency of establishing firmly in our political tradition the right of the Supreme Court to pass on the Constitutionality of Congressional acts, and in so doing provoked his famous decision in the Marbury v. Madison case of 1803. Marshall had issued a writ of mandamus to Madison in 1801, demanding that the Secretary of State give reason why Marbury did not receive his commission. But the Repeal Act of 1802 abolished the August term of the Supreme Court, so it was not until February, 1803 that the case finally came to the Court. This power of issuing the writ of mandamus was a power given to the Supreme Court, not by the Constitution, but by Congress itself, in Section 13 of the Judiciary Act of 1789. In this section Congress gave to the Supreme Court the power to issue the writ of mandamus "to any courts appointed or persons holding office under the authority of the United States..."17 When Marshall issued the writ in 1801 there is no evidence that he intended to dispute the power of the Supreme Court to issue such a writ. Only the force of the Repeal Act of 1802 seems to account for

17 Cotton, I, 38.
the apparent change in procedure on the part of Marshall.\textsuperscript{18}

Now, in 1803, the case took on a new aspect. It was a golden opportunity, for here was a case that claimed its jurisdiction from a Congressional act. Yet by what power did Congress pass on such a jurisdiction? It was in this decision of Marshall's that he judged the incompetency of Congress to confer such a power and thus established the principle that the Supreme Court had the power to pass on the constitutionality of acts of Congress, for "it is the very essence of Judicial duty...to determine if a law be in opposition to the Constitution."\textsuperscript{19}

After the elections of 1800, the influence of the Federalist party in national politics waxed and waned until the war of 1812, when its influence was reduced to the barest minimum. But despite the fact that the Republicans controlled both the executive and legislative branches of the government, Marshall was molding the minds of the interpreters of the Constitution along Federalist lines.

In 1819, when the McCulloch v. Maryland Case came up, there were five Republican-appointed Judges on the Supreme Court Bench. Despite the fact that the case brought up

\textsuperscript{18} Beveridge, III, 133.
\textsuperscript{19} Cotton, I, 39
the issue of Federalism versus State Sovereignty, all five Republican justices concurred with Marshall in rendering a unanimous decision in favor of the Federalist interpretation of the Constitution.20

Adhering to the spirit of the Kentucky Resolves, which in no way reflected the spirit of the leaders of the Federal Convention of 1787, the defenders of the state of Maryland insisted that the Constitution flowed from the acts of sovereign and individual states and received its power from the states and not from the people. Marshall, ever on the watch for despoilers of the tradition of 1787, used the case as an instrument for projecting Federalist doctrine into the practical tradition of our government. "The government of the Union", said Marshall, "is emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them and are exercised directly on them and for their benefit."21

But more to the point was the doctrine of implied powers versus the Jeffersonian "strict interpretation" principle. Marshall was ready to admit that the powers of the government were "enumerated". And, of course, the dif-

20 Haines, 354.
21 Cotton, I, 312.
ficulty that arose and that "will probably continue to arise as long as our system shall exist" was the "extent of those powers actually granted." But at least a principle could be laid down that would shed some light on the solution of the problem. "The government of the Union, though limited in its powers, is supreme within its sphere of action." 23

It is true that the power to create a National Bank was not expressly granted to Congress by the Constitution, but was it not according to the spirit of the Constitution to argue that "a government entrusted with such ample powers, on the due execution of which the happiness and prosperity of the Nation so vitally depends, must also be entrusted with ample means for their execution?" For "the power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means." This principle is reiterated and re-echoed by Marshall throughout his decision. Even in more forceful words he says again:

23 Ibid., 313.
24 Ibid., 315
25 Ibid., 315
let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional. 26

So far we have noted a planned exposition of the meaning of the implied powers of our government, which might have been a part of any treatment on the significance of the United States government. Marshall meets the advocates of the state of Maryland head on, however, when he speaks of an implied prohibition of powers relating to state governments:

the states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the federal government. This we think the unavoidable consequence of that supremacy which the Constitution has declared. 27

In the same year, 1819, we find Chief Justice Marshall deciding another of his most famous Constitutional cases, Dartmouth College v. Woodward. Although it is one of his most famous decisions, as far as practical, political and

26 Ibid., 329.
27 Ibid., 344.
economic effects are concerned, the constitutional principles set down, for the most part, have appeared in the two cases already reviewed. In 1803, in Madison v. Marbury, the Chief Justice established the right of the Judiciary to pass on the constitutionality of legislative acts. In the Dartmouth case he confirms that principle by denying the validity of the legislative act of the State of New Hampshire when it meddled with the Dartmouth College "contract". Marshall held that the Dartmouth College charter was a "corporate franchise" and a "corporate franchise is a contract and so inviolable and beyond the control of the state."

It was the Federalist principle that the Supreme Court was the defender of the rights of the people, through its protection of the private contract and the private corporation, that encouraged the businessman to undertake private enterprises without fear of governmental interference and that had such widespread economic effects. 28 Going back to the Constitution itself, Marshall

28 W. F. Dodd, Cases and Materials on Constitutional Law, West Publishing Co., St. Paul, Minn., 1941, 1234. Mr. Dodd says that "although the Dartmouth College Case dealt primarily with the charters of eleemosynary corporations, it has been uniformly accepted since as applicable to the charters of all kinds of business corporations...", 1234.
notes that "the American people have said in the Constitution that 'no state shall pass...any law impairing the obligation of contracts'". 29 He quotes the same document to the effect "that the Judicial power shall extend to cases in law and equity arising under the constitution". 30

Thus we have seen that Marshall was a Supreme Court Justice of the Federalist mold. He decided his cases on definite objective principles defined and clarified by the speculative intellects of Wilson and Hamilton and proved pure gold in the fire of practical experience. It was not changing, spur-of-the-moment, subjective principles that Marshall applied to the Marbury, McCulloch and Dartmouth College cases. His philosophy and political principles did not change according to the "circumstances and time", but rather they were changeless principles, changeless in their essence because they were based on man's true nature, the same today as yesterday and tomorrow.

29 Cotton., I, 352.
30 Ibid., 353
CHAPTER IV
THE THREAD OF FEDERALISM IN MARSHALL'S CONSTITUTIONAL DECISIONS.

Henri Bergson, noted modern French philosopher, claimed that every great philosopher has one great intuition, through which he penetrates the mysteries of intellectual knowledge. This great intuition is the foundation stone, the anchor, the alpha and omega of all truth for him. Every other bit of reality gushes forth from the fountain of this one truth and loses its identity in the stream of that one reality. St. Thomas Aquinas saw all truth in the light of being, and whether we examine his doctrine on Act and Potency or the Nature of Relations or Free Will, we shall always be able to hark back to the fountain head, "being", and discover a consistency of which few philosophers can boast.

But this ability to see things through one idea is not limited to the field of philosophy. Alexander the Great centered his life around the conquering of the world, Napoleon ambitioned France and Napoleon as the rulers of Europe and perhaps the world. Hitler was convinced of the superiority of the German Race and viewed all other races as the handmaids of his people. John Marshall saw the people of the United States as a great empire, but only
in so far as the people were united under one strong national or central government. This government must be free from the petty jealousies of subordinated state governments and had to be able to act for the good of the whole nation, even if that action might be irksome to some. Reasonable principles of rights and duties did not motivate men when personal advantages came into play, unless hard and fast rules whose sanction was never to be doubted were laid down by well-founded authority. People needed threats to make them toe the mark, if greed and personal advantage were not going to dethrone justice. That is why a central government must dominate the United States, for states as well as people can be selfish. This fact was obvious from the quarrels of Virginia and Maryland over the navigation of the Potomac, and from the advantage that New York and Pennsylvania took over New Jersey before the Federal Convention of 1787. Such action based on personal gain spelt disunion, strife and war. It would make North America the happy hunting ground for older and better schooled foreign states. The stone that would kill two birds, that would make for an unselfish relationship at home and a united front abroad, was a well-regulated,

1 Beveridge, I, 302
well-respected, strong and efficient central or national government.

The means by which such a government was established are a living tribute to the Constitution, the Founding Fathers and the genius of Marshall, the Chief Justice. During the period of his chief-justiceship, from 1801 until his death in 1835, Marshall delivered 519 opinions in the field of general law and 36 in the field of constitutional law. These 36 constitutional law cases are like a strong rope made of 36 robust strands giving valiant support to an otherwise tottering national government. Master weaver that he was, Marshall wove the strands amidst the clamor of the opposition, reminding us of the Scarlet Pimpernell of French Revolution fame, who calmly watched the guillotining of the French Aristocracy disguised as a peasant woman, yet all the while with great courage and skill, he plotted the rescue of his fellow aristocrats.

The first strand of tightly-knit rope that has weathered political storms for nearly one hundred and fifty years was the Marbury Case, which succeeded in establishing the fact that the Constitution is the supreme law of the land and secondly, that constitutional
interpretation ultimately rests with the Supreme Court. This latter point was not a new idea, as Charles Warren points out in his book, Congress, The Supreme Court and the Constitution. He gives conclusive evidence that many of the leaders of the Federal Convention were of this conviction. But the Marbury Case established in practice the Supreme Court's right to pass on the constitutionality of a coordinate national branch, the Legislature. Confirming the Marbury Case was the Fletcher v. Peck Case wherein Marshall, in 1810, judged that the Supreme Court also had final authority when it came to a showdown between a state legislature and the Supreme Court in matters constitutional.

Two working principles, then, were the practical fruit of the Marbury and Fletcher v. Peck Cases; that the Constitution is the supreme law of the land and the Judiciary has the final decision in declaring whether the laws of a state of the nation are unconstitutional. These principles gave birth to a healthy offspring endowed with integrity, rather than a possible temperamental child that would yield to the impulse of the moment.

In 1821, additional support was given to that already

---

2 C. Warren, Congress, the Constitution and the Supreme Court, Little, Brown and Co., Boston, 1925, 69 and 70.
robust principle of Judicial power in the case of *Cohens v. Virginia*. We note from this case that "the Judicial power of every well constituted government...must be capable of deciding every judicial question which grows out of the Constitution and laws". This is so, for "the constitution and laws of a state, as far as they are repugnant to the Constitution and laws of the United States are absolutely void".

The Republicans were forced to accept the *Marbury* Case, and the principle on which the *Fletcher v. Peck* Case was founded. At least they had to acknowledge that the Constitution was the supreme law of the land. However, they also had a theory on how to make this supreme law of the land as ineffective and inoperative as possible. One way was to establish the states as the interpreters of this supreme law, which the Kentucky and Virginia Resolves explicitly intended to do. But this plan was upset by the three cases just cited.

The Republicans, however, fought hard for their convictions and were as bent on undermining Federalism as Marshall was in building it up. So they came back strong with a principle, which, if successful, would tie the

---

3 Cotton, I, 412.
4 Ibid., 442
neatly woven strands of Marshall's constitutional cases in knots and render them useless. That principle was the "strict interpretation" of the Constitution leaving the door open to state supremacy. The National Government, they claimed, had only those powers which the states had explicitly given it; all others were retained by the state governments. The Federal Government had no power, for example, to establish a National Bank, because this power was not given explicitly by the Constitution. To set one up, then, was a usurpation of power, a stepping beyond the bounds of their rights. We have seen how Marshall made Hamilton's doctrine of implied powers live in the McCulloch Case; yet he was ever on the alert to back up a great case and to prolong its spirit by bringing it back to life in new forms. In the Gibbons v. Ogden Case (1824), he reminded us of the hierarchy of political values. "...the acts of New York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the union, must be erroneous." Marshall knew that the integrity of a government depended on the proper subordination of inferior governments, and consequently he never tired of pointing out the proper re-

5 Ibid., II, 62
The nullity of any act, inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged state powers, interfere with, or are contrary to the law of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.

In this same case Marshall singles out the power of Congress to create a bank for the purpose of carrying on fiscal operations as a particular example of their general power to create corporations as "appropriate means of executing the powers of government". Long before the Chief Justice had the opportunity to announce the doctrine of the Federalists on implied powers in a big issue like McCulloch v. Maryland, he evidenced his attitude on the subject in United States v. Fisher et al. in 1808, "Congress

---

6 Ibid., II, 63
must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the constitution. 7

Part and parcel of the Nationalist tenets was the insistence on the inviolability of contracts. The most famous case that had such great commercial significance was the Dartmouth College Case, already discussed in this paper. Marshall must have had the page that contained the words "No State...shall pass any Law impairing the Obligation of Contracts" 8 thumb worn. He was convinced that the integrity of vested rights was a most fundamental principle of government and society, and that the preservation of such rights was an essential function of government. He was aware that providing adequate safeguards for property and contracts against state legislatures was if not the most important, one of the most important tasks of the framers of the Constitution. 9 It was Madison's conviction that interference with this sacred right of property was more influential than anything else in producing the convention of 1787. 10 So naturally he was on the alert to discover in a case possibilities for

7 Ibid., I, 45
8 Article I, Section 10, American Constitution
9 Corwin, 147.
10 Ibid., 148.
for establishing the integrity of vested rights and in the *Fletcher v. Peck* Case, in 1810, such conditions presented themselves. The state legislature of Georgia, in 1785, had authorized the sale of 35 million acres of disputed territory for $500,000.00 to four companies known as the Yazoo Companies. With one exception, every man who signed the bill obtained rights in the granted land. In 1796 the Legislature rescinded its previous act, pronouncing it null and void. In 1802 the claims of Georgia over this same controversial territory were recognized and the land was no longer under dispute. A settlement was made and commissioners were appointed by Congress to settle the conflicting claims. Those of the Yazoo Companies were not even recognized. But the Yazoo organization, the majority of whose members came from New England, was not to be denied of what it claimed was its right. In 1809 and 1810 the case came before the Supreme Court on a Writ of Error from the circuit court for the District of Massachusetts.\(^\text{11}\)

Professor Corwin tells us that Marshall could easily have disposed of the case before coming to the principal question. Among other outlets was the fact that the fraud

\(^\text{11}\) Cotton, I, 228-231.
connected with the grant was notorious, the "most resounding scandal of the generation".12 Yet Marshall closed his eyes to the facts because they were riveted on a possible constitutional issue involving the principle of vested rights. The dispute, as Marshall saw it, came to whether Georgia had the power to rescind a land grant made by a preceding legislature. Such a rescinding act was a violation of vested rights which in its broader aspects violated a fundamental principle of society. The Chief Justice stretched the issue of the obligation of contracts and applied it to this case. For in a grant, he stated, there is an implied contract, to wit, the grantor implies by his grant that he does not intend to reassert his right to the thing granted.13 More clearly in the following words he dismissed all doubt in the question: "When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights".14

Although the Sturges v. Crowninshield Case, delivered at the same time as the McCulloch v. Maryland, and the Dartmouth College Case, is sometimes referred to as

12 Corwin, 152
13 Ibid., 153.
14 Cotton, I, 244.
"dangerous ambiguity", Marshall is definite when speaking of the obligation of contracts. He says that the "Convention appears to have intended to establish a great principle, that contracts should be inviolable".

Again in New Jersey v. Wilson, Marshall declares the sanctity of contract. New Jersey had granted a portion of land in South Jersey to an Indian tribe, exempt from all taxation. When the Indians decided to move to New York in 1800 to join "their brethren at Stockbridge", they applied for and obtained an act of the legislature authorizing the sale of their land. The land was sold in 1803 without anything being said about the taxation clause. Then in 1804 the Legislature of New Jersey repealed that clause which exempted the land from taxes. The highest court of that state had justified the procedure of the legislature, but when the case was brought before Marshall on a Writ of Error, he reversed the decision, claiming that New Jersey could have insisted on a surrender of the tax provision as the sole condition on which a sale of the property should be allowed—but she did not. Therefore, New Jersey impaired the contract and was in error.

We have seen in this chapter how four fundamental

15 Corwin, 190
16 Cotton, I, 297
conservative principles constituted the background for all the important constitutional decisions of John Marshall. The right of private contract, the Judicial right to interpret the Constitution and to pass on acts of Congress, and the precedence of the Constitution as the Supreme Law of the land were championed in theory by the leading conservative element in the Federal Convention of 1787, and were projected by Marshall into the warp and woof of routine American life. The same principles which characterized the Federalist Fathers in 1787, through the instrumentality of the Supreme Court Cases were now made the living tradition of a unified nation. The American Union, whose blood was beginning to thin in 1802 due to an overdose of political liberalism was gradually restored to its pristine purity by a series of planned Supreme Court decisions based upon these fundamental tenets of the Conservative Party. These decisions made our governmental system pulse again with the beat of national unity, even though it was robed in the gaudy garments of the Liberals.

Burton J. Hendrick, in his book, *Bulwark of the Republic*, a biography of the Constitution, wonders if the task of forging the Constitution was not a lesser task than making the Constitution acceptable to the individual state conventions and the people. For instance, in New
York two-thirds of the Convention and four-sevenths of the people, according to Hamilton, were opposed to accepting the new Constitution.\textsuperscript{17} We shall show in the next chapter how writings, like the Federalist Papers, during this momentous period of our history, along with the speeches in the conventions of New York, Virginia and Pennsylvania which were an elucidation of the minds of the leading members of the Federal Convention, were the chief source of material for Marshall's great decisions. Thus, an unbreakable chain, whose links were the Federal Convention, the documents in defense of the Constitution immediately after the close of the Federal Convention, and the Constitutional decisions of Chief Justice Marshall, secured for the ages to come the political integrity of the United States.

\textsuperscript{17} Hendrick, 98
CHAPTER V
THE MAIN SOURCES FOR MARSHALL'S
CONSTITUTIONAL DECISIONS

To appreciate more fully how perfectly Marshall grasped the spirit of the leaders of the Federal Convention of 1787, let us consider more in detail the writings of the men who were most influential in forming the Constitution and shaping the political thought of the Chief Justice. For behind John Marshall's constitutional decisions were great political principles for which he claimed no originality. He achieved the heights of greatness in his own field, but that field was not the origins of fundamental political principles. Rather, his claim to fame was his uncanny faculty to use constitutional cases as a stepping stone to a greater national union, to apply sound political principles at the psychological moment, when their establishment was in dire need and seemed almost impossible. So, for a clearer understanding of these political convictions, which caused Marshall to exercise such patience and courage in raising an almost lifeless infant to a healthy and sound manhood, let us see how the minds of James Wilson and Alexander Hamilton helped to form and
strengthen the Chief Justice's political principles.

The task is not an easy one, for Marshall very rarely cited authority in his cases. Mr. Andrews, in his "Works of James Wilson", notes that Marshall's greatest opinions are founded on the arguments of council before him, but he seldom stops to say "it was held" or "as council argued". John Marshall would give an approving nod to the study of his source material. He was only too willing to disclaim any originality regarding purposes or tenets of the Federalist party. Professor Corwin tells us that Marshall did not originate the purposes of the Constitution:

...and no one would have been quicker than himself to disown praise implying anything different. He was thoroughly persuaded that he knew the intentions of the framers of the Constitution...and he was equally determined that these intentions should prevail.

Which of the framers did Marshall call upon to help him decide his constitutional cases? That he knocked on Hamilton's door we know, for Mr. Hamilton is one of the few authorities the Chief Justice cited as a reference. He quoted directly from the Federalist, which Cotton in his introduction to The Constitutional Decisions of John

1 J. DeW. Andrews, I, 549
2 Corwin, 122
Marshall, says was the "first authoritative interpretation of the Constitution and was mainly written by the two principal authors of that instrument". In the case of Weston v. Charleston, referring to the Federalist, Marshall used the words "this high authority". Again in McCulloch v. Maryland, he referred to the same Federalist as "those excellent essays". Another of Hamilton's writings that profoundly influenced the judgments of Marshall was his Cabinet opinion, written in 1791, on the Constitutionality of a National Bank. We shall also make reference to the speeches of James Wilson in both the Federal Convention of 1787, his defense of the Constitution in the Pennsylvania State Convention immediately following the Federal Convention, and his speech in 1785 in defense of the right of Congress to incorporate a National Bank. In these documents we are going to track down those four principles which we have already shown to be the fundamental principles upon which the cases in this essay were decided, as well as the backbone of the Federalist party. These principles include the conviction that the source of all government authority rests with the people; that there are implied powers in the

---

3 Cotton, I, xliii. He has reference to Hamilton and Madison.  
4 Cotton, II, 273.  
5 Ibid., I, 343
Constitution and therefore the Constitution must be interpreted, and interpreted liberally, that the judiciary has the right to pass on the constitutionality of acts of Congress, and finally that the right of private contract is inviolable.

First we shall consider the works of James Wilson, Scotch born American, lawyer, lecturer, signer of the Declaration of Independence, and one time Justice of the Supreme Court, who was one of the most influential speakers of the Federal Convention. No matter what speech you consult in the Convention of 1787, you will find Mr. Wilson interjecting somewhere his sentiments about the people as the source of all authority. He harped on this point ad nauseam, as if he had some great fear that, should this fundamental political idea not become part of America's new government, all the work of the Convention would be in vain. Again in his defense of the Constitution in the Pennsylvania State Convention of 1787, Wilson expressed his mind on the importance of establishing the United States government on the people as the source of all authority: "the supreme powers therefore should be vested in the people is in my judgment, the great panacea

of human politics".\textsuperscript{7} He realized that governmental powers must be considered and cautiously divided, but he insisted that the principle from which these powers flowed must be understood properly, if the Assembly was going to consider the new Constitution intelligently. Because the Constitution, that "great and comprehensive plan", conferred "streams of power", it was important to be able to "trace them all to one great and noble source, the people".\textsuperscript{8} It was Wilson's idea, that the government of the United States was a government of the people of the United States, and not a government of the states, as Jefferson intended. In order that this nation might function responsibility must hit every citizen directly, and not through the medium of a state government. For this reason, in Mr. Wilson's plan the state government assumed a subordinate position, whereas in Jefferson's scheme the individual state was independent of the Federal Government.\textsuperscript{9}

On December 19, 1787, still defending the new Constitution in the Pennsylvania State Convention, Wilson revealed a certain fear of tyranny and license. However,

\textsuperscript{7} Ibid., 142
\textsuperscript{9} McMaster, 231.
by conferring adequate powers on a national government, this fear would vanish, so he reasoned. This, of course, did not mean that the people lost anything by giving these adequate powers to the government, because sovereignty resided with the people who only "let out" those powers considered necessary for the common good. After all it is the "power of the people" that "is the great foundation of the proposed system."\(^{10}\) For the very existence of the new system "depends upon the supreme authority of the people alone."\(^{11}\) The sage diagnostician had placed his finger on the soft spot in our government's weakness during the days of the Confederation. "The people have been hitherto shut out of the federal government but it is not meant that they should any longer be dispossessed of their rights."\(^{12}\)

On July 24, 1788, Mr. Davie, defending the Constitution before the North Carolina Assembly, substantiated Mr. Wilson's position on the importance of the "we the people's" part in the formation of the Constitution:

The confederation derived its sole support from the state legislature.

\(^{10}\) Ibid., 356
\(^{11}\) Ibid., 302
\(^{12}\) Ibid., 302
This rendered it weak and ineffective. It was therefore necessary that the foundations of this government should be laid in the broad basis of the people.¹³

Not only as a lawyer and political statesman did Wilson reiterate this principle of the sovereignty of the people, but later on as Supreme Court Judge, under Washington's appointment, he insisted on the importance of the principle. In the Chisholm v. Georgia Case of 1793, he recalled the principle when he said: "Government belongs to the people of the United States".¹⁴

Washington had great admiration for the intellectual talents of James Wilson. Perhaps it was while our first President heard his opinions on the position of the legislature, behind the closed doors of the Federal Convention of 1787, or while reading his speeches in defense of the Constitution at the Pennsylvania State Convention, that made Washington think Wilson would serve his country well as a Supreme Court Judge. For in the Convention, Wilson expressed in so many words the principle that decided the Marbury Case. "I say", began Wilson, "that under this Constitution the legislature may be restrained

¹³ Farrand, 111, 340
¹⁴ Andrews, xvi
and kept within its prescribed bounds by the interposition of the Judicial Department. In the same speech the question of the legitimacy of acts of Congress came up. Wilson met the question with a principle that runs through Marshall's decisions. It is precisely this statement that de Tocqueville says characterizes American democracy:

But when it (an act of Congress) comes to be discussed before the Judges, when they consider its principles and find it incompatible with the superior powers of the constitution; it is their duty to pronounce it void; and judges independent and not obliged to look to every session for a continuance of their salaries will behave with intrepidity and refuse to the act the sanction of judicial authority.

To show that Mr. Wilson was not only revealing the position of the leaders of the Convention on this question, but stating the tradition in American Constitutional experience, we quote Mr. Gerry, speaking in the Federal Convention of 1787. He mentioned that it was customary in some states, from their earliest days to set aside laws because they were in opposition to the state constitution or charter. This was not considered any usurpation for it was "done with the greatest approbation."

15 McMaster, 304
16 Ibid., 304
17 See Introduction, 111
18 Farrand, 1, 97
We have already indicated that political conservatism summed up the spirit of Marshall and the Federalist party. Yet it is to Mr. Wilson that we turn for the most living, compact and most original exposition of that spirit. The document that we shall examine is Mr. Wilson's defense of the power of Congress to incorporate a National Bank. His speech was provoked by an act of the Pennsylvania Legislature which repealed a former act throwing open its doors to the Bank. The famous Philadelphia lawyer denied the legitimacy of this act of repeal on the part of the Pennsylvania Legislature. He argued that laws of different kinds that involve incorporation, rights and properties, do not imply the same discretionary power to repeal. In this division of his argument, Mr. Wilson reflects the whole spirit of the Conservative party:

In a law respecting the rights and properties of all citizens of a state, this power may be safely executed by the Legislature. Why? Because in this case the interest of those who make the law (the members of the assembly and their constituents) is the same. It is a common cause and may be safely trusted to the representatives of the community. Nor can one hurt another without at the same time hurting himself. Very different is the case with regard to a law by which the state grants privileges to a congregation or society. Here two parties are instituted and two distinct interests exist. Rules
of justice, of faith and of honor must therefore be established between them, for if interest alone is viewed, the congregation or society must always be at the mercy of the community... For these reasons and whenever the objects and makers of an instrument passed under the form of a law, are not the same, it is to be considered as a compact, and to be interpreted according to the rules and maxims by which such compacts are governed.19

We quote this speech at length in order to bring out the very essence of Conservative doctrine which was a thorn in the side of Jefferson, and the most fundamental reason for the decided split among men who professed to be citizens of the same country. Wilson takes great pains to show how a common cause between the state and the citizens can be "safely trusted", for "none can hurt another without at the same time hurting himself". But on the other hand, when two distinct interests conflict "rules of justice, faith and honor must be established between them". This kind of spirit put the damper on democracy, smacked of monarchism, smothered human liberty and had to be scratched from the annals of American History, thought the Liberals. Yet this was the spirit Marshall was looking for; this was the side Marshall wanted to fight on, because it was the very pruning knife that was going to bring about a full blossoming American nation.

19 Andrews, 567
John Marshall knew that if this country were to rise above petty state jealousies, this political doctrine of Mr. Wilson must permeate her statutes.

To conclude Mr. Wilson's contribution to the decisions of John Marshall, we quote once more from the National Bank speech of 1785, regarding acts of incorporation which is the best single quotation that reveals the core of the Federalist spirit:

...To receive the legislative stamp of stability and permanency, acts of incorporation are applied for from the legislature. If these acts are repealed without notice, without accusation, without hearing, without proof, without forfeiture, where is the stamp of their stability. Their motto should be Levity. If the act for incorporating the subscribers to the Bank of North America shall be repealed in this manner, a precedent will be established for repealing in the same manner every other legislative charter in Pennsylvania. A pretense as specious as any that can be alleged on this occasion, will never be wanting on any further occasion. Those acts of the state, which have hitherto been considered as the sure means of privilege and of property, will become the sport of every gust of politics, and will float wildly backwards and forwards on the irregular and impetuous tides of a party and faction...

Next to James Wilson, Marshall was especially guided by the writings of Alexander Hamilton. One of the

20 Andrews, 567
most important cases in American Constitutional History is the case of McCulloch v. Maryland. This case was decided on the principle of implied powers which Hamilton was the first one to advocate. It appeared in his Cabinet Opinion, addressed to Washington in 1791, on the constitutionality of a National Bank. The President had already received the opinions of Mr. Jefferson, his Secretary of State, and Mr. Randolph, his Attorney General, on the matter. Both had denied the power of Congress to create such a corporation. Washington sent both arguments to Hamilton so that he might put down the positive arguments as clearly as possible. It was Hamilton's rebuttal of the Liberal party's position that caused Washington to approve of the Bank.

Washington had a foretaste of the future battles between the Federalist and Republican parties when in 1791 he read the letters of Hamilton, Jefferson and Randolph on the constitutionality of a National Bank. If he had lived to hear the case of McCulloch v. Maryland his mind would have flashed back to the correspondence of 1791 when he was the judge of whether the strict or the

\[21\] A. C. Lodge, 111, 493.
\[22\] Ibid., 493.
broad interpretation was more consistent with the spirit of the Constitution. And now in 1819, Marshall carried on the tradition of both Hamilton and Washington in his decision, first by expounding the implied powers theory after the model of Hamilton's Cabinet Opinion, and then by judging as Washington did, in favor of the implied power theory.

Hamilton, one time student at King's College, showed that he had absorbed the substance of scholastic philosophy, the backbone of the curricula, not only at King's College, but at all the colleges and universities during the seventeenth and eighteenth centuries in this country.23 The oft repeated philosophic dictum medium ad finem was the general principle employed by Hamilton in discoursing on the implied powers of the Constitution. The question at issue was the power of Congress to form a corporation. This question fell under the broad aspect of proper relationship of means to an end. Does the corporation to be erected have a "natural relation" to any "objects or lawful ends" of the government. Since the government has "sovereign power to regulate a thing", it has the right

---

to "employ all the means which relate to its regulation to the best and greatest advantage".24

John Marshall based his argument for the legality of a National Bank on precisely this same fundamental philosophic argument. He remarked that it was a matter of human prudence and in conformity with the spirit of the framers of the Constitution that Congress in order that it might be able to execute its great powers expeditely, should have any means at its disposal which might be appropriate and conducive to the end. To favor the opposite interpretation that Congress's powers were to be executed according to a strict legal code would be to change entirely the character of that instrument.25

Jefferson argued from the elastic clause of the Constitution which reads: "The Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by the Constitution in the Government of the United States or in any Department or Officer thereof",26 against the establishment of a bank and claimed the National Bank was neither necessary nor proper.

24 Lodge, 111, 450
25 Cotton, I, 314
26 Article I, Section 8, Last Paragraph of the Constitution of the United States of America.
No means were necessary, Jefferson contended, but those "without which the grant of the power would be nugatory".\textsuperscript{27} Such an argument from Jefferson's pen caused Hamilton to go into a discussion of the significance of the word necessary. Arguing against such a restrictive use of the word necessary, Hamilton claimed that neither the grammatical nor the common use of the word justified such an interpretation. According to both these criteria, "necessary" often meant no more than "needful, requisite, incidental, useful or conducive to". He insisted, too, that the entire 'elastic clause' indicated that it was the intention of the framers of the Constitution to give "a liberal latitude to the exercise of specific powers".\textsuperscript{28} Hamilton's quill must have moved at a faster clip when he retorted:

To understand the word as the Secretary of State does would be to depart from its obvious and popular sense, and to give it a restrictive operation, an idea never before entertained. It would be to give it the same force as if the word absolutely or indispensably had been prefixed to it.\textsuperscript{29}

Marshall again modeled his argument after Hamilton's Cabinet Opinion when he took up the significance of the

\textsuperscript{27} Lodge, III, 452
\textsuperscript{28} Ibid., 453
\textsuperscript{29} Ibid., 453
word "necessary" in the McCulloch v. Maryland Case. His criteria for correct usage were "the common affairs of the world" and "approved authors". According to these criteria we discover the word 'necessary' frequently "imports no more than that one thing is convenient, or useful or essential to another".30 In the general accepted use of the term, to use the means necessary to an end is understood as "employing any means calculated to produce that end and not as being confined to those single means, without which the end would be entirely unattainable".31

Hamilton wrote in 1791 of the "great latitude of discretion" that a government needed in selecting and applying means to an end. By this he showed that he was not sitting in an ivory tower, for a government must be able to act, and act efficiently, if it is going to serve the common good. Marshall revealed the same practical spirit by insisting on the importance of a legislature's need to "avail itself of experience, to exercise its reasons and to accommodate its legislation to circumstances".32

Many other kindred passages could be cited to show

30 Cotton, I, 321
31 Ibid., 321
32 Ibid., 323
Marshall's thorough familiarity with Hamilton's Cabinet Opinion and its profound influence in such a case as 
McCulloch v. Maryland. For example, look at the striking similarity in Hamilton's criteria of what is constitutional 
in his Cabinet Opinion, and Marshall's criteria in McCulloch v. Maryland. Hamilton, writing about the doctrine of im-
plied powers claimed that the criterion of constitution-
ality is "the end to which the measure relates as a means". 
He goes on to say:

If the end be clearly comprehended without any of the specified powers, 
and if the measure have an obvious relation to that end, and is not 
forbidden by any particular provision of the Constitution, it may safely 
be deemed to come within the compass of national authority.33

Whereas Marshall says in the McCulloch v. Maryland:

Let the end be legitimate, let it be within the scope of the Constitution and all means which are appropriate, 
which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution are constitutional.34

It has already been mentioned that Hamilton through the Federalist influenced the judgment of Marshall. In

33 Lodge, III, 458
34 Cotton, I, 329
the Federalist, number 78, the one time Secretary of the Treasury, attempted to clarify the spirit of the Federal Convention on the position of the Judiciary in our national government. He wrote that the "interpretation of the laws is the proper and peculiar providence of the courts" and must be regarded by the Judges as a fundamental law.35 Just as Jefferson visioned the states as the bulwark of democracy, Hamilton envisioned the courts of justice as the "bulwark of a limited constitution against legislative encroachments."36 Caught by this sound political spirit of Hamilton which fitted in so perfectly with his own personal experience with human nature, Marshall adopted these principles and made them the basis of his constitutional decisions.

35 H. C. Lodge, The Federalist, 485
36 Ibid., 487
CHAPTER VI
CONCLUSION

There were many elements during the first fifty years of our nation's life that entered into making the American States a United States. The first and greatest of all was the Constitution itself, a political masterpiece, a compromise of wants and needs that showed posterity that more than anything else the framers of the Constitution wanted a Union. Big states and small states, agricultural states and non-agricultural states, states with navigable rivers and states without navigable rivers, slave states and non-slave states, after four months of heated debate, finally agreed to live as one nation, according to the provisions of the Constitution. This was triumph number one in the evolution of the great American nation. Not to be overlooked however were the succeeding steps that led to practical political unity in this country. The battle to ratify this written document was almost as hard fought a victory as its framing. The clarification of ideas through the Federalist, the courageous and undaunted exposition of constitutional concepts in the State Conventions of Virginia, Pennsylvania, Massachusetts.
and New York, by men like James Madison, James Wilson and Alexander Hamilton overcame almost insurmountable odds and opposition.¹

Yet the job was only beginning when the ninth state ratified the Constitution. The valiant defenders who opposed "consolidated government" and backed a loose confederated government along the lines of the Articles of Confederation were not to undergo a sudden change of heart. This group, the backbone of the Republicans, picked up power when the nation was but a babe in arms. Jefferson and Randolph and Breckenridge, master politicians and leaders, had plans to substitute their own child for the infant of the Constitution, before the very eyes of its guardian and protector, the Federalist party.

It was John Marshall who rallied to the defense of the Federalists when he thwarted the plans of the Jeffersonians by incorporating the fundamental tenets of the Federalists into the legal tradition of the Courts, the "bulwark of democracy". That he knew the spirit of the Federalists has been shown by his own constitutional decisions and the writings of the leaders of the Federal

¹ Beveridge, 1, 323 and Hendrick, 96-99
Convention of 1787. That he loved the principles of the Federalists has been brought out by the dangers of impeachment he faced in deciding the Marbury Case, and the abuse and criticism he knew he would have to accept in the Dartmouth College and *Fletcher v. Peck* decisions.

Because of his understanding, and faith in the tenets of Federalist doctrine, because he was convinced of the salutary nature of their philosophy as far as the life of the American Nation was concerned, John Marshall exercised the greatest courage and judicial statesmanship in fostering our country from infancy through adolescence up to wholesome manhood. Referring to this judicial statesmanship, Professor Corwin concludes his scholarly treatment of the Chief Justice's part in Constitutional History with the following encomium:

...he formulated, more tellingly than anyone else and for a people whose thought was permeated with legalism, the principles on which the integrity and ordered growth of their nation have depended. Springing from the twin rootage of Magna Carta and the Declaration of Independence, his judicial statesmanship finds no parallel in the salient features of its achievement outside our own annals.  

---

2 Corwin, 231
BIBLIOGRAPHY

PRIMARY SOURCES


Farrand, M., ed., Records of the Federal Convention, New Haven, Yale University Press, 1911, 3 vols. Supplementary records including letters and speeches during and after the Convention run 550 pages and include 403 different documents.


SECONDARY SOURCES


Oster, J. E. *The Political and Economic Doctrine of John Marshall*, 172 pages of Marshall's letters to men like Jefferson, Rufus King and Justice Story make up Chapter 11. This is the first systematic attempt to collect Marshall's letters.


APPROVAL SHEET

The thesis submitted by Edward Joseph Snyder, S.J. has been read and approved by three members of the Department of History.

The final copies have been examined by the director of the thesis and the signature which appears below verifies the fact that any necessary changes have been incorporated, and that the thesis is now given final approval with reference to content, form, and mechanical accuracy.

The thesis is therefore accepted in partial fulfillment of the requirements for the Degree of Master of Arts.

January 8, 1945

Charles H. Metzger, S.J.
Signature of Advisor.