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The Great Chief Justice: His Leadership in Judicial Review

THOMAS REED POWELL*

This is not the precise occasion when I would deem it peculiarly fitting to shower praise on the two distinguished Virginia gentlemen of the early nineteenth century who were the contending protagonists in the absence of cordiality between the Federal judiciary on the one hand and the Federal executive and legislature on the other. Indeed, I could go further. Not only would I not shower on Mr. Jefferson equal praise with that I gratefully accord to John Marshall, I would not shower praise at all. The most I could bring myself to proffer would be a mere sprinkle or perhaps only a drizzle. I really do not think that Jefferson merits praise at all for his views in opposition to Marshall or for what he wrote in private letters about Marshall and his brethren, except in condemnation of what some of the brethren did when in sitting on Circuit they harangued grand juries with political diatribes against anti-Federalist principles and conduct.

It was a season, not unlike some other seasons, when extravagance bred countervailing extravagance, and certainly the Alien and Sedition Laws and the enforcement of the latter merited all the condemnation that the anti-Federalists visited upon them. Both party partisans and liberal minded citizens could well be suspicious of the democratic, or anti-democratic, outlook of the political group who enacted and enforced those laws. And since some of the worst utterances and conduct was by judges who adhered to that political group, the men of opposite persuasion might well fear Federalist judges as possible engineers of tyranny. On other issues the position of the party led by Jefferson may be debatable in its own season. There may be even something to say in favor of the Pennsylvania frontiersmen who couldn't get their grain to market except in liquid form, though in recent years we have become accustomed to high taxes, Feder-

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al, state, and local on the beverage that cheers if it does also inebriate.

The bank, the tariff, the assumption of state debts and the hostility to the proletarian extravagances of the French Revolution are to my mind quite different matters. The underlying issue was whether we should become a nation or remain a congeries of local provinces. Strong steps were taken in the direction of nationalism when the Articles of Confederation were superseded by the Constitution. But the framework had to be filled in by positive expedients. The wisdom of Hamilton, an alien immigrant from an insignificant Caribbean island, found the way to tie to the national interest the men whose economic interests lay in finance, in commerce and in manufactures and in the political dominance of leaders in those economic camps. Were they on the whole a selfish oligarchy or a company of discerning nation builders, intent on implementing the Constitution of which they had succeeded in securing ratification against the opposition of those who later followed Jefferson in preferring national weakness to national strength? It would be a naive person who would deny that some were one and some the other, and that still others were both, finding no disharmony between their nationalistic persuasions and their economic well-being.

Putting to one side the possible selfish interest of Federalists, what of their opponents in terms of the wisdom of their political preferences? In the long run was it wise to have a national banking system or not? Was it wise to urge that state legislatures singly and collectively should have legal power to condemn the enforcement of Acts of Congress in their provinces or in the nation? Was it wise to think it better for the nation to leave to foreign powers the major part of the enterprises of finance and manufacturing and ocean transportation? Was it wise to resist national assumption of state debts incurred for nascent national purposes before we had a really national organization? I do not feel sure that the motives underlying these parochial notions were of superior nobility to the motives of those who preferred a strong central power. I do not care very much to try to assess motives. I find it easier to form my own convictions about wisdom, and I find greater wisdom in the plans of Hamilton than in those of Jefferson and greater wisdom in the views of Mar-

shall as statesman than in those of Jefferson as leader of national polity or the lack thereof.

Jefferson and Marshall had long been strong party men and partisans on opposite sides of the political fence when they faced each other on March 4th, 1801, and the new Chief Justice administered the oath of office to the new Chief Executive. Much of the hostility they had expressed toward each other had been contained in private letters to their respective friends, and hence the quarrel was not so open and notorious as it might now seem to be from reading the accumulation of the correspondence not widely known at the time. Nevertheless, the divergence between the two was great, and both men knew it. What was a natural and might in other men have been an amicable opposition of faith and outlook became more intensely personal as time went on. Jefferson in his private correspondence had less serenity than Marshall had in his, but Marshall in his gratuitous and extraneous assertion of the wrongfulness of withholding the commissions of Mr. Marbury and his associates and this in a matter with respect to which he found himself without jurisdiction was of questionable propriety. His later handling of the treason trial of Aaron Burr deprives him of unbroken tenancy of a lofty plane of technical and judicial objectivity.

In some respects Marshall had received excellent training for his work as Chief Justice. In other ways he may be thought to have been ill-prepared. He had received little formal schooling. Some tutoring at home had been followed by a short period at William and Mary, studying not too religiously under Chancellor Wythe. His notebooks had references to Molly Ambler in rivalry with points of law. For such periods as he was not in military and government service he had a busy practice in the Virginia courts. He had only one argument in the United States Supreme Court when in *Ware v. Hylton* he unsuccessfully sought his client's escape from the treaty obligations to pay debts to British creditors. He was more a debating advocate than a book lawyer, but he was skillful in debate. He had been active and influential in the Virginia convention to ratify the proposed Federal Constitution. He had been in the Virginia Assembly as a young man, and he was elected to Congress in 1799 and was an effective member in the session at Philadelphia.

So far as appears, he was never office hungry. He declined the offer of President Adams to succeed Mr. Justice Wilson on the Supreme Court in 1798, as he had earlier declined Washington's offer of the Attorney Generalship in 1795. He turned down the proposal of President Adams to become Minister to France in 1796, but the following year with reluctance he consented to become a member of the so-called X Y Z mission to France which took him away from the country for eleven months. In early May, 1800, he declined to take the post of Secretary of War in the turbulent Adams cabinet, but in the following week he was nominated to be Secretary of State and accepted the place two weeks later. Adams spent much of the summer at his home in Braintree, now Quincy, and Marshall bore the brunt of the executive work of the Presidency for a time. On January 20, 1801, the offer of the post of Chief Justice of the United States came to him unexpectedly, and he accepted. Secretary Dexter was designated to act as Secretary of State *pro hac vice*, to administer the oath to Marshall and to record his Commission. Nevertheless, Marshall continued to act as Secretary of State to the end of the term of Adams, though he no longer received the salary of that office.

All this was valuable experience for training in statesmanship. Experience, however, is not a teacher; it is only a textbook. Many persons with extensive experience have not learned wisdom from it, however much they may have become more useful by familiarity with details and with technique. To my mind the central explanation of Marshall's prowess must have been native endowment enriched by associations with many men of both high and moderate capacities. The testimony is overwhelming that his personal qualities as well as his mental powers opened to him the friendly doors of frequent and many-sided mutual interchanges between men who could severally combine the two not inconsistent roles of teacher and pupil, of Doctor and Student. In these qualities and powers there is a partial parallelism between Marshall and Lincoln, though Marshall had the advantage of background and of earlier and to a large extent of later associations. It is a matter of interest that these were the two men whom Beveridge selected for comprehensive biographies, though regrettably he died before getting as far as Lincoln's maturity. It may be relevant, and not to me unpleasant,

to suggest that none of these three men was of the political party of Mr. Jefferson.

Strange are the happenstances which led to the possibility of Marshall's appointment. Had he not reluctantly run for Congress at the urgent solicitation of General Washington and been elected, he very probably would not have come within close range of the appreciation of Washington's successor. Had not the dissension between Hamilton and Adams resulted in the President's dismissal of Pickering as Secretary of State, that high office would not have been vacant for Marshall to fill, and with such resulting reliance on him by Adams. Had John Jay, the first Chief Justice, prolonged his incumbency during his good behavior, again, no vacancy for Marshall. Had the health of Ellsworth not constrained him to resign when he did, his tenure would have been prolonged until Jefferson would have appointed Spencer Roane. Had Jay, after the resignation of Ellsworth and his own reappointment and confirmation, not declined to accept, again no opening for Marshall. Had Cushing, when commissioned by Washington after the Senate's refusal to confirm Rutledge, not been in such poor health and strength that he begged off, he might have become Chief Justice at that time and if in good health might have continued at the post until the Federalistic regime had been supplanted. And finally, if Adams had not been averse to Marshall's suggestion that he appoint Patterson, it would have been Mr. Chief Justice Patterson instead of Mr. Chief Justice Marshall.

Marshall was nominated Chief Justice on January 21, 1801, confirmed on January 27, and commissioned January 31, and sworn in on February 4. In the meantime, there had been public consideration of a proposal to amend a section of the Judiciary Act of 1789 under which Justices of the Supreme Court were required to do Circuit Court duty, entailing long and tedious journeys over wretched highways. There were intrinsic merits in the proposals. In addition to the onerous burdens, the Justices who participated in Circuit Court decisions did not sit on appeals from them to the Supreme Court. These demerits were, to my mind, hardly compensated for by the fact that the itinerant Supreme Court Justices gained familiarity with local conditions and the local bar and with the District judges who

joined with them in composing the Circuit Courts. But because of this and for other reasons, most of the Anti-Federalists had from the beginning been disinclined to favor the change.

To the intrinsic merits of the proposed change, there were political advantages which in the dying days of the Adams regime were appreciated by the Federalists and detested as disadvantages by their opponents. Though Adams urged a change and a Committee of the House reported a bill on March 11, 1800, before there was not yet certainty but strong apprehension that the Federalists would not long remain in power, the final action on an amended proposal was not taken until February 13, 1801, when it was certain that the Federalists had less than a month in which to retain command. This Circuit Court Act of February, 1801, relieved the Supreme Court Justices of Circuit duty and made provision for six new Circuit Courts with sixteen additional Circuit Judges. It also provided for the reduction of the membership of the Supreme Court from six to five to take effect when there should next be a vacancy. This eventuation was anticipated to be not far away owing to the health of Mr. Justice Cushing who, however, remained in service until his death in 1810, four years after that of Mr. Justice Patterson.

Though it was contended that the reduction in the size of the Supreme Court bench was justified by the relief of the Justices from further Circuit Court duty, the Anti-Federalists were confident that the animating purpose was to postpone the power of Jefferson to make an appointment. It would be a rash man who would deny that the Federalists had acumen enough to appreciate this. This was a tactic later practiced by Republicans of a different breed to deprive President Andrew Johnson of power to appoint any one to the Supreme Court. In reverse English it had a counterpart in the so-called "court packing plan" of President Franklin D. Roosevelt. The increase back to a court of nine when Grant became President was ample evidence of the design of the prior decrease. The increases of one under Jefferson in 1809, of two under Jackson in 1837, and one under Lincoln may be attributed to the needed increase in the number of Circuits with the growth of the country at a time when Supreme Court Justices still sat on Circuit.

With less than a month between the enactment of the Circuit Court Act and the accession of Mr. Jefferson, the Federalists had to work fast to name and confirm the sixteen new Circuit Judges. Work fast they did, and Marshall in his still continuing role as Secretary of State barely got under the wire in sealing and recording the commissions of those who were appointed and confirmed but a few hours earlier. Presumably these commissions were duly delivered. It did not matter for long, as well we know, for the Circuit Court Act was soon repealed. Certainly some of the new Circuit Judges acted, but whether they drew their salaries is unknown to me.

Shortly after the passage of the Circuit Court Act, Congress on February 27, 1801, enacted the Organic Act of the District of Columbia. This provided for forty-two Justices of the Peace in the two counties of the District. Adams made the appointments on March 2nd, and the Senate confirmed them on March 3rd. The offices were not important, though they may have conferred some slight honor. A number of the appointees did not regard them highly enough to participate in a proceeding to determine whether they were entitled to them. The blot on the scutcheon was that so late was the signing of the commissions that there was not time enough or perhaps not diligence enough to make delivery of them before the Midnight Hour marked the shift of power from Adams to Jefferson and the shift shortly thereafter from Marshall as Secretary of State to his successor, Mr. Madison, sometimes called the Father of the Constitution but notwithstanding not in all respects, according to Federalists, a wholly devoted parent.

Out of the non-delivery of these commissions, arose the case of *Marbury v. Madison*, the anniversary of which we celebrate. The first stage of the proceeding was initiated at the December Term of 1801 by William Marbury, Dennis Ramsey, Robert Townsend Hooe, and William Harper who in the words of their counsel, Charles Lee, late Attorney General of the United States, severally moved the Court for a rule to James Madison, "to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as Justices of the Peace in the District of Columbia." Such is the statement, by the Reporter, in the official reports at the later stage of the case in February, 1803,

when the final opinion was delivered by Marshall. It appears, however, from Mr. Warren's account that the *Aurora* and other contemporary journals had fairly full accounts of these preliminary proceedings and that then and in the ensuing debates in Congress on the Judiciary there was wide public discussion of them, and, indeed, not a little vituperation.

Though there were earlier interchanges between Anti-Federalists on the unwelcome conduct of the Federalist moves respecting the Judiciary, the official proceedings against that body started on January 6, 1802, by a motion of Senator Breckenridge of Kentucky to repeal the Circuit Court Act of 1801. On February 3, 1802, the bill passed the Senate by the narrow vote of sixteen to fifteen. The debate in the House was slightly more prolonged, but the bill passed there by a party vote of fifty-nine to thirty-two and became a law on March 31, 1802. Needless to say, the then incumbent President did not veto it. He was cautious in his public discussion of the proposal and of the judicial institution in its entirety, as was characteristic of him, but by private letters he animated his partisan supporters, perhaps even when it was an enterprise of supererogation. As party politician, he might not extravagantly be thought to be somewhat "wily."

My statements of facts about the quarrels over the Judiciary are, as you doubtless have already surmised, winnowed from the exhaustive and somewhat exhausting reports of Warren and Beveridge. My opinions about them are, however, my own even if for the most part they coincide with those of the two voluminous authors. Both of them give numerous and detailed accounts of what many contending Federalists and Anti-Federalists said in the course of the debates. I have an impression that the supporters of the Judiciary had the better manners, and I know that time has supported their positions. If any of my hearers who choose to read the long chapters have a feeling of local pride in the performances of Mr. Giles and of John Randolph of Roanoke, it is compelling testimony to the compulsions of localism and neighborhood after a century and a half.

The brave men who put through this repeal with its most questionable failure to make provision for the continuing tenure

of judges appointed for the period, according to the Constitution, during good behavior, were naturally somewhat fearful that Marshall and his crew, as they sometimes characterized them, might have the acumen and the courage to declare the repealing statute unconstitutional. Though there was some Anti-Federalist talk of impeachment as a method of getting rid of any judge or Justice who was in disfavor or whose place might be desired for another, the new Circuit Judges hadn't been in office long enough to have time to commit anything sufficiently reprehensible to come within the capsule or the caption of the constitutional phrase of high crimes and misdemeanors. True, some new appointees in the District of Columbia sought to get Congress to authorize a proceeding to test their right to their new office, but Congress was not favorable and the offensive suggestion evaporated.

The repeal of the Circuit Court Act was not in the nature of a "Ripper" enterprise in order to fill the empty seats with new placemen. The device was twofold; to get rid of Federalist judges and to abolish the newly created Circuit posts. Mr. Jefferson and his supporters disrelished federal courts, both because of the various things they had done and seemed likely to continue to do, and also because they preferred state courts and the law laid down and administered by them. There was apprehension in some states that federal courts were inimical to the questionable land titles of settlers, whereas state courts were more kindly disposed. With all this rampant localism, it seems strange that Congress did not go further in efforts to curtail national judicial power. Congressional power over the jurisdiction of the lower federal courts and over review of their decrees by the Supreme Court and over that Court's review of federal questions arising in state courts was ample enough to permit Congress to go much farther in the strangulation enterprise. Indeed the business of the lower federal courts was much more the fruit of diversity of citizenship than of the presence of federal questions.

One step beyond the repeal of the Circuit Court Act the Congress did take, though it was partly only a temporary expedient. The Repealed Act had substituted June and December terms for the former February and August terms. It was in late December (the 21st) in 1801 that the rule to show cause was issued in *Marbury v. Madison*, with direction to answer at

the next term of court. Under existing law this would be in June of 1802. By then, too, there might be some proceeding on foot to question the constitutionality of the Repeal Act. So Congress, in apprehension of this possibility and of a Supreme Court order to Madison to deliver these insignificant commissions to Justices of the Peace in the District of Columbia, moved fast and on April 23, 1802, decreed that there should be no June, August or December terms, but only annual February terms. This meant that the Supreme Court could not sit again until February 1803, fourteen months after it had issued the rule to show cause against Madison.

Thus was Marshall graciously accorded ample time in which to do the necessary home work before pronouncing judgment in *Marbury v. Madison*. During the interim he sat on Circuit in Richmond and Raleigh, but neither Warren nor Beveridge has told how much work he had to do. Nor do they report whether he conceived his subsequent peculiar disposition of *Marbury v. Madison* during that time, though the general issue of judicial review had been bandied about for years. All the arguments in favor and opposed were widely familiar. Even some Republicans who favored the views of Jefferson and Madison as expressed in the Kentucky and Virginia Resolutions did not think that a dispensing power in the state legislatures to condemn Acts of Congress was an exclusive power that would preclude the exercise of similar power on the part of the federal judiciary.

The long postponed "next term" of the Supreme Court was fixed by the Republican Congress to begin on the second Monday in February. It was therefore, on February 9, 1803, that *Marbury v. Madison* came on for hearing. Fortunately Judge William Cranch was now Reporter, and we are indebted to him for a lengthy account of the arguments and the affidavits and the various efforts to get testimony as to the existence of the commissions and what happened to them. Cranch expressed his indebtedness and his "obligation to those gentlemen of the bar, whose politeness has prompted a ready communication of their notes, which have enabled him more correctly to report their arguments." In the initial proceeding to show cause, Mr. Charles Lee, former Attorney General of the United States, and counsel for the petitioners, presented various affidavits, showing

that the commissions had been duly signed and reporting the fruitless efforts of the applicants to secure from Madison and from the Secretary of the Senate information as to what had happened to them. "Whereupon," the Reporter adds, "rule was laid down to show cause on the fourth day of this term," i.e., the February, 1803 Term.

Then follow sixteen pages reporting the proceedings. There is no indication that Mr. Lee was not sincerely endeavoring to have the Court issue the writ of mandamus. There is no doubt expressed on either side of the validity of the section of the Judiciary Act giving the Supreme Court original jurisdiction of the cause. The only difficulties considered were those of securing proof of the facts and the issue of the right of the judiciary to compel executive officers to give testimony and the question of the power of the Court to issue a writ of mandamus to the Secretary of State. On the latter point, Mr. Lee conceded that many of the duties of the Secretary were not subject to judicial inquiry or compulsion. From these, he sharply distinguished purely ministerial duties on the performance of which depended the rights of litigants. He gave illustrations in some detail, such as patents for useful discoveries, patents for lands, and other matters over which the President has no control. In all this Lee anticipated Marshall's distinctions.

Mr. Lincoln, the Attorney General who had acted as Secretary of State until Madison was qualified, was called and objected to answering questions. He requested that they be put in writing. After written questions were handed to him, he still objected to answering. His objections were of two kinds. One had to do with not disclosing official transactions. The other was still more interesting. As the Reporter puts it, it was that "he ought not to be compelled to answer anything that might tend to criminate him." The Court assured him on both points. He would not be required to disclose anything confidential or to state anything that would criminate him. Mr. Lincoln, still protested that he "thought it was going a great way to say that every Secretary of State should at all times be liable to be called upon to appear as a witness in a court of justice, and to testify to facts which came to his knowledge officially." The Court offered Mr. Lincoln time to consider what answers he would make but said that they had

no doubt that he ought to answer. So the cause was postponed until the next day. When he returned he testified that he had seen commissions duly signed and sealed, but that he did not recall surely the names on them. Later these commissions were superseded by a new general one and the persons named therein were duly notified.

One question Mr. Lincoln objected to "answering fully"—this was what had been done with the commissions. After he said that "he did not know that they ever came to the possession of Mr. Madison," the Court excused him from answering what had become of them. The Reporter quoted or paraphrased a statement from the Court to the effect that "if they never came to the possession of Mr. Madison, it was immaterial to the present cause what had been done with them by others." If the Court was satisfied that Madison never saw the commissions, it would seem difficult to issue a writ of mandamus against him. This tends to make one suspect that Marshall already had made up his mind not to issue the writ. Signing and sealing of the commissions was testified to by clerks in the Department of State who chose to be somewhat uncertain as to some of the names. Marshall's brother, James, gave an affidavit saying that on the 5th of March, 1801, he had got as many as twelve of the commissions to deliver, but could not conveniently take them all, and so had returned some to the office of the Secretary of State. A clerk in the Department of State, who had been absent during most of the argument before the Court, furnished toward the end of the trial an affidavit that he had seen commissions made out and signed by the President.

Thus from testimony and affidavits, Marshall got substantial confirmation of what he already well knew. According to Beveridge, it was from his brother James that he learned that the commissions had not been delivered. He wrote of his chagrin, and said that his failure to send them out was due to the absence of a clerk in the Department who had been called on by the President to become his private secretary. He, however, stated also in this letter of early March, 1801, that he thought delivery not necessary in the case of an officer for a fixed term, who was not subject to removal. Here is possibly a forecast of another point that was to arise in his final opinion. Lee in his argument

made the same point, as he had to, that delivery was not necessary in the case of such an officer for a fixed term. His further argument was confined to three points: (1) whether the Supreme Court can award mandamus in any case; (2) whether it will lie to a Secretary of State in any case; and (3) whether in this case it can award a mandamus to James Madison, Secretary of State.

Marshall delivered his opinion on February 24th. He praised the argument at the bar, which seemed to have been confined to Mr. Lee. He said that in the opinion, "there will be some departure in form, though not in substance, from the points stated in the argument." Marshall asked three questions and answered them in detail. He held that (1) the applicant has a "right to the commission he demands"; (2) that mandamus is a proper remedy to coerce a ministerial act, and that "it is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that propriety or impropriety of issuing a mandamus is to be determined," and that (3) the writ cannot issue from the Supreme Court because the statute conferring original jurisdiction in such cases is unconstitutional, since the Constitution prescribes original jurisdiction and says that "In all other cases . . . the supreme court shall have appellate jurisdiction. . ." This he takes to mean that in no other case than those specified in the Constitution shall the Supreme Court be given original jurisdiction.

Critics have noted that Marshall omits the qualifying clause "with such exceptions . . . as the Congress shall make" in the constitutional reference to appellate jurisdiction. They have pointed out that it was far from certain that Congress meant to add to the Supreme Court's original jurisdiction rather than merely to permit it to apply mandamus in the exercise of that jurisdiction. They have invoked the canon that it is the duty of a court, when reasonably possible, so to construe a statute as to avoid grave questions of constitutionality. They have insisted that the qualified permission that in other cases the Supreme Court shall have appellate jurisdiction does not carry with it the negative pregnant that in no other case shall added original jurisdiction be conferred upon it by Congress either under its general powers or with the added fortification of the "necessary

and proper" clause. Some of these contentions may be debatable, but it is familiar that a negative pregnant is not always a fruitful conception. At any rate, it is obvious that Marshall might readily have avoided the issue of unconstitutionality had he so chosen, as he might, when about to find himself without jurisdiction, have refrained in good lawyer-like fashion, from considering the two preliminary points.

It was these preliminary *obiter dicta* animadversions that first aroused the ire of Jefferson and his supporters. Before the decision their hostility was directed chiefly against the threat to interfere with executive functions, since the decision of judicial review was not clearly anticipated. Jefferson at one time had conceded that the courts might determine constitutional issues so far as their own participation in adjudication was concerned. Of course the possibility of judicial condemnation of the repeal of the Circuit Court Act was an apprehension in the minds of many, and this explained the enforced vacation of fourteen months accorded to the Supreme Court. Marshall had tried to get his colleagues to refuse to return to Circuit Court duty, but they had thought it wiser to continue and later in *Stuart v. Laird* the 1789 imposition of these perigrinations was officially sanctioned because it had for so long been acquiesced in. The new Circuit Judges whose seats had so rudely been pulled out from under them, had filed a lament with Congress in hopes of some favorable action, but they did not initiate judicial proceedings to recover place or pay. Indeed, nowhere have I come upon any information as to their pay or whether or where they sat between late February, 1801, and late March, 1802. It is, however, clear that Marshall and some of his Supreme Court colleagues did Circuit Court duty after the repeal of their alleviation.

This brings us to the familiar part of Marshall's opinion which no casebook on constitutional law fails to include. The premise is simple. The Constitution declares itself to be the supreme law of the land, and it is not supreme if the legislature may disregard it and so be superior to it. William Graham Sumner once said that you can always get out of a major premise all that you put in it. Marshall unquestioningly assumed that a contradiction found by him between statute and Constitution was an objective contradiction *in rerum natura*. It would have

been a more scientific approach to state the issue thusly: "Whose best guess is to determine whether Constitution and statute are opposed to each other?" The question put this way would admit of answer, however, by accepting Marshall's statement that "It is emphatically the province and duty of the judicial department to say what the law is." This may be granted with respect to common law and with respect to statutory interpretation, both of which are subject to corrective action by the legislature. It takes a stretch to make it equally applicable to constitutional adjudication.

In elaboration Marshall adduces the fact that parts of the Constitution are directions for judicial conduct and prohibitions against modes of such conduct. It is apparent, he says, that the framers of the Constitution contemplated that instrument "as a rule for the government of courts, as well as of the legislature." From this it might be concluded that each department may apply its own constitutional views in the performance of its own functions, but it goes no farther. The same may be said of the point that the Constitution and Congress require the judges to take an oath to support the Constitution. So must the President and the "Senators and Representatives . . . and the Members of the several State Legislatures, and all executives and judicial officers, both of the United States and of the several States" take a corresponding oath. This again, according to Marshall's argument, might make their constitutional interpretation final for their own action, but not for that of any one else.

It is hard to estimate how much credence Marshall gave to his minimal statement that "It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but only those which shall be made in pursuance of the constitution, have that rank." And with this, he goes to his concluding statement that "the particular phraseology of the Constitution confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument." Courts, "as well as other departments." Again does this go any

farther than to posit each for himself? Marshall's literary exegesis adds but little, if anything, to his general principle and to acceptance of his conviction that judges know the law better than outsiders can know it.

These considerations had been forcefully expounded by Hamilton in *The Federalist*. He had frankly faced the objection that for one reason or another, judges might err in interpreting constitutions. So, he added, may they err in deciding between successive statutes of the same government which have overlapping or inconsistent provision. The objection, he says, might go so far as to oppose having independent judges at all. To such a contention, it should be pointed out that various errors of judges are subject to prospective legislative rectification. This, however, is more difficult with constitutional condemnation, but not wholly impossible as those familiar with post-1937 judicial history are well aware. Hamilton thought judges less likely to err than others. They would naturally be picked men, he added, and the courts constitute the weakest branch of the government. He was strong for judicial independence and life tenure, and his *Federalist* essays gave ample warning that judicial review was open for assertion under the prospective new constitution.

One might well deem Hamilton's exposition superior to that of Marshall. Hamilton, however, was not running under judicial wraps, as was Marshall. Whether he had more time to prepare, I do not know, as I do not know whether or not Marshall's period of composition was confined to the early February of 1803, or whether or not he got help from any of his colleagues. His constitutional contribution took less than six pages of his sixteen page opinion. He did not, as did Hamilton, imply that the work of judges was that of divination of the will of the people as expressed in its most fundamental form. Neither of them were so thoughtless as directly to adduce the duty of "judges in every state" to disregard state laws in conflict with federal powers, though Marshall mentioned that "The judicial power of the United States is extended to all cases arising under the Constitution," as warrant for their right to look into the Constitution to see what it says.

Both Beveridge and Warren deem this assertion of judicial power over the acts of a co-ordinate legislative body to be of great if not transcending importance. I wonder just how important it was in its own time. It can hardly be said to have softened Republican hostility to some phases of federalism when they so soon impeached Mr. Justice Chase and strove, though in vain, to convict him. They didn't care much about those Justices of the Peace, or Jefferson would not have reappointed so many of them. They were incensed at Marshall's intrusion into executive secrets, though they had been Marshall's own secrets earlier when they took place. Their whole profession was in favor of limited national powers. The Supreme Court declared no other Act of Congress unconstitutional until Taney wrote the ill-fated *Dred Scott* opinion condemning the Missouri Compromise. I find it hard to see how Marshall strengthened the judicial hand at the time. If designed to deter possible successors from overruling him, the possibility seems a rather dim one. Judges do not have to declare legislation unconstitutional even if they retain the power to do so.

It is hard to see what Marshall gained by ruling unnecessarily that Jefferson did wrong in preventing the delivery of these relatively unimportant commissions and in declaring that mandamus from a duly qualified court might lie to compel the performance of a ministerial duty even by a high officer of state. So long as he was about to declare that his court could not issue such a writ as an exercise of original jurisdiction, it should not greatly please his own political party to be told that the President had done wrong, and it would naturally infuriate the President and his adherents and tend to strengthen rather than to moderate their nascent plans to humiliate and displace Federalist judges. The technical points in this part of the opinion would not govern the repeal of the Circuit Court Act or bear on an issue of impeachment. If designed as an instigation to bring mandamus proceedings in other courts, as it might possibly have been, it had some political relevance, but Marshall did not indicate any such design. It did not gain legal relevance merely because it had been advanced and argued by counsel, so long as the Court was to hold that it was without jurisdiction.

There was no need for Marshall to go into these preliminary matters in order to further his grand design to establish as far as

he could the power of the Supreme Court to declare Acts of Congress unconstitutional and void. Obviously the primary issue in a case is the one of jurisdiction. The Supreme Court now will inquire into jurisdiction even if the parties do not raise or suggest it. The issue of jurisdiction would require an inquiry into the meaning of the statute purporting to confer it. If Marshall had ruled that the Judiciary Act of 1789 had not intended to add to the Court's original jurisdiction, then he should have dismissed the writ. If, on the other hand, persuaded that the statute did mean to add to original jurisdiction, then he would have to decide whether such an addition was consistent with the Constitution. If he held that it was thus consistent, he would then have to pass on the right of the appointee and on the propriety of the remedy in the particular case of a high executive officer as defendant. He then could apply the statute without questioning its constitutionality, as the issue had not been raised by the counsel. If he found repugnance, he then was face to face with his constitutional power to so declare and to decline to apply its permissive prescription.

Of course it is strange that so fundamental a constitutional prerogative as judicial review should not have been explicitly accorded in the Constitution. Research has established sufficiently that the power was anticipated by leading members of the Philadelphia convention as expounded and justified at length by Hamilton in *The Federalist*. It could hardly have been feared that an explicit grant would have added strength to the natural opponents of ratification, for their main grounds of opposition were apprehensions of the awful things that this new national monster might do. If any group were to be soothed by the absence of clear authority on the part of courts, it would be more likely to be those so-called "friends of good government" who preferred strong centralized power. They, however, were the certain friends of ratification, and they were also disposed in favor of an independent judiciary. Of course the lines were not so clearly drawn as I have suggested. So I am driven back to the position that the only reason for constitutional silence was that it was sufficiently assumed that judicial review was an essential ingredient of a written Constitution—which still I find far from satisfactory.

If we were to entertain the hypothesis that Marshall was guilty of legal error in affirming this judicial power over legislation, it does not follow that he was a usurper, as some have been wont to charge. It is clear enough that the question was an open one, to be decided one way or the other, if the cause legitimately required it. There are many cases of first impression on which judges may be divided. Often it may be impossible to assert with justification that one answer is clearly right and any other clearly wrong. Even if a decision is demonstrably in error, it does not follow that it is usurpation to render it. It may be confirmed in time or qualified or rejected in time. This has been true of a fair number of Supreme Court decisions. A striking instance on one side is *Chisholm v. Georgia*, which with sufficient warrant in the language of the Constitution held that a State may be sued in the Supreme Court by a citizen of another state. Very shortly this decision was recalled by the Eleventh Amendment. Despite all the criticism of the Supreme Court and of the exercise of judicial review, the power has never been revoked by constitutional amendment.

Much of what I have written was not in my mind to write before I began. I have undoubtedly been too adversely affected by what seems to me to have some of the hallmarks of a petty squabble. Marshall, it is true, in his official language, maintained a high standard of Olympian dignity, but it would not be wholesome if all judges went to such length to condemn public officials in proceedings confessedly not within their judicial jurisdiction. I know that in many respects constitutional law is political public law, but I think that it should, so far as possible, refrain from being partisan political law. It could not be of permanent importance to declare that mandamus may be issued against a high federal official by a court duly vested with jurisdiction, because Congress has untrammelled power to decide upon the jurisdiction of the lower federal courts, and has not accorded such general jurisdiction to District or Circuit Courts. The single exception to this is worth noting.

Curiously enough the former Circuit Court of the District of Columbia has been held to have been given by Congress the power to issue writs of mandamus to federal officers. One of the reasons adduced for this in *Kendall v. United States* in 1838

was that Congress had given to this Court the powers that the Maryland Court had enjoyed before the creation of the District. Whether Marshall was aware of this in February, 1803, does not appear from anything he said. Whether he knew it or not can hardly be very important, for he could not have been ignorant of the fact of unfettered legislative control over the jurisdiction of the lower federal courts. Congress did not give District Courts general jurisdiction of all cases involving the Constitution until after 1870. There are now some strong arguments advanced in high places in favor of adding still further curtailments of the jurisdiction based upon diversity of citizenship. After rather prolonged reflection, it still seems to me improper for Marshall to have considered the law of officers or the general propriety of the writ of mandamus.

As to the lack of power on the part of the President to remove these officers, Marshall has probably not been followed. This depends upon whether these Justices of the Peace in the District of Columbia are more like postmasters or more like members of the Federal Trade Commission. What has remained of Marshall's law in *Marbury v. Madison* is that Congress may not increase the original jurisdiction conferred on the Supreme Court by the Constitution and that the Supreme Court and other courts have power to declare Acts of Congress unconstitutional. The first may have some importance, for even where the Supreme Court has original jurisdiction, as in cases between States, it can hardly do the *nisi prius* fact-finding itself but must appoint a master. It certainly would be a pity for the Supreme Court to exercise original jurisdiction in complicated cases under the Sherman Law, like the recent Investment Bankers suit and the Dupont-General Motors suit.

Marshall did not have to decide the mandamus point as he did, in order to get to the issue of judicial review. He might have started with and confined himself to the two issues of power to add to the Supreme Court's original jurisdiction and power of the courts over legislation claimed to be in conflict with the Constitution. He might have avoided both issues by finding that Congress meant to give the right to issue the writ only where the Supreme Court otherwise possessed original jurisdiction or in the exercise of appellate jurisdiction. But quite evidently he

and not a few of his adulators thought it highly important to have it officially declared that congressional legislation could be condemned by federal courts for unconstitutionality. My recent recanvassing of the history of this period has made me doubtful of any such necessity or indeed importance. The Jeffersonians and their successors were not strong for excessive central power either with respect to the scope of nationalism or to the interference with individual freedom. Marshall added a suggestion of judicial veto to their own natural self-restraint.

Considerable support for the notion that this judicial condemnation of this trivial piece of legislation was not of outstanding importance may be invoked from the fact that the power was not subsequently exercised until the *Dred Scott* case. Of course there is a possibility not subject to proof that the judicial power in the offing made for caution on the part of Congress. Whether any such caution was important or wise prior to the Reconstruction enormities would incline me to lean more to the negative than toward the affirmative. The party mainly in power during that period objected chiefly to Marshall's sustaining some surviving national legislation and condemning state legislation. Mr. Justice Holmes during his service on the Supreme Court expressed a doubt whether the power to nullify Acts of Congress was essential to our polity, but was strongly for the wisdom of power to condemn state legislation. Mr. Charles E. Hughes in the interim of his absence from the Court disagreed and thought that the possibility of Supreme Court constitutional objections to Acts of Congress made for a wise restraint. Men will forever disagree whether what the Supreme Court did during the ten years following his address fully supports him.

Marshall's transcendent achievement, to my mind, was what he did in both broad and narrow lines in supporting the exercise of wide national powers and in circumscribing the centrifugal propensities of the several States. I should have found his achievement in these fields a much happier theme for this commemorative anniversary occasion. For I would be most enthusiastic over most of his views and over much of his skill in presenting them. For all his strong leanings and nationalistic preachments, he left fairly wide scope for play in the constitutional joints. States could not give an exclusive license for the use of steam on

interstate waters, but they could stop unimportant navigation by damming up a creek. They could not tax the first sale in the original packages of imports from abroad, but they could tax the second sale or the first sale after the package had been broken. They could not tax the currency operations of the United States Banks, but they could tax such of their property as was not invested in United States bonds. They could enforce prospective state bankruptcy laws where jurisdictional requirements were satisfied, but not retrospective ones.

It has been a privilege to spend nearly fifty years in the exposition and analysis of Marshall's majestic opinions. No other American jurist seems to me to have had quite his full sweep. There are philosophical passages in *Gibbons v. Ogden* and in *Brown v. Maryland* which put into sharp relief the problems and powers and particulars of constitutional adjudication, how for example it is that similar or identical particulars may flow from different powers in some instances without proving that the powers are identical. Or better in his own words:

All experience shows that the same measures or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

And again:

The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application.

Marshall was one of our greatest educators in the technique of legal reasoning. It is most appropriate that a community of teachers should hail him as one of the greatest of their colleagues.