# BOOK REVIEW

The Constitution and Chief Justice Marshall. WILLIAM F. SWINDLER, Dodd, Mead & Co., New York, 1978. Pp. xi, 406.

This is a commemorative work, commissioned by the Bicentennial Committee of the Judicial Conference to explain to an interested layman the development of the federal judicial system and its importance for the rights and liberties guaranteed by the Constitution. This we are told in a formal introduction by the Chief Justice of the United States Supreme Court, Warren E. Burger. Practically, he explains, the Bicentennial Committee concluded it could not itself undertake this study. Instead the undertaking was assumed by Professor Swindler who, as Chairman of the Publication Committee of the Supreme Court Historical Society, Advisory Editor to the Papers of John Marshall and the John Marshall Professor of Law at the Marshall-Wythe School of Law, College of William and Mary, is obviously well-versed in the intricate relationships of Marshall, Virginia, the courts, country and the Constitution.

The Bicentennial Committee's initial responsibility had been to produce a series of documentary films designed in one-half hour segments to explain, through the medium of certain major constitutional cases, the development of the federal constitutional system. Basically the book was to follow this format and since Professor Swindler is also knowledgeable about the person of Marshall, his study pursues these cases through a focus on Marshall.

The volume's chief interest lies in its first part, covering some eighty-three pages. In an initial chapter the author briefly sketches Marshall's public career, the circumstances of his appointment to the Chief Justiceship, and the personalities of his associates on the Court and their contributions during his long tenure of office from 1801 through 1835. Of special interest is a long excerpt from Marshall's maiden speech in the House of Representatives, given in characteristically cogent style on constitutional grounds, in defense of the Adams administration against a charge of improper extradiction of a seaman to the British.

Next, in Part One, follows separate discussions of the well-known cases *Marbury* v. *Madison*,[1] *United States* v. *Burr*[2] (both as it af-

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[1] 5 U.S. (1 Cranch) 137 (1803).

[2] 25 Fed. Cas. 3 (C.C. Va. 1807) (No. 14,692).

fected the claim of executive privilege of the President from subpoena and as it afforded the protection of fair judicial process in the criminal trial of an individual), *Trustees of Dartmouth College* v. *Woodward*,[3] *McCulloch* v. *Maryland*[4] and *Gibbons* v. *Ogden*.[5] In each case, the author presents an interesting historical background out of which the controversy arose, sets forth the issues argued and/or decided in the holding, and states why the holding is important. Thus, *Marbury* established the doctrine of federal judicial review of federal legislative power; *Burr* established the principle of federal judicial limitation of federal executive power; *Dartmouth* and a line of related cases also noted, *Fletcher* v. *Peck*,[6] *Martin* v. *Hunter's Lessee*,[7] *Cohens* v. *Virginia*,[8] made certain the establishment of federal judicial power in the Supreme Court over state power, legislative and judicial. *McCulloch*, while further advancing federal supremacy over state law, also fixed the principle of a broad construction of congressional power generally: which principle was advanced more specifically under the commerce clause following *Gibbons*. The author has also, where relevant, brought the controversies down to date. Thus *Burr* had its eventual supplementation and triumph in *United States* v. *Nixon*;[9] and *Gibbons* in the almost total triumph of national power in *Heart of Atlanta Motel Co.* v. *United States*.[10]

In Part Two, Professor Swindler reprints the Constitution as it stood in Marshall's day, *i.e.*, the initial text of the first twelve amendments. To this text he appends an annotation. Next he presents a useful chronology of constitutional, judicial and Court development during the tenure of Marshall, and finally the voting records of all the Justices, including the publication of an opinion, in all constitutional cases determined during this time.

In Part Three, covering 257 pages (roughly five-eights of the entire volume) are reprinted opinions of the major cases and related documents, including the opinions of the Supreme Court in *Ex parte Bollman*[11] and *Ex parte Swartout*,[12] *Martin*, and *Cohens*; of the state courts in *Dartmouth* and *Gibbons*; and of the federal circuit decision

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[3] 17 U.S. (4 Wheat.) 518 (1819).
[4] 17 U.S. (4 Wheat.) 316 (1819).
[5] 22 U.S. (9 Wheat.) 1 (1824).
[6] 10 U.S. (6 Cranch) 87 (1810).
[7] 14 U.S. (1 Wheat.) 304 (1816).
[8] 19 U.S. (6 Wheat.) 264 (1821).
[9] 418 U.S. 683 (1973).
[10] 379 U.S. 241 (1964).
[11] 8 U.S. (4 Cranch) 75 (1807).
[12] *Id.*

in the South Carolina Black seaman's case.[13] From the related documents, one may peruse the affidavit of General Wilkinson in the *Burr* case, the Second Bank of the United States, and the New York Monopoly statute.

Finally, there is an Appendix, consisting of a reprint of a lecture given by Chief Justice Burger in 1972 at the University of London, entitled *The Doctrine of Judicial Review: Mr. Marshall, Mr. Jefferson and Mr. Marbury* in which the Chief Justice gives his views on the place of *Marbury v. Madison* in the establishment and development of the doctrine of judicial review.

From this rather long description, it may be deduced that the book is a little bit of this and a little bit of that. For the interested layman desiring enlightenment or, for that matter, for the busy practitioner forgetful of most of the constitutional law he learned in law school, the first eighty-three pages can give a bird's eye view of some of the initial advances of constitutional doctrine and their relevance today. In addition, if he should care to do so, there are some notable historical memorabilia for the reader to browse through and some attractive photographs to look at, and in the case of Andrew Jackson's to laugh over. (No doubt the Court's archives have long held on to this portrait, simpleton and sagging as it portrays the general, for semi-official use as revenge for his lack of support of Marshall in the Cherokee controversy). For those of keener interest, the passing comments of Professor Swindler and the related materials are worthy as a handy reference.

But it must be remembered that the book is in commemoration, bearing almost official status, with the introduction and the epilogue of the Chief Justice. As such, it suffers from the strain of the Establishment. And since intended for the layman, the viewpoint is that of a bird: lofty as it skims lightly over the trees of detail, easily averting any danger. It is these qualities which tend to dull its impact.

For example, in his discussion of *Marbury*, Professor Swindler concentrates on the political circumstances in which the case came before the Court and the legal issues, substantive and jurisdictional it raised, and only in conclusion does he directly discuss the significance of the case in the development and acceptance of the doctrine of judicial review. The common assumption is of course that Marshall in *Marbury* established the doctrine by a *deus ex machina* device wherein, in order to avoid a binding decision on the substantive issues, he daringly resorted to the hitherto unemployed device of de-

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[13] Elkison v. Deliesseline, 8 Fed. Cas. 493 (C.C. S.C. 1823) (No. 4,366).

claring a legislative act of Congress invalid. In one sense this is true, but as Professor Swindler mentions in passing, while the argument of Marshall was placed on "rather tenuous premises" the result itself "seemed to be accepted by the majority" of the people. *Marbury* then was a landmark case not because of its novel assumption of judicial power but because it happened to be the first case in which the federal Supreme Court applied this doctrine to a federal statute and held it invalid.

As Chief Justice Burger pointed out in his London lecture (which incidentally is rather engagingly written, with delightful political asides and insights), state judicial invalidation of state statutes under state constitutions had, by 1800, already become quite an acceptable doctrine. The Court itself, by that date, had also invoked the power of federal judicial invalidation of state statutes under the federal constitution (*Ware v. Hylton*,[14] in which Marshall himself participated as counsel, arguing against the doctrine; and *Calder v. Bull*).[15] And finally, the Court in *Hylton v. United States*,[16] in Ellsworth's tenure, had in validating a federal excise tax, implicitly exercised the power of federal judicial review of federal legislation. Indeed, in those days it was Jefferson's party which cried for such power and the aggressive use of such power, as a means of keeping the political branches controlled by the Federalists within their—to Jeffersonian eyes—proper constitutional spheres of power. The power is implicit, as such, in the notion of the limits of governmental power and the allocation of power among the federal and state government and within the federal government among the various branches, as in the language of article III. The purpose of a written constitution being to allocate power, the purpose of judicial review is to insure that the terms of the written contract are kept.

Professor Swindler is not unaware of this. After all, he did reprint the Burger lecture and indeed, the opening paragraph of his work shows us Marshall making this argument during the course of the constitutional ratification process in 1788. He is also aware of the close interrelationship between the accepted outcome of *Marbury* and the Court's decision one week later supporting the validity of the repeal of the 1801 Circuit Court Act. Republicans could afford to accept the judicial power, when applied as in *Marbury* to strike down a federal statute. It had the effect of depriving the Court itself of power

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[14] 3 U.S. (3 Dall.) 199 (1796).
[15] 3 U.S. (3 Dall.) 386 (1798).
[16] 3 U.S. (3 Dall.) 171 (1796).

to remedy a Federalist plaintiff against a Republican defendant; and when applied as in *Laird,* to uphold a federal statute, it had the effect of throwing out of office more than a dozen Federalist federal judges.

But to look at *Marbury* as a link in a chain of judicial decisions and contemporary assumptions is in a way to downgrade the eminence of an established landmark, in whose adoption, the Court takes great comfort. And this, as was said in the beginning, is first and foremost a commemorative work, quasi-Establishment in its commission. It is nonetheless an interesting and, rightly used, a valuable book.

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