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MARSHALL AND THE CONSTITUTION

BY ROBERT EUGENE CUSHMAN*

IT is a national misfortune that we have so frequently been guilty of canonizing our great men. While we have probably not praised them beyond their deserts we have managed by an uninterrupted flow of eulogy and a persistent spirit of reverence to rob them in large part of their human qualities. They have become, in consequence, ghostly figures whose lives and characters have lost their sharpness of outline and become blurred and nebulous. As has been aptly said, "they have been held up to our vision as superhuman creatures to admire whom was a duty, to criticize whom was a blasphemy, and to love or understand whom was an impossibility." It has required all the skill of our most painstaking and scientific biographers, and historians to bring these great figures back to life, and to restore them to an atmosphere of vividness, reality, and intimate understanding from which they ought never to have been removed.

It is not at all surprising that John Marshall should in this way have been even more completely devitalized than most of the great men in American history, nor is it surprising that he should be among the last to be resurrected. The ordinary layman is in no position to know very much about the work and services of a judge, no matter how eminent he is; and most readers of American history retain much more vivid impressions of Pocahontas than of the "great Chief Justice." To the lawyer, on the other hand, Marshall's name is so inextricably associated with

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certain concepts and doctrines in constitutional law that the man himself has become more or less of an abstraction.

The time had certainly arrived for rescuing Marshall from his position of sombre and majestic aloofness and for presenting to the students of history and law an accurate and vivid picture of his life and work. This service has been most admirably and effectively performed by former senator Albert J. Beveridge in his four volume *Life of John Marshall*¹ and by Professor Edward S. Corwin in his little book *John Marshall and the Constitution*.² It is not inappropriate that these books should both have appeared in the year 1919, thus marking the centenary of that famous term of the Supreme Court which produced three of Marshall's greatest constitutional decisions, *McCulloch v. Maryland*, the *Dartmouth College Case* and *Sturgis v. Crowninshield*.³

Mr. Beveridge's book furnishes a model to which the future writers of biographies may well repair. In it the fruits of astonishingly accurate and exhaustive historical research are presented in a style so graceful and entertaining that the reader's interest will not lag through the two thousand five hundred odd pages which the four volumes comprise. The first two of these volumes cover the period of Marshall's life prior to his appointment as Chief Justice of the United States in 1801. In this period were laid the foundations of Marshall's nationalism; and his experiences as a Revolutionary soldier, as a Virginia legislator, as a member of the Virginia ratifying convention of 1788, as a Federalist member of Congress during a portion of Washington's administration, and as a diplomatic envoy in the famous X. Y. Z. mission to France furnish the background necessary to a clear understanding of his constitutional doctrines. The third and fourth volumes deal with Marshall's judicial career and are of course of the most immediate interest to the student of constitutional history and constitutional law. Being himself a lawyer, Mr. Beveridge is the more to be congratulated upon resisting the temptation to make this portion of his work a commentary upon American constitutional law. The great constitutional cases which Marshall decided are discussed in the light of the personal,

¹Houghton Mifflin Company. Boston and New York, 1919.

²Yale University Press. New Haven, 1919. This appears as Volume 16 in *The Chronicles of America Series*, edited by Allen Johnson.

³These cases are reported in 4 Wheat. at page 316, 518, and 122 respectively. Professor Corwin alludes to this as "the greatest six weeks in the history of the Court." Corwin, 124.

political, and economic background out of which they arose and an adequate statement is given of the outstanding legal issues presented and the principal lines of reasoning by which Marshall disposed of them; but the reader is nowhere burdened with legal technicalities. The net result is to make fully clear for the first time the extraordinary obstacles which confronted Marshall in this formative period of our constitutional law, the political antagonisms in the atmosphere of which he lived and worked, and the many subtle and indirect forces and influences, non-legal in character, which may have aided or impeded him in the unfolding of his constitutional principles and philosophy. But it is a not less important result that Marshall himself emerges from the pages of the biography a real flesh and blood man,—a genial and companionable gentleman with whom the reader soon establishes an affectionate intimacy.

Professor Corwin has not attempted to compete with Mr. Beveridge in writing an elaborate biography. The full title of his book, *John Marshall and the Constitution, A Chronicle of the Supreme Court*, indicates the author's purpose to deal primarily with Marshall's influence upon American Constitutional law. For this task two hundred and thirty pages are used. Five of the nine chapters deal with Marshall's judicial labors while the others aim to throw light upon the circumstances and events which influenced them. This relatively limited objective has not, however, prevented the inclusion in the volume of a substantial amount of personal anecdote and presentation of a vivid picture of Marshall as a man. Nor has the emphasis upon constitutional doctrines placed the book beyond the reach of the layman; on the contrary, the author's treatment is at all times not only non-technical, but also delightfully entertaining. The book has high literary merit.

The general tone of Professor Corwin's book is very definitely critical and philosophical. Marshall's bitterest antagonist, Jefferson, receives much more sympathetic treatment at his hands than at the hands of Mr. Beveridge. Nor does the author hesitate to disagree with the correctness of several of Marshall's constitutional doctrines in the light of his own researches in the field of constitutional law; nor is he reluctant to advance the opinion that certain of those doctrines have gradually come to be replaced or modified since Marshall's day. This is far from saying that the treatment is unfriendly, for quite the reverse is true, but the

reader feels distinctly that while Marshall was to Mr. Beveridge a real hero whom he vastly admired and loved to study, to Professor Corwin he is rather a very distinguished man who has become the object of dispassionate and critical scrutiny. It is certainly no small tribute to Professor Corwin's insight and scholarship that he should have written, simultaneously with but independently of Mr. Beveridge's elaborate biography, a book which contains so much distinctive and suggestive material. His little volume constitutes a highly valuable supplement to its more ambitious contemporary.

It is not the purpose of the writer to attempt a critical review of either of these books nor to undertake to summarize or condense their contents. It is rather to assume a somewhat journalistic point of view and method of treatment, and to present the "news" regarding Marshall's services in the realm of statesmanship and constitutional law which the scholarship of Mr. Beveridge and Professor Corwin has made available. In order to accomplish this task the judicial labors of Marshall will be grouped under five major headings, and an attempt made to indicate the new light which has been thrown upon each of them by the two authors.

I. MARSHALL'S WORK IN ESTABLISHING THE DIGNITY AND AUTHORITY OF THE SUPREME COURT.

It seems clear that the greatest service which Marshall rendered during his long tenure of thirty-four years on the bench was of much broader and deeper influence than the establishment of any single doctrine of constitutional construction. This service was the establishment of the Supreme Court, in the face of bitter and unrelenting opposition, in a place of dignity and authority in our system of government. Perhaps this is merely the sum total of all of Marshall's judicial services, or the natural result of them, but it is a point which deserves special consideration.

It will be easier to measure accurately Marshall's services in this regard if an appraisal is made of the position and influence which the Supreme Court enjoyed when he ascended the bench in 1801.⁴ In this connection two important facts may be noted.

⁴This point is well covered in Corwin, Chapter I, "The Establishment of the National Judiciary," in which the early history of the Court is clearly sketched.

In the first place, it may safely be asserted that the Court, prior to Marshall's appointment, had gained no hold upon the imagination of the country, had exercised no vigorous powers, and was commonly regarded as the one weak and relatively insignificant branch of the federal government. It is not difficult to pile up evidence upon this point. During these eleven years the court had decided but six or seven cases involving questions of constitutional construction,⁵ and the only one of these which had excited any substantial popular interest had been the case of *Chisholm v. Georgia*,⁶ a case which was promptly and effectively repudiated by the country at large by the ratification within five years of the eleventh amendment to the constitution.⁷ While the doctrine that the Court had power to declare acts of Congress unconstitutional had been foreshadowed by some of the circuit judges, Jay amongst them,⁸ it had never been announced by the Supreme Court itself. Marshall's predecessors, Jay and Ellsworth, were both men of power and distinction but each had been more or less distracted from his work as Chief Justice by the imposition upon him of important and difficult diplomatic duties.⁹ Jay's own view of the importance and influence of the Supreme Court was well evidenced by his resignation from the Chief Justiceship in 1795 in order to become a candidate for the governorship of the state of New York, and by his refusal to accept a reappointment to the same high judicial office tendered him by President Adams in 1800 to fill the vacancy caused by the resignation of Ellsworth.¹⁰

⁵*Chisholm v. Georgia*, (1793) 2 Dall. 419; 1 L. Ed. 440; *Hylton v. United States*, (1796) 3 Dall. 171, 1 L. Ed. 556; *Ware v. Hylton*, (1796) 3 Dall. 199, 1 L. Ed. 568; *Hollingsworth v. Virginia*, (1798) 3 Dall. 378; 1 L. Ed. 644, *Calder v. Bull*, (1798) 3 Dall. 368, 1 L. Ed. 648; *Fowler v. Lindsey*, (1799) 3 Dall. 411, 1 L. Ed. 658; *Cooper v. Telfair*, (1800) 4 Dall. 14, 1 L. Ed. 721.

⁶(1793) 2 Dall. 419, 1 L. Ed. 440.

⁷In *Chisholm v. Georgia*, the Supreme Court had assumed original jurisdiction in a suit brought by a private citizen against the state of Georgia. Within two days after this decision the Eleventh Amendment was introduced into Congress; it was submitted to the states for ratification in 1794, and was proclaimed in 1798.

⁸*Hayburn's case* (1792) 2 Dall. 409, 1 L. Ed. 436. The views of the circuit judges that the act of Congress in question was unconstitutional because it imposed upon them non-judicial functions were expressed informally and not as judicial utterances. Thayer, *Cases on Constitutional Law*, 105, note.

⁹Jay was sent as special envoy to England by President Washington in 1794 and remained there until 1795. He resigned immediately upon his return. Ellsworth was sent to England in 1799 on a similar mission. He resigned from the bench while abroad and died there.

¹⁰Jay declined the office on the ground that the Court was hopelessly deficient in power. In his letter of declination he wrote "I left the

Jefferson himself, on his accession to power in 1801, seems not to have viewed the Supreme Court as a sufficiently powerful organ of government to lead him to look with any special anxiety upon Marshall's appointment to the Chief Justiceship.¹¹

The second fact of importance to be noted regarding the position and influence of the Supreme Court at the time of Marshall's appointment to the bench is that, while it was recognized to be feeble, it had already become involved in a partisan struggle and had incurred the bitter hostility of a substantial party throughout the country. That this was due more to the partisan zeal and lack of discretion of the Federalists than to any activities initiated by the court itself did not alter the fact. Both Mr. Beveridge and Professor Corwin present ample evidence on this point.¹² This hostility emanated from two principal sources. On the one side hostility was aroused by the part played by the courts in the enforcement of the Alien and Sedition Act of 1798. While the Supreme Court as a body never had occasion to deal with this act, the individual members sitting as circuit judges were in many instances charged with the construction and enforcement of it; while the result that a good deal of the odium in which the act was popularly held became attached to the national judiciary. Nor does there seem to be much question that some of the judges were needlessly harsh in the administration of this law.¹³ The second ground of hostility to the Court arose from the enactment of the Judiciary Act of 1801, which reduced the size of the Supreme Court, relieved its members of circuit duty, and created a substantial number of new judgeships. While this statute was salutary in effect and provided for much

bench perfectly convinced that under a system so defective it would not obtain the energy, weight, and dignity which are essential to its affording due support to the national government, nor acquire the public confidence and respect which, as the last resort of the justice of the nation it should possess." Johnston: John Jay, Correspondence and Public Papers, IV, 285; Beveridge: III, 55.

¹¹"It is probable that Jefferson never imagined that Marshall would prove to be anything more than the learned but gentle Jay or the able but innocuous Ellsworth had been. Also, as yet, the Supreme Court was, comparatively, powerless, and the Republican President had little cause to fear from it that stern and effective resistance to his anti-national principles, which he was so soon to experience." Beveridge: II, 563.

¹²Ibid. III, Chap. 1 and 2; Corwin, Chap. III.

¹³Beveridge: III, 29-49; Justice Samuel Chase of the Supreme Court had made himself particularly unpopular in this connection. "In 1800 there were few Republicans who did not regard Chase as the 'bloody Jeffreys of America'." Corwin, 57.

needed reforms,¹⁴ it is difficult not to sympathize with the Republican charges that it was passed for the purpose of further intrenching the Federalists in the national judiciary. The act was passed on February 13, 1801, less than three weeks before the Jeffersonian party was to assume control of the presidency and of Congress; and the appointments to the new judgeships, all of which went to good Federalists, were made with somewhat unseemly and frantic haste.¹⁵ While the Supreme Court itself was innocent of any share in this Federalist coup, as the beneficiary of the act it found itself the object of Republican suspicion and hatred. Marshall's inheritance from his predecessors was, therefore, the chief justiceship of a court neither vigorous nor powerful, which had become the object of an intense partisan hostility emanating from the other departments of the government. It was from this position that he was to cause the court to become "one of the great political forces of the country."¹⁶

There are several reasons why under Marshall's guidance the Supreme Court came to occupy a position of enormous power and influence. In the first place, Marshall gave to the Court leadership and unity. This was, of course, chiefly the result of his own personal influence over his colleagues. It was no inaccuracy to call it "Marshall's Court." Man after man appointed by Jefferson and his Republican successors in the hope of counteracting Marshall's influence, fell under the sway of his personality and his principles and became, if not an ally, at least no effective opponent to the Chief Justice.¹⁷ Mr. Beveridge declares

¹⁴Beveridge: III, 53 et seq. The merit of the act is demonstrated by the fact pointed out by Mr. Beveridge that nearly a hundred years later every essential feature of it was reenacted. See Act of March 5, 1891, 26 Stat. at L. 828, and Act of Feb. 18, 1895, 28 Stat. at L. 665.

¹⁵"The Federalists," wrote Jefferson, "have retired into the judiciary as a stronghold . . . and from that battery all the works of republicanism are to be beaten down and erased." Jefferson to Dickinson, Dec. 19, 1801. Writings of Thomas Jefferson; Washington, IV, 424; Beveridge: III, 21.

It is interesting to note that both authors repudiate as fiction the old story that Marshall worked until midnight of March 3, 1801, signing commissions for Adams's appointees.

¹⁶Corwin, 195.

¹⁷At the time of Story's appointment to the Supreme Court Jefferson wrote Madison "It will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall," Jefferson to Madison, May 25, 1810. Ford's Ed. Jefferson's Works, XI, 140; Beveridge: IV, 59. The conversion of Justice William Johnson is a case in point. See *Ibid.*, IV, 443-445.

that "in the whole history of courts there is no parallel to such supremacy." This unity in the Court was also promoted by the policy adopted upon Marshall's accession to the bench of embodying the judgment of the court in the opinion of a single member. This replaced the earlier practice of having each justice write a separate opinion, a practice which could hardly fail to give the impression of lack of harmony amongst the judges. For more than ten years Marshall himself wrote all the opinions of the court to which any name is attached with the exception of those in cases appealed from his own circuit or cases in which for any reason he did not sit. Beveridge refers to the initiation of this practice by Marshall as "one of those acts of audacity that later marked the assumptions of power which rendered his career historic"¹⁸ and the fact that this practice enormously increased the prestige of the Court is evidenced by the bitter denunciation of Jefferson that "an opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy and timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning."¹⁹

Not only did Marshall give the Court a united front but he also gave it what Professor Corwin calls "leadership in the political sense."

"It may be thought, no doubt, that judges anxious to steer clear of politics did not require leadership in the political sense. But the truth of the matter is that willy-nilly the Federal Judiciary at this period was bound to enter politics, and the only question was with what degree of tact and prudence this should be done. It was to be to the glory of Marshall that he recognized this fact perfectly and with mingled boldness and caution grasped the leadership which the circumstances demanded."²⁰

This is not to imply that Marshall was guilty of prostituting his high office for partisan ends. It does mean, however, that since the question of the powers and prerogatives of the Supreme Court as well as several vital questions of constitutional construction had already become the subjects of bitter political controversy, Marshall allowed no colorable occasion to pass for announcing with vigor and decision those constitutional doctrines which he

¹⁸Beveridge: III, 16; the importance of this practice is emphasized by Thayer in his "John Marshall," p. 54.

¹⁹Jefferson to Ritchie, Dec. 25, 1820. Works, Ford, XII, 176-78; Beveridge: IV, 339.

²⁰Corwin, 20.

regarded as sound and the enunciation of which he felt to be of paramount necessity.

Marshall's leadership of the Court in this "political" sense meant, concretely, two things. It meant in the first place, as both biographers make amply clear, that Marshall not merely seized upon but hunted for opportunities to voice his great doctrines regarding the nature of the federal system. Perhaps the clearest example of this is found in the circumstances surrounding the case of *Marbury v. Madison*, in which Marshall announced the power of the Supreme Court to declare unconstitutional acts passed by Congress. This will be discussed at a later point in this paper.²¹ Professor Corwin also believes that Marshall with equal enthusiasm seized upon the case of *Fletcher v. Peck*²² and made it the occasion for the first of his famous opinions upon the construction of the contract clause of the Constitution, although that case could have been disposed of upon any one of two or three other grounds without raising the issue of the impairment of the obligation of contracts.²³ The suggestion is not that Marshall exceeded his powers or decided the cases incorrectly, but only that he used occasions for the announcement of his doctrines which a less bold, vigorous, and statesmanlike judge would upon more or less technical grounds have allowed to pass by.²⁴

Marshall's leadership, in the sense now under discussion, meant in the second place a somewhat bold and generous use of the obiter dictum. Professor Corwin lays emphasis upon this point in a paragraph which merits quotation at length:

"Marshall's own outlook upon his task sprang in great part from a profound conviction of calling. He was thoroughly persuaded that he knew the intentions which had been wrought into the instrument itself—and he was equally determined that these intentions should prevail. For this reason he refused to regard his office merely as a judicial tribunal; it was a platform from which to promulgate sound constitutional principles, the very cathedra indeed of constitutional orthodoxy. Not one of the cases which elicited his great opinions but might easily have

²¹Infra, p. 12.

²²(1810) 6 Cranch 87, 3 L. Ed. 162.

²³"In the first place, it was palpably a moot case; . . . In the second place, Georgia's own claim to the lands had been questionable, and consequently her right to grant them to others was equally dubious; . . . Finally, the grant had been procured by corrupt means, . . ." Corwin, 151.

²⁴This is not what is meant by obiter dictum, which is, of course, reasoning which is irrelevant to the ground upon which a decision is based.

been decided upon comparatively narrow grounds in precisely the same way in which he decided it on broad, general principles, but with the probable result that it would never again have been heard of outside the law courts. To take a timid or obscure way to a merely tentative goal would have been at variance equally with Marshall's belief in his mission and with his instincts as a great debater. Hence he forged his weapon—the obiter dictum—by whose broad strokes was hewn the highroad of a national destiny.”²⁵

That Marshall's opinions contain a vast amount of material not strictly necessary to the decisions of the cases in question has doubtless impressed every close student of our constitutional law. The point upon which Professor Corwin and Mr. Beveridge both lay stress in this connection is that this use of the obiter dictum was not due to inadvertence or the slipshod processes of a mind unable to distinguish the relevant from the irrelevant, but was due to Marshall's fixed belief that these “irrelevant” doctrines ought to be enunciated and an equally fixed determination to enunciate them upon the earliest possible occasion. That these dicta have in large part come to be regarded as authoritative statements of the law is, of course, well recognized; a fact which indicates that Marshall's estimate of the value of announcing them was entirely sound. Nor is evidence lacking that Marshall's enemies realized the weight which such statements would come to carry. “This practice of Judge Marshall,” wrote Jefferson in 1823, “of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and censurable.”²⁶

In the third place, it may be suggested that Marshall's success in raising the Supreme Court to a position of dignity and power was due not merely to the intrinsic nature of the doctrines which he enunciated but also to his remarkable power of presenting those doctrines with what impresses the reader as complete and absolute logical finality. That Marshall decided great constitutional questions correctly every one now recognizes; but the same can be said of many other distinguished judges. It was his peculiar distinction that he was able to make it appear that those questions could have been decided in no other way. As Professor Corwin says, “his invariable quest, as students of his opinions are soon aware, was for the axiomatic, for absolute

²⁵Corwin, 122-3.

²⁶Jefferson to Justice William Johnson, June 12, 1823, Works. Ford, XII, footnote to 255-6; Beveridge: IV, 369-70.

principles, and in this inquiry he met the intellectual demands of a period whose first minds still owned the sway of the syllogism and still loved what Bacon called the 'spacious liberty of generalities'.²⁷ The author alludes to Marshall's scorn for "ifs," "buts," and "thoughts." Marshall succeeded in presenting his major premises in the form of legal platitudes or axioms, and having done so his reasoning went forward with relentless and irresistible momentum. This characteristic of Marshall's opinions is strikingly apparent in the two famous cases of *Marbury v. Madison*²⁸ and *Sturgis v. Crowninshield*.²⁹ This does not mean that he convinced his opponents that he was right; but it does mean that he made the task of showing that he was wrong almost impossible even for the abler of his adversaries. Professor Corwin cites in this connection the "despairing cry" of John Randolph of Roanoke, that one of Marshall's opinions was "All wrong, all wrong, but no man in the United States can tell why or wherein."³⁰

Still another characteristic of Marshall's opinions helped to create the impression that they were the pronouncements of self-evident truths. This was their almost entire freedom from any reliance upon authorities. While it is perfectly true that many of Marshall's famous cases were to a great extent cases of first impression in support of which few authorities could be assembled, it is equally true that Marshall did not take the trouble to cite what few there were.³¹ It is now, of course, well recognized that Marshall did not possess extensive juristic learning. In legal erudition he cannot be classed with either Kent or Story.³² As

²⁷Corwin, 123.

²⁸While Marshall's reasoning in this case had commonly been referred to as "unanswerable" see the criticisms urged against it by the following eminent writers: Thayer, *Legal Essays*, 2; Hall, *Constitutional Law*, 35; Willoughby, *Constitution*, I, 4.

²⁹Note the definition Marshall gives to the "obligation of a contract" in this case, 4 Wheat. at p. 197. While, as Mr. Beveridge says, this definition was given "much as a weary school teacher might teach the simplest lesson to a particularly dull pupil," the fact remains that the Supreme Court substantially repudiated that definition in *Ogden v. Saunders*, (1827) Wheat. 332, 6 L. Ed. 606. See *infra*, p. 30.

³⁰Corwin, 124.

³¹Compare Marshall's opinion in the *Dartmouth College Case*, *supra*, with that of Story. Mr. Beveridge states that Marshall's opinion in *United States v. Burr*, (1807) 4 Cr. App. 469, is the only one in "which an extensive examination of authorities is made." Beveridge: III, 504.

³²The learning of these men was prodigious and each retained throughout life the habits of the painstaking and systematic scholar. Beveridge: IV, 95-96. See also Story: *Life and Letters of Joseph Story*, *passim*; Kent: *Memoirs and Letters of Chancellor Kent*, *passim*.

Mr. Beveridge points out, "he detested the labor of investigating legal authorities," and was disposed as Professor Corwin aptly puts it "to use his brains rather than his bookshelves." But making such allowance as is necessary for Marshall's scholarly limitations and distaste for the drudgery of hunting up cases, it may still be urged that Marshall probably realized that his particular argumentative method would not have been substantially enhanced in vigor and effectiveness by encumbering his opinions with all the customary earmarks of erudition. To cite authorities in support of propositions or principles which are supposed to be self-evident would be not only superfluous but would tend to call into question the axiomatic character of such principles. certain it is that Marshall's opinions carry a weight by reason of their broad, vigorous doctrines, unfortified by citations, which might have been substantially lessened had he stopped to accumulate, criticize, and distinguish the views of other judicial authorities.

It is not the intention of the writer to suggest that Marshall's achievement in elevating the Supreme Court to a place of power and influence in the governmental system was due solely to the facts just reviewed. The intrinsic character of the questions which he decided and the doctrines of constitutional law which he enunciated contributed most vitally to that result. But it seems equally certain that without Marshall's "political leadership" and statesmanship, and his own bold and vigorous method, many of those vital doctrines might never have been established, or might at least never have been established upon the firm basis upon which they now rest.³³

II. THE DOCTRINE OF JUDICIAL REVIEW.

Turning to Marshall's more concrete and specific judicial achievements we may take up, second in order, his establishment in the case of *Marbury v. Madison* of the doctrine that the Supreme Court has power to declare unconstitutional an act passed by Congress. It is unnecessary to dilate upon the legal and political significance of this so-called doctrine of judicial review. So much has been written by so many distinguished men upon this great case and the principle which it announced that the

³³Compare DeTocqueville's estimate in 1835 of the position of power occupied by the Supreme Court, Corwin, 196-7, with Jay's gloomy outlook in 1801 noted above, *supra*, p. 5, note 10.

reader is agreeably surprised at the amount of new light which Mr. Beveridge and Professor Corwin managed to shed upon it.

In the first place both authors, but especially Mr. Beveridge, place emphasis upon the fact that *Marbury v. Madison* can be accurately understood and appraised only when viewed in the light of its political setting,—the bitter Jeffersonian assault upon the national judiciary.³⁴ It has been suggested earlier that when Marshall ascended the bench he found the court not only weak but the object of bitter partisan attack. It is clear from Mr. Beveridge's picture of the situation that the case could be put even more strongly by saying that the Court as an independent judicial organ was in danger of its life. If the doctrine of judicial review was to be enunciated with any hope of its final persistence, no time must be lost. This was true for two reasons which stood clearly in Marshall's mind. The first was that the question of what organ of government possessed the power of declaring acts of Congress unconstitutional had already become a party issue, and the two great leaders of Republicanism, Jefferson and Madison, had set before the country in the Virginia and Kentucky Resolutions the doctrine that that power resided in the states.³⁵ Professor Corwin makes the interesting comment that if the Federalist judges in 1798-9 had been less narrowly partisan, they might have established the doctrine of judicial review by declaring the Alien and Sedition Acts unconstitutional and at the same time have won for that doctrine the sympathy and support of the Republicans.³⁶ But the opportunity had been allowed to pass, and it was now clear that if the heresy of the Virginia and Kentucky Resolutions was to be repudiated and the power of the courts to pass upon the constitutionality of legislation was to be vindicated, Marshall must act without delay. The second reason for promptness in the matter was equally urgent. The Republican plan for the impeachment of the Federalist members of the national judiciary had already been set in motion.³⁷ Impeachment proceedings had already been instituted against Judge Pickering of the United States

³⁴Beveridge: III, Chaps. II, III, and IV; Corwin, Chap. III.

³⁵These resolutions were passed in 1798 denouncing the Alien and Sedition Acts as unconstitutional and declaring them not binding on the states. The Virginia Resolutions, which were drafted by Madison, were somewhat milder in tone than the Kentucky Resolutions drawn by Jefferson.

³⁶Corwin, 21.

³⁷Beveridge: III, III et seq.; and Chap. IV.

circuit court; his removal from office was to be followed by the impeachment of Marshall's colleague Justice Samuel Chase; and upon his conviction attention was to be turned to Marshall himself and the other objectionable Federalist judges. The Republicans were, many of them, frank to admit that the impeachment process was to be used for the purpose of ousting the Federalist judges from their places in order to give their offices to Republicans.³⁸ There seems to be little question that Marshall was really deeply worried over the outcome of this onslaught on the Court and realized that if the great doctrine of judicial review was to be announced at all it must be done before his political enemies had removed him from office. Certainly the doctrine would never be enunciated by Spencer Roane, the man whom Jefferson hoped to appoint in Marshall's place.³⁹

A second striking fact is brought out by Mr. Beveridge: namely, that Marshall, convinced that the early announcement of the doctrine of judicial review was imperative, deliberately set himself to the task of devising a "pretext" for announcing it.⁴⁰ In order to declare by solemn judicial decision that the Supreme Court possessed the power to pronounce an act of Congress unconstitutional and void, it was necessary to discover some act of Congress which violated the constitution. Now the act which most plainly and logically invited such treatment at the hands of the Court was the statute passed by the Republican Congress in 1802 repealing the Federalist Judiciary Act of 1801. Marshall himself, as well as most of the leading Federalists, regarded this Judiciary Repeal Act as flagrantly unconstitutional on two grounds; first, that it imposed on justices of the Supreme Court the duty of serving during part of the year in the capacity of circuit judges, and second, that it deprived judges appointed under the Act of 1801 of their offices and salaries.⁴¹ Two events, however, had conspired to prevent Marshall from taking advantage of this act as an occasion for promulgating the doctrine

³⁸Senator William Branch Giles, one of the leading spirits in the impeachment campaign, told John Quincy Adams, "We want your offices, for the purpose of giving them to men who will fill them better." Beveridge: III, 157.

³⁹Ibid. III, 113-114.

⁴⁰Ibid. III, 133.

⁴¹Marshall held this view to the end of his life. In 1807 he "actually proposed to his associates upon the Supreme Bench that they refuse to sit as circuit judges, and 'risk' the consequences." While agreeing with him that the Repeal Act of 1802 was unconstitutional his colleagues were unwilling to adopt this course. Beveridge: III, 122.

of judicial review. The first was the astute maneuver on the part of the Republicans in Congress in incorporating into the Judiciary Repeal Act of 1802 a provision altering the time of sitting of the Supreme Court with the result that the opening of the next term of court was postponed fourteen months.⁴² The result of this was that before the question of their constitutionality could even be raised, the provisions of the Repeal Act had been acquiesced in by the entire national judiciary for more than a year, a fact which created an almost irresistible presumption of constitutionality.⁴³ The second event which prevented making a test case out of the act was the failure of the judges whose offices had been abolished to seek redress from the courts. Obviously the act could not be declared unconstitutional unless some one would raise the question of its constitutionality.⁴⁴ Marshall found himself obliged to seek elsewhere for a case upon which to hang the doctrine of judicial review; and, apparently to the surprise of every one, including his colleagues, he selected the case of *Marbury v. Madison*.

Mr. Beveridge makes some interesting observations upon the actual political and intrinsic significance of the controversy involved in this case at the time it came up to the Supreme Court for decision. The case had been begun by Marbury in 1801 by a petition for a mandamus directed against Madison, the new Secretary of State, to compel the delivery of a commission appointed Marbury a justice of the peace, a commission signed and executed by President Adams but not delivered before his retirement from office. The case had not been disposed of before the abolition by Congress of the June session of the Court and was on the docket when the Court convened in 1803. By that time the case had lost all its earlier practical significance so far as the two parties to the action were concerned, for it was perfectly certain that Jefferson would not allow Madison

⁴²Under the Act of 1801 two sessions of the Court were provided for, December and June. The Repeal Act provided for a single session annually to convene in February. The result, accordingly was to omit two sessions which would have been held under the earlier statute. *Ibid.* 94-95.

⁴³The members of the Supreme Court had gone back to circuit court duty during this interval. Marshall, much to his disgust, felt constrained to acquiesce. Beveridge: III, 122.

⁴⁴"Certain of the deposed National judges had, indeed, taken steps to bring the 'revolutionary' Republican measure before the Supreme Court, but their energies flagged, their hearts failed, and their only action was a futile and foolish protest to the very Congress that had wrested their judicial seats from under them." Beveridge: III, 123.

to deliver the commission to Marbury even if the Supreme Court issued the mandamus prayed for.⁴⁵ In fact, the Republicans expected Marshall and his colleagues to issue the writ and openly threatened to impeach them if they did.⁴⁶ Marshall seemed to be confronted by an exceedingly awkward dilemma. If he issued the writ the result would surely be the successful defiance by the President and his Secretary of State of the court's order, by a defiance with which there was no means of coping. If, on the other hand, the case was dismissed, the court would seem to be acquiescing in the view that it had no authority to order the executive to obey the provisions of the law, and that it had no power to pronounce acts of Congress unconstitutional.⁴⁷

Marshall's escape from this dilemma was to declare unconstitutional that provision of the Judiciary Act of 1789 which expressly conferred upon the Supreme Court the power to issue writs of mandamus and prohibition. The theory that this section of the statute was unconstitutional was Marshall's own invention. "It was," declares Mr. Beveridge, "the only original idea that Marshall contributed to the entire controversy."⁴⁸ Both writers agree that there is grave doubt as to whether Marshall's theory was correct. In fact, Professor Corwin is convinced that it was not.⁴⁹ It seems clear that no one else had ever discovered the unconstitutionality of the section in question, although the Supreme Court itself had on two occasions assumed the jurisdiction which Marshall now finds had been unconstitutionally conferred.⁵⁰ Further presumption of the validity of the statute was raised by the fact that Ellsworth, Marshall's predecessor as Chief Justice, had drafted the act when he was a member of the first Congress, while not less than twelve members of the convention which framed the constitution had either been active in Congress in behalf of the act or had voted for it.⁵¹ It had never occurred to any of these men that the act was constitutionally defective in one of its important sections. Both Professor Corwin and Mr. Beveridge set forth the criticisms

⁴⁵Ibid. III, 126-7.

⁴⁶Ibid. III, 112.

⁴⁷Ibid. III, 127.

⁴⁸Ibid. III, 128.

⁴⁹Corwin, 65-66. See also Corwin, *The Doctrine of Judicial Review*, Ch. I.

⁵⁰*United States v. Lawrence*, (1795) 3 Dall. 42; 1 L. Ed. 502; *United States v. Peters*, (1795) 3 Dall. 121, 1 L. Ed. 535.

⁵¹Beveridge: III, 128-9.

which may be launched against Marshall's position on this matter but the scope of this paper prevents their presentation here.⁵² Mr. Beveridge, however, expresses the view that it was no small achievement for Marshall to win over to his position on such a questionable point the colleagues who had declined to join him in resisting the Judiciary Repeal Act of 1802 upon a much clearer constitutional issue.⁵³

Neither biographer deals in any great detail with the controversial questions which have arisen regarding the doctrine of judicial review. Each presents a satisfactory summary of Marshall's famous arguments without attempting to settle the question whether or not Marshall did actually "usurp" this authority, as has sometimes been charged. Any such controversial excursion would be beyond the scope of biographical writing, and would especially be unnecessary here since, as both writers clearly show, Marshall's whole arguments upon the question of the judicial power to declare congressional legislation unconstitutional had been anticipated either in earlier judicial utterances or in the congressional debates on the Judiciary Repeal Act.⁵⁴ What Marshall actually did was, as Professor Corwin puts it, "to gather these arguments together, winnow them of their trivialities, inconsistencies, and irrelevances, and compress the residuum into a compact presentation of the case which marches to its conclusion with all the precision of a demonstration from Euclid."⁵⁵

It may be noted, finally, that Mr. Beveridge throws some interesting light upon the reception which was accorded the decision of the Court in *Marbury v. Madison*. Contrary to what might be expected from the intrinsic importance of the doctrine enunciated the case seems to have caused but slight ripple upon the surface of the public affairs of the day. It was scarcely commented upon in the press and seems to have stirred up but little discussion. This was partly due, no doubt, to the fact already noted that the case had lost all practical importance in the eyes of the two litigants, and partly due to the failure of Jefferson to launch an early attack upon it. Mr. Beveridge states that this delay on Jefferson's part to express the abhorrence for

⁵²Ibid. III, 133; Corwin, 64-66.

⁵³Beveridge: III, 127-8.

⁵⁴Ibid. III, 116-120; Corwin, 67.

⁵⁵Corwin, 67.

the doctrine of judicial review which he later did express and continued to reiterate to the end of his life, was due, not to any failure upon his part to recognize at once the significance of *Marbury v. Madison* but to certain considerations of political expediency. The presidential campaign was not far away and there was no good reason for stirring up new and unnecessary antagonisms by a bitter attack on Marshall. Furthermore, Jefferson had on his hands the unwelcome problem of the new Louisiana Purchase. Since he firmly believed that he had exceeded his own constitutional powers in acquiring this territory it might perhaps be better to postpone any open onslaught upon the constitutional usurpations of other departments of government.⁵⁶ At any rate Marshall escaped for the time being the denunciation which was to be hurled against him later.⁵⁷

III. THE DOCTRINES OF NATIONALISM.

The third great achievement of Marshall's was in the establishment of the great doctrines of nationalism. This meant, concretely, two things: first, the principle of liberal construction of the powers of Congress, or the doctrine of implied powers; second, the principle of the complete supremacy of the federal government in its own sphere as against the pretensions of the states. The two biographers tell the lawyer little if anything that he did not already know, or might not have known, about these great constitutional doctrines.⁵⁸ They summarize adequately the

⁵⁶Beveridge: III, 143-153.

⁵⁷For Jefferson's attack on Marshall's opinion in *Marbury v. Madison* during the Burr trial see *ibid.* III, 431-2. Jefferson's correspondence contains numerous criticisms of similar nature for he never recognized the validity of the doctrine of judicial review.

⁵⁸Professor Corwin presents a useful summary of Marshall's nationalistic doctrines under six heads as follows:

"1. The Constitution is an ordinance of the people of the United States, and not a compact of states. 2. Consequently it is to be interpreted with a view to securing a beneficial use of the powers which it creates, not with the purpose of safeguarding the prerogatives of state sovereignty. 3. The Constitution was further designed, as near as may be, "for immortality," and hence was to be "adapted to the various crises of human affairs," to be kept a commodious vehicle of the national life and not made the Procrustean bed of the nation. 4. While the government which the Constitution established is one of enumerated powers, as to those powers it is a sovereign government, both in its choice of the means by which to exercise its powers and in its supremacy over all colliding or antagonistic powers. 5. The power of Congress to regulate commerce is an exclusive power, so that the states may not intrude upon this field even though Congress has not acted. 6. The National Government and its instrumentalities are present within the states, not by the tolerance of

masterful reasoning by which Marshall supported them and make clear the tremendous importance of those doctrines in the development of our constitutional law. But the reader will be chiefly edified by the interesting new light which is thrown upon the political setting and consequences of these great decisions. After reading Mr. Beveridge's exhaustive and illuminating treatment of these cases the reader feels very clearly that there is no exaggeration in saying that between the time of the demise of the Federalist Party and the death of Hamilton, and the time in the early thirties when Webster and Clay became the open and powerful enemies of the states rights doctrines, a period of more than twenty years, Marshall almost singlehanded, expounded and defended the great principles of nationalism. It is possible here to do more than touch briefly upon the decisions by which he performed this feat.

Mr. Beveridge makes clear, in the first place, how inevitable it was that the decision in the bank case, *McCulloch v. Maryland*,⁵⁹ should have infuriated the Republican state rights adherents almost to the point of frenzy. To them it was not only bad law and bad politics, but worse economics. In his chapter on "Financial and Moral Chaos" he makes clear that the Bank of the United States, which was here under legal attack, occupied much the same place in the less conservative and less contended popular mind which that somewhat vague entity known as the "money trust" occupies today in the mind of the socialist. It was the one active force pulling for financial conservatism in a period of inflation and speculation.⁶⁰ It was, therefore, the friend of the rich and the enemy of the poor. A decision the result of which was to fortify the position of the bank was naturally designed to rouse bitter antagonism. But this was not the only point of attack upon Marshall's opinion, for that opinion announced the great doctrine of implied powers.

"Let the end be legitimate," declared Marshall, "let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."⁶¹

the states, but by the supreme authority of the people of the United States." Corwin, 144-45.

⁵⁹(1819) 4 Wheat. 316, 4 L. Ed. 579.

⁶⁰Beveridge: IV, 196, et. seq.

⁶¹4 Wheat. 316, 421, 4 L. Ed. 579.

Here, at one blow, was demolished the theory of strict constitutional construction, a theory of construction vitally necessary to preserve the states from unwarranted national aggression. Under Marshall's theory the Republicans saw no practical limit to national authority, for, as one writer graphically expresses it, "as ends may be made to beget means, so means may be made to beget ends, until the cohabitation shall rear a progeny of unconstitutional bastards which were not begotten by the people."⁶² And it may be suggested that the subsequent development of national authority under the rule of liberal construction of powers of Congress would have seemed to the followers of Jefferson to justify this gloomy foreboding.⁶³ Furthermore, if it was dangerous to state authority to recognize so wide a range of congressional power, it was positively destructive to that authority to hold that a state could not exercise its admitted power to tax upon a branch of the bank; and yet this was what Marshall had had the temerity to decide.

Such doctrines as those laid down in *McCulloch v. Maryland* must, urged the Republicans, be definitely and immediately repudiated. Accordingly Roane, the leading spirit in the Virginia court of appeals and one of Jefferson's close friends and followers, published an attack on the decision so bitter in character as to rouse Marshall to reply, a proceeding which Mr. Beveridge regards as "thoroughly uncharacteristic" of the man, and, it may be said, a procedure which would be regarded today as a rather serious breach of professional ethics. The reply, according to the prevailing custom in regard to pamphleteering, was under a "nom de guerre," and seems not to have been eminently satisfactory.⁶⁴ The Virginia legislature passed a resolution condemning the decision in *McCulloch v. Maryland*;⁶⁵ Pennsylvania sent a petition to Congress asking for a federal constitutional amendment prohibiting Congress from authorizing any bank outside the District of Columbia;⁶⁶ while Ohio, herself engaged in an attack on a branch of the Bank of the United States, passed an

⁶²John Taylor: *Construction Construed*, p. 84. For other excerpts from this interesting volume see Beveridge: IV, 335, et seq.

⁶³The best examples of this expansion of national authority may be seen in the field of what may be called the police power of the national government. See studies by the writer upon this subject in *Minnesota Law Review*, Vol. III, 289, 381, 452; Vol. IV, 247, 402.

⁶⁴Beveridge: IV, 318-323.

⁶⁵*Ibid.* IV, 324-327.

⁶⁶*Ibid.* IV, 333-4.

inflammatory resolution declaring herself not bound by the decision in the bank case and announcing theories of state immunity from federal control which make the Virginia and Kentucky Resolutions seem mild in comparison.⁶⁷ Other states concurred more or less vigorously.⁶⁸

While this attack on the court was raging Marshall added fuel to the flames by the decision in the case of *Cohens v. Virginia*.⁶⁹ The insignificant character of the dispute out of which the case arose led to the accusation that it was "feigned" for the purpose of giving Marshall the chance to rebuke the protagonists of state sovereignty.⁷⁰ Mr. Beveridge thinks this is possible. At any rate he declares:

"If the case came before Marshall normally, without design and in the regular course of business, it was an event nothing short of providential. If, on the contrary, it was 'arranged' so that Marshall could deliver his immortal Nationalist address, never was such contrivance so thoroughly justified."

One is little disposed to question this statement, for out of the facts of the case⁷¹ finally emerged the vital issue whether or not an appeal could be taken from the decision of the highest court of a state to the Supreme Court of the United States on any question involving the construction of the constitution, laws, or treaties of the United States. While Story's decision in *Martin v. Hunter's Lessee*⁷² had anticipated the general doctrine of *Cohens v. Virginia* it did not cover the entire ground, and Marshall was able to write an opinion vigorously upholding the power of the Supreme Court to act as the ultimate arbiter in all cases of federal constitutional construction in contradistinction to the Virginia doctrine that "the constitution, laws, and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable."⁷³

⁶⁷Ibid. IV, 330-333.

⁶⁸Ibid. IV, 334. These states were Indiana, Illinois, Tennessee, and a little later, Kentucky.

⁶⁹(1821) 6 Wheat. 264, 5 L. Ed. 257.

⁷⁰This charge was made in a resolution of protest passed by the Ohio legislature. Beveridge: IV, 343.

⁷¹The city of Washington, acting under authority from Congress, authorized a lottery. The laws of Virginia forbade the sale within the state of tickets of lotteries not authorized by the Virginia statutes. The two Cohens sold tickets of the Washington lottery in Virginia and were convicted by the Virginia courts. Virginia resisted an appeal from her courts to the Supreme Court.

⁷²(1816) 1 Wheat. 304, 4 L. Ed. 97.

⁷³6 Wheat. 264, 377, 5 L. Ed. 257.

The reaction to this decision was prompt and furious.⁷⁴ A leading Republican newspaper in Virginia advocated the abolition of the Supreme Court entirely. Judge Roane launched another avalanche of five pamphlets venomously attacking the Court and its decision.⁷⁵ Jefferson, from his position of retirement, lent aid and comfort to the opposition by a letter bitterly denouncing the whole theory of judicial review.⁷⁶ In Congress an amendment to the constitution was vigorously advocated which would make the Senate rather than the Supreme Court the court of last resort in questions of constitutional construction. In fact, so grave did the crisis seem to be that when in March, 1822, the Supreme Court heard reargument of the case of *Green v. Biddle*,⁷⁷ a case in which the Court finally held certain Kentucky land laws unconstitutional, it withheld its decision for an entire year.⁷⁸ Marshall's own recognition of the seriousness of the situation is reflected in his correspondence with his associates, especially in a letter to Story in which he declares that "fuel is adding to the fire at which *exaltees* are to roast the judicial department."⁷⁹

While this attack upon the Court was about at its climax Marshall handed down the decision in the case of *Osborn v. The Bank of the United States*.⁸⁰ Mr. Beveridge declares that at that time "seven states were formally in revolt against the National Judiciary, and others were hostile" and threats of nullification were hurled forth by some of the most thoroughly enraged commonwealths.⁸¹ This new decision was, of course, little more than a vigorous reaffirmation by the Court of the doctrine in *McCulloch v. Maryland*, that a state could not interfere by taxation with a branch of the Bank of the United States. No one could have expected any other result in the case from Marshall and his asso-

⁷⁴See chapter entitled "Threats of War," Beveridge: IV, 340-396.

⁷⁵Marshall did not reply to these attacks but contented himself with preventing, through Story's good offices, the reprinting of Roane's articles in Hall's "Journal of American Jurisprudence," the leading law journal of the day. Jefferson had asked Hall to print the articles. Ibid. IV, 364-365.

⁷⁶Jefferson to Jarvis, Sept. 28, 1820, Works, Ford, XII, 162-63. Beveridge: IV, 362. The letter was not made public until after the decision of the Court in *Cohens v. Virginia*.

⁷⁷(1823) 8 Wheat. 1, 5 L. Ed. 547.

⁷⁸The decision was exceedingly unpopular. Beveridge: IV, 375-380.

⁷⁹Ibid. IV, 383. See also letters quoted, *ibid.* 360.

⁸⁰(1824) 9 Wheat. 738, 6 L. Ed. 204.

⁸¹Beveridge: IV, 384.

ciates.⁸² While the states did not relax from their various attitudes of defiance, the most interesting result of the Ohio Bank case was to shift the scene of attack upon the Court to the halls of Congress, where the spokesmen of the aggrieved states vented their wrath by introducing either bills or proposals for constitutional amendments either to curb the powers of that obnoxious tribunal or, as Professor Corwin puts it, "to curtail Marshall's influence on its decisions."⁸³ These measures in the main proposed to take away the Court's appellate power in constitutional cases, or provided for swamping the court by increasing its size, or sought to make necessary the concurrence of an extraordinary majority of the court in order to hold a law unconstitutional.⁸⁴ One measure to increase the size of the court to ten actually passed the House of Representatives,⁸⁵ and the friends of the Court became so alarmed that Webster himself sought to pour oil on troubled waters by introducing a compromise measure to the effect that in any case before the Supreme Court "where the validity of a state law or constitution is drawn in question on the ground of repugnancy to the constitution, treaties, or laws, of the United States, no judgment shall be pronounced or rendered until a majority of all the justices . . . legally competent to sit . . . shall concur in the opinion."⁸⁶

Neither Mr. Beveridge nor Professor Corwin has undertaken to treat in detail all of Marshall's "nationalistic" opinions. Nor was it necessary for them to do so in order to present to the reader with a new vividness the enormous odds against which Marshall had to struggle in maintaining the doctrines of national supremacy as against the doctrines of state rights. Marshall himself died with the gloomy conviction that he had fought a losing fight; that his successors would overthrow his work and the philosophy of localism would prevail.⁸⁷ We are able now to see that the struggle in which he fought so valiantly was to

⁸²For the history of the case see *ibid*, 327-330. The Ohio legislature had levied a tax of \$50,000 upon each of two branches of the Bank of the United States located in Ohio. The issue was much the same as that in *McCulloch v. Maryland*.

⁸³Corwin, 186.

⁸⁴For an enumeration of these see Corwin, 186-7; Beveridge: IV, 394-396, 450-54.

⁸⁵Corwin, 186; Beveridge: IV, 451-2.

⁸⁶*Ibid*. IV, 396.

⁸⁷This is made very apparent throughout Mr. Beveridge's last chapter entitled "The Final Conflict." It is well known that both Kent and Story shared Marshall's pessimism.

be settled by arms and not by judicial decision; and we are also able to see that he succeeded in keeping alive the doctrines of nationalism during a period when they had so few other powerful friends that had it not been for his efforts those doctrines might have disappeared forever.

IV. THE FREEDOM OF COMMERCE.

Marshall's work in establishing the freedom of commerce from state restrictions of various kinds does not call for extended discussion. This is not to underestimate the incalculable value and importance of that doctrine but merely to indicate that that problem took on a less complex and less controversial aspect and that Mr. Beveridge and Professor Corwin find less occasion for treating it in great detail and have added relatively little to our previous knowledge of the subject.⁸⁸ Their treatment naturally concerns itself with the two well-known cases of *Gibbons v. Ogden*⁸⁹ and *Brown v. Maryland*.⁹⁰

The case of *Gibbons v. Ogden* hinged upon the constitutional question whether the state of New York could grant a monopolistic license to navigate by steamboat the waters of New York, and was decided adversely to the existence of the monopoly. The two biographers present three interesting points regarding Marshall's famous answer to this question. In the first place, both are in agreement that this is one of Marshall's superlatively great opinions. Professor Corwin is inclined to rank it first of all Marshall's state papers.⁹¹ Mr. Beveridge regards it as but barely surpassed by the opinion in *McCulloch v. Maryland*. There seems no doubt that these are no exaggerated estimates of the merit of this great and powerful analysis of the relation between federal and state power in matters of interstate commerce. In the second place, the vast practical importance of the decision is made amply clear by a vivid picture of the evil which it remedied. With the development of steamboat navigation the various states had embarked upon a program of monopolistic steamboat licenses until this narrow and selfish policy intensified by retaliatory discriminations had practically paralysed interstate transportation

⁸⁸Beveridge: IV, Chapter VIII, "Commerce Made Free." Professor Corwin does not devote a separate chapter to the problem.

⁸⁹(1824) 9 Wheat. 1, 6 L. Ed. 23.

⁹⁰(1827) 12 Wheat. 419, 6 L. Ed. 678.

⁹¹Corwin, 130, 137.

by water.⁹² Marshall's opinion, by destroying the New York monopoly, set interstate commerce free.

"But few events in our history," says Mr. Beveridge, "have had a larger and more substantial effect on the well-being of the American people than this decision, and Marshall's opinion in the announcement of it. New York immediately became a free port for all America. Steamboat navigation of American rivers, relieved from the terror of possible and actual state-created monopolies, increased at an incredible rate; and because of two decades of restraint and fear, at abnormal speed."

Finally, the decision in *Gibbons v. Ogden* had an immediate effect upon the precarious political situation of the Supreme Court. "For the one and only time in his career on the Supreme Bench," says Mr. Beveridge, "Marshall had pronounced a 'popular' opinion. The press acclaimed him as the deliverer of the Nation from thralldom to monopoly."⁹³ Handed down almost simultaneously with the decision in *Osborn v. Bank of the United States*⁹⁴ it tended to stem the tide of criticism which, as has been shown, was becoming so bitter and insistent. In fact, the attacks upon the Court which were made in Congress soon became milder and milder and while they continued to occur during a period of some years they never again grew to alarming proportions.

In the case of *Brown v. Maryland* Marshall followed up the decision in *Gibbons v. Ogden* by announcing his famous "original package doctrine" that "so long as goods introduced into a State in the course of foreign trade remain in the hands of the importer and in the original package, they are not subject to taxation by the state."⁹⁵ Professor Corwin regards this decision as highly significant for two reasons. First, "it implies . . . that an attempt by a state to tax interstate or foreign commerce is tantamount to an attempt to regulate such commerce, and is consequently void. In other words, the principle of exclusiveness of Congress's power to regulate commerce among the states and with foreign nations, which is advanced by way of dictum in *Gibbons v. Ogden*, becomes in *Brown v. Maryland* a ground of decision."⁹⁶

⁹²Ibid. 136; Beveridge: IV, 401-405. The situation seems to have been not unlike that which prevailed prior to the adoption of the Constitution.

⁹³Beveridge: IV, 445.

⁹⁴*Gibbons v. Ogden* was decided March 2, 1824 and *Osborn v. The Bank of the United States* on March 19, 1824.

⁹⁵Corwin, 142.

⁹⁶Ibid. 142. Since Marshall decided in *Gibbons v. Ogden* that the New York monopolistic license to Livingston and Fulton could not bar from New York waters vessels enrolled under the Act of Congress to

This has had the important result of keeping the states out of the field of commercial regulation even when Congress itself has not yet occupied that field. In the second place, Professor Corwin points out that this case is similar in one important respect to *McCulloch v. Maryland* in that it implies in its treatment of the state's power to tax that "where power exists to any degree and for any purpose, it exists to every degree and for every purpose." This, it is indicated, is the rule of construction which the Court has so far always applied in construing congressional legislation; as Marshall put it, "questions of power do not depend upon the degree to which it may be exercised." Accordingly Congress has been upheld in the use of its power to tax for purposes of regulation and prohibition. In construing the power of the states, on the contrary, the Court has not accepted Marshall's doctrine but has insisted that the validity of state legislation depends upon the substantial effect which it produces rather than upon mere theoretical justification. This difference of construction Professor Corwin thinks has given the national government a decided advantage.

V. THE SANCTITY OF CONTRACTS.

"Marshall's reading of the constitution may be summarized in a phrase; it transfigured State Sovereignty with a two-edged sword, one edge of which was inscribed 'National Supremacy,' and the other 'Private Rights.'"⁹⁷ Having dealt with Marshall's achievements in establishing national supremacy, we may turn to the subject of private rights and examine his development of the great principle of sanctity of contracts, a field in which Professor Corwin declares his work to be not one of conservatism but a task of restoration. This work was accomplished by Marshall through the medium of three great decisions, the discussion of which in the two biographies under review may be briefly commented upon.

The first of these decisions was handed down in the case of *Fletcher v. Peck*.⁹⁸ Mr. Beveridge presents a vivid summary of the history of the notorious "Yazoo Land Frauds" out of which this interesting case arose. The issue raised was whether the

engage in coastwise trade, whatever was suggested as to the power of the state to restrict freedom of commerce in the absence of any congressional regulation of the subject matter was dictum.

⁹⁷Corwin, 173.

⁹⁸(1810) 6 Cranch 87, 3 L. Ed. 162.

legislature of Georgia could constitutionally rescind a grant of land made by its predecessor under circumstances of open and flagrant corruption, when, as in this instance, that land had passed into the hands of innocent purchasers for value. This was a new and vital question and one which had apparently not been foreseen by the framers of the Constitution. Professor Corwin indicates that by this time the habit upon the part of state legislatures of intervening by special acts in private controversies so as to change the legal rights of the parties thereto had grown to alarming proportions.⁹⁹ It had been felt originally that the clause of the federal constitution forbidding the states to pass ex post facto laws was the proper remedy for this abuse. This remedy, however, had been rendered unavailable by the decision of the Supreme Court in *Calder v. Bull*¹⁰⁰ holding that the ex post facto clause applied only to penal legislation. Marshall apparently realized the importance of finding a new remedy¹⁰¹ for this evil so keenly that he was willing to pass upon the constitutionality of the Georgia statute in a case which quite obviously was a friendly suit brought merely for the purpose of getting an adjudication as to the validity of title to the lands in dispute.¹⁰² Both authors make clear the uncertainty which Marshall seems to have experienced as to the precise ground upon which to hold the rescinding act unconstitutional. His initial and primary conviction was that the act was void as being a violation of the elementary "principles of justice." He then resorts to the contract clause of the constitution and proceeds to show that the rescinding statute impaired the obligation of the contract entered into by the state of Georgia and the grantees of the land. Apparently not feeling entirely sure of his ground; however, he leaves the question in a state of ambiguity by declaring at the end of his opinion that the state was restrained from repealing its former grant, "either by general principles which are common to our free institutions, or by particular provisions of the constitution of the United States."¹⁰³ Like many of Marshall's

⁹⁹Corwin, 148-150.

¹⁰⁰(1798) 3 Dall. 386, 1 L. Ed. 648.

¹⁰¹Professor Corwin calls attention to the rather obvious regret with which Marshall abandons the ex post facto clause as a ground of attack on the Georgia state. Corwin, 154. The passage alluded to is in 6 Cranch at page 138, 3 L. Ed. 162.

¹⁰²Beveridge: III, 583. This was the view taken by Justice Johnson in his dissenting opinion. Ibid. 592.

¹⁰³6 Cranch, 87, 139, 3 L. Ed. 162.

opinions this decision had no practical result so far as the rights of litigants were involved for the claims of those who had purchased lands from the fraudulent grantees were now being pressed before Congress¹⁰⁴ but Marshall had served notice upon the country that the contract clause would be enforced for the protection of contracts to which a state was a party and also that a grant made by a legislature must be regarded as a contract within the meaning of the contract clause.¹⁰⁵

The decision in the *Dartmouth College Case*,¹⁰⁶ is the logical result of the doctrine of *Fletcher v. Peck*. This famous case raised the issue whether the legislature of New Hampshire could on its own authority alone fundamentally change the organization and powers of a corporation chartered in the seventeenth century by the Crown of England. The setting of the case is given by Mr. Beveridge in his thorough and entertaining manner.¹⁰⁷ Both authors emphasize in this connection one fact which may be commented upon here. It has just been seen that Marshall allowed a certain ambiguity to remain as to the precise ground upon which such legislation as the Georgia rescinding act in the case of *Fletcher v. Peck* ought to rest. While relying primarily upon the contract clause he clearly intimated that the case might also rest upon the general and universal principles of justice. This left those leaders of the bar who had been retained in the *Dartmouth College case* painfully uncertain how to proceed and upon which ground to base their arguments. Finally counsel for the college concluded that their best chance lay in stressing the argument that the act of the New Hampshire legislature was a violation of those general principles which lie at the basis of all free governments. This line of reasoning was pushed with great vigor not only before the Supreme Court of New Hampshire but also by Webster and Hopkinson before the Supreme Court of the United States.¹⁰⁸ It is interesting to note that while Marshall finally decided the case squarely on the basis of the contract

¹⁰⁴After repealing the fraudulent grant Georgia sold the lands in dispute to Congress. Beveridge: III, 573-4.

¹⁰⁵In 1812 Marshall handed down the unanimous opinion of the Court in the case of *New Jersey v. Wilson*, 7 Cranch 164, holding that the contract clause prevented the legislature of New Jersey from repealing a grant of exemption from taxation which had attached to certain lands originally granted to the Indians. Beveridge: IV, 221-223.

¹⁰⁶*Dartmouth College v. Woodward*, (1819) 4 Wheat. 518, 4 L. Ed. 629.

¹⁰⁷Beveridge: IV, Chapter V.

¹⁰⁸*Ibid.* 240-44.

clause, Story was exceedingly impatient that it was felt necessary to adopt so narrow a ground and declared in correspondence with Webster and Jeremiah Mason, of counsel for the college, that a new case should be brought in such a form as to allow the Court to decide it upon the broad general principles of necessary protection to vested rights.¹⁰⁹

While recognizing the prevalence of criticism of Marshall's opinion in this case, and while recognizing also that it made possible the keeping by corporate interests of charters and privileges fraudulently secured, both writers agree in maintaining with vigor that the general effect of the decision has been wholesome and beneficial. Not only did it set up a high standard of legislative morality, but also at a somewhat critical time it aligned the corporate economic interests of the country on the side of nationalism as against the power of the states. Professor Corwin thinks that it had a still more far-reaching result which he thus describes:

"For the United States the problem of making legislative power livable and tolerable—a problem made the more acute by the multiplicity of legislative bodies—was partly solved by the establishment of judicial review. But this was only the first step; legislative power had still to be defined and confined. Marshall's audacity in invoking generally recognized moral principles against legislative sovereignty in his interpretation of the 'obligation of contracts' clause pointed the way to the American judiciaries for the discharge of their task of defining legislative power. The final result is to be seen today in the Supreme Court's concept of the police power of a State as a power not of arbitrary but of reasonable legislation."¹¹⁰

One other great decision of Marshall's upholding the sanctity of contracts remains to be mentioned, that in the case of *Sturgis v. Crowninshield*.¹¹¹ Professor Corwin does not enter upon any extended discussion of the case, but Mr. Beveridge devotes a chapter to the conditions and circumstances out of which it arose and to Marshall's opinion deciding it.¹¹² It seems no exaggeration to say that a large portion of the population of the country had lost its hold upon any decent sense of business honesty and fair dealing. A period of frenzied speculation and "wild-cat" banking was followed by the inevitable period of deflation. With

¹⁰⁹Ibid. 251-52.

¹¹⁰Corwin, 170-71.

¹¹¹(1819) 4 Wheat. 122, 4 L. Ed. 529.

¹¹²Beveridge: IV, Chapter IV "Financial and Moral Chaos."

insolvency and a debtor's prison staring them in the face the victims clamored for stay laws and bankruptcy laws to relieve them from their distress, and state legislatures began to answer this demand by the enactment of bankruptcy statutes. It was the question of the constitutionality of such a law passed in New York that was raised in the case of *Sturgis v. Crowninshield*. The debt which was the subject of this litigation had been incurred before the enactment of the New York bankruptcy act and the Supreme Court held that to apply the statute to this debt was to impair the obligation of the contract between creditor and debtor. Mr. Beveridge calls attention to the fact that Marshall took particular pains to emphasize in his opinion that the right which state statutes created of imprisoning an insolvent debtor, a practice which Marshall abhorred, was no part of the contract between the parties and was not within the protecting rule of his decision.¹¹³ It is also to be noticed that Marshall's opinion is couched in language so broad and sweeping as to make clear his belief that a state bankruptcy act would be equally an impairment of the obligation of contracts whether it applied to debts incurred before or after the enactment of the statute. This is, of course, dictum, so far as *Sturgis v. Crowninshield* is concerned but it made Marshall's opinion even more obnoxious in the eyes of those seeking relief in bankruptcy. That this dictum represented Marshall's mature judgment is evidenced by his powerful dissenting opinion eight years later in *Ogden v. Saunders*.¹¹⁴ In that case the Court held that a state bankruptcy law did not impair the obligation of future contracts. What seems to us at present a useful and legitimate rule appeared to Marshall and Story as an open and flagrant violation of sacred contract rights and for the first and only time during his thirty-four years on the Court the Chief Justice found himself dissenting in a case involving constitutional construction. There can be no doubt, however, that the decision in *Sturgis v. Crowninshield*, unpopular as it was in many quarters, helped to bring the country back to a truer conception of fair play and a sense of moral responsibility in respect to business dealings.

Lack of space prevents the discussion of Marshall's work in other fields of law. Both biographers deal at some length with his conduct of the Burr trial and his doctrine in regard to trea-

¹¹³4 Wheat. 122, 200-201, 4 L. Ed. 529.

¹¹⁴(1827) 12 Wheat. 213, 12 L. Ed. 606.

son.¹¹⁵ Mr. Beveridge also devotes a chapter to Marshall's decisions in the field of international law.¹¹⁶ Nor has it been possible to gratify the impulse to reproduce some of the more interesting and entertaining anecdotes and sketches by which the two authors, but Mr. Beveridge in particular, have made Marshall's lovable personality stand out so vividly. The writer can only close by suggesting that no student of constitutional history or constitutional law can read these books without giving Marshall a new place amongst the "fathers," and without feeling that there was no real exaggeration in alluding to him as "the second founder of the Republic."

¹¹⁵Mr. Beveridge devotes Chapters VI-IX inclusive to the Burr conspiracy and trial. He approves Marshall's doctrines regarding treason laid down in that case. Professor Corwin treats this problem in his fourth chapter and reaches an opposite conclusion. He believes Marshall's view that "constructive" treason cannot be punished under the Constitution is untenable and has not proved possible of application. "In recent legislation necessitated by the Great War, Congress has restored the old Common Law view of treason but has avoided the constitutional difficulty by labelling the offense 'Espionage.' Indeed, the Espionage Act of June 15, 1917, scraps Marshall's opinion pretty completely." p. 110.

¹¹⁶Vol. IV, Chapter III.