

# A New Look at Chief Justice John Marshall

By Robert G. Natelson

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John Marshall, the fourth chief justice of the United States Supreme Court, is generally conceded to be the greatest chief justice in U.S. history. He served from the time of his appointment by President John Adams (1801) until his death in 1835.

It is common to cloth great men with myths, and this is true of Marshall as well. One of the most enduring myths about Marshall was that he was a judicial activist who usurped power for himself and for his court. Another myth is that Marshall's decisions justified constitutionally the huge expansion of federal power that occurred during the twentieth century.

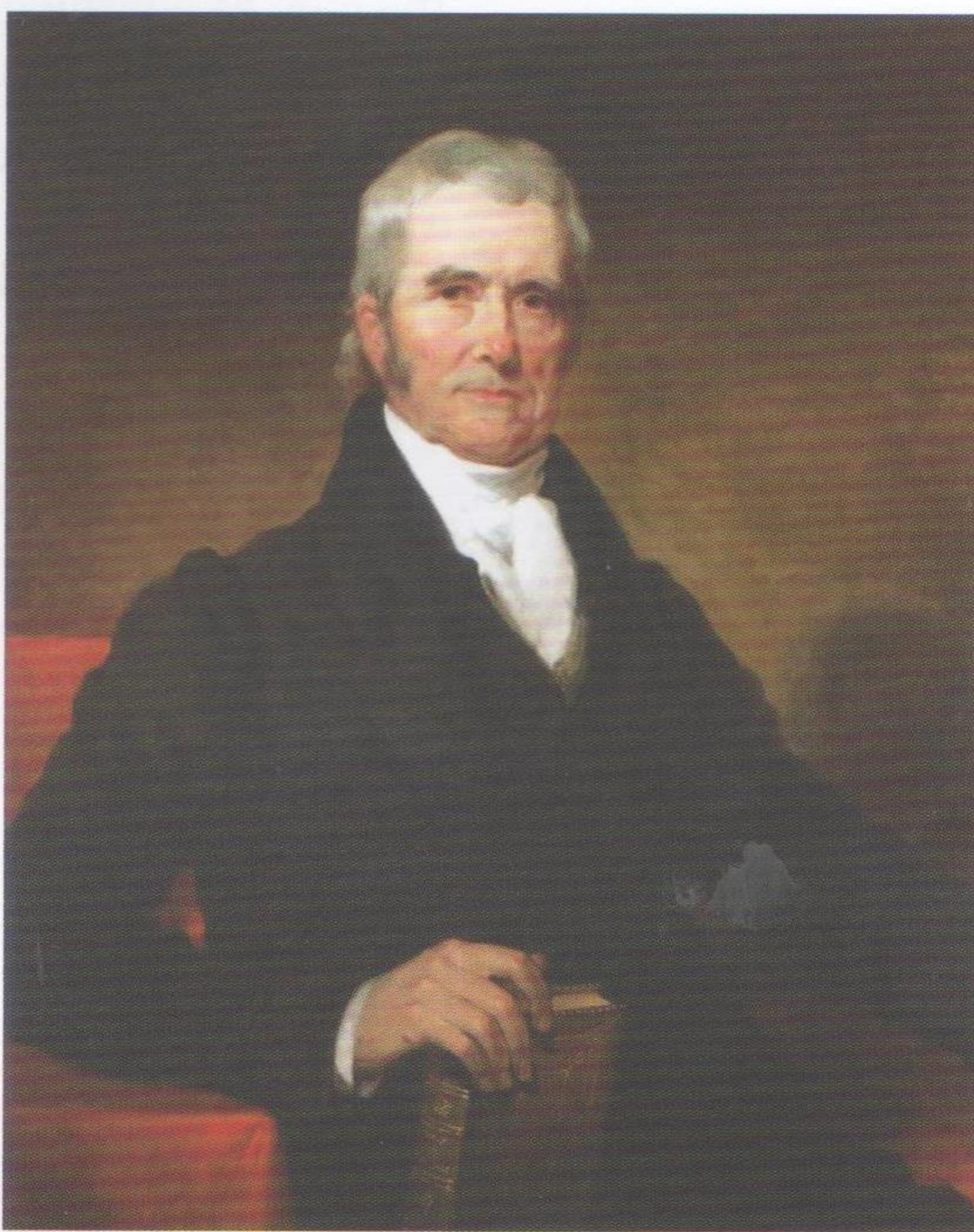
For example, it is often said that:

- In his decision in *Marbury v. Madison* (1803), Marshall invented the doctrine of judicial review. He thereby assumed for his court the prerogative of declaring laws contrary to the Constitution to be void. Thus, the Supreme Court became much more potent than the Founders intended.

- In *McCulloch v. Maryland* (1819), Marshall turned the Necessary and Proper Clause (Article I, Section 8, Clause 18) into a vast reservoir of congressional power, thereby giving Congress authority to regulate the entire economy.

- In *Gibbons v. Ogden* (1824), Marshall further laid the foundation of the regulatory state by, in the words of Justice Robert Jackson (*Wickard v. Filburn*, 1942), "describ[ing] the Federal commerce power with a breadth never yet exceeded."

Yet all of these claims are flatly false.



John Marshall, painted by Henry Inman, 1832

## Declaring Laws Void

Marshall did not "invent" judicial review. On the contrary, when Marshall announced the unanimous court decision in *Marbury*, judicial review already was a well-accepted aspect of American law. Before the Declaration of Independence in 1776, laws of the American colonies were understood to be void if they violated Magna Carta or the colonial charters. After Independence, state courts could strike down state laws that violated state constitutions.

Indeed, one distinguished researcher, William Michael Treanor of Fordham Univer-

sity School of Law, noted over thirty reported cases issued in which American tribunals applied or recognized the rule of judicial review. This would have been after the Declaration of Independence and prior to *Marbury*.

Moreover, during the debates over the ratification of the Constitution, both those favoring and those opposing the document stated that the courts should void unconstitutional laws. Chief Justice Marshall knew this, because at the Virginia ratifying convention fifteen years earlier, he had said the same thing.

Nor is it true that Marshall used judicial review to aggrandize the power of his own court. After *Marbury*, Marshall never voided a federal statute as unconstitutional in his remaining 32 years on the bench.

## Vast Federal Power?

The claim that Marshall stretched the Necessary and Proper Clause in *McCulloch v. Maryland* is also untrue. Marshall was a consummate lawyer who

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–*Chief Justice Marshall, cont'd. from page 27*

knew the jurisprudence of his time exceedingly well. Under then-existing law, the Necessary and Proper Clause was not a grant of power; it was a direction for reading federal authority in accordance with certain widely-understood rules. In *McCulloch*, Marshall merely applied those rules to a difficult case.

It also is asserted that Marshall interpreted the federal government's Commerce Power in *Gibbons v. Ogden* exceedingly broadly—that under his formulation Congress to regulate any economic activity “substantially affecting” interstate commerce. In modern times, the U.S. Supreme Court has cited *Gibbons* to uphold congressional regulation of agriculture, mining, manufacturing, health care, insurance, medical marijuana, and almost every other aspect of the American economy.

But this view of *Gibbons* also is profoundly wrong. The central ruling of *Gibbons* was that the authority of Congress “to regulate Commerce . . . among the several States” included the power to regulate navigation.

When you read the law books of the time, you find that this ruling was certainly correct. Marshall also pointed out that sometimes commerce (including navigation) within state boundaries might be so tied up with commerce “among the several States” that Congress could regulate it, which was also correct under the law of his era.

Marshall did *not* say that Congress could govern other aspects of the economy. On the contrary, he listed various regulations reserved exclusively for the states, including “health laws of every description.” Those who use the *Gibbons* decision to argue that Congress may supervise the entire American economy are twisting some of Marshall's words and omitting others.

Why did the Founders make the decision to deny the federal government control over most aspects of American life? In other words, why did they decide that most regulations were for the states, not Congress, to make?

The decision was not reached easily. At the Constitutional Convention of 1787, most delegates favored a nearly unlimited central government. They would have subordinated the states to a level just above that of counties in England.

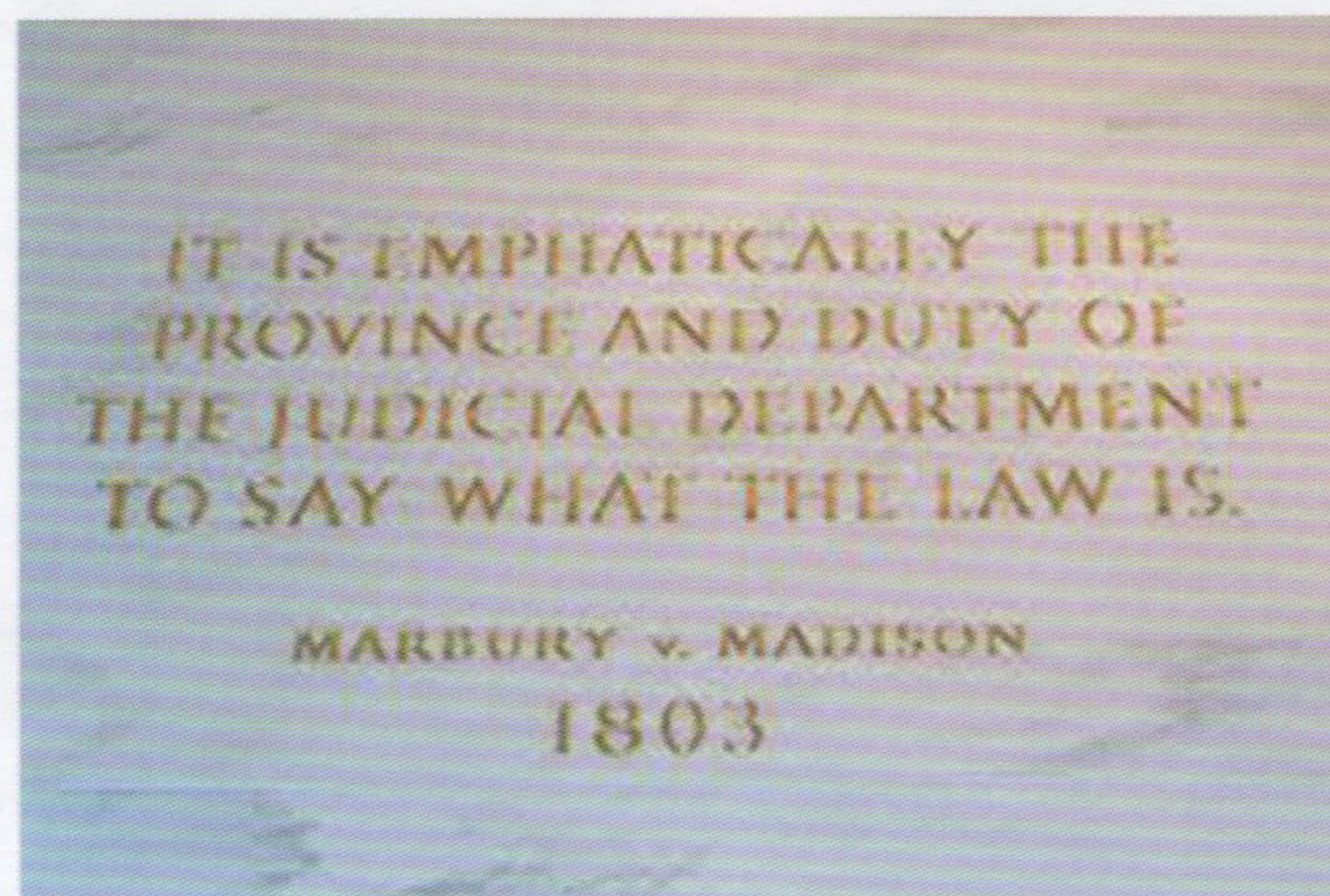
After vigorous debates, the delegates ended up with an enumeration (list) of powers the federal

government would have, and reserving all else to the states. Of course, the Framers recognized that human activities are highly intertwined, but they chose to decentralize power in the interests of better government and human liberty.

In the economic realm, they split governance between Congress and the states. Congress could regulate foreign, interstate, and Indian commerce, and a few other items, such as patents, copyrights, and bankruptcies. The states would control agriculture, manufacturing, health matters, social services, and the rest. As a leading Founder himself, John Marshall understood all of this.

### An Image Debunked

Why is Marshall so often painted as an activist? There are at least four reasons: First, few writers



on constitutional law today have studied the general jurisprudence of Marshall's era, so they don't understand much of his legal language. When Marshall failed to cite a lot of prior authority, some of those writers assume he was making things up. Second, few commentators seem to understand that key words sometimes had different

meanings than they do today.

Third, when students read cases such as *Marbury*, *McCulloch*, and *Gibbons*, they seldom are assigned the entire opinions, which are quite lengthy. Instead they read edited versions, which often omit explanatory and qualifying language.

Finally, throughout the years many people have had personal reasons for promoting the image of Marshall as a big-government judicial activist. In Marshall's day, his political opponent Thomas Jefferson (a believer in small government) portrayed Marshall that way. More recently, judges and law professors advocating big government have enlisted him to promote their own constitutional agendas.

The truth is that Marshall was a talented and careful judge who effectively applied the Constitution in a common-sense way and in the manner that was understood by the American public at the time it was ratified. That is the core of his greatness. ■

*Mr. Natelson is co-author of a more detailed article on Chief Justice Marshall which appears in the June 2011 issue of Engage, the journal of the Federalist Society for Law and Public Policy Studies. His views may be read on his Constitution blog, appearing on the Independence Institute website, <http://constitution.izi.org>.*