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EXECUTIVE POWER AND THE RULE OF LAW IN THE MARSHALL COURT: A REREADING OF *LITTLE V. BARREME* AND *MURRAY V. SCHOONER CHARMING BETSY*

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This Essay uses two 1804 opinions by Chief Justice John Marshall to explicate a world in which understandings of executive power and the rule of law were very different from those that predominate today. Scholars have misread Little v. Barreme *and* Murray v. Schooner Charming Betsy*, this Essay argues, because they apply modern assumptions about the balance of power between Congress and the executive that do not fit the Marshall Court's constitutional vision. Contemporary interpretations read* Little *for the propositions that the president's inherent wartime power may be limited by statute and that early American jurists rejected officers' "good faith" defenses to liability for tortious acts. But the opinion in fact reflects the Marshall Court's view that, in an undeclared war, the president could not act at all unless authorized by Congress and that under no circumstances could the president give an officer a right to act where Congress had not.* Charming Betsy*, meanwhile, is known today for the* "Charming Betsy *canon*"*: Marshall's assertion that wherever possible, courts ought to interpret the laws of Congress to accord with international law. In its historical context, however, the case illustrates Marshall's view of the law of nations not as an external constraint on sovereignty—a common understanding of international law's role today—but as an aspect of the rule of law critical to preserving the proper allocation of powers between Congress and the president. Indeed, read together, these cases show Marshall using the law of nations to reinforce a tenet central to the separation of powers in the new republic: that only Congress could alter the nation's war footing. Through* Little *and* Charming Betsy*, the Marshall*

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Court sought to foreclose Congress's efforts to abdicate its responsibility to authorize acts of war and thus to underscore the constitutional balance that placed the warmaking and lawmaking power not with the courts, not with the executive, but with Congress.

INTRODUCTION

To admiring scholars of Chief Justice John Marshall, 1803's *Marbury v. Madison*[1] opinion represents a crowning achievement: a strategic masterpiece of statutory interpretation that avoided a partisan, interbranch conflict over executive authority, while at the same time establishing the judiciary's power to review a statute's constitutionality. In the prevailing view, the decision was intensely political: Marshall the Federalist, knowing he could not compel his personal and political rival, President Thomas Jefferson, to comply with the Court's holding, chose instead to declare in dicta that Marbury had a right to his commission, while at the same time preserving the U.S. Supreme Court's fragile authority by holding that it lacked the jurisdiction to hear such cases and thus could not provide a remedy. Scholars have emphasized the holding's significance for the judiciary's oversight of administrative action and for its "structural approach" to judicial review.[2] There is disagreement on whether and to what extent Marshall engineered the conflict between Article III and section 13 of the Judiciary Act of 1789[3] to tee up a holding on judicial review.[4] But there is widespread consensus that the opinion showcased Marshall's deft maneuvering in a treacherous political climate and, in establishing judicial review,[5] provided critical clarity to one aspect of the otherwise indeterminate

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

2. William Michael Treanor, *Judicial Review Before* Marbury, 58 STAN. L. REV. 455, 561–62 (2005) (describing *Marbury* as rooted in "the constitutional theory" that "protection of spheres of governmental authority was critical to the rule of law and the protection of individual liberty"); *see also* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1, 1–2 (1983).

3. Ch. 20, 1 Stat. 73.

4. *Compare, e.g.*, LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 75 (1988) (describing *Marbury* as a "flagrant specimen[] of judicial activism"), Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443, 455–56 (1989), *and* Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 WIS. L. REV. 301, 328–29, *with* James E. Pfander, Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1518 (2001) (arguing *Marbury* is "a good deal closer" to Marshall's contemporaries' understanding of the Court's authority than most modern commentators assume).

5. More recent scholarship suggests that judicial review was relatively well established by 1803. *Compare, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962), *and* SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION (1990), *with* Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1113–14 (2001), Maeva Marcus, *Judicial Review in the Early Republic*, *in* LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA 204 (Ronald Hoffman & Peter J. Albert eds., 1997), *and* Treanor, *supra* note 2, at 561 (contextualizing *Marbury* within the then "common practice of invalidating statutes that affected the judiciary").

boundaries between the branches of the infant federal government.[6] Perhaps most important, Marshall's pronouncement that the United States possessed a "government of laws, and not of men"[7] helped to cement a central tenet of the Federalist Constitution that appeared endangered by Jeffersonians' resounding recent victory at the polls and what one scholar has characterized as their commitment to "a politics of revolution."[8]

Little v. Barreme[9] and *Murray v. Schooner Charming Betsy*,[10] two Marshall opinions issued a year after *Marbury*,[11] each involving erroneous seizures of neutral vessels during the United States's Quasi-War with France, have not received anything like the painstaking analysis that scholars have devoted to *Marbury*. Today, *Little* is known for two holdings. The first concerns whether a federal statute can "disable" the president's inherent authority to determine the manner in which the country wages war.[12] The second relates to what today falls under the label of qualified immunity: whether an officer who commits a tort in the course of following orders in good faith can be excused from damages. Scholars have cited the case as evidence that war was not always regarded as a preserve of the executive

6. For the indeterminacy of the concept of separation of powers at the founding, see Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1730 (1996) (refuting "the idea that the Founders had developed a thoroughgoing, tripartite baseline capable of resolving modern controversies"); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011) (noting that "[t]he historical record . . . reveals no one baseline for inferring what a reasonable constitutionmaker would have understood 'the separation of powers' to mean in the abstract").

7. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

8. PAUL W. KAHN, THE REIGN OF LAW: *MARBURY V. MADISON* AND THE CONSTRUCTION OF AMERICA 10 (1997); *see also* GEORGE LEE HASKINS & HERBERT A. JACKSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–1815, at 202 (1981) (describing Marshall's "concern for a reconciliation between transcendent popular will, as exhibited in the legislature, and immutable principles of law, as embodied in 'a regular administration of justice'" (quoting 5 JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 100–02 (Philadelphia, C. P. Wayne 1807)); GERALD LEONARD & SAUL CORNELL, THE PARTISAN REPUBLIC: DEMOCRACY, EXCLUSION, AND THE FALL OF THE FOUNDERS' CONSTITUTION, 1780s–1830s, at 89 (2019) (describing Marshall as "fear[ing] the consequences of the Republican ascendancy for Federalist legalism").

9. 6 U.S. (2 Cranch) 170 (1804).

10. 6 U.S. (2 Cranch) 64 (1804).

11. *Little* was first argued in December 1801, the same month as *Marbury*. It was reargued in February 1803, the same month that the Court both heard arguments in *Charming Betsy* and issued its decision in *Marbury*.

12. Stephen I. Vladeck, *Congress, the Commander in Chief, and the Separation of Powers After* Hamdan, 16 TRANSNAT'L & CONTEMP. PROBS. 933, 939 (2007).

branch[13] and of the harshness of the law of official immunity in the founding era.[14]

Although scholars correctly recognize in *Little* a vision of executive power more limited than that which predominates today, they misread the case in certain crucial respects and therefore miss both Marshall's strategic agility and the *Marbury*-like separation of powers principle that lies at its heart. The more accurate reading of the case, I argue, reveals a far stronger precedent for congressional control over the conduct of hostilities. *Little* does not stand for the idea that the president's constitutional war power is constrained only by explicit statutory limits. Instead, it represents the widespread founding-era understanding that in an undeclared war, the president's authority to engage in hostilities derives exclusively from statute.[15] Read in light of the Justices' ongoing disagreement over judicial cognizance of executive orders, captured in footnotes in the original edition of the U.S. Reports, *Little* reminds us that the Marshall Court's rejection of official immunity reflected its conviction that the Constitution placed the lawmaking and warmaking

13. *See, e.g.*, DAVID J. BARRON, WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS, 1776 TO ISIS 66 (2016); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding* (pt. 1), 121 HARV. L. REV. 689, 762 (2008) [hereinafter Barron & Lederman, *Lowest Ebb I*] (arguing that, in *Little*, "a statute had prohibited the President from using the navy during an armed conflict in a manner that might otherwise have been within his constitutionally authorized discretion"); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—a Constitutional History* (pt. 2), 121 HARV. L. REV. 941, 968 (2008) [hereinafter Barron & Lederman, *Lowest Ebb II*] (citing *Little* for the proposition that Congress's authorization of the use of force in an undeclared war "implied statutory *limitations* on the Commander in Chief's war powers that must be followed"); Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme *or* Curtiss-Wright*?*, 13 YALE J. INT'L L. 5, 11 (1988) (arguing that *Little* views the president's foreign affairs power as "largely dependent upon the will of Congress"); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2366–67, 2367 n.67 (2006) (placing *Little* in a line of decisions "rejecting the claim that the President may invoke his power as Commander in Chief to disregard an act of Congress designed specifically to restrain executive conduct in a particular field"); Henry J. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 24 (1993) (arguing that, under *Little*, "the President lacks authority to act *contra legem*, even in an emergency"); Vladeck, *supra* note 12, at 935 (attributing to *Little* a conception of the separation of war powers in which "the President could not disregard valid substantive limitations that Congress placed upon his authority during wartime"). *But see* J. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 492 (2005) (ascribing to *Little*, by "negative implication," a capacious view of wartime executive authority in instances of congressional silence).

14. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55 (2018); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14 (1972); Richard H. Fallon Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 942–43 (2019) (citing *Little* as an example of the founding-era common law's "striking[]" relative disregard for government officials' responsibilities); Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RSRV. L. REV. 396, 415 (1987). *But cf.* James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1864, 1865 n.11 (2010) (noting that Marshall acknowledged "the harshness of the rule" but also that Congress indemnified Little three years later).

15. *See* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804).

authority with Congress alone.[16] Executive orders could not immunize an officer against damages because only Congress could "give a right."[17] This precept, in turn, was intimately connected with the principle that only Congress could alter the nation's war footing, and thus only Congress could decide when to deviate from the law of nations' rules for peacetime conduct. This vision of the power of the legislature in relation to the other branches was, I argue, central to the Court's understanding of the rule of law, no less than (and indeed, intimately connected to) the idea that the federal government was "a government of laws, and not of men."[18]

Scholars have likewise missed the constitutional stakes of *Charming Betsy*, a Marshall opinion issued five days before *Little*. Like *Little*, *Charming Betsy* involved a U.S. naval officer's mistaken seizure of a neutral vessel. Today, the case is known for the "*Charming Betsy* canon," instructing courts to interpret the laws of Congress to accord with international law whenever possible.[19] Yet when it was decided, the case was better known for its holding that probable cause was the standard of proof for seizures of neutral vessels on the high seas.[20] Marshall's interjections during oral

16. *See id.* at 177–78.

17. *See id.* at 179 ("[T]he instructions of the executive could not give a right . . . .").

18. *See supra* note 7 and accompanying text.

19. The literature on the *Charming Betsy* canon, its present-day significance, and the case underlying it is substantial. *See, e.g.*, ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION 235 (2017) (arguing that the canon "presuppose[s] that Congress could violate the law of nations if it clearly expressed its intent to do so"); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1205 (2018) (arguing that, as the executive claims increasing control over international law matters, courts applying the *Charming Betsy* canon "often give presidential interpretations of international law substantial deference"); Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1998) (arguing that contemporary use of the canon is best justified as a heuristic to preserve separation of powers); David M. Golove & Daniel J. Hulsebosch, *The Law of Nations and the Constitution: An Early Modern Perspective*, 106 GEO. L.J. 1593, 1655–56 (2018) (reviewing Professors Anothony J. Bellia and Bradford R. Clark's book and refuting the idea that the canon presupposes Congress's authority to violate the law of nations); Frederick C. Leiner, *The* Charming Betsy *and the Marshall Court*, 45 AM. J. LEGAL HIST. 1, 1 (2001); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1196 (1990) (arguing that the canon encourages "a mode of inclusive analysis, admitting multiple sources of potentially relevant considerations into a process of practical reasoning"); Jonathan Turley, *Dualistic Values in the Age of Legisprudence*, 44 HASTINGS L.J. 185, 267 (1993) (cautioning against the antidemocratic effects of courts' reliance on the canon).

20. *See, e.g.*, Maley v. Shattuck, 7 U.S. (3 Cranch) 458, 483 (1806) (showing counsel for appellee arguing that "[u]nless the taking was lawful, or with probable cause, the captor is liable for all the loss" and unfavorably comparing Maley's case to Murray's); *id.* at 489 (including Marshall listing evidence supporting probable cause in *Charming Betsy* to reach the same conclusion); Burke v. Trevitt, 4 F. Cas. 746, 748 n.4 (C.C.D. Mass. 1816) (No. 2163) (Story, J.) (citing, among others, *Charming Betsy*, *Little*, and *Maley* to demonstrate the unsettled nature of the question whether probable cause excused an officer from damages where the officer erroneously seized goods for a suspected violation of a municipal statute and whether there was a difference between seizures on land and on the high seas); The Rover, 20 F. Cas. 1277, 1278 (C.C.D. Mass. 1814) (No. 12,091) (Story, J.) (showing respondents' counsel citing *Charming Betsy*, *Little*, and *Maley* for the proposition that probable cause justified the seizure of an American vessel suspected of violating a trade prohibition, the law's

argument reveal his concern that the executive order under which Captain Alexander Murray had seized *The Charming Betsy*, in instructing officers to seize vessels "apparently, as well as really American," had exceeded the authority granted by Congress and violated the law of nations, thereby moving the nation closer to war.[21] At risk were both the United States's precarious standing as a civilized nation[22]—had the United States deliberately violated neutral rights?—and the fundamental constitutional division of power in which Congress alone possessed the ability to alter the nation's war footing. Ultimately, Marshall's worry led him to find a way to reconcile the order's "probable cause" standard with the law of nations.[23] By creatively interpreting the bounds of the president's statutorily granted authority, I argue, Marshall preserved the essential constitutional balance that placed the lawmaking and warmaking power with Congress.

Little and *Charming Betsy* thus round out our understanding of what Marshall meant when he pronounced in *Marbury* that the United States government was a government of laws, not of men. In the face of Jeffersonians' provocations, Marshall used his opinions to delineate what it meant for a government to be premised on the rule of law. To be sure, there are important differences between the political stakes of the three opinions, including the fact that the presidential administration on the hot seat in *Little* and *Charming Betsy* was that of President John Adams, not President Jefferson. Yet, like scholars who resist a deeply politicized interpretation of *Marbury*,[24] I do not believe that Marshall's upholding of the executive orders at issue in *Little* and *Charming Betsy* was nakedly partisan.[25] Instead, the three opinions together shed light on the constitutional vision of one of the early republic's foremost legal practitioners—a vision centered not only on

municipal status notwithstanding, and for the sufficiency of the evidence); The Lively, 15 F. Cas. 631, 633–34 (C.C.D. Mass. 1812) (No. 8403) (citing *Charming Betsy*'s probable cause holding). Of course, *Charming Betsy* was cited for its other holdings as well. *See, e.g.*, The Venus, 12 U.S. (8 Cranch) 253, 257 (1814) (citing *Charming Betsy*'s holding regarding expatriation); *Maley*, 7 U.S. (3 Cranch) at 484, 491 (citing *Charming Betsy*'s holdings regarding the sale of American-made vessels to neutrals and damages).

21. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 78 (1804) (emphasis omitted).

22. For an illuminating discussion of the Framers' focus on the urgency of the United States's compliance with the law of nations, see David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010).

23. *See infra* note 132 and accompanying text.

24. *See, e.g.*, Christopher L. Eisgruber, Marbury*, Marshall, and the Politics of Constitutional Judgment*, 89 VA. L. REV. 1203, 1205 (2003); Pfander, *supra* note 4, at 1522; Treanor, *supra* note 2.

25. The partisan upshot of the opinions is far from clear. The finding that Adams's orders had been lawful, although resting on a creative interpretation of what the law of nations allowed, was not fanciful. The opinions precluded congressional attempts to avoid the political and electoral consequences of an ambiguous and ambivalent approach to war, shoring up a key separation of powers principle (that the power to make war rested with Congress) that lacked an obvious partisan valence. And while the opinions' major premise—that only Congress could give a right—arguably limited Jefferson's power, it did so by empowering the heavily Jeffersonian legislature.

the idea that "where there is a legal right, there is also a legal remedy,"[26] but also on the understanding that Congress, not the executive, possessed the power to give rights and start wars and could not evade the accountability that came with it.[27]

Because the cases themselves are complex and involve nonobvious questions of international law, and because one of my aims is to showcase the game of three-dimensional chess that Marshall played to resolve the dilemmas they presented, the remainder of this Essay proceeds by reconstructing Marshall's reasoning from the inside out. It begins, in Part I, by describing the decisions' Quasi-War context and the facts of *Little* before foregrounding a puzzle in Marshall's *Little* opinion: what had his brethren said to change his mind regarding Captain George Little's immunity? Part II turns to *Charming Betsy* for an answer, describing the facts of the case and taking a scene-setting detour through the centrality of the probable cause dilemma that Marshall confronted in both cases: if the law that had authorized the orders under which both Captains Little and Murray had acted had not been a war measure, did that mean that the executive, in ordering the seizure of vessels "apparently, as well as really American," had exceeded the authority Congress had delegated to him? The law-of-nations rule was that only in a state of war could a nation seize neutral vessels on the high seas with probable cause to believe that the vessels were in some way aiding the enemy. Outside of war, officers seized vessels suspected of violating the law at their own risk and faced strict liability for damages incurred if their suspicions proved unfounded. If the president's order could not be squared with the law of nations, the unavoidable implication was that he had moved the nation closer to a war footing than Congress had authorized, something that not even the most strident advocates of the president's commander-in-chief powers believed he could do.

To shed light on this pivotal question, Captain Murray's counsel offered to read the president's orders themselves, but Justice Samuel Chase cut him off, explaining that it was "a bad practice" to read executive orders in court and that he would always "give [his] voice" against it.[28] Part II proceeds to describe the rule of law principle that likely motivated Chase's vehement objections and perhaps Marshall's change of heart regarding Captain Little's immunity as well: the idea that the dispensing power—literally, the executive's power to dispense with the law in particular circumstances for

26. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

27. In many ways, Marshall's constitutional vision resembles the one that John Phillip Reid ascribes to the American Whigs whose heavily legalistic arguments led their country to revolution against Britain. As described by Reid, this vision rejected contemporary Britons' embrace of parliamentary supremacy—a vision in which "legislation was command, the fist of power and the voice of sovereignty"—and instead conceived "of government not so much in terms of sovereignty and command but somewhat optimistically as the rule of law." 4 JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF LAW 4–5 (1993). It was this constitutional theory that appeared under threat in the high tide of Jeffersonian popularity, and it was this vision that Marshall was attempting to protect not only in *Marbury* but in *Little* and *Charming Betsy* as well.

28. *See infra* Part II.B.

particular people—had no place in a government premised on the rule of law. It was this principle that made the problem of probable cause such a concern, for if Congress had not authorized the seizure of neutral vessels on probable cause, then the executive certainly could not; to hold otherwise would be to reject the constitutional vision in which the dispensing power was antithetical to lawful rule. Drawing on this insight, Part II then explains how Marshall solved the problem of probable cause in *Charming Betsy* without running afoul of this critical rule of law principle, clearing the path for the Court's decision in *Little*. Part III explores the implications of this backstory for the standard readings of *Little*'s holdings. Far from assuming a deep reservoir of presidential war power bottomed only by statutory limits, *Little* starts from the premise that the Non-Intercourse Act[29] had impliedly authorized the president to issue implementing orders and thus that the president's power stemmed from statute. By starting from the wrong premise, I show, the standard characterization of *Little*'s holding as one in which the president's inherent war power is in conflict with statute misses key assumptions about the limits of executive power that undergird the decision. Rather than centering on Congress's ability to limit executive war power, *Little* turns on the rule of law principle that "the executive could not give a right." The Conclusion then suggests this Essay's doctrinal, methodological, and historiographical implications.

At its core, this Essay makes two interrelated points. The first is historical and doctrinal: the holdings of *Little* and *Charming Betsy* are products and evidence of a constitutional vision in which a profoundly constrained executive was central to the rule of law and in which the law of nations was the law of the land. The second is methodological, with implications that go far beyond the particular holdings of two 1804 cases. Scholars have misread these opinions, it argues, because they have missed this wider constitutional vision. Excavating this vision through close doctrinal analysis, paying attention to original edition footnotes and overlooked, deliberate turns of phrase, does more than suggest that contemporary arguments for expansive presidential war power do not stand on originalist legs. It also underscores the extent to which our world, where military engagements are frequently fought without any legislative authorization at all, diverges from the state of the republic during America's first undeclared war. In John Marshall's United States, it was a fundamental constitutional precept that the president could not unilaterally alter the "existing state of things" by bringing the nation any closer to war than Congress had authorized. As James Madison put it in a 1798 letter to Thomas Jefferson, "[t]he constitution supposes, what the History of all Govts. demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it," and consequently had "vested the question of war in the Legisl."[30] Marshall's deft maneuvering in both *Little* and *Charming Betsy* demonstrates his effort to apply this fundamental

29. Ch. 2, 1 Stat. 613 (1799).

30. Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), *in* 17 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 104, 104 (William T. Hutchinson et al. eds., 1991).

understanding in the murky context of the Quasi-War. Yet the separation of powers in our modern arrangement has veered so far from this premise that contemporary scholars have failed to recognize its centrality to both opinions, as well as to Marshall's larger constitutional frame.

Undoubtedly, the world of 2021 is not the world of 1798 or 1804. Yet the concerns that animated James Madison in 1798 and John Marshall in 1804 are, if anything, more pressing today. Recovering this lost constitutional order invites us to consider the applicability of its precepts to our modern arrangements, asking both how we have come so far from the Federalist constitutional vision and whether that vision might, even in today's changed world, offer salutary lessons.

I. THE QUASI-WAR WITH FRANCE, THE NON-INTERCOURSE ACTS, AND THE MYSTERY OF MARSHALL'S CHANGE OF MIND

The conflict that gave rise to both *Little* and *Charming Betsy* was the United States's Quasi-War with France. France, resentful of the United States's 1794 Jay Treaty with Great Britain and upset by what it saw as America's deviations from its earlier commitments to the French, began to harass American commercial vessels in the mid-1790s.[31] After diplomatic efforts failed (future Chief Justice Marshall, then a member of Congress, had been one of three American envoys who had spent the winter of 1797–1798 in Paris attempting unsuccessfully to negotiate with three anonymous French ministers in what became known as the XYZ Affair),[32] Congress responded with a series of warlike measures beginning in the spring of 1798,[33] each authorizing the president to protect American commerce without a formal declaration of war.

The divisions in Congress over these measures were sharply partisan: Federalists, who were in the majority, wanted a formal declaration of war, while minority Republicans mostly aimed to pass only defensive measures.[34] Federalists and Republicans also disagreed regarding the extent to which Congress could control the president's deployment of congressionally authorized forces. Federalists believed, as Speaker of the House Jonathan Dayton argued in 1798, that the president's role was to use "the military and naval force . . . as should appear to be most likely to promote the general welfare, having regard to the existing state of things, whether of peace or

31. For more on the Quasi-War context, see generally GARDNER W. ALLEN, OUR NAVAL WAR WITH FRANCE (1909); ALEXANDER DECONDE, THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801 (1966); FREDERICK C. LEINER, MILLIONS FOR DEFENSE: THE SUBSCRIPTION WAR SHIPS OF 1798 (2000); MICHAEL A. PALMER, STODDERT'S WAR: NAVAL OPERATIONS DURING THE QUASI-WAR WITH FRANCE, 1798–1801 (1987); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER: THE ORIGINS (1976).

32. *See* ALLEN, *supra* note 31, at 23–26.

33. *See id.* at 39.

34. *See* DECONDE, *supra* note 31, at 89–92.

war."[35] To Dayton and his like-minded colleagues, the president's role as commander in chief involved broad discretion to control authorized armed or naval forces, so long as he did not alter the "existing state of things, whether of peace or war," as determined by Congress. The Republicans' position, in contrast, was that Congress retained significant control over any force that had been raised. "When a force was raised for a particular object," agreed Republican House member John Nicholas,

> it was [the president's] business to direct the manner in which this force should be used; but to say that he had the right to apply it at his discretion, was to make him master of the United States . . . . If a contrary doctrine were to prevail, if [Congress] did not give up the right of declaring war, they gave up the power, which would inevitably lead to war.[36]

Federalists and Republicans nonetheless agreed in some respects. Among these was the understanding, as Abraham Sofaer has written, that "the power to take military actions that significantly increase the risk of war must be clearly delegated"[37] and that the president "could not alter the existing state of things" by moving the country from peace to war, a position to which even the zealous Dayton subscribed.[38] Many Federalists and Republicans also agreed that in the absence of legislative direction, the president's actions were governed by the law of nations.[39] What this meant in practice—whether, for instance, the president could engage in a defensive action consistent with international law that nevertheless moved the country closer to war—was far less clear. The ambiguity may have been deliberate: while some members of Congress likely believed the president ought to possess such discretion, others were probably happy to avoid the responsibility themselves by creating a situation in which the president would be to blame if his orders brought the nation from peace to war.[40]

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35. SOFAER, *supra* note 31, at 151 (quoting 5 ANNALS OF CONG. 1454–55 (1798) (statement of Rep. Jonathan Dayton)).

36. SOFAER, *supra* note 31, at 149 (quoting 5 ANNALS OF CONG. 362 (1797) (statement of Rep. John Nicholas)).

37. *Id.* at 157.

38. 5 ANNALS OF CONG. 1445 (1798). After Congress had approved the outfitting of additional armed vessels in April 1798, Dayton argued against legislative language authorizing the president to use these vessels "in any . . . manner which, in his judgment, will best contribute to the interests of the United States." He thought that this clause undermined the president's power by providing congressional authorization where none was needed. The president, he argued, "as Commander in Chief, could employ [the force] as he thought proper," provided that he did so with "regard to the existing state of things, whether of peace or war." *Id.* at 1445, 1455. Federalist Robert Goodloe Harper agreed, stating that while the president "could not alter the existing state of things," thereby forcing a "state of war" on a state "at peace," once force was authorized, it was up to the president to determine the manner in which it "should be employed, conformably to the state of peace and the rights and duties resulting from it." *Id.* at 1445–46. That even these champions of presidential war power believed the president could not alter the "existing state of things" underscores how uncontroversial this position was in the early republic. For more on the significance of this understanding for Marshall's opinion in *Little*, see *infra* Part III.

39. SOFAER, *supra* note 31, at 154.

40. *See id.*; *see also infra* Part III. The problem of Congress's abdication of its responsibility to authorize acts of war was a singular focus of separation of powers scholarship

As Congress was taking steps to protect American commerce without a formal declaration of war, it passed a series of Non-Intercourse Acts—officially, acts "to suspend the Commercial Intercourse between the United States and France, and the dependencies thereof."[41] The first passed in June of 1798, followed by a second in February 1799, and a third in February 1800, forbidding and penalizing all trade between the United States and France.[42] The 1798 statute impliedly left the work of seizure and condemnation up to the nation's private armed vessels, while the 1799 and 1800 measures added a section explicitly authorizing the president to instruct public armed vessels to stop and examine American vessels suspected of violating the prohibition and to seize and send in for adjudication any ship apparently in violation of the Act.[43] After the 1799 and 1800 Non-Intercourse Acts, at the request of President Adams, Secretary of the Navy Benjamin Stoddert instructed naval commanders to seize vessels on "just suspicion" of violating the Act, to "prevent all [French-American] intercourse . . . in cases where the vessels or cargoes are *apparently, as well as really, American*," and to take special care that "vessels or cargoes really *American*, but covered by *Danish* or other foreign papers, and bound to, *or from, French* Ports, do not escape you."[44] It was on these orders that Captains Little and Murray, in 1799 and 1800, respectively, mistakenly seized Danish ships.

Of the two cases, *Little* was the first to reach the Supreme Court. Marshall and his fellow Justices heard argument in the case in December 1801.[45] In December 1799, Captain Little, following Stoddert's orders, had captured *The Flying Fish*, a Danish ship sailing from Jeremie, a French port in Hispaniola, to St. Thomas, a Danish colony. Little had suspected *The Flying Fish* was really American, and he returned it to Boston for trial. The Massachusetts district court discovered that he had gotten the facts wrong: the vessel really was Danish. The circuit court, hearing the case on appeal, found he had gotten the law wrong too. True, *The Flying Fish* had been sailing *from* a French port, but it was not sailing *to* one, and the language of section 5 of the 1799 statute—"if, upon examination, it shall appear that such

for much of the second half of the twentieth century. *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993).

41. Act of June 13, 1798, ch. 53, 1 Stat. 565.

42. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 77 (1804).

43. *Compare* § 1, 1 Stat. at 565 (providing that vessels violating the prohibition "shall be forfeited, and shall accrue, the one half to the use of the United States, and the other half to the use of any person or persons, citizens of the United States, who will inform and prosecute for the same"), *with* Act of Feb. 9, 1799, ch. 2, 1 Stat. 613, *and* Act of Feb. 27, 1800, ch. 10, § 8, 1 Stat 7, 10 (authorizing the president to instruct naval officers to seize vessels that appeared to be violating the prohibition).

44. Little v. Barreme, 6 U.S. (2 Cranch) 170, 171–72 (1804); *see also* H.R. REP. NO. 8-44 (1805), *reprinted in* 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS 128, 132 (Washington, Gales & Seaton 1834) (reporting the Committee of Claims's recommendation that Alexander Murray's petition be granted). Throughout this Essay, I refer interchangeably to the orders as issuing from Stoddert or from Adams.

45. *Little*, 6 U.S. (2 Cranch) at 176.

ship or vessel is bound or sailing to any port or place within the territory of the French Republic"[46]—covered only the latter circumstance.

The Supreme Court did not issue its ruling in the case right away. Instead, it waited over two years, hearing reargument in February 1804 and issuing its ruling on February 27, less than a week after announcing its opinion in *Charming Betsy*. The record does not reveal the cause of the delay.[47] But Justice Marshall, in his *Little* opinion, admitted he was troubled by the idea that a military officer would owe damages for an act he had been ordered to take. "I was strongly inclined to think," Marshall wrote, that "the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation."[48] Yes, section 5 of the 1799 Non-Intercourse Act had spoken only of vessels sailing *to* French ports, but Secretary Stoddert had instructed naval commanders not to let American vessels bound "to or from French Ports" escape; how was it fair for Little to pay the price for Stoddert's mistake? Perhaps, Marshall thought, the fact that Little had been following executive instructions could "excuse an act not otherwise excusable."[49] If that were so, Little might escape damages altogether, if the Court then found that he had had probable cause for believing the vessel to be American.[50] Marshall was initially "in favor of the opinion that though the instructions of the executive could not give a right, they might yet excuse from damages,"[51] implicitly transferring the responsibility to remedy the resulting harm from the individual officer to the sovereign, to be pursued through diplomatic means.[52] He had thought that the military chain of command implied "the principle that [military] orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them, and who is placed by the laws of his country in a situation which in general requires that he should obey them."[53] But Marshall "[had] been convinced" that he was wrong.[54] "I acquiesce in [the

46. § 5, 1 Stat. at 615.

47. In 1802, the new Jeffersonian Congress adjusted the Court's terms so that it did not sit at all that year, perhaps because it feared the Court would find its repeal of the Judiciary Act of 1801 unconstitutional. *See* R. KENT NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 28 (1968); *see also* HASKINS & JACKSON, *supra* note 8, at 184. This explains some (but not all) of the delay. *See* Vladeck, *supra* note 12, at 942 n.55 (noting *Little* was the only case argued in December 1801 not decided that term and that it was not decided during the February 1803 sitting either).

48. *Little*, 6 U.S. (2 Cranch) at 179.

49. *Id.* at 178.

50. *Id.* at 178–79.

51. *Id.* at 179.

52. Secretary of State James Madison and Denmark's consul and resident minister Richard Söderström corresponded over several Danish reparation claims arising from the Quasi-War. Madison maintained that Congress would consider compensating the Danish captains only after the courts denied relief and only if "the obligations of the United States should be found nevertheless to demand that compensation should be made." Pfander & Hunt, *supra* note 14, at 1895 (quoting Letter from James Madison to Richard Söderström (July 23, 1801), *in* 1 THE PAPERS OF JAMES MADISON: SECRETARY OF STATE SERIES 461 (Robert J. Brugger et al. eds. 1986)).

53. *Little*, 6 U.S. (2 Cranch) at 179.

54. *Id.*

opinion] of my brethren," he explained, "which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."[55] It was "therefore unnecessary to inquire" into probable cause, because even if *The Flying Fish* had "actually been an *American*, the seizure would [still] have been unlawful."[56] Little was liable; the Court affirmed the lower court judgment with costs.[57]

What his brethren said to convince him, Marshall does not say. But William Cranch, the court reporter, recorded in his footnotes an exchange among the Justices during the February 1804 arguments in *Charming Betsy* that offers some insight.[58] The debate reveals that *Little* was not the first case in which the Marshall Court had wrestled with the relevance of executive orders to a party's liability. Whether a president, acting out of military necessity, could legalize an unlawful act hinged on an issue that went to the heart of what it meant to be a government of laws, not men: what, exactly, were the sources of law-giving authority in the new republic?

II. *THE CHARMING BETSY* AND THE PROBLEM OF PROBABLE CAUSE IN A PARTIAL WAR

In June of 1800, U.S. naval captain Alexander Murray seized from French captors a schooner called *The Charming Betsy* and sold her cargo in Martinique. That December, he libeled her in a Philadelphia district court.[59] In his libel, Murray explained that he had seized the schooner on the belief that she was an American vessel sailing to Guadeloupe, a French colony, in violation of the 1800 Non-Intercourse Act.[60] But the Philadelphia district court found that *The Charming Betsy* in fact belonged to a Danish subject named Jared Shattuck. Whether Murray had had probable cause to believe the schooner was American was irrelevant, Judge Richard Peters held, because probable cause could not excuse him from damages. Peters ordered the vessel restored to Shattuck with costs and damages.[61] On appeal, the circuit court affirmed the restitution and payment of net proceeds of the sale

55. *Id.*
56. *Id.*
57. *Id.*
58. These footnotes were edited out in subsequent editions. *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291 (1985). One of this Essay's methodological claims is that the footnotes, oral arguments, and lower court opinions included in the original edition of the U.S. Reports illuminate important aspects of the Court's decisions and dynamics.
59. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 66–69 (1804).
60. Ch. 10, 2 Stat. 7 (1800); *see Charming Betsy*, 6 U.S. (2 Cranch) at 65.
61. *Charming Betsy*, 6 U.S. (2 Cranch) at 69–70. In admiralty, unlike at common law, a captor whose seizure was found to be illegal was immediately liable to a decree for damages. *See id.* at 73 (argument of counsel) (citing The "Fabius" (1800) 165 Eng. Rep. 304, 2 C Rob. 245 (Eng.), which affirmed a ruling revoking a lower court's sentence of confiscation and decreed restitution and damages).

of the cargo but reversed for the residue; both parties appealed to the Supreme Court.[62]

Alexander Dallas, the U.S. attorney general representing Murray on appeal,[63] knew the key to excusing Murray from damages was to convince the Justices that Murray's liability turned on whether he had had probable cause to seize *The Charming Betsy*. This, Dallas knew, hinged on war. Not only had Dallas been the court reporter in 1788's *Respublica v. Sparhawk*,[64] where Congress's wartime powers were held to justify an act that would ordinarily have been a trespass,[65] but he had also argued the losing side in 1801's *Talbot v. Seeman*,[66] where Marshall held that it was "a universal principle" that where war was involved, it was "lawful" to capture vessels at sea and subject them to court adjudication, so long as there was probable cause to believe the vessel "liable to capture."[67] If Murray's seizure of *The Charming Betsy* could be deemed an act taken pursuant to the United States's war effort, then he would be liable only if he had lacked probable cause for the seizure. It was in this context that Dallas offered to read the president's order as evidence of the "nature of the case," only to be sharply rebuffed by Justice Chase.[68] To shed light on Chase's response and its implications, this Essay will turn briefly to the law-of-nations principle under debate: whether probable cause could be understood to govern the seizure of neutrals outside of wartime.

A. The Notice Problem

The reason that probable cause hinged on war was a question of notice. A sovereign, Emmerich de Vattel had explained in his eighteenth-century treatise on the law of nations, "is to make known his declaration of war to the neutral powers . . . to notify them that such or such a nation is his enemy, that they may conduct themselves accordingly."[69] Neutral nations could be expected to take notice of declared wars and to anticipate that belligerents would seize, on the high seas, apparently neutral vessels that they suspected

62. *Id.* at 70. Judge Peters was no admiralty novice. A few years earlier, he had spearheaded a rare American printing of a six-volume edition of Sir William Scott's admiralty judgments. *See* John D. Gordan III, *Publishing Robinson's* Reports of Cases Argued and Determined in the High Court of Admiralty, 32 LAW & HIST. REV. 525, 528, 544 (2014). Peters had received the original copy of the second volume of Robinson's *Reports*, which he used as the basis for the American printing, directly from then secretary of state John Marshall. *Id.* at 530, 544.

63. *See* Letter from R. Smith to Samuel W. Dana (Dec. 26, 1804), *reprinted in* H.R. REP. NO. 8-44 (1805), *supra* note 44; *see also* Leiner, *supra* note 19, at 10.

64. 1 U.S. (1 Dall.) 357 (1778). Dallas took liberties in recording counsels' arguments in several cases before the Supreme Court. *See* Joyce, *supra* note 58, at 1304–05. If he did so in *Respublica*, that strengthens the conclusion that he embraced its lesson on the law-giving nature of wartime powers.

65. *See Respublica*, 1 U.S. (1 Dall.) at 357, 363.

66. 5 U.S. (1 Cranch) 1 (1801).

67. *Id.* at 31–32.

68. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 78 (1804).

69. EMMERICH DE VATTEL, THE LAW OF NATIONS 331 (Béla Kapossy et al., eds., Liberty Fund 2008) (1758).

of belonging in fact to the enemy. In a partial war, however, this logic applied only on a case-by-case basis. Unlike in a general war, whose "extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations," Justice Chase had explained in 1800's *Bas v. Tingy*,[70] an early Quasi-War case, the "extent and operation" of a partial war were defined by municipal laws alone.[71] In the circumstances of the Quasi-War, this meant that each seizure had to be inspected to determine how far, as Justice Marshall had explained in *Talbot*, the laws of war "actually appl[ied]."[72] If the underlying statute was deemed a war measure, then a seizure supported by probable cause was justified, even if it turned out to be mistaken. If, however, the law was a mere domestic measure, neutral nations could not be expected to take notice, and probable cause would not justify a mistaken seizure. As Shattuck's lawyers had reminded the Court in February 1803, "[t]he right of search and seizure is incident only to a state of war,"[73] because war measures were the only sort of regulation of which neutral vessels on the high seas were obliged to take note.

Congress's piecemeal approach to the Quasi-War consequently left President Adams on shaky constitutional ground. In May 1798, soon after Congress had created the Department of the Navy and authorized the president to procure several vessels to protect American commerce, Secretary of War James McHenry wrote to Alexander Hamilton seeking advice. These new vessels would likely encounter French privateers; they might even need to board a French warship to "terminate a contest."[74] McHenry was anxious to "preserve the Executive from any future accusation, of having by its orders involved the country in war."[75] What instructions could he give to these new captains that would "comport with the existing state of things"?[76]

Hamilton, a staunch Federalist who would soon be appointed inspector general of the Army,[77] responded that because he had not seen the relevant statute, he did not know if it had given the president any "new power."[78] If it had not, the president was left "at the foot of the Constitution" and could only order captains to repel French privateers encountered within "a marine league of our coasts."[79] Given the ambiguity of the then existing state of

70. 4 U.S. (4 Dall.) 37 (1800).

71. *Id.* at 37, 43 (Chase, J.). Similarly, Justice Bushrod Washington explained in *Bas* that the partial war was "confined in its nature and extent; being limited as to places, persons, and things" and that officers "authorised to commit hostilities . . . can go no farther than to the extent of their commission." *Id.* at 40 (Washington, J.).

72. *Talbot*, 5 U.S. (1 Cranch) at 28.

73. *Charming Betsy*, 6 U.S. (2 Cranch) at 70.

74. Letter from James McHenry to Alexander Hamilton (May 12, 1798), *reprinted in* 21 THE PAPERS OF ALEXANDER HAMILTON 459, 459 (Harold C. Syrett ed., 1974).

75. *Id.*

76. *Id.*

77. On Hamilton's appointment, see RON CHERNOW, ALEXANDER HAMILTON 558–60 (2004).

78. Letter from Alexander Hamilton to James McHenry (May 17, 1798), *reprinted in* 21 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 74, at 461, 461.

79. *Id.*

hostilities, anything more would "require[] the sanction of that department which is to declare and make war": Congress.[80] The best approach, Hamilton thought, would be for Adams to explain to Congress that under the current statutory regime, he believed he could only go "so *far* and no *farther*."[81] In "so delicate a case" involving "so important a consequence as that of War," Hamilton urged, it was critical that Adams not overstep his constitutional authority.[82] Presenting his dilemma to Congress would win Adams "credit for frankness and an unwillingness to chicane the Constitution" and would "return upon Congress the Question in a shape which cannot be eluded."[83]

Hamilton's careful advice, coupled with McHenry's focus on avoiding accusations that the executive had moved the country closer to war, underscores the executive's precarious legal position. Where statutes were clearly part of the nation's Quasi-War effort, the president could presume the authority to follow the laws of war, including the use of a probable cause standard. But where a statute's war status was murkier, the president was left "at the foot of the Constitution" and could assume no authority beyond that which was spelled out by statute.[84] Any step taken beyond what was statutorily authorized risked altering "the existing state of things." Congress's step-by-step approach to authorizing the Quasi-War had created much constitutional ambiguity and had left the president and his officers to shoulder the burden.

B. The War Measure Problem

The challenge for Dallas was that none of the three Non-Intercourse Acts looked much like a war measure. If the Act was not a war measure, then under the law of nations it could not support the probable cause standard that Secretary Stoddert had employed when he had instructed naval officers to seize vessels or cargoes "*apparently*, as well as *really American*."[85] True, the statute had used a probable cause standard in authorizing the seizure of American ships where there was "reason to suspect" they were engaged in the prohibited trade.[86] But it had said nothing about seizing a vessel where there was merely a "reason to suspect" it was actually American.[87] That aspect of Stoddert's orders had been the executive's gloss alone, and it looked awfully like a departure from the "existing state of things," moving the nation closer to a war footing.

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80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. Alexander DeConde describes Adams as "trying to wage a defensive war with uncertainty as to the extent of presidential powers and without a formal declaration." DECONDE, *supra* note 31, at 89.
85. *See supra* note 44 and accompanying text.
86. Act of Feb. 27, 1800, ch. 10, § 8, 1 Stat. 7, 10.
87. *See id.*

The legislative history did not appear to be in Dallas's favor. In debate leading up to the passage of the first Non-Intercourse Act in the spring of 1798, members of the House of Representatives had evinced a number of justifications for the trade prohibition, none of which seemed particularly bellicose. Albert Gallatin of Pennsylvania, an opponent of the bill, had characterized it as intended to "distress France and the French West Indies as much as possible," while Massachusetts's Samuel Sewall, a supporter, had offered a number of goals, ranging from preventing privateers from the West Indies from "depredat[ions on] our commerce upon our coast" to "withdraw[ing] from our enemies the means of supporting their hostility" to "induc[ing France] to change her conduct with respect to the United States."[88] John Rutledge Jr. of South Carolina, another supporter, had viewed the measure as "a very considerable means of protecting our seamen."[89] Moreover, when Marshall, in 1801's *Talbot*, had surveyed the various war measures Congress had passed with regard to France in 1798 and 1799 in order to determine how far the laws of war "actually apply to our situation,"[90] he had conspicuously left the Non-Intercourse Acts off his list. As Shattuck's lawyers would repeatedly suggest, the trade prohibition appeared to have been passed not so much to advance war as to prevent it.[91]

At the 1803 oral argument, Shattuck's lawyers took the position that the Non-Intercourse Act had not been a war measure. They reminded the Court that a nation's "municipal regulation[s]" were only binding on the nation's own citizens and that even then, probable cause did not justify a seizure unless the municipal law in question made it so.[92] They also warned of severe commercial and diplomatic consequences for holding otherwise. "If the present circumstances are sufficient to raise a probable cause for the seizure," they warned,

> and if such probable cause is a justification, it will destroy the trade of the *Danish* islands. The inhabitants speak our language, they buy our ships, &c. It will be highly injurious to the interests of the *United States*; and this court will consider what cause of complaint it would furnish to the *Danish* nation.[93]

88. 5 ANNALS OF CONG. 1860–61 (1798) (statements of Rep. Samuel Sewall and Albert Gallatin).

89. *Id.* at 1862 (statement of Rep. John Rutledge Jr.). In asserting the measure's purpose, counsel made no mention of the arguments presented in Congress. Professor Farah Peterson's recent article on the Marshall Court's expository practices supplies an intriguing explanation: in interpreting statutes deemed public rather than private, a category into which the Non-Intercourse Act would certainly fall, jurists in the early republic understood legislative history to be "unallowable." Farah Peterson, *Expounding the Constitution*, 130 YALE L.J. 2, 25 (2020) (quoting Claim of the Representative of Henry Willis, 5 Op. Att'y Gen. 752, 753 (1823)).

90. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801).

91. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 74 (1804) (1803 oral argument); *id.* at 108 (1804 oral argument).

92. *Id.* at 72.

93. *Id.* at 74.

For reasons grounded in both precedent and prudence, the Non-Intercourse Act could not be deemed a part of the war effort. It could thus give "no right to search a neutral,"[94] and Murray owed damages for his trespass.

Dallas had not been at the February 1803 argument in *Murray*. But when the case came up for reargument a year later, he vehemently disagreed with Shattuck's lawyers' assertion that the Non-Intercourse Act was not a war measure. The Non-Intercourse Acts were no "mere municipal laws,"[95] he assured. They were "part of the war measures" Congress had adopted, "*quoad hoc* tantamount to a declaration of war."[96] The Non-Intercourse Act, Dallas was saying, codified the United States's wartime right to search for her own citizens trading with the enemy.[97] Dallas insisted that *Talbot*'s "universal principle" regarding wartime captures applied, and probable cause would justify the seizure of a vessel liable to capture under the Act. "Although the act of congress mentions only vessels of the *United States*," he reasoned, "the right to seize and send in must extend to *apparent* as well as *real American* vessels."[98] This was what the president's instructions had said, after all. Would the Justices like to hear them?[99]

No, Justice Chase responded, they would not. He was, he explained, "always against reading the instructions of the executive; because if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted."[100] The instructions had no bearing on the lawfulness of Murray's act; they were merely the executive's interpretation of what the law allowed. Reading them could only distract from or interfere with the Court's own job, which was to determine what the law was. "I think it a bad practice," Chase maintained, "and shall always give my voice against it."[101]

C. The Dispensing Power Problem

Dallas's offer to read the president's instructions, though benign on its face, had in fact been a loaded question, so much so that Cranch took pains to capture the Justices' reactions in a detailed footnote in his official case report. Cranch's footnotes in *Murray* and *Talbot* suggest that by 1804, there was an ongoing dispute within the Marshall Court about the admissibility and relevance of executive orders. In the 1801 arguments in *Talbot*, one of the points of disagreement had been whether the Act of July 9, 1798,[102] which authorized the seizure of "armed French vessels on the high seas," had

94. *Id.* at 71.
95. *Id.* at 77.
96. *Id. Black's Law Dictionary* defines "quoad hoc" as: "As to this; with respect to this; so far as this in particular is concerned." *Quoad Hoc*, BLACK'S LAW DICTIONARY (9th ed. 2009). The Non-Intercourse Act, Dallas was saying, was effectively a declaration that the laws of war applied to the French-American trade made illegal by the act.
97. *Charming Betsy*, 6 U.S. (2 Cranch) at 77.
98. *Id.* at 78.
99. *Id.* at 78 n.
100. *Id.*
101. *Id.*
102. Ch. 68, 1 Stat. 578.

actually meant that only French vessels could be seized or whether the phrase was simply Congress's ill-advised shorthand for its language in two earlier wartime measures—"armed vessels sailing under authority, or pretence of authority, . . . of France" (the wording of an Act of May 28, 1798[103]) or "armed vessel[s] sailing under French colours, or acting, or pretending to act, by, or under the authority of the French republic" (the wording of an Act of June 25, 1798[104]).[105] Talbot's lawyer argued that the president had made just this sort of logical leap, issuing instructions regarding a related measure that had capaciously interpreted similarly restrictive statutory language. The lawyer offered to read the president's instructions to support his contention,[106] but Chase would not have it. "I am against reading the instructions," Chase explained, "because I am against bringing the executive into court on any occasion."[107] Chase's colleagues were not so rigid—Justice William Paterson suggested that "[t]he instructions can only be evidence of the opinion of the executive, which is not binding upon us," while Justice Marshall, assuring the Court that the instructions would "have no influence on my opinion,"[108] had "no objection to hearing them"—but the claimant's lawyer argued that the instructions were not in the record, and ultimately the Court did not let them in.[109]

Chase's adamancy had deep republican roots.[110] Blackstone—whose *Commentaries* the Virginia judge St. George Tucker had published with

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103. Ch. 78, 1 Stat. 561.

104. Ch. 60, 1 Stat. 572.

105. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 7–8 (1801).

106. *Id.* at 10. Counsel explained he wanted to read the instructions "because the opinion of learned men, and men of science, will always have some weight with other learned men. And the court would consider well the opinion of the executive before they would decide contrary to it." *Id.* at 10 n. Although the historical antecedents of *Chevron* deference are beyond this Essay's scope, this Justices' exchange, and in particular counsel's comments, suggest that the question of whether, for what reasons, and to what extent the judiciary should defer to executive interpretations of statutes dates back considerably earlier than *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206 (1827), the Supreme Court opinion that *Chevron* cites as the earliest case holding that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 & n.14 (1984). To my knowledge, no other scholar has cited the *Talbot* or *Charming Betsy* exchanges with regard to their implications for the roots of *Chevron* deference, although Henry Monaghan captured the historical trend accurately when he wrote that "[a]s the nineteenth century wore on, and public administration became a larger and larger component of the American governmental system, judicial expressions of deference increased." Monaghan, *supra* note 2, at 15. Justice Chase's view certainly suggests that not every Justice on the early Marshall Court believed that "[i]n the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect." *Edwards' Lessee*, 25 U.S. (12 Wheat.) at 210.

107. *Talbot*, 6 U.S. (5 Cranch) at 10 n.

108. *Id.*

109. *Id.* at 10.

110. Chase's fierce protection of the judiciary's power was a consistent theme of his tenure and an underlying reason for his impeachment, plans for which were being formulated at the time the Court issued its opinions in *Little* and *Charming Betsy*. *See generally* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 282 (1924); Stephen B. Presser, *Samuel Chase: In Defense of the Rule of Law and Against the Jeffersonians*, 62 VAND. L.

annotation in 1803, only a year before Dallas's arguments in *Charming Betsy*—was explicit that executive orders were only binding to the extent that they "do not either contradict the old laws or tend to establish new ones."[111] The only source of lawful executive authority, in other words, was statute: executive orders that contradicted or went beyond legislative acts had no lawful power either to bind or, in Murray's and Little's cases, to exonerate. Blackstone had illustrated this conception of executive authority by citing a 1766 act of Parliament indemnifying several ministers who had imposed a corn embargo without parliamentary authorization while Parliament was in recess, explaining that "a proclamation to lay an embargo in time of peace . . . being contrary to law . . . the advisers of such a proclamation and all persons acting under it, found it necessary to be indemnified by a special act of parliament."[112] The incident, and the lesson it conveyed about the illegitimacy of what early Americans referred to as the "dispensing power"—literally, the executive's power to dispense with the laws in times of duress—seems to have been well known among Chase's peers.[113] The story thus sheds light on what Chase may have understood to be the stakes of his collegial exchanges and on why Cranch may have viewed such judicial back-and-forth as worthy of recording in his footnotes.

The outline of the story is as follows. The ministers who had issued the 1766 corn embargo proclamation explained that they had acted to mitigate grain shortages and quell incipient civil unrest,[114] and they defended their action on the grounds of necessity and the *salus populi*. But when Parliament reconvened a month and a half later, it condemned the embargo. Critics charged the action had not been grounded in statute and that the ministers' actions were a return to the hated "dispensing power" exercised by King James II.[115] Defenders claimed that the trade ban had been "at worst but a

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REV. 349, 352–53 (2019) (describing multiple instances in which Chase articulated a capacious understanding of the judiciary's province).

111. 1 WILLIAM BLACKSTONE, COMMENTARIES *270.

112. *Id.*

113. *See, e.g.*, 9 ANNALS OF CONG. 538, 564, 573 (1807) (statements of Reps. John Randolph and Barnabas Bidwell). Early Americans were certainly familiar with the concept of the "dispensing power." *See, e.g.*, JOHN BOUVIER, 1 A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA 469 (Philadelphia, T. & J. W. Johnson 3d ed. 1848). This was the first of Bouvier's editions to include an entry for "dispensation," defined as a "relaxation of law for the benefit or advantage of an individual. In the United States no power exists except in the legislature to dispense with law, and then it is not so much a dispensation as a change of the law." *Id.*; *see also* Kendall v. United States *ex rel* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) (asserting that "vesting in the President a dispensing power" had no basis "in any part of the constitution"). During his impeachment trial, Justice Chase argued that questions of law were for the court because the jury lacked a "dispensing power" over the law. *See* STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 261 (6th ed. 2005).

114. *See generally* Philip Lawson, *Parliament, The Constitution and Corn: The Embargo Crisis of 1766*, 5 PARLIAMENTARY HIST. 17 (1986); Saikrishna Bangalore Prakash, *The Imbecilic Executive*, 99 VA. L. REV. 1361, 1380 (2013).

115. *See* Lawson, *supra* note 114, at 17.

forty days' tyranny";[116] detractors responded that such a position amounted to "the justification of the legality of [a] power superior to law."[117] Necessity, Lord Mansfield reminded his colleagues in the House of Lords, could not make law; only Parliament could.[118] The solution Mansfield proposed was a parliamentary act of indemnity "prevent[ing] suits against the persons concerned in the execution of the order,"[119] which would both protect officers liable to suit and reinforce the critics' most important point: that no one was above the law.[120] The act that resulted barred suits against both ministers and those who had acted under their orders. The Journals of the House of Commons quoted a member's summation of the case: that "where the Safety of the People called for an Exertion of a Power contrary to the written Law of these Kingdoms, such Exertion of Power is excusable only by [necessity], and justifiable by Act of Parliament."[121]

To early Americans, the corn embargo story stood for two things: the illegitimacy of the dispensing power and the uniqueness of their own understanding of the rule of law. In Parliament, the act of indemnity had served as a post hoc justification of the ministers' actions, immunizing them from suit and leaving those who had suffered from their unlawful acts without recourse. But in the United States, Representative Barnabas Bidwell explained in 1807, "such an act might . . . be considered unconstitutional and void."[122] Instead, the American government offered compensation after the fact. The legislature did not immunize the officer against suit but offered "remuneration for damages incurred" after the courts had first determined what the officers owed, and then only if the legislature determined that the officer deserved to be excused from damages. In this way, every injury had its proper redress, and the rule of law was preserved.[123] For a scrupulous

116. *Id.* at 25 (quoting 1 LORD EDMOND FITZMAURICE, LIFE OF WILLIAM EARL OF SHELBURNE 290 n.2 (2d. rev. ed. 1912)) (reporting the statement of Lord Camden).

117. Letter from The Earl of Suffolk to Mr. Grenville (Nov. 24, 1766), *reprinted in* 3 THE GRENVILLE PAPERS 347, 349 (William James Smith ed., London, John Murray 1853).

118. Lawson, *supra* note 114, at 29.

119. 1 SIR HENRY CAVENDISH, DEBATES OF THE HOUSE OF COMMONS 595 (J. Wright ed., London, J. L. Cox & Sons 1841).

120. *Id.* at 32.

121. 18 Nov. 1766, HC Jour. 15 (UK).

122. 9 ANNALS OF CONG. 564 (1807) (statement of Rep. Barnabas Bidwell); *see also* Lucius Wilmerding Jr., *The President and the Law*, 67 POL. SCI. Q. 321, 324 n.6, 336 (1952) (recounting Bidwell's comments, the corn embargo story, and examples of early Americans' opposition to the dispensing power). This understanding had changed by 1863, when Congress passed the Indemnity Act, ch. 81, 12 Stat. 755 (1863), providing retrospective defenses to damages actions for officers following presidential orders. *See* Monaghan, *supra* note 13, at 27; *see also* Prakash, *supra* note 114, at 1367–68 (noting that today presidents "stretch and strain constitutional and statutory authority" to argue that their actions are legal, instead of admitting illegal action and seeking legislative forgiveness).

123. Murray's and Little's claims before Congress illustrate this process. *See* Pfander & Hunt, *supra* note 14, at 1900–03 (tracing Murray's and Little's relief measures); Wilmerding, *supra* note 122, at 324 n.6 (noting Murray's and Little's relief). Murray's petition argued he had been following orders; the Navy secretary said the seizure had been authorized by military orders Murray was bound to obey. *See* H.R. REP. NO. 8-44 (1805), *reprinted in* 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS, *supra* note 44, at 129, 131. Murray's relief bill passed in January 1805, a little more than two months after the House received his memorial. *See* An

defender of the rule of law like Chase, the specter of Stuart despotism could not be ignored, even for sympathetic defendants like George Little and Alexander Murray.[124] Indemnification, even of the most obedient of public servants, was a job for Congress, not the courts.

D. The Probable Cause Solution: Sir William Scott's Maritime Law

In *Charming Betsy*, unlike in *Talbot*, the executive's instructions were a part of the record, something Marshall noted as he overruled Chase's objection and let Dallas read the president's order. Marshall assured Chase that "[t]he construction, or the effect they are to have, will be the subject of further consideration."[125] But Chase was not appeased, and Marshall's subsequent admission in *Little* suggests that he may have had good reason to be concerned. In *Little*, Marshall acknowledged, he had considered the possibility that the executive's instructions might justify Little's seizure of *The Flying Fish*, even though the law did not. In *Charming Betsy*, a suit involving a later iteration of the same act and substantially the same instructions, Marshall may have been considering a similar option: a holding that probable cause would justify Murray's seizure of *The Charming Betsy* not because Congress had established such a standard but because the executive had. Chase, I suspect, worried that the Court, in its solicitude for military officers led astray by their superiors, might disregard the hard-won lessons of their English forebears, calling into question the fundamental precept of their new republic: that the United States was a government of laws, not of men.

But Marshall did not make such a ruling. Instead, he found a way to read a probable cause standard into the statute without relying on the dubious proposition that the Non-Intercourse Act had been a war measure. The questions Marshall asked during the 1803 and 1804 arguments, again recorded in Cranch's footnotes, suggest his focus was consistently on finding an alternative basis for probable cause. In 1803, Marshall had interjected twice in the argument of Shattuck's lawyers on the matter of probable cause: first to point out that an English case, which the lawyers had cited for the

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Act for the Relief of Alexander Murray, ch. 12, 6 Stat. 56 (1805); 8 ANNALS OF CONG. 985 (1804). Little's indemnification took longer. The House Committee of Claims recommended relief in February 1805, see H.R. REP. NO. 8-46 (1805), *reprinted in* 1 AMERICAN STATE PAPERS: NAVAL AFFAIRS, *supra* note 44, at 138, but the House did not vote on relief until 1807. A possible explanation for the delay comes from a House debate a month after Little's petition was granted. Representative Bidwell had voted against Little's relief, he explained, because he thought that the "[e]xecutive orders, under which [Little] claimed, taken in connexion with the law, which was referred to in the orders, did not appear to me to warrant the transaction." 9 ANNALS OF CONG. 563 (1807) (statement of Rep. Barnabas Bidwell). Bidwell's comments suggest that Little's indemnity took longer because it involved a straightforward statutory violation; Little should have known the seizure was unlawful. Presumably, Murray's case, which had involved only an erroneous judgment as to probable cause, had presented no such difficulty.

124. *See generally* Presser, *supra* note 110 (defending Chase as a zealous proponent of the rule of law).

125. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 78 n. (1804).

proposition that probable cause would not justify an erroneous seizure, had in fact been overturned two years later,[126] and second to call attention to an English decree that the lawyers had failed to cite, a revenue case decided by the preeminent British admiralty judge, Sir William Scott, that employed a probable cause standard.[127] In 1804, after Shattuck's lawyer suggested that the Non-Intercourse Act could not be a war measure because, in a war, no statute was necessary to make trading with the enemy grounds for condemnation, Marshall followed up. If the United States and France had been in a "public general war," he asked, would probable cause excuse the taking of a neutral vessel mistakenly believed to be an American vessel trading with the enemy?[128] And Marshall seized on the idea, raised by Dallas in passing, that "[p]robable cause [was] a thing of maritime jurisdiction."[129] Marshall pressed Dallas for more: "In answer to an inquiry by the *Chief Justice* for authorities to support the position that probable cause is always a justification in maritime cases," Cranch noted, "Mr. *Dallas* referred *generally* to *Brown's Civil and Admiralty Law*, and to the *decisions of Sir Wm. Scott*."[130]

This reference, vague as it was, appears to have been enough, for when Marshall issued his opinion on February 22, he employed a probable cause analysis. "It remains to inquire," Marshall wrote, having already determined that *The Charming Betsy* was not subject to seizure and the recaptors were not entitled to salvage, "whether there was in this case such probable cause for sending in the *Charming Betsy* for adjudication as will justify captain *Murray* for having broken up her voyage, and excuse him from the damages sustained thereby."[131] Whether the Non-Intercourse Act was a war measure, Marshall did not say; he simply proceeded to evaluate the circumstances that had existed at the time of *The Charming Betsy*'s seizure, before concluding that Captain Murray had lacked probable cause to believe the vessel was American.[132] He owed damages—but not "vindictive or speculative damages," Marshall hastened to add. "A public officer intrusted on the high seas to perform a duty deemed necessary by his country," he explained, "and

126. *Id.* at 74 n.

127. *Id.* at 75. The case cited is *The "Sally,"* a 1799 opinion by Sir William Scott. *See* The "Sally" (1799) 165 Eng. Rep. 296, 2 C. Rob. 224 (Eng.); *see also* Gordan, *supra* note 62, at 557 n.92 (noting Marshall's reference to the case and Cranch's citation of the American edition of Robinson's *Reports*).

128. *Charming Betsy*, 6 U.S. (2 Cranch) at 109 n.

129. *Id.* at 111. Admiralty jurisdiction was commonly thought to involve two separate headings: the prize courts, which handled all matters involving war, including the seizure of enemy vessels, and instance courts, which addressed maritime law in peacetime. *See* Joyce, *supra* note 58, at 1315. Admiralty was understood to be part of the law of nations. *See* Golove & Hulsebosch, *supra* note 22, at 1003.

130. *Charming Betsy*, 6 U.S. (2 Cranch) at 112 n.

131. *Id.* at 122.

132. James Pfander and Jonathan Hunt mistakenly cite the opinion of District Judge Peters in concluding that Marshall did not hold that probable cause would justify the seizure. *See* Pfander & Hunt, *supra* note 14, at 1882 n.88. On this basis, they conclude—erroneously, I believe—that Cranch's headnote reference to probable cause is misleading. I believe Cranch's headnote was correct.

executing according to the best of his judgment the orders he has received" should not be punished for such a mistake.[133] Murray ought to compensate the owners of *The Charming Betsy* for the damages they sustained as a result of his decision to libel the ship, but no more. Marshall instructed the circuit court to establish a commission to calculate damages on this basis and ordered each party to pay the costs they had incurred on appeal.[134]

Professor G. Edward White has characterized the prototypical John Marshall opinion as "grounded . . . [in] the first principles of American civilization."[135] As White shows, Marshall reasoned syllogistically, moving through major and minor premises to reach conclusions consonant with these first principles.[136] White's insight helps us see the first principle implicated by the probable cause problem in both *Charming Betsy* and *Little*: that the executive could not, to use the words Marshall used in *Little*, "give a right."[137] Viewed through this lens, Marshall's efforts to locate a law-of-nations basis for Stoddert's order appear as his attempt to determine the minor premise: whether the executive's instruction to seize vessels "apparently as well as really American" had given Captains Murray and Little any right that Congress had not. Thanks to the maritime decisions of Sir William Scott, Marshall concluded that it had not: even in peacetime, neutral vessels could be seized on probable cause, and so the executive's use of the standard had not given the nation's naval captains rights they did not already possess.

By resolving the probable cause question in *Charming Betsy* in a way that avoided a conflict with the law of nations, Marshall also avoided holding that the Adams administration had altered the "then existing state of things." This minor premise—that the probable cause standard was lawfully authorized by statute—cleared the way for Marshall's holding in *Little*, solving a problem that may well have caused the over-two-year delay between the first oral arguments in December 1801 and the Court's 1804 decision. When Marshall and his brethren first heard argument in *Little*, it was only seven months after Judge Peters's district court decision in *Charming Betsy*, holding that whatever probable cause might have existed was irrelevant and that *The Charming Betsy*'s seizure had been illegal.[138] Presumably, Peters, an admiralty expert,[139] had assumed that the Non-Intercourse Act had not been a war measure. This meant that by the time the Justices first heard argument in *Little*, they were well aware that unless they held that the Act had been a war measure or found another way to reconcile the executive's probable cause standard with the law of nations, there would be no getting around a

133. *Charming Betsy*, 6 U.S. (2 Cranch) at 124.
134. *Id.* at 125–26.
135. G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 11 (3d ed. 2007).
136. *Id.* at 25.
137. Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804).
138. *Charming Betsy*, 6 U.S. (2 Cranch) at 67.
139. *See supra* note 62 (describing Peters's admiralty expertise).

holding that Little's seizure of *The Flying Fish* had been unlawful.[140] Only after solving the probable cause problem in *Charming Betsy* did the Court return to the question left outstanding in *Little*: could the executive's order excuse an act that would otherwise have been "a plain trespass"?

III. A REREADING OF EXECUTIVE WAR POWER AND OFFICIAL IMMUNITY IN *LITTLE*

In his *Little* opinion, Marshall divides his analysis of the relevance of the executive order into two parts, following his familiar right-remedy pattern.[141] First, he asks whether the president's order might have been lawful in the "then existing state of things."[142] If it had been, and if Little had in fact had probable cause to believe *The Flying Fish* was truly American, then the seizure was lawful. Only after concluding that the order had not been lawful and that the rights of the owners of *The Flying Fish* had thus been violated does Marshall turn to the question of the dispensing power. Did the fact that Little had followed the president's order in good faith excuse him from damages for what would otherwise be a tortious act?

A. The President's Authority to Order Seizures in Little *Derives Not from Inherent Executive Power but from Statute*

To determine whether the president's order had been lawful, Marshall focuses his first question on the authority Congress had delegated. The Constitution gave the president the "high duty . . . to 'take care that the laws be faithfully executed'" and made him commander in chief.[143] Might this singular role mean the president had had the authority to issue the instructions in question, despite the fact that his order to seize vessels sailing both to and from French ports went beyond what the 1799 Non-Intercourse Act had stipulated? Here's how Marshall reasons through the question:

> It is by no means clear that the president of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might

140. Alternatively, the Court could have held that Stoddert's orders excused the seizure without determining the probable cause question. But this would have raised the sensitive dispensing power issue only four months after Chase had objected to "bringing the executive into court" under any circumstance in *Talbot*. Moreover, determining whether Stoddert's instructions excused Little would likely have returned the Court to the war measure question since, as Blackstone's *Commentaries* suggested, concerns regarding the dispensing power's illegitimacy did not apply in wartime. *See* BLACKSTONE, *supra* note 111. Until the war measure question was decided, it probably seemed pointless to again debate the relevance of executive orders. Tellingly, the Court returned to the dispensing power question in *Little* only after the resolution of the probable cause question in *Charming Betsy* had, by dodging the Act's war measure status, made the dispensing power question unavoidable.

141. *See, e.g.*, Pfander, *supra* note 4, at 1515 n.1 (identifying the right-remedy structure of the first part of *Marbury*); *id.* at 1585 n.293 (suggesting that establishing Marbury's right may have been a part of Marshall's strategy to preserve the possible future use of mandamus in the lower federal courts).

142. *Little*, 6 U.S. (2 Cranch) at 177.

143. U.S. CONST. art. II, §§ 2–3.

> not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But when it is observed that the . . . first section of the act . . . obviously contemplates a seizure within the United States; and that the 5th section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, the legislature seems to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port . . . . [H]owever strong the circumstances might be, which induced captain Little to suspect the Flying Fish to be an American vessel, they could not excuse the detention of her, since he would not have been authorized to detain her had she been really American.[144]

Today, scholars read this excerpt as addressing the difference between the president's constitutional power to issue such an order in the absence of a statute and the power to do so in the face of explicit congressional limitation.[145] If *Youngstown Sheet & Tube Co. v. Sawyer*[146] (*Steel Seizure*) represents the "bedrock principle" that "except perhaps when acting pursuant to some 'specific' constitutional power . . . the President not only cannot act *contra legem*" but "must point to affirmative legislative authorization when so acting,"[147] *Little* represents the exception: a case where the president acts pursuant to an inherent power, yet still lacks the power to act *contra legem*. On this reading, the case becomes evidence of the president's reservoir of implied war power, a precursor to Justice Thomas Clark's assertion in his *Steel Seizure* concurrence that "the Constitution does grant to the President extensive authority in times of grave and imperative national emergency" and that "in the absence of . . . action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation."[148] Likewise, scholars have argued that *Little* is a direct antecedent of *Hamdan v. Rumsfeld*,[149] in which Justice John Paul Stevens wrote that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard

144. *Little*, 6 U.S. (2 Cranch) at 177–78 (emphasis omitted).

145. *See, e.g.*, EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 62 (1947); Barron & Lederman, *Lowest Ebb II*, *supra* note 13, at 969; Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 76 n.303 (1972); Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180 (1998); Sidak, *supra* note 13, at 492; Vladeck, *supra* note 12, at 937. *But see* SOFAER, *supra* note 31, at 162 (describing *Little* as posing the question "whether a seizure pursuant to an executive instruction was invalid because the instruction exceeded the power delegated by Congress").

146. 343 U.S. 579 (1952).

147. Monaghan, *supra* note 13, at 10.

148. *Steel Seizure*, 343 U.S. at 662 (Clark, J., concurring in the judgment). For the link between Clark's concurrence and *Little*, see Vladeck, *supra* note 12, at 937–38.

149. 548 U.S. 557 (2006).

limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[150]

But when Justice Marshall wrote in *Little* about the president's authority to act in the face of the Non-Intercourse Act, he was not writing about a situation in which the president would have had "independent power" to act "absent congressional authorization." Such a reading would have run counter to the lesson of *Bas*: that, as both Justices Chase and Bushrod Washington had explained, the extent of a partial war was defined by statute.[151] Moreover, Marshall's own language suggests his meaning was more limited—that the baseline of presidential authority he assumes is not an inherent power to wage war but instead the authority that inheres in the first responsibility he mentions: the "high duty . . . to 'take care that the laws be faithfully executed.'"[152] The trade in question was "illicit" not because the United States was in a general war in which trading with the enemy was prohibited.[153] It was illicit because Congress had declared it so, in the same piece of legislation in which it had authorized specific ways in which the president might enforce the ban—in a law, in other words, that the president was duty bound to faithfully execute. Perhaps, Marshall was saying, that codification of illegality alone would have empowered the president to issue the instructions he did, even without section 5's explicit authorization of instructions to "the commanders of the public armed ships" to enforce the ban "on the high sea."[154] But that possibility had been precluded by the fact that section 5 had clearly limited the law's application to ships sailing *to*, rather than *from*, French ports.

Marshall's syllogistic logic helps us to see the major and minor premises around which this passage is structured. If we assume that the major premise is that the president cannot "give a right" by ordering unlawful seizures, then the minor premise is that because the Non-Intercourse Act had implicitly barred the seizure of vessels sailing from French ports, the executive's order had given Captain Little a right to seize vessels where none existed. If, as the literature assumes, Marshall's major premise was that the president could have acted absent congressional prohibition,[155] he would not have framed his

150. Vladeck, *supra* note 12, at 958 (quoting *Hamdan*, 548 U.S. at 593 n.23). Vladeck describes *Hamdan* as "reaffirm[ing] . . . a straightforward conception of the proper separation of war powers that is almost as old as the Republic itself, dating back to Chief Justice Marshall's opinion in *Little v. Barreme*." *Id.* at 935–36. Other scholars, however, interpret *Hamdan* as a case involving the president's authority to act in the absence of clear statutory authorization. *See, e.g.*, Cass R. Sunstein, *Clear Statement Principles and National Security:* Hamdan *and Beyond*, 2006 SUP. CT. REV. 1, 4–5, 28, 44.

151. *See supra* note 71 and accompanying text.

152. Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (quoting U.S. CONST. art. II, § 3).

153. *See, e.g.*, Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 77 (1804) ("By the general laws of war, a belligerent has a right not only to search for her enemy, but for her citizens trading with her enemy.").

154. *Little*, 6 U.S. (2 Cranch) at 171.

155. *See, e.g.*, Barron & Lederman, *Lowest Ebb II*, *supra* note 13, at 965 (assuming Congress's prior authorization of force enabled "the President to assert a greater measure of command authority, rooted in his powers as Commander in Chief, once an armed conflict had commenced").

discussion as an inquiry into "the manner in which *this law shall be carried into execution*."[156] Marshall's language reveals his focus: whether the Non-Intercourse Act gave the president the requisite authority. Because he concluded that it did not, it followed that the executive had, in giving naval captains a right to seize vessels where Congress had not, exercised a power possessed only by Congress.

Marshall's reference to the president's role as "commander in chief of the armies and navies of the *United States*"[157] is not to the contrary. As Justice Robert Jackson noted in *Steel Seizure*, the commander-in-chief role has long been cited as support for the president's "power to do anything, anywhere, that can be done with an army or navy."[158] But this is not Marshall's meaning. Marshall almost certainly intended his invocation of the president's commander-in-chief role to be read in connection with his reference to the "then existing state of things,"[159] and thus to the nation's state of war or peace as declared by Congress.[160] Reading these two phrases together, we see that Marshall's reference to the president's commander-in-chief role is neither a nod to a vast reserve of presidential power nor merely an expression of sympathy for the complex responsibilities borne by wartime presidents. Instead, it is a deliberate allusion to the lawfulness of the instructions' use of a probable cause standard, the conclusion that the Court had reached five days earlier in *Charming Betsy*. Because the probable cause standard did not alter the "then existing state of things" by moving the country closer to war, Marshall reasons, the president, as commander in chief, likely could have issued the instructions he did even absent explicit statutory authorization, had Congress not implicitly prohibited that particular manner of enforcement.

In ruminating about whether, without explicit legislative direction, the president could determine how to enforce a municipal measure with theater-of-war implications, Marshall did articulate an expanded vision of the president's discretionary authority. But that authority still derived from statute. *Little* is not an example of an executive order issued at what Jackson's *Steel Seizure* concurrence called the "lowest ebb" of presidential power.[161] Instead, the additional increment of authority in question is simply

156. *Little*, 6 U.S. (2 Cranch) at 177–78 (emphasis added).

157. *Id.* at 177.

158. Steel Seizure, 343 U.S. 579, 642 (1952) (Jackson, J., concurring).

159. *Little*, 6 U.S. (2 Cranch) at 177.

160. In explaining the statutory backdrop to *Little*, Professors David J. Barron and Martin S. Lederman interpret earlier legislation that had conditionally authorized the raising of forces as "permit[ing] the President to move the nation to a war footing against France." Barron & Lederman, *Lowest Ebb II*, *supra* note 13, at 965. This analysis overlooks Congress's apparently undisputed consensus that the president could not alter the nation's war footing, *see supra* note 27 and accompanying text, to which I argue Marshall's use of the term-of-art phrase "then existing state of things" is a deliberate reference. To read Congress's conditional authorization of the raising of forces as permitting the president to alter the nation's war footing is, I suggest, an interpretation informed more by present-day assumptions about the president's constitutional war powers than by early American understandings of the president's power to act in an undeclared war.

161. *See generally* Barron & Lederman, *Lowest Ebb II*, *supra* note 13.

the power to execute a statute without explicitly being authorized to do so. In *Steel Seizure*'s terms, Marshall's conjecture is that the president's action could have fallen into Jackson's first category, where the president's actions are congressionally authorized, had Congress not implicitly prohibited the kind of order the president issued.[162] From today's vantage point, where debates over presidential war powers focus on the constitutionality of congressional efforts to impose limits on executive action, it is easy to lose sight of the original terms of debate.[163] But as far as *Little* is concerned, Jackson's third category does not exist: the president could not give a right that Congress had not already given. Far from presupposing the existence of ample executive discretion in wartime, *Little* instead exemplifies the Marshall Court's understanding that a president's authority to execute an undeclared war derived exclusively from statute.

B. Little*'s Official Immunity Holding Is Rooted in Separation of Powers Concerns*

Little had no right to seize *The Flying Fish*. The vessel's owners had been wronged; they were owed a remedy. But what if the damages were owed not by the naval captain who had committed the trespass but by the government whose orders he had followed? Marshall had already determined that the president's orders could not "justify" the trespass, turning an unlawful act into a lawful seizure. But maybe justifying a trespass was different from excusing from damages? Here is Marshall's reasoning:

> I confess the first bias of my mind was . . . that though the instructions of the executive could not give a right, they might yet excuse from damages. I was much inclined to think that . . . . implicit obedience which military men usually pay to the orders of their superiors . . . ought to justify the person whose general duty it is to obey them, and . . . . the claim of the injured party for damages would be against that government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken . . . . I acquiesce in [the opinion] of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.
>
> It becomes, therefore, unnecessary to inquire whether . . . probable cause . . . would excuse Captain *Little* from damages for having seized and sent [*The Flying Fish*] into port, since had she actually been an *American*, the seizure would have been unlawful.[164]

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162. *Steel Seizure*, 343 U.S. at 635–37 (Jackson, J., concurring).

163. *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 183–84, 288, 301 (1996) (arguing that the president possesses "plenary and exclusive power . . . as the sole organ of the Nation in foreign relations" to use military force abroad, and that Congress's power to declare war is merely the "judicial power" to recognize whether "the nation was [already] in a legal state of war" for domestic purposes).

164. *Little*, 6 U.S. (2 Cranch) at 179.

Initially, Marshall had thought that although the instructions could not give a right, they might excuse from damages; the passage explains why this "bias" could not be maintained. The instructions could not "justify" Little's actions, turning the ship owners' claim into one against the U.S. government. Nor could they exempt Little from damages, Marshall explains, because either option would effectively legalize a trespass and thus "give a right," the very thing Marshall tells us the executive cannot do. Both options, in leaving the owners of *The Flying Fish* to seek legislative compensation for the wrong they had suffered, would sever right from remedy. Marshall's minor premise had collapsed: excusing from damages and giving a right were in fact the very same thing.[165]

There is also another way to read this passage: as Marshall's deft reconciliation of two competing constitutional visions that were then being contested in courts and legislatures and in discussions "without doors"[166] throughout the country. On the one hand was the vision of Federalist constitutionalism, centered around institutional restraints and the rule of law. On the other was a Jeffersonian vision premised on legislative supremacy and the belief that law was "the fist of power and the voice of sovereignty."[167] Marshall, in floating before rejecting the idea that there might be a source of lawful authority outside of statute, affirmed the core Jeffersonian precept that statute was the source of law in the American republic.[168] But in doing so through a logical exposition of what it meant to commit a trespass rather than bald declarations of legislative supremacy, Marshall focused his readers' attention on a central tenet of the Federalist Constitution: that, as he had written in *Marbury*, "where there is a legal right, there is also a legal remedy."[169] In *Marbury*, Marshall had reasoned the executive could not take away a right; in *Little*, he stipulated that the executive could not give one. In both cases, the executive had caused injury. But in *Little*, unlike *Marbury*, the Court could order the remedy.

CONCLUSION

In the end, the Court let neither Little nor Murray off the hook. But by reading a probable cause standard into the Non-Intercourse Act, Marshall had created some space for military officer discretion in the execution of municipal laws. He had also hinted that the executive's authority to execute

165. *Id.*

166. For a powerful exposition of the constitutional thought of the people "out of doors"—those literally and metaphorically outside the halls of power—see Mary Sarah Bilder, *Without Doors: Native Nations and the Convention*, 89 FORDHAM L. REV. 1707 (2021).

167. REID, *supra* note 27, at 5.

168. The idea that there might be a source of lawful authority outside of statute also featured prominently in the contemporaneous debate over whether there was such a thing as a federal common law of crimes. Marshall no doubt had this debate in mind when he wrote this passage in 1804. On this debate, see generally Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism, and the Common Law of Crimes in the Early Republic*, 4 LAW & HIST. REV. 223 (1986).

169. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

the law included discretion over the manner of enforcement, absent congressional specification. Most important, Marshall had found a law-of-nations basis for Stoddert's use of a probable cause standard, thereby avoiding a holding that the Adams administration had brought the country closer to war while reinforcing the major premise of both opinions: that only Congress could give a right. Like *Marbury*, *Murray* and *Little* creatively interpret the bounds of statutory authority in order to avoid an interbranch conflict over an executive act. Carefully avoiding a clash with the law of nations, Marshall used both opinions to clear a wider path for the exercise of executive discretion without undermining the constitutional balance that placed the lawmaking and warmaking power squarely with Congress.

Recognizing the law-of-nations principle at stake in *Charming Betsy* and *Little* sheds new light on Marshall's understanding of the relationship between the executive and Congress in an undeclared war.[170] Modern scholarship tends to see international law as constraining executive power. Yet in these two cases, the law of nations clarified and expanded executive authority, allowing the Court to sidestep the vexing questions of the Non-Intercourse Acts' war status and whether the president had, in employing a probable cause standard, altered the "then existing state of things." If Congress had intended to let the president shoulder the burden and risk of determining what, exactly, the state of things was in the midst of the Quasi-War, then Marshall's decisions cut short the attempt. By drawing on the law of nations to define the president's authority to implement a nonwar measure, Marshall assigned Congress the responsibility for any resulting change in the "existing state of things." So long as the president, in executing a municipal statute, kept within statutory bounds and the law of nations, his order was to be understood as authorized by Congress, even if it ended up bringing the country closer to war. Far from constraining the president's power, the law of nations in *Little* and *Charming Betsy* was a tool to expand the margins of executive authority and to foreclose congressional efforts to shift to the president and his officers the liability for altering the nation's ambiguous war footing.

Using the law of nations in this way came at a cost to neutral rights. Prior to *Charming Betsy* and *Little*, officers had been strictly liable for erroneous seizures of neutral vessels on the high seas outside of wartime. By altering that standard of proof,[171] Marshall weakened the security of neutral shippers. This fact suggests an intriguing alternative reading of the *Charming Betsy* canon. Most modern scholars believe that Marshall's canonical assertion that federal statutes "ought never to be construed to violate the laws of nations if

170. Congress has not formally declared war since World War II. Some scholars argue that today's nontraditional conflicts, such as the war on terror, should trigger commensurately less executive branch authority. *See, e.g.*, Barron & Lederman, *Lowest Ebb I*, *supra* note 13, at 732 n.124 (quoting David Luban, *The Defense of Torture*, N.Y. REV. BOOKS, Mar. 15, 2007, at 37, 38 (reviewing JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR (2006))).

171. For a list of cases citing *Charming Betsy* and *Little* for their probable cause standard, see *supra* note 20.

any other possible construction remains" and that they should "never be construed to violate neutral rights"[172] has something to do with the opinion's holding that the fact that *The Charming Betsy* had been built in America before being sold to a Danish merchant did not subject it to Congress's ban on American vessels trading with France.[173] This may well be true. But the statement may also serve as an explanation for why Marshall, a staunch defender of the legal rights of neutral vessels,[174] had employed a standard that materially diminished those rights. Marshall believed that American adherence to the law of nations was a central aim of the government's constitutional design.[175] In *Charming Betsy*, the protection of neutral rights and the preservation of American compliance with the law of nations conflicted. Marshall's canonical statement can be read as implicitly acknowledging this trade-off and explaining its rationale, reminding his readers that ultimately, American fidelity to the law of nations was the surest way to secure the United States's neutral rights over the long term.

Likewise, the canon might also be read to refer to the ongoing debate over the president's power to act in conditions of statutory ambiguity, where Congress had failed to adequately define the "existing state of things." In a 1797 letter to Thomas Jefferson, James Madison had staked out one position, arguing that President Adams's earlier suspension of an order restricting the arming of merchant vessels engaged in European or West Indian commerce had effected a "virtual change of the law" and "[u]surp[ed] . . . a legislative power." It would "not avail to say that the law of Nations leaves this point [the lawfulness of arming commercial vessels] undecided, & that every nation is free to decide it for itself," Madison contended, because the regulation was a legislative matter, not an executive one, and thus "comes expressly within the power to 'define the law of Nations' given to Congress by the Constitution."[176] Whether the nation would exert its power to the extent permitted by the law of nations, Madison was suggesting, was solely a legislative decision. This, of course, is the position that Marshall rejects in *Little* and *Charming Betsy*, reasoning instead that in cases of ambiguous legislative intent, executive discretion could fill in the blanks, bounded only by what the law of nations permitted. The *Charming Betsy* canon can be read to subtly underscore this conclusion, putting Congress on notice that its laws (and the orders they gave rise to) would henceforth be read to align with the law of nations wherever possible, including in instances where the executive's aggressive interpretation of an unclear statute stretched the limits of what international law permitted. In the future, the Court was saying, Congress could no longer rely on ambiguous wording to dodge hard decisions about military engagement. If it chose not to exercise its power to

172. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

173. *See, e.g.*, Bradley, *supra* note 19, at 486–87; Turley, *supra* note 19, at 213.

174. *See* JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 56–59 (2012).

175. *See* Golove & Hulsebosch, *supra* note 22, at 932.

176. Letter from James Madison to Thomas Jefferson, *supra* note 30; *see also* SOFAER, *supra* note 31, at 143.

"define the law of Nations," it effectively authorized the executive to do so, overseen by a Court that had demonstrated its willingness to capaciously interpret international law.

Finally, Marshall's focus on ensuring that the president did not move the country any closer to war than Congress intended—a focus that existing scholarship on both *Charming Betsy* and *Little* overlooks—reveals a corollary of the *Charming Betsy* canon: that interpreting U.S. statutes to align with international law would do little to secure American compliance with the law of nations if executive power was understood to extend beyond the bounds of congressional authorization.[177] Recently, Professors Anthony J. Bellia and Bradford R. Clark described the canon as designed to prevent judicial encroachment into the foreign affairs power of the political branches by requiring courts to narrowly construe statutes so as not to "abrogat[e] the rights of foreign nations" absent a clear statement of intent.[178] This description would almost certainly have been news to Marshall, whose interpretation of statute in *Charming Betsy* had been a muscular effort to avoid holding that the political branches had violated the law of nations and to police the boundaries between Congress and the executive, not between the judiciary and the political branches. The canon makes far more sense when we understand the president's power to be dependent on statute.

The world of *Little* and *Charming Betsy*—a world in which executive deference to the legislature was a given, presidential power was ancillary and carried the risk of authoritarian rule, and the law of nations provided a hermeneutic and doctrinal backdrop not only to the nation's foreign affairs, but to its internal governance as well[179]—is a far cry from the world we live in today. The assumptions and practices of this world were not specific to the early republic but instead built on a long, transatlantic tradition of constitutional thought.[180] As Marshall and his colleagues confronted the question of how to define the terms of legislative power within a national government of limited powers and jurisdiction—that is, the problem of Federalist constitutionalism—this backdrop informed their reasoning. Only by keeping in mind the radically different early modern understanding that grounded the Marshall Court's analysis can we fully appreciate Marshall's jurisprudential dexterity. And only by attending closely to Marshall's language in light of this baseline can we comprehend the full import of two decisions whose significance has been obscured by two centuries of shifting understandings of executive power.

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177. This might explain why early republic Supreme Court cases treated as inseparable the issue of "whether a given executive action complied with the laws and usages of war" and the question of whether congressional authorization of a particular conflict freed "the President to exercise the full complement of powers that customary international law would sanction in the case of a war." Barron & Lederman, *Lowest Ebb II*, *supra* note 13, at 954.

178. BELLIA & CLARK, *supra* note 19, at 83.

179. For more on the Framers' understanding of the law of nations' implications for internal governance, see David M. Golove & Daniel J. Hulsebosch, *The Federalist Constitution as a Project in International Law*, 89 FORDHAM L. REV 1841, 1851–53, 1869–73 (2021).

180. *See generally* REID, *supra* note 27.

Like a Marshall opinion, this Essay has a major premise: that one way to understand the instantiation of the rule of law in the early republic is through close doctrinal analysis of the interpretive methods of one of its most competent practitioners. As with *Marbury*, attention to Marshall's careful reasoning and rhetorical choices in *Little* and *Charming Betsy* reveals not just doctrinal nimbleness. It also reveals the understanding of the rule of law, with its close connection to the separation of powers, that Marshall saw as essential to the success of America's republican experiment. That particularly American constitutional understanding, grounded in Americans' fear of arbitrary power and fealty to liberty-protecting "restraints to power and . . . the rule of law," is in many ways radically different from the understanding that governs our contemporary balance of powers.[181] How we moved from Marshall's world, with its presumption of congressional power bounded by the rule of law, to our world of executive dominance remains an urgent legal and historical question.

181. *Id*. at 24.