The Case that Made the Court

Two hundred years ago, amid a dramatic clash of great principles and great men in the early Republic, Marbury v. Madison *established the doctrine of judicial review. The case and its implications are still hotly debated today.*

by Michael J. Glennon

The most monumental case ever decided by any court in any country began as a petty dispute over a patronage job. The underlying controversy quickly blossomed into a clash between two titans of the early American republic, and it ended with the unveiling of a new judicial doctrine that would alter the course of American history and spread around the world to protect the liberty of hundreds of millions of people.

The doctrine was judicial review—the practice by which courts strike down acts of other governmental entities—and it led to such epoch-making Supreme Court judgments as *Brown v. Board of Education* (1954), which ended the legal racial segregation of public schools, and *United States v. Nixon* (1974), in which the Court ordered President Richard Nixon to turn over certain potentially relevant audiotapes to the Watergate court. It also gave the nation *Roe v. Wade* (1973). Judicial review is American constitutionalism's greatest gift to the world—an arguably greater gift than the U.S. constitutional model itself. Unlike many other features of the new American government, the practice was virtually without precedent when the Supreme Court announced it in *Marbury v. Madison* (1803). An English case in 1610 had intimated that an act of Parliament "against common right and reason" was void under the common law, and the English Privy Council was later empowered to invalidate colonial statutes that ran counter to the colonial charters or English law. But nowhere in the world before 1803 did the courts of any country engage in the practice of striking down laws inconsistent with the national constitution.

William Marbury (1762–1835), a prominent Maryland land speculator who sued the U.S. government to claim a job as a federal justice of the peace, was only a bit player in the high drama to which he gave his name. Two larger figures—Thomas Jefferson (1743–1826), the third president of the United States, and John Marshall (1755–1835), who was chief justice of the Supreme Court from 1801 to 1835—dominated the stage.

President John F. Kennedy hardly exaggerated when he told a group of Nobel laureates that they constituted the most distinguished group ever to dine in the White House—with the possible exception of Thomas Jefferson, when he dined there alone. Jefferson owned one of the largest private libraries in North America and was said to read sometimes for 12 hours without a break. Expert in agronomy, archeology, botany, enology, architecture, ornithology, literature, political theory, law, and philosophy, he represented the apotheosis of the American Enlightenment. "I cannot live without books," he said. When he tutored his young aide Meriwether Lewis for the upcoming exploration of the newly acquired Louisiana Territory, Jefferson taught him botany, introduced him to the Linnaean system of classification, and showed him how to use a sextant—giving Lewis, as historian Stephen Ambrose observed, "a college undergraduate's introduction to the liberal arts, North American geography, botany, mineralogy, astronomy, and ethnology." "You can never be an hour in this man's company without something of the marvelous," President John Adams

Marbury ***was the first crucial step toward establishing the authority of the Supreme Court, but it wasn't until 1935 that the Court, long a tenant in the U.S. Capitol building, got a home of its own.***

said, before the two had their falling out.

Today, political activists of all stripes call themselves "Jeffersonians." In Jefferson's day, however, his political philosophy was distinctive. Jefferson was the original advocate of "small is beautiful." He favored the states over the federal government and preferred a limited federal government and (until he became president) a weak presidency. He believed that an enlightened electorate was the path to good government, and that civic virtue lay more surely in small farms than in big business or citified commerce. Decentralized authority was essential, he thought, to keep government close to the people and responsive to their wishes. Many opponents of the new U.S. Constitution shared Jefferson's views, though Jefferson himself, as American emissary to France during the 1787 Philadelphia convention, avoided formally having to resolve his own ambiva-

lence toward the nation's new charter.

Jefferson's philosophical antagonist is less known to Americans, at least to those outside the legal profession. John Marshall was the longest-serving chief justice in the Court's history, and easily the most influential. The rumpled, outgoing, athletic Virginian was the first grand master of the Court's internal politics and oversaw the disposition of more than a thousand cases. He wrote the opinions for 508 of them.

Marshall's power flowed from three sources: political canniness, disarming charm, and a riveted focus on his unvarying long-term strategic objective: establishing the supremacy of the federal judiciary. Before his appointment by President Adams in 1801, the Court's six members wrote separate opinions, limiting the Court's potential institutional strength. Marshall changed that. He encouraged his colleagues to speak with one voice. He even cajoled them into joining him in taking rooms at Conrad's, a Capitol Hill boarding house, where they dined together, drank together, and argued together. (Justices in those days had no offices, and the unnoticed Court met in a small room on the first floor of the Capitol.) In his first three years on the Court, Marshall participated in 42 cases. The opinion of the Court was unanimous in every one of them, and John Marshall wrote every opinion.

Some years later, when President James Madison appointed Massachusetts's Joseph Story to the Court, Jefferson warned that he would fast be drawn into Marshall's political orbit. Marshall was described in a contemporary newspaper account as "irresistibly winning." Madison assured Jefferson that Story's commitment to Jeffersonian principles would not flag. Within a year, Story was Marshall's strongest ally. "I love his laugh," Story wrote. "It is too hearty for an intriguer." Story later worried that Jefferson's influence might "destroy the government of his country," but he eulogized Marshall as "the great, the good, the wise." The two became fast friends. Story recalled Marshall's fondness for Madeira, with which Marshall would enliven the Court's conferences on rainy days. One day, when the chief justice asked him to look outside and check the weather, Story reluctantly reported that the skies were clear. Surely, Marshall replied, it was raining somewhere within the Court's vast jurisdiction. Drinks were poured.

The first of a family of 15 children, Marshall was born in a log cabin in 1755 in the rural Virginia village of Germantown. His comportment reflected his country roots, though he quickly rose to the top of the Virginia elite. He was fastidious in neither dress nor demeanor. With 10 children of his own, he often had nowhere to work while practicing law in Richmond and was wont to spread his books and papers under a large oak tree. On a visit to Philadelphia, he was once denied a room because of his shabby appearance. In the nation's capital, a churlish teenager who found it demeaning to carry home a turkey for his mother offered a passing stranger 25 cents to carry it for him; the chief justice obliged.

Yet in "strong reasoning powers," said Thomas Sedgwick, Speaker of the House of Representatives, Marshall was "almost unequaled." His first great career opportunity came at the Virginia convention that had been called to consider ratification of the proposed federal Constitution. Marshall, a 33-year-old lawyer, assisted James Madison (who would become a friend). The case against ratification was presented in a masterful three-hour summation by Patrick Henry, then reputed to be the continent's leading orator. Virginia's endorsement, and the Constitution's approval, both appeared in doubt. Marshall, already a respected member of the Virginia bar, gave the rebuttal.

Twelve years later, during his sole term (1799–1801) in the House of Representatives, Marshall defended President Adams in a major foreign policy dispute. Opponents of Adams urged their floor leader, Albert Gallatin, to answer Marshall's argument. "Gentlemen," Gallatin responded, "answer it yourself; for my part, I think it is unanswerable."

Even Jefferson was intimidated by his fellow Virginian's intellect. "When conversing with Marshall," Jefferson said, "I never admit anything. So sure as you admit any position to be good—no matter how remote the conclusion he seeks to establish—you are gone. So great is his sophistry, you must never give him an affirmative answer, or you will be forced to grant his

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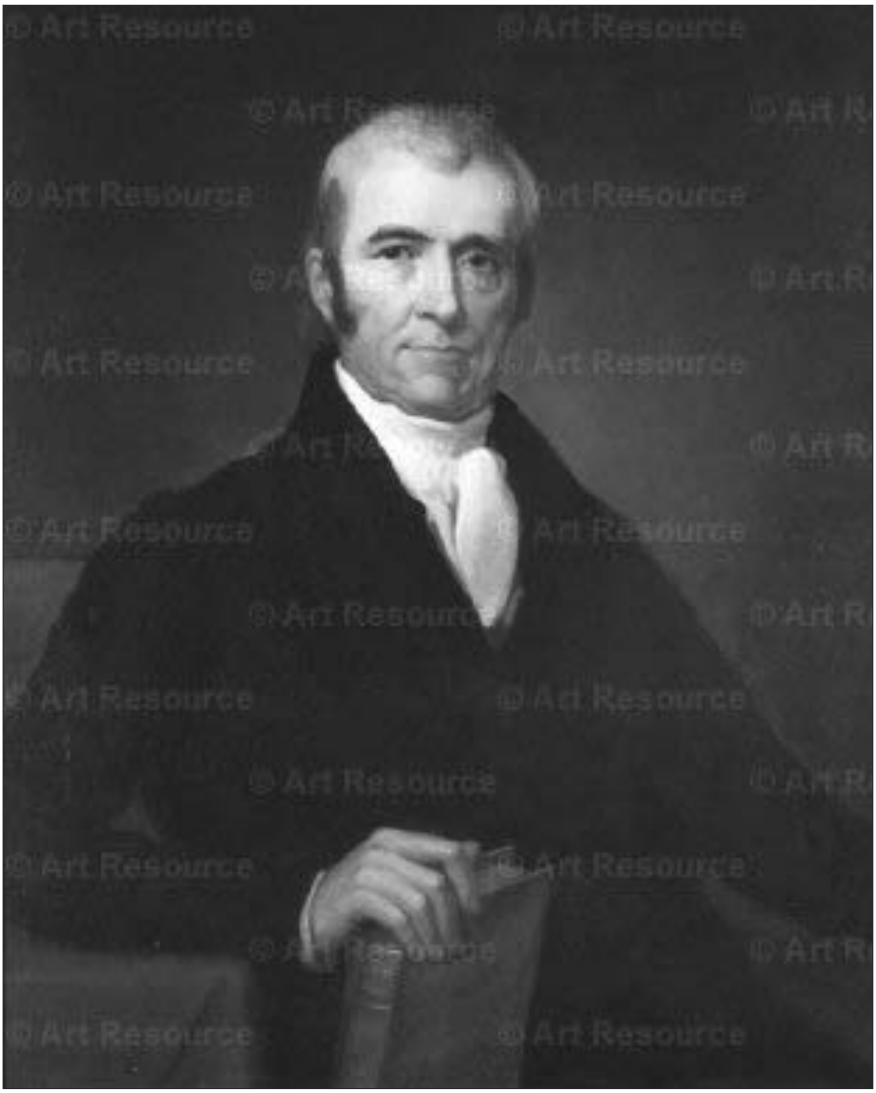

John Marshall (portrayed in 1831) said that a constitution must "approach immortality."

conclusion. Why, if he were to ask me whether it was daylight or not, I'd reply, 'Sir, I don't know. I can't tell.'" Yet when Jefferson needed a lawyer to sort out his tangled real estate dealings, he retained the best: John Marshall.

Part of Jefferson's animus toward Marshall grew out of their diametrically different political philosophies, which traced in turn to very different life experiences. While Jefferson punctuated periods of service to state and country during the Revolution with interludes spent entertaining captured English and Prussian officers at Monticello, Marshall passed the winter of 1777 at Valley Forge. The stench, cold, and hunger were unbearable, and 3,000 men—one-fourth of the Continental Army—died. The misery left an indelible impression on the 22-year-old Marshall. The troops knew, as did he, that the colonies were not poor and that there was no shortage of foodstuffs. But the Continental Congress had no power to requisition supplies. It's hardly surprising that Marshall's every effort throughout his 34 years as chief justice would be directed at solidifying the authority of the federal government over the states, and the authority of the judiciary over Congress and the executive branch.

Marshall saw Jefferson as an aristocrat masquerading as a commoner. After Jefferson fled before English troops advancing in Virginia in 1781, Marshall had little respect for him—and was apparently encouraged in his contempt by his wife and her family: Jefferson had once

courted Marshall's mother-in-law, who retained little affection for him. And then there was the matter of political philosophy. Jefferson's admiration for French revolutionaries and his dangerous willingness to entrust major issues of governance to the unqualified masses made him ill suited, in Marshall's view, for the presidency. "Every check on the wild impulse of the moment," Marshall wrote Story, "is a check on [Jefferson's] own power."

But the bitter election of 1800 gave the presidency to Jefferson. The Electoral College had deadlocked between Jefferson and Aaron Burr, leaving the election to be decided in the House of Representatives. After 36 ballots over a period of six days, Jefferson finally received a majority of the states' votes. It was the first time in the history of any major country that the full basket of governmental power had been passed peacefully, as the result of a vote, from one political party to an opposition party. The Federalist Party of John Adams and John Marshall had been wiped out, losing both houses of Congress as well as the White House to Jefferson's Democratic-Republicans. Unless some way could be found to survive the Jeffersonian onslaught, the Federalist Party would become extinct.

Jefferson himself speculated that the Federalists would retreat "into the judiciary as a stronghold the tenure of which [would] render it difficult to dislodge them." That's exactly what the lame-duck Federalists did. Among other provisions, the Judiciary Act of 1801 created 42 new justices of the peace. These were not the lowly judicial nonentities of today but, in some cases at least, officials who exercised substantial local power. Adams's appointments naturally went primarily to Federalist Party loyalists, one of whom was William Marbury. The final stage of the appointment process was rushed, however. After Adams signed the appointments, the requisite seal was added to the stack of commissions on the administration's last night in office, March 4, 1801. The work was done in Marshall's State Department office. (During Marshall's first days as chief justice he also served—simultaneously—as the secretary of state, who then as now was the chief administrative officer of the cabinet.) Helping Marshall complete the paperwork was his younger brother James. James left to deliver some of the commissions but apparently did not take all of them. At four in the morning, Adams departed by coach for Massachusetts, loathe to participate in the installation of his successor.

Jefferson had sent Marshall a note urging him to be on time for the inauguration, and, promptly at noon the next day, the chief justice administered the oath of office to Jefferson and listened to an unexpectedly conciliatory inaugural address ("We are all republicans; we are all federalists"). Later, Jefferson dropped by the State Department and noticed the pile of undelivered commissions sitting on a table. He asked what they were, was told, and thereupon ordered that the commissions not be delivered. That, at least, was his own later version of events, in which he emphasized that he, the president of the United States, not James Madison or some other administration official, was personally responsible for the directive; the point was meant to underscore Marshall's effrontery in the *Marbury* opinion. At the end of the day, Jefferson, according to legend, returned to Conrad's boarding house (where he too was staying), stood in line for dinner, and ate at the far end of the table.

When, after 10 months of waiting, Marbury had still not received his commission, he decided to act. Joined by three coplaintiffs, he appeared before the Supreme Court on December 16, 1801, and asked it to issue an order to the secretary of state—by this time James Madison—directing him to show cause why he should not be ordered to deliver the commissions. How, one might ask, were the plaintiffs able to appear at the outset before the United States Supreme Court? The Court normally sits as the nation's highest appeals court, hearing cases that come up from U.S. courts of appeal and from state supreme courts. The answer lay in section 13 of the Judiciary Act of 1789, a provision of the law that gave "original jurisdiction" to the Supreme Court in cases involving writs of mandamus. A writ of mandamus is a court order directing a government official to perform a certain act—which is what the plaintiffs here had requested. Under section 13, plaintiffs were permitted to proceed directly to the United States Supreme Court, with no prior or intermediate steps required. Hence, the unusual trial in front of the six Supreme Court justices. (Congress set the

number of justices at nine only in 1869.)

The Jeffersonians, in any event, were irate at this turn of events. Fearful that Marshall would order delivery of the commissions, their congressional cohort proceeded to abolish the 1802 session of the Court and to commence impeachment proceedings, first against a Federalist district judge, John Pickering, and later against Marshall's Federalist colleague on the high court, Samuel Chase. The courts may not have changed political hands with the rest of the government following the election of 1800, but impeachment was then a tool of undefined scope. With early successes as precedent, it might be used, thought some of Jefferson's more rabid followers, to bring the judiciary in line with the latest will of the people. The political atmosphere was thus an explosive one in which to press for an expansion of judicial power. A single misstep could not only end one's judicial career but permanently weaken the federal courts.

So prudence counseled that Marshall proceed with the utmost caution. At the outset, he was slow to accept the plaintiffs' assertions of fact. They confronted, in today's terms, a serious proof problem. How could the Court know that Marbury and his coplaintiffs had in fact been nominated? Since they could produce no commissions, what evidence was there that they had actually been appointed? Marshall, despite his earlier involvement in the appointments, could hardly have appeared as a witness himself. (Under modern standards of judicial recusal, Marshall would never have been permitted to sit in judgment in *Marbury*, let alone testify in a case over which he himself presided.) It was necessary, accordingly, for the plaintiffs to produce some probative evidence that Adams had appointed them.

The plaintiffs turned first to the secretary of state, James Madison, who gave no satisfactory reply.

Their next stop was the United States Senate. The appointments in question had required not only presidential action but Senate confirmation. Obviously, the best evidence would be the official records of the Senate. But the Senate's records were not public, and the Senate was now in the control of the Republicans, so when Marbury and his companions asked for copies of the relevant documents, they were politely told to get lost. The request, exclaimed one Republican senator, was "an audacious attempt to pry into executive secrets, by a tribunal which has no authority to do any such thing." (This was the first assertion of "legislative privilege," a doctrine that exists to this day, though it is seldom asserted.)

Thus rebuffed, the plaintiffs turned to the executive branch. They proceeded to call as witnesses two State Department clerks. One testified that he could not recollect whether he had seen any commissions in the office. The second testified that he did not remember any of the names in the commissions, nor did he know what had become of the documents.

Their plight increasingly desperate, the plaintiffs turned to another administration official conveniently present in the courtroom, the attorney general of the United States, Levi Lincoln. Lincoln was, in fact, the logical official to whom the questions should have been directed, given that he had been serving as Jefferson's acting secretary of state when the commissions disappeared. At first, Lincoln, like the State Department clerks, declined to answer. Upon reflection, however, he asked for the questions in writing. Marshall gave Lincoln the questions, and there then occurred one of the most remarkable—and un–remarked-upon—events in American legal history: Thomas Jefferson's attorney general pleaded the Fifth Amendment before the United States Supreme Court. He ought not, he testified, be compelled to answer anything that might tend to incriminate him. In addition, Lincoln said, he did not think himself bound to disclose his official transactions while acting as secretary of state. Marshall, in reply, told Lincoln that he might want to take some time to think about the answers he would give to the questions. Lincoln responded that he would like to have until the next day.

The following morning, Lincoln appeared before the Court and said that he had no objections to answering all the questions but one—the final question, about what had become of the commissions. This, apparently, was the question on which he had feared self-incrimination, perhaps because he himself had destroyed the commissions or assisted others in doing so. The other questions, he proceeded to answer. He did not know whether the commissions had ever come into the possession of James Madison, or whether any of them

related to the plaintiffs. Nor did he know anything else that might be relevant to the plaintiffs' cause. Marshall did not press to find out where the commissions had gone: If the commissions had never come into Madison's possession, he said, it was immaterial what had happened to them. That seems to have made it unnecessary for Lincoln to reiterate his reliance upon the Fifth Amendment. (To this day, historians do not know what became of the commissions.)

Now Marbury and the others had hit a brick wall. There seemed no remaining options that would meet the Court's evidentiary requirements. But there was, they remembered, one final witness—a witness whom the chief justice would trust like a brother. The star witness, indeed, *was* the chief justice's brother—James Marshall, the person who had last seen the commissions as the clock ticked away the final minutes of the Adams administration, and who remembered well that, yes, William Marbury and his three coplaintiffs had in fact been among those individuals whose commissions had been signed and sealed on that fateful night. James Marshall promptly executed an affidavit so certifying, and the case, at long last, moved ahead to argument on the merits. Curiously, the record of the oral argument sets forth extensive comment by counsel for the plaintiffs, Charles Lee, but is virtually devoid of any substantive response by Attorney General Lincoln, who may, in effect, have boycotted the proceedings on the merits, reasoning that his appearance would lend legitimacy to the Court's actions.

While they waited for the Court's decision, the Jeffersonians must have believed that Marshall was boxed in, and that neither of his apparent options would be attractive to him. Marshall could order Madison to deliver the commissions, but Jefferson might then direct Madison simply to ignore the Court's order, thus leaving Marshall with no means of enforcement—and creating a precedent that the executive branch is not subject to judicial direction. Such a course, moreover, might well play into the Republicans' impeachment plans and make it possible to replace the entire Court—thereby establishing, perhaps, the even broader precedent that a change in administration carries with it the right to appoint new, sympathetic Supreme Court justices. Marshall's second option—to decide in favor of Madison and hold that, for one reason or another, he was not required to deliver the commissions—was no better. It, too, would have been a devastating victory for the Jeffersonians, not merely a triumph on the law but a highly visible political capitulation of the Supreme Court in the face of apparent political threats.

On February 24, 1803, two weeks after the *Marbury* trial ended, Marshall delivered the opinion of the Court. It was, as usual, unanimous, and was, as usual, signed only by him. The text lacks the sweep and flow of Marshall's more majestic opinions, such as *McCulloch v. Maryland* (1819), or the timeless logic of *Gibbons v. Ogden* (1824), but it is a masterwork of calculated restraint, feint, and cunning, an opinion that laid claim for the courts to the greatest of governmental powers—the final say as to what the law is—even as it left Marshall's opponents no effective response.

The opinion is pure Marshall in its gradual, almost imperceptible movement from the obvious to the arguable, and in the understated, inexorable, syllogistic force of its reasoning. The chief justice began with the undisputed facts that the plaintiffs' commissions were signed by the president and sealed by the secretary of state (himself); therefore, he concluded, because the appointments were made and the commissions were complete, the plaintiffs had a right to them.

For every abridgement of a right, he continued, there is a remedy. This is "the very essence of civil liberty." If the government of the United States should provide no remedy for the deprivation of a vested legal right, it should cease to be a "government of laws and not of men."

Whether the plaintiffs were entitled to the remedy they sought—a writ of mandamus—depended upon the nature of the writ and the power of the Court. Marshall moved into more dangerous territory. "It is not by the office of the person to whom the writ is directed," he wrote, "but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." In other words, there was nothing in the Constitution that precluded the Supreme Court from telling the secretary of state—or the president of the United States—to do what the law required. At

issue was what the Court would order to be done. Here, Marshall said, the test was whether the administration's action had been discretionary or non-discretionary: If the action was purely discretionary, the question presented would be political and not within the Court's power. But if the action had not been discretionary, then there would be no ground on which a court could refuse to order it to be carried out. Delivering a completed commission incident to a valid appointment, Marshall noted, was something that Madison was directed by law to do; it was therefore a non-discretionary act, which the Court could properly order Madison to carry out.

By this point in the opinion, then, Marshall had thoroughly excoriated the Jefferson administration for violating the law and suggested in plain terms that Madison's failure to deliver the commissions was nothing less than a breach of duty. Would he take the final step and order that the commissions be delivered? That depended, Marshall continued, in a neat tactical twist, upon whether the Court had power to decide the case.

Jurisdiction was granted, remember, by section 13 of the 1789 statute that conferred original jurisdiction upon the Court in cases such as this. The Constitution, however, also conferred original jurisdiction upon the Court in specified cases. It provided that the Court could sit as a trial court in "all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party." Was it within Congress's constitutional power to expand that list by law, as it had done in 1789, and did the Court therefore have jurisdiction to hear this case?

Marshall's stunning answer was no—stunning because the issue of Congress's power to expand the list in the Constitution had not been raised in the briefs presented, or even in passing in the oral argument; stunning because Marshall himself, in an earlier case, had relied upon section 13 in finding valid jurisdiction; stunning because section 13 was written by Oliver Ellsworth, one of the framers of the Constitution—who, as chief justice before Marshall, had also relied upon the statute to find valid jurisdiction; stunning because nearly half the members of the Congress that approved section 13 had been members of the Philadelphia convention. But there it was: Congress had acted beyond the scope of its constitutional power in enacting this statute. Any contrary interpretation, Marshall wrote, would render the Constitution's list of specified cases mere surplusage. The consequence, Marshall went on to conclude, was that the 1789 law was of no force and effect: An "act of the legislature, repugnant to the Constitution, is void." Then came the monumental point: "It is emphatically the province and duty of the judicial department to say what the law is." In other words, the Supreme Court has the power to determine

Judicial review at work: In 1952, the Court barred President Truman from seizing strike-threatened steel mills, even though the U.S. was at war.

whether a law is repugnant to the Constitution.

Marshall thus succeeded in publicly labeling the Jefferson administration as a lawbreaker, lecturing Jefferson on his obligation to obey the Constitution, and establishing a precedent for judicial supremacy. He accomplished all this, moreover, in a manner that immunized him and his fellow justices from retribution, because the Court itself, after all, was the "victim" of its own abnegation.

The opinion is not a paragon of logic; much of it is circular, in particular the question-begging final argument that the Court has the power to invalidate a statute at odds with the Constitution. Nothing in the constitutional text directly supported that conclusion. Nonetheless, as many commentators have pointed out, the opinion was a small step backward (Marbury and his fellow Federalists never got their jobs as justices of the peace) and a huge step forward in Marshall's lifelong quest to establish the United States Supreme Court as the final arbiter of the meaning of the Constitution.

The decision was widely covered in the press of the day, and roundly debated. Jefferson himself said nothing publicly. The next year, however, he did criticize the opinion in a letter to Abigail Adams. Giving judges "the right to decide what laws are constitutional, and what not," he said, "would make the judiciary a despotic branch." The three branches retained for themselves, he believed, the right to decide upon the constitutionality of a given act, "in their spheres." None of the three had a constitutional right to impose its interpretation of the Constitution upon another.

History has long since rejected Jefferson's doctrine of "coordinate review." It is now clear that the Supreme Court *can* "decide what laws are constitutional, and what not," for all three branches. By 2000, the Court had struck down 151 acts of Congress, 1,130 acts of state legislatures, and 129 local ordinances. But for many years after *Marbury*, the authority of the courts to declare invalid the acts of other governmental entities remained controversial. The Court did not again strike down a federal statute until 1857, when it held the Missouri Compromise violative of slaveholders' due process rights—and helped precipitate the Civil War.

Long after *Marbury*, many mainstream observers continued to believe that the Court lacked the power to make law obligatory for any but the parties to the case before it. As late as 1861, for example, Abraham Lincoln held that, while a decision of the Court was entitled to "a very high respect and consideration" by other branches of the government, the decision was actually binding only "upon the parties to a suit." It was not until 1958, in *Cooper v. Aaron*, that the Supreme Court explicitly rejected Lincoln's theory.

Still, arguments continue to rage over whether there's justification for permitting judges to substitute their will for the will of the elected representatives of the people—and even over whether that's the right way to look at what happens when a court strikes down a statute. It's pointed out, for example, that the reviewing judge has hardly assumed judicial authority without the permission of "the people." The people, after all, elected the president who appointed the judge, and the Senate that confirmed him, and, before that, the people approved the Constitution under which the whole process takes place. Thus, judicial review is hardly "undemocratic" in the strict sense of the term. The philosophical problem is more complex, involving multiple, conflicting "wills" of the people, indeed of different groups of people, with one will having been expressed at the time of the framing, another at the time of the president's election, another at the time of the various senators' election, and another at the time the statute was enacted.

How different our history might have been without John Marshall is a matter for endless debate. "A great man," Oliver Wendell Holmes, Jr., said, "represents a strategic point in the campaign of history, and part of his greatness consists of being there." What's not debatable is that Marshall accurately foresaw the nation the United States would become and the needs that nation would look to its courts to fulfill. *Marbury* was not fully discovered, or rediscovered, in the United States until the 20th century. It was then that the Supreme Court began its vigorous enforcement of the full panoply of civil rights and political liberties guaranteed by the Constitution. *Marbury*, we see now, with the perspective of 200 years of history, was the lever that made it all possible. And it was John Marshall who gave us the lever. ❑