May it please the Court:

It was a day in mid-January 1801. John Adams, the President of the United States, was conferring with the Secretary of State, John Marshall. President Adams, a Federalist who had been defeated for re-election, had much to do before turning over executive authority to his successor, Thomas Jefferson, a Republican, in early March. The President’s most important remaining chore was to select and install a new Chief Justice to succeed Oliver Ellsworth, the third Chief Justice, who had resigned a few weeks before. On receipt of Ellsworth’s resignation, the President had at once written, tendering the post, to his old friend John Jay, the first Chief Justice, who had left the bench five years before to become Governor of New York and who was now at the close of his second term. Concurrent with his letter to Jay, the President had sent Jay’s name to the Senate, which had quickly confirmed the nomination. But Jay did not respond to the President’s letter for some time. And when the letter came, it was in the negative. When Jay was Chief Justice, he had felt strongly that the Judiciary Act of 1789 had imposed on the Justices of the Supreme Court burdensome responsibilities of circuit-riding that were not compatible with the Supreme Court’s appellate responsibilities. In the years since leaving the Court, Jay had not changed his mind:

Expectations were . . . entertained that [the Judiciary Act] would be amended as the public mind became more composed and better informed; but those expectations have not been realized nor have we hitherto seen convincing indications of a disposition in Congress to realize them. On the contrary, the efforts repeatedly made to place the Judicial Department on a proper footing have proved fruitless. I left the Bench per-
fectly convinced that under a system so defective, it would not obtain the energy, weight, and dignity which are essential to its affording due support to the National Government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence, I am induced to doubt both the propriety and the expediency of returning to the Bench, under the present system; especially as it would give some countenance to the neglect and indifference with which the opinions and remonstrances of the Judges on this important subject have been treated.¹

Years later, John Marshall recalled his conversation with John Adams:

When I waited on the President with Mr. Jay’s letter declining appointment he said thoughtfully, “Who shall I nominate now”? I replied that I could not tell, . . . After a few moments hesitation he said, “I believe I must nominate you”. I had never before heard myself named for the office and had not even thought of it. I was pleased as well as surprised, and bowed in silence.²

Notwithstanding some initial resistance from senators of the “High Federalist” faction of the President’s own party, Secretary of State Marshall’s nomination as Chief Justice was confirmed a week after he was nominated, on January 27, 1801. And on February 4, at the Court’s first sitting in Washington, in Committee Room 2—the room in the not-yet-finished Capitol assigned to the Supreme Court and also to the circuit and district courts of the District of Columbia—John Marshall was sworn in as the fourth Chief Justice of the United States. Marshall was an unpretentious man. Perhaps he did not mind that the courtroom was, in the words of Benjamin Latrobe, the architect of the Capitol, “a half-finished committee room meanly furnished and very inconvenient.”³ Eschewing the elaborate robes—whether academic regalia or the scarlet and ermine derivative from the King’s Bench—of his colleagues, Marshall adopted the plain black worn by judges of the Virginia Court of Appeals⁴ and which your honors wear today. Change had come to the Court.

The Marshall Court did more than change costumes. The Court changed its way of speaking. Under Marshall’s leadership, the English practice of seriatim opinions was abandoned and the Court took to speaking with one voice—and, in the great majority of cases, that voice was the voice of John Marshall. Sometimes there were concurring and dissenting opinions, but until the later years of Marshall’s unparalleled thirty-four years in the center chair, opinions other than that of the Court were infrequent.

Under Marshall, the voice of the Court was not only a single voice but a voice that took on new strength and direction. In 1803, only two years after Marshall became Chief Justice, Marbury v. Madison⁵—the first of Marshall’s great trilogy—was decided. The magisterial opinion announced—and exercised—the authority of the judicial branch to sit in judgment on the validity of an act of Congress and to set aside an act not in conformity with the Constitution. But Marshall did not announce the opinion in his courtroom. He announced it in the living room of Stelle’s Hotel, the boarding house that constituted the local lodgings of the Justices.⁶ For a few weeks in the winter of 1803, the Justices held court in their lodgings so that Justice Chase, who was unwell, would not have to journey some hundreds of yards to the Capitol.

The second and third opinions in the Marshall trilogy were, of course, McCulloch v. Maryland⁷ and Gibbons v. Ogden.⁸ McCulloch validated Congress’s establishment of the Bank of the United States, announced that the words “necessary and proper”—describing
congressional authority to enact laws implementing the expressly delegated powers—were words not of limitation but of enlargement of Congress’s authority, and, finally, invalidated Maryland’s attempt to tax this instrumentality of federal power. It was in *McCulloch* that Marshall said: “[W]e must never forget that it is a constitution we are expounding”—the pronouncement characterized by Justice Frankfurter as “that most important, single sentence in American Constitutional Law.”9 (It may be noted that Marshall announced the Court’s opinion only three days after the nine days of oral argument were concluded.)

In *Gibbons v. Ogden*, Marshall explored Congress’s commerce power, describing it with a breadth that has made it the principal basis for federal legislative authority—and of concomitant limits on state authority—to this very day.

When Marshall died in 1835—having survived his great antagonist, Jefferson, by just short of a decade—there was, to be sure, widespread recognition that what the Chief Justice had accomplished was of great consequence. But the full weight of his achievement was not generally understood until the centennial of his appointment. February 4, 1901, was celebrated as John Marshall Day by the American Bar Association. Chief Justice Fuller addressed the House of Representatives. Here in Philadelphia, the Pennsylvania Bar Association conducted a parade to Musical Fund Hall, and one of the justices of the Pennsylvania Supreme Court made a speech.11 And, in Boston, the Supreme Judicial Court, presided over by the chief justice of Massachusetts—Oliver Wendell Holmes, Jr.—entertained a motion from the bar. Holmes took note of “the fortunate circumstance that the appointment of Chief Justice fell to John Adams, instead of to Jefferson a month later, and so gave it to a Federalist and loose constructionist to start the working of the Constitution.”12 Holmes went on:

The setting aside of this day in honor of a great judge may stand to a Virginian for the glory of his glorious State; to a patriot for the fact that time has been on Marshall’s side, and that the theory for which Hamilton argued, and he decided, and Webster spoke, and Grant fought, and Lincoln died, is now our corner-stone. To the more abstract but farther-reaching contemplation of the lawyer, it stands for the rise of a new body of jurisprudence, by which guiding principles are raised above the reach of statute and State, and judges are entrusted with a solemn and hitherto unheard-of authority and duty.13

Holmes also said:

> [W]hen I consider his might, his justice, and his wisdom, I do fully believe that if American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be one alone and, that one, John Marshall.14

John Marshall gave life to the original document drafted here in Philadelphia. But that original document—notwithstanding Marshall’s interpretations—was fatally flawed, for it presumed the permanent legitimacy of slavery. Only a civil war could remove the flaw. As the second Marshall, Justice Thurgood, put it, writing in 1987 on the occasion of the bicentennial of the Constitution, “[T]he true miracle was not the birth of the Constitution, but its life, a life nurtured through two turbulent centuries of our own making, and a life embodying much good fortune that was not.”15

Your Honors, I bring to your attention the fact that, a century ago yesterday, the parade to Musical Fund Hall was not the only Philadelphia event that celebrated the centen-
nial of John Marshall’s installation as Chief Justice. The Court of Appeals held a session at which a motion was presented by the Chancellor of the Law Association of Philadelphia. The record of what transpired is cast in bronze on the plaque on the third floor of this courthouse. Perhaps when the current renovation of the first floor of the courthouse is complete, the plaque can be moved to the first floor, for all who have business in this courthouse to read. The legend on the plaque is as follows:

UPON FEBRUARY 4th, 1901
BEING THE ONE HUNDREDTH
ANNIVERSARY OF THE DAY UPON
WHICH
JOHN MARSHALL
TOOK HIS SEAT AS CHIEF JUSTICE OF
THE SUPREME COURT OF
THE UNITED STATES
THE CHANCELLOR OF THE LAW
ASSOCIATION OF PHILADELPHIA
ON BEHALF OF
THE LAW ASSOCIATION OF
PHILADELPHIA
THE LAWYERS CLUB OF
PHILADELPHIA
THE PENNSYLVANIA BAR
ASSOCIATION
THE DEPARTMENT OF LAW OF THE
UNIVERSITY OF PENNSYLVANIA
ACTING FOR THE MEMBERS OF THE
BAR OF THE
SUPREME COURT AND OTHER
COURTS OF PENNSYLVANIA
MOVED THE UNITED STATES CIRCUIT
COURT OF APPEALS
FOR THE THIRD CIRCUIT
THEN SPECIALLY CONVENED
TO ENTER UPON ITS RECORD
A MINUTE
EXPRESSING THEIR APPRECIATION
OF HIS CHARACTER AND WORK
AND IT WAS THEREUPON
SO ORDERED

Chief Judge Becker, I move the Court of Appeals to reaffirm its order of a century ago. And, Chief Judge Giles, I move the District Court to adopt that century-old order as its order from today forward.

Louis H. Pollak

We meet to commemorate the 200th anniversary of a small event with large consequences: the swearing-in of John Marshall as the fourth Chief Justice of the Supreme Court of the United States. This is also the 300th anniversary of the Charter of Liberties, the frame of government that William Penn granted his colony. It not only continued the liberty of religious conscience that Penn had guaranteed from the outset of the colony in 1682, but also provided a powerful representative assembly, a huge step forward in self-rule that foreshadowed the American Revolution. The two events are connected in our history by a bell.

On the fiftieth anniversary of the Charter of Liberties, in 1751, the Pennsylvania Assembly commissioned a bell that was to hang in the State House that we now call Independence Hall. The bell now rests on Independence Mall to inspire hundreds of thousands of tourists a year, and it bears an inscription, put there at the direction of the eighteenth-century Speaker of the Assembly: “Proclaim LIBERTY throughout all the land unto all the inhabitants thereof.” This comes from Leviticus (25:10). Moses is reporting that God has directed Israel to allow the land to lie fallow every seventh year. After “a week of years”—seven times seven years—the nation is to observe a jubilee year, during which all debts are to be forgiven, property returned to original owners, and slaves freed. 1751 was the Jubilee Year of the Charter of Liberties. It is the biblical admonition to free the slaves that abolitionists in the 1830s noticed; they began using the bell as their emblem and referring to it as the Liberty Bell. It is that bell that was rung on July 8, 1776, to announce the first public reading of the Declara-
tion of Independence that had been approved four days earlier.

At that moment in 1776, John Marshall was twenty years old, and he was a dedicated patriot. He fought throughout the Revolutionary War and suffered through the winter at Valley Forge with his hero, George Washington, an experience that deepened his commitment to the new nation. After his military service, he became a successful lawyer and was elected to the Virginia Assembly in 1787, from which vantage point he supported the work being done here in Philadelphia to craft a new constitution providing a stronger national government. He was a leader in the ratification struggle in Virginia. No doubt his fervent nationalism had been deepened by the sacrifices of the Revolution, but it probably owed something, too, to his birth and rearing on the Virginia frontier, one of fifteen children in a well-connected but not wealthy family. It is frequently true that people on the fringes of society, either geographically or otherwise, see a strong central government as the protector of liberties and opportunities.

For several years after the new government was in being, Marshall resisted politics and a number of calls to national service. Finally, he accepted an appointment, with C. C. Pinckney and Elbridge Gerry, to a commission whose task it was to try to reach an accord with revolutionary France, of which he was enormously suspicious. When he was approached for a bribe, he refused and reported the notorious XYZ Affair to President John Adams. His correct and honorable behavior enhanced his national reputation.

When Marshall entered upon his duties as Chief Justice in 1801, the Supreme Court was lightly regarded. There had not even been space provided for it in the plans for the new Capitol building in Washington. At the end of Marshall’s tenure, thirty-four years later, the Court was a respected coequal branch of government. During that period, the Court decided 1,106 cases, and Marshall wrote the opinions in 519 of them—almost half. He dissented only nine times. In fact, such was the skill of Marshall’s leadership that there were not many dissenters at all. He dominated the Court through his unequaled power of persuasion, his congenial manner, and his shrewd sense of policy. As a nation, we are much in his debt.

Two major themes can be found in Marshall’s jurisprudence: judicial supremacy and
the sanctity of contract. He left his beneficent mark on the substance of the law, as well as upon the institution of the Supreme Court. To historians, it has seemed providential that Marshall was the Chief Justice during the formative years of our nation.

At the age of seventy-nine and in failing health, Marshall came to Philadelphia for medical treatment. It was unsuccessful. He died on July 6, 1835. As his funeral cortege made its way through the city on July 8, the Liberty Bell that had rung on July 8, 1776 pealed again in honor of the great jurist.

Sheldon Hackney

ENDNOTES

*These remarks were made on February 5, 2001, at a special joint session of the United States Court of Appeals for the Third Circuit and the United States District Court for the Eastern District of Pennsylvania, commemorating the bicentennial (one day before) of John Marshall’s accession as Chief Justice. Chief Judge Edward R. Becker of the Court of Appeals and Chief Judge James T. Giles of the District Court presided over the session.

4 Ibid.
5 5 U.S. (1 Cranch) 137 (1803).
6 Smith, supra note 3, at 319.
7 17 U.S. (4 Wheat.) 316 (1819).
8 22 U.S. (9 Wheat.) 1 (1824).
11 These and others among the numerous celebratory events of February 4, 1901, are noted in Michael Kammen, *A Machine That Would Go of Itself* (1986) 210.
13 Id. at 385.
14 Ibid.