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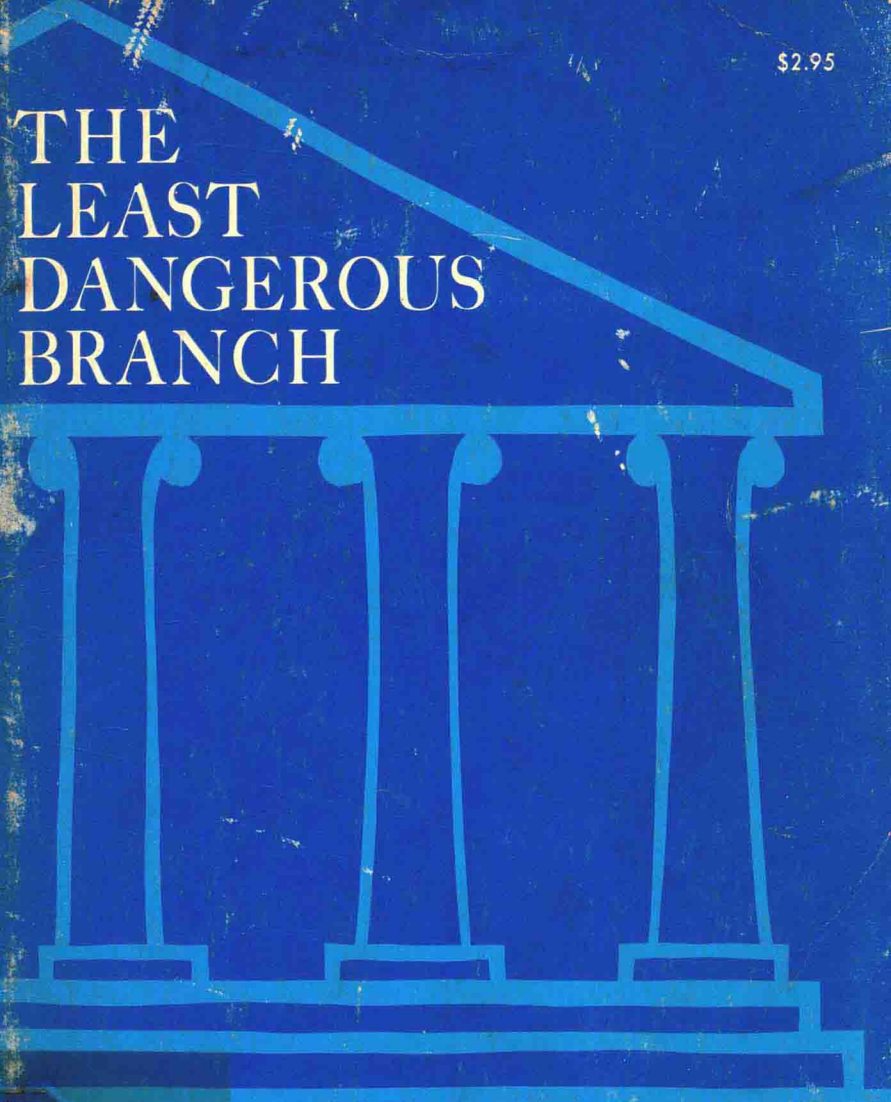
THE LEAST DANGEROUS BRANCH



Supreme Court at the Bar of Politics

By Alexander M. Bickel

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Some aspects of the thesis of this book have found expression over the past five years in notes and articles, signed and unsigned, that I have published in *The New Republic*. In a few instances I have borrowed my earlier phrasing, with the kind permission of the editor and publisher, Mr. Gilbert A. Harrison. Portions of Chapter 4 appeared, in an earlier version, in the November 1961 issue of the *Harvard Law Review* and are incorporated here by permission of the editors of that publication.

Finally, I am grateful to the editorial staff of my publisher for many helpful suggestions.

A.M.B.

New Haven, Connecticut
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"Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."

ALEXANDER HAMILTON,
in the 78th FEDERALIST,
"The Judges as Guardians
of the Constitution."

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Contents

CHAPTER 1

Establishment and General Justification of Judicial Review

The least dangerous branch of the American government is the most extraordinarily powerful court of law the world has ever known. The power which distinguishes the Supreme Court of the United States is that of constitutional review of actions of the other branches of government, federal and state. Curiously enough, this power of judicial review, as it is called, does not derive from any explicit constitutional command. The authority to determine the meaning and application of a written constitution is nowhere defined or even mentioned in the document itself. This is not to say that the power of judicial review cannot be placed in the Constitution; merely that it cannot be found there.

Marbury v. *Madison*

Congress was created very nearly full blown by the Constitution itself. The vast possibilities of the presidency were relatively easy to perceive and soon, inevitably, materialized. But the institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; and the Great Chief Justice, John Marshall—not singlehanded, but first and foremost—was there to do it and did. If any social process can be said to have been "done" at a given time and by a given act, it is Marshall's achievement. The time was 1803; the act was the decision in the case of *Marbury* v. *Madison.*

William Marbury's law suit against Secretary of State Madison

was an incident in the peaceful but deep-cutting revolution signaled by Jefferson's accession to the presidency. The decision was both a reaction and an accommodation to the revolution. It was, indeed, as Professor Robert G. McCloskey has written, "a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another." The Court was "in the delightful position . . . of rejecting and assuming power in a single breath"; although Marshall's opinion "is justly celebrated," "not the least of its virtues is the fact that it is somewhat beside the point."[1]

The opinion is very vulnerable. "It will not bear scrutiny," said the late Judge Learned Hand. And it has in fact ill borne it at the hands of Thomas Reed Powell and others. Marshall was one of the most remarkable figures in an astonishing generation of statesmen. He was not given, he at once created and seized, what Holmes called "perhaps the greatest place that ever was filled by a judge." In his superb brief *Life,* James Bradley Thayer made the just estimate that in constitutional law, Marshall was "preëminent—first, with no one second." But Thayer remarked also that the very common favorable view of the reasoning in *Marbury* v. *Madison* "is partly referable to the fallacy which Wordsworth once remarked upon when a friend mentioned 'The Happy Warrior' as being the greatest of his poems. 'No,' said the poet, 'you are mistaken; your judgment is affected by your moral approval of the lines.' "[2] It is necessary to analyze the reasoning and to abandon it where it fails us, however hallowed by age and incantation. For to rest the edifice on the foundation Marshall supplied is ultimately to weaken it, as opponents of the function of judicial review know well. There are sounder justifications of judicial review. And there is yet another purpose to be served by a hard analysis of the decision. Not only are the props it provides weak, and hence dangerous; they also support a structure that is not quite the one we see today. Marshall's proofs are not only frail, they are too strong; they prove too much. *Marbury* v. *Madison* in essence begs the question. What is more, it begs the wrong question.

William Marbury and some others sued Secretary Madison for delivery of their commissions as justices of the peace for the County

of Washington in the District of Columbia, an office to which they had been appointed in the last moments of the administration of President John Adams. Marshall held that Marbury and the others were entitled to their commissions, but that the Supreme Court was without power to order Madison to deliver, because the section of the Judiciary Act of 1789 that purported to authorize the Court to act in such a case as this was itself unconstitutional. Thus did Marshall assume for his Court what is nowhere made explicit in the Constitution—the ultimate power to apply the Constitution, acts of Congress to the contrary notwithstanding.

"The question," Marshall's opinion begins, "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 an intricacy proportioned to its interest." Marshall's confidence that he could traverse the path ahead with ease is understandable, since he had already begged the question-in-chief, which was not whether an act repugnant to the Constitution could stand, but who should be empowered to decide that the act is repugnant. Marshall then posited the limited nature of the government established by the Constitution. It follows—and one may grant to Marshall that it follows as "a proposition too plain to be contested"—that the Constitution is a paramount law, and that ordinary legislative acts must conform to it. For Marshall it follows, further, that a legislative act contrary to the Constitution is not law and need not be given effect in court; else "written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable." If two laws conflict, a court must obey the superior one. But Marshall knew (and, indeed, it was true in this very case) that a statute's repugnancy to the Constitution is in most instances not self-evident; it is, rather, an issue of policy that someone must decide. The problem is who: the courts, the legislature itself, the President, perhaps juries for purposes of criminal trials, or ultimately and finally the people through the electoral process?

This is the real question. Marshall addressed himself to it only partially and slightly. To leave the decision with the legislature, he said, is to allow those whose power is supposed to be limited themselves to set the limits—an absurd invitation to consistent abuse. Perhaps so, but the Constitution does not limit the power of the legislature alone. It limits that of the courts as well, and it

may be equally absurd, therefore, to allow courts to set the limits. It is, indeed, more absurd, because courts are not subject to electoral control. (It may be argued that to leave the matter to the legislature is to leave it ultimately to the people at the polls. In this view the people as the principal would set the limits of the power that they have delegated to their agent.)

The case can be constructed where the conflict between a statute and the Constitution is self-evident in accordance with Marshall's general assumption. Even so, Marshall offers no real reason that the Court should have the power to nullify the statute. The function in such a case could as well be confided to the President, or ultimately to the electorate. Other controls over the legislature, which may be deemed equally important, are so confided. Courts do not pass on the validity of statutes by inquiring into election returns or into the qualifications of legislators. They will entertain no suggestion that a statute whose authenticity is attested by the signatures of the Speaker of the House and the President of the Senate, and which is approved by the President, may be at variance with the bill actually passed by both Houses.[3] Marshall himself, in *Fletcher* v. *Peck*,[4] the Yazoo Frauds case, declined to inquire into the "motives" of a legislature, having been invited to do so in order to upset a statute whose passage had been procured by fraud. Why must courts control self-corruption through power, a condition difficult of certain diagnosis, when they rely on other agencies to control corruption by money or like inducements, which is no less dangerous and can be objectively established?

So far Marshall's argument proceeded on the basis of a single textual reliance: namely, the fact itself of a written Constitution. But Marshall did go on to some more specific textual references. His first was to Article III of the Constitution, which establishes the judiciary and reads in relevant part as follows:

> SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, or other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Could it be, Marshall asked, that those who granted the judicial power and extended it to all cases arising under the Constitution, laws, and treaties meant that cases arising under the Constitution should be decided without examination and application of the document itself? This was for Marshall "too extravagant to be maintained." Note well, however, that what the Constitution extends to cases arising under it is "the judicial Power." Whether this power reaches as far as Marshall wanted it to go—namely, to reviewing acts of the legislature—is the question to be decided. What are the nature and extent of the function of the Court—the judicial power? Is the Court empowered, when it decides a case, to declare that a duly enacted statute violates the Constitution, and to invalidate the statute? Article III does not purport to describe the function of the Court; it subsumes whatever questions may exist as to that in the phrase "the judicial Power." It does not purport to tell the Court how to decide cases; it only specifies which kinds of case the Court shall have jurisdiction to deal with at all. Thus, in giving jurisdiction in cases "arising under . . . the Laws" or "under . . . Treaties," the clause is not read as prescribing the process of decision to be followed. The process varies. In

cases "under . . . the Laws" courts often leave determination of issues of fact and even issues that may be thought to be "of law" to administrative agencies. And under both "the Laws . . . and Treaties," much of the decision concerning meaning and applicability may be received ready-made from the Congress and the President. In some cases of all three descriptions, judicial decision may be withheld altogether—and it is for this reason that it will not do to place reliance on the word "all" in the phrase "all cases . . . arising. . . ." To the extent that the Constitution speaks to such matters, it does so in the tightly packed phrase "judicial Power."

Nevertheless, if it were impossible to conceive a case "arising under the Constitution" which would not require the Court to pass on the constitutionality of congressional legislation, then the analysis of the text of Article III made above might be found unsatisfactory, for it would render this clause quite senseless. But there are such cases which may call into question the constitutional validity of judicial, administrative, or military actions without attacking legislative or even presidential acts as well, or which call upon the Court, under appropriate statutory authorization, to apply the Constitution to acts of the states. Any reading but his own was for Marshall "too extravagant to be maintained." His own, although out of line with the general scheme of Article III, may be possible; but it is optional. This is the strongest bit of textual evidence in support of Marshall's view, but it is merely a hint. And nothing more explicit will be found.

Marshall then listed one or two of the limitations imposed by the Constitution upon legislative power and asked whether no one should enforce them. This amounts to no more than a repetition of his previous main argument, based on the very fact of limited government established by a written Constitution. He then quoted the clause (significantly constituting Section 3 of Article III, the Judiciary Article) which provides that no person "shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." If the legislature were to change that rule, he asked, and declare that one witness or a confession out of court was sufficient for conviction, would the courts be required to enforce such a statute? In one aspect, this is but another restatement of the argument proceeding from

the existence of limitations embodied in the written Constitution. But even if it were admitted that a court, in the treason case Marshall put, should apply the Constitution and not the contrary statute, this may mean only that it is the judiciary's duty to enforce the Constitution within its own sphere, when the Constitution addresses itself with fair specificity to the judiciary branch itself. The same might be true as well of other clauses prescribing procedures to be followed upon a trial in court and also of the provisions of Article III setting forth the jurisdiction of the courts. Such a provision was in question in *Marbury* v. *Madison* itself, and perhaps the result there might be supported in this fashion. The upshot would be that each branch of the government would construe the Constitution for itself as concerns its own functions, and that this construction would be final, not subject to revision by any of the other branches. Marshall himself, at this point in his argument, drew only the following conclusion: "From these, and many other selections [from the Constitution] which might be made, it is apparent that the Framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." And of the legislature as well as of courts, so that when the Constitution addresses itself to the legislature, or to the President, or to the states, for that matter, each may be the final arbiter of the meaning of the constitutional commands addressed to it. The distinction would lie between such provisions as those empowering Congress "to regulate Commerce" or "to coin Money," on the one hand, and, on the other, such commands as that of the Sixth Amendment that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." To find such an arrangement textually permissible is not, of course, to advocate it or to vouch for its workability. I should make plain my disavowal of an analysis by Professor William Winslow Crosskey, which is in some respects similar but which is also quite different, having regard to its context and supports and to the purposes it is made to serve.[5]

But, Marshall continued, the judges, under Article VI of the Constitution, are "bound by Oath or Affirmation, to support this Constitution." Would it not be immoral to impose this oath upon them while at the same time expecting them, in upholding laws

they deem repugnant to the Constitution, to violate what they are sworn to support? This same oath, however, is also required of "Senators and Representatives. . . . Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States. . . ." Far from supporting Marshall, the oath is perhaps the strongest textual argument against him. For it would seem to obligate each of these officers, in the performance of his own function, to support the Constitution. On one reading, the consequence might be utter chaos—everyone at every juncture interprets and applies the Constitution for himself. Or, as we have seen, it may be deduced that everyone is to construe the Constitution with finality insofar as it addresses itself to the performance of his own peculiar function. Surely the language lends itself more readily to this interpretation than to Marshall's apparent conclusion, that everyone's oath to support the Constitution is qualified by the judiciary's oath to do the same, and that every official of government is sworn to support the Constitution as the judges, in pursuance of the same oath, have construed it, rather than as his own conscience may dictate.

Only in the end, and then very lightly, does Marshall come to rest on the Supremacy Clause of Article VI, which in later times has seemed to many the most persuasive textual support.[6] The Supremacy Clause is as follows:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

"It is also not entirely unworthy of observation," Marshall wrote —and this was all he had to say on the point—that in declaring what is to be the supreme law of the land, this clause mentions the Constitution first and then not the laws of the United States generally but only those which shall be made in pursuance of the Constitution. Marshall left it at that, and what is to be concluded from this remark? First, it must be noted that nothing here is addressed to federal courts. Any command to them will have to be

inferred, if there is to be one at all. Only as a forensic amusement can the phrase "Judges in every State" be taken to include federal judges, on the ground that some of them sit in the states. After all, the Supreme Court does not. The clause speaks to the constituent states of the federation and tells them that federal law will supersede any contrary state law. Further, it goes over the heads of the state governments and speaks to state judges directly, telling them that it will be their duty to enforce the supreme federal law above any contrary state law. State judges need enforce, however, only such federal law as is made in pursuance of the Constitution. Conceivably the reference here might be to more than just the mechanical provisions that describe how a federal law is to be enacted—by the concurrence of both Houses and with the signature of the President. Conceivably state judges were to be authorized to measure federal law against the federal Constitution and uphold it or strike it down in accordance with their understanding of the relevant constitutional provision. But such an arrangement, standing alone, would have been extraordinary, and it would have been self-destructive.

It is perfectly evident that the purpose of the clause is to make federal authority supreme over state. It is also certain that if state judges were to have final power to strike down federal statutes, the opposite effect would have been achieved, even though the authority of the state judges was drawn from the federal Constitution. The result is possible on the language, and there have been those who have contended for it precisely because it is destructive. The argument, known as interposition, is grounded in the oath provision discussed above as well as in the Supremacy Clause. And it is easily met. There is no call thus to upend the plain purpose of the clause. State judges must apply supreme federal law, statutory and constitutional, and must do it faithfully on their oaths. So much is unavoidable. But it fully meets all else that is compelling in the language of the clause simply to conclude that the proviso that only those federal statutes are to be supreme which are made in pursuance of the Constitution means that the statutes must carry the outer indicia of validity lent them by enactment in accordance with the constitutional forms. If so enacted, a federal statute is constitutional. That is to be taken as a given fact