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LAW VERSUS POLITICS IN THE EARLY YEARS OF THE MARSHALL COURT

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John Marshall was once characterized by Chief Justice Gray of the Supreme Judicial Court of Massachusetts as the "greatest judge in the language," that is, in the English-speaking world.¹ Lord Bryce spoke of his decisions as never having been "surpassed and rarely equaled by the most famous jurists of modern Europe or of ancient Rome."² So enduring were his accomplishments that it seems almost temerarious to attempt to analyze certain of the problems and issues that beset him and other judges nearly two centuries ago. Yet one must recognize that at the time these were problems of great urgency which were dealt with so effectively and definitively that the Supreme Court of that era left us a legacy that is amazing in its magnitude. It was with reason as well as foresight that, in old age, ex-President John Adams referred to the

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This article is an expanded version of the Annual Lecture delivered before the Supreme Court Historical Society on May 18, 1981, in the restored Supreme Court courtroom in the Capitol, in Washington, D.C. Some of the ideas here advanced are discussed at length in the author's Part I of 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1981).

¹ 1 JOHN MARSHALL 80 (J. Dillon ed. 1903). The members of the Supreme Court were generally referred to as "judges" rather than "justices" during this period. This early usage is followed in this essay.

² *Id.* 77.

appointment of Marshall as Chief Justice as "the proudest act of his life."³

The inspiring accomplishments of John Marshall, as a statesman and as a judge, often tend to obscure the difficulties that lay, or that were placed, in his path as chief architect of constitutional interpretation when the Supreme Court was establishing the foundations of its power in the early years of the 19th century. Sometimes it is overlooked that his associates on the Court, often overshadowed by their Chief, were also men of great ability, and that at the outset, at least, they were drawn from the elite of the bench and bar of their native states. Altogether, the performance of the Court during that period, and the enduring constitutional principles that were enunciated and declared, can easily mesmerize one into believing that the expansion of judicial power and jurisdiction took place methodically and with relative ease. Nevertheless, not far beneath the superficiality of traditional history were vibrant clashes of personalities and basic conflicts in attitudes towards law, politics, and the nature of national government, that helped to shape the evolution of the Court's jurisdiction and its eventual standing in the public eye.

In 1801, the year of Marshall's appointment, the Court had attracted little attention save as the titular head or apex of the judicial system. As a Court, it had as yet done little to presage its later pre-eminence. Indeed, to many contemporaries, it seemed destined to languish in relative obscurity.⁴ It was a body on which even John Jay had declined to serve a second term, and on which others had refused to serve at all.⁵ It had been referred to as a group of itinerant judges whose chief duty was to ride about the country on circuit, better suited to be "post-boys" than the final expounders of the law of the land. Worse, when John Adams lost the precarious 1800 presidential election to Jefferson (by one of the narrowest of margins),⁶ the Court was immediately branded as a group of arch-conservatives. Because the executive and legislative branches had

³ In 1825, Adams made this reference to Marshall's youngest son, C. WARREN, *A HISTORY OF THE AMERICAN BAR* 252 n.1 (1966).

⁴ Freund, *Editor's Foreword* to G. HASKINS & H. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15* (2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES) xiii (1981).

⁵ See, e.g., Letter from John Jay to John Adams (Jan. 2, 1800), reprinted in 4 *THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY* 284 (H.P. Johnson ed. 1890).

⁶ Jefferson and Aaron Burr received an equal number of electoral votes, and the election was deadlocked in the House. This stalemate was broken when a "deal" was arranged, and James A. Bayard of Delaware voted for Jefferson. 2 *MEMOIRS OF AARON BURR* 130-32 (M. Davis ed. 1837) (deposition of James A. Bayard).

become dominantly Republican through the elective process, the old-line Federalists, who composed the Court and who could not be supplanted because of their judicial independence, were resented by the incoming party.

The same taint of opprobrium fell upon almost the entire body of national courts—likewise staffed by Federalists—and not less so because of the “midnight appointments” that President Adams had made on the eve of his departure from office.⁷ It will be recalled that an Act of Congress, enacted early in 1801 to amend deficiencies in the Judiciary Act of 1789, and also aimed at relieving the Supreme Court judges of the burden of riding circuit, had authorized the creation of new circuit courts, and that this Act had afforded Adams the opportunity to appoint sixteen judges to those courts.⁸ Numerous other openings—for judges (created by vacated places in the district courts), federal marshals, attorneys, and justices of the peace—also became available. Careful and assiduous as Adams had been to seek out “safe men” to fill the most important of those positions⁹—and nearly all were in fact persons of ability—all whom he nominated were Federalists. Hence they were viewed with suspicion, dislike, and even fear by the incoming Republicans. The Federalists “have retired into the judiciary as a strong hold,” complained Jefferson to John Dickinson in 1801.¹⁰ To another, Jefferson admitted that “[their tenure] renders it difficult to dislodge them.”¹¹ Thus, the complexion of the entire federal judiciary was reflected onto the Supreme Court, and became a potential impediment to its free functioning.

The federal judiciary of the late 18th century, although by constitutional mandate a separate and independent branch of the new government, had nevertheless remained to some extent involved in partisan politics. That involvement was seldom deep, but it offends our modern sense of propriety that a Supreme Court judge—for example, Bushrod Washington, nephew of the President—should descend from the bench to campaign actively in favor

⁷ See generally Turner, *The Midnight Judges*, 109 U. PA. L. REV. 494 (1961).

⁸ Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801); see F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 14-30 (1928); Farnand, *The Judiciary Act of 1801*, 5 AM. HIST. REV. 682 (1900).

⁹ See the exchange of letters for the early weeks of 1801 in John Adams's Letter Book, in the Adams Papers, Massachusetts Historical Society (courtesy of the Editor of the Adams Papers).

¹⁰ Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), reprinted in 3 MEMOIR, CORRESPONDENCE, AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 487 (T. Randolph ed. 1830).

¹¹ Letter from Thomas Jefferson to Joel Barlow (Mar. 14, 1801), reprinted in *id.* 457.

of a candidate for political office.¹² Likewise, it may appear offensive—though it was entirely consonant with earlier usage, as well as with the practice in England at that time—for a Supreme Court judge, in the course of discharging his judicial duties, to deliver politically oriented speeches to grand juries within his jurisdiction.¹³ In the beginning, the latter practice was thought important and useful, and newspapers would comment—usually favorably—on these “sermons,” prepared with meticulous care by even the most politically neutral judges.¹⁴ With the enactment of the Alien and Sedition Acts in the late 1790’s, however, these jury charges tended to become political harangues intended to ferret out violators of the Sedition Act in particular. Sufficient partisan opposition to those Acts had been generated to make many of the jury charges anathema to anti-Federalists and to the rising Republican faction. In the hands of a judge such as Samuel Chase, soon to be the object of impeachment charges initiated by Jefferson and his lieutenants in Congress, these politically motivated jury charges, together with the Federalist complexion of the judges who delivered them, helped to draw the federal judiciary, and especially the Supreme Court, inexorably into the vortex of partisan politics.¹⁵

It would be easy to repeat oversimplified generalizations about the politicization of the judiciary and the Court in the early 1800’s and thereby seek to explain the persistent antagonisms between Republicans and Federalists—an antagonism that caused Marshall and his brethren to tread cautiously around such issues as judicial review in *Marbury v. Madison*¹⁶ and executive privilege in the treason trial of Aaron Burr.¹⁷ Such generalizations often fail to identify the real causes of that antagonism, which had its roots not only in the personalities that dominated the scene, but also in the political ambitions and arrogance of both Jeffersonian Republicans and right-wing New England Federalists—as opposed to the genuinely statesmanlike qualities displayed by the cautious, moderate men of both parties. Many of the policies of the Federalists, initiated or sponsored by the moderate John Adams, had aroused genuine fears of monarchical subversion and of submissiveness to

¹² See G. HASKINS, *FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15*, *supra* note 4, pt. I, at 223.

¹³ 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 58-61, 165-67 (1926).

¹⁴ See, e.g., Hackett, *The Circuit Court for the New Hampshire District One Hundred Years Ago*, 2 GREEN BAG 262, 264 (1890).

¹⁵ See 1 C. WARREN, *supra* note 13, at 276-77.

¹⁶ 5 U.S. (1 Cranch) 137 (1803).

¹⁷ *United States v. Burr*, 25 F. Cas. 1 (C.C.D. Va. 1807) (No. 14,692-694a).

British foreign policies.¹⁸ On the other hand, the proclaimed platform of Jefferson and his adherents—to reduce the Army, to beach the Navy, and to promote agrarian interests at the expense of commerce and growing nationalism—had aroused virulent antagonism in the hearts of moderate as well as right-wing Federalists, from Massachusetts to South Carolina.¹⁹

Accordingly, it seems more than appropriate to put into a more realistic and less simplistic *mise-en-scène* some of the controversies that beset the Court at the outset of Marshall's appointment. It is not enough to suggest cavalierly that in *Marbury v. Madison* John Marshall bent the Judiciary Act of 1789 in order not to splinter the fragile alliance that subsisted between the new departments of government. Nor is it sufficient to state, without modification, that Jefferson's malignant jealousy and personal hatred of Marshall²⁰ was the primary cause of the Republican attacks on the Court. One must look beyond personalities to the clash of ideologies between Federalists and Republicans and to the roots of political allegiance as more important, and more basic, to understanding the principles that began to guide the Court through perilous and treacherous waters. Those principles became startlingly indentifiable very soon after Marshall's appointment, and for at least a decade they ran like a red thread through the fabric of the life of the Court and its decisions. In a mere sentence, one can, I think, say with confidence that Marshall—and his fellow judges as well—were set upon removing "law" from the arena of politics, upon establishing a rule of law that did not bend to the vagaries of expediency and the uncertainties of legislative and executive action on sensitive political issues. The two principal problems facing the Court at this time—the first involving the survival of the institution, and the second involving the firm establishment of the supremacy of law—are obviously interrelated, but to explain their bearing on the early history of the Court requires separate and more detailed discussion.

As for ideologies, brevity is difficult. The new anti-Federalism, known as Republicanism, was composed of many political elements, which had in common such programs as returning power to the "people" and discrediting, as well as dismantling, the Federalist party. At one extreme were the radicals, realists like William Branch Giles of Virginia, who once bluntly stated to John Quincy

¹⁸ G. HASKINS, *supra* note 12, at 58-63.

¹⁹ See *id.* 63-70.

²⁰ 1 H. ADAMS, HISTORY OF THE UNITED STATES OF AMERICA 192 (1889).

Adams, "[w]e want your offices" in order to fill them with more qualified men.²¹ At the other end were idealists, men like John Randolph, who ultimately helped to split the party because of their belief that the early ideals were being ditched for reasons of expediency by Jefferson himself, who had purported to espouse them. Differing points of view also characterized the Federalist party. At one end, it was guided partly by Hamilton and reinforced by the merchant class in New England. Towards the other end were moderates like John Adams, who believed in progress and a prosperity that would benefit all, and not merely the mercantile or some other single class.

At the beginning of Marshall's stewardship, the Supreme Court faced two dark and opposing perils: as Professor Freund has perceptively remarked, "[t]he Court might languish in benign obscurity or it might go down under the lash of active contempt."²² Almost from the outset, however, the Court took steps to assert and strengthen its power. For example, it began to announce its decisions through a single voice—usually that of the Chief Justice—rather than through the former practice of seriatim opinions delivered by each judge. That single voice, "magisterial yet tactful," could be used by Marshall to justify the Court's decisions through a dialectical prowess that was little short of amazing.²³

Almost the first case of major importance to come before the Court was that of *Marbury v. Madison*, in 1803.²⁴ William Marbury—one of the last of the "midnight" appointees of President Adams—demanded his duly signed commission as a justice of the peace, which had been deliberately withheld by the new Secretary of State, James Madison, acting on Jefferson's instructions. It is vital to bear in mind the political climate and other circumstances at the time *Marbury* was decided. First, there was the deep-rooted personal animosity that Jefferson felt towards John Marshall, his cousin, an animosity that intensified his distrust of the Supreme Court. Sustained as it was by the principle of judicial independence, the Court stood, in Jefferson's mind, as a monument to his one failure to reap the full harvest of the Republican victory over the Federalists in the election of 1800.²⁵ Second, Jefferson's lieutenants had been successful in 1802 in having repealed the Judi-

²¹ 1 MEMOIRS OF JOHN QUINCY ADAMS 322 (C. Adams ed. 1874) (emphasis in original).

²² Freund, *supra* note 4.

²³ *Id.*

²⁴ 5 U.S. (1 Cranch) 137 (1803).

²⁵ See G. HASKINS, *supra* note 12, at 208.

ciary Act of 1801, which had been enacted by the outgoing party.²⁶ They had also succeeded in postponing the regular 1802 session of the Court, out of fear that the Court would declare the repealing Act invalid. Finally, the House of Representatives, skillfully manipulated by Jefferson, had begun to "test the waters" for a direct attack on the federal judiciary by initiating impeachment proceedings against an aging and infirm federal district judge, John Pickering.²⁷ Definite plans were already afoot to impeach Judge Samuel Chase of the Supreme Court, as a prelude to impeaching Marshall himself.²⁸

A further potential collision lurked in the background in the prideful position of the new State Department, a position that surfaced in the *Marbury* case. It became clear not only that the officers of that Department felt no obligation to deliver Marbury's duly signed commission, but also that they believed that "executive privilege" placed them so far above the law that they were not even required to testify about any aspect of the transactions involved.²⁹ These events brought into sharp focus for Marshall and his brethren a well-grounded distrust of both the new administration and its views concerning the roles of the departments of government established by the Constitution. Marshall himself was profoundly distrustful of Jefferson, as well as of his ideas and prejudices. In 1801, Marshall wrote to Alexander Hamilton about those "almost insuperable objections":³⁰ "By weakening the office of President he will increase his personal power. He will . . . sap the fundamental principles of the government" ³¹

A direct confrontation at that time between the Presidency and the Court, which could have resulted from the Court's ordering the Secretary of State to deliver Marbury's commission, would have been ill-timed to say the least. Thus, a seemingly unimportant case contained the elements of a real and powerful threat that the executive branch might and probably would assert that it could not only deny a vested right, but, even worse, could declare itself to be above the law in situations to which executive privilege might allegedly extend.

²⁶ *Id.* 163-68.

²⁷ *Id.* 211-15.

²⁸ *Id.* 205.

²⁹ 5 U.S. (1 Cranch) at 143.

³⁰ Letter from John Marshall to Alexander Hamilton (Jan. 1, 1801), reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON 290 (H. Syrett ed. 1977).

³¹ *Id.*

None of the foregoing is intended to suggest that the Court denied *Marbury's* petition merely on grounds of political expediency. Far from it, as will appear from the following analysis of the Court's opinion. At the outset of the *Marbury* opinion, Marshall declared that the petitioner was lawfully entitled to his commission, that he had a legal remedy to obtain it, and that it was a plain case for a writ of mandamus.³² Marshall held, however, that *Marbury* had come to the wrong tribunal for judicial relief. He held that section 13 of the Judiciary Act of 1789, purportedly conferring on the Supreme Court the power to issue writs of mandamus, was unconstitutional insofar as it might be interpreted to grant the Supreme Court *original* jurisdiction in this type of case, and therefore that the writ could not issue from that Court.³³ Without reciting the provisions of section 13, or analyzing Marshall's careful exegesis and exposition of it, it is fair to say that Marshall's opinion leads one ineluctably to the conclusion that, at least for this case, mandamus was intended to be an *appellate* and not an *original* writ. Hence, despite the eloquent and carefully prepared arguments of *Marbury's* distinguished counsel, Charles Lee, Marshall concluded that the remedy sought could not be obtained in the Supreme Court.

To suggest that Marshall gave in to an oppressive and threatening political situation, and chose a route that would avoid the confrontation that Jefferson undoubtedly hoped for, is to miss the skill with which the opinion was presented. The principle of judicial review was not a novel concept in 1803, but had recognizable antecedents in colonial experience.³⁴ More important, as Raoul Berger has demonstrated, the principle had been forming since the time of the Constitutional Convention and appeared already to have won an accepted place in the new federal system.³⁵ Marshall did not invent it, but he did apply it to *executive* action, when he declared that neither the President nor his ministers (including, that is, James Madison) had power at their discretion to "sport away the vested rights of others."³⁶ He went further in stating, first, that where individual rights were violated, the judiciary's power of review was available; and second, that this was not so when the executive had constitutional or legal discretion, as where

³² 5 U.S. (1 Cranch) at 172-73.

³³ *Id.* 175-79. Cf. Burger, *The Doctrine of Judicial Review*, in 25 CURRENT LEGAL PROBLEMS 1, 13-15 (1972) (The Jeremy Bentham Lecture for 1972).

³⁴ See J. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 523-653 (1950).

³⁵ R. BERGER, *CONGRESS v. THE SUPREME COURT* 25-27 (1969).

³⁶ 5 U.S. (1 Cranch) at 166.

political matters were involved, or where the doctrine of separation of powers prohibited encroachment by the courts on the powers of the legislature or the executive.³⁷ Hence, the Court, as watchdog of the rules of law embodied in the Constitution, has the dual function of protecting individual rights and of guaranteeing that no department of government—executive or legislative or judicial—shall overstep the bounds of another.

As one carefully examines *Marbury*, one is hard pressed to find justification for the enthusiasm of Senator Beveridge that, "for perfectly calculated audacity, [it] has few parallels in judicial history."³⁸ That Marshall chose the route of judicial review to deny *Marbury*'s claim is undeniable, as is the fact that he thereby avoided an inopportune confrontation with the executive, which he presumably wished to avoid. The reasoning of the latter part of the opinion is difficult—technical and certainly literal—but what seems clear, especially after the opening part in which *Marbury*'s vested rights were announced, is that Marshall wished to affirm in the course of his opinion not only the doctrine of separation of powers but also the vitality of the "rule of law." So-called "political" rights could and did comport with the rule of law, because they were incorporated in the Constitution in response to popular will.³⁹ Judicial review, however, did not constitute an intrusion by the courts into other departments, but rather a comparison of a legislative or executive act with the words of the Constitution to ensure that there was no conflict.⁴⁰ Judicial review was viewed at that time as having a very limited scope, far more limited than it was to have even by the 1850's. At the time of the *Marbury* decision, judicial review was not believed to give judges the power to make law by resolving disputes or social conflicts between various interest groups (as courts were later to do), but rather to assure the body politic protection from erratic policies of those in whom the electorate had placed its trust.⁴¹ Thus, the primary issue in *Marbury* was not simply judicial review, because judicial review of legislative acts was already an accepted concept, but whether the executive could place itself above the law.

Marshall was trying in *Marbury* to draw some kind of line—as he and other judges were to do throughout this period—that would

³⁷ *Id.* 163-66.

³⁸ 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 132 (1947).

³⁹ See *Marbury*, 5 U.S. (1 Cranch) at 166.

⁴⁰ *Id.* 177-78. For a discussion of this aspect of the *Marbury* decision, see G. HASKINS, *supra* note 12, at 196-204.

⁴¹ Cf. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 132-33 (1810).

more clearly differentiate political from legal questions. In part, this was an extension of his discourse on the doctrine of separation of powers. But it was more than an abstract, though surely statesmanlike, effort. It was a conscious attempt, as we shall see in other connections, to keep from the Court's door a host of political questions which more properly belonged elsewhere. To be asked constantly to review, via the appellate writ of mandamus, countless political acts of executive officers would not only overburden the Court, but would bring to it nonlegal questions which were improper for it to decide. It was one thing to declare that *Marbury* had a legal right, and a legal remedy; it would have been another thing to decide that the Supreme Court had authority to grant that relief in light of a broad reading of the Judiciary Act of 1789. Granting Marshall's general objective, a decision on technical grounds alone, and an avoidance of the issue of constitutionality, would have weakened the force of the opinion, which, as it stands, is an integrated whole. Indeed, read in its entirety, the opinion is an essay on American constitutional law and government, written at a time when not only the judiciary but middle-of-the-road Federalists were genuinely fearful that Jefferson, with the firm 1800 electoral mandate behind him, would declare himself and his officers to be above the law.

In 1803, it seemed vital to protect the still fragile vitality of the Court—an institution, hardly yet tested for strength, which was harassed by political onslaughts that threatened to engulf it. In the *Marbury* decision, Marshall was able to build upon the skilled arguments of that able lawyer, Charles Lee, to assert the supremacy of the rule of law. By apt reference to the separation of powers, he went a long way towards the related goal of keeping law and politics distinct. After stating that it would be inappropriate “to intrude into the cabinet, and to intermeddle with the prerogatives of the executive,”⁴² he made two final and lasting points, monuments to an independent judiciary: first, “[t]he province of the court is, solely, to decide on the rights of individuals,”⁴³ and second, “[q]uestions in their nature political . . . can never be made in this court.”⁴⁴ According to Marshall, no power exists to control the executive's discretion, and the acts of its officers within its sphere “can never be examinable by the courts.”⁴⁵ Hence, the Constitu-

⁴² 5 U.S. (1 Cranch) at 170.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* 165. See Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893).

tion is the embodiment of rules of law that all must serve. It affords protection to individual rights, but it also guarantees that one department shall not go beyond its lawful bounds. Although these two principles are different, it is the duty of the judiciary to safeguard both.

Only six days later, *Stuart v. Laird*⁴⁶—another case fraught with serious political overtones, involving the constitutionality of the 1802 Judiciary Act—was decided by the Court. Few pieces of legislation in the early 1800's were more strongly motivated by partisan purposes than was the 1802 Judiciary Act,⁴⁷ which, at Jefferson's instigation, was propelled into Congress to destroy the carefully and professionally thought-out Judiciary Act of 1801.⁴⁸ The latter Act, it will be recalled, had as one of its principal purposes the creation of new circuit courts and the appointment of new judges to staff them, to the end that Supreme Court judges would no longer have to ride circuit and hold the preexisting circuit courts.⁴⁹ Enacted by Congress in the closing days of the Adams administration, as a measure of genuine reform, it was nevertheless the objective of Jefferson and such powerful political lieutenants as Giles and Breckenridge to see the Act destroyed—as it was destroyed—by the Judiciary Act of 1802.⁵⁰

Jefferson's political motives are too palpable to require elaboration, for proof is clearly laid out in the debates recorded in the *Annals of Congress*.⁵¹ The constitutionality of the repeal act was challenged almost immediately in *Stuart*. Not unlike the problem of the mandamus in *Marbury*, the 1802 Act was challenged as unconstitutional in that under it Supreme Court judges were required to sit as trial judges in circuit courts, and as a result were given an original jurisdiction which, as alleged, only the Constitution could confer.⁵² Speaking briefly for a unanimous Court, Judge Paterson upheld the Act. Was the Court yielding to expediency and threats from activist Republicans? Probably not, for the decision was justi-

⁴⁶ 5 U.S. (1 Cranch) 299 (1803).

⁴⁷ Act of April 29, 1802, ch. 31, 2 Stat. 156 (1802).

⁴⁸ Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801). It seems reasonably certain that Jefferson had formulated a plan to repeal the 1801 Act at least as early as April, 1801. Letter from Thomas Jefferson to James Monroe (Apr. 25, 1801), Thomas Jefferson Papers, Manuscripts Division, Library of Congress. For a discussion of the Republican attack on the federal judiciary, see generally G. HASKINS, *supra* note 12, at 149-68.

⁴⁹ See *supra* note 8 and accompanying text.

⁵⁰ Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (1802).

⁵¹ 11 ANNALS OF CONG. 25-184, 510-985 (1802); see also G. HASKINS, *supra* note 12, at 163-68.

⁵² 5 U.S. (1 Cranch) at 304-05 (argument of counsel).

fied, if not compelled, by the *Marbury* holding that Congress could not lawfully expand the original jurisdiction of the Supreme Court. The Act reviewed in *Stuart* required only that the judges singly, and not as a full Court, should exercise original jurisdiction. More important, explained Paterson, the Supreme Court had performed circuit duties from the outset⁵³—that is from 1789 until 1801. Therefore, “practice and acquiescence” afforded “practical exposition [that] is too strong and obstinate to be shaken or controlled,” and “fixed the construction of the Constitution.”⁵⁴ Thus, the 1802 Act merely confirmed the earlier practice which had obtained before enactment of the 1801 Act. For the issuance of a mandamus, on the other hand, as in *Marbury*, no precedent or established practice impeded the declaration that such a writ could not constitutionally issue as a matter of original jurisdiction.

One cannot but speculate, however, whether *Stuart* would have been decided differently had the plaintiff been one of the new circuit judges whose position had been abolished by the 1802 Act and whose “vested individual right” had been impaired by that Act.⁵⁵ As it was, the plaintiff raised no issue of fundamental private right, but only questioned the power of Congress to change the organization of lower federal courts so as to require him to transfer his case to one of the newly constituted 1802 circuit courts. If the Supreme Court was to withdraw from politics, and because no issue of individual right had been raised, it was clearly wise as well as prudent for the Court to decide *Stuart* as it did and to withdraw itself from such politically controversial issues as the constitutionality of the 1802 Act. If Marshall compromised, it was a compromise that did not impair the protection of legal rights, yet did allow the Court to refrain from deciding political questions. So viewed, the two decisions are compatible and not contradictory.

The decisions in *Marbury* and *Stuart* were by no means isolated instances on the part of Marshall, nor on the part of other judges who sat with him on the Court, to insist on what they regarded as the proper demarcation between the spheres of the departments of government—or, otherwise phrased, a distinction between questions in their nature essentially “political” and questions essentially “legal.” In laying the groundwork for discussing one of the most striking, and in many ways parallel, decisions,

⁵³ *Id.* 309.

⁵⁴ *Id.*

⁵⁵ There are statements in Marshall's opinion in *Marbury* that indicate that he might have granted relief to a judge who had been deprived of his office. See 5 U.S. (1 Cranch) at 162, 165-66.

Fletcher v. Peck,⁵⁶ it is instructive first to consider two other decisions, which were not decided by the Supreme Court itself but by two of its judges, while holding the circuit courts to which they were assigned. One was the treason trial of Aaron Burr, presided over by John Marshall in the circuit court at Richmond in 1807.⁵⁷ The other was the *Gilchrist* case,⁵⁸ decided at Charleston in 1808 by Judge William Johnson, recently appointed to the Supreme Court by Jefferson as a presumed dyed-in-the-wool Republican.

Few acts in the public career of Thomas Jefferson have so blackened his "darker side" as his relentless persecution of Aaron Burr, in strategically planned efforts to have him convicted of treason.⁵⁹ Few acts of any President have so adversely reflected on the office of the Presidency as did Jefferson's special message to Congress, on January 22, 1807, in which—based on the flimsiest of hearsay evidence—he named Burr as the prime mover in a conspiracy to sever the Union and attack Mexico.⁶⁰ Well before Burr had been arrested, long before he had even been presented or tried, Jefferson openly declared that his guilt was beyond question.⁶¹

With the shifting and sometimes aimless career of Burr since he had served as Vice President under Jefferson we cannot here concern ourselves. His vote against the 1802 Repeal Act had lost him Republican friendships, while Hamiltonian machinations against him in New York had completed his political downfall.⁶² By 1805, he was a ruined man, his law practice gone and his career seemingly ended. Yet he was intent on adventure and on regaining his lost fortunes by trying to open up and settle new lands that he had acquired in the West.⁶³ These plans were to form the basis of the charge that he was conspiring to dismember the Union. That there was in fact no conspiracy and no treason in this new

⁵⁶ 10 U.S. (6 Cranch) 87 (1810).

⁵⁷ *United States v. Burr*, 25 F. Cas. 55 (C.C.D. Va. 1807) (No. 14,693).

⁵⁸ *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5,420).

⁵⁹ See generally 3 A. BEVERIDGE, *supra* note 38, 274-342, 398-545; L. LEVY, *JEFFERSON & CIVIL LIBERTIES* 70 (1963) (In his response to the alleged Burr conspiracy, Jefferson was "insensible to constitutional limitations and to standards of fairness.").

⁶⁰ 16 ANNALS OF CONG. 39-43 (1807).

⁶¹ *Id.* 40.

⁶² See 3 A. BEVERIDGE, *supra* note 38, at 279-81.

⁶³ See generally 3 A. BEVERIDGE, *supra* note 38, at 538; W. McCaleb, *A NEW LIGHT ON AARON BURR* (1963); W. McCaleb, *THE AARON BURR CONSPIRACY* (expanded ed. 1936). The latter author seems to believe that the expedition was in fact a legitimate cover-up for Burr's planned expedition into Mexico. See *id.* 76. Cf. F. PHILBRICK, *THE RISE OF THE WEST 1754-1830* at 248 (1965); 3 A. BEVERIDGE, *supra* note 38, at 286.

venture now seems well established and documented by modern research.⁶⁴

Reference to the Burr trial is relevant less to highlight the darker aspects of Jefferson's career and personality than to illustrate how his personal antagonisms could be turned into political and even judicial policies that threatened the independence of the judiciary, as well as the growing conception of a distinct rule of law. Equally important, it emphasizes the masterful way in which Marshall dealt with such head-on confrontations with the President, who periodically sought to use executive power to further vengeful plans against those he saw as political enemies. Burr was tried at Richmond before John Marshall in his capacity as circuit judge. Although George Hay, the United States attorney at Richmond, was nominally in charge of the prosecution, his conduct of the trial was continually directed or guided by the President.⁶⁵ The full array of evidence, from Jefferson's initial declaration of Burr's guilt to the collection of blatantly false affidavits, makes unpleasant reading for those with preconceived notions about Jefferson's self-proclaimed moral virtues.⁶⁶ On the other hand, the printed record of the trial, as it appears in the *Annals of Congress*, occupying some 400 pages of small print, illustrates how adroitly, and in the most painstaking and lawyer-like manner, Marshall dealt with every motion.⁶⁷ In the end, Burr was acquitted of the treason charge.⁶⁸

Jefferson was outraged at the verdict. He wrote arrogantly to his son-in-law that the proceedings at the trial demonstrated "the original error of establishing a judiciary independent of the nation."⁶⁹ He instructed Hay that "[t]hese whole proceedings will be laid before Congress, that they may . . . provide the proper remedy."⁷⁰ Not only was Congress deliberately stirred up by the President's Annual Message on October 17th,⁷¹ but the popular outcry, fed by Republican newspaper commentaries, was so great that Marshall was linked with Burr as "morally guilty" and a

⁶⁴ F. PHILBRICK, *supra* note 63, at 248-51.

⁶⁵ See generally 3 H. ADAMS, *supra* note 20, at 445; 3 A. BEVERIDGE, *supra* note 38, at 430; L. LEVY, *supra* note 59, at 71.

⁶⁶ See generally G. HASKINS, *supra* note 12, at 266-67.

⁶⁷ 17 ANNALS OF CONG. 385-778 (1807).

⁶⁸ *United States v. Burr*, 25 F. Cas. at 180-81.

⁶⁹ Letter from Thomas Jefferson to John W. Eppes (May 28, 1807), reprinted in 9 THE WRITINGS OF THOMAS JEFFERSON 67-68 (P. Ford ed. 1898).

⁷⁰ Letter from Thomas Jefferson to George Hay (Sept. 4, 1807), reprinted in 3 H. ADAMS, *supra* note 20, at 470.

⁷¹ 17 ANNALS OF CONG. 17-18 (1807).

traitor "in heart and in fact."⁷² So enraged did public opinion become that Marshall was hanged in effigy,⁷³ and might indeed have been subjected to impeachment proceedings had not Jefferson finally been distracted from his single-minded and remorseless pursuit by a dramatic event that had occurred four months before. That event, to which he had paid but the slightest of attention at the time, while the Burr trial was in full progress, was the June twenty-second attack by a British warship on the American frigate *Chesapeake*,⁷⁴ an act that soon began to reverberate throughout the land, echoing ancestral voices prophesying war.

The second case, *Gilchrist v. Collector of Charleston*,⁷⁵ was sparked by a further collision between the power-seeking Jefferson administration and the firm-minded judiciary. The case arose in connection with Jefferson's embargo, initially enacted as a necessary measure of retaliation against British policies on the high seas, but soon perceived as a serious hardship wherever livelihoods depended on commerce and trade. One of the Embargo Acts, enacted in April 1808, had vested in the customs collectors of various ports the authority to detain a vessel whenever they believed there was an intention to evade or break the embargo.⁷⁶ In the following month, in a letter to his Secretary of the Treasury, Albert Gallatin, Jefferson attempted to eliminate the discretion that had been given to the collectors.⁷⁷ This letter of instruction immediately aroused popular furor, and a month later the validity of the President's action was tested in the *Gilchrist* case.

Pursuant to the President's order, a vessel loaded with rice was detained in Charleston, despite the collector's personal belief that the vessel was bound only for Baltimore and that the owners had no intention of breaking the embargo. *Gilchrist*, one of the vessel's owners, applied to the federal circuit court in South Carolina for a mandamus to compel issuance of a clearance.⁷⁸ Supreme Court Judge Johnson, sitting on circuit in that court, promptly announced

⁷² 3 A. BEVERIDGE, *supra* note 38, at 535 (quoting *Richmond Enquirer*, Dec. 12, 1807).

⁷³ See generally 3 A. BEVERIDGE, *supra* note 38, at 539.

⁷⁴ See 2 H. ADAMS, *supra* note 20, at 1-24; 3 A. BEVERIDGE, *supra* note 38, at 475-76. Although it was assumed that Jefferson would call Congress into special session immediately, H. ADAMS, JOHN RANDOLPH 220 (1892), he did not do so for five weeks, and then he set the date for October 26, 1807, a full four months after the event. See generally 3 A. BEVERIDGE, *supra* note 38, at 477.

⁷⁵ 10 F. Cas. 355 (C.C.D.S.C. 1808) (No. 5,420).

⁷⁶ Act of Apr. 25, 1808, ch. 66, 2 Stat. 499, 501 (1808).

⁷⁷ Letter from Thomas Jefferson to Albert Gallatin (May 6, 1808), *reprinted in* 1 THE WRITINGS OF ALBERT GALLATIN 386 (H. Adams ed. 1879).

⁷⁸ See generally 1 C. WARREN, *supra* note 13, at 325-26.

that he had jurisdiction to interpose the court's authority and, by mandamus, to compel the collector to issue the clearance. He stated that discretionary authority vested in collectors by an act of Congress could not legally be altered by an instruction of higher executive officials. "[T]he act of congress," Johnson stated, "does not authorize the detention of this vessel."⁷⁹ "[W]ithout the sanction of law," he wrote, "the collector is not justified by the instructions of the executive, in increasing restraints upon commerce."⁸⁰ Moreover, as he explained: "The officers of our government, from the highest to the lowest, are equally subjected to legal restraint; . . . all of them feel themselves equally incapable . . . to attempt an unsanctioned encroachment upon individual liberty."⁸¹

These were the words of the President's own appointee, a Republican Judge admonishing a Republican President, and the *Gilchrist* case has often been acclaimed on this ground.⁸² What appears to have escaped the attention of most lawyers and historians is that Johnson was making almost exactly the same distinction between law and politics, between vested individual rights and the shifting policies of the executive and legislative departments, that Marshall had made earlier in *Marbury*. No one on the Supreme Court at that time, except Marshall himself, could have been more articulate about the distinction than the recently appointed Johnson, who, although still in his thirties, did not hesitate to speak up for the independence of the judiciary, for individual rights, and particularly for the principle of the separateness of the departments of government. Until now, the administration had believed him to be a sound Republican. On the Court, however, although he frequently differed with his brethren, his voice was heard and heeded because of his clear judicial capacities and his independence of mind.⁸³

Press reaction to Johnson's *Gilchrist* opinion was almost as strong as it had been to the decision of the *Burr* case. Republican newspapers immediately assailed it as another example of judicial high-handedness. Federalists, on the other hand, praised the Judge and took delight in the fact that Jefferson's own appointee had frustrated the President's policy.⁸⁴ Johnson's opinion so disturbed

⁷⁹ 10 F. Cas. at 357.

⁸⁰ *Id.*

⁸¹ *Id.* 356.

⁸² See, e.g., D. MORGAN, JUSTICE WILLIAM JOHNSON: THE FIRST DISSENTER 60, 65, 67 (1954); 1 C. WARREN, *supra* note 13, at 326-27.

⁸³ See generally D. MORGAN, *supra* note 82.

⁸⁴ See generally 1 C. WARREN, *supra* note 13, at 326-29.

Jefferson that he procured from his Attorney General, Caesar A. Rodney, an advisory opinion attacking Johnson's statement of the law, and sent it to all collectors and marshals,⁸⁵ as well as to the press. Johnson first read the communication in a Charleston newspaper,⁸⁶ and he responded immediately that "an act so unprecedented in the history of executive conduct could be intended for no other purpose than to secure the public opinion on the side of the executive and in opposition to the judiciary."⁸⁷

As might be expected, Rodney's views, as well as the impropriety of Jefferson's action in publishing them, aroused widespread indignation. Judge Johnson was so outraged by the advisory opinion given to the newspapers that he published a reply, in which he set forth an elaborate defense of his decision several times longer than his original opinion. In this reply, he stated:

The courts do not pretend to impose any restraint upon any officer of government, but what results from a just construction of the laws of the United States. Of these laws the courts are the constitutional expositors; and every department of government must submit to their exposition; for laws have no legal meaning but what is given them by the courts to whose exposition they are submitted. It is against the law, therefore, and not the courts, that the executive should urge the charge of usurpation and restraint: a restraint which may at times be productive of inconveniences, but which is certainly very consistent with the nature of our government: one which it is very possible the president may have deserved the plaudits of his country for having transcended, in ordering detentions not within the embargo acts, but which notwithstanding it is the duty of our courts to encounter the odium of imposing.⁸⁸

In conclusion, he stated:

There never existed a stronger case for calling forth the powers of a court; and whatever censure the executive sanction may draw upon us, nothing can deprive us of the consciousness of having acted with firmness, impartiality

⁸⁵ Letter from Thomas Jefferson to Charles Pinckney (July 18, 1808), reprinted in 12 THE WRITINGS OF THOMAS JEFFERSON 102, 104 (A. Lipscomb ed. 1904).

⁸⁶ See 10 F. Cas. at 359. Johnson's published reply to Rodney's opinion letter and Jefferson's public distribution of it was reprinted with the *Gilchrist* opinion in the federal reporter.

⁸⁷ *Id.*

⁸⁸ *Id.* 364.

and an honest intention to discharge our duty. . . . It may be possible to prove the court wrong in interposing its authority; but certainly establishing the point of their want of jurisdiction will not prove the legality of the instructions given to the collector. The argument is not that the executive have done right, but that the judiciary had no power to prevent their doing wrong.⁸⁹

Rodney, not quelled by the force of Johnson's position, wrote to the President lamenting the state of his profession:

The judicial power, if permitted, will swallow all the rest. They will become omnipotent It is high time for the people to apply some remedy to the disease. You can scarcely elevate a man to a seat in a Court of Justice before he catches the leprosy of the Bench.⁹⁰

Later in the year, when a grand jury in Georgia criticized Johnson for his issuance of the mandamus, he firmly replied:

It is very far from correct in fact that the Circuit Court had the least wish or idea of embarrassing the execution of the Embargo Laws. The single question before the Court was whether the law or the instructions of the Executive was to govern. . . . For what cause are we now reproached? *For interposing the authority of the laws in the protection of individual rights*, of your rights and the rights of succeeding generations.⁹¹

Other, less well known decisions, which must be dealt with before discussing *Fletcher*, indicate similar efforts on the part of the federal courts to separate law from politics. In the Supreme Court, the seldom noticed bankruptcy case of *United States v. Fisher*⁹² contains a significant argument made by the United States Attorney for Pennsylvania, Alexander J. Dallas. Dallas, a Jefferson appointee, minced no words in stating that the Court was not to decide that an act of Congress was unconstitutional "on the ground of inconvenience, inexpediency or impolicy."⁹³ Here, within two years of the *Marbury* decision, a Republican echoed Marshall's own

⁸⁹ *Id.* 366.

⁹⁰ 1 C. WARREN, *supra* note 13, at 336 (quoting letter from Caesar Rodney to Thomas Jefferson (Oct. 31, 1808)).

⁹¹ *Id.* 337 (emphasis added) (citation omitted).

⁹² 6 U.S. (2 Cranch) 358 (1805).

⁹³ *Id.* 384.

words in an attempt to draw a line between the review of "legal" issues and those that were politically motivated or infected.

More striking is a federal district court case in Massachusetts, *United States v. The William*,⁹⁴ decided by Judge Davis in 1808 during the embargo. At issue in the case was the constitutionality of the congressional legislation that put Jefferson's 1807 embargo into effect. Judge Davis, though a staunch New England Federalist, and though beset by political pressures resulting from the dread effects the embargo was exerting on trade and commerce, nevertheless refused to declare the embargo unconstitutional. Without even a reference to *Marbury*—whether he knew of it is not clear—Judge Davis wrote that the legislation had been enacted pursuant to the powers of Congress to regulate foreign commerce and to wage war, and, further, that the decision of Jefferson to impose the embargo involved a political judgment.⁹⁵ Thus he held that judicial review would extend only to cases involving affirmative provisions and express restrictions, "contained in the constitution, [that were] sufficiently definite to render decision . . . satisfactory." Judge Davis reasoned that:

To determine where the legitimate exercise of discretion ends, and usurpation begins, would be a task most delicate and arduous. . . . Legal discretion is limited. . . . Political discretion has a far wider range. It embraces, combines and considers, all circumstances, events and projects, foreign or domestic, that can affect the national interests. Legal discretion has not the means of ascertaining the grounds, on which political discretion may have proceeded⁹⁶

Such expressions were not confined to the federal courts. In an 1804 state decision in Virginia, *Turpin v. Locket*,⁹⁷ the Virginia Court of Appeals affirmed a decree upholding the constitutionality of legislation that had deprived the Episcopal Church of its title to certain lands. Judges St. George Tucker and Spencer Roane, both strong Jefferson supporters, wrote affirming opinions. Yet the position they took, ironical as it may seem, was in principle strikingly close to that taken by Marshall in *Marbury* a year before. Tucker stated that, if the state legislature had been "impolitic,

⁹⁴ 28 F. Cas. 614 (C.C.D. Mass. 1808) (No. 16,700).

⁹⁵ *Id.* 620.

⁹⁶ *Id.*

⁹⁷ 10 Va. (6 Call) 113 (1804). I am indebted to Professor W.E. Nelson for this reference.

and unadvised," it could have amended or repealed its act, "provided it [did] not annul, or avoid any private right, which may have been legally acquired by any individual in his natural capacity, under such act."⁹⁸ In a less forthright and more circumlocutory opinion, Roane concluded that the people had power through the political process "to reform the government," but that private and vested rights that are not hostile to the principles of government are inviolable.⁹⁹

Finally, in the well-known case of *Fletcher v. Peck*,¹⁰⁰ decided in 1810, the Supreme Court had before it the question of the constitutionality of a state law. Although *Fletcher* is often characterized as merely a "contracts" case, and as the first major decision that struck down a state statute, its relevance for present purposes is in fact larger and far greater—and certainly less recognized—in that it illustrates the Court's continued determination to separate "law" from "politics." At issue in the case were two Georgia statutes, the first of which had been enacted as a result of bribery of state legislators. The Court refused to invalidate this first act because, as Marshall said, once the legislature had acted, its motive could not be inquired into by the judiciary. "[T]he principle by which judicial interference would be regulated . . . [could] not [be] clearly discerned," because the validity of the act was not properly a legal issue and because no fixed standards for resolving it had been presented.¹⁰¹ Thus, clear notice was given that such an inquiry by the judiciary was entirely improper, because the questions presented were in essence political and not legal.

The second Georgia statute before the Court in *Fletcher*, which raised a question of legislative power to declare void a grant of land, was pronounced invalid. This, said Marshall, the state cannot do, because to do so violates individual rights, a fixed principle everywhere accepted by citizens and also embodied in the contract clause of the Constitution.¹⁰²

Although at first glance, at least, the Court in *Fletcher* simply adhered firmly to the principle of judicial self-restraint, Marshall's opinion went further. As he had done in *Marbury* and to some

⁹⁸ *Id.* 156.

⁹⁹ *Id.* 169-70.

¹⁰⁰ 10 U.S. (6 Cranch) 87 (1810). For the background of this case, see generally C. MAGRATH, *YAZOO* (1966); C.H. HASKINS, *The Yazoo Land Companies*, in 5 PAPERS OF THE AMERICAN HISTORICAL ASSOCIATION 61 (1891).

¹⁰¹ 10 U.S. (6 Cranch) at 130.

¹⁰² *Id.* 136. Marshall identified natural law as the source of this fixed principle. See G. HASKINS, *supra* note 12, at 350-51.

extent in the *Burr* case, Marshall argued that, because the spheres of the departments of government were distinct, it was emphatically beyond the jurisdiction of the judiciary to limit the discretion of another department, except where the Constitution itself had defined the appropriate divisions. His statesmanlike vision was not affected by the charges of bribery and corruption of the Georgia legislators, because he realized that to inquire into such charges would have lured into the federal courts numerous suits attacking state legislation, at the very time when he and other judges thought it vital to dissociate the Court from politics and from politically motivated cases. Thus, in addition to holding invalid a state statute that conflicted with the United States Constitution, Marshall went further to prescribe guidelines for the judiciary insofar as the separation of powers was concerned.

The conclusion should not be drawn that the federal and even the state courts decided the cases discussed above as they did either to avoid confrontation or to advance or entrench idiosyncratic philosophical and constitutional ideas. Thus, *Fletcher* was based on the principle that rights vested by contract cannot be impaired by legislation, however infected by fraud the antecedent legislation may have been. Nevertheless, inherent in the Court's refusal to inquire into the legislators' motives and the bribery charges was a further recognition that law and politics are distinct, and that it is the province and even the duty of the Supreme Court to keep them so.

* * *

These decisions have been selected for comment partly because they illustrate the continuing efforts of the judges of the Supreme Court, and of lower courts as well, to make secure the federal judicial system in the early years of our republic. Equally important were their efforts to ensure as part of that system, and as an enduring element of the constitutional law of the United States, the recognition of a rule of law: fixed norms or principles that would become embedded not only in judicial tradition and precedent but in the minds of the people at large.

The theme, of course, was not new either to America or to England, from which it was derived. In the seventeenth century, Lord Coke had helped to popularize the idea of an abstract law to serve as a check on government, and in particular on the arbitrary acts of the king and his officials.¹⁰³ In essence, the principle pro-

¹⁰³ See Haskins, *Executive Justice and the Rule of Law*, 30 SPECULUM 529, 529-30 (1955).

claimed that a law higher than that of mortal man should govern the actions of kings and princes; in Coke's words—graven in stone above the entrance to Langdell Hall at the Harvard Law School—*non sub homine sed sub deo et lege*. We inherited those ideas early in the 18th century, but, curiously, in this country we carried those concepts further. By insisting on an independent judiciary, we developed the notion that judges should not be subservient to the executive, and, as a corollary, that an abstract rule of law was superior to discretionary exercise of executive power. It was a short, but historically critical, step from those ideas to the proposition that the judiciary has the power to overturn governmental acts in appropriate circumstances. Thus, the doctrine of the supremacy of law, historically at least as old as Magna Carta, and effectively used to check usurpations of Stuart kings, was in this country "turned into an instrument to control the action of popularly chosen officials and legislators."¹⁰⁴

The distinction which many of the federal judges were attempting to draw between law and politics was not readily perceived by men who had strong roots in colonial attitudes, and who had been accustomed to seeing the courts performing tasks which were not always strictly judicial. Many tasks of the courts of that day were coordinated with or ancillary to functions that we, today, would view as primarily executive or legislative in nature, and hence responsive to the changing political moods of the people or their elected representatives.¹⁰⁵ By contrast, the idea of the supremacy of law, popularized by such men as Alexander Hamilton and reinforced in the courts by judges such as John Marshall, slowly gained acceptance. But in the beginning, for political even more than for doctrinal reasons, the idea was anathema to Republicans, and especially to Jefferson and his lieutenants in the executive and legislative branches of the government, largely because it brought into sharper focus the independence of the judiciary.

Hence it becomes necessary again to emphasize the continuing attack on the federal judiciary in this early period of the 19th century. Jefferson was obsessed with the idea that the federal judges should fall in line with Republican views, and a prime objective of his policies, which continually intruded on the judicial process, was to remove or replace Federalist judges. In this attack on judicial independence, Jefferson had the strong and open backing of

¹⁰⁴ J. DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 98 (1927); see *id.* 95-99.

¹⁰⁵ G. HASKINS, *supra* note 12, at 206.

such radical Republicans as the arrogant Giles and Roane of Virginia, and Breckenridge of Kentucky.¹⁰⁸ Moreover, it was an open secret that one reason for Jefferson's wish to have Marshall impeached or otherwise deposed was to appoint his personal friend and supporter, Spencer Roane, as the nation's Chief Justice.¹⁰⁷

It is no distortion of history to underscore what Leonard Levy has termed the "darker side" of Thomas Jefferson,¹⁰⁸ for, much as one may admire him for his intellect, his political ingenuity, and his accomplishments in education and the arts, it is the "darker side" that continually revealed itself in the attacks on the Court, its judges, and the judicial process. It was Jefferson who instigated the first stages of the Chase impeachment by approaching Nathaniel Macon and then enlisting the aid of John Randolph of Roanoke.¹⁰⁹ It was Jefferson who declared Aaron Burr guilty of treason before the latter had even been indicted, much less tried.¹¹⁰ And it was Jefferson who openly advocated to Congress that Marshall should be impeached because the treason trial had resulted in a "not guilty" verdict from the jury.¹¹¹ These few episodes among many are part of the history of the Court, and help to explain how, until the more moderate James Madison came into power, the Court was forced so deeply into partisan politics.

One reason for the success of the early Marshall Court in proclaiming a rule of law free from the intrusion of politics—accomplished through decisions on specific issues of law, not through the kind of empty ideological phrases in which Jefferson so constantly indulged—was that by attending to its business in a lawyerlike fashion the Court began to win the respect of important people in the Republican camp. Can it be a coincidence that, after the successive failures of Jefferson during the "four lean years" of his second term, the Court began to emerge from vain Republican efforts to discredit the national judiciary, that it was strengthened by its own labors, by competent arguments made by skilled lawyers, and by its own efforts to assert national supremacy at the expense of state sovereignty? One cannot overlook that among the first acts of President Madison in 1809 was to call out federal troops to en-

¹⁰⁶ 3 A. BEVERIDGE, *supra* note 38, at 50-100; G. HASKINS, *supra* note 12, at 205-45.

¹⁰⁷ 3 A. BEVERIDGE, *supra* note 38, at 20.

¹⁰⁸ E.g., L. LEVY, *supra* note 59, at ix.

¹⁰⁹ G. HASKINS, *supra* note 12, at 219-21, 224.

¹¹⁰ See *supra* note 61.

¹¹¹ See 3 A. BEVERIDGE, *supra* note 38, at 530-531 (and sources cited therein).

force the Supreme Court's decision in *United States v. Peters*,¹¹² which the Republican Governor of Pennsylvania had tried to obstruct. Nor can one ignore Congress's eventual appropriation of funds to carry out the Court's decree in *Fletcher v. Peck*.¹¹³

If, as some have argued, Marshall's own objectives were political, founded on the middle-of-the-road Federalism that he had espoused before he took his place on the bench, it seems clear that he furthered them through the nonpolitical technique of deference to the principle of a rule of law separate from the vagaries of executive and legislative policies. Indeed, his decisions, viewed in their entirety, belie a politically motivated "government by judiciary." A nationalist at heart, Marshall served, and advanced, nationalist ends while on the Court, at the expense of the older view of states' rights. But one cannot ignore the impressive performance of two of the strongest of Marshall's associates, Johnson and Story—both of whom were appointed for their Republican affiliations—who stood with him, and sometimes stood alone, for the nonpolitical settlement of disputes through recourse to the principle of the supremacy of law.

A major impediment to the attainment of the goals that the judges of the Supreme Court had set for themselves was the persistence of concepts of states' rights, which were embraced by many Americans who were not even Republicans. Frequently, one overlooks that the roots of these concepts did not arise so much from theoretical considerations as from the insistence of men who continued to believe that the powers that the states had exercised before the Constitution had been ratified were the very powers they did not wish, or see fit, to relinquish. Hence, the impact of the kind of nationalism inherent in and fostered by the decisions of the Court was resisted in many parts of the country, so that criticism of those decisions was thereby reinforced. Those decisions were leading ineluctably in the direction of nationalism, not so much because the members of the Court were nationalistically minded, as because of the judges' growing conviction that it was their duty to establish a set of fixed principles—a rule of law—that would be binding, not as the law of a case or of a line of decisions, but as generally accepted ideals throughout the nation. Nationalism, in short, was bred of the growing awareness of, and insistence upon, the importance of the rule of law.

¹¹² 9 U.S. (5 Cranch) 115 (1809).

¹¹³ 10 U.S. (6 Cranch) 87 (1810). These funds were finally appropriated in 1814. The debates on the Yazoo claims are summarized from the *Annals of Congress* in 3 A. BEVERIDGE, *supra* note 38, at 595-602.

What, then, were the roots of Marshall's constitutionalism? Of course, he was a Federalist, but a moderate one, and he had learned much about the nature and importance of nationalism from serving under General Washington during the Revolutionary War.¹¹⁴ But could he, however dominating and persuasive he might be, mesmerize his Republican colleagues on the Court, men who after 1811 constituted a majority, and who included such strong-minded personalities as William Johnson and Joseph Story? "Federalism," like "puritanism" in an earlier day,¹¹⁵ showed itself in many forms, and meant different things at different times.

Probably it oversimplifies the issue to say that Republicans stood for the proposition that men are capable of governing themselves and hence that the popular will should be given free rein, whereas Federalists stood for accepted and customary standards and the stability of an older order in which government, especially at the local level, functioned without giving in to persons temporarily in power. Recognizing the inherent vices of generalizations, one can nevertheless perceive, even on the basis of the few decisions that have been adverted to, the continual, and generally consistent, effort of the Court—and especially of its Chief Justice—to separate law from politics, and thus to keep from its doors matters that were believed to be properly within the spheres of the executive and the legislature. This was, to these judges, a separation dictated by the principles of the Constitution. But what was the test of the distinction that was to be drawn, and when were the tenuous lines to be considered overstepped? A cynical revisionist might respond that where the lines would be drawn depended on how the judiciary's self-interest could best be served at a time when the Court had been inexorably drawn into virulent political debate, and when its very existence had been threatened. Was it not prudent to deny *Marbury* his commission, and to declare constitutional the 1802 Judiciary Act and the 1808 Embargo Act? Was the constant reference to a transcendent rule of law merely a rationalization for various decisions? If so, how does one explain a newly appointed Republican judge, William Johnson, defying the President in his attempt to extend an act of Congress by executive fiat? Likewise, one sees Marshall, and even lower court judges, expressly, and even vehemently, upholding individual vested rights, regardless of the political consequences. Insistent on a judiciary independent

¹¹⁴ Haskins, *John Marshall and the Commerce Clause of the Constitution*, 104 U. PA. L. REV. 23, 28 (1955).

¹¹⁵ See *id.*; G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 10-24 (1977).

of executive whim and legislative act, these judges, and especially those on the Supreme Court, continually defended a rule of law that protected private rights from public manipulation and intrusion.

Vague as may be the doctrine of supremacy of law, tenuous as may be the lines between judicial action and legislative or executive action, a standard at least was recognized, and it was developed through such specific decisions as those heretofore discussed. Moreover, when clear precedent was lacking, when the words of the Constitution seemed less than entirely clear, one finds Marshall—and even the Republican Johnson—turning as justification for decision to concepts of what they termed “natural law,” and also to a scrutiny of the philosophical criteria inherent in statecraft. Thus, in *Fletcher v. Peck*, Marshall referred to “certain great principles of justice, whose authority is universally acknowledged.”¹¹⁶ In his *Life of George Washington*,¹¹⁷ Marshall contrasted the Republicans, on the one hand, as seeking to remedy society’s ills through legislation, and hence leading to uncertainty and instability of principles that ought to be immutable, with the Federalists, on the other hand, as uniform friends of a regular administration of justice. Yet, while he recognized the transcendent power of the people, as evidenced for instance in the adoption of the Constitution, it was central to his thinking that the power of the majority could be reconciled with immutable principles of the law that have their roots in moral justice and that therefore precede both government and legislation.¹¹⁸ It is a recognition of this need for reconciliation, it is suggested, that marks the tenor of the difficult constitutional decisions in which a line was drawn between law and politics, a line not so firmly or precisely drawn as to be more than a general guide to decisionmaking, but one that gave due recognition to constitutional mandates and emerging nationalism. It may well be asked whether, for that period, a more precise line, giving any greater certainty, could have been drawn. Indeed, it has recently been observed that “the success of Marshall’s generation in keeping core segments of the constitutional process free . . . from the intrusion of politics raises a possibility that we, too, might

¹¹⁶ 10 U.S. (6 Cranch) at 133. Judge Johnson went even further in relying on natural law, rather than on constitutional arguments, in the course of his concurring opinion, referring to “the reason and nature of things: a principle which will impose laws even on the deity.” 10 U.S. (6 Cranch) at 143 (Johnson, J., concurring).

¹¹⁷ 5 J. MARSHALL, *THE LIFE OF GEORGE WASHINGTON* 85, 87 (1805-1807).

¹¹⁸ See *Fletcher v. Peck*, 10 U.S. (6 Cranch) at 133-34.

sometimes be able . . . to perceive some portions of constitutional law as beyond the pale of political controversy." ¹¹⁹

Under Marshall, the Court became the ultimate seat of federal judicial power and, more important, a fertile breeding ground for developing the idea of the supremacy of the rule of law, as distinct from elusive and unpredictable accommodations to the executive and the legislature. Inevitably, these developments and the ideas they nurtured permeated the lower federal courts, and helped to spread nascent ideas of a new American nationalism. No less important was the relentless shaping of the judicial process, the effort to maintain the Supreme Court as a court of law that sought consciously to mark the separation of law from politics. This is a vital clue to the survival of the early Marshall Court. Its legacy, as Professor Paul Freund has so cogently remarked, is one that must be comprehended if it is to be possessed.¹²⁰

¹¹⁹ Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 960 (1978).

¹²⁰ See Freund, *supra* note 4.