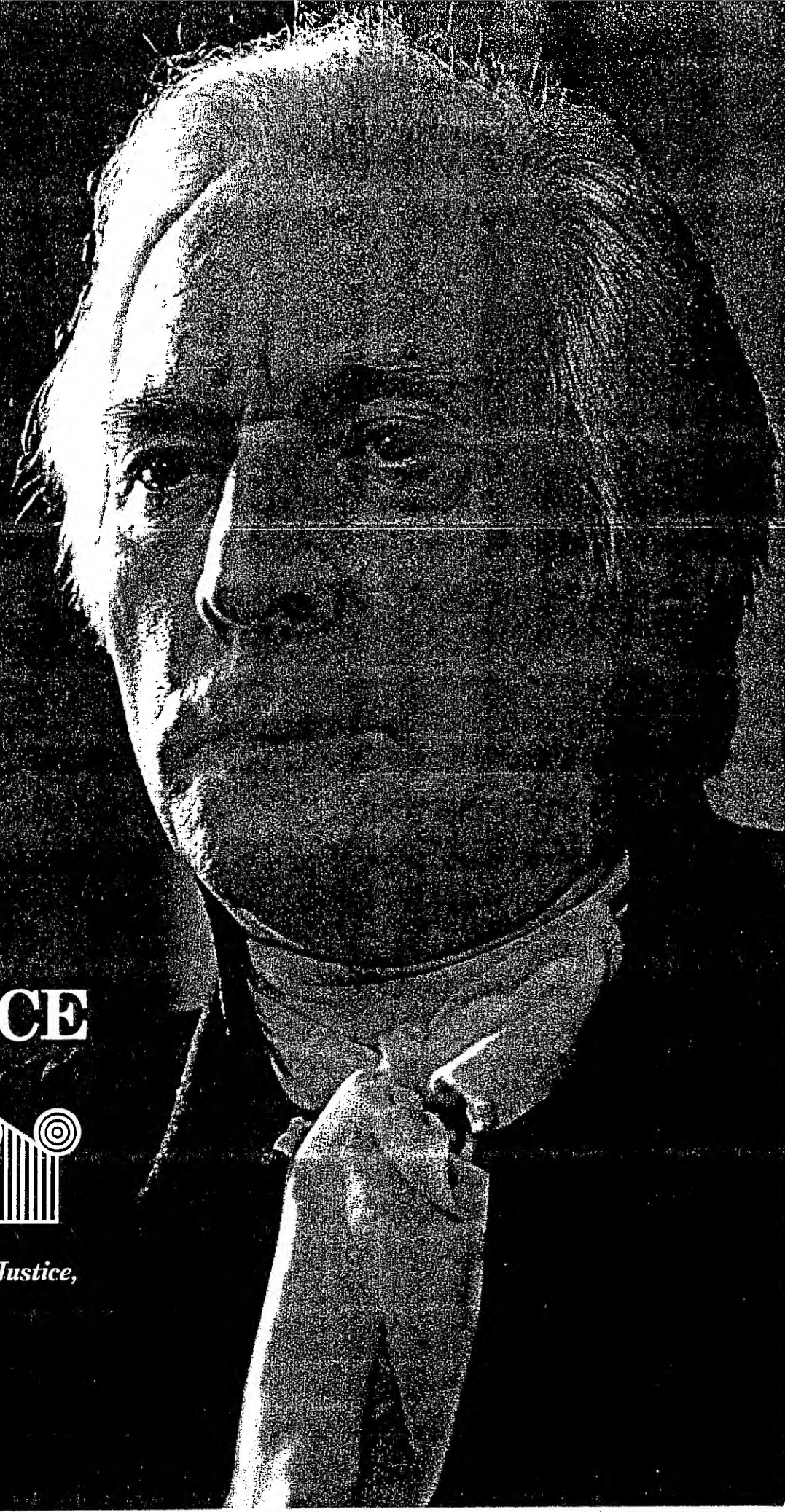


TEACHING GUIDE

EQUAL JUSTICE UNDER LAW

*Dramatizations
of historic decisions
from the courtroom
of America's great Chief Justice,
John Marshall.*



Committee on the Bicentennial of Independence and the Constitution
Judicial Conference of the United States

Dear Educator:

The programs in "Equal Justice Under Law" and this teaching guide focus upon certain landmark cases which arose early in our history and in which Chief Justice John Marshall played a major role as judge.

They are designed to promote constructive thinking about the United States Constitution, particularly as it contemplates enforcement by the courts of the separation of powers at the federal level, the division of powers between state and federal government, as well as the specific constitutional prohibitions and limitations upon the exercise of official authority.

This judicial role in implementing the constitutional design to provide an effective government, but to avoid the exercise of arbitrary official power as well, is as important today as it was early in our history.

Warren E. Burger Clement F. Haynsworth, Jr. Byron R. White

Warren E. Burger
Chief Justice of the
United States
Chairman, Judicial
Conference

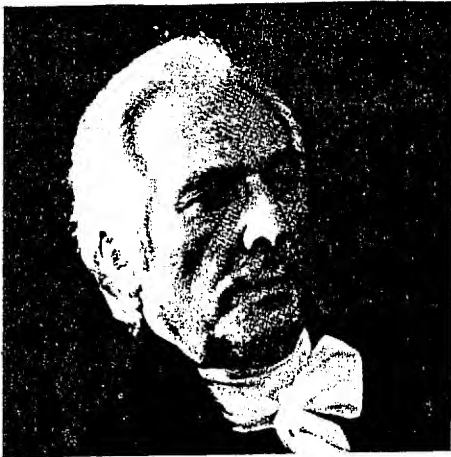
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Chief Justice John Marshall

Who determines what the Constitution means — what is and is not constitutional?

In this 1803 case, the Supreme Court established its responsibility to review the constitutionality of acts of Congress. President John Adams appointed Federalist William Marbury as justice of the peace, but failed to deliver Marbury's official commission before President Jefferson and the Democratic-Republicans took over the administration. Marbury asked the Supreme Court to order Jefferson's Secretary of State, James Madison, to deliver the commission. Marbury's demand precipitated a confrontation between Chief Justice Marshall and President Thomas Jefferson. The Supreme Court held that it did not have jurisdiction and declared that the law permitting the Court to hear the case was unconstitutional.

MARBURY v. MADISON

STUDENT OBJECTIVES

1. To understand how judicial review of federal legislation was established in the United States.
2. To understand Chief Justice Marshall's interpretation of the constitutional basis for judicial review of acts of Congress.
3. To understand the Federalist and Democratic-Republican positions on judicial review.
4. To place the case in its political and historical context.
5. To understand the basic structure of the American judiciary.

BEFORE VIEWING Discussion Questions

1. What are the distinct functions of the three branches of government? What limits are placed on the functions and power of each branch? (Art. I, II & III)
2. What are the three levels of the federal judiciary that were introduced by the Judiciary Act of 1789?
3. What happens when the Supreme Court of the United States decides that a law is unconstitutional?
4. What were the differences between the Federalist and the Jeffersonian-Republican views of government?

Other Activities

1. Review the steps in the process of judicial review:

- (1) Congress or a state legislature passes a statute;
- (2) a citizen challenges its constitutionality in a federal or state court;
- (3) the decision may be appealed to a higher court and may ultimately reach the Supreme Court.

Propose a hypothetical law that may be unconstitutional. **Role-play** each step in the process.

2. **Research the Constitutional Convention** on the subject of judicial review. Analyze the views of the major factions. **Role-play** a debate on the relation between the branches of the government that includes Jefferson, Madison, Hamilton, William Branch Giles, Gouverneur Morris and Rufus King.

3. **Research the election of 1800.** The class can recreate or develop a **media campaign** that simulates the issues and tone of the 1800 election. Included may be press releases, editorials, posters, brief speeches and campaign slogans. If videotape equipment is available, students may create brief television commercials or televise a debate between candidates, using the rules developed by the League of Women Voters for the 1976 presidential campaign (or those used in 1960).



Thomas Jefferson

AFTER VIEWING*

Discussion Questions

The Constitutional Issue

1. How does each branch of government decide whether a law is constitutional? If Congress passes a bill, do its members consider the law to be constitutional? If the President signs a bill and a department carries it out, does the executive branch assume the law is constitutional?

2. How can the Supreme Court declare a law unconstitutional?

What is the process for judicial review? What are the steps for appeal to the Supreme Court? What is the result of the Court's declaring an act of Congress null and void?

3. What is the Jeffersonian-Republican position?

Why did Jefferson and other Republicans disagree with the Court's decision that it could review the constitutionality of a law passed by Congress? What are Jefferson's arguments *against* the Supreme Court's power to declare a law unconstitutional? To whom is Congress accountable?

4. What legal arguments did Chief Justice Marshall develop to support the principle of judicial review?

Why does the Constitution take precedence over laws passed by Congress? What does the supremacy clause mean (Art. VI, Sec. 2)?

What are Chief Justice Marshall's arguments for allowing the Supreme Court to determine the constitutionality of a law, rather than another branch of the federal government? Whom does the independence of the Court protect?

5. What were the intentions of the framers of the Constitution regarding judicial review?

What were the views of Hamilton (expressed in the Federalist Papers) and Madison? How do Jefferson and Marshall interpret the intentions of the framers? How well did these two men know the writers of the Constitution and their intentions? Should either Jefferson or Marshall, or the present Supreme Court, be bound by the *intentions* of the writers of the Constitution?

6. What are some of the precedents for judicial review of the constitutionality of an act of Congress?

Were any *state* courts empowered by state constitutions to determine on appeal the constitutionality of laws passed by state legislatures?

7. What other process for determining the constitutionality of a law is possible or advisable besides that of judicial review?

How would it function? How would it protect democracy, individual rights against the state, or ensure that the Constitution is not violated? What did Jefferson suggest?

The Political Struggle

1. The Balance of Power

What constitutional means does Congress have to balance the power of the federal judiciary?

Which branch appropriates funds for the courts? What is the role of Congress in reviewing and impeaching presidential appointments? Which branch determines the jurisdiction of the courts and the number of judges?

What constitutional means does the executive branch have to check the power of the judiciary?

Who appoints members of the federal judiciary? Can other branches refuse to enforce a Supreme Court decision?

Jefferson argued that the Supreme Court was not democratic. Are American courts democratic? Should they be? Does the fact that an elected Senate confirms justices appointed by an elected President make the court a democratic institution?

What power does judicial review give to the Supreme Court?

Does the Court have power to enforce its decisions? Does the Court have a moral authority that is difficult to resist?

2. The Federalists

Who appointed the members of the Supreme Court? Who appointed Marbury and the other "midnight judges"? For what purpose?

Why did Marshall consider Section 13 of the Judiciary Act of 1789 unconstitutional? With which section of the Constitution did it conflict?

Was it *necessary* for the Supreme Court to declare Section 13 of the Judiciary Act of 1789 unconstitutional? What other choices did the Court have? What strategy did Chief Justice Marshall design so Madison and the Jeffersonians win the case, but lose the "war"?

3. The Jeffersonian-Republicans

What were Jefferson's motives for withholding Marbury's commission? Why did he feel he had the right to do so? Why did he challenge the Supreme Court's right to order him, or his Secretary of

State, Madison, to deliver a commission signed by President Adams?

What constitutional means did the Jeffersonians use to limit the power of the judiciary while the *Marbury v. Madison* suit was pending? (Repealed Judiciary Act of 1801, suspended the Supreme Court's June and August terms, impeached federal Judge Pickering and threatened to impeach Supreme Court Justice Chase).

The Legal and Social Consequences

1. What would the consequences have been if the Supreme Court had upheld Marbury and ordered Madison to deliver the commission?

Did Jefferson intend to obey such an order? Would his noncompliance have affected the prestige of the Court?

2. Since the Supreme Court lacked jurisdiction over Marbury's case, it did not need to review the case. Would this have been a politically expedient decision for the Court? What criticism could it have avoided?

3. Why was the Supreme Court's decision generally unopposed? Are Americans predisposed to accept the courts as arbiters of disputes? Give some examples of the range of problems—criminal, juvenile, moral, civil, political, personal, domestic and economic—that Americans expect courts to resolve. What does the American tendency to entrust—and burden—the courts with a wide range of problems indicate about the responsiveness of courts to the problem of average citizens?

*Questions in boldface type are appropriate for high school or college students. Instructors should select from the more specific questions in regular type according to students' academic levels and backgrounds.

Other Activities

1. Research the views of Presidents Jefferson, Jackson, Lincoln, Franklin D. Roosevelt and Nixon, and their strategies for dealing with the Supreme Court's power to declare acts of Congress unconstitutional. Research the views of Chief Justice Marshall and Justices Holmes, Brandeis, Frankfurter and Black, to analyze the range of opinions among members of the Supreme Court regarding the constitutional scope of judicial review.

a. Simulate an exchange of letters between any two persons, one opposed to and one supportive of the principle. Each student should write two letters arguing opposite sides in the debate. An interesting debate would be to match a President and a Supreme Court Justice serving concurrently.

b. Simulate a debate between teams for and against judicial review of federal statutes. Students can either select a position and debate it, or select a historical person to role-play in the debate.

2. Arrange a panel discussion of judicial review of laws passed by Congress which includes any of the following: a judge, a prosecuting attorney, a defense attorney, a legislator, a citizen, a historian, a constitutional law specialist, a reporter. Students can prepare questions for the panel. A similar panel can be arranged for viewing the film and structuring discussion.

3. Simulate the writing of a constitutional amendment. Divide the class into groups of four to six students. Each group can write an amendment to the Constitution that explicitly states the process for determining the constitutionality of an act of Congress. Each group may decide among these alternatives: the Supreme Court, Congress, the Executive, the people, a national referendum, a new institution specifically established for this function, or a process based on that of another country. Amendments ought to be written, debated before the full class and voted on. A three-fourths majority can "ratify" the amendment for the class.

4. Research the intentions of the framers of the Constitution regarding judicial review (See Beard in Bibliography).

5. Research the precedents for judicial review. Consider colonial, state and federal precedents for the *Marbury* decision.

6. Research the procedure for determining constitutionality in modern democracies. Consider Great Britain, the Federal Republic of Germany, Canada, France.

7. Research how *Marbury v. Madison* changed—or did not change—United States history. Analyze several significant cases where the Supreme Court struck down statutes passed by Congress.

SUPPLEMENTAL AIDS*

A. Characters

John Marshall, fourth Chief Justice of the United States (1801-1835), appointed by John Adams.

Thomas Jefferson, Democratic-Republican, third President.

Supreme Court Justices: Washington, Pater-son, Chase, Cushing and Moore.

William Marbury, appointed by President Adams as Justice of the Peace for the District of Columbia.

James Madison, Secretary of State under Jefferson.

William Branch Giles, Democratic-Republican Congressman from Virginia.

Charles Lee, attorney for Marbury.

B. Vocabulary (See Glossary)

•judicial branch

judiciary

judicial review

appeal

jurisdiction

•Constitution

constitutional

unconstitutional

•legislative branch

impeach

Democratic-Republican

Federalist

•executive branch

Secretary of State

commission

•the Supreme Court

Supreme Court Justice

Chief Justice

justice of the peace

midnight judges

C. Stop-film Technique

Useful places to stop the film and clarify vocabulary, issues and events include: after each narrative section by E. G. Marshall; after discussion among the Justices; before the Court's decision.

* For lower level or lower ability students with little background in American history or law-related studies.

John Marshall flanked by Associate Justices (left to right): Gabriel Duval, Joseph Story, and William Johnson.





William Marbury

BACKGROUND

In *Marbury v. Madison*, President Jefferson and Chief Justice Marshall confronted each other over the question of which of the three branches of government has the responsibility and authority to determine the constitutionality of laws passed by Congress. Marshall deliberately raised the issue of judicial review, and it is still debated today. The interpretation of the Constitution's position on judicial review depends on the intentions of the framers of the Constitution, the legal precedents, the language of the Constitution and the practical consequences of granting review authority to each branch.

Intentions of the Framers of the Constitution

Despite Jefferson's protests over *Marbury*, the record shows that the great majority of the members of the Constitutional Convention, Federalists and Jeffersonians alike, supported judicial review by the Supreme Court. The framers generally viewed judicial review as a safeguard against the excesses of a popularly elected legislature.

The Legal Precedents

Precedents for judicial review can be found in American law as early as colonial times, when judicial review was practiced by the Privy Councils. Eight state constitutions explicitly provided for judicial review, and by 1803, at least 18 decisions by state courts declared state laws in conflict with state constitutions. The Judiciary Act of 1789 gave the federal government authority to review state laws or state constitutional provisions that conflicted with the federal Constitution. In several cases prior to 1803, federal circuit courts held federal and state statutes unconstitutional.

The Language of the Constitution

In *Marbury*, the Supreme Court held that Section 13 of the Judiciary Act of 1789 conflicted with Article III, Section 2 of the Constitution, which sets out the Court's jurisdiction. By ingeniously declaring unconstitutional a section of a law which had extended its jurisdiction and increased its power, the Supreme Court unequivocally established its constitutional authority to review acts of Congress.

The Consequences

The Constitution established checks to the power of the judicial branch. Congress was given authority (Art. I, Sect. 8, Clause 9) to establish the lower federal courts and delineate their jurisdiction. Congress exercised this power in the Judiciary Act of 1789, which established two tiers of courts beneath the Supreme Court: district and circuit courts. Congress also controls appropriations to the judiciary, but may not reduce judicial salaries (Art. III, Sect. I). Congress can, and has, both increased and decreased the number of judges and justices. A president's judicial appointments are subject to confirmation by the Senate, and Congress may impeach judges and justices. This was seriously attempted by the Democratic-Republicans during Jefferson's first term. Congress held impeachment proceedings against federal Judge Pickering and considered impeaching Justice Chase. The Jeffersonian-Democrats also exercised their power to check the judiciary by suspending the June and August terms of the Supreme Court while *Marbury* was being considered. It was Jefferson's efforts to override President Adams' and the lame-duck Federalist Congress' increase in the number of federal judges that led to *Marbury v. Madison*.

Jefferson and Marshall disagreed about the best way to determine the constitutionality of legislation. Jefferson's more populist views led him to rely on Congress, the one branch at that time whose members were popularly elected. Marshall's and the Court's understanding of the precedents and intentions of the authors of the Constitution led them to assert the independence of the Supreme Court in order to safeguard the rights provided by the Constitution.

**EQUAL
JUSTICE
UNDER
LAW**



Can states tax the operations of the federal government? In this unpopular decision, the Supreme Court dealt a great blow to a claim of states' rights by striking down a state's attempt to interfere with a legitimate federal activity.

The Maryland Bank of the United States refused to buy stamped paper from the state of Maryland or to pay the annual \$15,000 tax required by Maryland law. In 1818, the state of Maryland sued James McCulloch, the Bank's local cashier, for refusing to comply with Maryland law. The Baltimore County Court ruled against the Bank and the case was ultimately brought before the Supreme Court of the United States.

The case presented two principle issues to the Court. First, was the federal law that chartered the Bank in conflict with state tax laws? Second, if a conflict did exist, should the federal or the state law take precedence?

The Supreme Court held that since the Bank was necessary in order for Congress to meet its constitutional responsibilities, Congress had the implied power to charter a national bank. The states, however, did not have the power to tax the federal government's activities, and the Maryland law could not constitutionally be applied to the federal bank. This decision greatly restricted the powers of the states and engendered animosity toward the Court.



James McCulloch

McCULLOCH v. MARYLAND

STUDENT OBJECTIVES

1. To understand the Supreme Court's interpretation of the relative powers of the federal and state governments in *McCulloch v. Maryland*.
2. To understand the Federalist and Democratic-Republican positions on states' rights.
3. To gain awareness of the impact of a strong federal government on American life.

BEFORE VIEWING Discussion Questions

1. What were the functions of the Bank of the United States? Why was it established?
2. Does Congress have the authority to charter a federal bank?
3. The federal government taxes state banks; should the states tax a branch of a federal bank?
4. If a state law and a federal law are in conflict, which should be supreme?
5. What is the source of the federal government's authority?
6. What is the major purpose of the federal government? Whom should it serve?

Other Activities

1. Discuss some contemporary issues that are related to *local* versus national interests (education, housing, employment, health care, auto insurance, pornography, obscenity, the death penalty, pollution, and drug standards). On each issue, consider who will be affected by legislation and whether the states or Congress should regulate these areas.
2. Review some of the major states' rights issues in 19th century America: commerce, trade embargoes, tariffs, federal banks, slavery. In each case, consider the consequences of allowing the states, rather than the federal government, to determine the outcome.



Associate Justices (left to right) Gabriel Duval, Joseph Story, Bushrod Washington, and William Johnson

AFTER VIEWING

Discussion Questions*

The Language of the Constitution (Refer to a copy of the Constitution)

1. According to the preamble, who established the Constitution?

Was the Constitution established by the people, the states, or representatives of the states? Did the delegates have to return to their states and get the approval of the citizens? How was the Constitution ratified in each state?

2. What specific purposes of the Constitution does the preamble announce?

"A more perfect union" means more perfect than what? What earlier contract between the states were the delegates trying to improve upon? What does "the federal welfare" mean? What economic goal is being specified?

3. What powers does the Constitution give to Congress? (Art. I)

What is meant by the "enumerated" powers of Congress (Art. I, Sect. 8)? Why were these powers listed? Why did the delegates fear too strong a central government?

Explain the "necessary and proper" clause (Art. I, Sect. 8, Clause 18), which concludes the section on the powers of Congress. Referring back to Congress' enumerated powers, give examples of the legislation that might be "necessary" to execute Congress' responsibility to establish a postal service, raise and support armies, borrow money and regulate interstate commerce. What institutions or procedures would need to be established in order for the federal government to exercise its authority in these areas?

4. What does the "supremacy" clause mean?

How does Article VI, Clause 2 define the relationship between the federal and state governments?

The Meaning of the Constitution

The Federalist and Democratic-Republican Positions

How would Federalist and Democratic-Republicans answer the following questions? What is your answer? Refer to the language of the Constitution.

1. From whom does the Constitution get its authority?

From the states or the people? What is the difference?

2. What are the Constitution's economic goals?

What are the specific economic responsibilities and powers of Congress (Art. I, Sect. 8)? Is a healthy economy a specific objective? What kind of central government would be most beneficial to economic expansions?

3. What were some of the economic goals of the delegates? What were Hamilton's objectives?

What restrictions on trade and commerce did the delegates hope to eliminate? What economic problems did they want to solve? What weaknesses of the Articles of Confederation were the delegates trying to alleviate?

4. What are the political and social goals of the Constitution?

How does the Constitution divide power among the federal government and the states and the people? What rights does the Constitution guarantee? To whom? What kind of *justice* does it aim to establish?

5. The First Congress passed the first ten Amendments—the Bill of Rights. Why was the 10th Amendment passed? Who was it supposed to protect? From whom? Why did some states only ratify the Constitution on the condition that a Bill of Rights would be added?

The Supreme Court Decision

1. In speaking for the unanimous Court, how did Chief Justice Marshall answer these major questions:

From whom does the Constitution derive its authority?

What are the major purposes of the Constitution?

What powers were given to Congress to carry out its responsibilities?

What powers are reserved to the states? Can the states limit the power and operations of the federal government?

2. How were these questions answered by the Court in *McCulloch*:

Was the federal bank's charter constitutional? For what reasons? Was the Maryland tax on federal banks constitutional? For what reasons?

The Impact of *McCulloch v. Maryland*

1. How would the United States be different today if the Supreme Court had upheld Maryland's right to tax the federal government?

How might the federal government's power be limited? What federal agencies might not have developed? Would there have been a civil war? How would individual rights and rights of minorities have been affected? (Consider the civil rights legislation of the 1950s and 1960s and the Supreme Court decisions on the rights of the accused.)

2. What are some of the long-range effects of the federal supremacy over states?

Which enumerated or implied power justifies the development since Washington's presidency of such departments as Health Education and Welfare, Housing and Urban Development, Agriculture, Labor, Interior, Commerce, Transportation, Energy?

Which enumerated or implied power justifies the development of such agencies as the Interstate Commerce Commission, National Endowments for the Arts and Humanities, Atomic Energy Commission, the Central Intelligence Agency, Federal Bureau of Investigation, Federal Communications Commission, Civil Aeronautics Board, Federal Trade Commission, Federal Drug Administration, Federal Power Commission?

Which other agencies have been created recently?

3. Have these agencies of the federal government benefited the nation?

What is the job of the government?

Have these departments and agencies helped to achieve the goals of the Constitution?

Has the federal government been effective in ensuring "domestic tranquility" and promoting a healthy economy?

Has the federal government guaranteed the provisions of the Bill of Rights?

Has a rapidly growing federal bureaucracy helped or hindered individual liberties or economic growth?

4. Could local or state government better protect individual rights or a flourishing economy?

* Questions in bold face type are general questions appropriate for high school or college students. Instructors should select from the specific questions in regular type according to students' academic levels and backgrounds.



John Marshall, the "great Chief Justice"

Other Activities

1. States' Rights Poll

Students, another class or the community could be polled to determine whether they feel the federal or state government should regulate these areas.

	Government	
	Federal	State
discrimination in housing	_____	_____
abortion	_____	_____
welfare benefits	_____	_____
child custody laws	_____	_____
death penalty	_____	_____
environmental standards	_____	_____
voting rights	_____	_____
school desegregation	_____	_____
obscenity and pornography	_____	_____

(Analyze results in class)

2. Chart the various agencies of the federal government that have developed after 1789. Divide the class into several groups to study the role of the federal government in the areas of business, agriculture, the general economy, political power, social values, individual rights, interpersonal relations, employment, education and health care. Trace each of these to an enumerated or implied constitutional power.

3. Draw a chart of the federal, state and municipal court systems. Indicate the jurisdiction of each court and the process of appeal from each court.

4. Write to the nearest Federal Reserve Bank for information on its operations. Discuss: the role of the Federal Reserve Bank in the economy; how it differs from a commercial bank.

5. Research Alexander Hamilton's doctrine of implied powers. Research *The Federalist* and compare his views to those expressed in *McCulloch*.

6. Compare the Articles of Confederation and the Constitution. Compare the two documents' positions on what led to the relative powers of the states and the central government.

7. Research Franklin Delano Roosevelt's New Deal. Compare his concept to that enunciated by Chief Justice John Marshall in *McCulloch*.

8. Study the agencies of the federal government. Analyze the various agencies that have developed after Washington's presidency and their effect on American life.

9. Study the role of the central government in modern democracies. Compare the division of power among the central and local governments in the United States and such countries as Canada, Mexico, Great Britain, France, and India. Consider how individual and local interests are protected.

10. Research the history of the First and Second Bank of the United States. Analyze their management and contribution to the American economy.

SUPPLEMENTAL AIDS*

A. Characters

John Marshall: fourth Chief Justice (1801-1835), appointed by John Adams

Supreme Court Justices: Washington (appointed by John Adams), Story, Duval (latter two appointed by Madison)

Charles Pinkney: attorney for the Bank of the United States

Luther Martin: attorney for the State of Maryland

James McCulloch: cashier (officer) of the Baltimore branch of the Bank of the United States

Spencer Roane: judge on Virginia's Court of Appeals, for states' rights

John Brokenbrough: President of Bank of Virginia

Thomas Richie: Publisher of influential *Richmond Inquirer*, for states' rights

B. Vocabulary (See Glossary)

- judicial review
- Supreme Court Justice
- Chief Justice
- constitutional
- enumerated power
- charter
- states' rights
- Bank of the United States

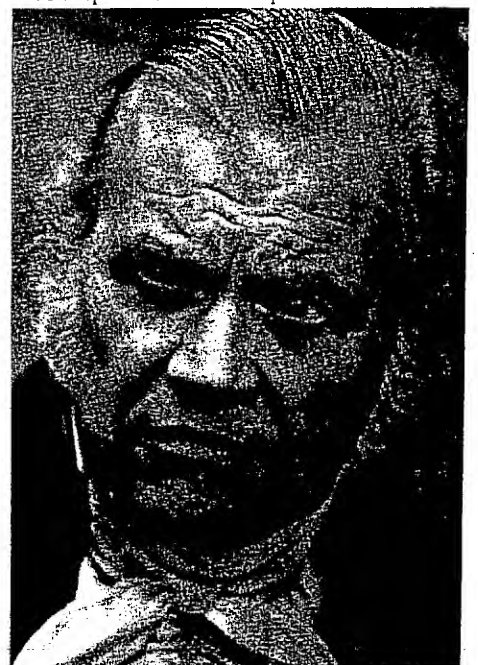
- appeal
- precedent
- repeal
- unconstitutional
- implied power
- corporation
- sovereignty
- cashier

C. Stop-film Technique

Useful places to stop the film and clarify vocabulary, issues and events include: after each narrative section by E.G. Marshall; after discussions among the Justices; before the Court's decision.

* Lower level or lower ability students with little background in American history or law-related studies may require these supplemental aids.

John Taylor, a disciple of Thomas Jefferson, was suspicious of federal power.



BACKGROUND

The Political and Economic Climate
Congressional approval of the charters of the First and Second Bank of the United States was primarily a result of Congress' acceptance of Hamilton's doctrine of the implied powers of Congress. Jefferson and others, however, continued to oppose the Bank. Democratic-Republicans voiced opposition because they believed it to be an unconstitutional extension of federal authority that reduced the sovereignty of the states.

Wealthy eastern investors supported the Bank and a vigorous central government as bulwarks of a healthy national economy from which they could profit. Smaller landowners in the South and West, however, distrusted the economic principles of banks in general and of a large federal bank in particular. The less than illustrious record of the first two federal banks intensified this antagonism.

The economic crisis following the War of 1812 was precipitated by inflation in state banks and widespread, reckless speculation, but the public blamed the Second Bank for the disaster. Public hostility grew as the Bank seemed to aggravate the very economic problems it was intended to alleviate. Intense local resentment led to the enactment of state statutes restricting the Bank's operations in Maryland and seven other southern and western states. These statutes were designed to protect the local interests that state legislatures felt were jeopardized by the Bank.

The Constitutional Issue

The Supreme Court faced two questions in *McCulloch v. Maryland*: (1) does the Constitution give Congress power to charter the National Bank; and (2) was the Maryland tax on the Bank's operations constitutional? The Supreme Court's response to these questions clarified the source of the Constitution's authority, the Constitution's purpose, the scope of Congress' authority, and the limits on powers reserved to the states.

The Maryland attorneys presented the traditional states' rights argument that the Constitution, as well as the previous Articles of Confederation, was a compact among sovereign states who remained independent while delegating limited powers to the central government in order to benefit state citizens.

Chief Justice Marshall delivered the unanimous opinion of the Court. Relying on the language of the preamble, Marshall wrote that, in contrast to the Articles of Confederation, the Constitution does not derive its authority from the states, but from "the people" in whose name it is "ordained and established". "It is the government of all; its powers are delegated by all; it represents and acts for all." The federal government is therefore accountable, not to the states, but to the citizens of the entire nation. This decision stated that the purpose of the Constitution—and by implication the federal government—is "to form a more perfect union" and "to promote the general welfare".

Authority of Congress

Both the Federalists and the Democratic-Republicans argued that the powers of the central government should be limited. The Court pointed out that the 10th Amendment was adopted because of "widespread fear that the national government might... attempt to exercise powers which had not been granted". Following the Constitutional Convention, however, controversy arose concerning the precise limits of federal power.

The Democratic-Republicans felt that a primary motive for the Revolution was England's refusal to consider local colonial interests. In the minds of the Democratic-Republicans, the sovereign states were best able to protect the individual from a potentially antagonistic federal government. Thus, Jefferson and other Democratic-Republicans sought to limit Congress' powers to those enumerated in Article I, Section 8.

The Federalists believed that a vigorous federal government would best serve their economic and social interests. Hamilton repeatedly and articulately maintained that the conclusion of Section 8 ("To make all laws which shall be necessary and proper for carrying into execution the foregoing powers") conferred additional *implied* powers on Congress.

The Court's decision dwelt on the necessity of allowing Congress the implied powers advocated by Hamilton, in order to fulfill the purpose of the Constitution. The Court broadly interpreted the "necessary and proper" clause to allow Congress to choose the most expedient means of promoting a healthy economy. Chief Justice Marshall concluded that Congress' charter of the Bank was constitutional.

Limits on State Powers

The Democratic-Republicans argued that even if the Bank's charter were constitutional, the Constitution did not abridge the right of the states to raise revenue within their borders; nor had the states yielded that right in ratifying the Constitution. The Court agreed with these two arguments.

Nevertheless, again relying on the purpose and authority of the Constitution, Chief Justice Marshall elaborated the crucial principle of the relative powers of the states and the federal government. The Supreme Court held that states have powers reserved to them by the Constitution that cannot be abridged by Congress. The Constitution also confers supreme authority to the federal government and its powers or operations cannot be limited by the states. Because the Maryland tax limited the operation of the United States Bank, it was unconstitutional. The ultimate significance of the Supreme Court's decision in *McCulloch v. Maryland* was its establishment of federal supremacy over the states in areas implicitly reserved to the federal government by the Constitution.





John Randolph, longtime friend of John Marshall opposed federal control over slave trade

Who has the authority to regulate commerce, the states or Congress? In *Gibbons v. Ogden* the Supreme Court built the basis for a unified American common market.

The New York State legislature granted the firm of Livingston and Fulton the right to issue licenses to steamboat operators using state waters. Ogden, a licensee of this monopoly, sued his former partner Gibbons for navigating in New York waters without a New York license. New York courts decided in favor of Ogden, forbidding Gibbons from operating in New York ports or interfering with Ogden's monopoly.

Gibbons appealed to the Supreme Court and argued that his federal license entitled him to trade between the ports of different states. While the Court left undefined the overlapping powers of the state and federal governments to regulate commerce, it interpreted the Constitution as (1) reserving to the states the right to regulate intrastate commerce and (2) asserting the supreme power of the federal government over the regulation of interstate commerce.

GIBBONS v. OGDEN

STUDENT OBJECTIVES

1. To understand the Supreme Court's interpretation of the relative powers of Congress and the states to regulate commerce.
2. To gain awareness of the economic impact of the Supreme Court's decision in *Gibbons v. Ogden*.
3. To understand the role of the Supreme Court in shaping the Constitution.
4. To gain awareness of Chief Justice John Marshall's contribution to the judiciary.

BEFORE VIEWING Discussion Questions

(See Vocabulary List)

1. Define commerce. (Read Art. I, Sect. 8, Clause 3) Does it include the manufacture, transportation and sale of goods? Which of these components are essential to commerce, and which are optional?
2. Should a state be allowed to have a monopoly over certain kinds of transportation?
3. What power should Congress have to control commerce within a state?
4. How were American waterways important to 19th century transportation?
5. Was a prosperous economy a significant goal at the Constitutional Convention?

Other Activities

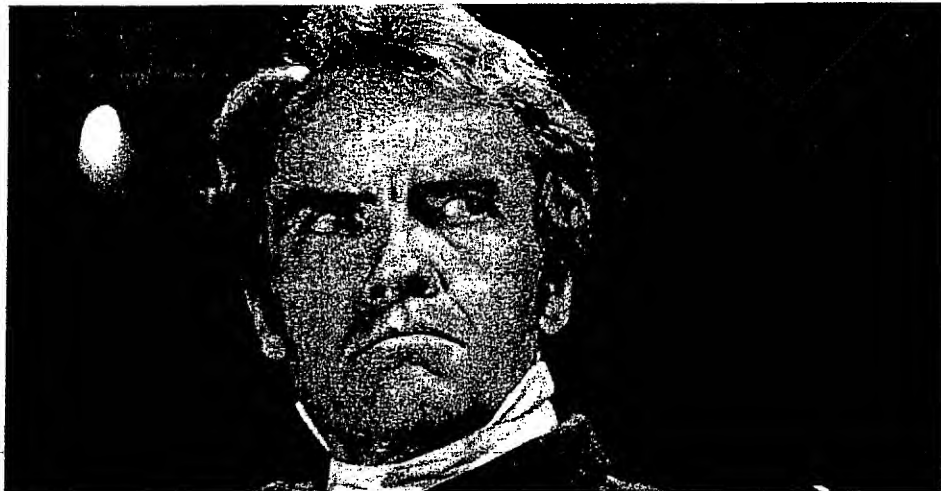
1. Review the states' rights issues raised in *McCulloch v. Maryland*, the Missouri Compromise and the problem of slavery.

2. Research the barriers to interstate commerce among the states in colonial times, under the Articles of Confederation, and before 1824.

Review the hindrances to free flow of goods and persons between states during the 17th and early 18th centuries. What were the reasons for these barriers?

3. Study the development of efficient transportation and its importance to early 19th-century trade. Evaluate the effects of the various state monopolies of transportation (in such states as New York, New Jersey, Ohio, Connecticut, Territory of Orleans) on interstate trade in the early 1800's. What were the reasons for these hindrances to interstate commerce?

4. Trace the flow of specific major products from their states of origin to the major sea or river ports of the early 19th century. Illustrate these on a map with a key for the major goods transported and symbols for ports indicating their degree of commercial importance.



Associate Justice William Johnson

AFTER VIEWING

Discussion Questions*

The Political Problem

1. What were some of the significant states' rights issues in the early 19th century?

What was the significance of the 1820 Missouri Compromise to the problem of slavery?

What were the provisions of South Carolina's Negro Seaman Act? How did the act affect free Blacks? Why was the act passed? What did South Carolina citizens fear would happen if free Blacks were allowed to enter the state? On what grounds did Justice Johnson, himself a Southerner, hold the South Carolina Act unconstitutional?

What kinds of retaliatory transportation regulation did several states enact? What was the response of southern and western states to the Supreme Court's decision in *McCulloch v. Maryland* that the states could not interfere with the operations of a federal bank?

2. What was the likelihood of war or rebellion?

What conflicting regional problems—social, economic and political—existed in the early 19th century that were similar to those that led to the Civil War?

3. What were the political arguments for reserving to the states the power to control intrastate commerce?

4. What are some of the major states' rights issues in American history?

In the 19th century? (the federal bank, interstate commerce, tariffs, slavery, the franchise, territories becoming states)

In the 20th century? (civil rights in the areas of education, housing, employment and public welfare)

The Constitutional Issue (Refer to a copy of the Constitution)

1. What does the supremacy clause of the United States Constitution mean (Art. VI, Sect. 2)?

Do state or federal statutes have precedence? Which branch of government has the responsibility to determine whether a state law conflicts with a federal law?

2. How does the Constitution divide power between the states and the federal government? (9th and 10th Amendments)

To whom do the 9th and 10th Amendments reserve those rights and powers that are not enumerated by the Constitution?

What are some of the specific powers of Congress enumerated in the Constitution? (Art. I, Sect. 8)

What does the Constitution say about commerce or transportation? (Art. I, Sect. 8, Clause 3)

3. What are the powers of Congress?

What does *implied powers* of Congress mean? (Art. I, Sect. 8, Clause 18) What is the meaning of the clause that states that Congress may "make all laws which shall be necessary and proper for carrying into execution" the powers that were specifically listed?

How did Alexander Hamilton interpret the *implied powers* of Congress in order to establish a national bank?

How had the Supreme Court interpreted the *implied powers* of Congress in the case of *McCulloch v. Maryland*?

What is Congress' enumerated or specific power to regulate commerce? (Art. I, Sect. 8, Clause 18) How specific is it? Is there any constitutionally enumerated power given to Congress to deal with commerce that does *not* cross state lines?

How does the concept of implied powers apply to Congress' power to regulate commerce?

4. How did Chief Justice Marshall interpret the concepts of implied powers as giving Congress the power to regulate not just commerce but transportation as well?

Is transportation the necessary *means* for maintaining commerce? Did the commerce clause *have* to be interpreted in this way?

What pragmatic reasons did the Court have for construing very broadly Congress' implied power over commerce? (How would commerce be affected?)

What constitutional basis was there for reserving to the states the power to control commerce that was *completely* internal? (10th Amendment)

Why were the New York steamboat monopolies unconstitutional? How did the New York statutes conflict with the 1793 Federal Coasting Act? Which law had priority? Why? (Art. VI, Sect. 2)

The Economic Impact

1. What were the economic goals of the authors of the Constitution?

In the preamble to the Constitution what does the phrase, "the public welfare" refer to? What were the economic weaknesses of the Articles of Confederation that the delegates to the Convention tried to remedy?

2. What was the economic situation in the early 19th century in relation to transportation?

What were the most efficient and heavily used routes for commerce between and within the states? Were ships of each state totally free to travel *to* and *through* other states? What kinds of measures did states resort to in order to protect their own commerce? What was the effect of retaliatory trade barriers on American commerce?

3. What might have happened to the American economy if the Court had not interpreted the commerce clause so broadly?

Would interstate commerce have developed as rapidly as it did?

Would the development of steamboat, railroad, highway and other transportation have been encouraged?

Hypothesize the kinds of trade barriers and obstacles that could have proliferated. (Each state could have its own railroad, airline and trucking company that could *not* cross into another state.) What would have been their effect on the American economy?

4. What are some of the long range economic consequences of *Gibbons v. Ogden*?

(Was the decision, as some have claimed, the "emancipation proclamation" of American commerce?)

What forms of transportation and interstate commerce have been aided by a broad interpretation of the commerce clause? (shipping, railroads, airlines, trucking, the automotive industry, tourism, telegraph, telephone, interstate pipelines for oil, gas, coal, water, etc.) Are there some detrimental effects of the rapid expansion or "explosive expansion" of American commerce? Does economic growth unnecessarily damage the environment or the quality of American life—or offend the values of some Americans?

* Questions in bold face type are general questions appropriate for high school or college students. Instructors should select from the more specific questions in regular type according to the students' academic levels and backgrounds.

Other Activities

1. Set up a panel to discuss the impact of the Supreme Court's interpretation of the commerce clause. The panel may include an economist, a corporate lawyer, a consumer advocate, and someone from a group whose values are opposed to materialistic goals or economic progress.
2. Interstate commerce inventory.
Each student can take half an hour to list each item in his or her home which has crossed state lines at some stage of its production, sale or delivery. Class discussion can focus on the all-encompassing range of interstate commerce, and its effect on daily life.
3. Divide the class into three groups to study the Interstate Commerce Commission regulations on trucking, airlines and railroads. The groups can report back and communicate their findings to each other.

Jury



SUPPLEMENTAL AIDS*

A. Characters

John Marshall: fourth Chief Justice (1801-1835) appointed by John Adams.
Justices: Washington, Story, Johnson, Duval (last three appointed by Jefferson).
Daniel Webster: attorney for Gibbons, leading constitutional lawyer, New Englander.
Thomas Emmet: attorney for Ogden.
John Randolph: Virginian, for states' rights, friend of John Marshall.
Livingston and Fulton: hold monopoly from state of New York to operate steamboats in New York state.
Thomas Gibbons: operated steamboat between New Jersey and New York without New York license.

Aaron Ogden: purchased licenses from Livingston for operating steamboat between New York and New Jersey.

B. Vocabulary (See Glossary)

- judicial review
- The Supreme Court
- Supreme Court Justices
- Chief Justice
- appeal
- precedent
- constitutional
- unconstitutional
- enumerated power
- implied power
- states' rights/sovereignty
- insurgents
- commerce
- interstate
- intrastate
- market
- monopoly
- coasting trade
- navigation

C. Stop-film Technique

Useful places to stop the film and clarify vocabulary, issues and events include: after each narrative section by E.G. Marshall; after discussions among the Justices; before the Court's decision.

* Lower level or lower ability students with little background in American history or law-related studies may require these supplemental aids.

BACKGROUND

In *Gibbons v. Ogden* the Supreme Court of the United States once again became the arbiter of the respective powers of the federal government and the states. At issue was the extent to which the individual states and the federal government could control and regulate commerce. The trial's outcome had significant political, constitutional and economic ramifications that are central to American society today.

The Political Problem

The Supreme Court has repeatedly dealt with states' rights controversies. Threats of secession and nullification were used from the time of the Articles of Confederation until the Civil War. In the 1820s, the political situation was particularly volatile. The Missouri Compromise brought the growing problem of slavery to the surface.

In addition to the incipient trade war between several states, controversy arose over a decision made by Supreme Court Justice Johnson while he presided over the Federal Circuit Court for South Carolina. Justice Johnson, himself a Southerner and a Jefferson appointee, ruled that South Carolina's Negro Seaman Act, which restricted free Blacks in the state, was unconstitutional because it was a regulation of interstate commerce in conflict with the commerce clause of the Constitution.

Justice Johnson's decision in South Carolina generated threats of dissolution of the union. To Southerners such as the vocal Virginian John Randolph, there was a clear connection between commerce and slavery: slaves were property and southern commerce depended on the slave trade. If Congress had power to regulate all commerce, it could eventually control slavery. Randolph and other Southerners, including Supreme Court Justice Duval, accurately predicted that extension of federal power over slavery would lead to rebellion.

The Constitutional Issue

The Supreme Court's decision in *Gibbons v. Ogden* centered on three major constitutional questions: (1) what does the term "commerce" include; (2) are the federal and state governments' powers to regulate commerce exclusive, concurrent or overlapping; (3) did New York monopoly law conflict with federal law?

Associate Justice William Johnson





Associate Justice Bushrod Washington (left), Chief Justice John Marshall with Associate Justice Joseph Story

In its decision, the Court broadly interpreted commerce to include not only the buying and selling of goods, but their transportation as well. There is evidence that the framers of the Constitution intended that the federal government regulate interstate transportation of goods. The strongest reason for a broad interpretation of commerce, however, is the pragmatic argument that such a view of commerce was necessary to foster the economy of the United States.

The most controversial question of interpretation in *Gibbons v. Ogden* concerned the relative federal and state powers under the commerce clause (Art. I, Sect. 8, Clause 3). New York's highly respected jurist Chancellor Kent ruled that regulation of commerce within state borders was the exclusive domain of the states. The Supreme Court disagreed, and carefully reiterated the doctrine of implied powers stated in *McCulloch*: Congress is empowered (by Art. I, Sect. 8) to pass laws that are "necessary and proper" to the execution of its enumerated constitutional responsibilities. According to the Court, effective regulation of interstate commerce requires control of transportation going *through* states as well as *between* states. In addition, this means for controlling interstate commerce was "necessary and proper" to carry out the framers' intention to create a prosperous economy.

Chief Justice Marshall was careful not to annihilate states' rights while expanding the power of the federal government. His decision asserts the federal government's supreme authority over regulation of *interstate* commerce, but explicitly reserves to the states the power to regulate *intrastate* commerce. The decision, however, left an undefined area where state and federal regulatory powers overlap. In a series of cases spanning more than a century and a half, the Supreme Court has refined the interpretation of the law governing the area of concurrent state and federal authority over the regulation of commerce.

The final constitutional question focused on the effect of a conflict between New York and federal laws. Chancellor Kent of New York did not perceive a conflict between the New York and federal statutes because he interpreted the Federal Coasting Act very narrowly. Chief Justice Marshall, however, interpreted the relatively limited provisions of this act of 1793 very broadly. He argued that the Act conferred the general right to engage in the coasting trade and to enter navigable waters of the United States. Because the federal and state statutes conflicted, the supremacy clause of the Constitution (Art. VI, Sec. 2) required that the federal law prevail. The New York law was therefore declared void. This decision established the constitutional role of the Supreme Court as the final arbiter of state and federal power to regulate commerce.

The Economic Impact

In spite of opposition by states' rights advocates, *Gibbons v. Ogden* was one of Chief Justice Marshall's most popular opinions because of the immediate positive economic impact that the destruction of state trade monopolies had on the nation. The decision averted the economic warfare brewing between states. Many states authorized trade and transportation monopolies in order to stimulate business in their states. These retaliatory statutes limited interstate trade and stifled the national economy.

The Court's decision facilitated the creation of the unified market that was the vision of many of the delegates to the Constitutional Convention. Congress, though it did not fully respond until later in the century, was encouraged to appropriate funds for the improvement of trade routes through the states. The steamboat, together with later developed means of transportation, directly stimulated growth. Twentieth century Supreme Court decisions that relied on *Gibbons*' interpretation of the commerce clause led to a great expansion of Congress' authority to regulate commerce. The modern free flow of commerce in the American economy's enormous national market is the legacy of *Gibbons v. Ogden*.

**EQUAL
JUSTICE
UNDER
LAW**





Burr's jail escort

Should the President of the United States have to appear in court when a judge requires him to be a witness? Is an accused traitor entitled to all fair trial rights guaranteed by the Constitution? These were the controversial issues in the dramatic trial of Aaron Burr.

United States v. Burr was not a Supreme Court case. In 1807, Aaron Burr was tried for treason in the Federal Circuit Court in Richmond, Virginia. Although the actual evidence against Burr was tenuous, in an address to Congress Jefferson declared Burr guilty. In a dramatic maneuver during the grand jury hearings, over which Chief Justice John Marshall and District Judge Cyrus Griffin presided, Burr requested the court to subpoena President Jefferson so that Burr could view the evidence that would be used against him. Because Chief Justice Marshall insisted on satisfying due process requirements throughout the proceedings, he once again found himself in opposition to President Jefferson who insisted both on the conviction of Burr and protection of presidential privilege. The confrontation produced dramatic results: a precedent for limiting executive privilege was set; the right of unpopular defendants to a fair trial was established; the constitutional definition of treason was upheld; and Chief Justice Marshall was hanged in effigy.

UNITED STATES v. BURR

STUDENT OBJECTIVES:

1. To gain awareness of due process of law—the procedural safeguards for a fair trial guaranteed by the United States Constitution.
2. To understand the precedents set by Chief Justice John Marshall for applying due process requirements even in highly controversial political trials.
3. To understand that every citizen is bound by the law of the land, whatever his social or political position.
4. To gain awareness of the uses and limits of executive privilege.
5. To understand the concept of treason and the reasons why the English and American definitions differ.
6. To better understand the philosophies, motives and values of Marshall, Jefferson and Burr.

BEFORE VIEWING Discussion Questions

The Legal Issues

(See Vocabulary List)

1. **What is due process of law?**
What articles in the United States Constitution refer to due process?
What procedural safeguards for a fair trial does the Constitution guarantee?
What do the 5th, 6th and 14th Amendments mean?
2. **What is a grand jury?**
What is its purpose? How does it foster due process? What is the difference between a grand jury and a petit jury?
3. **What is a subpoena?**
Who can issue one? What is its purpose? Who must comply with subpoenas? What is the penalty for not complying?
4. **Should due process guarantees apply to cases of treason or other crimes against the government?**
Is it possible to distinguish between cases requiring due process and those not requiring it? Should a person's assumed guilt, a revolution, war, or danger of war make a difference? Have wars or threats of war, such as those which arose during the Presidency of John Adams, the cold war in the 1950s or the Viet-

nam conflict in the 1960s, affected the treatment of people who disagreed with the government?

5. **What is the purpose of bail?**
Are there cases in which bail should not be granted? Does the Constitution consider bail? What does the 8th Amendment say about bail?
6. **How can individuals who oppose government policies protect themselves?**
How were the Alien and Sedition Acts of Adams' Presidency and of the World War I era applied?
7. **Trace Burr's career through his various attempts for power. How did Burr almost become President in 1800?**
In what ways did he contribute to Jefferson's presidential campaign in 1800? What reasons did Burr have for believing that Jefferson had cheated him out of the presidency? Did Burr allow the lame-duck Federalist Congress to manipulate him? Why did Jefferson not want Burr as his vice-presidential candidate in the 1804 election?

AFTER VIEWING

Discussion Questions*

The Conflicting Evidence

1. What stories about Burr's military and political ambitions led to his arrest for treason in 1807? How credible were the sources of these stories?

According to Jefferson and Hay, what was Burr plotting? What evidence was General Wilkinson's letter said to contain? Is a copy of a letter convincing evidence? What did some of the men who met on Blennerhasset's Island think they were going to do?

What was Burr's defense?

What were some of Burr's other possible plans?

2. What did Chief Justice Marshall seem to believe about this evidence?

3. If President Jefferson had solid evidence against Burr, why did he never produce the original of Wilkinson's letter? Why is Eaton's testimony suspect? The records indicate that Burr knew that Wilkinson was in the pay of the Spanish government. Do you think Jefferson knew of this? If he did, would he have used Wilkinson's testimony anyway? There is evidence that the government granted Eaton immunity. Is this an ethical procedure? Are grants of immunity in exchange for testimony against former accomplices unusual?

The Legal Issues

1. What is treason?

How does English law define treason? American law? How does Article III, Section 3 of the Constitution define treason? Why were the writers of the Constitution careful to change the British definition of treason? How was the British common-law definition of treason used against Americans? Against dissidents in England? How had "lettres de cachet" been used in France to silence opposition to the government?

How did Chief Justice Marshall define treason in the Bollman case? What precedent did he cite? How did he rule in the Burr trial? Why did he change his mind? What legal principles did he intend to uphold? Who did he feel the courts are required to protect? If Washington had been President, would Marshall have changed his ruling? Would he have ruled differently if the country had been at war?

2. What were some of Jefferson's political reasons for opposing Burr?

What was the major national security problem in the United States? What was the European political situation? Was war with England or Spain likely? How should this possibility have affected Jefferson's treatment of Burr? Should these national security concerns have affected Marshall's rulings?

3. To what extent did Marshall's and Jefferson's personal feelings influence their decisions during the Burr trial?

How did they differ politically? What were some of their previous confrontations? (the 1800 and 1804 elections, *Marbury v. Madison*, the Mazzei letter.) Are there indications that their feelings were intense? Did Marshall need to speak of "the hand of malignity"? Was it necessary for Jefferson to publicly declare Burr guilty before the trial? Was it ethical for Jefferson to offer money to those who would testify against Burr?

4. What were Chief Justice Marshall's intentions?

Considering Burr's unpopularity with Congress and the President, and the expected negative public reaction to his release, could Chief Justice Marshall expect to gain anything by insisting on due process?

What did Marshall and the federal courts stand to lose by protecting Burr?

Considering Marshall's carefully planned strategy in *Marbury v. Madison* for strengthening the Supreme Court while apparently giving in to the ruling Democratic-Republicans, was it politically wise to protect Burr?



Chief Justice John Marshall in
"The Trial of Aaron Burr"

The Consequences

1. What were some of the consequences of the Burr trial?

What would have happened to the prestige, legitimacy and effectiveness of the Supreme Court if Marshall had insisted on Jefferson's appearance and been ignored?

What would have happened to the prestige, legitimacy and effectiveness of the Presidency if Marshall had insisted on the exact terms of the subpoena and Jefferson had been arrested?

Who gained by the compromise? How did the compromise reinforce the balance of power?

What constitutional principle was asserted regarding the rights of an individual, even one who is generally believed to be guilty?

What does the Burr trial demonstrate about the role of American courts in protecting the individual against a powerful central government?

2. How does the Burr trial demonstrate "equal justice under law"—that no man or woman is above the law?

Why did Jefferson feel that he had laid a trap for Marshall?

How does Article III, Section 3 apply to the Burr trial? What two points must the prosecution have proven to convict Burr? Are there circumstances, such as times of war, when these two points should not apply?

3. What is a grand jury?

What is the purpose of the grand jury? Who sits on a grand jury? How does it operate? What decisions can it make? What are the consequences of those decisions? In what way does the grand jury protect the individual's right to due process? What might happen without a grand jury?

The American grand jury was based on the English model, but in 1933, England eliminated the grand jury. What is the future of the grand jury in the United States? What should it be?

4. What is the difference between treason and the high misdemeanor for which Burr was indicted?

What was the specific charge in each indictment?

* Questions in bold face type are general questions appropriate for students on any level. The questions which follow are more specific and may be selected according to the students' academic level.

Other Activities

1. Set up a debate in which one side argues for the American Constitution's definition of treason and the other for the common-law definition.
2. Develop a poll concerning presidential privilege. Administer it to another class, the school or community members. Analyze the results in terms of how well the respondents understand the law on these issues. People may be asked: Does the President of the United States have to go to court if he is subpoenaed? If the President of the United States does not go to court when subpoenaed, should he be put in jail?
3. Draw a map of the United States using a color or pattern code to indicate how territories were added: by purchase, annexation, war, negotiations, etc.
4. Research the Burr trial. Write the letter which General Wilkinson might have sent to Jefferson. Consider what the letter might have said that made Jefferson reluctant to produce it. Review the requirements for due process in a criminal proceeding. Hold a mock trial or mock grand jury hearing using the new letter as evidence. The instructor or a resource person such as a lawyer or judge could take the role of Chief Justice Marshall. Students can take the roles of defendant, the several attorneys and witnesses. To create more interest, someone taking the role of President Jefferson might also take the stand. The rest of the class could be the jury.
5. Groups of students can research famous English treason trials, such as those of Sir Thomas More; Anne Boleyn; Lady Jane Grey; Mary, Queen of Scots; Sir Walter Raleigh; and the American trials of Cramer and Haupt in 1945 and 1947. In a panel discussion, students can report on each of the trials and compare them with the precedents for due process that John Marshall set in Burr's trial. Students not on the panel can ask questions about due process: grand jury procedure, grand and petit jury selection, presence of attorneys, rules of evidence, right against self-incrimination and use of witnesses.

6. Research the uses and misuses of presidential privilege. Study the ways in which Presidents Washington, Adams, Jefferson, Lincoln, the two Roosevelts, Kennedy and Nixon used executive privilege.
7. Research the grand jury in the United States. What are its legal and political functions? Analyze the procedures used and their purposes. Pay particular attention to jury selection, the use of evidence and the presence of attorneys. How has the grand jury evolved since the early years of the Republic? Do all states have grand juries? Is the grand jury an institution which still fosters due process? What reforms have been suggested?
8. Research bail in the United States. Analyze the use of bail in terms of how it is actually used and how it should be used. Review recent reforms and suggestions for reform.
9. Research the ethical dilemma of treason. Study the political and ethical concept of treason. For example, if revolutionaries win, then "loyalists" are traitors; but if a revolution fails, the revolutionaries are traitors. Can such political problems of power be partially resolved by legal means such as insistence on due process? How did Lincoln intend to resolve similar problems after the Civil War?
10. Research the legal problem of treason. Study English treason law, bills of attainder and French "lettres de cachet", and their political uses. Compare these practices with Marshall's interpretation of the intent of the framers of the United States Constitution.
11. Research separatism. Study separatist movements in such countries as Canada (Quebec), Belgium (Walloons), Ireland (Northern Ireland), Britain (Wales, Scotland), Spain (Basques), Italy (South Tyrol), France (Brittany), the United States and other countries. Compare the motives and interests, and results of these movements.
12. Research United States expansion. Trace the ways the United States acquired territory from native American Indians and from foreign powers.

A. Characters

- Thomas Jefferson: third President, Democratic-Republican
 John Adams: second President, Federalist
 John Marshall: fourth Chief Justice (1801-1835) appointed by John Adams, presides in Burr trial
 Cyrus Griffin: Judge, district court in Richmond, Virginia, presides in Burr trial.
 Aaron Burr: former Vice President under Jefferson
 William Branch Giles: Democratic-Republican Congressman from Virginia
 George Hays: District Attorney, prosecutor
 John Wickham: defense attorney for Burr
 General Eaton: witness for the prosecution
 Blennerhassett: owner of island in Virginia on the Ohio River
 Bushrod Washington: Supreme Court Justice, a Virginian, nephew of George Washington and a friend of Marshall's

B. Vocabulary (see Glossary):

- The Supreme Court
- Federal Circuit Court
- Chief Justice
- common law
- constitutional
- unconstitutional
- due process
- expansionism
- separatism
- Democratic-Republican
- Federalist
- district attorney
- defense attorney
- prosecuting attorney
- grand jury
- jurisdiction
- Attorney General
- indictment
- precedent
- principal (in a crime)
- accessory (in a crime)
- subpoena
- high misdemeanor
- treason
- overt fact
- levying war
- sedition

C. Stop-Film Technique

Useful places to stop the film and clarify vocabulary, issues, and events include: after each narrative section by E.G. Marshall; and before the Court's decision.

* For lower level or lower ability students with little background in American history or law-related studies.



BACKGROUND

The Judiciary Act of 1802 required Supreme Court Justices to serve on circuit courts, so Chief Justice Marshall and Judge Cyrus Griffin presided over the Federal Circuit Court in which Aaron Burr was tried for treason (levying war against the United States) and high misdemeanor (planning a military campaign against a country with which the United States is not at war) in 1807. These circumstances created a three-way struggle between Marshall, Jefferson and Burr that was rooted in their philosophical differences and personal animosities.

Burr

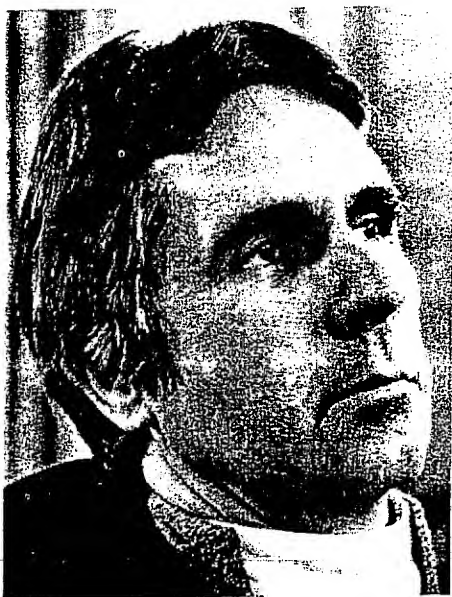
Burr's differences with Jefferson began in the 1800 presidential election. Burr led the New York Democratic-Republican party, and even though the party intended that he be Vice President, he was chosen as a presidential candidate. Before the 12th Amendment electors voted for two presidential candidates, and whoever came in second became Vice President. Burr's success exceeded expectations and he and Jefferson received an equal number of votes. The election was thrown into the House of Representatives, presided over by Jefferson. Adams' vice president. The lame-duck Federalist members tried to maneuver Burr, who they thought more pliable than Jefferson, into the Presidency. Other Federalists, Hamilton among them, helped to abort the attempt, and Jefferson acquired an antagonistic Vice President and a daring political foe. Burr's loss of the Presidency appears to have shaped his ambitions the rest of his life; his career became a series of imaginative grasps for glory. Burr's dominant fantasy seemed to be that if he could not rule all the United States he would rule a part of it. When Jefferson rejected him for the Vice Presidency in 1804, Burr decided to run for governor of New York, aiming ultimately to be the military leader of the Northeast. Burr conspired with senators from New York and New England to secede from the union. Hamilton's opposition to Burr's scheme led to the duel that ended Hamilton's life and Burr's political career in the East.

Aaron Burr

Burr gave up hope of capturing the Northeast and fled West to conquer new lands. As a skilled opportunist, Burr exploited two strains of thought in American culture that have existed in some form throughout the country's history: expansionism and separatism.

Separatist threats of secession were used by states' rights and regional advocates since the Constitutional Convention, and generally met heavy opposition. Expansionist proposals encountered less resistance; and arguably, Burr's ingenious defense that he was settling new territories, anticipated the exploits of Andrew Jackson in Florida and Sam Houston in Texas. While some sober Americans may have agreed with Burr's separatist or expansionist plans, his conspiracy or attempted conspiracy with the Spanish and English governments verges on treason.

Today, Burr's real intentions seem vague and contradictory; perhaps even Burr himself was unsure of them. Letters written by Burr and the English and Spanish ambassadors suggest that he expected to be offered the presidency of New Orleans when it declared its independence. Then Burr would either invade Mexico under some pretext, or await what he thought was imminent war with Spain, or even create a pretext for such a war. Burr might have ultimately planned to lead a revolution in Mexico and have himself declared emperor. When these ambitious schemes failed to materialize, he might have clutched at the legitimate possibility that became his defense at trial: leading a great colonizing expedition.



Jefferson

Political considerations predominantly motivated Jefferson's conduct before and during the trial. Jefferson felt that as President he carried the burden of national security. He believed that a show of strength was required to confront internal enemies like Burr, as well as external enemies. In both of his terms, Jefferson was engaged in keeping America free from entanglement in the Napoleonic wars. He was acutely fearful that Britain might consider America weak, and might direct all of the British naval power to attack the new Republic and regain her lost colony. Spain was apparently prepared to extend her New World territories northward at any time. Napoleon, also imperialistically ambitious, was not to be trusted.

In the confrontation between the Presidency and the courts, Jefferson feared the loss of executive power which might result by either yielding to a subpoena or being arrested. The compromise he suggested was to the advantage of both the judicial and executive branches. But Jefferson was well aware of the dilemma in which he had placed the Chief Justice: if Burr were acquitted, Marshall would be vilified; if Burr were convicted, Jefferson's improper pretrial declaration of Burr's guilt would be vindicated.

Marshall

Marshall and Jefferson had deep-rooted philosophical differences. They were members of opposing political parties with often irreconcilable positions, and in the first decades of the Republic the two men disagreed over several presidential elections and the Mazzei letter, in which Jefferson had maligned George Washington. Furthermore, the naturally opposing constitutional roles of the two men required them to act as checks upon each other, creating repeated confrontations that could only reinforce any mutual antagonisms. Nevertheless, Marshall had no reason to favor Burr, since Burr had killed Hamilton, a Federalist Marshall liked and respected. Neither the judiciary nor Marshall could gain by defending an unpopular person. In addition, by reversing his previous position on treason in the *Swartwout-Bollman* case, Marshall made himself vulnerable to the criticism of inconsis-

tency. Marshall's insistence upon the subpoena of Jefferson, combined with his willingness to compromise, displays his reliance on the Constitution as well as his understanding of political realities and of the negative consequences that inflexibility could have on the Supreme Court. Marshall's other decisions indicate that he carefully avoided jeopardizing the independence of the judiciary. Marshall seemed to perceive the role of the judiciary as one of elevating Burr's trial from a personal and political struggle to the legal problem of interpreting the Constitution.

Legal Issues

The problem of constitutional interpretation encompassed several issues. The first issue arose when Burr sought to subpoena the President during the grand jury proceedings. Marshall's significant ruling established that no man, even the President, is above the law. This precedent was cited repeatedly in *United States v. Nixon* in 1974.

The arguments Jefferson offered for not fully complying with the subpoena have been used by other presidents, including George Washington and Richard Nixon. These arguments included the President's executive privilege and his duty to preserve national security by maintaining the confidentiality of certain negotiations. Jefferson seriously feared arrest, however, and assumed that he would be subject to arrest if he did not comply with the subpoena. Jefferson's partial compliance with the subpoena resulted in a compromise that dramatizes the political realities of the time and the constitutional basis for checks and balances.

The second major legal issue was whether England's common-law or America's constitutional definition of treason would be applied in the case. The defense cited Marshall's previous decision in *Swartwout-Bollman*, which accepted the common-law definition of treason used by Britain and the original colonies:

In treason all are principals, what one does through another he does himself.

Thomas Jefferson



The Chief Justice burned in effigy

The United States Constitution, however, was developed by men who, because of their knowledge of the arbitrary and bloody British abuse of the common-law definition of treason, distrusted and feared a tyrannical government. They wrote:

Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

(Art. III, Sect. 3)

Chief Justice Marshall's decision in *United States v. Burr* suggests that he accepted the defense's contention that strict application of the United States

Constitution's definition of treason is the only one that can legally and ethically be used in American courts.

The third issue, which has possibly the most important ramifications, is the interpretation of due process as it applies to every step in the criminal justice process; from bail, jury selection, and rules of evidence to the final charge to the jury. The political context of the Burr trial amplified this issue. Ostensibly, the case precipitated conflicts between Jefferson and Marshall. But the two actual confrontations were between the President and the law, and between the national government and a citizen accused of betraying his nation. As judge interpreting the law, Chief Justice Marshall was thrust into the uncomfortable position of arbiter of these dis-

putes. The decision was intended to guarantee due process to all citizens even if the government views them as traitors. In the Burr trial, Chief Justice Marshall applied the spirit of equal and orderly government that is embodied in the 5th and 6th Amendments to the United States Constitution.

**EQUAL
JUSTICE
UNDER
LAW**



ACTIVITIES TO CONCLUDE THE FILM SERIES

1. Discuss John Marshall's career as Chief Justice, including the major cases (*Marbury v. Madison*, *United States v. Burr*, *McCulloch v. Maryland*, *Dartmouth College v. Woodward*, and *Gibbons v. Ogden*). Consider how Marshall influenced the function, prestige and authority of the Supreme Court.
2. Discuss how the Supreme Court shaped the Constitution during Marshall's tenure as Chief Justice. How did these major decisions influence the quality of American life over the long run (the nature of the federal government and its impact on citizens, the criminal justice process, the economy, presidential power)?
3. Consider the role of the Supreme Court in American society. (Consider the same aspects of society as in #2.)
4. Simulate a Constitutional Convention focusing on the issues of judicial review of federal statutes, judicial review of state statutes, the definition of treason, due process, the implied powers of Congress, a federal bank, the division of state and federal powers, individual rights and commerce. The roles of delegates to the Convention may be simulated, or students may determine their own position on these issues and argue for them in committees. A plenary session may be held to vote on those articles passed in committee. A two-thirds vote will make it part of a new simulated constitution.
5. Value strategy: Opinion Poll Rank from 1 (most important) to 10 (least important) those constitutional goals you feel are most essential to a democratic society.

- ___judicial review
- ___fair trial
- ___a strong federal government
- ___strong state governments
- ___individual rights
- ___the right to vote
- ___the right to bear arms
- ___a vigorous economy
- ___an independent judiciary
- ___the right to property

Another class, the school or community may be polled. Analyze results in class.

RESOURCES

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Washington, D.C. 20001

GLOSSARY FOR STUDENTS

Note: Terms are very simply defined as used in the context of the films (rather than providing a complete definition).

accessory (to a crime): someone who knowingly participates in a crime.

appeal: review by a higher court.

cashier (of a bank in the early 18th century): an officer of a bank.

charter (of a bank): allows a bank to legally conduct business.

coasting trade: shipping along the coast of an ocean.

commerce: exchange of goods or products.

commission: a document granting an office in government.

common law: law based on English and American custom or tradition.

constitutional: in accordance with the United States Constitution.

defense attorney: lawyer who defends the person accused.

Democratic-Republicans (Jeffersonian-Republicans): advocates of states' rights who believe in limiting the power of central government.

district attorney: lawyer for the government or the people in a certain area.

due process: fundamental protections guaranteed by the U.S. Constitution to a person accused of a crime.

enumerated power (of Congress): power listed in Article I of the Constitution.

expansionism: policy of extending United States territories.

Federal Circuit Court: federal court above Federal District Court, but below the Supreme Court (established by the Judiciary Act of 1789).

Federalists: advocates of strong central government.

grand jury: a body of citizens who decide if there is enough evidence to prosecute.

high misdemeanor: the crime of attacking a foreign country not at war with the United States.

implied power (of Congress): power of Congress suggested by those specifically listed in the Constitution; power necessary to carry out a specific power listed in the Constitution.

indictment: a formal accusation of a crime as required for a trial.

interstate (commerce): between states.

intrastate (commerce): within states.

judicial review: the power to decide if a law accords with the Constitution.

jurisdiction: a court's right or authority to hear a case.

justice of the peace: a local public officer who has very limited authority as a judge.

levying war: carrying out a war.

market: the whole area for buying or selling.

midnight judges: appointed in the last hours of John Adam's presidency.

monopoly: total control of a product or service.

overt act (of war): an actual open act of war.

precedent: a legal decision forming the rule for similar cases that follow.

principal (of a crime): person directly responsible in a crime.

prosecuting attorney: lawyer representing the government in accusing a person in a trial.

repeal: to recall a law and make it not legally binding.

sedition: inciting rebellion against the United States.

separatism: policy of separating or seceding from the United States.

sovereignty: independent authority and power.

states' rights: the policy of giving states power and authority.

subpoena: an order from a court to be a witness or to produce evidence.

Supreme Court Justice: a judge on the Supreme Court.

Supreme Court of the United States: the highest court that hears appeals and determines whether a law is constitutional.

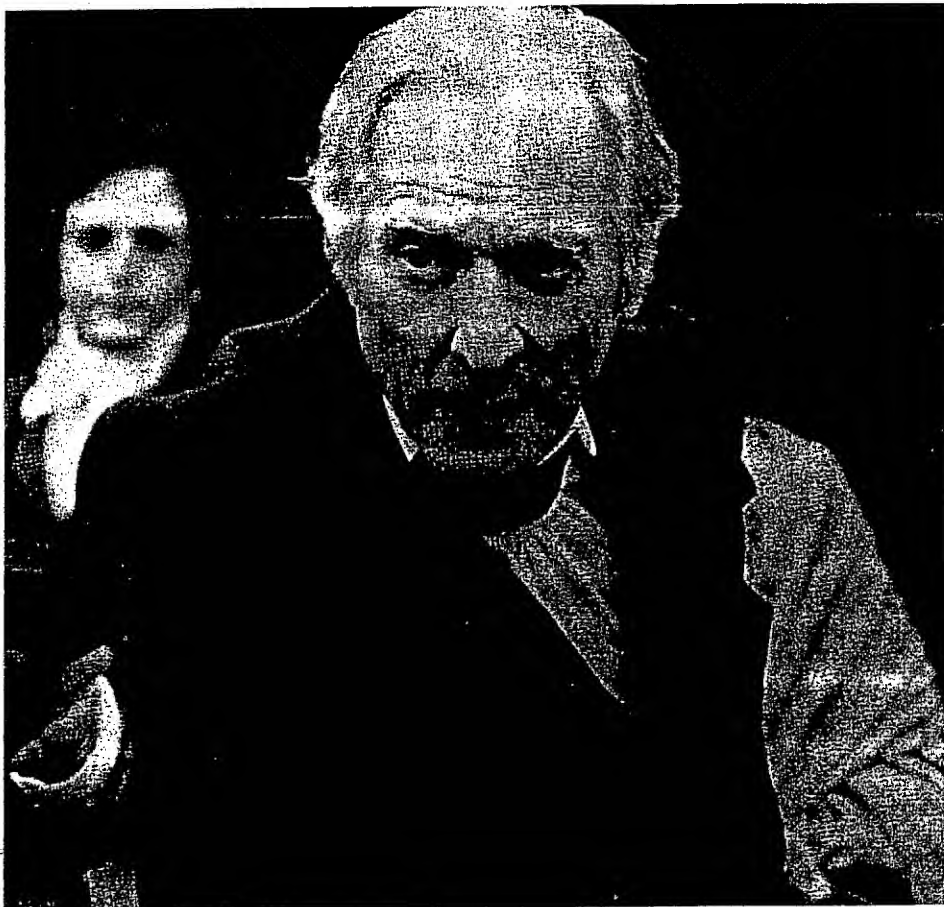
Secretary of State: cabinet officer, head of Department of State.

treason: the United States Constitution states: levying war against the United States; an overt act is required, not merely planning an attack.

tyranny: a government's abuse of power.

unconstitutional: in conflict with the United States Constitution, and therefore void.

Marshall at leisure



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