At the beginning of the twenty-first century, 200 years after his appointment to the Supreme Court of the United States, John Marshall is an iconic figure. Albert Beveridge, his first great biographer, observed: “He has become a kind of mythical being, endowed with virtues and wisdom not of this earth. He appears to us as a gigantic figure looming, indistinctly, out of the mists of the past.” He holds special meaning for us who are lawyers, judges, and students of the law. He is our Founder. For many of us, he is our hero. He is the one who showed that law—no less than war, legislation, administration, or popular leadership—is central to the creation of a national government, and even to the creation of a people. I doubt there is a judge—or wannabe judge—in the country who does not, in some way, try to take John Marshall as his model.

In his day, Marshall was regarded as a champion of conservative values. He distrusted direct democracy and favored checks and balances against democratic excess. He protected vested rights against the incursions of populist legislatures. He also stood up for civil liberties—as in his opposition to the Alien and Sedition acts—and saw no fundamental difference between civil rights and property rights. He was sharply critical of the French Revolution. He favored strong central government, a strong executive, an independent judiciary shielded from popular opinion, and a strong military. His jurisprudence bore striking similarity to the political program of the Whig Party of John Quincy Adams and Henry Clay—which, not surprisingly, infuriated their politically more successful opponents, the Jeffersonian Republicans and the Jacksonian Democrats.

Yet despite this background, today he is claimed and admired by people across the political spectrum. For example, take a look at the Web page of the American Constitution Society. This is a new—and quite welcome—organization of law students and lawyers that hopes to become the left-wing counterweight to the Federalist Society. According to its Web
page, its goal is to counter what it calls the “dominant” conservative vision of law that “pervades” academic scholarship, judicial interpretation, and legislative and executive decisionmaking. Yet John Marshall, the pillar of the Federalist-Whig conservative establishment in his day, is at the top of its list of Supreme Court Justices who “embody” its anti-conservative jurisprudential ideals.2

In his own time, Marshall did not enjoy such universal esteem. It is difficult to appreciate his greatness unless we understand why he was controversial as well as why he was admired. In his day, Marshall was excoriated for his conservative politics, for his antipopulist view of the judicial function, for his nationalism, and above all for his ability to disguise his supposedly partisan purposes behind a beguiling screen of legalism.

No less a figure than Thomas Jefferson complained that “the state has suffered long enough . . . from the want of any counterpoise to the rancorous hatred which Marshall [sic] bears to the government of his country, and from the cunning and sophistry within which he is able to enshroud himself.”3 To John Tyler, Jefferson wrote that in Marshall’s hands, “the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice.”4 There were two basic themes of Jeffersonian’s attack: (1) that Marshall promoted a movement toward consolidated government at the expense of state authority, and (2) that he promoted the power of unelected and unaccountable courts at the expense of elected officials. Thus, in a letter to former Secretary of the Treasury Albert Gallatin in 1820, Jefferson complained that “the steady tenor” of the Court has been to “break down the constitutional barriers between the coordinate powers of the States and of the Union.”5 To another associate, Jefferson described the judiciary under Marshall as a “subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric.”6 Combining the issues of federal power and judicial overreach, Jefferson commented that “The legislative and executive branches may sometimes err, but elections and dependence will bring them to rights. The judiciary branch is the instrument which, working like gravity, without intermission, is to press us at last into one consolidated mass.”7 Jefferson generally believed that the powers of the federal government could go no further than those expressly enumerated in Articles I and IV of the Constitution and that constitutional judgments were ultimately the responsibility of the people, not of an unelected, aristocratic, and unaccountable judiciary. Of course, it is precisely those features of Marshall’s jurisprudence—nationalism and the rejection of states’ rights, and affirmation of judicial authority in the face of popular opposition—that so attract his newfound friends in the modern academy.

I believe that neither Marshall’s Jeffersonian detractors in his own lifetime nor his American Constitution Society admirers today do John Marshall justice. Marshall was not a single-minded advocate of federal or judicial power. To be sure, at a time when the centrifugal forces of sectionalism—fueled by slavery and by agrarian and Jeffersonian ideology—threatened to undermine the necessary authority of the national government, Marshall strongly and decisively tilted the other way. But he did so, not in the name of an all-powerful national government, but in defense of a constitutional structure in which the national government was vested by the people with substantial but limited authority. Much of Marshall’s statesmanlike genius consisted in defending national power by reassuring the people that the Constitution provides a bulwark against consolidation as much as it does against disintegration. And Marshall never came close to asserting judicial supremacy over the political branches of government. He conceived of judicial review as a power to be
exercised sparingly. In his entire career, Marshall voted to invalidate only one, relatively unimportant statute of Congress as unconstitutional.

He insisted on the authority of the political branches to resolve constitutional issues within their jurisdiction. And even within the appropriate scope of judicial review, he deferred to the judgments of Congress, especially when Congress had carefully considered the constitutional arguments and had reached a stable consensus over time. Marshall did not view constitutional law as a substitute for politics, or as a solution to all injustice. As he wrote for the Court in Providence Bank v. Billings:

[T]he constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the state governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against... unwise legislation generally.8

Who was John Marshall? What were the characteristics of his legal method? And what role did he play in the creation of a national government?

Personal History and Characteristics

John Marshall was born in 1755, on the Virginia frontier.9 He and Jefferson were distant cousins, both descending from the great Randolph clan of Virginia. But the resemblance in backgrounds stops there. Marshall’s grandmother had been disowned by the family, and his father was the successful son of a small farmer. Marshall spent much of his early career scrambling to make a living and became a substantial land speculator. He thus had an orientation to the frontier and to those who had to make their own fortunes, rather than to the Virginia aristocracy.

He served as a junior officer in the American Revolution under General Washington, who was his lifelong hero. Historians tell us that one of the most formative experiences of his life was that awful winter at Valley Forge, when the army struggled by without blankets, meat, flour, or shoes.10 When, years later, as Chief Justice, he explained the utility of a national bank for collecting taxes and providing pay and supplies to the troops, we hear the echo of that winter of privation with Washington at Valley Forge. As an old man, Marshall commented that as a result of serving in the Revolution “with brave men from different states who were risking life and everything valuable in a common cause, . . . I was confirmed in the habit of considering America as my country, and Congress as my government.” He said he “had imbibed these sentiments so [thoroughly] that they constituted a part of my being.”11

During and after Washington’s presidency, Marshall was Washington’s close political associate. Washington offered him positions as Attorney General and as Ambassador to France, which Marshall declined, and later twisted his arm to persuade him to run for Congress, where in a single term he became the leader of the Washington-Adams wing of the Federalist Party. Marshall wrote Washington’s first great biography. He delivered the eulogy to Washington in the Congress of the United States and, with the Speaker of the House, led Washington’s funeral procession from the congressional meeting-place to the church. Vice President Thomas Jefferson, by the way, refused to attend.12

An account of his career as a diplomat and architect of American foreign policy as Secretary of State would occupy a lecture in itself. He also served in such positions as state legislator, delegate to the Virginia ratifying convention, municipal official, acting state attorney general, and brigadier general in the
Virginia militia. By the time of his appointment to be Chief Justice, he had held just about every possible position in public life except that of judge.

Marshall’s appearance was not impressive. One acquaintance described him, shortly after his appointment to the Court, as “tall, meager, emaciated; his muscles relaxed, and his joints so loosely connected, as . . . to destroy everything like elegance and harmony in his air and movements.”13 His dress was simple, perhaps even shabby. In one amusing incident, he was hanging about the farmers’ market in Richmond doing some shopping when a visiting gentleman, mistaking him for a servant, offered him a coin to carry a turkey home for him. Marshall obliged and accepted the coin, later commenting that “we were going the same way” and that it was only “neighborly” to help.14

A religious skeptic, Marshall could not accept the divinity of Christ. Nonetheless, he was instrumental in raising funds for Richmond’s Memorial Church, purchased a pew, and attended regularly.15

Marshall was a devoted husband, father, and grandfather. His beloved wife, Polly, was weak and sickly for much of their adult lives, and Marshall shocked his contemporaries by doing housework and domestic shopping to ease her burden. Feminist Harriet Martineau, who knew Marshall well, wrote after his death that he “carried to his grave a reverence for women, as rare in its kind as in its degree.”16

Though he possessed a small number of slaves, Marshall was an officer in the Virginia branch of the American Colonization Society, an organization devoted to emancipation of slaves and their conveyance to Liberia; he worked for the improved treatment of slaves and was particularly vigilant in defending the rights of former slaves.17 On the Court, he described the slave trade as “contrary to the law of nature” and stated that “every man has a natural right to the fruits of his own labor” and that “no other person can rightfully deprive him of those fruits, and appropriate them against his will.”18 Nonetheless, he upheld the institution of slavery and rendered decisions in favor of slave-owners when he judged that the law was on their side.

We often think of him as somber and austere. In fact, he was humorous and convivial, quick to laugh. At the Virginia ratifying convention, he was a match for Patrick Henry in the fine art of schmoozing wavering delegates over a glass in the tavern. He cofounded the Barbecue Club in Richmond, where he continued to drink rum, eat barbecue, and play quoits on Saturday afternoons until the end of his life. Theodore Sedgwick described Marshall as “indolent” and “attached to pleasure, with convivial habits strongly fixed.”19 Reading many descriptions by contemporaries, I am struck by how frequently the word “indolent” is attached to him. He seems to have cultivated a relaxed manner, like a laid-back California undergraduate. But in fact he arose before dawn, and had usually completed a day’s work by noon.20

With a few exceptions, Marshall got along well even with his political adversaries. He and Henry clashed at the Virginia ratifying convention, but served as co-counsel in several important cases in the years afterward. Marshall and James Monroe were close friends at college and bunkmates in the army, though they found themselves on opposite sides of the fight over ratification and later over many other political issues. He and James Madison remained friends despite decades of political conflict. Among the exceptions were Jefferson and Judge Spencer Roane, both of whom added personal dislike to political disagreement. The abstemious Jefferson criticized what he called Marshall’s “lax lounging manners”—a reference to Marshall’s ease at the tavern.21

Marshall’s natural sociability played a large part in building the Supreme Court as a collegial institution. Under Marshall’s leader-
ship, the members of the Court roomed in the same boarding house and discussed cases over meals in the evening. This contributed mightily to their ability to meld their differences into united opinions of the Court, which in turn greatly enhanced the authority of the Court’s decisions. The Marshall Court thus avoided the spectacle of acrimonious dissents and separate opinions that so often feature in the decisions of the Court today.

Let me share a wonderful story from Jean Edward Smith’s biography:

President Josiah Quincy of Harvard, a friend of Story’s, once accompanied the Justice to Washington. When Quincy inquired about the city, Story warned him that “I can do very little for you there, as we judges take no part in the society of the place. We dine once a year with the President, and that is all. On other days we take our dinner together, and discuss at table the questions which are argued before us. We are great ascetics, and even deny ourselves wine, except in wet weather.” Quincy reports that Story paused at that point, as if thinking that the act of mortification he had mentioned placed too severe a tax upon human credulity, and presently added: “What I say about the wine, sir, gives you our rule; but it does sometimes happen that the Chief Justice will say to me, when the cloth is removed, ‘Brother Story, step to the window and see if it does not look like rain.’ And if I tell him that the sun is shining brightly, Judge Marshall will sometimes reply, ‘All the better; for our jurisdiction extends over so large a territory that the doctrine of chances makes it certain that it must be raining somewhere.’”

Today’s Supreme Court might do well to adopt this practice of sharing a glass of Madeira, at least when it is raining.

On January 20, 1801, after John Adams had been defeated for reelection but before Jefferson had been sworn into office, Adams nominated Marshall to be the fourth Chief Justice of the Supreme Court (as the office was then called). A week later, Marshall was confirmed unanimously by the Senate. It is noteworthy that, despite a pitch of partisan division rarely exceeded in our history—including a disputed election and a lame duck President—not only Marshall but all three of Jefferson’s subsequent nominees to the Supreme Court were confirmed unanimously, without delay.

At the time of his appointment, the prestige of the Supreme Court as an institution was very low. John Jay, the first Chief Justice, had resigned to accept the office of Governor of New York. Invited by Adams to take on the job again in 1800, Jay declined, citing the failure of the Court to “acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.”

It was not a good enough job for Jay.

Marshall served as Chief Justice of the United States for almost thirty-five years, spanning the terms of five Presidents. Over the course of those years, the Court rendered 1,100 decisions, 519 of them written by Marshall himself. Marshall dissented only eight times. Many of these decisions remain among the greatest in our constitutional history. Examine the curriculum of any constitutional law class in the country and you will see the mark that Marshall’s Court made on the development of the law. By the end of Marshall’s long career, the Court was no longer held in low esteem. President Andrew Jackson, with whom Marshall had clashed repeatedly, delivered Marshall’s eulogy:

I have always set a high value upon the good he had done for his country.
The judicial opinions of John Marshall were expressed with the energy and clearness which were peculiar to his strong mind, and gave him a first rank among the greatest men of his age.25

Of course, the most lasting tribute to Marshall was not Jackson’s eulogy, but his opinions in the U.S. Reports, which continue to set the framework for much of our constitutional law. It would be impossible even to attempt to canvass this vast body of work in a single lecture, and you will be relieved to know that I will not even try. Instead, I invite you to take a look at one characteristic Marshall decision, one that many historians consider his most important and one that has been misunderstood as often as it has been quoted: McCulloch v. Maryland.26

The legal issue in McCulloch is easy to state. The Congress of the United States had established a national bank, with branches in cities across the country, including Baltimore, Maryland. The legislature of that state—like the legislatures of many states—resented this federal creation and sought to inhibit its operations by imposition of a special tax of one to two percent on the issuance of its notes, or $15,000 a year. The bank refused to pay.

This raised two issues. First, did Congress have the power to incorporate the bank? Note that nowhere in Article I, Section 8 of the Constitution is Congress given such a power. Indeed, a motion to give Congress the power of incorporation was defeated at the Constitutional Convention. If Congress has such a power, it must be implied—and the idea of “implied” powers raised fears of federal overreaching. If powers can be implied, what is the limit? Second, assuming that the bank itself was constitutional, did Maryland have the constitutional power to impose a tax? What was the constitutional standing of federal entities within a state?

The political context is somewhat harder for us to appreciate at a distance of 180 years. It may seem to be a musty old argument, without much relevance to us today. But the real drama of McCulloch v. Maryland, and its contribution to the creation of a national government, cannot be grasped without a recognition of the place of the bank debate in certain perennial questions of American politics.

It may fairly be said that, as of 1819, when McCulloch was argued and decided, the status of the Bank of the United States was the longest-running and most hotly contested question in American politics—more so, at that time, than slavery. In his biography of Washington, Marshall expressed the view that the bank debate—more than any other domestic issue—was responsible for crystallizing American politics into the two contending parties, Federalist and Republican. From the first bank debate in 1790 forward, opposition to the bank was a central credo of the Jeffersonian Republicans. Many of the issues raised by the bank remain disputed in other guises today.

There were several interrelated reasons for this intense controversy over the bank. First was the abstract question of constitutional principle: What is the reach of federal power? Is federal power defined and limited by the expressed enumerations in Article I and Article IV—or does it go beyond them? The idea of implied powers was nothing new. That had been the basis of Hamilton’s defense of the Bank way back in 1790. Indeed, it had been the basis for defense of the Bank of North America, a predecessor institution, under the Articles of Confederation. But it remained problematic, because no one could discern its practical limits. As Jefferson wrote in response to the McCulloch decision:

Congress are authorized to defend the nation. Ships are necessary for defense [sic]; copper is necessary for ships; mines necessary for copper; a company necessary to work mines; and who can doubt this reasoning
who has ever played at “This is the House that Jack Built?” Under such a process of filiation of necessities the sweeping clause makes clean work.27

It is well to remember that much the same “process of filiation of necessities” that supported the implied power of Congress to establish a national bank would also support the program of canals, roads, and other internal improvements that was the platform of the newly emerging Whig Party and that at this juncture was thought unconstitutional by Monroe and Madison, the leading Republicans. The principle of the bank was thus at the very heart of contemporary partisan divisions.

Second was the symbolic significance of banks in the cultural-ideological conflict of the day. This is a complicated matter, and I am not a social historian, but the division looked something like this: Two visions of America were in competition. One was an agrarian and populist vision of an America of independent yeoman farmers and mechanics. The other was a cosmopolitan vision of America as a great commercial republic. There may be echoes of this division in today’s fights over globalization, Wal-Mart, and the family farm. The agrarian vision was based on an idea of republican virtue as independence and a primitive form of the labor theory of value, which treated commercial middlemen and the payment of interest as parasites on the real value-generating activity of labor. Banks—especially the Bank of the United States—were a symbol of this evil. John Taylor of Caroline described banking as “a fraud whereby labour suffers the imposition of paying an interest on the circulating medium.” He said that “In the history of our forefathers we recognize three political beasts, feeding at different periods upon their lives, liberties, and properties. Those called hierarchical and feudal aristocracy, to say the worst of them are now the instruments of the third”—meaning banks.28

Third, and relatedly, banks and other corporations were thought incompatible with a democratic social order. According to the 1785 report of the Pennsylvania Assembly, which repealed the charter of the Bank of North America, “[T]he accumulation of enormous wealth in the hands of a society who claim perpetual duration will necessarily produce a degree of influence and power which can not be entrusted in the hands of any set of men whatsoever without endangering the public safety.”29 The attack on the Bank of the United States was thus part of a wider hostility to the accumulation of capital in corporate form.

To read McCulloch v. Maryland, you might think that the Bank of the United States was an agency of the federal government. It was not: it was controlled by private investors and was not accountable to the public. There were widespread reports of favoritism to insiders and other skullduggery. Perhaps more serious is the fact that the Bank of the United States first extended loose credit in 1817 and then drastically cut back in 1819, ruining many state banks in the process. This coincided with a collapse in commodity prices, which sent the economy into a depression. The Bank of the United States thus appeared to wield enormous power, and if its lawyers were right, the states were powerless to regulate it. Again, the resentment and fear of multinational corporations today may provide something of a parallel.

Fourth, a national bank presented serious and damaging competition to politically well-connected local banks. Especially if it were exempt from state regulation and taxation, the Bank of the United States would gain local business at the expense of local banks. National bank notes would drive state bank notes out of circulation. As Madison observed, a national bank “would interfere so as indirectly to defeat a state bank at the same place” and would “directly interfere with the rights of states to prohibit as well as to establish banks.”30 Naturally, state legislatures were more responsive to the competitive needs of
Thus, when *McCulloch* came to the Court in 1819, it was a political hot potato. It was the centerpiece of partisan division. For the Court to decide in favor of the Bank of the United States would confirm for its critics that the Court was an arm of Federalist-Whig politics. For the Court to decide against the bank would be a blow against all the principles Marshall held dear. Three days after the oral argument, Marshall delivered a unanimous decision in favor of the bank and against the power of the state to tax it.

What does *McCulloch* tell us about those two issues that troubled Jefferson, the role of the federal judiciary and the scope of national power? The first and most striking feature of this opinion, I think, is something it does not do: It does not cite a single Supreme Court precedent. Contrast this to a modern decision, in which lawyers and the Court quote copiously from earlier decisions. Sometimes it seems even the most obvious propositions require the support of an array of footnotes.

And Marshall’s failure to cite Supreme Court precedent cannot be explained by any lack of it. Fourteen years before, in *United States v. Fisher*, the Court had upheld Congress’s power to give claims of the United States priority in the disposition of insolvent estates, on the basis of an exposition of implied powers almost identical to that in *McCulloch*.

The key passage in *Fisher* is as follows:

> In construing [the Necessary and Proper] clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each, that it was not necessary, because the end might be obtained by other means. Congress 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.

That, of course, is also the animating principle of *McCulloch*. This failure to cite available precedent is reminiscent of Marshall’s opinion for the Court in *Marbury v. Madison*, in which he did not trouble to cite the several earlier cases in which the Court had engaged in constitutional judicial review, not even the one case in which he himself had appeared as an advocate in the Supreme Court. Note that there is a difference between not referring to precedents and not following them. I am not saying that Marshall had no respect for the principle of *stare decisis*, but it was his apparent view that an opinion of the Court has more authority if it proceeds from fundamental principles and from the constitutional text than if it seems to rest on the authority of prior decisions.

This leads to a second striking feature of the decision: while it does not rely on judicial precedent, it does rely on precedent set by the political branches of government, even on this constitutional question. The constitutionality of the Bank of the United States, Marshall wrote, “can scarcely be considered as an open question.” The principle “was introduced at a very early period of our history, has been recognised by many successive legislatures, and has been acted upon by the judicial department in cases of peculiar delicacy, as a law of undoubted obligation.” Marshall emphasized that the Congress and the executive had debated and resolved the constitutional question. It “did not steal upon an unsuspecting legislature, and pass unobserved.” Rather, after full and fair debate, both in Congress and in the executive cabinet, the arguments in favor “convinced minds as pure and as intelligent as this country can boast.” That was a reference to George Washington. To Mar-
shall, Washington’s judgment was better than any judicial precedent.

Marshall embraced what is sometimes called “the doubtful question” or “clear mistake” rule later championed by James Bradley Thayer. Marshall put it this way: that on a “doubtful question, one on which human reason may pause, and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned,” the courts ought to be guided by “the practice of the government.”

To those who see Marshall as the symbol of judicial supremacy, this must come as some surprise. The constitutional duty of judicial review was not questioned. Marshall expressly noted that what he called a “bold and daring usurpation” of power might be resisted even “after an acquiescence still longer and more complete than this.” But in *McCulloch*, Marshall stood in the camp of what we now call “judicial restraint”: the view that the judiciary should not lightly overturn the actions of representative bodies—especially when those bodies themselves gave attention to the constitutional question and when their decision has been reflected in a course of practice over a number of years.

Nor was *McCulloch* the only Marshall Court decision to emphasize the constitutional role of the other branches of government. In *Stuart v. Laird*—a case scarcely less politically explosive than *McCulloch*—the Court upheld the Judiciary Act of 1802, a statute passed by the new Jeffersonian majority abolishing lower federal courts established at the end of the Adams administration. Many Federalists considered this an assault on the principle of an independent, life-tenured judiciary, and deemed the return to circuit-riding by Supreme Court Justices a violation of the appellate nature of their jurisdiction. Without truly answering the constitutional arguments, the Court simply observed that “[P]ractice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible an-
swer, and has indeed fixed the construction, . . . Of course, the question is at rest, and ought not now to be disturbed.”

It is fair to say, then, that Marshall tempered his affirmation of the authority of the courts with a style of judicial review that gave substantial respect and deference to the other branches of government. At later points in our history, judges were sometimes less inclined toward deference, and less likely to credit the constitutional judgments of Congresses or Presidents.

This brings us to the question of federal-state balance of power. Once again, Marshall adopted a view that, while affirming the wide scope of federal authority, also recognized the limitations on that power. Marshall did not suggest that the scope of federal authority is whatever Congress says it is. He did not treat the question of allocation of power between states and the federal government as a political question, to be left entirely to the give and take of national politics, as the Court would later hint in *Garcia v. San Antonio Metropolitan Transit Authority*. “This government is acknowledged by all,” Marshall wrote, “to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. . . . We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended.”

Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision, come before it, to say that such an act is not the law of the land.

I wish to emphasize here that the genius of Marshall’s jurisprudence lies precisely in giving due credit to the just fears and principles...
of those on the opposing side. In this way, he situated the Court in the moderate center of American constitutional politics. He did not allow himself to be an advocate of consolidation, but instead advocated a fair and generous reading of the powers entrusted to Congress.

Marshall was at his most persuasive in explaining why—contrary to Jefferson—it would not be possible to read the powers granted to Congress in a narrow and exclusive fashion. His examples are telling. The federal government is not expressly granted the power to pass criminal laws, save in the cases of counterfeiting, piracy and felonies on the high seas, and offences against the law of nations. Yet all admit that Congress must have the power to punish violations of its laws—not as an end in itself, as a full criminal code, but as a means of executing the enumerated powers. Congress also has the power “to establish post-offices and post-roads.” Surely this must include, by implication, the “power and duty of carrying the mail along the post-road, from one post-office to another.” And “from this implied power, has again been inferred the right to punish those who steal letters from the post-office, or rob the mail.”

From these examples, and more like it, Marshall infers that Congress must have a choice of “means for carrying into execution all sovereign powers.”

And Marshall drew further support from the wording of the Necessary and Proper Clause and of the Tenth Amendment, which reads “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” He noted that the Framers of this provision deliberately omitted the word “expressly,” which had appeared in the otherwise identical provision in the Articles of Confederation before the word “delegated,” thus implying that the powers of Congress need not be “express” to be delegated.

Equally persuasive, in my opinion, is Marshall’s application of these principles to the national Bank itself:

Throughout this vast republic, from the St. Croix to the Gulph [sic] of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed. Is that construction of the constitution to be preferred, which would render these operations difficult, hazardous, and expensive?

In this passage we hear the voice of the veteran of Valley Forge, who saw his fellow soldiers die of cold, starvation, and disease, not from the bullets of the British, but from the inability of the Congress under the Articles of Confederation to raise money and to provide shoes, clothing, blankets, and food. To a veteran of Valley Forge, nationalism and patriotism naturally went hand in hand.

I must say, however, that I find the second part of the McCulloch opinion—the part about the Maryland tax—less persuasive. The “great principle” on which the Bank of the United States’s immunity from state taxation rested, according to Marshall, was “that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them.” He went on:

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another.

It thus followed that if Congress had the power to create the bank without leave of the states, the states must not have the power to
There are at least three things wrong with this analysis. First, it disregards the significance of the very Supremacy Clause upon which the argument is said to rest. Under the Supremacy Clause, Congress has the power to shield the Bank of the United States from state taxation and to preempt state laws that might interfere with its efficient operations. But to say that Congress has the authority to immunize the bank from state taxation is a far cry from saying that the Constitution requires such immunity. Why not leave this issue to Congress?

Second, and relatedly, the principle seems to go too far. The rationale of this holding, for one thing, seems to apply symmetrically to federal taxation of state entities as well as to state taxation of federal entities—a conclusion that Marshall denied in *McCulloch*, but that the Court embraced not long thereafter. By the middle of the century, *McCulloch* had spawned an elaborate, rigid, and ultimately unworkable doctrine of intergovernmental tax immunities, which was overruled in 1939. Marshall never explained why some lesser principle—such as a prohibition of discriminatory taxes—would not suffice to protect national interests.

Finally, and most significantly, the Court never explained why the principle of federal government immunity from state taxation should extend to an essentially private corporation such as the Bank of the United States. Only a small part—20 percent—of the bank’s stock was owned by the federal government; for the most part, the bank was a private, profit-making enterprise. Counsel for Maryland repeatedly emphasized this fact in their arguments to the Court, and I am sorry to say that Marshall gave this argument the worst possible rebuttal: no rebuttal at all. Marshall wrote:

If the states may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government.50

But the Bank of the United States was not like the post office or the courts. It was a privately owned, for-profit corporation. It is difficult to understand why it should not be taxed and regulated by the states in which it operated.

To sum up, let us return to Jefferson’s charges against Marshall: that he aggrandized the power of the courts and of the national government. In a sense, Marshall was guilty of both—but only in a sense. Marshall’s exercise of judicial review was tempered by deference to the constitutional judgments of coordinate bodies within their jurisdiction. Modern myth to the contrary, this was not particularly controversial even at the time. *McCulloch* was much more controversial a decision than was *Marbury*. And note that in *McCulloch*, the Court was criticized not for exercising the power of judicial review, but for failing to strike down an act of Congress.

As to the powers of the national government, Marshall was undoubtedly a nationalist in an era of extreme states-rights agitation. But his constitutional ideal was one not of national domination, but rather of balance—in his terminology, “equipoise.” “The constitution has . . . established that division of power which its framers, and the American people, believed to be most conducive to the public happiness and to public liberty. The equipoise thus established is as much disturbed by taking weights out of the scale containing the powers of the [federal] government, as by putting weights into it,” Marshall wrote in defense of his decision in *McCulloch*. “His hand is unfit to hold the state balance who occupies
himself entirely in giving a preponderance to one of the scales.”51

Moreover, recent studies of Marshall’s jurisprudence have emphasized that his nationalist vision was not so much of a strong, interventionist national government as of a unified commercial nation.52 National institutions—including the federal courts—were important not so much to the regulation and control of American life as to the guaranteeing of property rights and the rule of law against the populist, changeable, and often foolish actions of state legislatures. The two most prominent examples in anyone’s list of nationalist decisions on the part of the Marshall Court would be McCulloch and Gibbons v. Ogden.53 But what were they about? McCulloch insulated a privately owned and controlled bank from state interference, and Gibbons v. Ogden permitted a private steamship company to defy a state-imposed monopoly. These decisions are truly of a piece with Dartmouth College, Fletcher v. Peck, Sturges v. Crowninshield,54 and the other decisions typically classed as protections for vested property rights.

It would therefore be a mistake—a historical anachronism—to treat John Marshall as if he were an early version of a New Dealer or the precursor of modern judicial activism, whether of the left or of the right. People of all ideological stripes can—and should—find much to admire in Marshall, but if they take him honestly, they will find much to challenge their current convictions.

Nonetheless, we all still revere John Marshall. I think that is because, beyond issues of Federalist and Republican, Whig and Democrat, beyond issues of judicial review and the precise balance between federal and state power, beyond capitalist and agrarian notions of republican virtue, Marshall was above all an American. His role in the creation of our national identity must be an inspiration to any American patriot. If George Washington founded the nation, and Abraham Lincoln held it together at the time of its greatest peril, John Marshall was the man who kept the idea of Union alive when the forces of sectionalism were gathering their strength. For that he deserves our admiration and our thanks.

When I was asked to deliver this lecture and assigned the topic of “John Marshall and the Creation of a National Government,” no one could have foreseen that between the asking and the delivering, a band of terrorist fanatics would cause us to ask once again what it means to be a nation, and would cause Americans of all political dispositions to draw together in a unity I had not seen before in my lifetime. I think John Marshall would understand and appreciate that impulse to unity. Listen to these words from Marshall—my personal favorites—from his opinion in Cohens v. Virginia:

In war we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and for many purposes, a nation; and for all these purposes, her government is complete; to all these objects, it is competent.55

Thanks in no small part to Chief Justice Marshall, that description continues to be true.

ENDNOTES

1Albert J. Beveridge, 1 The Life of John Marshall v (1916).
3Letter from Thomas Jefferson to James Madison, May 25, 1810, reprinted in 3 The Republic of Letters: The Corre-


6Letter from Thomas Jefferson to Thomas Ritchie (December 25, 1820), in 12 id. at 175–179.

7Letter from Thomas Jefferson to Archibald Thweat (January 19, 1821), in 12 id. at 196–197.


12Smith, supra note 10, at 256.


14Smith, supra note 10, at 376.

15Id. at 406.


17Newmyer, supra note 10, at 414–437, contains a thorough and balanced discussion of Marshall’s involvement with and views on slavery.


19Quoted in Smith, supra note 10, at 264.

20See id. at 329.

21Quoted in id. at 161.

22Id. at 403 n.4, quoting Josiah Quincy, Figures of the Past 189–190 (1883).

23Quoted in Smith, supra note 10, at 283.


25Quoted in Smith, supra note 17, at 1128–1129.


27Letter from Thomas Jefferson to Edward Livingston, April 30, 1800, in 9 Works of Thomas Jefferson, supra note 6, at 132–133.

28Quoted in B. Hammond, Banks and Politics in America 36 (1957).

29Id. at 13.


316 U.S. (2 Cranch) 358 (1805).


336 U.S. at 395.

344 U.S. (1 Cranch) 137 (1803).

3517 U.S. at 401.

36Id. at 402.

37Id. at 401.

38Ibid.

394 U.S. (1 Cranch) 299 (1803).

40Id. at 309. Marshall himself did not participate in the decision, because he had been on the lower court panel that decided the case. The Court affirmed Marshall’s decision.


4217 U.S. at 405, 421.

43Id. at 423.

44Id. at 417.

45Id. at 418.

46Id. at 406–407.

47Id. at 408.

48Id. at 426.

49Id. at 431.

50Id. at 432.


52See Newmyer, supra note 10, at 318–319.


5417 U.S. (4 Wheat.) 581 (1819); 10 U.S. (6 Cranch) 87 (1810).