CHIEF JUSTICE MARSHALL AS A CONSTRUCTIVE STATESMAN[1]

I

John Marshall served with credit in the Revolutionary army, was a most effective champion of the proposed Federal Constitution in the convention of Virginia, won the high approval of President Adams and great popular applause for the dignity with which he maintained the honor of the United States in an unsuccessful mission to France, and served with eminent distinction as Secretary of State during the latter part of the Adams administration. But had he left public life when the Federalists were swept out of office by the election of Jefferson to the presidency, had his last public service (and it would undoubtedly have been his last, for he was a strong Federalist, and the anti-Federalists for many years after the retirement of John Adams dominated the policies of the government) been as Secretary of State, I venture to say that he would not have been remembered in our time as an eminent statesman. His claim to distinction is as a judge; and yet it is because, while performing his duty as judge, he had the opportunity, owing to the peculiar nature of the court over which he presided as Chief

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Justice, and because he so presided at a formative period in the history of the government and the court, to exercise the molding influence of a statesman as well, that he has been given so high a rank among the men of his time and his country. It will be well worth while, therefore, to consider for a few moments how it came about that a member of a judicial tribunal could properly, in discharging the functions of that office, show the highest skill in statesmanship; for I am compelled to confess that, after comparing the genius displayed, as well as the results accomplished by the men who molded our institutions, I find none of them to have possessed a stronger insight, or to have been more capable or successful as to the results achieved, than John Marshall.

The Federal Constitution is not a mere historical growth, though it is the result of historical development; nor, on the other hand, is it an original creation, though in form a specific instrument. Those who see in it merely an adaptation to circumstances of the principal features of the English Constitution on the one hand, are as far wrong as those who, on the other, make use of the antithesis of Gladstone when comparing it to the English Constitution, which latter he described as the greatest product of the creative forces of human history, while characterizing the Constitution of the United States as "the most wonderful work ever struck off at a given time by the brain and purpose of man." Our Constitution has the two characteristics subtly combined. There are preserved in it the concrete achievements of long centuries of struggle for freedom by the English people—local self-government, representation, popular suffrage, independence of the three coördinate departments of govern-

ment, the right to have infringement of personal liberty inquired into by means of the writ of habeas corpus, the fundamental right to due process of law. Even historically, however, it stands for more than these. It embodies the concrete results of the struggles of the American Colonies for independence. The characteristics prominent over all others in the State governments formed by the Colonies when they declared their independence, was that just government derives its authority ultimately from the people, and that public officers exercise, by reason of the trust imposed in them, powers delegated by the people, the source of all the powers of government. The framework of the State governments, as organized after independence, was strikingly the same as that of the charter governments established by the King of England in the exercise of his royal prerogative, but the source of the authority exercised under them was essentially different. Take from the charter the royal power as its basis, and substitute for it the power of ultimate sovereignty in the people, and you have a State Constitution such as that adopted in Massachusetts, or Virginia, or Connecticut.

This substitution of the will of the whole people as the ultimate source of authority was a new thing in practical government. The people of England had never realized it. The notion of ultimate responsibility of the ruler for the welfare of his subjects, the realization that the interests of his subjects were the highest interests which he could consider in the administration of his authority, the conception that in the people reposed the ultimate force which the ruler must employ and rely upon if his gov-

ernment should be stable,—these ideas were not new, but practical embodiment of them in a form of government was strikingly original. Such ideas did not inhere either in constitutional or representative governments such as had previously been known. It would be interesting to search for the sources of this American doctrine. That it did not spring full fledged from the minds of constitutional draftsmen, and that it was not adopted off-hand, without some preparation and period of development, must be conceded. Some language in the earliest State Constitutions, as well as in the Declaration of Independence, would indicate the belief that it is the result of the adoption of the general theory embodied in the social compact as to the necessity of the consent of the governed as a foundation for governmental authority, and that this theory was acquired from the philosophers, whose dissertations on the natural rights of man led to the deification of Liberty, Fraternity, and Equality, and prepared the way for the French Revolution. But as a matter of fact the social compact theory is clearly traceable to English philosophy, and the agitation of the eighteenth century with relation to individual liberty seems to have been as active in England as in France. It was but a phase of the struggle for the recognition of extreme individualism which followed quickly on the heels of the complete overthrow of the ideas which underlay the Feudal system. But the government of England had acquired its final definite form before the right of the people to participate in the affairs of the government was fully established, and while individual liberty has there achieved recognition as fully as elsewhere, the constitutional forms have not been changed

to adequately represent its ultimate triumph as against the doctrine of the inherent possession of power by the governing body. In France the breaking down of the Feudal system at a later date than in England gave full opportunity for an embodiment in actual form of the theories of natural right. But the practical protection of individual rights was no more fully secured in France than in England, and I doubt very much whether as to these latest developments of our governmental system we owe any more to French philosophizing, and the French advocacy of liberty, than we do to the agitation which was carried on in England without any such tangible results in constitutional forms.

The Constitution of the United States is a specific instrument of government, adopted by lawful authority, binding on those owing allegiance to the government of which it is the charter, and subject like any other written instrument to authoritative interpretation and enforcement by the judicial department of the federal government, to which the people, in the exercise of their sovereign power have delegated that authority. It is not an unwritten Constitution, reduced tentatively and experimentally to written language, subject to constant alteration and revision, as particular circumstances or emergencies may arise calling for modification, but an instrument binding as written, to be adapted, however, to new conditions or circumstances by the same power of interpretation which is exerted in applying a statute or a contract to conditions not anticipated when it was framed. If it lacks the flexibility of the unwritten Constitution of Great Britain on the one hand, it possesses on the other the distinguishing merit of resting on sovereign authority, an authority para-

mount to that of the different departments of the government, and capable of a binding interpretation. Add to these characters that other one which has remained unique, that there is a tribunal with not only the authority, but the courage, to determine whether those who administer the legislative and the executive authority have kept within the limits prescribed for them by the sovereign will, and it is clear that the government under that Constitution has a responsiveness to public needs, a power of resistance as against the sudden gusts of passion or the insidious burrowings of corruption, and an efficiency in the protection of personal and property rights which distinguish it as the best government which has existed or now exists in the civilized world. The supreme excellence of our Constitution, in the ultimate analysis, consists in its adaptability by interpretation to new conditions and the vesting of the power of interpretation in a tribunal proceeding in accordance with the established traditions of the law, that system of law which has in the whole history of systems of jurisprudence attained the highest development with respect to the protection of the individual rights of the subject, and given the fullest scope of liberty to individual efforts. The power of interpretation being given to a conservative tribunal, it is but reasonable that it should be liberally exercised; without such liberal exercise our Constitution would have been a straight jacket to stifle, instead of an armor to protect, the institutions existing under it. Amendment has proven to be cumbersome and inadequate as a means of adjustment. Interpretation, on the other hand, has furnished the elasticity which has been necessary. Essential principles alone being em-

bodied in the written Constitution, so long as these principles remain unchanged (and they are so fundamental that until our entire theory of government undergoes a revolution a change can hardly be imagined), the power of interpretation will give the necessary means of adjustment.

There are those who pretend to think that liberality of interpretation has destroyed the value of this organic instrument. But they have been unable to point out any material respect in which the ideals of a free government, embodied in the Constitution as originally framed, have been departed from or abandoned. There must always be differences of opinion as to the expediency of any particular construction as between those who are conservative and those who are liberal in their views on such questions. But a difference of judgment as to one particular act of interpretation cannot furnish any adequate basis for a claim that as a whole the instrument has been wrenched from its original purpose. In fact those who have in one particular instance been found insisting upon a strict construction have often in some other particular case been the most zealous in availing themselves of a broad and liberal construction, and there is now really no serious controversy as to the general principles to be applied in constitutional interpretation.

Assuming, then, that from the beginning it must have been apparent that interpretation would be necessary, it is evident that it was a matter of great concern to determine by what authority such interpretation should be made, and on what sanction it should rest. If, as was true of the Articles of Confederation, which formed the basis of the federal authority prior to the adoption of the Constitution in 1789,

this power of interpretation was left to the States, then discord and disunion must inevitably have followed. If the very instrument itself, which purported to be the charter of a more perfect union, designed to secure the blessings of liberty to those on whose authority it was made to rest and their posterity, embodied such a theory, it contained the elements of its own destruction, the limitations of its own existence. If, on the other hand, the power of interpretation was vested in those departments of government whose authority it purported to define and limit, then it could afford no specific protection as against the exercise of arbitrary and unlimited power, or at best only the protection of giving a justification for revolt against authority and the disastrous remedy of revolution. But Anglo-Saxon love for that which is lawful and orderly and certain, and for law, blind to private interests, irresponsive to the attempt to exercise tyrannical authority, made possible the vesting of this power of interpretation in a tribunal as far removed as any human institution can be from the exercise of undue influence, on the one hand or the other, and better adapted than any other conceivable agency for maintaining a just balance between the irresponsible public will and equally irresponsible exercise of unlimited power. Such a tribunal, a court furnished with the machinery and operating in accordance with well established traditions in the administration of justice, was ready at hand. The judicial department was a recognized branch of the government of England. Its protection had been invoked, and the justice which it alone was calculated to administer had been demanded by the Colonists as a part of their inalienable inheritance as Englishmen. As State

Constitutions were formed the judicial department in each was created as coördinate with the legislative and executive departments. It was reasonable, and it was inevitable, that in the formation of a federal government, one which should be a government in fact, and not a mere compact between contracting parties, a judicial department should be provided to determine controversies among individuals arising under the laws which that government was authorized to make. And it seemed reasonable and natural that to this department should be entrusted the interpretation of the fundamental law on which the authority of the federal government was to rest. It was reasonable and natural, and yet it was the unique and supreme result of the struggle for law and liberty combined.

It must be borne in mind that the federal judiciary department, at the head of which stands the Supreme Court, was not primarily created for the interpretation of the Constitution, nor for the application of limitations to the powers of the legislative and executive branches of the federal government. That department was established for the purpose of administering justice to those whose controversies might legitimately be brought before it. No other system of courts in England or the United States has so great or varied a jurisdiction. It administers all branches of the law. It adjudges punishments for crimes, gives redress for torts, gives damages for breach of contract, applies the admiralty and maritime law and expounds the law of nations. And the new and crowning feature of the jurisprudence intrusted to it is that of constitutional interpretation. I mention the wide scope of its jurisprudence for the purpose of showing

how wisely and how safely the constitution-makers acted in bringing forth their one original, though perhaps unconscious, creation in the development of the theories of government, by which was entrusted to the Supreme Court of the United States ultimate and binding authority in the matter of interpretation of the Constitution, the authority which, for the preservation of perpetual peace and union, must be vested somewhere, and could not safely be vested elsewhere.

It is not impossible that the federal tribunals, acting as a coördinate branch of the federal government, shall depart from the letter or the spirit of the Constitution. But if ultimate power of decision is to be vested anywhere, where more safely than in a tribunal presided over by those skilled in the law, and imbued with the traditions of the law, removed as far as possible from any influence of self-interest, with no offices at their disposal, no treasury to draw upon, no army at their command, incapable of coercing any obedience save that which the great body of Anglo-Saxon people yields to the impressive and sublime majesty of the law. As Chief Justice Marshall has said, "That department has no will, in any case. If the sound construction of the act [creating a bank of the United States] be, that it exempts the trade of the bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the States, courts are as much bound to give it that construction, as if the exemption had been established in express terms. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere

legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."[1] The Supreme Court of the United States has exercised its great and conservative power in the preservation of our institutions and the protection of our national prosperity, not because of the individual ability of its judges, though among them have been great lawyers and great statesmen nor because its judgments are infallible, for no human tribunal can claim this prerogative of omnipotence, but because of the nature of the law itself, and the respect which is accorded to it by the people in whom sovereign authority rests. It was as the Chief Justice of this tribunal, and as a judge administering the law, that Marshall was able to exercise the highest prerogatives of statesmanship, and to prove himself to be entitled to a place among the founders of our great federal system.

It is not to be denied that judges are human, and are capable, even though honest and sincere in their convictions, of entertaining the prejudices and passions of other human beings. It is not possible to apply judicial methods to the solution of difficulties which do not have the nature of legal controversies. The results of judicial deliberations are satisfactory because they relate to subjects within the scope of judicial investigation and determination. When judges have

[1] 9 Wheaton, 866.

acted in matters pertaining to other fields in the affairs of the government, they have been found to be subject to the same limitations, and affected by the same weaknesses, as those which are found in others who attempt to render like services. If the judges of the Supreme Court have been preëminently successful in dealing with constitutional questions, it is because the nature of the controversies involving the interpretation of the Constitution and the determination of the authority of the coördinate branches of the government especially adapts them to judicial solution, and because the Supreme Court, as a court, has dealt with them as other questions of law given to it for decision.

The Supreme Court has no policy to maintain, nor does it undertake to determine beforehand or prospectively questions which may be mooted as to the interpretation of the Constitution or the laws. When a cause has arisen involving their determination, has been brought before it in an orderly form of procedure, and has been presented with full argument by men trained in legal reasoning, representing with their utmost energies the different sides of the controversy, it is then, and then only, that the court, in the light of the argument, attempts to announce its decision relating to the very case presented. That the results have always been free from the influence of that partisanship which is inevitable in the consideration of matters of public concern cannot be claimed. But this can be truthfully said, that no other method of determining such questions is so likely to lead to a feasible, satisfactory, and permanent solution.

II

It was not, however, merely because Marshall was Chief Justice of the Supreme Court of the United States, and discharged his duties with signal courage, integrity, fairness and ability, that he is entitled to be called a statesman. The nature of the court, and the character of the questions which it was called upon to determine, gave him his opportunity. But his position as presiding justice entitled him to no dominance in the deliberations of the court, and no peculiar credit for its decisions. The fact that he did, however, in a just sense dominate the court, not by virtue of his position but through the strength of his mind and the justness of his conclusions, is made apparent by the fact that of all the opinions delivered on constitutional questions during his thirty-five years of service, more than one-half were written by him; that practically all of the decisions on these questions, rendered during his term, which are now cited as fundamental and of undoubted authority, were among those in which he wrote the opinions; that the acquiescence of his associates was not by reason of any partisan agreement, for very soon after his appointment the majority of the court, by reason of appointments to fill vacancies, was constituted of those selected by Presidents placed in power by a party hostile to the views of the Federalists, a party which remained in control of the government throughout his entire period of service, the staunchest and ablest supporter, admirer and champion whom he had among his associates being Justice Story, a Democrat by party affiliation, and the appointee of President Madison. It was not, therefore, as a Federalist or a partisan that Chief Justice Marshall domi-

nated the court and determined the character and tendency of its decisions on constitutional questions. His associates, without regard to party, credited him with unimpeachable personal character, a broad, sound and unbiased judgment, and a majestic courage. The majesty of his mind can only be compared to that of Washington, his clearness of insight and strength of intellect only to that of Hamilton.

It was, however, as a judge that he had occasion to deal with questions vitally affecting the character of the government created through the Federal Constitution, which others had considered from the standpoint of statesmen. If, then, the final interpretation of the Federal Constitution devolved upon the Supreme Court; if in that interpretation it was necessary to settle important questions as to the nature of the federal government, the scope of the powers and the relations to each other of its departments, and the division of sovereignty between it and the governments of the States; if on some questions, most vital in their nature, there was radical and irreconcileable difference of opinion; if we believe in the light of subsequent history that among these conflicting opinions some were more conducive to the prosperity of the people and the perpetuity of the Union than others, and that it is of importance that what we now think to be the sounder opinions prevailed; that it was in accordance with the fundamental purpose of those who framed and successfully labored for the adoption of the Constitution, that those views of the nature of the instrument, and the government which was created under it, should be adopted which would promote the prosperity of the people and the perpetuity of the Union; that, though men with unselfish and patriotic

motives might differ in their views, yet strength of intellect, cogency of reasoning and clearness of foresight as to results, and courage of conviction as to principles, would be valuable guides in determining which of conflicting interpretations of the Constitution as applied to new conditions was more nearly in harmony with the ultimate intent and purpose of the framers of the instrument, then, I think, we must agree that the adoption of a sound interpretation involved not only the technical skill of a great judge, but the highest abilities of a great statesman, and that to Chief Justice Marshall should be accorded preëminence in this constructive statesmanship. He carried into the discussion of constitutional questions that fairness and impartiality which we traditionally demand of a judge, but seem rarely to expect of a statesman. His reasoning was legal reasoning, his conclusions were legal conclusions, and his judgments were fortunately the judgments of a court, and not of the forum. Greater judges have sat upon the bench than he. Story, Taney, and Gray had better knowledge of the branches of law included within the scope of the jurisdiction of the ordinary courts. They knew the precedents and intricacies of admiralty, equity, and commercial law better than he. But in capacity for legal thinking, and power of legal reasoning, he was inferior to none, and in the clear grasp of the principles on which the Constitution rested, and the problems which must be worked out in its interpretation, he was superior to all. And thus he was a statesman, and a greater statesman because he was a great judge.

III

I have dealt in these generalizations because it would be impossible, within the reasonable limits of this paper, to discuss in detail the work which Marshall actually did, and to point out the specific beneficent results which have flowed from his wisdom and sound judgment. But I should feel that my characterization of him and his accomplishments was empty and impotent indeed if it rested in the mere statement of them. I cannot do better in justifying what I have said, nor do less in justice to the character and ability of Marshall, than to point out in specific instances some of the problems presented to him, the strength of reasoning and judgment with which he sought their proper solution, and the conclusive proof of the wisdom of the conclusions finally reached, as established by subsequent events in our national history. And for this purpose I have selected a few of the most noted cases in which he announced the conclusions of the Supreme Court, confining myself, as more appropriate for this paper, to those involving the exercise of the wisdom of the statesman rather than those showing merely his skill and learning as a judge.

The case of *Marbury v. Madison*, decided by the Supreme Court in 1803, that is, within less than two years after Marshall's appointment, was the first of the great cases in which the Chief Justice expounded the nature of the power conferred by the Constitution upon the federal judiciary. It is the first case, and the conclusive one, indicating on the part of the court an intelligent appreciation of the unique position in which that court was placed in our system of government, and the resolute courage essential to the full and bene-

ficial employment of that power. Up to this time the court had temporized when approaching the determination of its relations to the other departments of the government. Now those relations were to be made clear and definite.

The case was briefly this: John Adams, who, as President, had been unable to secure a reëlection because of the dissatisfaction of some of the leading Federalists, and because of the breaking down, which perhaps was inevitable, of the Federalist party, was about to retire and give place to Thomas Jefferson, the choice of the then so-called Republicans. The term of office of certain justices of the peace for the District of Columbia had expired, and on the last day of his administration Adams had sent to the Senate nominations to fill these offices, which had been ratified, and the commissions, duly made out and signed by the President, had been deposited during the very last hours of the administration in the office of the Secretary of State, ready to receive the official seal of the United States, which by law was placed in the custody of the Secretary, and to be recorded and delivered. President Jefferson had treated the commissions not thus sealed and delivered at the hour when his term of office commenced as invalid, and had made other appointments to the offices. One Marbury, claiming appointment under Adams, asked the issuance of a mandamus by the Supreme Court of the United States to compel the new Secretary of State, James Madison, to seal and deliver his commission, and it was argued for him, first, that the Supreme Court had jurisdiction to award an original writ of mandamus; second, that such writ could issue to the Secretary of State so far as his duties were ministerial and pre-

scribed by law, and third, that the present case was a proper one for the exercise of such authority. So far as appears from the report of the case no argument was made on the other side.

The Chief Justice, in delivering the opinion of the court, considered, first, whether Marbury was entitled to his commission, and on this point held that after it had been signed by the President and delivered to the Secretary of State, nothing remaining essential to its validity save the ministerial act of sealing, recording, and delivering, it became valid, and Marbury was entitled to it, and his right was of such nature that a court should protect it by proper process, the writ of mandamus being the appropriate writ for that purpose. Second, that in respect to the ministerial duties, imposed on the Secretary of State by law, to affix the seal of the United States in proper cases, make record in his office of such instruments as this when duly signed and sealed, and deliver them to the proper persons, the Secretary of State was a mere ministerial officer, the performance of whose duty in a proper case could be enforced by legal process. Third, that an act of Congress which authorizes the Supreme Court to issue original writs in case of mandamus was unconstitutional, because by the Constitution itself the original jurisdiction, as distinct from the appellate jurisdiction of the Supreme Court of the United States was defined and limited, and did not extend to such a case. The result was that the Supreme Court declined to interfere, and Marbury was defeated.

But the opinion of the Chief Justice was bitterly assailed at that time by the supporters of the administration of Jef-

ferson on account of the assertion of its authority to control the acts of an officer of the executive department of the government, and it has since been criticised repeatedly by those who consider themselves the followers of Jefferson because of the assertion by the court of the power to declare a statute of Congress to be unconstitutional and void. It will be seen that these two grounds of criticisms have no necessary connection with each other, though they have this in common that each relates to an assumed usurpation of authority by the judiciary over coördinate branches of the government. As to the correctness of the first point there is no longer any controversy. It has become established law, as indeed it was at the time the decision was made, that a ministerial officer is subject to the control of the courts as to the execution of his trust, and when it was made clear that the Secretary of State was in respect to the duties in question a purely ministerial officer, whose duties were pointed out by statute, and not a mere agent of the President, the head of the executive department, it was demonstrated to a lawyer that judicial inquiry into the performance of the duty required by statute was proper. Chief Justice Marshall takes great pains to make this distinction clear, for he says that where the head of a department "is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden, as, for example, to record a commission or a patent for land, which has received all the legal solemnities, or to give a copy of

such record; in such cases it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to the injured individual, than if the same services were to be performed by a person not at the head of a department."[1] And he further says that "the province of the court is solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are by the Constitution and laws submitted to the executive, can never be made in this court. But if this be not such a question, if so far from being an intrusion into the secrets of the cabinet it respects a paper which, according to the law, is upon record, and to a copy of which the law gives a right on the payment of ten cents, if it be no intermeddling with a subject over which the executive can be considered as having exercised any control, what is there then in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus, directing the performance of a duty not depending on executive discretion, but on particular acts of Congress and the general principles of law?"[2] And yet, this clear and conclusive reasoning on the question, which was according to well settled law, furnished the occasion of much bitterness of feeling on the part of President Jefferson and his friends, and was made the excuse by the President for expressions of distrust, which were reiterated from time to time, until he finally

[1] 1 Cranch, 171.

[2] *Ibid*, 170.

said: "It has long been my opinion that the germs of dissolution of our federal government are in the constitution of the federal judiciary, an irresponsible body, working like gravity, day and night, gaining a little today and a little tomorrow, advancing its noiseless step like a thief over the field of jurisdiction until all shall be usurped." President Jefferson was the one detractor to impugn the honesty of the motives which actuated the Chief Justice in rendering this decision. It is not necessary to attribute to Jefferson conscious unfairness or low partizanship in explaining his attitude towards Chief Justice Marshall and the court over which he presided. It is enough to say that it is not given to many men to be in all directions equally great, and it was the conspicuous defect of Jefferson that he could not appreciate the necessity of that stability, certainty, and order in the operations of government which is afforded by incorporating into it the administration of law as a coördinate branch, and that he could not credit to a judge the impartiality which by legal training becomes to him a second nature. If so able a man as Jefferson could so far misunderstand the necessities of a federal system of government as to pen the Kentucky Resolutions, or so far misconceive the functions of a court as to insist that it should in some way be amenable to the vicissitudes of the popular whim, it is not strange that throughout our national history there have been many, less strongly endowed with intellect than he, who have sought to discredit and belittle the value of the judicial interpretation of the Constitution, and judicial restraint upon the unlimited exercise of power. In objecting to this exercise of authority by the Supreme Court with

reference to an executive officer, the President was oblivious to history, for it was by the assertion of precisely this authority on the part of Parliament and the courts as against the administration of the King that the royal prerogative in Great Britain was most effectually limited and the rights of the people protected.

But the conclusion reached on the other branch of the case, that is, as to the power of the court to hold unconstitutional a statute of Congress attempting to confer upon it a new jurisdiction, was practically without support in previous judicial decisions, and the authority thus asserted has repeatedly been questioned by non-professional men whose judgment is entitled to some consideration as to a matter affecting a question of public policy. There was judicial precedent, but not of a conclusive character, and Marshall did not attempt to bolster his views by citing a few scattering cases in early State courts in which a like authority of the judiciary had been asserted or suggested, but struck out boldly on the sea of constitutional interpretation, guided by the compass of reason, the needle of which indicated a course calculable only from the fundamental theories of sovereignty and responsibility on which the Constitution was founded. The course indeed was plainly indicated. Hamilton had in the *Federalist* stated in a few sentences the controlling considerations. This is his terse and cogent language:

> Some perplexity respecting the rights of the courts to pronounce legislative acts void because contrary to the Constitution has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. * * * There is no position which depends on clearer principles than that every act of a delegated

authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal, that the servant is above his master, that the representatives of the people are superior to the people themselves, that men acting by virtue of power may do not only what their powers do not authorize, but what they forbid. * * * It can be of no weight to us that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes, or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law, and if they should be disposed to exercise will instead of judgment, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove anything, would prove that there ought to be no judges distinct from that body.[1]

Marshall did not hesitate to endorse this line of reasoning, and he made it more clear and persuasive by his own illustrations.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of any intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it. That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; and as the authority from which they proceed is supreme, and can seldom act,

[1] Lodge's *Federalist*, pp. 485–7.

they are designed to be permanent. This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop there, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited power is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, either that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.[1]

But I cannot follow further his course of reasoning and illustration. Suffice it to say that as a legal proposition it has never been seriously questioned from this announcement of it until the present day, and it is only those who misconceive the functions of a court and the nature of the federal system who have seriously questioned it.

One other suggestion is pertinent with reference to this case, for it has been made the occasion of the only serious

[1] 1 Cranch, 176–7.

attack on the fairness of judgment of the great Chief Justice, and the only foundation in the minds of lawyers for imputing to him partisanship in the discharge of the duties of his judicial office. It is said that the case might have been decided by simply declaring the statute giving the court jurisdiction in such cases unconstitutional, as was done in the end, and then abstaining from the further discussion which was so obnoxious to the President and his friends as to the authority of the Secretary of State to withhold Marbury's commission. It is said that if the court has not jurisdiction, this should be declared at once and the merits of the case should not be considered. And unquestionably this is a sound rule in the performance of judicial duty. It is the rule which Chief Justice Taney unfortunately departed from, to his own great discredit and to the peril of the Union (though in the vain hope, it must be said, of perpetuating rather than imperiling it) when in the Dred Scott case, after finding that the court had no authority to entertain jurisdiction because Dred Scott, a former slave, was not a citizen, he proceeded to discuss at length and to declare invalid the provisions of the act of Congress known as the Missouri Compromise, which prohibited the further extension of slavery into portions of the territory of the United States from which by that act it was forever excluded. Those who have looked at the matter superficially have been inclined to say that Chief Justice Marshall as well as Chief Justice Taney erred in the attempt to commit the court unnecessarily in matters not directly involved in the adjudication of the case before it. But it has been pointed out, and I think with sound reason, that Chief Justice Marshall pursued the proper course of entering upon a

discussion of the constitutionality of an act of Congress only when, after determining every other point on which the case could be decided, it appeared that the determination of the constitutionality of the legislative act was absolutely essential. He properly, therefore, postponed that question until it became apparent in the course of the discussion that it could not be avoided. Chief Justice Taney on the contrary, after holding that the court had no jurisdiction of the case, proceeded unnecessarily to discuss the constitutionality of an act of Congress. The comparison, instead of showing Chief Justice Marshall to be subject to the criticism which is properly made on the action of Chief Justice Taney, shows clearly that Marshall exhibited proper deference to the legislative department, while Taney unnecessarily pursued the opposite and unjustifiable course.

The powers and functions of the court having been settled by this early decision, the court had occasion in subsequent cases to consider many questions as to the extent of the powers of the federal government and its relations to the States. Perhaps the most instructive case is that of *McCulloch v. Maryland*, decided sixteen years later, involving the constitutionality of the act incorporating a United States bank, and the power of a State to tax a bank created by federal authority. The first Congress under the Constitution, acting under the advice and at the urgent solicitation of Hamilton as Secretary of the Treasury, who regarded such an institution at the time as one of the most promising agencies for promoting the welfare of the country by giving the government credit and stability, chartered the Bank of the United States, and that bank established a branch in the

city of Baltimore. The legislature of Maryland, however, in 1818 passed an act "to impose a tax on all banks or branches thereof in the State of Maryland not chartered by the legislature," thus plainly raising the issue, not merely whether the bank created by the federal government could be subjected to the same taxing laws as those institutions created by the authority of the State, but whether the State could, by discriminative legislation, prevent the federal institution from carrying on its business in the State in competition with banks existing under State authority. Suit was brought by the State against the officer of the Baltimore branch of the United States Bank for the recovery of the taxes claimed to be due to the State under this statute, and the decision of the State court being that the tax must be paid, the officer acting for the bank appealed to the Supreme Court of the United States. Elaborate arguments for the bank were made by Webster, Wirt (as Attorney-General) and Pinkney, and for the State of Maryland by its Attorney-General and others.

It may be noticed as interesting that although the establishment of the Bank of the United States had been strongly opposed by the anti-Federalists, and the control of the government was in the hands of their successors, who had come to be known as Democrats, Monroe being President, there was no partisan feeling at this time with reference to the existence of the bank. Its powers had been extended, with the approval of Jefferson, during his administration, and its charter had been renewed under the administration of Madison. The fact is, that strongly as Jefferson and his political sympathizers had resisted every measure calculated

to make the government of the United States under the Constitution effective, they cheerfully accepted the machinery provided for them by Hamilton and his associate Federalists, and administered it with great satisfaction to themselves, and with eminent success.

The case involved, therefore, not in a partisan, but in a fundamental way the ultimate question of the authority of a State to interfere with the operations of a corporation created by the United States, and I know of nothing to indicate that the Democratic administration sympathized with the effort of the State to interfere by discriminative legislation with the discharge by the bank of its functions as a creature of the federal government. Nevertheless the original contention that the federal government had no authority under the Constitution to charter a banking corporation, coupled with the further argument that even though such action had been justifiable on the ground of necessity when the bank was first created, the necessity had disappeared and the power no longer existed, was urged upon the court, and in disposing of this contention Chief Justice Marshall had occasion to announce in plain terms, and as the result of an incontestable course of reasoning, the rule as to implied powers, and the doctrine of liberal interpretation.

It is impossible to reproduce here, even in outline, the points of his argument. His unanswerable logic has never been refuted, and in fact no systematic attempt has ever been made to refute it, and his conclusion that, although the government of the United States is one of enumerated and not of general powers, yet under the authority given by the Constitution to Congress to make "all laws which shall

be necessary and proper for carrying into execution" the powers vested in it, Congress has authority to pass all laws appropriate to the exercise of the authority conferred upon it, is announced in one cogent sentence:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional.[1]

But let it be observed that this doctrine, neither in its theory nor its application, involved the general assertion of unlimited power within the discretion of Congress as to the unexpressed purposes for which the federal government was created. Marshall puts his finger on the express provisions of the Federal Constitution from which the power to create a bank must necessarily and properly be inferred, and uses no language which would relieve us from the necessity of putting our fingers on the specific provisions of the Federal Constitution relied upon when we assert for the federal government an implied power.

In determining the other branch of the case, that is, the question of the power of the State to interfere by taxation or other discriminative legislation with the exercise of its legitimate powers on the part of the federal government, the opinion of the Chief Justice is equally fundamental in the premises assumed and conclusive as to the results reached. Here again he founds his reasoning on the language of the Constitution itself:

> This constitution, and the laws of the United States which shall be made in pursuance thereof * * * shall be the supreme law of the

[1] 4 Wheaton, 421.

land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Whatever be the power given to the federal government, in the exercise of that power it is supreme, and no State authority can limit or interfere with its assertion; and from this premise, found in the fundamental charter which the people have given to the federal government, follow conclusions as far reaching in their logical scope as they have been beneficent in their application. Indeed, the case of *McCulloch v. Maryland* has furnished the clew for the solution of a multitude of questions arising in the operation of our complex system of government, involving as it does a divided sovereignty as between the States and the federal government, each sovereign and supreme within the scope of its legitimate powers. I need not trace the line of subsequent decisions as to the right of the States to interfere with the operations of banks chartered by the federal government by taxation or otherwise, except in so far as the right of taxation is conceded to the States by the federal authority.

In the subsequent case of *Osborne v. United States Bank*, the whole matter was again reviewed by the Supreme Court in the light of arguments by Webster and Clay in support of the federal power, resisted in this instance by the State of Ohio, which, without resorting to the forms of taxation, had appropriated to itself by way of penalty or forfeiture a part of the property of the United States Bank. Chief Justice Marshall in an elaborate opinion in this case again went over the whole ground. Nor need I refer to the subsequent cases in which the principles announced in *McCul-*

loch v. Maryland were applied in determining that, without the consent of the United States, no State can levy taxes upon the notes, bonds or other securities issued by the federal government in the exercise of its legitimate functions. But the conclusive solution of the whole question as to the right of a State to tax the agencies or instrumentalities which the United States government sees fit to make use of in the exercise of the authority vested in it by the Constitution is found in the terse statement by the Chief Justice that the power to tax or regulate involves the power to destroy, and that the power on the part of a State to destroy is hostile to and incompatible with the power of the federal government to create and preserve, and that where any such repugnancy exists that authority which is supreme must control, not yield, to that over which it is supreme." "The sovereignty of the state," he says, "extends to everything which exists by its own authority, and is introduced by its permission, but it does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States."[1]

The same line of reasoning has been followed in the many cases involving the validity of State laws as affecting interstate commerce. The first of these was that of *Gibbons v. Ogden*, in which the right of the State of New York to give an exclusive franchise to private parties for the purpose of operating vessels propelled by steam power upon the waters within the jurisdiction of that State was questioned. As illustrating the importance of the case, the interesting fact

[1] 4 Wheaton, 429.

was pointed out in the arguments of counsel that the State of Connecticut absolutely excluded from the waters within its jurisdiction, including a portion of Long Island Sound, those vessels having a license from the State of New York, while the State of New Jersey, under a system of reprisal, was imposing upon vessels entering into its waters with New York license the same penalties that were imposed by the State of New York on vessels coming from New Jersey and interfering with the exclusive privilege which New York had given. In other words, the States of Connecticut and New Jersey were in an attitude of hostility towards the State of New York with reference to commerce coming from that State on account of the attempt of New York to grant an exclusive monopoly to steam navigation within its own waters. That such a conflict might ultimately lead to consequences as disastrous to commerce as a state of war was evident, and yet, unless there was something in the Federal Constitution to render invalid such State legislation, there was no reasonable hope for relief from the resulting interference with interstate commerce.

Gibbons was the owner of certain vessels operated by steam, and had obtained from the United States a license to engage in the coasting trade, a trade which Congress assumed power to regulate by virtue of the provisions of the Constitution giving it authority with reference to foreign and interstate commerce. Ogden, as the assignee of the rights of Livingston and Fulton, who had the exclusive monopoly from the State of New York, sought in the courts of New York to enjoin Gibbons from operating his vessels within the limits of the State, even though coming into its

waters from another State, and, therefore, being engaged in carrying on commerce among the States. In the Supreme Court of New York, and on appeal in the Court of Errors of the same State, the exclusive monopoly granted to Livingston and Fulton had been upheld as against the contention that it interfered with Gibbons' rights under the Constitution of the United States to carry on interstate commerce, and especially to operate his vessels in New York waters under the license given him by the federal government. Gibbons appealed to the Supreme Court of the United States, and his case was presented to that tribunal by Webster and Wirt, who took the broad ground that State interference with interstate commerce was invalid. Emmett on the other side contended that the powers of the federal and State governments as to interstate commerce were coördinate, there being nothing in the language of the Constitution to indicate an intention to make the authority of the United States in that respect exclusive.

The opinion of Chief Justice Marshall contains an exposition of the nature of the power to regulate interstate commerce, declares that such regulation extends to navigation, and every species of commercial intercourse among the States, and does not stop at the external boundaries of the State, and the court supported him unanimously in the conclusion that the exclusive privileges granted to Livingston and Fulton were invalid so far as they were invoked to prevent such commerce. As indicating the original and fundamental character of the reasoning employed it may be interesting to note that Webster and Wirt cite but two or three authorities in the course of their extended arguments, as

reported in the Supreme Court reports, and that, although many authorities are referred to on the other side, the Chief Justice cites none whatever in his extended and elaborate opinion. Where the conclusion reached must depend upon reasons which could not in the nature of things have been presented to other courts for conclusive adjudication he evidently thought that the strength of the reason, and not the multitude of authorities which might be collaterally referred to, would alone justify the conclusions reached.

Again, in *Brown v. Maryland*, the question as to the power of a State to interfere with interstate commerce was presented to the court. Brown had brought into Maryland a cargo of goods, paying the United States import duty. The State of Maryland attempted to compel him to pay a tax for the privilege of selling these goods, imposed on importers only, by way of a license, and it was contended by counsel for Brown, one of whom was Wirt, that this was an unconstitutional interference with the power of Congress under the authority given to it to regulate foreign and interstate commerce. Taney on the other hand, as counsel for the State of Maryland, contended that this was not a duty on imports, nor was it an interference with the power of Congress to regulate commerce. But the Chief Justice expressed the opinion of the court to the effect that such a license tax was in effect a duty on imports, and also that it was an interference with the power of Congress under the commerce clause, and suggested that the same objection would exist if an attempt were made to impose such a license tax on the sale by the importer of goods brought into a State from a sister State. This case is notable because it contains

the first pronouncement of the court with reference to original packages, and it is a case constantly referred to as fundamental in the subsequent discussion, which has extended down to the present time, as to the authority of a State, in the exercise of its power of police regulation, to interfere with the sale of goods which are brought into the State in pursuance of interstate commerce.

It is impossible to pursue further the ramifications of the controversies which have constantly arisen, and must still arise, in determining the respective limits of State and federal authority. One other class of cases, however, must be referred to, namely, those involving the power of the Supreme Court of the United States to review the action of the highest tribunals of a State in cases involving some right, privilege, or immunity claimed under the Constitution, laws, or treaties of the United States wherein the decision has been against the person relying on such right, privilege, or immunity. The question was first discussed and elaborated by Justice Story in *Martin v. Hunter's Lessee*, on writ of error from the Court of Appeals of Virginia; but later, in *Cohens v. Virginia*, the whole subject was elaborately reargued by Barbour, later one of the justices of the Supreme Court and an extreme strict constructionist, on the one hand, and by Ogden and Pinkney on the other, and Chief Justice Marshall, delivering the opinion, shows the magnitude of the questions involved by saying that the contention on the part of the State of Virginia is that "the nation does not possess a department capable of restraining peaceably and by authority of law any attempts which may be made by a part against the legitimate powers of the whole, and that

the government is reduced to the alternative of submitting to such attempts or of resisting them by force." "They maintain," he says, "that the Constitution of the United States has provided no tribunal for the final construction of itself or of the laws or treaties of the nation, but that this power may be exercised in the last resort by the courts of every state in the Union; 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." Quoting then the language defining the power of the federal judiciary, he continues:

> The American states, as well as the American people, have believed a close and firm union to be essential to their liberty and to their happiness. They have been taught by experience that this union cannot exist without a government for the whole, and they have been taught by the same experience that this government would be a mere shadow that must disappoint all their hopes unless invested with large portions of that sovereignty which belongs to independent states.[1]

Without further quotation it is sufficient to say that the court entertained no doubt under the language of the Constitution of its power to review the action of the highest tribunal of a State wherein a right or privilege claimed under the Constitution or laws of the United States was denied, and declared that if the Constitution or laws may be violated by proceedings instituted by the State against its own citizens, and if that violation may be such as to essentially affect the Constitution or laws, such as to arrest the progress of the government in its constitutional course, these cases should not be excepted from those provisions which

[1] 6 Wheaton, 380.

expressly extend the duties and power of the Union to all cases arising under the Constitution and laws.

As to the power of the Supreme Court to enforce its judgments as against those acting under State authority, Chief Justice Marshall had already said in a previous case:

> If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania [the case was one arising in that state] as well as the citizens of every other state must feel a deep interest in resisting principles so destructive of the Union and in averting consequences so fatal to themselves.

As the great interpreter for all time of the rules to be followed in construing the fundamental law and the authority of the Supreme Court to give a final and conclusive interpretation binding on all as to the construction of that Constitution and of the laws passed by Congress; as the first judicial champion of the supremacy of federal authority as embodied in the declarations of the Federal Constitution, the acts of Congress passed in pursuance thereof and the decisions of the federal courts interpreting and applying them, and the supremacy of the federal government over the States in those matters as to which the federal government is by the Constitution given authority, Chief Justice Marshall stands preëminent and without comparison as a judge and a statesman.

In justice to the subject, however, I must give one further illustration of the incontestable skill with which Chief Justice Marshall dealt with new and difficult questions. In

the case of *American Insurance Company v. Canter*[1] decided in 1828, was involved the relation of Florida, recently acquired from Spain and having a territorial government, to the United States. On the one side it was argued by Ogden that the Constitution of the United States at once extended over the newly acquired territory so that admiralty cases, which by the Federal Constitution are within the jurisdiction of the federal courts, could not be adjudicated by courts created by the legislature of the territory under the legislative power given to it by Congress; while on the other hand it was contended by Webster that the Constitution of the United States had no application to the government of a territory like this, formed out of the newly acquired province. These arguments have a familiar sound. They seem to suggest the question whether the Constitution follows the flag. But just as a patient investigation of the difficulties arising out of the recent acquisition of new territory will show that no glittering generality will furnish a satisfactory solution, so Chief Justice Marshall, in the decision of this case, committed himself to no broad generalization, but proceeded to ascertain the exact controversy before the court and to apply to its solution the plain tests furnished by careful constitutional interpretation.

He reached the conclusion that "under the power of making war and making treaties, the goverment of the United States possesses the power of acquiring territory, either by conquest or by treaty." Inasmuch as the treaty with Spain by which the territory was acquired, provided that the inhabitants thereof should be admitted to the enjoyment of

[1] 1 Peters, 511.

the privileges, rights, and immunities of citizens of the United States, he found it unnecessary to determine whether without such provision the inhabitants would be in that condition. He found further that under the power to "make all needful rules and regulations respecting the territory or the property of the United States," Congress had authority to establish a territorial government and to authorize that government to establish courts, and he concluded that the power of Congress in providing either directly for the establishment of courts or in authorizing the territorial legislature to provide for such courts, was not limited by the language of that article of the Constitution defining the jurisdiction of the federal judiciary; in other words, that in providing for the government of acquired territory Congress is not limited to those enumerated powers conferred upon it with reference to territory and people existing under the established governments of the States of the Union. What he decided has long been acquiesced in without controversy. His authority is invoked on each side of the question still unsettled as to the relations of the inhabitants of our newly acquired territories to the federal government. Nothing could more conduce to a satisfactory solution of present uncertainties growing out of the new situation confronting the Supreme Court than that patient, clear, impartial, and statesmanlike frame of mind which Chief Justice Marshall so successfully employed in the solution of the greater and more difficult questions with which the Supreme Court was confronted during the thirty-five years of his administration as Chief Justice.

It is not necessary for a just and proper appreciation of the services which Marshall rendered to his country to maintain that his contributions were greater than those of any

other. Many States together make the Union, no one is primarily essential to its existence; there are three departments of the government, no one of which is superior to the other two; great men contributed their strength and their wisdom to the development of our system of government, but it is not for us to say that the contribution of one was essential or valuable rather than that of another. Washington was the great leader, holding together discordant elements and influences which, without his power of command, would have made for separation and rendered independence and union impossible. Hamilton furnished the great organizing brain, which, with marvelous skill and foresight, proposed the measures of finance and admistration which were essential to bring order out of chaos and infuse strength into weakness. Jefferson brought the scheme of government into responsive touch with the popular will, without which it could not have permanently existed. Marshall expounded the principles which must govern the various departments in their relation with one another and the federal government in its relation with the States in order that by peaceful means all controversy should be determined and all friction avoided. Had the true force and significance of the principles he announced been appreciated and recognized, even an attempt at disunion would have been impossible. It was not his fault that such an attempt was made, but it is to his perpetual glory that the principles which he announced have prevailed over all opposition, and that the great and enlightened government of a reunited country continues to recognize them as the landmarks by which its course is guided.

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