The John Marshall Law Review

Volume 37 | Issue 2 Article 1

Winter 2004

Foreword, 37 J. Marshall L. Rev. 317 (2004)

Samuel R. Olken
John Marshall Law School, 7olken@jmls.edu

FOREWORD

On February 24, 1803, Chief Justice John Marshall, on behalf of the entire United States Supreme Court, read from the bench his opinion in *Marbury v. Madison*.[1] As would be his custom in many of the Court's seminal constitutional cases during the early decades of the nineteenth century, Marshall wrote the majority opinion, thus creating the indelible, though not entirely accurate, impression upon contemporaries and subsequent generations of scholars alike that when the Chief Justice spoke he expressed not only his own cogent views but also those of the other justices as well.[2] In a complex opinion, noteworthy for its purposeful indirection[3] and bountiful dicta, Marshall explained that while William Marbury had a vested legal right in his justice of the peace commission,[4] for which he could pursue the remedy of mandamus,[5] the Supreme Court ultimately lacked jurisdiction to issue this writ to Secretary of State James Madison.[6] Exceptionally clever in its assertion of judicial authority to review the legal actions of the political branches of the federal government while avoiding the risk of embarrassment that would have occurred had the Court issued a mandamus order likely ignored by the Secretary of State and President Thomas Jefferson,[7] the decision enhanced the prestige of the Court and helped solidify its institutional independence at a time when it was most vulnerable to partisan politics.

Few cases in American constitutional law have generated as much attention as *Marbury*, which particularly during the last century or so has achieved, rightly or wrongly, depending upon

---

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

2. For a discussion of Chief Justice John Marshall's influence upon his fellow justices *see generally* Donald M. Roper, *Judicial Unanimity and the Marshall Court – A Road to Reappraisal*, 9 AM. J. LEGAL HIST. 118 (1965) (acknowledging Marshall's paramount influence while refuting the notion that he necessarily dominated the Court).

3. *See* ROBERT G. MCCLOSEKEY, THE AMERICAN SUPREME COURT (1960) ("The decision is a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.").

4. *Marbury*, 5 U.S. at 162, 172.

5. *Id.* at 168-73.

6. *Id.* at 173, 176-77, 180.

7. *See* Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WISC. L. REV. 301, 319, 333.

one's perspective, preeminent status in constitutional law.[8] Criticized by some for its flawed constitutional and statutory analysis,[9] others regard Marshall's opinion as an eloquent defense of judicial review,[10] prescient in its vision and fundamentally sound in its distinction between law and politics.[11]

To the extent judicial review existed before *Marbury*, it essentially amounted to a political act in that courts invoked it sparingly as "a substitute for revolution"[12] in a constitutional democracy based upon the consent of the governed. In the closing decades of the eighteenth century, judges were viewed as intermediaries between the people and the legislative branch, and the judicial function was understood, in part, as a means of preserving the boundaries of public authority, including judicial power.[13] In the aftermath of the American Revolution, the spate of laws enacted by local legislatures facilitated the emergence of and respect for an independent judiciary entrusted to protect individual rights from the tyranny of ephemeral democratic

8. Not surprisingly, there is a considerable body of literature about the meaning and scope of *Marbury v. Madison*. For studies in praise of *Marbury* *see, e.g.*, GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, VOL. II: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815 (Part I Haskins) 182-204 (1981); MCCLOSKEY, *supra* note 3, at 40-44. Some commentators believe that the flaws in *Marbury* outweigh its virtues. *See, e.g.*, LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 75-88 (1988); Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST. L. REV. 553 (2003). Others consider the case overrated and not as important as other decisions such as *McCulloch v. Maryland* (1819). *See, e.g.*, Michael Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1113-44 (2001) (questioning the importance of both *Marbury* and *McCulloch*); Jack Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997) (de-emphasizing *Marbury*'s influence in the development of judicial review). For particularly balanced appraisals of the decision *see generally* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 47-71 (1996); Dean Alfange, Jr., *Marbury v. Madsion and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329; Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989); Bloch & Marcus, *supra* note 7; James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515 (2001).

9. There is also much criticism of Marshall's legal reasoning in *Marbury*. *See, e.g.*, William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L. J. 1; James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992).

10. HOBSON, *supra* note 8, at 47-71.

11. WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND THE LEGACY OF JUDICIAL REVIEW 7-9, 59-71 (2000).

12. SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 3, 74, 93 (1990).

13. *See, e.g.*, Kamper v. Hawkins, 1 Va. Cas. 20, 32-33 (1793) (invalidating a Virginia law that authorized district court judges to issue injunctions).

majorities and political factions.[14] Within this context, courts adopted a defensive posture from which as a coordinate branch of government they refused to enforce ordinary laws that blatantly conflicted with constitutional limits upon public authority. Accordingly, judges often invoked the doubtful case rule as a means of judicial restraint in situations that did not present clear violations of fundamental law.[15]

Upon the creation of the federal constitution, Alexander Hamilton sought to explain the role of the federal judiciary in the constitutional system. In Federalist Paper Number 78, he linked constitutional supremacy and popular sovereignty to judicial review when he observed:

> It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[16]

From this perspective, Hamilton considered an independent federal judiciary "the bulwar[k] of a limited Constitution against legislative encroachments" and the guardian of individual rights in a constitutional democracy.[17] Insofar as Hamilton outlined the contours of federal judicial power, he also indicated its potential as a means for preserving the rule of law in a democratic society.

In several respects, Chief Justice John Marshall drew upon Hamilton's concepts as well as the burgeoning tradition of judicial review within the states and federal courts when he crafted his *Marbury* opinion. Yet Marshall did more than simply take notice of the Constitution when he manufactured a conflict between a portion of a federal law whose constitutionality few questioned and Article III of the Constitution. For he ignored the doubtful case rule in order to bolster the role of the Court in constitutional

---

14. *See, e.g.*, Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More out of Less*, 56 WASH. & LEE L. REV. 787, 791-92 (1999).

15. *See, e.g.*, Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (Paterson. J.).

16. THE FEDERALIST NO. 78, 519, 522-23 (Alexander Hamilton) (Heritage Press ed., 1945).

17. *Id.* at 405.

adjudication.[18] In addition, he consciously distinguished between legal and political questions to insulate the Court from external political pressures.

Indeed, his seemingly innocuous statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[19] belied the extent to which Marshall manipulated the issues in *Marbury* to assert judicial review over both the executive branch and Congress and thus enhance the role of the Court in the constitutional system. Moreover, his explanation that "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each"[20] rested upon syllogistic reasoning intended to legitimize the practice of federal judicial review.

Accordingly, through application of common law techniques of statutory interpretation, Marshall sought to ascertain the meaning of constitutional limitations.[21] Though John Marshall did not claim anywhere in *Marbury* a unique role for the Court in constitutional interpretation, nor expressly assert the doctrine of judicial supremacy, by the end of the nineteenth and throughout the twentieth centuries, commentators and jurists increasingly ascribed these notions to *Marbury* to either justify the exercise of judicial review or question the scope of its practice.[22]

Although the Constitution does not set forth in precise terms the doctrine of federal judicial review,[23] it is certainly implicit in the structure of the constitutional system in which there are three coordinate branches of the national government: the legislature, the executive and the judiciary. An integral aspect of separation

---

18. LEVY, *supra* note 8, at 81-82.

19. *Marbury*, 5 U.S. at 177.

20. *Id.*

21. HOBSON, *supra* note 8, at 191-208.

22. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) (citing *Marbury* for the proposition "that the federal judiciary is supreme in the exposition of the law of the Constitution . . . "); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 554 (1895) (invoking *Marbury* as precedent while invalidating federal income tax legislation); Mugler v. Kansas, 123 U.S. 623, 661 (1887) (relying, in part, upon *Marbury* to assert that "courts are not bound by mere forms . . . [but] are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."). *See also* Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375 (2003) (discussing the trajectory of *Marbury* in constitutional discourse).

23. While Article III of the Constitution establishes a Supreme Court, provides for the creation of lower federal courts and delineates the contours of lower federal court and Supreme Court jurisdiction, no express constitutional language authorizes the federal judiciary to review either state or federal laws.

of powers, judicial review exists as a means of maintaining the constitutional limits of governmental authority.[24] Seemingly anti-democratic in form, in function it protects individual rights from the tyranny of popular majorities, manipulated by political factions who create partial laws at the expense of the public welfare.[25] Theoretically constrained by the doctrine of stare decisis and prudential concerns, unelected federal judges with lifetime tenure bear the responsibility of assessing the boundaries of governmental power without casting judgment upon the wisdom of public policy choices made by political actors. In so doing, federal courts tread a fine line between interpreting the law and making political judgments.

In large part, the "counter-majoritarian"[26] tendencies of judicial review expose its vulnerabilities, a point which, Alexander Hamilton implicitly expressed when, in 1788, he observed that the judiciary would be the "least dangerous branch" of the federal government because, lacking influence over either the purse or the sword, it could only rely upon the executive branch for aid in the enforcement of its decisions.[27] Over the course of the last century, frequent debate over the parameters of federal judicial review and mounting concerns about the extent to which judges employ principles of neutral adjudication to resolve legal disputes[28] demonstrate how susceptible federal courts are to criticism in a constitutional democracy. Indeed, some of the more virulent attacks upon judicial intervention in cases involving implied constitutional rights and doctrines have come from jurists worried that federal judges have allowed social and political values to impede dispassionate legal analysis.[29] Independent from their political counterparts, federal courts must often assess the validity of legislation and determine whether actions of public officials conform with prescribed legal standards. Yet, ultimately, they must exercise judgment with care in order to preserve the delicate balance of power within the constitutional system and the efficacy of their decisions.

---

24. *See, e.g*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (Jackson, J., concurring) (discussing the role of the court in separation of powers cases).

25. *See* Samuel R. Olken, *The Business of Expression: Economic Liberty, Political Factions and the Forgotten First Amendment Legacy of Justice George Sutherland*, 10 WM. & MARY BILL RTS. J. 249, 264, 268-69 (2002).

26. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16-23 (1962).

27. THE FEDERALIST NO. 78, *supra* note 16, at 520.

28. *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutionial Law*, 73 HARV. L. REV. 1 (1959).

29. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 996-1001 (1992) (Scalia, J., dissenting) (warning about the dangers of Supreme Court adjudication based upon political and social concerns).

In large part, because judicial review is a theoretical construct, its parameters reflect the underlying policies of separation of powers: legitimacy, efficiency and tyranny.[30] Modern assessment of the meaning and significance of *Marbury*, therefore, often involves the interplay of these policies, as commentators attempt to justify, explain or critique the practice of judicial review. Though John Marshall did not expressly invoke such concepts in his now fabled opinion, in retrospect, its curious mixture of rhetoric and legal analysis suggests *Marbury*'s pivotal role in the evolution of judicial review. Indeed, the Chief Justice's conscious distinction between law and politics, the means by which he derived a constitutional conflict, his explanation about the limits of judicial power and the manner in which he linked constitutional supremacy and popular sovereignty all raised questions about judicial legitimacy, efficiency and tyranny that continue to permeate the landscape of constitutional law.

Interestingly, at the time Marshall delivered his opinion there was much more interest in its discussion of William Marbury's vested legal rights, the propriety of mandamus as a legal remedy and the amenability of public officials to the rule of law than in Marshall's seemingly straightforward assertions about judicial review. Thus, initially, the political aspects of the case overshadowed its points about judicial power. Moreover, the subtle manner in which the Chief Justice construed the meaning of the Constitution through his application of common law canons of interpretation also appears, in retrospect, to have quelled somewhat debate about the Supreme Court's refusal to enforce a federal law.

Eventually, as perceptions changed throughout subsequent decades of the nineteenth century and into the last one about the role of federal courts, in general, and the United States Supreme Court, in particular, Marshall's observations about judicial review attracted increased attention. For much of the last century or so historical and legal commentators have frequently studied and reassessed the meaning and parameters of judicial review. Throughout this ongoing analytical process they have closely scrutinized *Marbury* and subjected to critical examination Marshall's notions about judicial review and the role of the Court in constitutional interpretation. Not surprisingly, numerous critiques of Marshall's methodology and reasoning emerged,[31] which, in turn, have raised a vast spectrum of questions and concerns about the process of judicial review and the institutional objectives of the federal judiciary.

---

30. *See* DAAN BRAVEMAN, WILLIAM C. BANKS & RODNEY A. SMOLLA, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 166-68 (4th ed. 2000).

31. *See, e.g.*, Van Alstyne, *surpa* note 9.

Marbury, therefore, has become a touchstone in constitutional discourse, and for this reason analysis of American judicial review–either in a historical sense or in terms of a modern critique–often includes discussion of this seminal opinion. Indeed, as testament to its enduring influence, some commentators invoke the case as precedent for judicial supremacy in matters of constitutional interpretation[32] while others regard Marshall's opinion as an illustration of the inherent problems of an unelected judiciary interpreting the Constitution.[33]

Aside from its points about judicial power, *Marbury* addressed some fundamental questions about the role of courts in a democratic republic. Viewed in this light, the case takes on even greater importance because of its widespread influence in many aspects of public law. For example, careful analysis of the decision reveals the origins of the political question doctrine which, as Professor Michael Seidman explains in his intriguing article that appears in this issue, illustrates both the virtues and vices of judicial review in a constitutional democracy. Other facets of the case have influenced judicial precedent about executive privilege, the appointment and removal of executive branch officials, the scope of presidential foreign policy authority and prudential limits upon judicial power.[34] Moreover, as Professor Thomas Merrill indicates in his article, Marshall's discussion of whether the Supreme Court could issue writs of mandamus to public officials presaged the development of administrative law.[35]

The articles that appear in this special symposium issue of the law review illustrate the enduring allure of *Marbury* and its continued relevance to modern constitutional law. They also reflect a diverse range of views about the nature of judicial review and the meaning of *Marbury*. In this regard, Professors William E. Nelson, Larry D. Kramer and Samuel R. Olken analyze *Marbury* in the context of broader historical themes yet draw different conclusions about the historical significance of this case and the objectives of Chief Justice John Marshall. Assessing *Marbury* from the perspective of the late twentieth century, Professors Mark Tushnet and Walter J. Kendall question the efficacy of judicial review in a legal system in which powerful

32. *See* ARCHIBALD COX, THE COURT AND THE CONSTITUTION 344 (1987) (proclaiming that "[u]nder *Marbury v. Madison* the judiciary has the final word. . .").

33. *See* BICKEL, *supra* note 26, at 16-23. For a more modern critique of judicial review *see generally* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (refuting the concept of judicial supremacy and advocating an increased role for the political branches in the resolution of constitutional issues).

34. *See* Amar, *supra* note 8 at 446-49.

35. *See also* Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

interest groups and political factions wield considerable influence over the administration of justice.

Two hundred years old, *Marbury v. Madison*,[36] continues to enthrall scholars and law students, in large part, as the articles in this symposium issue suggest, because it demonstrates both the promise and paradox of judicial review in a constitutional democracy.

Samuel R. Olken, Professor of Law and Symposium Chair,

Marbury v. Madison and Judicial Review: Legitimacy, Tyranny and Democracy

October 3, 2003

36. 5 U.S. 137.