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THE OFFICE OF THE OATH

*Patrick O. Gudridge**

There is little difficulty, Alexander Bickel declared, in concluding that the Constitution takes precedence in cases in which the Constitution and congressional legislation conflict. Whether, or in what circumstances, federal judges should assume the responsibility of deciding if there is such a conflict is a separate and ultimately more important matter. *Marbury v. Madison* therefore "begged the question-in-chief"[1]:

> [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?[2]

None of Chief Justice Marshall's arguments persuaded Bickel that active involvement of judges in constitutional interpretation is in any sense necessary. It "may be possible; but it is optional."[3] The fact that federal judges take oaths to support the Constitution, a matter of considerable relevance for Chief Justice Marshall, was—it seemed—especially beside the point:

> This same oath . . . 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 . . . it may be deduced that everyone is

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1. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 3 (1962).
2. *Id.*
3. *Id.* at 6.

> 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.[4]

Professor Bickel proceeded too quickly. John Marshall might have readily agreed that judicial constitutional interpretation is "an issue of policy"—but he may well have thought (I will argue) that the presuppositions of the oath to support the Constitution provided that policy. He might have readily endorsed the proposition that "everyone at every juncture interprets and applies the Constitution for himself"—but he probably would not have viewed this state of affairs as "utter chaos." The presuppositions of the oath implied not only authorization for constitutional interpretation but also the requisite discipline.

Are such conceptions (conceptions Marshall might have plausibly held) of any pertinence now? I address this question last. It is first necessary to sketch what he might have taken "the presuppositions of the oath" to be.

A

This is the text of Chief Justice Marshall's discussion of oaths in *Marbury*:

> Why otherwise does it [the Constitution] direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!
>
> The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ________, according to the best of my abilities and under-

4. *Id.* at 8.

> standing agreeably to the constitution and laws of the United States."
>
> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.[5]

The constitutional oath to which Marshall refers is, of course, the oath required by Article VI, section 3:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution: but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.[6]

Why make much of this oath? Oaths of allegiance had played a prominent part in English constitutional practice since at least the reign of Henry VIII. But their use was, more often than not, linked with reformations of relationships of church and state. Administration of oaths, usually selective, was a way of testing for anti-establishment dissent, thus inhibiting it, or advertising the (seemingly) small number of dissenters in a particular place at a particular time.[7] The article VI oath, by its terms, bars

5. Marbury v. Madison, 5 U.S. 137, 180 (1803).

6. The presidential oath, set out in article II, section 1, paragraph 8, of the Constitution is worded not much differently: "Before [the President] enter on the Execution of his Office, he shall take the following Oath or Affirmation: -'I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'" Section 3 of the Fourteenth Amendment attaches implications to the article VI oath:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

7. *See* DAVID MARTIN JONES, CONSCIENCE AND ALLEGIANCE IN SEVENTEENTH CENTURY ENGLAND: THE POLITICAL SIGNIFICANCE OF OATHS AND ENGAGEMENTS 14-62 (1999). English practice, in this regard, put loyalty oaths to work in much the same

this sort of managerial deployment—"but no religious Test shall ever be required . . . ."[8] This oath, moreover, is an obligation imposed only on federal and state officials. The most important English oaths purported to test the general population, or at least parts of it; the oaths frequently put to use in America during the Revolution also served as a means for scrutinizing the allegiance of suspect members of the public at large.[9] The article VI oath also requires only a terse pledge "to support this Constitution." The oath itself thus identifies no "central tenets" of constitutional faith[10]; it would seem, at least at first reading, precisely to invite the sort of jesuitical casuistry that had put in question the usefulness of the English reformation oaths.[11]

The article VI oath, in first draft, imposed its obligation only on state officials.[12] It provoked a suggested amendment aimed at obliging federal officials to respect state constitutions. Such an added duty, we might well think, would have substantially complicated the workings of the Supremacy Clause.[13] The final version of the article VI oath did not create this risk; it requires only a promise "to support this [federal] Constitution." Its extension to encompass federal officials also, if it was meant to mollify state officials, would seem to have done so by adopting a principle of equal suspicion, in effect declaring "We trust *no* government officials 'to support this Constitution.'" Why, though, was the oath left so empty? The drafters could not have thought, could they, that the Constitution was entirely unambiguous?

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way that Augustus did, in the Roman constitutional crisis of 32, invoking the famous all-Italy oath of that year as proof of his authority. *See* RONALD SYME, THE ROMAN REVOLUTION 284-89 (1939).

8. "The 'but' suggests that the Framers considered the constitutional oath a substitute for the religious tests the colonists were familiar with under the English established church." Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 18 (1984) (emphasis deleted).

9. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 214-15 (1991).

10. SANFORD LEVINSON, CONSTITUTIONAL FAITH 94 (1988); *see id.* 122-25 (discussing *Marbury* and the emptiness of the constitutional oath).

11. *See* MARTIN JONES, *supra* note 7, at 88-98. *See also* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 67-68 (1993).

12. For pertinent legislative history, *see* 4 PHILLIP B. KURLAND & RALPH LERNER, THE FOUNDERS' CONSTITUTION 637-38 (1987).

13. *See also* THE FEDERALIST No. 44, at 287 (James Madison)(Clinton Rossiter ed., 1961)(explaining difference in treatment on the ground that federal officials do not participate in state government, but state officials are involved in federal government).

B

It is clear, at least, that John Marshall wrote as though there was a point to the oath, as though it proved something, passage of some sort of "Test," a matter (whatever it was) of importance for judges.

The high pitch of his language in *Marbury* is striking. He uses three rhetorical questions and an exclamation in the course of seven sentences (excluding the expository paragraph quoting the legislatively-imposed oath). Terms like "immoral," "solemn mockery," and "crime" jump from the page. All of this emphasis, it appears, serves to underscore the proposition, put immediately previously, that "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."[14] The key phrase, obviously, is "rule for the government of courts"—it reappears in the penultimate paragraph in the sequence; if the Constitution "forms no rule for . . . government" for "a judge" than the oath "becomes . . . a crime," "is worse than solemn mockery."

What does "rule for . . . government" mean? Marshall equates "court" and "judge." It is as individuals that judges are governed.[15] An earlier sentence makes this conclusion obvious: "This oath certainly applies in an especial manner, to their conduct in their official character" (by implication, applies to unofficial conduct as well—and thus governs judges as individuals). How is it possible for individuals to violate the Constitution—and thus to oblige themselves to refrain from violating the Constitution—when acting unofficially? Section 3 of the Fourteenth Amendment supplies one later answer. Insurrection or rebellion are plainly not official acts; but they are, it seems, violations of the oath to support the Constitution. Insurrection or rebellion also likely constitute treason, of course. "Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort." Article III, section 3, is broader, is not limited in application only to public officials, to oath-takers. Still, for federal or state official in particular,

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14. *Marbury*, 5 U.S. at 179-80.

15. On the conception of judges as "legal savants," largely consistent with the argument that I develop in this essay, but broader in its implications, see G. Edward White, *Recovering the World of the Marshall Court*, 33 JOHN MARSHALL L. REV. 781, 783-98 (2000).

though, we might take treason to be an (the?) obvious example of failure to support the Constitution.

Supposing insurrection or rebellion or treason in general to be examples of breaches of the constitutional oath—does this mean that other such failures are of more or less equal moment? This would not have to be the case, of course. But something akin to this equation seems to play a part in Chief Justice Marshall's formulations. Or at least, if this is so, we can begin to appreciate the outrage that he proclaims: If "courts must close their eyes on the constitution, and see only the law," they run the risk of acting contrary to the Constitution—violating the Constitution. If judges are "to be used as the instruments, and the knowing instruments, for violating what they swear to support"—after all, judges do not really "close their eyes"—they are put in a position something like that of rebels or traitors. Why is failure to abide by the Constitution, as judges themselves understand the Constitution, akin to treason, insurrection, or rebellion? Why might Marshall write as though this equation was given?

C

Treason is a topic that the 1787 Constitution repeatedly addresses, in disconcertingly matter of fact ways. We might understand the article III, section 3, definition as an important limitation, and so too the following sentences requiring proof by two witnesses to an overt act or confession in open court and prohibiting punishment of the families of traitors.[16] But what are we to make of article II, section 4? "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Or article IV, section 2, paragraph 2? "A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime." "[L]evying War" against the United States, or "adhering to their

16. 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. [¶] The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted. U.S. CONST. art. III, § 3.

Enemies, giving them Aid and Comfort," are acts that the Constitution contemplates that even the highest "civil Officers of the United States" might commit, and as against this possibility outlines responsive procedures. Treasonous acts *vis à vis* state governments, however state laws define treason, are both foreseeable and (often) matters of routine; ordinary extradition procedures, the Constitution seems to conclude, will frequently suffice in dealings with persons charged with state law treason.[17]

Alexander Hamilton, writing in *Federalist No. 74*, again appears to treat treason as ordinary, not surprising, the political equivalent of especially bad weather:

> The expediency of vesting the power of pardoning in the President has, if I mistake not, been only contested in relation to the crime of treason. . . . As treason is a crime leveled at the immediate being of the society when the laws have once ascertained the guilt of the offender, there seems a fitness in referring the expediency of an act of mercy towards him to the judgment of the legislature. And this ought the rather to be the case, as the supposition of the connivance of the Chief Magistrate ought not to be entirely excluded. But there are also strong objections to such a plan. . . . It deserves particular attention that treason will often be connected with seditions which embrace a large proportion of the community, as lately happened in Massachusetts. In every such case we might expect to see the representation of the people tainted with the same spirit which had given birth to the offense. . . . But the principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth. . . . The loss of a week, a day, an hour, may sometimes be fatal.[18]

17. To be sure, the Constitution also recognizes that there may be extraordinary circumstances in particular states—article IV, section 4, assures state governments that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." How extraordinary were these circumstances imagined to be, however, if they were thought to require constitutional treatment? Plainly, conceivable cases included serious breakdowns in civil order. Why otherwise provide for situations in which "the Legislature cannot be convened"?

18. THE FEDERALIST No. 74 at 448, 449 (Alexander Hamilton)(Clinton Rossiter ed., 1961). Hamilton's argument responds to a criticism put by George Mason in 1787: "The President of the United States has the unrestrained power of granting pardons for treason; which may be sometimes exercised to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own

In *Federalist No. 43*, James Madison supposes that the problem to be addressed is not treason per se, but accusations of treason—like Hamilton, however, he treats the matter as inherent in the dynamic of politics as usual:

> As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.[19]

D

Aaron Burr's expedition, we may think, would have confirmed the expectations of Hamilton, if Burr—only recently Vice President—had not already shot him. Thomas Jefferson's seemingly frantic responses, we might as readily conclude, would have struck Madison as clearly illustrating his point, were Madison able to think uninfluenced by his own participation in the Jefferson government. The uncertainties as to just what it was that Burr and company had actually done, along with further uncertainties as to their purpose (conquer Mexico? seize New Orleans?) provided grounds for Chief Justice Marshall, writing for the Supreme Court, to dismiss treason charges against two of Burr's associates in *Ex parte Bollman*.[20] But Marshall also declared:

> It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose; all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an

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guilt." George Mason, "Objections to the Constitution" (1787), *reprinted in* 1 THE DEBATE ON THE CONSTITUTION 345, 348 (Bernard Bailyn ed., 1993).

19. THE FEDERALIST No. 43 at 273 (James Madison)(Clinton Rossiter ed., 1961).

20. 8 U.S. 75 (1807).

> actual assembling of men for the treasonable purpose, to constitute a levying of war.[21]

Jefferson's prosecutors used this passage as a template for another try, aimed at Burr himself. A group of men had made their way as far as Virginia, with some measure of direction, encouragement, and other assistance from Burr. Under *Bollman*, prosecutors argued, Burr was a traitor, even though he did not join up with men ("all those who perform any part, however, . . . remote"), and even though the group did not assemble in any openly military way (at bottom, the government asserted, the cohort—including Burr himself—had "the purpose of effecting by force a treasonable purpose," and that was enough). Because the group gathered in Virginia, venue lay there, and thus the presiding judge at trial became Circuit Justice John Marshall.

Marshall's famous opinion addressed to the jury in the Burr case, pointing towards acquittal as to treason, is a notably odd performance. It depicts Marshall, at least as much as Burr, as standing accused—indeed, it is rather more a defense of Marshall himself than an analysis of Burr's circumstances. The problem was *Bollman*. Marshall manuvered at length. He argued that the pertinent passage in the opinion was a digression, albeit excusable dictum, that only four of the seven Justices participated in deciding the case, and that one of the four may not have concurred in the dictum—all reasons, Marshall suggested, not to give much weight to the *Bollman* pronouncement.[22] He nonetheless conceded: "If the supreme court have indeed extended the doctrine of treason, . . . their decision would be submitted to. At least this court could no further than to endeavor again to bring the point directly before them."[23] In any case, prosecutors were misreading *Bollman*. Their construction, Marshall demonstrated in detail, put the Supreme Court at odds not only with American judges, but also a long line of English authorities, all of whom seemed to agree that "levying war"—necessary for treason—supposed "a warlike assemblage, carrying the appearance of force, and in a situation to practice hostility."[24] If the Supreme Court meant to strike out on its own, fashion a "new-fangled" treason (in Madison's words), its opinion would have been forthright, would have made the fact of its departure clear: "A mere

21. *Id.* at 126.
22. United States v. Burr, Opinion, U.S. Circuit Court (Va.), August 31, 1807, reprinted in 7 THE PAPERS OF JOHN MARSHALL 78-79 (Charles F. Hobson ed., 1993).
23. *Id.* 87.
24. *Id.* 86; *see id.* 82-87.

implication, ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the court ought to have expressly declared . . . ."[25] Close reading revealed no such declaration.[26] Marshall's own prior rulings in the *Burr* case, he noted, were consistent with narrow construction of *Bollman*.[27]

In any event, notwithstanding the government's belief, the Supreme Court had not sanctioned prosecution of someone like Burr himself, who was not on site at the point of assembly, or at least close at hand. English law extended more broadly than the literal language of the constitutional definition of treason, allowing use of various fictions that Marshall understood the indictment to foreswear.[28] *Bollman*, in this regard, should be read as similarly limiting:

> According to the opinion, it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. This part, it is true, may be minute, it may not be the actual appearance in arms; and it may be remote from the scene of action, that is from the place where the army is assembled, but it must be a part. . . . This part however minute or remote constitutes the overt act on which alone the person who performs it can be convicted. [¶] The opinion does not declare that the person who has performed this remote and minute part may be indicted for a part which was in truth performed by others and convicted on their overt acts.[29]

Burr did not join the others in Virginia; their overt act, if it indeed amounted to "levying war," was not his, and thus could not come within the Virginia-focused indictment.[30]

Concluding his charge, Marshall elaborated a remarkable apology:

> No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of

25. *Id.* 87.
26. *See id.* 88-92.
27. *See id.* 93-94.
28. *See id.* 103-09.
29. *Id.* 109-10.
30. Marshall recognized the possibility that Burr might have "procured" the Virginia assembly and that this would have established a sufficient connection. But the act of "procuring" required direct proof as in the case of other overt acts, proof lacking in the case so far. *See id.* 110.

> calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country who can hesitate which to embrace.
>
> That gentlemen, in a case the utmost interesting, in the zeal with which they advocate particular opinions, & under the conviction in some measure produced by that zeal, should on each side press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is perhaps a frailty incident to human nature; but if any conduct on the part of the court could warrant a sentiment that they would deviate to one side or the other from that line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.
>
> The arguments on both sides have been intently and deliberately considered.... The result of the whole is a conviction as complete as the mind of the court is capable of receiving on a complex subject....[31]

A few weeks later, in the midst of another phase of the case, Marshall returned to the question of his integrity:

> Reports may very possibly be in circulation that this court instead of obeying has absolutely reversed a decision of the supreme court. While such reports would be entirely incorrect in point of fact, they would cast an imputation on the court, which, I flatter myself, will never be merited. But such reports may circulate with great facility, and the labor of reading the opinion to which they refer, and which would certainly refute them, will be taken only by a few.... I therefore feel myself bound to declare that I have given what I believe to be the sound and true legal construction of the opinion of the supreme court....[32]

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31. *Id.* 115. Some of the grammar of this passage ("they would deviate") reflects the fact that Marshall did not sit alone—he was assisted by another federal judge.

32. *Id.* 146. Marshall invited counsel to declare that the charges against him "should be heard unnoticed." *Id.*

He was, all the same, burned in effigy, along with Burr, in Baltimore.[33]

E

It is hard not to perceive a dissonance in John Marshall's efforts in *Burr*. His treatment of *Bollman* and his specification of the parameters of treason exhibit a characteristic exuberant virtuosity, a near too-obvious brilliance—he treats his own prior pronouncement as both almost irrelevant and, carefully read, precisely correct and dispositive; similarly, common law notions of treason figure as limited and controlling and as open-ended and beside the point. But Marshall also insists on his own good faith and faithfulness—he does not, he urges, "deviate . . . from that line prescribed by duty and by law." Indeed, he verges on literally swearing that this is so ("I . . . feel myself bound to declare . . . .") He appears to have been genuinely disconcerted by hostile public reaction.

Burr, we can see, is very much of a piece with *Marbury*. There too Marshall showed off a whirlwind facility. His long opinion seized upon the organization of the argument of Marbury's counsel and reversed it, repeatedly putting Marbury and Madison in the posture of plaintiff and defendant in the course of demonstrating Marbury's right to the commission, therefore showing, even before Marshall addressed the question explicitly, that Marbury's action was easily characterized as an original proceeding rather than an appeal—notwithstanding counsel's own principal argument. Simultaneously, by repeatedly invoking and using constitutional provisions to confirm Marbury's right to the commission, Marshall also prepared the way for his conclu-

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33. In a letter to Richard Peters, dated November 23, 1807, Marshall remained defensive:

> The day after the commitment of Colo. Burr for a misdemeanor I galloped to the mountains whence I only returned in time to perform my North Carolina circuit which terminates just soon enough to enable me to be here to open the court for the antient dominion. Thus you perceive I have sufficient bodily employment to prevent my mind from perplexing itself about the attention paid me in Baltimore & elsewhere. [¶] I wish I could have had as fair an opportunity to let the business go off as a jest here as you seem to have had in Pennsylvania: but it was most deplorably serious & I could not give the subject a different aspect by treating it in any manner which was in my power. I might perhaps have made it less serious to myself by obeying the public will instead of the public law & throwing a little more of the sombre upon others.

Id. 165. Concerning the widespread, negative public reaction to the Burr proceedings, *see* GEORGE LEE HASKINGS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, 2 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 289-91 (1981).

sion that the Constitution was just one species of ordinary law (albeit hierarchically superior). Paul Kahn puts the point well: "The power of the opinion is precisely its ability to draw the reader into an appearance of law that it creates."[34] The razzle-dazzle concludes, though, with Marshall's insistence that, somehow, it is all bound up with the constitutionally-required oath of allegiance, that it is the obligation imposed by the oath—faithfulness, again—that judicial opinions like his discharge. It is the oath, somehow, that motivates and justifies what came before.

Professor Kahn also writes: "Reading *Marbury* we see only the rule of law with its claims of indifference to individual political actors, of permanence, and of representation of the people."[35] This is, we might think, a difficult proposition to defend. Reading *Marbury*, we plainly see John Marshall—or rather, unmistakable marks of his personality: his talents and preoccupations. *Marbury*, like *Burr*, advertises its author—demonstrates skill, pleads good faith. Marshall makes his own predicament in *Burr* the organizing frame of his discussion, and thus makes the sincerity of his analysis a central theme and question. So too Marshall in *Marbury* calls attention to his own effort, through his conspicuous lawyerly counterpoint at the outset, and even more so through the emotional coloring he adds to the discussion of the constitutional oath at the end. In "the literature of public documents" (Robert Ferguson's famous phrase[36]), *Marbury*, like *Burr*, stands in notable contrast to the Constitution, written in a terse, commonplace, anonymous style exhibiting much more clearly Paul Kahn's ideal "rule of law."[37]

Readers of Joanne Freeman, however, would not be at all surprised to glimpse the subjective insistences in *Marbury* and *Burr*:

> In a government lacking formal precedents and institutional routines, reputation was the glue that held the polity together. The fragile new republic was a government of character striving to become a government of rules within its new constitutional framework. In this highly personal political realm, an

34. PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 17 (1997).

35. *Id.* "Central to law's rule is a particular organization of the community's consciousness of itself as a single, temporally extended phenomenon." *Id.* 177.

36. ROBERT A. FERGUSON, THE AMERICAN ENLIGHTENMENT, 1750-1820, p. 149 (1994).

37. *See id.* 135-41.

> attack on a government measure was an attack on a politician, and an attack on a politician immediately questioned his honor and reputation. As one statesman noted, "It is impossible to censure measures without condemning men."[38]

Within the world that Professor Freeman recovers, Jefferson, Adams, Hamilton, Madison, Burr, Marshall and their contemporaries set to work against the backdrop of gossip, the "paper war" of leaked letters, newspapers, pamphlets, and broadside posters, dueling codes, and "the universal recognition of the language of honor."[39] Preoccupied with appearances, they sought to present themselves as acting in the public interest, and their adversaries as otherwise motivated. The most successful of these actors in "the theater of national politics" carefully modulated their attacks on each other and hid their responsibility, aware that authorship of overstatement undercut the appeal to public interest and, at the extreme, triggered the etiquette of dueling and its attendent risks. All were "exceedingly paper-minded": more or less sensitive to the political implications of choices of forms of public communication, aware also of the risks of "no theory," of having drawn "no intellectual line in the sand" evident enough to assure restraint, to deter corruption.[40]

Professor Freeman's account of "paper war" emphasizes mostly unofficial writings. We can see, I think, much of the same dynamic within the literature of public documents. There is a similar inventive profusion of forms: declarations, constitutions, resolutions, reports—and Supreme Court opinions. There is a similar display of greater or lesser skill in making use of the various document types: Jefferson, Madison, Hamilton, and Marshall were obviously virtuosi. We should not be surprised to find within public documents, at least within the limits of their form, evidences of the anxieties characteristic of the political environment of the period. The judicial opinion, it might be hypothesized, is the least restricted document-type—an outgrowth of oral presentations like the jury charge in *Burr*, still first presented orally, only subsequently put in print, as much individual as collegial.[41] The personal element might thus be most evident

38. JOANNE B. FREEMAN, AFFAIRS OF HONOR: NATIONAL POLITICS IN THE NEW REPUBLIC 69 (2001).

39. *Id.* 171; *see id.* 62-104 ("the art of political gossip), 105-58 ("the art of paper war"), 159-98 ("dueling as politics").

40. *Id.* 267, 211.

41. *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, 3-4 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 181-95 (1988).

in the "opinion." Finally, we should be entirely unsurprised if judicial writings juxtaposed legal erudition and political sensitivity.

Marbury, we all know, is easily read within the terms of this conjunction. Readers of Professor Freeman are well positioned to treat *Burr* as *Marbury* more so. Were the Burr proceedings set in motion by Jefferson, master politician of the era, in order to damage Marshall, to take revenge for Marshall's depiction of Jefferson in *Marbury*, and not just to (at minimum) further disgrace Burr? Marshall certainly seems to have sensed the trap—be seen to bow to Jefferson or share in Burr's taint, sacrificing political reputation carefully achieved, for example, as the honest chronicler of French corruption in the XYZ affair,[42] and the official biographer of George Washington.[43] Within these terms, Marshall's organization of his *Burr* opinion as a defense of himself was not simply judicial narcissism, and his subsequent seeming distress in the face of public criticism, we may think, was likely sincere.

And we can now, finally, appreciate the office of the oath. We can understand why only public officials, and not the citizenry at large, were obliged to make the constitutional pledge. The problem of distrust, the risk of disloyalty, originated in the politics of office. The function of the oath, thus, was also consistent with its wording, was at bottom altogether secular. Its obligation was an obligation to account for disagreement, to demonstrate no disloyalty or dishonor, to answer the charge of "no theory." Its obligation was, in other words, an obligation to "expound,"[44] to show that, for example, the judge's conclusions were traceable, in a persuasive enough way, to the Constitution (or some other pertinent legal instrument), and thus to show that for the judge, "the constitution forms . . . [a] rule for his government." This is why the terms of the oath, unlike (for example) the English test oaths, itself includes no particular propositions requiring acknowledgement.

This is also why, contra Alexander Bickel, it was not sufficient, for purposes of constitutional interpretation in a judicial opinion, simply to defer to legislative or executive constitutional

42. *See* STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800, pp. 549-79 (1993).

43. On the political significance of the Washington biography, written between *Marbury* and *Burr*, and Jefferson's appreciation of Marshall's public popularity, *see* FREEMAN, *supra* note 38, at 61-63, 231.

44. Concerning this characteristic Marshallian term, *see* FERGUSON, *supra* note 36, at 147.

interpretation. "Government" here, it would seem, is chiefly a psychological phenomenon. The point was to demonstrate loyalty or public interest as a state of mind, to show the sincerity of the invocation of the Constitution. Immediate, unreflective deference would not serve as such a demonstration. Affirmations as well as rejections of congressional action raised questions of judicial faithfulness. The complexity or originality of an opinion's exposition would not necessarily be inconsistent with the claim of "government"—at least if the exposition was persuasive enough.

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The oath of allegiance to the Constitution, thus, was a version of the Athenian dikastic oath.[45] Indeed, it is easy to identify other predecessors. For example, the political environment that Joanne Freeman describes is not very different from the emergent scientific sphere, with its inter-related concerns for "credible persons and credible knowledge" that Steven Shapin maps in seventeenth century England.[46] Shapin reports use of a provocatively similar restricted oath. "If a gentleman's word was his bond, the servant required double-bonding."[47] The purpose served by the federal constitutional oath, as I have characterized it, was also not unlike the purpose oaths of allegiance sworn by nobles served in twelfth century Occitania: "to counteract threats of disintegration," "to recreate . . . community," "to internalize . . . values."[48] As a matter of anthropology, generalization is not difficult. The oath—high or low—in each instance "transforms at the same time the representation which the person who has been invested makes of himself, and the attitudes which he believes it is necessary for him to adopt in order to conform to this representation."[49]

Of what use to us now is this history and anthropology?

A government of institutions not individuals, of complexly organized groups of officials and employees no longer reducible (for most purposes) to a small set of elite personalities—Is there

45. *See* S.C. TODD, THE SHAPE OF ATHENIAN LAW 54-62 (1993).
46. STEVEN SHAPIN, A SOCIAL HISTORY OF TRUTH: CIVILITY AND SCIENCE IN SEVENTEENTH-CENTURY ENGLAND 238 (1994).
47. *Id.* 403.
48. FREDRIC L. CHEYETTE, ERMENGARD OF NARBONNE AND THE WORLD OF THE TROUBADORS 198 (2001).
49. Pierre Bourdieu, *Rites as Acts of Institution*, *in* HONOR AND GRACE IN ANTHROPOLOGY 82 (J.G. Peristany & Julian Pitt-Rivers eds., 1992).

any point, within our context now, to thinking through constitutional oaths and their implications? There is this, at least: "Paper war" persists (if now also digitally and electro-magnetically). "The literature of public documents" remains central, remains profuse, remains multiple in its forms. The question of "honor" may appear to be anachronistic. But there is an institutional variant. The language of comity persists. Constitutional law today regularly evidences concern for due regard for state governments, for example, or for executive discretion, or for the Supreme Court's place. Institutions do not fight duels. But the question of the etiquette of confrontation and conflict remains alive.[50]

As one test of possible relevance, we might consider, the currently-prominent question of congressional enforcement of section 5 of the Fourteenth Amendment and the associated question of the limits of congressional freedom to interpret section 1 of that amendment in ways justifying legislation more protective of individual rights than Supreme Court case law would justify.[51] With respect to this Fourteenth Amendment question, I think, several obvious propositions follow if we extrapolate from the reading of *Marbury* and the constitutional oath that I have outlined here.

First, the Supreme Court should bring to bear its own understanding of the Constitution in passing on the validity of acts of Congress.

Second, the fact that Congress independently interprets the Constitution is not problematic—simply a corollary of the congressional constitutional oath. Whether or not the congressional reading matches the Supreme Court's understanding is, in and of itself, irrelevant for purposes of the substance of judicial constitutional review. The operative question is whether legislation is inconsistent with the Constitution within the Court's own independent reading.

Third, if legislation burdens individual rights recognized in Supreme Court conceptions, the Court should declare such legislation to be invalid. If the constitutional question is one of power, judicial deference to legislative fact-finding or remedial

50. *E.g.*, Hicks v. Miranda, 422 U.S. 332 (1975).

51. *See, e.g.*, Nevada Dept. of Human Resources v. Hibbs, 123 S. Ct. 1972 (2003); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001); City of Boerne v. Flores, 521 U.S. 507 (1997); Robert Post & Reva Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2001)

judgment should not depend upon whether Congress shares the Supreme Court's understandings, but upon whether the Court's own sense of state government interests or risks of conflict with constitutionally-protected individual rights indeed warrants restricting legislative discretion.

Fourth, in cases in which a statute rests on congressional constitutional interpretations evidently differing from those held by the Supreme Court, the Court cannot enforce its own views unreflectively, through invocation of the doctrine of stare decisis, but must consider the matter de novo, thus acknowledging the congressional interpretive responsibility, giving it consequence, without minimizing the Court's own responsibility. This may be an especially important corollary, insofar as Court decisions that provoke congressional responses are likely to be controversial in terms both immediately legal as well as political.[52]

Fifth, the Supreme Court should also attribute to Congress a complementary recognition of the independence of the Court's own responsibility. The Court need not consider constitutional questions without regard to stare decisis unless Congress in fact has self-evidently legislated on the basis of contrary constitutional understanding. The substance of the law at issue cannot be glossed in any terms that do not presuppose the divergent constitutional understanding.

This regime pretty plainly differs a lot, at least in form, from the working rules that the Supreme Court appears to follow currently. I do not explore the advantages and disadvantages of the approach I have outlined here. I also do not hazard a guess as to which results in which of the Supreme Court's decisions would change if the five propositions above were brought to bear. This regime pretty plainly differs a lot, in more than just form, from the working rules that the Supreme Court appears to follow currently. The Court really ought not to invoke *Marbury v. Madison* in defending its own approach.

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52. The result might be a practice very much resembling the "second look" doctrine proposed some years ago by Judge Calabresi—only in reverse: Congress would be able to ask the Supreme Court to reconsider its rulings. *See generally*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).