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FOREWORD: A SILK PURSE?

*John T. Noonan, Jr.**

On March 2, 1801, President John Adams appointed forty-two persons to be justices of the peace in the District of Columbia.¹ John Marshall, doubling as Secretary of State as well as Chief Justice, failed to deliver the commissions. Adams's term expired. James Madison, Marshall's successor as Secretary of State, withheld seventeen of the commissions. In 1802, William Marbury and three other appointees to this minor office brought mandamus against Madison in the Supreme Court.² Madison was ordered to show cause why the writ should not issue. Congress abolished the June sitting of the Court. Only in 1803 was the case argued.

In an opinion famous for its brilliance and its bluntness, Chief Justice Marshall wrote: "It is emphatically the province and duty of the judicial department, to say what the law is."³ And he went on to say that if the law and the Constitution are in conflict, "the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."⁴ The conflict was resolved by the justices' oath to uphold the Constitution.⁵ On that premise, Marshall held the Judiciary Act of 1789, authorizing the Supreme Court to issue writs of mandamus, violated Article III of the Constitution and was therefore void.⁶ The court was without jurisdiction to hear Marbury's suit. The icing on the cake — John Marshall's special brand of icing⁷ — was that the side that hated his principle, Madison's side, could not appeal his conclusion because it had won the case.

A silk purse out of a sow's ear? The case arose from a failure in Marshall's duty as Secretary of State, a failure for which he feared "some blame may be imputed to me."⁸ The decision held unconstitu-

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1. 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 110 (Houghton Mifflin 1929) (1919).

2. *Id.* at 111.

3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

4. *Id.* at 177-78.

5. *Id.* at 180.

6. *Id.* at 173.

7. *Cf. Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

8. 3 BEVERIDGE, *supra* note 1, at 124 (quoting Marshall to his brother James M. Marshall, March 18, 1801 (internal quotation marks omitted)).

tional a provision of the Judiciary Act passed by a Congress dominated by Federalists and containing at least thirteen Framers of the Constitution.⁹ The decision invalidated a provision already used by the Court without question to decide a case.¹⁰ The decision held the Court to be without jurisdiction to hear the suit, so what more could the Court say than that it lacked jurisdiction?¹¹ The general statement of the Court's duty to void unconstitutional statutes must have been dictum going far beyond the immediate issue. The dictum emerged against a political background in which the Jeffersonian Republicans, triumphant in the election of 1800, had announced plans to tame the antidemocratic rule of the Federalist judiciary; Marshall felt the need to confront the political challenge.¹² All of these aspects of *Marbury* are what made it a political can of worms or the proverbial sow's ear. Precedent for a court invalidating legislation existed in the practice of the highest court of Virginia.¹³ Still, what nation had a court monitoring all its laws? The power of the court to interpret law was itself a great power. "Its interpretation makes the law," as an old maxim of the canonists puts it.¹⁴ To go beyond interpretation to nullification was a quantum jump. But out of a bureaucratic bungle, a surprise attack on a statute enacted by the First Congress, and a disavowal of jurisdiction emerged an invention dazzling in its reach, supported by reasoning whose cogency seems undeniable. *Marbury v. Madison*, whose 200th anniversary we commemorate this weekend, does look like the proverbial silk purse.

It is my purpose tonight to put before you what *Marbury* has spawned and ask if it is a purse to be prized. First, some vital statistics. Since 1803, there have been 156 cases in which the Supreme Court has held acts of Congress unconstitutional.¹⁵ This number is modest in comparison with the 1,150 cases holding state laws unconstitutional.¹⁶ Of the 156 federal cases, ten have involved the District of Columbia, which was treated as a state might have been,¹⁷ so that only 146 cases have involved the exercise of truly national power by Congress. The

9. *Id.* at 129.

10. *United States v. Lawrence*, 3 U.S. (3 Dall.) 42 (1795).

11. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998).

12. 3 BEVERIDGE, *supra* note 1, at 131.

13. *Cases of the Judges*, 8 Va. (4 Call) 135 (1788); *Commonwealth v. Caton*, 8 Va. (4 Call) 5 (1782).

14. JOHANNES TEUTONICUS, GLOSSA ORDINARIA ON COMPILATIO TERTIA 5.23.6, at *intelligere volumus*.

15. *See THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 999-1031 (Johnny H. Killian et al. eds., 1997).

16. *Id.* at 2035-491 (The number of cases is as of 2000).

17. *Id.*

number of invalidations has been rising — only one from 1803 to 1866; only twenty-six for the entire nineteenth century; the remaining 120 from 1900 through 2002, with thirty-seven since 1986 by the Rehnquist Court.¹⁸ If judicial activism means preferring judges' view of the constitutionality of legislation to that of legislators, this court has been the most judicially active court in our history.

I turn from statistics and trends to a different kind of question. Has John Marshall's invention been exercised for good, for bad, or for results that either did not matter or could have been reached by a different route?

By "a different route," I mean on the basis of a principle that did not make the Supreme Court supreme over the two other coordinate branches of the federal government on most questions of what the Constitution means. To illustrate what I mean, the Court in *Marbury* could have held that the judicial power was peculiarly within the competence of the judiciary, so that the Supreme Court alone had power to decide what jurisdiction Congress correctly conferred upon it. The assertion of the power to protect one's own turf, as it were, would not necessarily imply a power to judge all acts of Congress.

It may be objected, How can constitutional review be so arbitrarily limited to Article III questions? The answer is that, as the power has been invented without any express constitutional basis, it may be limited as seems prudent to the Court. One can as easily ask, Why does the Court not extend its power to decide constitutional disputes within Congress or involving foreign affairs or bearing on actions by the military? Logically, there is no reason for the Court to shirk its constitutional task in these areas. The Supreme Court of Israel does not.¹⁹ Just as prudence keeps our Supreme Court out of such matters, so judicial restraint could limit it to Article III questions.

If the Court took upon itself only the interpretation of Article III of the Constitution, it could have invalidated a number of the acts it did invalidate *and could have done so without* asserting a general supremacy over Congress. Article III is explicit: "The judicial Power of the United States, shall be vested in one supreme Court . . ." ²⁰ This grant of power is broad enough to confer upon the Court the power to rebuff all congressional intrusions upon it and to regulate all congressional variations of it. For example, the five cases of the 1950s and 1960s invalidating the extension of the jurisdiction of military tribunals over civilians could all be decided as congressional invasions of Article

18. *Id.*

19. Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 98-100 (2002).

20. See U.S. CONST. art. III, § 1.

III.²¹ The twenty-four cases invalidating congressional regulation of civilian trials also fall within the scope of Article III.²² So, for example, the Supreme Court could have decided the application of the Seventh Amendment in 1869 in *Justices v. Murray*²³ to prevent retrial after a jury acquittal in federal court; so in 1965, it could have decided *United States v. Romano*²⁴ by holding invalid the presumption of guilt from presence at the scene of a crime; and so in 1969, it could have decided *Leary v. United States*²⁵ by invalidating the presumption of knowledge that drugs are imported. Other examples are *Wong Wing v. United States*²⁶ in 1896, which invalidated summary criminal proceedings out of court; *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*²⁷ in 1982, holding that bankruptcy judges cannot exercise the powers of Article III judges; and *Plaut v. Spendthrift Farm, Inc.*²⁸ in 1995, deciding that the Securities and Exchange Commission could not be given the power to reopen a judgment of a federal court.²⁹

The list could be extended; there are at least fifteen more such cases. The examples suggest how effective Article III alone, or used in conjunction with other constitutional provisions, would be in preserving the integrity of the judicial branch. Indeed, when the courts are regarded as the repository of Article III power, and that alone, the use of the courts to appoint federal defenders and bankruptcy judges and the use of the courts to decide extradition cases raise constitutional questions worthy of examination.³⁰

The one area where I would think judges cannot use Article III or any other basis to protect themselves is that involving their own salaries. A judge who has a financial interest in a case is no longer a judge.³¹ Necessity cannot remove incapacitating interest and make him

21. See *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

22. See, e.g., *Haynes v. United States*, 390 U.S. 85 (1968); *Marchetti v. United States*, 390 U.S. 39 (1968); *Kirby v. United States*, 174 U.S. 47 (1899).

23. 76 U.S. (9 Wall.) 274 (1869).

24. 382 U.S. 136 (1965).

25. 395 U.S. 6 (1969).

26. 163 U.S. 228 (1896).

27. 458 U.S. 50 (1982).

28. 514 U.S. 211 (1995).

29. See *Plaut*, 514 U.S. at 211; *N. Pipeline Constr. Co.*, 458 U.S. at 50; *Wong Wing*, 163 U.S. at 228.

30. The appointment of attorneys and other judges is not an exercise of judicial power. In extradition cases it may be argued that the courts are only advising the Executive Branch. See *LoBue v. Christopher*, 893 F. Supp. 65 (D.D.C. 1995), vacated by 82 F.3d 1081 (D.C. Cir. 1996).

31. See, e.g., *Hall v. Thayer*, 105 Mass. 219 (1870).

or her impartial. *United States v. Will*³² in 1980 was decided ignoring this principle, and there are other examples.³³

Now let's look at cases where, at least in the long run, the employment of John Marshall's wonderful invention didn't make much difference. In this category, I put, argumentatively, the cases involving the respective powers of Congress and the President. To take two notable examples, in *Myers v. United States*³⁴ in 1926, the Court, under Chief Justice Taft (an ex-president), held that Congress could not restrict the president's power to remove appointees of the president.³⁵ In 1998, in *Clinton v. City of New York*, the Court held that the President could not be given a line item veto over an appropriation.³⁶ In the short run, no doubt, each decision was significant. But in the long run, power flows back and forth from the executive branch to the legislative branch, and vice versa. Imbalances tend to right themselves. Is a benevolent umpire really needed? One may inquire whether what Learned Hand called "a bevy of Platonic Guardians" was necessary in the ten cases in this category.³⁷

Another type of case is where the immediate decision did not make much difference, and any principle established could have been established in a more significant case or was already known. In this category fall *United States v. Dewitt*³⁸ in 1869, holding that Congress could not regulate the sale of naphtha; *In re Heff*³⁹ in 1905, holding that Congress could not prohibit liquor sales to Native Americans, a decision overruled eleven years later; and *Coyle v. Smith*⁴⁰ in 1911, declaring invalid a provision in the act admitting Oklahoma as a state that fixed the location of the state capital for three years in Guthrie. Not entirely trivial but wasteful of time and legislative energy are cases like the *Trade-Mark Cases*⁴¹ of 1879, holding that Congress had no power under the Patents and Copyright Clause to protect trademarks. Of course in 1881, Congress exercised its power under the Commerce Clause to do that very thing.⁴²

32. 449 U.S. 200 (1980).

33. See *United States v. Hatter*, 532 U.S. 557 (2001); *Booth v. United States*, 291 U.S. 339 (1934); *Evans v. Gore*, 253 U.S. 245 (1920).

34. 272 U.S. 52 (1926).

35. *Myers*, 272 U.S. at 52.

36. 524 U.S. 417 (1998).

37. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

38. 76 U.S. (9 Wall.) 41 (1869).

39. 197 U.S. 488 (1905), *overruled by* *United States v. Nice*, 241 U.S. 591 (1916).

40. 221 U.S. 559 (1911).

41. *Trade-Mark Cases*, 100 U.S. 82 (1879).

42. See *Trademark Act of 1881*, ch. 138, 21 Stat. 502 (1881).

Value judgments, no doubt, are involved in saying these cases didn't make much difference, and I have no doubt that my examples could be disputed or extended. I enter upon what is, perhaps, more perilous: to give examples where exercise of the Court's power was a serious mistake, bad for the country and not good for the Court.

The most famous example is *Dred Scott v. Sandford*⁴³ in 1856, a decision that not only voided the carefully worked out Missouri Compromise, but helped bring on the Civil War; a decision that not only prevented Congress from prohibiting slavery in the territories of the United States but held that no descendent of a slave could ever be a citizen of the United States; a decision that didn't even need deciding because it was a fake case, made up by pro-slavery partisans who wanted the opinion of the pro-slavery Supreme Court.⁴⁴

Not quite in this rank category but bad enough are the decisions of 1883 — *United States v. Harris*,⁴⁵ voiding the post-Civil War law against conspiracy to lynch African Americans, and *The Civil Rights Cases*,⁴⁶ voiding the law on discrimination against them in hotels and restaurants. *The Civil Rights Cases* of 1883 are the operative precedent for *United States v. Morrison*⁴⁷ in 1996, holding unconstitutional the federal civil remedy provided in the Violence Against Women Act of September 13, 1994.

Only slightly better in this hierarchy of the bad — I speak not as a judge but as an observer of popular opinion — is the case attempting to outlaw labor for more than eight hours a day or more than six days a week in manufacturing by children under the age of fourteen, *Hammer v. Dagenhart*⁴⁸ in 1918, and the case of another federal law attempting to tax similar exploitation of the young, *Bailey v. Drexel Furniture Co.*⁴⁹ in 1922.

One can go a little higher to the whole batch of cases that constituted the assault by the Court on the New Deal — an assault mounted almost immediately after the passage of the legislation attacked. Here are *A.L.A. Schechter Poultry Corp. v. United States*⁵⁰ in 1935, denying Congress the power under the Commerce Clause to authorize codes of

43. 60 U.S. (19 How.) 393 (1856).

44. See John T. Noonan, Jr., *Book Review*, 1979 ARIZ. ST. L.J. 281-92 (reviewing DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS*).

45. 106 U.S. 629 (1883).

46. 109 U.S. 3 (1883).

47. 529 U.S. 598 (2000).

48. 247 U.S. 251 (1918) (also known as *The Child Labor Case*).

49. 259 U.S. 20 (1922) (also known as *The Child Labor Tax Case*).

50. 295 U.S. 495 (1935).

fair competition; *Panama Refining Co. v. Ryan*⁵¹ in 1935, denying Congress the power to delegate power to the President to regulate oil production; *United States v. Butler*⁵² in 1936, holding the Agricultural Adjustment Act not to be within the tax power of Congress; and *Carter v. Carter Coal Co.*,⁵³ a collusive suit, in which the Commerce Clause power was held not to embrace employer-employee relations in mining. These cases of the mid-1930s are particularly striking in presenting a deeply divided court, with the embattled majority intent upon what many saw as a political struggle with a popular president.

I go from these cases to those of more recent vintage in which the Court has affirmed the immunity of the states from suits for damages for their violation of federal law. In particular, there are *Alden v. Maine*⁵⁴ in 1999, affirming state immunity from damages under the Fair Labor Standards Act; the two *College Savings Bank*⁵⁵ cases in 1999, protecting state-sponsored insurance schemes from suit under the patent laws or under the trademark laws; *Kimel v. Florida Board of Regents*⁵⁶ in 2000, denying recovery from a state under the Anti-Discrimination in Employment Act; and *Board of Trustees of the University of Alabama v. Garrett*⁵⁷ in 2001, preventing recovery from the state under the Americans with Disabilities Act. This batch of cases represents the reaffirmation of state sovereignty that was first asserted to be of constitutional dimensions in *Hans v. Louisiana*⁵⁸ in 1890. The cases also reflect the discovery of a new constitutional principle that requires the federal judiciary to determine whether Congress, in legislating under the Fourteenth Amendment, has established a record that shows a pattern of evil on a national scale and has then enacted a remedy congruent with and proportionate to the evil identified by the record.⁵⁹

After this chronicle of decisions ranging from the truly terrible to those where reasonable jurists might disagree as to the premises and the policies embraced, what about the good that has been achieved by John Marshall's mighty device for correcting error? It has worked spectacularly well in an area that could be deprecated as merely symbolic. But we live by symbols, and the symbols are those celebrating

51. 293 U.S. 388 (1935).

52. 297 U.S. 1 (1936).

53. 298 U.S. 238 (1936).

54. *Alden v. Maine*, 527 U.S. 706 (1999).

55. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999).

56. 528 U.S. 62 (2000).

57. 531 U.S. 356 (2001).

58. 134 U.S. 1 (1890).

59. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

our basic freedoms of thought and speech. I refer in particular to *Bolger v. Youngs Drug Products Corp.*⁶⁰ in 1983, invalidating the nineteenth-century Comstock law prohibiting the use of the mails to send information about contraception; *United States v. Eichman*⁶¹ in 1990, holding unconstitutional a law prohibiting desecration of the flag; and the *Legal Services Corp. v. Velazquez*⁶² case of 2001, striking limits on the speech of lawyers employed by federally funded legal aid clinics. In each of these cases, I am certain that in the long run Americans will be grateful not only that we have a Supreme Court but that it is capable of restraining popular excesses.

The Court's use of its power to invalidate campaign finance reform in 1976 in *Buckley v. Valeo* was controversial and still is,⁶³ because it equated a limit with spending with a limit on speech; the concern over corruption that the legislation embodied seemed to be trumped by a metaphor. But in the three cases I have classified as symbolic — and there are others like them — the Supreme Court has been the stalwart defender of freedom.

What is the balance? Is Marshall's machine worth celebrating and preserving? Has it cost too much in actual injury to the legislative process and the common good? By my imperfect and controversial count, use of the general power of invalidation was unnecessary at least sixty-three times, harmful seventeen times, and necessary and beneficial three times. If these figures are extrapolated to all 146 instances, it looks as though only seven times or five percent of the time has the power been truly useful.

Is the power too deep in our democratic process as we understand it in America to be cut back in any way? It is plain that a survey of decided cases does not reveal the number of times the existence of the power has operated as a restraint on legislative excesses that, because of its existence, are not enacted. Is it "a landmark in American history so high that all the future could take [its] bearings from it?"⁶⁴ These are questions for you to investigate and to illuminate.

60. 463 U.S. 60 (1983).

61. 496 U.S. 310 (1990).

62. 531 U.S. 533 (2001).

63. 424 U.S. 1 (1976).

64. 3 BEVERIDGE, *supra* note 1, at 142.