

Marshall's Questions

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BETWEEN LATE 1799 and early 1803, John Marshall served in all three branches of the federal government, first as a member of the House of Representatives, then as Secretary of State, and finally as Chief Justice of the United States. As a legislator and executive officer, Marshall's chief concern was with questions of politics and policy; in contrast, Marshall the judge seems memorable for his insistence that the courts deal only and impartially with questions of law. While observers have often disagreed over whether to credit the Chief Justice's claims of neutrality, they generally have agreed that those claims rested on the sharp distinction Marshall drew between questions of law and questions of politics.

And yet, twice during this brief period, once as a politician and once as a judge, John Marshall addressed the question of where questions ought to be asked and answered in a

manner that contradicted any simple distinction between law and politics. In 1800, Congressman Marshall explained to the House of Representatives that the Constitution does not vest in the federal courts the exclusive authority to decide issues arising under the Constitution, laws and treaties; while such issues are by definition questions of law, some of them are "questions of political law," and must be answered by one (or both) of the political branches of the government.¹ Three years later, Chief Justice Marshall spoke for the Supreme Court in renouncing any pretensions on the part of the judiciary to interfere with the president's resolution of questions "in their nature political" that arise in his exercise of power.²

In our constitutional tradition, John Marshall is remembered above all for what we now see as his success in making the Supreme Court's power of judicial review the centerpiece of American constitutional-

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1 Marshall Speech (March 7, 1800), in 4 *The Papers of John Marshall* 103 (Charles T. Cullen ed., 1984) (emphasis added).

2 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

ism. "Above all, Marshall asserted the authority of the Supreme Court to interpret the Constitution."³ It was Marshall who established beyond dispute that the Constitution is law, that the courts "say what the law is," and that as a consequence it is the courts that are charged with enforcing the law of the Constitution.⁴ When the Supreme Court asserts its authority to impose its views of the Constitution on the "co-equal" political branches, it is Marshall's opinions that the Court cites.⁵

This essay is not a contribution to the recent and fascinating scholarship on what exactly Marshall thought about judicial review and its constitutional limits. We are interested, instead, in what Marshall thought about the nature of political decisionmaking and its constitutional possibilities. Contemporary discussions of the "political question" doctrine often treat the claim that one of the political branches has (judicially) unreviewable authority to decide a question as, in effect and perhaps even in principle, a claim that the question is non-constitutional in nature. If the judiciary, within whose "province" lies "the duty to say what the law is,"⁶ cannot answer a question, it is easy to assume the question must sim-

ply not involve constitutional law at all. But that was plainly not John Marshall's opinion, and in this essay we will attempt to tease out what he meant when he spoke of "questions of political law" that, although genuinely questions about the law of the Constitution, must "be discussed in another place" than the courts. In his thinking about the proper "location" for questions, Marshall, we believe, suggested an understanding of law and politics that is more capacious and more attractive than the narrower views assumed in much contemporary discussion.

I

Between December 1799 and May 1800, John Marshall was a member of the United States House of Representatives.⁷ The Sixth Congress included a significant body of Federalists elected from Southern states; as a group they tended to hold less partisan views than the High Federalists of the Northeast. Marshall was generally acknowledged to be the most able of the Southerners, and he quickly emerged as the one Federalist who could bridge the divisions between moderates and High Federalists, and between Congress and the embattled presi-

3 Jean Edward Smith, *John Marshall: Definer of a Nation* 2 (1996).

4 "Beginning with *Marbury v. Madison*, [Marshall] consistently held that the Constitution was law And in matters of law, the decision of the Supreme Court was final." *Id.* The reader should not infer any criticism of Professor Smith's admirable biography. This perception of Marshall's views, in varying formulations, is widely held. In his important revisionist account of our constitutional history, for example, Professor Bruce Ackerman gives what is in the end an easily recognizable variation on the usual evaluation of Marshall. Marshall "assert[ed] that the Constitution has a superior status as higher law by virtue of its enactment by the People. Until a constitutional movement successfully amends our higher law, the Court's task is to preserve the People's judgments against their erosion by normal lawmaking." 1 Ackerman, *We the People: Foundations* 72 (1991).

5 See, e.g., *City of Boerne v. Flores*, 117 S. Ct. 2157, 2172 (1997) (citing *Marbury*); *United States v. Lopez*, 514 U.S. 549, 566 (1995) (citing *M'Culloch v. Maryland*).

6 *City of Boerne*, 117 S. Ct. at 2172 (paraphrasing *Marbury*).

7 There are good accounts of Marshall's congressional service in Smith, at 252-65, and Stanley Elkins & Eric McKittrick, *The Age of Federalism* 728-32 (1993). The editors of the Marshall Papers provide a succinct and excellent summary of Marshall's congressional career, 4 *Papers of John Marshall* 31-38 (editorial note).

dent, John Adams.⁸ Throughout the session, Marshall worked with considerable success to promote Federalist unity while accomplishing legislative goals that he believed desirable and achievable.⁹

Marshall's greatest rhetorical performance during his half-year in Congress was a speech he gave on March 7, 1800, during the House's debate on the Jonathan Robbins affair.¹⁰ Robbins was a seaman on an American merchant ship docked in Charleston harbor who was accused of being in fact a Royal Navy petty officer, Thomas Nash, wanted for committing mutiny and murder on the frigate *Hermione* in 1797. When the British consul asked the local federal authorities to turn "Nash" over pursuant to the Jay Treaty between Britain and the United States, United States District Judge Thomas Bee and the

United States district attorney at first declined to do so without the approval of the president. After President Adams "adviz[e]d and request[ed]" Bee that extradition was appropriate if the facts warranted the identification of Robbins with Nash, Bee ultimately ordered Robbins delivered to the British in July 1799 despite his last-minute claim that he was actually a native-born American citizen who had been illegally impressed into the Royal Navy. Robbins was quickly executed by the British.¹¹

The Robbins episode was tailor-made for partisan exploitation, and the Republicans in the Sixth Congress spent much of the late winter of 1800 attacking Adams for his actions. While some effort was made to paint Adams as having mercilessly turned over a persecuted American to his death, the Republican critique centered on Adams's

8 See, for example, the letter Oliver Wolcott wrote early in the session to his fellow New Englander Fisher Ames. Wolcott like other High Federalists had qualms about the reliability of Marshall's political and constitutional views: "he will think much of the State of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute." Nonetheless, in describing Marshall's work on a reply to a speech by Adams that had divided the Federalists, Wolcott explained that "[c]onsidering the state of the House, it was necessary and proper that the answer to the speech should be prepared by Mr. Marshall" since the "object was to unite all opinions, at least of the federalists." Wolcott, Letter to Ames (Dec. 29, 1799), in 2 *Works of Fisher Ames* 1337, 1336 (rev. ed. 1983).

9 As Smith summarizes Marshall's work, he "had prevented the [Federalist] party from enacting the more egregious items on its legislative agenda and had offered timely compromises to secure the enactment of national legislation on bankruptcy and the demobilization of the standing army." Smith, at 264. In particular, Marshall displayed his political courage and independence by joining with the Republicans in attempting to repeal the Sedition Act of 1798 and in defeating High Federalist efforts to vest the Federalist-dominated Congress with control over the outcome of the 1800 presidential election. *Id.* at 263-64.

10 Albert Gallatin, the intellectual leader of the House Republicans, refused to reply to Marshall: "Gentlemen," said Gallatin, "answer it yourself. For my part, I think it is unanswerable." Smith, at 262. See also Thomas Jefferson, Letter to James Madison (Mar. 8, 1800), in 17 *Papers of James Madison* 368 (David B. Mattern et al. eds., 1991) (summarizing the debate over Robbins and stating that "[Edward] Livingston, [John] Nicholas & Gallatin distinguished themselves on one side & J. Marshall greatly on the other").

11 On the Robbins affair, see Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 *Yale L.J.* 229 (1990), and Larry D. Cress, *The Jonathan Robbins Incident: Extradition and the Separation of Powers in the Adams Administration*, 111 *Essex Institute Historical Collections* 99 (1975). Cress's article shows that Robbins's claim of United States citizenship, despite its suspicious timing, may well have been correct. *Id.* at 116-18. On the importance and interpretation of Marshall's speech, see H. Jefferson Powell, *The Founders and the President's Authority over Foreign Affairs*, 40 *Wm. & Mary L. Rev.* 1471 (1999).

alleged violation of the Constitution's separation of powers. The Republican logic, according to resolutions introduced by Edward Livingston, was straightforward. The Constitution "declares that the Judiciary power shall extend to all questions arising under the Constitution, laws, and treaties of the United States, and to all cases of admiralty and maritime jurisdiction." The legal issues raised by the accusations against Robbins all arose "from treaties, laws, Constitutional provisions, and cases of admiralty and maritime jurisdiction." Therefore, Adams's "decision of those [exclusively judicial] questions ... against the jurisdiction of the courts of the United States," was "a dangerous interference of the Executive with Judicial decisions," and Judge Bee's compliance was "a sacrifice of the Constitutional independence of the Judicial power."¹²

Livingston's resolutions, Marshall responded, rested on a false premise that vitiated his entire argument. Livingston asserted that the Constitution extends "the judicial power ... to all questions arising under the constitution, treaties and laws," but in fact Article III vests the judiciary with power over "all cases in law and equity arising under the constitution, laws and treaties of the United States." The difference between Livingston's inaccurate paraphrase and the Constitution's language was, Marshall said, "material and apparent," for two distinct but mutually reinforcing reasons. First, the words actually employed by Article III clearly limited the jurisdiction of the federal courts to a defined subset of the questions that could arise under the Constitution, the laws and treaties.

A case in law or equity was a term well understood, and of limited signification. It was a

controversy between parties which had taken a shape for judicial decision. ... To come within this description, a question must assume a legal form, for forensic litigation, and judicial decision. There must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit.¹³

At the same time, secondly, the powers vested in Congress and the president necessarily and regularly require each of the political branches to answer questions of law. The passage of legislation demands judgment about the constitutionality of the legislation proposed; no rule of law can be faithfully executed without decisions as to its meaning and application. In a system that was defined, as Livingston had rightly said, by a constitutional "division of powers" and by "the duty of each department to resist the encroachments of the others," the notion that the judiciary has exclusive authority to interpret the Constitution, statutes and treaties was self-refuting.

If the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power which the gentleman had stated, could exist no longer, and the other departments would be swallowed up by the judiciary.¹⁴

The purpose of this part of Marshall's argument was to establish the ground for rejecting the false logic that because the Robbins case must have involved "points of law" those points – and thus the basic question of his extradition – "could only have been decided in

¹² 10 *Annals of Congress* 533.

¹³ Marshall Speech, at 95.

¹⁴ The quotations in this paragraph are all from Marshall Speech, at 95.

court."¹⁵ By itself, of course, the conclusion that the political branches must and therefore can address "points of law" is compatible with the belief that the courts possess the ultimate power to answer all legal questions. On this view, while the judiciary's practical ability to enforce its interpretations of the law may be limited to those questions that "assume a legal form, for forensic litigation," the authority of its interpretations extends in principle to those decisions that must be decided with de facto finality by the political branches. Some of Marshall's contemporaries appear to have held this belief, and it underlies much of the court-centered constitutional thinking of the present day.¹⁶

Marshall, however, was of a different view, and in his speech he went on to argue that there are legal issues that even in principle the courts cannot answer – in other words, that our constitutional system gives the *political* branches exclusive, de jure authority to answer some questions of *law*. This latter assertion emerged during the course of Marshall's refutation of the Republicans' "if legal/then judicial" reasoning. Livingston had cited the Washington administration's dealings with the problems arising out of privateering by the European powers during the 1790s as execu-

tive-branch precedent for the assertion that the courts had final authority over questions about the international obligations of the United States. Marshall conceded that the federal courts had rightly resolved disputes over the legal ownership of prize ships when they took the form of private lawsuits,¹⁷ but he denied the further claim that judicial resolution of such cases demonstrated executive subordination to the courts' views on the nation's international rights and duties. In fact, Marshall explained, not only had President Washington maintained his authority to resolve individual cases "brought before the executive as a national demand" rather than "carried before a court as an individual claim," but the courts had governed their decisions on "the fact" of ownership "by the principles established by the executive department."¹⁸ Far from demonstrating executive acquiescence in judicial power to decide legal issues, the prize cases demonstrated the judiciary's agreement that the final answers to some legal questions are for the executive to decide.¹⁹

For Marshall, therefore, the practical question of which branch applies the law to a particular issue was distinct from the normative question about which branch has the authority to settle the meaning of the law: some

15 *Id.* at 103. Marshall continued immediately that "[a] variety of legal questions must present themselves in the performance of every part of executive duty, but these questions are not therefore to be decided in court."

16 Justice William Johnson wrote in 1808 that "the courts are the constitutional expositors" of the laws of the United States; it follows, he continued, that "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." Public Statement (Aug. 26, 1808), in H. Jefferson Powell, *Languages of Power* 237 (1991). Cf. *City of Boerne*, 117 S. Ct. 2157.

17 "Individuals on each side claimed the property, and therefore their rights could be brought into court, and there contested as a case in law or equity." Marshall Speech, at 99.

18 *Id.* at 99, 101.

19 Marshall neatly turned on its head the argument that a political branch must follow the courts' (presumed) views on legal principle even in cases where the political decision is unreviewable. While the Washington administration had conceded that it had no power "to dismiss or decide upon [an individual prize] claim ... pending in court," and thus the court's decision as to "the fact" whether the particular ship was a lawful prize was final, the administration had asserted its own authority to "settle the principle" that the courts would apply. *Id.* at 99.

“cases in law or equity” that the courts adjudicate are governed by the legal interpretations of the political branches just as some political decisions presumably must conform to the courts’ understanding of the law. How does one determine, then, whether it is the judiciary or the political branch which has final normative authority? The answer Marshall pointed to was the presence or absence, within the question of *law*, of issues involving *political* judgment.

The question whether vessels captured within three miles of the American coast, or by privateers fitted out in the American ports, were legally captured or not, and whether the American government was bound to restore them if in its power, were questions of law, but they were questions of political law, proper to be decided and they were decided by the executive and not by the courts.

Marshall immediately cited the question debated in 1793 of the United States’s obligations to France under the 1778 treaty of alliance as another such “question of political law.” “The *casus foederis* of the guaranty was a question of law but no man would have hazarded the opinion; that such a question must be carried into court, and can only be there declared.”²⁰ The ultimate legal question posed by the Robbins episode, whether the United States was obliged to honor the British request for extradition, Marshall concluded, was similar to the prize cases and “the case of the late guarantee in our treaty with France.”²¹

The question to be decided is whether the particular case proposed be one, in which the nation has bound itself to act, and this is a question depending on principles never submitted to courts.²²

In his speech, Marshall never paused to give an express definition of the “principles never submitted to courts” that distinguish the answer to a question of political law from one subject to judicial determination, but as we have already suggested, his meaning was rather clear from the examples he gave of “questions of political law.” The ultimate determination of issues such as the border between British America and the United States, the duty of the United States to support the French Republic in its war with Britain, and the means by which the United States ought to enforce its neutrality²³ was dependent in part on a judgment about where the nation’s interests lay, including its interests in justice to itself and others and in the preservation of national security. The federal courts lack the information to make such judgments wisely, they have no power to enforce such decisions effectively, they lack the political accountability that legitimates a claim to speak for the nation, and unlike the political branches, their decisions are not supposed to be influenced by “consequences” or “policy.”²⁴ Questions of law that involve such factors are necessarily beyond the competence of the judicial branch, to which “the constitution had never been understood, to confer ... any political power whatever.”²⁵

20 *Id.* at 103-04. Revolutionary France’s declaration of war on Britain and Holland in 1793 arguably obligated the United States to enter the war as France’s ally under the 1778 treaty. However, President Washington concluded to the contrary, and his decision ultimately was ratified by Congress’s maintenance of American neutrality.

21 Marshall Speech, at 96.

22 *Id.* at 104.

23 *Id.* at 96, 98-101. See also *id.* at 104 (asserting that the decision whether to demand that the British extradite a fugitive from American justice would be “a question of law” but one clearly not “to be decided in the courts”).

24 See *id.* at 105 (discussing the characteristics of the executive branch that make it “the proper department” to decide extradition questions under the Jay Treaty).

25 *Id.* at 95.

John Marshall's argument in his 1800 speech on the Robbins affair rested on a distinctive understanding of the relationship between law and politics. For Marshall, the resolution of some questions involving the interpretation of rules of law and their application to the circumstances of the world demanded the exercise of the type of discretionary judgment that characterizes political action. The process of deciding a question of this sort did not thereby cease to be a matter of applying legal norms (Marshall used the term "principle" in discussing the conclusion the executive reached in the prize cases), but the answer reached included *in principle* the consideration of prudence and policy, of the public interest in the broadest sense. Political, discretionary decision, Marshall's argument assumed, is not by definition the opposite of legal, rule-governed decision. But in our constitutional order, questions of political law that are simultaneously discretionary and rule-governed are committed to Congress or the president. Judicial determination of such questions is neither necessary nor appropriate.

II

Chief Justice Marshall's opinion for the Supreme Court in *Marbury v. Madison* was, on its face, a vindication of the Court's authority as over against both of the political branches. With respect to Congress, Marshall asserted the power of judicial review, while with regard to the executive branch, he assumed the authority of a court with jurisdiction to provide a remedy against executive interference with an individual's vested rights. At the same time Marshall abjured any judicial power "to intermeddle with the prerogatives of the executive,"

but even commentators who find in *Marbury* a relatively modest view of judicial review tend to read Marshall's political question doctrine as an attempt to distinguish questions of law subject to judicial decision from questions that are unreviewable because their answers are not governed by legal norms.²⁶ However, the echoes in *Marbury* of Marshall's 1800 speech are too strong to make this a satisfactory interpretation of Marshall's meaning. In fact, we believe, *Marbury* restated, in slightly different language, Marshall's 1800 concept of decisions that are at one and the same time political and legal – questions of political law committed in principle to the political branches.

Marshall's premise in that part of *Marbury* which discusses political questions is that "[b]y the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." Some of the political powers Marshall has in view are clearly decisions of pure policy – Marshall himself gives the example of the president's power "of nominating to the senate, and ... of appointing the person nominated," and it is possible to read him as implying that all of the president's "political powers" are of this sort, unreviewable because they do not involve the interpretation or implementation of legal rules at all.²⁷ However, such a reading does not take adequate account of all that Marshall said. A preliminary consideration is that such a reading fails to note that Marshall's reference to the political power of appointment and his description of questions "in their nature political" are in different sections of his opinion,

26 See, e.g., Christopher Wolfe, *The Rise of Modern Judicial Review* 81, 106-07 (2d ed. 1994).

27 5 U.S. (1 Cranch) at 165-66, 167. Marshall himself accidentally invited this misreading by contrasting situations in which an executive branch official is a "mere organ" of the president's "will" from those in which he is "the officer of the law." *Id.* at 166.

and make different points.²⁸ More importantly, the distinction *Marbury* drew was not in fact between political acts of will and principled legal decisions, but between questions involving the national interest and questions of individual right – exactly the same distinction Marshall relied on in 1800 in discussing the respective roles of the executive and the courts. The president properly exercises unreviewable political power where “[t]he subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.”²⁹ The judiciary is excluded from reviewing the president’s exercise of authority as to which “the executive possesses a constitutional or legal discretion,” not because discretion is incompatible with a duty to decide in accordance with legal principle,³⁰ but because the Constitution assigns differing spheres of responsibility to the two branches. “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.”³¹ The picture *Marbury* evoked of discretionary but duty-

bound executive decisions closely paralleled Marshall’s 1800 account of “questions of political law,” and the summary sentence in his 1803 discussion seems a deliberate paraphrase of the very wording of his earlier argument: “Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”³²

Marbury, as we read it, was the mirror image of Marshall’s 1800 speech on the distinction between justiciable and political questions of law. The decision to withhold William Marbury’s commission as a justice of the peace was “examinable by the courts” because it primarily involved the rights of an individual rather than the duties and interests of the nation; resolving the dispute between Marbury and Secretary of State James Madison required only that a court with jurisdiction determine “whether a right has vested or not,”³³ not that it consider the issues of international obligation and national security posed by implementation of the Jay Treaty. Thus in 1803, unlike 1800, Marshall was defending the judiciary’s au-

28 Marshall mentioned the appointment power in rejecting the argument that the president’s freedom to choose whom he will to appoint to office necessarily entails freedom to remove the officeholder; where the latter does not serve at the president’s pleasure, once the president has appointed him, he has fully exercised his discretion and cannot simply wish away the consequences. The same reasoning would apply equally, of course, to any other presidential decision with consequences beyond the president’s control – as Marshall stated in 1800, having determined the legal principle governing prizes, President Washington had no power to interfere with judicial decisions enforcing that determination. In contrast, the sentence about “questions, in their nature political” appeared in the course of Marshall’s rejection of the idea that no court could issue a writ of mandamus to a cabinet officer because to do so would interfere with “the prerogatives of the executive,” Marshall’s point being that whether a court can do so depends not on the identity of the officer but on the nature of his actions.

29 *Id.*

30 In the context of a discussion of judicial discretion a few years later, Marshall wrote that “a motion to [a court’s] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.” *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.D. Va. 1807). On the various meanings of “discretion” in the founding era, see H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. Rev. 949, 996-1008 (1993).

31 *Marbury*, 5 U.S. (1 Cranch) at 170.

32 *Id.*

33 *Id.* at 167.

thority to address the question before him, but, just as in his earlier discussion, his argument assumed the existence of decisions that are within the executive's sphere, and yet are exercises of rule-governed political judgment.³⁴ Such decisions, he continued to assert, "can never be made" by a court.³⁵

III

In perhaps the most famous sentences in *Marbury v. Madison*, Chief Justice Marshall announced that "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."³⁶ We commonly read Marshall's language to carve out a domain of law, administered by judges, that is quite distinct from the domain of politics, governed by partisan politicking and (at best) prudential judgments about the interests of society. To ascribe a task or a power to the political

domain is often taken as license, in principle, for "the politicians" to act as they, their party, or their constituents, wish. Gerald Ford's remark about the scope of the impeachment clause is only the best known expression of a view of our constitutional order that is widespread indeed: "An impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history."³⁷

Whatever may be said for it, however, this was not John Marshall's view, as we have seen. His association of the duty "to say what the law is" with a court's power to judge legislative acts against the standards of a written constitution was not original with him.³⁸ Ironically, in light of *Marbury's* subsequent fame as the fountainhead of judicial review, Marshall's more original thought was his inscription into the constitutional jurisprudence of the Supreme Court of the idea that the courts are not the only institutions whose province and duty includes the exposi-

34 Marshall's language, indeed, suggests the potential existence of two types of questions of political law, those involving political judgment ("in their nature political") and those which are constitutionally reserved for the political branches regardless of whether they are theoretically within the judiciary's competence to resolve ("which are, by the constitution and laws, submitted to the executive").

35 On several subsequent occasions, John Marshall made use of the concept of questions in their nature political and thus committed to the political branches for decision. His remarks were consistent with his 1800 speech and 1803 opinion, and added little to the views he expressed then except to confirm that his concept of political law applied to Congress as well as the executive. *Rose v. Himely*, 6 U.S. (2 Cranch) 241 (1804), and *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), both involved the relative legal positions of a European colonial power and Western hemisphere revolutionaries. In both cases, Marshall stated for the Court that the decision whether to accord any form of recognition to the insurgent governments belonged to the political branches. The question of private rights to real property in *Foster & Elam v. Neilson*, 27 U.S. (2 Pet.) 253 (1829), depended on the proper construction of a treaty with Spain. Marshall's opinion for the Court stated that where "those departments which are entrusted with the foreign intercourse of the nation ... have unequivocally asserted its rights" under one interpretation of a treaty, "it is not in its own courts that this construction is to be denied." *Id.* at 309.

36 *Marbury*, 5 U.S. (1 Cranch) at 177.

37 116 Cong. Rec. 11913 (Apr. 15, 1970).

38 Nine years earlier, Judge St. George Tucker of the General Court of Marshall's home state had defended judicial review in almost exactly the same terms. See *Kemper v. Hawkins*, 1 Va. Cas. 20, 78-79 (1793) (seriatim opinion) (the written constitution "becomes the first law of the land, and as such must be resorted to on every occasion where it becomes necessary to expound what the law is. This exposition it is the duty and office of the judiciary to make").

tion and interpretation of the law.³⁹ From Marshall's perspective, it might well be that the question of what acts are grounds for impeaching a civil officer of the United States is "in [its] nature political, or ... by the constitution submitted" to the House, but he hardly would have agreed with then-Representative Ford's belief that the House was entitled to answer the question on the grounds of sheer expediency.⁴⁰ The definition of "high Crimes and Misdemeanors" remains a question of *law* even if we conclude that considerations of constitutional structure or purpose make the House's answers unreviewable in the courts. On Marshall's view, in Marshall's terms, it would be a question of *political law*.

Marshall can hardly be accused of political naïveté or democratic utopianism. He was keenly aware of the roles passion, prejudice and self-interest play in human affairs, and there is considerable truth in the common notion that he esteemed the Constitution and judicial review in part because of the check they place on democratic excess. During the period encompassing his speech on the Robbins affair and his opinion in *Marbury*, furthermore, Marshall was acutely aware of what he viewed as the threat posed by partisan politics, acting through power obtained through

elections, to all he held dear.⁴¹ But Marshall's constitutional vision rested on caution, not cynicism, about the processes of politics. Marshall thought that the Constitution expects of political officials no less than of judicial ones the ability and willingness to interpret and apply legal norms. But he did not think that in doing so the politicians could or would renounce politics. Indeed, on some issues only the political capacity to make judgments of prudence and policy can fulfill the Constitution's requirements. In our system, political questions of law determined finally by Congress and the president exist not only because of the judiciary's limitations, but also because of the political branches' virtues.

In his great opinion in the bank case, *M'Culloch v. Maryland*, Chief Justice Marshall touched briefly but significantly on this matter. *M'Culloch*, of course, involved neither foreign affairs nor the presidency; it was a case about the relative powers of Congress and the states. The federal legislature had asserted the power to charter a national bank, a state legislature the power to levy on it a discriminatory tax; Marshall concluded that the bank was constitutional and the tax invalid. Marshall's reasoning on the bank's validity is often, and correctly, seen as dependent on Alexander Hamilton's 1791 cabinet opinion on the first

39 Contrast Tucker's statement that "the duty of expounding [the law] must be exclusively vested in the judiciary." *Id.*

40 For Marshall's actual views on the quite similar question posed by the impeachment of Justice Samuel Chase in 1804, see Smith, at 337.

41 To give only two of many examples, in early 1799, Marshall wrote George Washington that his reluctance to stand for a seat in Congress was overborne by his alarm at the violent partisanship (as he saw it) of the Republicans. "To me it seems that there are men who will hold power by any means rather than not hold it They will risk all the ills which may result from the most dangerous experiments rather than permit that happiness to be enjoy'd which is dispensed by other hands than their own." Marshall, Letter to Washington (Jan. 8, 1799), in 4 *Papers of John Marshall* 4. See also Marshall, Letter to Alexander Hamilton (Jan. 1, 1801), in 6 *The Papers of John Marshall* 46 (Charles F. Hobson ed., 1990) (if elected president, Jefferson "appears to me to be a man who will embody himself with the house of representatives. By weakening office of the President he will increase his personal power. He will diminish his responsibility, sap the fundamental principles of the government, & become the leader of that party which is about to constitute the majority of the legislature.").

bank act, but at one point Marshall deviated, quietly but unmistakably, from Hamilton's views. The opponents of a national bank argued in 1791 and in 1819 that the Constitution limited Congress's employment of implied powers to those strictly necessary to the exercise of an enumerated power. Hamilton had conceded that Congress's objective in employing the implied power had to "be clearly comprehended within any of the specified powers, & ... have an obvious relation to that end,"⁴² but he insisted that the relative necessity of a particular implied power in accomplishing a given constitutional goal, being "ever a matter of opinion," was not itself a constitutional question.⁴³

Despite the care with which he otherwise tracked Hamilton's reasoning, however, Marshall omitted this last point. He insisted, to be sure, that the relative necessity of the bank was not an issue the Supreme Court could address, but he based the Court's incapacity on the Constitution's separation of powers, not on the issue's irrelevance to the constitutional question of the bank's validity. "[N]one can deny [the bank] being an appropriate measure; and if it is, the degree of its necessity as has been very justly observed, is to be discussed in another place. ... [T]o undertake here to inquire into the degree of its necessity, would be to pass the line which

circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."⁴⁴ Congress is the "place" to discuss questions about the need to legislate beyond the specifically enumerated powers of Article I, not because those questions do not arise under the Constitution but because the Constitution commits to Congress the task of addressing them.

John Marshall believed in the ability of the courts conscientiously to interpret and obey the Constitution. Whether he was justified in believing this remains a matter of debate, although as a practical matter the authority of the courts to engage in judicial review is settled. John Marshall also believed in the ability of the political branches conscientiously to interpret and obey the Constitution and other rules of law even, or rather especially, in those cases beyond the power of the judiciary to resolve. In an era much like ours, torn by partisan strife and filled with lamentations over the degradation of politics, Marshall asserted the constitutional necessity of seeking political answers to high questions of legal principle. Perhaps, as he suggested in his day and for his society's difficulties, part of the answer to our problems lies in expecting more, not less, from our political representatives and, thus, from ourselves. *JB*

42 Opinion on the Constitutionality of an Act to Establish a Bank (1791), reprinted in 8 *The Papers of Alexander Hamilton* 97, 102-03 (Harold C. Syrett ed., 1965).

43 "The degree in which a measure is necessary, can never be a test of the legal right to adopt it. That must ever be a matter of opinion; and can only be a test of expediency. The relation between the measure and the end, between the nature of the mean employed towards the execution of a power and the object of that power, must be the criterion of constitutionality not the more or less of necessity or utility." *Id.* at 104.

44 Note the echo of *Marbury's* statement that it was "scarcely necessary for the court to disclaim all pretensions to such a jurisdiction [to review the president's political decisions]."