One Nation Under Law

KLARMAN
The issues change. Before the Civil War, the issues were slavery or state sovereignty, federalism. In the last part of the twentieth century, the issues are culture war issues. But again, you have this Constitution that doesn't yield real clear answers.

POWE
Justices are trying to apply the Constitution in light of all of American history and in light of the peculiar circumstances that we, as a nation, find ourselves in today. And it's hardly surprising that under all these circumstances, different people will have different views on what the Constitution means. It would be an incredibly weird country if everyone agreed on everything.

GILLMAN
The Court will never be that far out of tune with the prevailing attitudes and prejudices of its time. Nevertheless, when the Court speaks, it's supposed to speak for what the country stands for, our basic values, our highest aspirations. And so we put a lot of faith in the Court and a lot of us want the Court not to let us down.

NARRATOR
The Supreme Court did not always hold such sway in the life of the nation. In the early years of the Republic, justices were unsure how far their power extended and shy to exert it. One man changed all that.

POST
I think nobody until Marshall, until Marshall comes along, I think did anybody really have a coherent vision of how powerful this institution could become.

KOBYLKA
The base that Marshall built in law, and in tradition, transcends his life and animates the rest of American history. Part of the genius of John Marshall, is that in a very real sense, he invented the Supreme Court.

SHOW TITLE: ONE NATION UNDER LAW NARRATOR
The United States Supreme Court was written into being at the Constitutional Convention in 1787: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The Framers knew they wanted an independent judiciary, free from the pressures of politics, but little else was determined. The Supreme Court's inaugural session did not portend a powerful future.

POST
For the first year, nothing comes to the Court. They literally, they, they have a two-hour session in 1790. They have no cases, and they all go home. They were given a second floor room in some building in New York, I mean nobody sees this as having the, the majesty of the executive branch or the legislative branch.

ROBERTS
The Supreme Court was a Court of law, but it wasn't established as a Constitutional Court. So its early decisions tended to be just every day run-of-the-mill legal disputes, not great constitutional questions.

NARRATOR
Congress originally set the number of seats on the Court at six, lifetime appointments all. But it was no mean task keeping the bench filled, in part because the justices were compelled to ride circuit-hundreds of miles, twice a year-to preside over lower Courts.

POWE
It was terrible. Justice Chase, in 1800, is driving his carriage across the iced-over Susquehanna River and the ice breaks. And he is rescued almost dead from that. Circuit riding just, well, in some case you could say it came very close to killing the justices.

ROBERTS
It was not a job for those with a weak constitution. Membership on the Supreme Court was in a great deal of flux. People didn't stay on the Court very long. The first Chief Justice, John Jay, left to be governor of New York.

LAW
The president wanted to appoint John Jay to the Court again and he refused. He declined. He said, 'The Supreme Court is not an institution with lot of a lot of energy. It's just not a great job. I'm gonna take a pass on that.'

POST
It had so little prestige as an institution, at that point, that it was really an afterthought. The Court was off on the sideline and played almost no role.

NARRATOR
It was the tumble of partisan politics-not the imperatives of the Constitution, not the majesty of the law-that drew the Supreme Court into the momentous battles of the early Republic, that vaulted a 45-year-old Virginia politician named John Marshall to the bench, and that started the Court toward its destiny as a dynamic and co-equal branch of the federal government.

By the time George Washington retired from the Presidency in 1797, the country had split into factions, the first political parties: new President John Adams and Federalists such as Alexander Hamilton and John Marshall on one side, Vice President Thomas Jefferson and his new party on the other. Their differences seemed fundamental-and had widened as each side watched the democratically-fueled French Revolution devolve into mass murder of the aristocracy.

KLARMAN
For Marshall, the French Revolution was anarchy, attacking order, attacking property. Jefferson's response was it's a good thing to spill a little blood every once in a while. You need to do that. A little revolution is a good thing. It shakes people up.

NARRATOR
Federalists didn't intend to let unchecked democracy-the mad passions of the people-threaten their fragile new Republic. To hold the mob in check, they championed a stout national government led by the educated and landed elite.

SIMON
Jefferson believed that the Federalists represented a new monarchy, not much different from that which we'd declared our independence from in Great Britain.

YOUNG
When Hamilton said "I think we need a standing army,"the Jeffersonians immediately assumed the worst. What are you gonna use this army for? To oppress us? To draw all power to yourself?

NARRATOR
The Federalists had, in fact, consolidated their power in government. They controlled the executive branch and the Congress and had appointed each and every federal judge.

From his Virginia plantation, Vice President Jefferson began running an all-out insurgency against the ruling party-a "second revolution" he called it. He meant to ride people power to the Presidency. As Jefferson stirred dissent, visions of the French Revolution danced in Federalist heads.

POST
Jefferson was known for his Francophile leanings. And there was real concern that there would be bloodshed in, in Washington, um, if Jefferson came in. And you know, heads would roll, um, almost literally.

GORDON-REED
You could look back at and say it was ridiculous to think that Jefferson was going to lead a revolution that led to bloodshed. But at the moment, things were pretty much up for grabs.

NARRATOR
The politics of the day were partisan . . . and ugly. And there was no precedent or tradition that demanded the judicial brand steer clear. Federalists-appointed lower-Court judges enforced the plainly unconstitutional Sedition Act, tossing Jeffersonian pamphleteers and politicians in jail for merely criticizing President Adams.

And as the election of 1800 neared, many of those judges campaigned openly against Thomas Jefferson. Then the Jeffersonians won . . . big.

Jefferson took the White House from Adams, and his party-men swept into majorities in the House and the Senate. But there was no way to sweep the nation's courts of Federalist partisans Jefferson despised. Judges were appointed for life. "The Federalists," wrote Jefferson, "have retired into the judiciary as a stronghold."

And John Adams meant to shore up the Federalist breastworks. In the aftermath of the election, the angry lame-duck President installed his close friend and then-secretary of state, John Marshall, as the new Chief Justice of the United States.

Marshall's appointment blocked Jefferson from naming his own Chief. And it sent a clear signal to the incoming President: John Marshall would be watching him.

GORDON-REED
Jefferson was building a country and he had a very extended vision of where things were going to go. And I think he became pretty hardcore about people who got in the way. And he saw Marshall as someone who was getting in the way.

NEWMYER
The swearing-in of Thomas Jefferson has got to be one of the great ironic moments in American history because you have Chief Justice Marshall swearing in his second cousin, Thomas Jefferson, and both men pretty much by that time hated one another.

They feel that the policies represented by the other person was detrimental to American civilization. It was as fundamental as that. So you have Marshall holding the Bible, Jefferson has his hand on the Bible swearing to uphold the Constitution, which Marshall is absolutely sure he was going to destroy.

NARRATOR
The first fight between Jefferson and Marshall was a fight picked by John Adams on his way out of town. That quarrel would spill into the United States Supreme Court . . .

On paper, Marbury vs. Madison involved a small technical question of administrative housekeeping, but in the political swirl of 1801, this seemingly straightforward legal case would determine the future of the Court-and test the cunning and ability of the new 45-year-old Chief Justice.

Marbury vs. Madison began with another breathtaking act of partisanship by the

outgoing President, John Adams. Just weeks before Jefferson's inauguration, the lame-duck Federalist Congress had passed legislation swelling the federal courts - and Adams stuffed them full of anti-Jeffersonians.

SIMON
At the very end - literally, the last day - of Adams's presidency, he was busy signing commissions for these federal judgeships, including these justices of the peace. And the hour got very late. And he had to get the commissions signed. And then they were sent over to the secretary of state, who happened to be John Marshall. And Marshall had to put the seal of the United States on it. And then they were to be delivered to these designated justices of the peace.

YOUNG
John Marshall knows he can't deliver them all. He gives about half of them to his brother James to deliver. James doesn't get around to delivering them before time runs out. The key lesson of Marbury vs. Madison is: Don't give important documents to your brother.

NARRATOR
When Thomas Jefferson arrived at the executive offices, seventeen commissions sat signed, sealed and undelivered. He directed his new secretary of state, James Madison, to leave them lay.

Ten months later, a would-be Justice of the Peace named William Marbury showed up at the Supreme Court asking Marshall and his brethren to compel Madison to deliver his commission. John Marshall ordered Madison to show just cause for withholding Marbury's commission.

Madison didn't feel obliged to bow to the Court. He simply didn't answer. But when word of Marshall's demand spread through the Capitol, the Jeffersonians in Congress were not so passive.

YOUNG
Congress passes a law that basically closes down the Supreme Court for a full term. They just cancel the term by statute. Now there's nothing in the Constitution that says they can't do that specifically. On the other hand, it's a pretty aggressive attack on the Court.

NEWMYER
There was the real feeling on the part of the Justices that their days were numbered. And Marshall himself, I think, felt under considerable threat of impeachment.

NARRATOR
The Court was in its Congressionally-enforced recess for fourteen months while the Jeffersonians threatened to dismantle the entire Adams-built judiciary.

Marshall stayed home in Richmond, Virginia with his wife Polly and their six children, puzzling out his next move in Marbury v. Madison. He didn't have a lot of good options.

WEINBERG
If he backed down, if he was seen to back down, the Court would lose all prestige. It would take generations for the Court to recover from that act of cowardice. If, on the other hand, Marshall bravely gave an order to President Jefferson- "Command the secretary of state to convey the commission!"-the administration would disobey, pay no attention to the court order. And in that case, the Supreme Court of the United States would be a laughingstock.

YOUNG
Marshall doesn't want to have that situation because then the Court looks powerless,s and it sets a precedent that the Court doesn't have to be obeyed. Everything people do in this time is setting a precedent. They're very aware that it's the first time for everything.

NARRATOR
When Congress permitted the Supreme Court to reconvene in February of 1803, the first case on the docket was Marbury vs. Madison. The Court was meeting in the lobby of a Washington hotel, and partisans on both sides milled the halls, anxiously awaiting the Court's judgment. When Marshall announced the decision . . . it confounded almost everyone.

LAW
He says, well, "Mr. Marbury, you have been wronged. The Jefferson administration has completely illegally withheld your commission and that's a horrible, terrible thing. And we deeply feel your pain. However -- just when Marbury thought he had won -- see, you're in the wrong place to get any help. And this is not the proper tribunal for us to help you. So good luck with that. Bye."

GILLMAN
Most Jeffersonians thought of it as a victory for the Jeffersonian administration, because, in fact, they had won. This guy wanted to have a court order Madison to do something, and Marshall said no.

POST
It was trumpeted as something of a victory for Jefferson. Um, it made it hard for Jefferson, who I think realized very quickly that it wasn't such a big victory.

NARRATOR
It took some doing to untangle Marshall's opinion. The Chief Justice had taken Jefferson to task for trampling Marbury's rights; he'd also asserted the power to force the President to comply with a court order. But he'd run away from the real fight, explaining that he was powerless to issue such an order in Marbury, because in this particular case, the Supreme Court did not have jurisdiction.

YOUNG
In order to hold that there's no jurisdiction, he has to strike down an act of Congress. And so as part of his holding that there is no jurisdiction, his way of backing out, in a sense, he reaches out and takes the power of judicial review to boot.

NARRATOR
The Court's power of judicial review-the ability to strike down any law 'repugnant to the Constitution'-was not written into the Constitution itself. Jefferson believed the Court had little standing to be the final word on the constitutionality of laws. In fact, he thought it dangerous to give so much power to men who were appointed for life and did not answer to voters.

But in his Marbury opinion, in his own hand, John Marshall scrawled into the record the Court's central power.

KOBYLKA
Judicial review is the capacity to say, 'This law does not comport with the Constitution; it's not really law, it's void.' The trick is that nothing in the Constitution says that the Supreme Court has this power, no language in Article Three, which creates the Courts, no language in any part of the Constitution says, 'The Court has the power to strike legislation.' We know the president can veto legislation because Article One, Section Seven says he can. We know the Supreme Court can strike down legislation as unconstitutional because John Marshall said it could.

ROBERTS
It was emphatically, as he said in Marbury vs. Madison, emphatically the province and duty of the Courts to say what the law is. And the Constitution is law. In most governments, if not all at that time, a Constitution was regarded as a political document. Marshall's real significant and unique contribution was to view the Constitution as law. And once you accept that, that the Constitution is law, then the courts have a significant role because courts tell you what the law means.

POST

He's asserting the constitutional equality of the Court in the constitutional scheme; that they were gonna push back; that they had a role to play, a major role to play, the major role to play perhaps, in interpreting the meaning of the, of the Constitutional text.

KOBYLKA
Marshall holds down a decision that Jefferson despises-the Court has power of judicial review-but does so in a way that Jefferson can't evade it. I mean, the only way Jefferson can get around the decision in, in Marbury v. Madison is to give Marbury his commission. Say, "I don't care what Marshall says. Here, here is your commission." Well, Jefferson's not gonna do that. That is classic Marshall.

YOUNG
So, pretty good day for John Marshall, right? He's avoided a political crisis. He's publicly scolded the President for behaving badly. And he's established the most important power that the Court owns. There is no Brown versus Board of Education, there is no Roe versus Wade, there is no Bush v. Gore without a power of judicial review.

NARRATOR
In 1803, the notion of the Supreme Court having the stature to decide a presidential election was laughable. John Marshall had barely extricated the Court from the political noose in Marbury . . . and its future hardly appeared secure.

Court sessions took place in a cramped, 'meanly furnished' Senate committee room. "An old potato hole of a place," one writer called it. Justices had no private chambers, no conference room, no library . . .nothing to suggest permanence.

Marshall was careful not to further antagonize the President. The Chief Justice shed the scarlet and ermine robe reminiscent of the British judges Jefferson despised, choosing to wear a plain, black robe. The other justices followed his lead. More important, Marshall was careful not to challenge the elected branches of the federal government.

GILLMAN
Marshall never again uses the power of judicial review against the national government. In effect, what you had was a negotiated settlement between Marshall and the Jeffersonians. The Jeffersonians were willing to agree to the idea of judicial review as long as they knew that federal judges could be trusted with the power. Marshall made the exercise of judicial power appear safe.

ROBERTS
Marshall established a much lower tone. He was very sensitive to the vulnerability of the Court and was quite anxious to establish it as a nonpartisan, non-political branch of government.

NARRATOR
His fellow justices quickly came to appreciate their Chief's ability to steer the Court through the roughest of political storms. They also came to appreciate his ability to add flair to their otherwise dull days and nights.

No justice was willing to subject his family to the swampy, mosquito-infested and primitive capital-under-construction, Washington City. So for the six to eight weeks the Court was in session each year, the justices lived as bachelors.

ROBERTS
John Marshall convinced the early justices that they oughta board together in the same boarding house so they could take their meals together. And he made sure they had plenty of Madeira to have at those meals. He was a very social, convivial host.

POST
Part of the atmosphere of being on the Court, was you were all in it together in this, almost a martial way, I guess. This was like their barracks. And you li-, you lived together, and then you, you, you think of ourselves as a, the band of

brothers.

NEWMYER
Marshall just loved the give and take of company, the congeniality. He liked to have a drink now and then which helped, you know, get over the difficult points mooting cases. He did buy wine by the pipe, which is, if I'm not mistaken, 126 gallons. Certainly it must have eased discussions occasionally.

POWE
Everybody who knew Marshall seemed to like him. He had a great sense of humor, which he would turn on himself easily. He loved to laugh. He was just one of the fellas.

KOBYLKA
Through a combination of charm and sort of institutional authority, Marshall put his stamp on the way the Justices acted as a collective.

ROBERTS
Marshall really changed the way judges do business. Prior to that time the model that had prevailed in the United States was the British model where however many judges you have on a particular bench they would each give you their views at the end of the case, they would tell you what they think. And if you had seven justices sitting, then you'd get seven different opinions and you'd try to figure out what they mean.

POST
There was no Court; there were a bunch of different justices, each of them opining on any issue that came before them. Marshall starts this practice of having an opinion for the Court.

O'CONNOR
He felt that very strongly in those early days of the Court, he thought that a unanimous Court spoke with a stronger voice and could thereby earn the respect of the American people.

ROSEN
He was convivial. He liked the Madeira, but he was perfectly capable to issue gentle threats to get his way. Justice William Johnson made it clear that when Johnson wanted to dissent, Marshall made it clear to him that there would be consequences to this.

NARRATOR
The beauty of the unanimous opinion of the Court was that it suggested certainty, even infallibility. A Supreme Court decision was beyond argument because the Justices had found truth in the text. Political considerations were beside the point.

And once John Marshall had solidified the authority of the Court and scrubbed it of the taint of politics, he began to use it to advance a remarkably sweeping political agenda . . . to weigh in on the great argument that had bedeviled the young Republic since its founding.

AMAR
America's founders were children of the Enlightenment. They are living in an Age of Reason. They are seeing remarkable discoveries in the natural sciences. And the framers of the Constitution believe that they can discover enduring principles of political science that are every bit as important and powerful as laws of the natural sciences.

POST
It's a manmade reflection, in a sense, of the universe, of how they thought the universe was working. It was how they were thinking about the natural world, in this sort of balanced and opposing forces. And I think it was very natural for, for them to think about the social world in the same way.

NARRATOR

It was a singular experiment, assigning distinct but overlapping powers to two separate sovereignties-the federal government and the individual states.

In the twenty years since that uncertain balance had been negotiated at the Constitutional Convention, Americans had discovered only one thing for sure: nature might be governed by hard, fast and immutable laws; government is not.

A deep divide still separated the champions of a strong central government from those who cherished state sovereignty.

GILLMAN
You really had two major views about what the Constitution really stood for, that are really well embodied in Jefferson and in John Marshall. From Jefferson's point of view, the Constitution creates a relatively small national government. Marshall, on the other hand, thought that the Constitution had created a great American republic; that its greatness was in its unity, and in the power of its national government.

NARRATOR
Marshall's belief in a strong Union wasn't some glorious abstraction; it came straight from his life . . . most especially from his service as a young infantry officer in the Revolutionary War.

For Marshall, the unforgettable lesson of that war began in the days before Christmas, 1777, when General George Washington's Army retreated into the frozen hills of eastern Pennsylvania.

At Valley Forge, 22-year-old Lieutenant John Marshall counted nearly 4,000 men unfit for duty for want of clothes. "Scarcely one man of these," he later wrote, "had a pair of shoes." George Washington begged the states for provisions, to no avail. The Continental Army was nearly destroyed by the indifference of the states. The Continental Congress was powerless to help.

NEWMYER
The powers of Congress were essentially limited by the fact that the states were sovereign. So they could request that the states supply troop and supplies, but they had no way of enforcing it.

It was pretty much impossible to conduct a war, you know, if you have 13 states doing what they think is in their best interest of the states. And this is the thing which Washington complained about, which Marshall undertook to remedy, I guess you might say, in his political career and, of course, in his career as Chief Justice.

NARRATOR
John Marshall kept the lessons of war close to heart. The greatest danger to a strong Union, as he saw it, would be the state legislatures, which were too likely to be swayed by the people's fleeting and irrational passions.

ROBERTS
Marshall regarded his first government as Congress, not Virginia. And it's because he fought at peril of his life, and bravely, to establish that government. At a time when I think most people would reflexively regard themselves as a citizen of Massachusetts, a citizen of Pennsylvania, a citizen of Virginia, he was first a citizen of the United States. And you see that reflected in the decisions of his Court.

AMAR
John Marshall inherits a Constitution that doesn't have very many "No State shall" clauses. But the ones that it does have he makes the most of. When individual states misbehave, John Marshall's court slaps them down.

NARRATOR
Marshall's first great chance came just as Thomas Jefferson was leaving the Presidency in 1809, in a case involving America's most valued commodity: land.

By the time the case reached the Supreme Court, the issues in Fletcher versus Peck had been bouncing around state and federal courts for almost fifteen years. The story began back in the 1790s, when the State of Georgia was in desperate need of cash...

POWE
In 1795, the Georgia legislature sold thirty-five million acres for one and a half cents an acre, which seems very low and may be explicable by the fact that every legislator voting for it had been bribed.

GILLMAN
Land that is the equivalent of the states of Alabama and Mississippi. I mean huge chunks of land. It goes to these four big landholders. Who then in turn sell this land at a big profit to lots of other people.

LAW
The election comes up. The voters find this out. They get very angry. Of course they throw the bums out on their ears.

POWE
The Georgia voters in 1796 wanted to put in a legislature that would repeal the grant. And indeed they did.

KOBYLKA
But by the time the new legislature does this, the land is in the hand of second or third or fourth parties. So then the question becomes: Can the legislature essentially take back property that it had sold to investors?

NARRATOR
The voters in Georgia sure thought so; this land had been a public trust and the first legislature had given it away. Few of the beneficiaries were fellow Georgians-most were Northern speculators, in it for the profits.

But John Marshall had little sympathy for the brutish will of the majority. The Georgians had attacked two things the Chief Justice prized: order and private property. Marshall himself was an enthusiastic and unapologetic land speculator.

For Marshall, the right to acquire and possess private property, free from irrational government intrusion, was a God-given right, at the heart of the Revolution in which he'd fought. Marshall believed that if a state legislature could arbitrarily void private contracts, the whole structure of commerce would be undermined.

GILLMAN
Marshall thought that what was great about the national government was its ability to promote a, a commercial republic.

So for Marshall, in a case like Fletcher versus Peck, the important question, from his point of view, was really the protection of the kind of entrepreneurial spirit and the basic rights of property and contract that were really central to his vision of the Constitution.

KOBYLKA
It's protection of private property. Private property is a theme that runs through American politics to this very day. This was about protecting individual rights. This was about protecting minorities from majorities.

NARRATOR
In its Fletcher opinion, in 1810, the Court essayed a full-throated defense of private property rights; and Marshall himself stretched the issue into a constitutional one, applying the Contract Clause for the first time in the Court's history. No state could retroactively invalidate a private contract.

"Georgia is a part of a large empire; she is a member of the American union," Marshall wrote. "And that union has a Constitution which imposes limits to the state legislatures of the several states."

With Marshall in the lead, the Supreme Court, for the first time in its history, was re-channeling the rippling currents of the times. The Marshall Court extended Contract Clause protection to public as well as private contracts.

It also invalidated New York State's grant of a steamboat monopoly, opening the nation's navigable waterways as great, flowing arteries of traffic and trade.

Marshall's crowning decision came in 1819 in a case involving the Second Bank of the United States.

The Bank had been chartered by Congress to work toward a more uniform system of currency and credit. Despite its name, the Bank of the United States was not a public entity, but a profitable monopoly controlled by private stockholders. It also competed with state and local banks. And in 1818, when the nation slid into economic depression, the Bank of the United States was the obvious scapegoat.

GORDON-REED
The economy is in turmoil. People are losing money. Land prices are falling. The prices of slaves are falling for people in the south. So it's a time of panic.

POWE
And in the areas that were hit hardest, the South and the West, the Bank was just hated. And you had states like Maryland and then Ohio that did everything within their power to put the Bank out of existence.

SIMON
Maryland decided to, to, fight back. So they passed a bill which taxed the Bank of the United States and its Baltimore headquarters. The cashier of the Baltimore branch-a man named James McCulloch-refused to pay the tax. And he said, "We're an entity of the, of the United States. You can't do that."

ROBERTS
What was really at issue in McCulloch against Maryland is which government was going to be dominant, the governments of the states or the government of the United States.

NARRATOR
The state of Maryland sued McCulloch in a Maryland Court. And won. McCulloch appealed to the United States Supreme Court.

Marshall and his fellow brethren heard McCulloch's appeal in their dramatic and dearly refurbished new Court room in the Capitol. Under the vaulted ceiling, among pillars modeled on the Temple of Poseidon, Marshall kicked Maryland in the teeth.

The Chief Justice dismissed out of hand a state's right to tax any national entity. "The power to tax," he said, "is the power to destroy." And Marshall took on a larger question: did Congress have the right to create a bank at all? The Constitution certainly didn't speak to the point. But Marshall did, finding implied powers in the Constitutional phrase "necessary and proper," ceding to Congress the authority to regulate and encourage interstate commerce. States would have to fall in line.

ROBERTS
This was a new nation, and he was going to ensure that it had the authority that the founders intended it to have. Lincoln's famous statement, 'government of the people, by the people and for the people,' is just a paraphrase of what he said in McCullough against Maryland: that this national government was founded not by the states but by the people, and for their benefit. People can debate whether Lincoln's expression is more eloquent than Marshall's, but it's the same sentiment and the same thought and, I think, borne in each case from the fact that they were fighting to preserve the Union.

NARRATOR

A few weeks after he handed down the McCulloch decision, Marshall returned home to Richmond . . . where his fellow Virginians treated him as something of a traitor to his home state. The landed aristocracy was sure Marshall's McCulloch decision threatened its dear way of life, a way of life built largely on slave labor.

KLARMAN
Virginians by the 18-teens, 1820s, their economy is falling apart. Their soil is exhausted. They're starting to export their slaves south, and they're worried about the future of slavery. And what are they gonna do with this huge population on African Americans if they're ever freed? So they're now more pessimistic, they're more defensive, and they see John Marshall celebrating the power of the national government at the very moment when the national government is perhaps starting to pose a threat to slavery.

WEINBERG
If the powers of Congress were not simply specified and delimited, who is there to say that Congress could not abolish slavery and take, take your slaves from you?

NARRATOR
Slavery had been a rare point of agreement between John Marshall and Thomas Jefferson. Both men had been uneasy slavers; they shared the public stance that blacks should be emancipated . . . and then shipped out of the country.

By 1820, the men had split on this issue, too. Jefferson could not abide Northern politicians in Congress dictating the terms of ending slavery. And he could not abide that John Marshall's McCulloch decision had given them an opening to do just that. Long retired from the presidency, the Sage of Monticello stirred.

ROSEN
Jefferson was furious about McCulloch versus Maryland. He saw this as an assault on his vision of state sovereignty. And he encouraged his acolytes to write pamphlets defending a vision of state sovereignty so radical that it eventually blossomed into the theory that would lead to the Civil War.

It was in the years after McCulloch that southern states began asserting a radical theory of the ability to nullify laws that they disagreed with in order to protect slavery.

NARRATOR
Marshall, at 70, still kept faith in the Union and in the Supreme Court. He meant to protect both, so he was careful not to arouse the pro-slavery, states' rights crowd.

But the Chief Justice saw real trouble on the horizon...in the person of Andrew Jackson, who was swept into the Presidency in 1828 by the rabble Marshall had always feared.

GILLMAN
Andrew Jackson earned his reputation. Not as a gentleman philosopher, writing Declarations of Independence and Constitution-Jackson earned his reputation on the battlefield, as really a quite ruthless leader of men in battle. He's really the first public figure vying for national office that temperamentally was not a gentleman, but represented instead the lower classes.

NEWMYER
Jackson got elected, in a sense, by associating himself and his new party, his new political party, with the Jeffersonian tradition, democracy, state's rights. And so Marshall perceived that Jackson was another threat to the integrity of the Union and, of course, the authority of the Supreme Court.

NARRATOR
Andrew Jackson was a man you crossed at your peril. He was an avid and accomplished duelist, having killed three men. And he had one ball of shot lodged in his chest and one in his shoulder, both from duels. Recurring infections required vigilance, making Jackson the only President to ever bleed himself in the White

House.

Unlike Jefferson, Andrew Jackson wasn't keen to diminish the Court's power. He meant to own it. In two terms, Jackson would appoint five justices to the Supreme Court. Four were solid state's righters and strong supporters of slavery.

The new justices resisted the charming orbit of the Chief, choosing to take their own separate Washington City lodgings. The convivial boardinghouse broke up; dissents were more frequent. Marshall even found himself looking for room to compromise with the States Rights bloc. There was one notable exception.

The Cherokee Indians had lived for nearly forty years on land that they held by treaty with the federal government. Unfortunately, it was in one of the most recalcitrant states in the country: Georgia. When gold was discovered on the Cherokee lands, the Georgia legislature grabbed for it-openly defying the federal treaty.

WHITE
The state of Georgia is just trying to kick them out and, and send them to territory which was not their ancestral home, and basically saying, "Go out there and start over."

NARRATOR
President Jackson, an old Indian fighter, was with Georgia; the President-like the U.S. Congress-plainly wanted the Cherokees removed to make way for the White Man. And Marshall no longer appeared equal to Jackson's monumental will. As two separate Cherokee cases moved through the Supreme Court, woe seemed to pile on the head of the aging Chief Justice.

In October of 1831, Marshall underwent bladder surgery, without the aid of anesthesia. While he was convalescing at home in Richmond, his wife died.

When Marshall returned to the business of the Court, he was clearly diminished. A colleague went to Marshall's room one morning and found him weeping. A lawyer flinched when the Chief Justice arrived at the Court unshaven, with egg on his face.

But when the time came to issue a decision on the final Cherokee case, John Marshall refused to stand down. For the first time in his career, he took on the entire political system -- President, Congress and a state government. Georgia's seizure of Cherokee lands, Marshall found, was illegal.

KOBYLKA
This may be an apocryphal story. But Jackson said, "Well, Chief Justice Marshall has made his decision. Now let him enforce it," knowing full well that Marshall and the brethren are not going to go out and stop the movement of Native Americans into the interior part of the country. What Jackson knew, and what Marshall knew as well, is that the reach of judicial power extends as far as the executive is willing to enforce it.

O'CONNOR
There are only a couple of examples in all of the history of our country where Presidents did not enforce some relevant, applicable decision of the Supreme Court. One was President Andrew Jackson, and the result was disaster for the Cherokee Indians.

NEWMYER
Andrew Jackson negotiated action with the Cherokees to send them, in a sense, on this incredible trek west of the Mississippi River, in which thousands of them, men, women and children died on the way. And once they got there, of course they had no land, as it turns out. It was one of the great tragedies, certainly, in American history.

GILLMAN
The lingering lesson of the Cherokee cases is that the power of the Court is

merely the power to persuade. Unless the Court's decisions are brought to life by the rest of the political system, they're just words.

KOBYLKA
Marshall was in failing health. The national political tide was turning against him. His wife had died. He transferred, to an extent, the pain and suffering that he felt personally to the experiment that he had been an intimate part of. He feared the worst. He feared that the nation, the centrifugal forces, would blow the nation apart: that the center wouldn't hold. This would work against everything he had worked for on the Supreme Court. It would undermine his understanding of the Constitution and, in so doing, culminate in the demise of the nation that he had served.

NARRATOR
John Marshall died in July 1835. The Union he'd fought for held. Even Andrew Jackson had defended it against Southern secessionists. The Supreme Court enjoyed a place of pride and prestige among the nation's youthful institutions. But it would have come as no surprise to Marshall to learn that Andrew Jackson appointed as Chief Justice a states' righter named Roger Taney. At the end of his life, John Marshall knew the threats to the Supreme Court and to the Union outlived him. 'I yield . . . to the conviction that our Constitution cannot last,' Marshall had written shortly before his death. 'The Union has been prolonged thus far by miracles . . . they cannot continue.'

It is one of history's sad ironies that the Supreme Court became an animating force for John Marshall's dark prophecy of disunion. The issue of slavery, which Marshall had taken pains to avoid, was the undoing of the Court and the Union both.

For thirty years, back to the time of Marshall's McCulloch decision, the Union was largely held together by a bit of legislative baling wire called the Missouri Compromise. Territories below 36(30' would enter the nation as slave states, territories above as free. It was federal law, negotiated in the U.S. Congress. But in 1854, when it looked like the balance of power was shifting to free states, Southern legislators demanded a new deal.

GILLMAN
The country had come to the, the end of the line. It had tried so hard, in so many ways, to deal with the issue of slavery. And by the mid-1850s, desperate times had called for desperate measures, and there was no other institution that they could turn to to try, finally, to resolve this issue than the Court that Marshall helped create.

AMAR
The politicians actually invite the Court to get involved in this, to take this hot potato out of their laps.

NARRATOR
Led by Marshall's successor, Roger Taney, a usually steady and moderating Chief Justice, the Supreme Court took on Dred Scott versus Sanford. The case was a plea for freedom by one man, but begged the questions of slavery, states rights and federal power.

Dred Scott was a Missouri slave whose owner had taken him, his wife and two daughters, to live in the free state of Illinois, then the free Territory of Wisconsin, before returning to Missouri. Scott and his attorneys argued that once he had lived on free soil, he was a free man. Congress, in the Missouri Compromise, had made it plain.

GORDON-REED
I think Justice Taney wanted to make a pronouncement and make it known what his thoughts were about where blacks belonged in American life. And in order to do that, he goes back to the very beginning and makes the argument that blacks were never intended to be a part of the American experiment. And he wanted to be on record with that.

AMAR
The opinion in Dred Scott says, "The Congress of the United States has to enforce slavery. Slavery must exist in all federal territory. Free soil laws are unconstitutional. The Missouri Compromise in effect was unconstitutional."

NARRATOR
For the first time since Marbury versus Madison, the United States Supreme Court struck down an act of Congress. For the first time in fifty-four years, the Court exercised the power of judicial review against the national government-to protect slavery.

SIMON
It was a disaster. It was the worst opinion ever written in the history of the Supreme Court of the United States. And solved nothing.