

REVIEWS

JOHN MARSHALL AND ALEXANDER HAMILTON, ARCHITECTS OF THE AMERICAN CONSTITUTION. By *Samuel J. Konefsky*.* New York: The Macmillan Co., 1964. Pp. viii, 274. \$5.95.

This book, rehearsing conflicts between federal and state power in the first half-century of our constitutional history, is timely. For the issue of civil rights, especially of Negroes, takes us back to the need for what Professor Konefsky phrases as "authority in the central government to curb the parochial and disruptive actions of the states and to compel them to accept measures required for the good of the nation as a whole." Thus the national insistence of Marshall and Hamilton, relived in these pages, applies precisely to reports in today's newspaper. Back in 1832, when Nullification was the threat, Marshall wrote from Richmond to Joseph Story of his fears for the Constitution: "I had supposed that north of the Potomac a firm and solid government competent to the security of rational liberty might be preserved. Even that now seems doubtful. The case of the South seems to me to be desperate. Our opinions are incompatible with a united government even among ourselves."¹ Hamilton at times was driven closer to despair.

Fortunately, these prime protagonists of national supremacy in matters concerning the integrity of the country were also prophets. Current disquiets are less disturbing because of precedents which Hamilton and Marshall established. Cultural differences, while they now appear uppermost, were not lacking in the antagonisms of their era. Cleavage of social custom must yield to the harmonizing mandate of the fundamental law, just as contests more explicitly political and economic were composed. Birchers' billboards in the Southwest crying "Impeach Earl Warren" were anticipated in President Jefferson's mutterings against John Marshall. Federal officers in western Pennsylvania fared worse, at the hands of Whiskey Boys, than did those dispatched to execute court orders in Oxford, Mississippi 175 years later.

By coupling the services of Hamilton and Marshall to the Constitution, the author presents not only a cordial partnership of statesmen,

* Professor of Political Science, Brooklyn College.

1 *Proceed. Mass. Hist. Soc.*, XIV, 351-52 (2d. ser. 1901).

but a development, or continuing articulation of principles, for Hamilton left off as Federalist leader at the moment that Marshall ascended the bench. From wide and thorough acquaintance, Professor Konefsky draws familiarly on a mass of materials, selecting episodes and decisions that illustrate his central theme, the emergence and firming of national authority. Students of the period will approve his interpretation, unless partisans of strict construction of the Constitution would wish more attention to reasons for that view. The author avoids technicalities in favor of a straightforward recital informative to the general reader.

Gratefully, this volume does not pose Hamilton and Marshall as conservatives in the easy fashion all too common. A conservative, presumably, guards accepted sanctions. These men, Marshall even more than Hamilton, were in a minority laboring to create a pattern for the conduct of American public life. They were innovators, activists, anything but keepers of a waning economic, political, and legal philosophy. They were less defenders than promoters. What they cherished grew by their efforts.

It is further appropriate to treat Hamilton and Marshall together, for the focus of both was primarily political. The economic contributions of Hamilton are familiar, and the author cites Professor Dorfman's description of the economic foundations of Marshall's legal opinions. But for both, positive government was the means of achieving social progress. Here again we are thankful for their light and leading. Increasingly, as economics becomes less a system of dogmas, and more a choice of public policies, polity, rather than private acquisitiveness, determines the course of action. The sovereign notion of these statesmen was that economic behavior is not to be obeyed, but shaped.

Since this, by invitation of the editors, is a review article, not a summary notice, and since Professor Konefsky particularly spells out the impact of Chief Justice Marshall, the participation of the first Secretary of the Treasury may be further explored.

Hamilton was as firm as anybody, and firmer than most, for independence. But he was less seized than others by the freedom frenzy of the Revolution. If tradition serves, he held the Sons of Liberty in check at the doors of King's College until he could spirit the Loyalist President Cooper out the back way in little more than his nightshirt but without the intended dress of tar and feathers. He deplored the raid of Isaac Sears and his horsemen on the press of James Rivington. It was from the place in New Jersey called "Liberty Pole" (now Engle-

wood), when the war was in parlous state, that he urged on James Duane the reforms, political and economic, necessary for success in the struggle. While still in uniform, writing from Washington's headquarters, he begged Governor Livingston to be moderate in approving punishments for suspected Tories.

Following the peace, Hamilton was foremost in pleading that adherents of the British who had remained in New York during the occupation not be expelled indiscriminately to Nova Scotia, since their talents and means would help rebuild the economy of the city. He began his law practice by defending enemy merchants being sued for trespass, during the conflict, on patriot property. He applauded the French Revolution only briefly before he saw that the object of the rights of man was degenerating into grievous excesses. First to last, he never indulged in flag-waving, but reserved his earnest eloquence to recommend solid expedients for creating a viable Union. Let others linger in the glow of freedom; he busied himself to give it a basis in fact. He had no political adolescence, but sprang from childhood into sober manhood.

This does not mean that the romantic was omitted from his nature. In his youth he indited sentimental verses, interrupted, however, by appreciation of useful lessons from Machiavelli's *Prince*. He enjoyed military exploit, was resentful when chances of battle glory were denied him during the war, and sought enthusiastically his later appointment as Inspector General. He had an extra-marital affair which, if we may judge by the woman's letters (we lack his, if he wrote any) was fervid. A severely practical man would have turned his back on dueling. Intellectually and morally Hamilton condemned the practice, but he engaged as second to John Laurens in the latter's encounter with General Charles Lee, he threatened interviews on the field of honor with Commodore Nicholson and James Monroe, and he died in his duel with Aaron Burr. In these exchanges was more than a touch of the romantic, unrealistic, and capricious.

Jefferson figures as the philosopher, the explorer in fields of humane ideas, of natural phenomena (the fauna and flora of Virginia), and of language. As exponent of democracy, he was Benjamin Franklin with a dream added. His economic allegiance to individualism, *laissez faire*, and agricultural life was a compound of the near-frontier of Monticello and the rebellion of French Physiocrats against the mercantile system. Correspondingly, in matters of government, he espoused local option as against national authority.

Hamilton, by contrast, has been pictured as possessing more limited

vision, focused on ways and means rather than on ideals. His expertness in empirical strategy, especially fiscal, is readily praised. Hamilton's reach in recommendation of long-range social development has been said to fall short of Jefferson's noble conceptions. So many imponderables enter into this comparison that it is difficult to come to a defensible conclusion. An approach to an answer may rely on two considerations, one of theory and the other of history.

As to theory we are obliged to question the popular notion that Hamilton was the champion of capitalist enterprise. True, he stood for the protection of property claims, but every public man of his time, in America and in Britain, whatever his constitutional slant, did the same, unless we are to include the virtual anarchism of William Godwin. Life, liberty, and property were the accepted triumvirate. A favorite form of property, in slaves, Hamilton consistently condemned. Perhaps he remembered the abuses of slavery in his native West Indies. So far as we know, he never owned a slave; he early joined an anti-slavery society in New York led by his friend John Jay, he ministered to the welfare of freedom, and he urged the recruitment of slaves in the Revolutionary army with promise of their liberty with their swords.

It is no purpose of this review to magnify the antagonisms between Hamilton and Jefferson. That theme has been too much dwelt upon. On the contrary, it is more revealing to treat each as a proponent rather than as an opponent. Their services, as must appear, were complementary in constructing American society. But we are not called upon, on the head of property, to be blind to the fact that Jefferson, the proclaimer of the rights of man, held many slaves, whom he worked for his advantage. "The Spirit of Christmas at Monticello" is the title of a recent holiday brochure which pictures the slaves serving the revels. The black people had their own merry-making in the quarters, and the author, Professor Boyd, is candid enough to include an apology for the shocking contrast between Christianity and chattel slavery, especially in the household of Jefferson. Custom, the obfuscations of manumission, and the supposed benefits to the slaves themselves furnish plausible excuses. But these obstacles to freeing slaves all deny principle which Quakers and other brave souls acted upon.

Defense of property aside, Hamilton had his own economic and political philosophy. It was that of the power of association or of organization. He agreed with Adam Smith's stress on division of labor, which has as its counterpart cooperation of specialists. Adam Smith, for coordination of effort, relied on the mechanism of the competitive market, whether within a country or between countries. But Hamilton,

instead of trusting to the chances of self-interest, invoked the wisdom, policy, and resources of government, both to encourage private initiative and to promote combination of pursuits. He did not depend upon an invisible hand to accomplish the public good, but supplied purposeful plan. In a new nation, with ample and varied natural endowments, but with a sparse population of little skill and capital, he would bring government to the assistance of commerce, industry, finance, and agriculture.

Hamilton returned for inspiration to the best aims and methods of the mercantilists. He had more in common with his predecessors, Colbert and Mun, than with his successors, Carnegie and J. P. Morgan. Before the Careys and Friedrich List emphasized the precept, he interposed the nation between the individual and the world of individuals. His study was to make the nation economically prosperous and politically disciplined. For Hamilton, dogma yielded to expediency, the absolute to the relative. In the superficial view, in an age that applauded *laissez faire*, he retrogressed to legislative controls. But actually he laid hold on the advanced idea that what we call wealth, or social welfare, is not so much in production and exchange of goods and services, as in the faculty of organization. Political economy is as immaterial and sophisticated as political science. For him, capacity went beyond the accumulation and application of capital. Rounded progress of an economy and polity required deliberate plan and execution. Under such auspices, well-being is cumulative, partaking more of the geometric than of the arithmetical. Two and two, in such a society, make more than four.

Does this theory neglect democracy? Here it must be understood that Hamilton's task, before and after the Constitution, was preparatory. Sovereignty must rest upon solvency. His solicitude was for the whole people. In great issues, unmistakably posed, the people could be trusted to judge rightly. In matters of legislative and administrative tactics, in interim decisions, they would profit by responsible guidance. He urged the usefulness of an elite, as servant of the community. To enlist special abilities it was necessary and proper to reward them with opportunities of material gain and the satisfaction of exercising authority in the public behalf. This is far different from disparaging democracy and promoting privilege. Near the end of his career he regretted that he and his fellow-Federalists, absorbed in devising national policies and putting them to work, had not sufficiently cultivated the confidence of the people. He sincerely projected means of repairing this defect, but too late. The public could be grateful to the

Federalists without choosing to follow them in the next act of the national drama.

On this point of Hamilton's democracy—qualified faith in democracy, if you wish—we must remember that in 1801 when the presidency hung in the balance in the House of Representatives, Hamilton exhorted his friends there to prefer Jefferson, whose policies he disliked, to Burr, whose principles he distrusted. The weight of his pleas, when the issue was delicately poised, may have tipped the scale. Hamilton frankly said that, with assurances from Jefferson on a few cardinal questions, the future of the country was safe in his hands. This was Hamilton's noble patriotic surrender.

So much for theory, or for Hamilton's public purpose and outlook. What has been the unfolding of American history since? The two views at the outset—collective controls and individualist choice—have been interwoven threads in the national fabric. At times the one or the other has been more prominent, from current party dominance or from more profound social changes. Neither force would have served so well without the corrections and supplements of the other. But the tortoise has overtaken the hare. With increased growth and integration of our society, national responsibility has proved superior to state and local volition. The evidences, economic, political, and cultural, are too manifest to require recital. At this moment an administration which acknowledges Jefferson as its parent pursues a multiplicity of policies which Hamilton, if he did not inspire them, would doubtless endorse.

Furthermore, the remainder of the world, in differing degrees, magnifies the role of government in men's daily lives. Western Europe adopts measures of public planning, Eastern Europe and most of Asia proceed completely on that principle. The undeveloped countries, whether coached by communism or by capitalism, expect to make progress through collective means.

As Professor Konefsky's portrayal of the influence of the two men abundantly shows, Marshall carried forward Hamilton's purpose to utilize the central government as the powerful means of promoting American national progress. Here the Chief Justice had an advantage over the Secretary of the Treasury. The urgings of a cabinet minister may be persuasive, and take form in institutions (funding system, Bank of the United States, and protective tariffs), which prove serviceable. But he is regarded, at the time and afterward, as the exponent of policies subject to political reversal. On the other hand, the pronouncements of the highest court are deeply etched on the tablets of

the law. They may be reinterpreted, even canceled, in later decisions, but they are not readily washed out in shifts of party domination. Thus Marshall was able to give an imprimatur to what Hamilton had earnestly commenced.

We are at no loss to understand Hamilton's hopes of the Constitution and his valiant efforts, in spite of his own misgivings, to use the Constitution as the instrument for producing national greatness. In his hands (and that is not too strong an expression) the Constitution became an enabling act. With a profound deference for the law, he yet regarded it as living and changing in response to public need. The Constitution was a means, not a model, certainly not an idol. Only a slack public official, if a policy-maker, would lean upon the letter of the law and refuse to discharge his function by responsibly interpreting its spirit. Devoted as he was to positive government, he used the community's most precious asset, the common will.

Professor Konefsky agrees with Beveridge and others that Hamilton was not the source of Marshall's convictions. However, in opening discussion of *McCulloch v. Maryland*, our author refers to the Chief Justice as "a conscious disciple of the Hamiltonian brand of nationalism." Since this suit arose from Maryland's assertion of state's rights, Marshall declared impressively that the Constitution was the act, not of the states, but of the people. Hamilton, in defending to President Washington the constitutionality of the First Bank, was not called on to expound the origin of the fundamental law, though his conception of it was always the same as Marshall's. The remainder of Marshall's decision in *McCulloch v. Maryland* is straight out of Hamilton's report, though the Chief Justice's statement is not as crisp as that of the first Secretary of the Treasury. Indeed, Hamilton could have derived his own argument for implied powers of Congress and his treatment of the "necessary and proper" clause from the copious debate in Congress on the bill to charter the bank. Hamilton did not need to revert to that rehearsal, for he had supplied the reasoning of the bank's supporters.

On the general question of Hamilton's influence on Marshall, which must be in the reader's mind throughout Professor Konefsky's pages, there is no reason to diminish Marshall's originality. The two men, moving in the same scenes, early arrived at the same view of the broad powers of the national government and the emphatic need to use these powers for the strength and harmony of the Union. Marshall made his own additions, not only legal but political. An example is Marshall's clear-cut assertion of the right of review of legislation by the federal courts, expressed by him in the Virginia ratifying convention five years

prior to *Marbury v. Madison*. Hamilton, treating the authority of the Supreme Court, did not allow the tribunal the same latitude in applying the Constitution. Hamilton, in pressing through his program, was not concerned with striking down acts of Congress, but wanted to find room for them in the wording of the Constitution.

Though Marshall was far from being Hamilton's creature, Hamilton could not have done better than invent John Marshall to carry on his work in the next generation against odds. Marshall, in his high judicial office, was a projection of the purposes of Hamilton. Marshall was a blessed salvage from the wreck of the Federalist party. Hamilton's political ineptitude, as party leader, is evident in his failure to train apprentices. His collaboration was mainly with men of his own age, or older, who had come independently to the same commitment, such figures as Washington, Boudinot, Jay, King, Robert and Gouverneur Morris, Greene, Charles Cotesworth Pinckney, and Duane. He early lost the valuable cooperation of Madison and wantonly alienated John Adams. Three members of Adams' cabinet may be called Hamilton's apostles; but he had to supply lacks in the well-meaning McHenry; Wolcott, Hamilton's protégé, in later years was a "Toleration Republican"; and the devoted Pickering erred the other way in extreme Federalism.

Hence the special importance of Marshall as a Federalist carry-over. Aside from his signal service in giving scope to the Constitution, Marshall erected the judiciary to majestic stature in spite of obstacles greater than those Hamilton met in creating the Treasury. Marshall took the vaguest department of government, little esteemed by Jay and not improved by Ellsworth, and made it equal and, on occasion, superior to the others. On the other hand, when Hamilton entered the empty Treasury, all looked anxiously to him to fill it and furnish sinews for the nation. Marshall immediately encountered the bitter hostility of Jefferson and held steadily to his course through a long series of antagonistic executives. Contrariwise, Hamilton rode the crest of the Federalist wave, enjoyed the perfect support of Washington during his tenure in the Treasury and afterward, and, unofficially and gratuitously, managed the finances during most of John Adams' term.

We say "the beginning is hard," but the next stage of American development brought complications—political, military, commercial, and geographic expansionist—even harder to overcome. Hamilton successfully argued his program through Congress; only his carriage tax came to the Supreme Court, and here also his plea won a favorable

verdict. The executive and legislative branches had an inescapable, almost organic connection. But the Chief Justice was not expected to be a policy maker, and worked under the handicap of detachment.

A further contrast between the service of Hamilton and of Marshall to the Constitution presents itself. Marshall approved the Constitution to an extent not shared by Hamilton. At the Annapolis commercial talks and long before, Hamilton did more than others to produce the calling of the Constitutional Convention of 1787. In the convention he was crippled by the opposition of his two fellow delegates from New York, Lansing and Yates. However, it was not this frustration that provoked him to unveil on the floor a plan of union more centralized than any but a few would accept. When, after a considerable absence, he returned to the convention, as Washington urged, he was the lone representative of his state, and thus had no vote. But he had learned prudence, and recommended a scheme more moderate than his first essay, and thereafter busied himself to compose differences between delegates. Though the document, as framed, fell short of his desires, he begged for its unanimous approval. Then in his *Federalist* papers he used anonymity and patriotism to give a better character to the Constitution than he would confess before St. Peter. In the New York ratifying convention at Poughkeepsie he continued more vehemently in this strain. In the Treasury and for the remainder of his life he did his best to prop what he called, perhaps in a moment of despondency, the "frail fabric."

Marshall was a sturdy supporter of the Constitution in the Virginia convention, but he was not obliged, except briefly as Secretary of State, to assume administrative responsibility under it. By the time he became Chief Justice the first ten amendments had satisfied the clamor for a bill of rights. The Eleventh Amendment had been adopted, ostensibly limiting the judicial power of the United States, but Marshall construed it to forbid states, as Professor Konefsky says, "to determine for themselves the extent of the jurisdiction of federal courts." Moreover, the government was prosperously launched under the Constitution. If John Adams' enforcement of Alien and Sedition Acts caused outcry, the same President had removed the threat of war with France. Marshall was to have his grievous troubles, as we have said, before he could sit on the bench with comfort or even with safety, but at least the Constitution had been proved during a dozen years and Marshall was at peace with it.

BROADUS MITCHELL†

† Teaching Fellow, New College of Hofstra University.