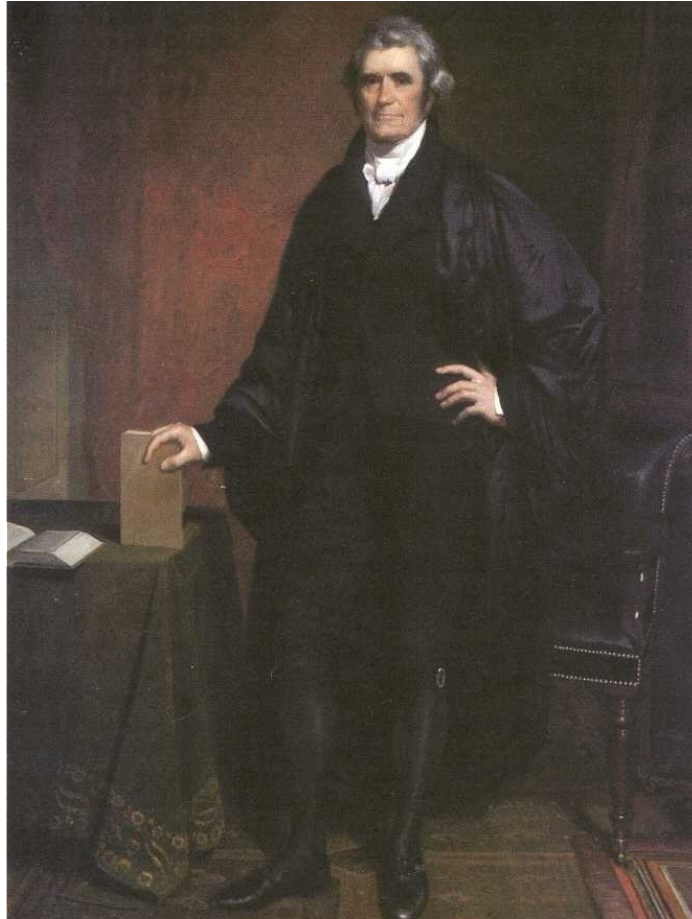


The Judicial Nationalism of John Marshall

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John Marshall (1755 - 1835): Chief Justice of the U.S. Supreme Court

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John Marshall



The chief justice who made the U.S. Supreme Court the final arbiter on the acceptability of laws had "one original and almost supernatural faculty," said a contemporary, William Wirt: he could grasp an argument in a law court by "a single glance of his mind." This amazing capacity for concentration and insight was obvious to others even in John Marshall's youth. After only a month of formal study and a few years of practice, he became one of Virginia's leading lawyers. And, although he never held a judicial post before his appointment to the Supreme Court, he became perhaps the nation's greatest chief justice.

The eldest child in a family of 15 children, Marshall was born on September 24, 1755 to well-connected and, for the frontier, well-educated parents near Germantown, Virginia. Marshall served as an officer in the American Revolution from 1775 to 1781, first in the militia and then in the Continental Army. While awaiting his formal discharge from the army, Marshall was admitted to the Virginia bar in 1780. He quickly became a prominent Federalist political figure as well as a successful attorney in Richmond. He was elected to two terms in the state assembly (1782 and 1787) and executive council (1782-1784), and helped secure the ratification of the Constitution in Virginia (1788). Although he turned down several important political posts offered by presidents George Washington and John Adams because he preferred the practice of law, he did accept, primarily for personal business reasons, a diplomatic assignment to France by President Adams in 1797. Ironically, it was this mission that first brought him national fame as part of the infamous XYZ Affair.

After his return, Marshall declined an appointment to the Supreme Court. Instead, he was elected to Congress in 1799. President Adams nominated him as secretary of war in 1800, but Marshall declined. Shortly afterward, however, he agreed to become the secretary of state, and in the following year, Adams selected him to become chief justice. The first official act Marshall performed in his remarkable 34 years in office was to administer the presidential oath to his cousin and political rival, Thomas Jefferson.

Firmly committed to the need to create a strong and effective national government, Marshall's historic effect on the Court began with the first opinion he delivered in 1801. Until *Talbot v. Seeman*, each justice delivered his own separate opinion. Marshall substituted a single majority opinion and kept Court debate behind closed doors. Indeed, his influence was so strong that in the 1,106 decisions handed down, most of which he wrote, he disagreed with the majority opinion only nine times.

Out of the Jefferson-Marshall political antagonism came one of the Supreme Court's most momentous decisions. Shortly after assuming office, the Republican administration of Jefferson refused to deliver some last-minute appointments (known as midnight judges) by Federalist president Adams. One of the men involved, William Marbury, denied his commission as justice of the peace, petitioned the Supreme Court to force Jefferson to have Secretary of State James Madison deliver the appointment as the Court was empowered to do by the Judiciary Act (1789). Marshall sympathized with Marbury, but he realized the Court could not force Jefferson to do anything. So, instead of ordering Jefferson to do what Marbury asked, he used *Marbury v. Madison* (1803) to establish that the Supreme Court was the final arbiter on the constitutionality of laws. In his precedent-setting opinion, Marshall scathingly criticized Jefferson for not giving Marbury the commission he was legally entitled to, but then declared that the Court could not help Marbury because the section of the Judiciary Act of 1789 that had empowered the Court to issue such an order was unconstitutional. By assuming for the Court the power of declaring laws unconstitutional, Marshall vastly increased the power and importance of the body. In effect, he was elevating the Constitution over the will of the majority, as a law passed by majority vote (either directly by the people or through the people's elected representatives in Congress) could be not supercede the Constitution. The Supreme Court became the final arbiter of which laws were constitutional and which were not.

Marshall's reputation as the author of a large body of constitutional doctrine is founded on the opinions rendered in such cases as *Fletcher v. Peck* (1810), the first Court decision holding a state law invalid under the federal Constitution, which declared that the states, as well as private individuals, had an "obligation of contracts"; *U.S. v. Peters* (1809), *Cohens v. Virginia* (1821), and *Gibbons v. Ogden* (1824), which unified the federal court system and established its supremacy over state courts in federal matters; *McCulloch v. Maryland* (1819), which assigned powers to Congress that were implied rather than stated in the Constitution; and *Dartmouth College v. Woodward* (1819), which held contracts with states inviolable.

Marshall's support for the preeminence of the federal courts caused him to be savagely attacked by the advocates of states' rights. Nevertheless, he never let popular sentiment control his actions. In 1807, in the role of circuit justice, he presided over the trial of Aaron Burr for treason and used the occasion to protect the rights of all Americans by narrowly defining the crime of treason. He ruled that hearsay evidence and mere membership in a conspiratorial group were insufficient grounds for conviction.

Marshall combined his belief in the need for a strong central government with a deep appreciation for the rights of individuals and the sanctity of private property. Fortunately for the nation, none of the efforts by his political adversaries to weaken the power of the Supreme Court or to force him to resign succeeded. He died while still serving as chief justice on July 6, 1835.

A. Instructional Strategy: *Jigsaw*

This is a cooperative learning strategy. Students work in learning teams made up of experts who are responsible for researching subtopics of a larger topic. Experts from each learning team meet to discuss their findings, and then return home to their original team to teach their research findings to the group.

B. In Practice - How It's Used in Class

Students are put into "expert groups" and given a Supreme Court case to research. They are also given a set of **Basic Questions** to explain to the class once the "expert group" is prepared to teach the class. After each group has presented their information, the class (as a whole) considers **Discussion Questions** to talk about and consider. These discussion questions give the entire group the chance to take the information to a higher level of analysis.

1. **Basic Questions:** to be explained by the "expert group" as they present the information to the class.

- The Facts of the Case
- The Question(s) Under Consideration
- The Decision of the Court
- The Reasoning of the Court
- Importance of the Case

2. **Discussion Questions:** to be discussed by the class after all groups have presented their information.

- To what extent is John Marshall a Nationalist, would it be possible to argue that he is not?
- Which is Marshall's most important decision and why?
- Did Marshall overstep his bounds as Chief Justice of the Supreme Court? Could we say that his judicial philosophy is that of 'judicial activism'?
- What would the conservative and liberal elements in our society today say about Marshall?
- How consistent was Marshall throughout his career as Chief Justice?
- What was the most lasting contribution of Marshall to American History?

C. Bibliography for this Lesson on Marshall and Judicial Nationalism:

Supreme Court Cases (Summaries): <http://tourolaw.edu/PATCH/CaseSummary.asp>

Landmark Supreme Court Cases: <http://www.landmarkcases.org/>

Supreme Court Historical Society: <http://www.supremecourthistory.org/index.html>

Menez, Joseph F. and Vile, John R. *Summaries of Leading Cases on the Constitution*. Maryland: Rowman & Littlefield Publishers, Inc., 2004.

Roche, John P. (Editor) *John Marshall: Major Opinions and Other Writings*. New York: Bobbs-Merrill Company, Inc., 1967.

Case Summaries and Excerpts ¹

Marbury v. Madison (1803)

Facts: In compliance with the Act of Congress of February 1801 revising the judicial system, President John Adams signed a commission for William Marbury as a justice of the peace for the county of Washington, D.C. The seal of the U.S. was affixed to the commission, but it never reached Marbury. James Madison, the incoming secretary of state under Jefferson (a Democratic Republican rather than a Federalist) refused to deliver the commission. Marbury went directly to the U.S. Supreme Court for a writ of mandamus requiring Secretary of State Madison to deliver to Marbury his commission. The Judiciary Act of 1789 in Section 13 had provided that the Supreme Court could issue writs of mandamus.

Questions: 1. Has the applicant a right to the commission he demands? 2. If that right has been violated, do the laws of the U.S. afford him a remedy? 3. Is this remedy a mandamus issuing from the Supreme Court? 4. The question that Marshall does not state, but for which this decision is most famous, is whether the Supreme Court had the power to void an act of national legislation that it considers to be unconstitutional?

Decisions: 1. - yes, 2. - yes, 3. - no, 4. - yes

Reasons: *John Marshall* - By signing Marbury's commission, President Adams appointed him a justice of the peace. The seal of the U.S. affixed thereto by the secretary of state was conclusive testimony of the legitimacy of the signature, and of the completion of the appointment. That appointment, under its terms, conferred on Marbury a legal right to the office for the space of five years. Thus, Marbury had a right to the commission he demanded. In all cases, it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded. Marbury had a legal right, as shown above, and this right was obviously violated by Madison's refusal to deliver to him the commission. Thus a remedy under U.S. laws was due Marbury. The Supreme Court of the U.S. had no power to issue a mandamus to the secretary of state since this would have been an exercise of original jurisdiction not warranted by the Constitution. Congress had no power to enlarge the Supreme Court's original jurisdiction beyond the limited circumstances (involving diplomatic personnel and disputes among states) described in Article III of the Constitution. The Constitution was designed by the people as a written instrument designed to control government. The Constitution is "either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts [like the provision of the Judiciary Act in question]." Marshall argued that the Constitution was in the former category of fundamental law and that "It is emphatically the province and duty of the judicial department to say what the law is." "when faced with a conflict between an unconstitutional law (further examples, Marshall cited cases where a state lays a prohibited export tax, adopts a bill of attainder or ex post facto law or flouts constitutional guidelines regarding convictions for treason) and the Constitution, the judges, who take an oath to uphold the Constitution, must enforce the more fundamental law. Otherwise, provisions of the Constitution could be flouted with impunity. Judges take an oath to uphold the U.S. Constitution: "Why does a judge swear to discharge his duties agreeably to the constitution of the U.S., if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?" Marshall also noted that the supremacy clause in Article VI of the Constitution makes "the constitution itself" the supreme law of the land.

Note: This is the first time the Court declared an act of Congress unconstitutional, and thus established the doctrine of judicial review. It was not until a half century later in *Dred Scott v. Sandford* (1857) that the Court was to do it again. Today, it is fairly routine for the court to strike down both state and national legislation as unconstitutional, but although the Court's word is generally accepted as authoritative in the case at hand, other branches of the government may continue to push for rival views of the meaning of the Constitution. The Court sometimes reverses past rulings, and, on at least four occasions, the amending process has been utilized to reverse U.S. Supreme Court decisions.

Fletcher v. Peck (1810)

Facts: John Peck deeded to Robert Fletcher lands in the state of Georgia, which had been bought from the state of Georgia. The contract was executed in the form of a bill passed through the Georgia legislature in 1795, but it appears that most members had accepted bribes. The next legislature accordingly rescinded the act and took possession of the land. Fletcher sued Peck to regain the purchase price.

Question: Can an executed contract in the form of a legislative grant of land by the state itself through its legislature be rescinded later by the state?

Decisions: No

Reasons: *John Marshall* - A valid contract was executed. The state of Georgia was restrained either by general principles that are common to our free institutions or by particular provisions of the Constitution of the U.S., from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void. "One legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." However, ". . . if an act be done under a law, a succeeding legislature cannot undo it. . . . when, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

Note: *Peck*, an unpopular decision, was the first case in which the Court held a state law contrary to the Constitution. As the country developed economically so the Court maintained an unswaying view of the contract clause in Article I, Section 10. But in *Charles River* (1837) it adopted the view that contracts must be viewed narrowly and nothing is given by implication. In *Blaisdell* (1934) the contract must bend under the onslaught of an economic upheaval. Chief Justice Hughes found it untenable that the clause prevented dealing with a great public calamity such as a fire, flood, a major depression, or an earthquake.

McCulloch v. Maryland (1819)

Facts: Although the U.S. Constitution made no direct mention of the subject, Congress incorporated the Bank of the U.S., a branch of which was established in Baltimore. The state of Maryland required all banks not chartered by the state to pay a tax on each

¹ Menez, Joseph F. and Vile, John R. *Summaries of Leading Cases on the Constitution*. Roman & Littlefield Publishers, Inc.: New York, 2004.

issuance of bank notes. McCulloch, the cashier of the Baltimore branch of the Bank of the U.S., issued notes without complying with the state law. Action was brought on the part of Maryland to recover the penalties.

Questions: 1. Does Congress have the power to incorporate a bank? 2. May the state of Maryland tax a branch of the U.S. Bank located in Maryland?

Decisions: 1. - yes, 2. - no

Reasons: *John Marshall* - The Constitution empowers the government with the right to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise the support armies and navies. Congress has also been granted the power "to make all laws which shall be necessary and proper for carrying into execution" the expressed powers in the Constitution. The provision is included within the powers of Congress and does not limit Congress to choosing those means that are "absolutely" necessary. Therefore, by incorporating a bank, Congress is creating the means to attain the goals of the powers entrusted to them. The Tenth Amendment does not include the limitation "expressly" before the word "reserved", and thereby does not bar the congressional exercise of implied powers. The Court contended that the Constitution and the laws made in pursuance thereof are supreme and cannot be controlled by the various states. If the state of Maryland could regulate the laws of the federal government to its own convenience, then the Constitution and federal laws would soon lose their significance. "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." When Maryland taxed the operations of the federal government, it acted upon institutions created not by its own constituents, but by people over whom it claimed no control. The power to tax involves the power to destroy. Such a tax could be used to destroy an institution vitally necessary to carry out the operations of the national government, and therefore is unconstitutional and void.

Note: *McCulloch* will be found in any list of the "great cases". A good deal of Hamiltonian theory became law. It proclaimed the doctrine of implied congressional powers and of federal supremacy. In the *Legal Tender Cases* (1871), and in *Julliard v. Greenman* (1884), *McCulloch* was supplemented by the development of the doctrine of "resulting" (or resultant) powers.

Trustees of Dartmouth College v. Woodward (1819)

Facts: In 1769 the English Crown chartered Dartmouth College. Later in 1816, the state legislature of New Hampshire passed a law completely reorganizing the government of the college and changing the name to Dartmouth University. The old trustees of the college brought an action of trover (used in cases where a party is alleged to be wrongfully using the goods of another) against Woodward, who was secretary and treasurer of the college and joined in the new university movement. He held the seal, records, and account books. The state decided against the old college trustees.

Questions: 1. Is the contract protected by the Constitution of the U.S.? 2. Does the act of 1816 impair the original charter, as contended by the old college trustees?

Decisions: 1. - yes, 2. - yes

Reasons: *John Marshall* - "This is plainly a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property...It is then a contract within the letter of the Constitution, and within its spirit also." Corporations are designed to achieve a form of immortality for those who create them, and future donations may well depend on donors' beliefs that their money will continue to be directed where they want it to go. Dartmouth College was not a state institution by a private eleemosynary (charitable) institution. The act of 1816 by the New Hampshire legislature gave the college a public and civil status, increased the number of trustees, and, therefore, in essence impaired the operations of the college as originally intended by the founders. The founders sought the charter in good faith, thus making a legally binding contract. Under the act of 1816, the charter as originally intended no longer existed. Thus the New Hampshire legislature violated the Constitution of the United States, and the act of 1816 was unconstitutional and void.

Note: Dartmouth not only came down on the sanctity of contracts--in this case for the college-- but for business and corporate interests. Daniel Webster argued for the college from which he had graduated, and his final words have echoed through the ages: "It is . . . a small college, and yet there are those that love it."

Cohens v. Virginia (1821)

Facts: To effect improvements in the city of Washington, Congress passed a law in 1802 authorizing the District of Columbia to conduct lotteries. Acting under this authority, the city passed an ordinance creating a lottery. The state of Virginia had a law forbidding lotteries except as established by the state. P.J. and M.J. Cohen were arrested in Norfolk, Virginia, charged with selling tickets for the lottery. They were found guilty and fined \$100. Then they appealed to the Supreme Court to which Virginia did not object since the states desired to force the issue of the Supreme Court's authority over state actions.

Questions: 1. Is the jurisdiction of the Court excluded by the character of the parties, one of them a state and the other a citizen of that state?

Decisions: 1. - no.

Reasons: *John Marshall* - "Where, then, a state obtains a judgment against an individual, and the court, rendering such judgment overrules a defense set up under the Constitutions or laws of the United States, the transfer of this record in the Supreme Court, for the sole purpose of inquiring whether the judgment violates the Constitution or laws of the United States can, with no propriety, we think, be denominated by a suit commenced or prosecuted against the state whose judgment is so far reexamined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. . . . Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the Constitution and laws of the Union. It is, then, the opinion of the Court, that the defendant who removes a judgment rendered against him by a State court into this Court, for the purpose of re-examining the question, whether that judgment be in violation of the Constitution or laws of the U.S., does not commence or prosecute a suit against the State, whatever may be its opinion where they effect of the writ may be to restore the party to the possession of a thing which he demands."

Note: In *Martin v. Hunter's Lessee*, the Court held that the Constitution, in order to bring uniformity to U.S. jurisprudence, extended the appellate jurisdiction of the Supreme Court to cases in state courts that involved the Constitution, laws, and treaties of the U.S. *Cohens* further established that when a state has obtained a judgment against an individual in a state court over a defense based on the Constitution or laws of the U.S., the Supreme Court may review the decision.

Gibbons v. Ogden (1824)

Facts: The state of NY gave exclusive navigation rights to all water within the jurisdiction of the state of NY to R. R. Livingston and R. Fulton, who assigned Ogden the right to operate between NY City and NJ ports. Gibbons owned two steamships running between NY and Elizabethtown, which were licensed under act of Congress. Ogden gained an injunction against Gibbons, who appealed.

Questions: 1. Can a state grant exclusive rights to navigate its waters?

Decisions: 1. - no

Reasons: *John Marshall* - (6-0) Congressional power to regulate commerce is unlimited except as prescribed by the Constitution. Commerce is more than traffic; it is intercourse, thus including navigation, and it is regulated by prescribing rules for carrying on that intercourse. Regulating power over commerce between states, and may be exercised within a state, but it does not extend to commerce wholly within a state. When the state law and federal law conflict on this subject, federal law must be supreme. Thus the act of the state of NY was unconstitutional. Any matter that affects interstate commerce is within the power of Congress.

Note: This case, argued for Gibbons by Daniel Webster, is almost always the starting point for discussions of the commerce power and is noteworthy because it was the first one ever to go to the Court under the commerce clause. Marshall defined commerce very broadly and received popular acclaim for striking down a monopoly. The commerce clause has become one of the primary bases for the expansion of congressional powers.

Cherokee Nation v. Georgia (1831)

Facts: The Cherokee nation filed a suit from enjoining Georgia from forcing laws that parceled out Indian lands and otherwise interfered with their rights.

Questions: 1. Is an Indian tribe a state or a foreign nation that can bring a suit in Court? 2. Will the Court issue an injunction against Georgia?

Decisions: 1. - no, 2. - no

Reasons: *John Marshall* - (4-2) Marshall decided that under the terms of the US Constitution, Indian tribes did not constitute either a domestic state or a foreign nation. He found that they could best be described as "domestic dependent nations" in the relation of a ward to a guardian. The tribe could thus not be a case before the Court under Article III. Moreover, the request made by the Cherokee nation "savours too much of the exercise of political power to be within the proper province of the judicial department." Thus, "if it be true that the Cherokee nation have rights, this is not the tribunal in which those right are to be asserted."

J. Johnson and J. Baldwin concurred, and *J. Thompson* dissented. Johnson agreed that the Cherokee tribe was neither a state nor a foreign nation. Baldwin thought that Marshall's opinion was an attempt to give the tribe a status it did not have under the Constitution. Thompson dissented. He believed that the Indians could be considered as a foreign state over which the Court had competence and that they were entitled to relief under treaties and other agreements to which they were parties.

Worcester v. Georgia (1832)

Facts: Georgia adopted a law under which a Vermont missionary to the Cherokees was sentenced to four years in prison for residing with the Cherokee Territory without a license from the governor.

Questions: 1. Was the record of the case properly before the Supreme Court? 2. Can the Court take cognizance of a case involving an appeal of a state prosecution? 3. Are treaties with Native American tribes a matter for state or national authorities?

Decisions: 1. - yes, 2. - yes, 3. - National

Reasons: *John Marshall* - (5-1) A case is considered to be before the Court when signed by the clerk, and this case was so certified. The Judiciary Act does give the Court discretion over the cases it will accept. These include matters involving federal treaties. When Europeans came to America, they found the continent inhabited "by a distinct people divided into separate nations, independent of each other and of the rest of the world, having institution of their own, and governing themselves by their own laws." The European nations, including Great Britain, who claimed each area, entered into treaties with the Indians and oversaw trade with them, keeping other European nations at bay in the process. This power later passed to the United Colonies and to the new nation under the U.S. Constitution. The U.S. has entered into a number of treaties with the Cherokees: "This relation was that of a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subject to the laws of a master." Treaties have recognized the territory of the Cherokees, and state laws repugnant to such treaties, including the law in question, are void.

J. McLean, concurring, agreed that the Court had properly accepted this case. He argued that it was just as important for the federal courts to review criminal cases originating in the states as to review civil cases. He further emphasized the role of the national government in managing relations with Native Americans through its power over commerce. The Native Americans "have always been admitted to possess many of the attributes of sovereignty." As long as Native Americans retain their identity as tribes, the national government governs relations with them.

Note: Although the Marshall Court attempted to protect the rights of the Cherokees, the Court did not have the sympathy either of the state government, which refused to honor its decision, or of Andrew Jackson. This decision was followed by the tragic Trail of Tears in which thousands of Cherokees were relocated to Oklahoma, many dying along the way.

Barron v. Baltimore (1833)

Facts: The city of Baltimore in paving its streets diverted several streams from their natural course, with the results that they made deposits of sand and gravel near Barron's Wharf, which rendered the water shallow and prevented the approach of vessels. The wharf was rendered practically useless. Barron alleged that this action upon the part of the city violated the clause in the Fifth Amendment that forbids taking private property for public use without just compensation. His contention was that this amendment, being a guarantee of individual liberty, ought to restrain the states, as well as the national government.

Questions: 1. Does the Fifth Amendment restrain the states as well as the national government?

Decisions: 1. - no, the provisions of the Bill of Rights, of which the Fifth Amendment is a part, are designed to limit the national government rather than the state governments.

Reasons: *John Marshall* - (7-0) The Constitution was established by the people of the U.S. for their own government, not for the government of the individual states. The powers they conferred on that government were to be exercised by that government. Likewise, the limitations on that power, if expressed in general terms, are necessarily applicable only to that government. The Fifth Amendment contains certain restrictions obviously restraining the exercise of power by the federal government. Since the Constitution is a document framed for the government of all, it does not pertain to the states unless directly mentioned.

Note: In a development often associated with *Gitlow v. New York*, the Supreme Court began applying individual provisions of the Bill of Rights (in *Gitlow*, the First Amendment's right to freedom of speech) to the states as well as to the national government. Over the course of time, almost all of these provisions have been so applied through a process known as "selective incorporation." Under this doctrine, the due process clause of the Fourteenth Amendment has been used to apply those provisions in the Bill of Rights regarded to be fundamental.

Case	Date	Facts	Question	Decision	Reasoning
Marbury v. Madison					
Fletcher v. Peck					
McCulloch v. Maryland					
Dartmouth College v. Woodward					
Cohens v. Virginia					
Gibbons v. Ogden					

Cherokee Nation v. Georgia						
Worcester v. Georgia						
Barron v. Baltimore						