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# Chief Justice Marshall in the Context of His Times

R. Kent Newmyer\*

There are many things to admire in Professor Wood's presentation.<sup>1</sup> Not least is the admirable mix of scholarship and common sense along with a rare gift for making complicated ideas understandable. In these traits, he is not unlike John Marshall himself. Professor Wood's presentation also is admirably heuristic – important for the questions it raises as well as for the answers it gives. In this essay, I will touch on some of the points I found most inviting.

One point has to do with Wood's insistence on placing Marshall and judicial review in the context of history. Contextualization has, in fact, been the tendency of much recent Marshall scholarship. By tracking the development of judicial review into the nineteenth and twentieth centuries, recent scholars have shown persuasively that Marshall's formulation of judicial review in *Marbury v. Madison*<sup>2</sup> was much more inchoate and restrained than scholars once assumed. The hey-day of judicial review, in fact, came in the late nineteenth and early twentieth century with the Court's foray into substantive due process (ironically during one of its most conservative phases). Decisions by "liberal" majorities in more recent cases like *Brown v. Board of Education*,<sup>3</sup> *Roe v. Wade*,<sup>4</sup> and even the less controversial *Baker v. Carr*<sup>5</sup> represent a law-making exercise of judicial power that makes Marshall's position in *Marbury* look very modest indeed.

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1. See generally 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 (1999).

2. 5 U.S. (1 Cranch) 137 (1803).

3. 349 U.S. 294 (1955).

4. 410 U.S. 113 (1973).

5. 369 U.S. 186 (1962).

By avoiding the pitfall of anachronism (and escaping the long shadow of Albert Beveridge's hagiographic biography), recent scholars have performed a much needed service. The danger, however, as Professor Wood rightly reminds us, is in diminishing *Marbury* (and Marshall) too much. Revisionist scholars draw heavily on historical perspective. Wood asks us to consider their conclusions in the same light. Their perspective is judicial review in the nineteenth and twentieth centuries; Wood's perspective is judicial review (or the lack of it) in the seventeenth and eighteenth centuries. What strikes him about the judiciary during this early period is how constricted it was both in England and in the colonies. Even if we concede that Marshall's definition of judicial review in *Marbury* was neither sweeping nor definitive, the compelling truth remains: Under his guidance and in a relatively short period of time, judicial review became a standard feature of American government. And so it has continued to be. Not unsurprisingly, *Marbury* remains the pivotal decision and John Marshall the epic hero of the story. Several thousand citations by the Supreme Court over the years speak to the point, as does the fact *Marbury* and Marshall invariably are called on by the Justices when they need to defend the Court from its critics or to speak authoritatively on controversial issues.

When Wood reaffirms *Marbury*'s prominence, then, he has the Supreme Court of the United States in his corner. Efforts to understand the intricacies of the case will no doubt continue, and scholars will continue the search for Marshall's complex and elusive motives. *Marbury*'s place, however, in the pantheon of great cases, is secure. So also, I suspect, is the assumption that John Marshall is the undisputed father of judicial review – even though the story is much more complicated.

This assumption brings me to yet another question: Why, given the limitations of Marshall's actual opinion (as well as its lack of originality) does *Marbury* continue to loom so large in the grand narrative of American constitutional history? Why must we have one great dazzling moment, one great decision, one representative legal giant? One reason for *Marbury*'s mythic status (and Marshall's too), I submit, is institutional in nature. Simply put, the Supreme Court as an institution takes care of its own – and is uniquely equipped to do so. Marshall and *Marbury*, the two inextricably linked in public memory, have been celebrated and memorialized in countless ways over the years by all sorts of people and groups. In truth, lawyers, judges, courts, and above all the United States Supreme Court have been the main keepers of the Marshall flame. *Stare decisis* and *Shepard's Citations*, now online, not only are indispensable in practicing law, they are remarkably potent myth-making instruments. They also are uniquely judicial. Presidents may, of course, justify their policies by reference to past administrations, though

they rarely bother. In any case, presidential pronouncements about legislation are not constitutionally authoritative. And though Congress can and does make a huge ruckus, it lacks the singular voice necessary for constitutional clarification of the laws it enacts. Lacking unified and continuous membership and tied to the changing opinions of their constituents, Members of Congress feel little obligation to maintain constitutional consistency.

In short, the principle of *stare decisis* belongs exclusively to the judicial branch. As an explanation of judicial decision making, it is far from adequate. Still, it remains basic to the judicial process – and it works wonders for John Marshall and for *Marbury*. As historians, we insist on understanding the complexity of events; we cherish nuance and accept change, accident, and indeterminacy as part of life. Lawyers' history by definition requires clarity and needs definitive closure. To function effectively as precedent, *Marbury* must be divested of its ambiguities and limitations. In the work-a-day world of law, lawyers' history will reign supreme. It is a sure bet that the Supreme Court will continue to celebrate *Marbury* as the decisive moment and Chief Justice John Marshall as a judge for all seasons.

If such be the case, why do the American people need a mythic legal hero? The answer, in large part, stems from the fact that law in a representative democracy like ours must be accepted by the American people in order to be law. In the formative age of American law, legitimation was especially critical and equally hard to come by. Think for a moment about the fragility of the new Constitution in the decades following ratification. In John Murrin's apt words, it was "a roof without walls."<sup>6</sup> The document was not simply a piece of parchment as one could say, but it was not much more. To legitimize the Constitution, to bring it to life, to make it a part of American culture, symbol and myth were crucial. The presence of Washington at the head of the new government, for example, was a legitimating fact of vital importance. I submit that Chief Justice Marshall was to American law what President Washington was to American politics – an authenticating presence. The historic process of nation building fed the Marshall myth, if it did not actually create it. This myth is what Holmes meant when he said (in his speech on the centennial of Marshall's ascension to the Court in 1901) that "part of his greatness consists in his being there."<sup>7</sup> Marshall had the great advantage of writing on a slate that was largely blank, of making precedents

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6. See John A. Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 333-48 (Richard Beeman et al. eds., 1987) (explaining that Constitution became substitute for national identity in years shortly after ratification).

7. OLIVER WENDELL HOLMES, *John Marshall*, in *COLLECTED LEGAL PAPERS* 267, 267-68 (1920).

rather than following them. In law, as in religion, first generation interpreters get the hermeneutic nod, so to speak. What those interpreters say, if they say it rightly and well, becomes inseparable from the text they are interpreting. Joseph Story once remarked that his friend Marshall "clung to the Union, and nailed its colors to the mast of the Constitution."<sup>8</sup> One might add that the Constitution, thus adorned, carried Marshall himself to glory.

Judicial review, figuratively speaking, was the nail. In the myth-making process, it really does not matter that the concept was not original with Marshall or that it was not fully developed in *Marbury*. What counts is that Marshall was the first Justice to make it work for the Court – to make it law rather than theory. Equally important, he made it stick. Marshall made it stick – that is to say, he shielded the Court from retaliation from the political branches – because he did not claim too much for the Court's powers of review and because he couched his claim in the language of the common law.<sup>9</sup> (Remember how long his opinion went on about the history of the ancient writ of mandamus and how the dispositive paragraph drew heavily from Blackstone's Tenth Rule of statutory construction.<sup>10</sup>) Marshall's greatness, to put it another way, consisted not just in being "there" but in understanding what the traffic of the moment would bear. Unfortunately for historians, he left no paper trail concerning his calculations. Clearly, though, he understood the importance and delicacy of what he was doing in *Marbury*. Just as clearly, he did what came naturally. That is to say, he operated like the superb common lawyer he had been for twenty years and never stopped being once he got on the Court. He also brought to the Court the savvy political skills he had learned as the leader of the Federalist party in Virginia in the 1790s. As a Federalist in Jeffersonian Virginia, he had to be savvy to survive. He had taken careful measure of Jefferson and his new party. He had come to distrust their motives and to fear their radical states' rights constitutionalism (as set forth in the Virginia and Kentucky Resolutions of 1798).<sup>11</sup> Knowing what he knew, Marshall could not have failed to appreciate the Court's political vulnerabilities. By casting his opinion in the language of the common law and by not expounding fully on judicial review itself, he defused the opposition. Doing what came naturally, it would seem, also was doing what was politi-

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8. JOSEPH STORY, *Life, Character and Services of Chief Justice Marshall*, in MISCELLANEOUS WRITINGS OF JOSEPH STORY 639, 683 (William W. Story ed., 1852).

9. See SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 109-13 (1990) (describing Marshall's careful use of language in *Marbury*).

10. See ROBERT LOWREY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 19-20 (1989) (discussing Blackstone's Tenth Rule and Marshall).

11. See DOCUMENTS OF AMERICAN HISTORY 178-84 (Henry Steele Commager ed., 1968) (providing reprint of Virginia and Kentucky Resolutions of 1798).

cally smart and institutionally essential. Holmes was right that Marshall's greatness had to do with his being there, but it was equally important that it was John Marshall who was there.

One other of Marshall's unique contributions to judicial review, the single contribution without which judicial review literally could not have happened, was his genius for leading the Court and specifically his success in getting the Justices to abandon the practice of seriatim opinions in favor of a majority opinion.<sup>12</sup> One could, I think, discover some faint movement in this direction in the 1790s – at both the Supreme Court and the state court levels. But the dominant practice, as in England, was that each judge would write a separate opinion. Jefferson wanted to keep it that way to reduce the Court's power. Marshall, however, persuaded his colleagues to speak in a single majority opinion. This quiet revolution happened before *Marbury*. It would not have happened without Marshall's unusual leadership skills – his knowledge of human nature, his sensitivity, and the innate authority he came to have because he was who he was. I should say, also, that Marshall's campaign for internal unity most probably would not have succeeded if the Court had not been under siege by President Jefferson and the Republican radicals in Congress. Thinking like the combat soldier he had been, Marshall used the strength of his political enemies to mass his own troops: to unite the Court and to strengthen his position as Chief Justice. If Marshall had not spoken with the authority of the whole Court in 1803 and if the Court thereafter had not been able to speak in a single voice, the doctrine of judicial review would have amounted to very little indeed. Because it could speak as an institution and because it so often spoke in the voice of John Marshall, the Supreme Court became inseparable from its fourth Chief Justice. On this point, Thomas Jefferson was right.

One final observation about *Marbury*: Following Professor Wood, I would like to draw one more lesson from historical context – the thirty years following 1803 and, most particularly, the Court's history in the dozen or so years following *McCulloch v. Maryland*<sup>13</sup> in 1819. The lesson of colonial history, as Wood teaches it, is not to underestimate *Marbury*. The history of the Marshall Court in the 1820s and early 1830s warns us against overestimating it.<sup>14</sup> The objective is to strike a balance.

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12. See GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, 2 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 382-89 (Paul A. Freund ed., 1981) (analyzing opinions of Justice Marshall).

13. 17 U.S. (4 Wheat.) 316 (1819).

14. See generally G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, 3&4 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF

*Marbury* resembles a great painting in that its meaning often varies with the light and the viewer. As a guide to judicial review during Marshall's tenure on the Court, for example, the opinion was positively misleading – conveying the impression that Marshall mainly was interested in limiting the power of Congress (because *Marbury* invalidated a federal statute).<sup>15</sup> Nothing could be further from the truth. Very early on, as Marshall explained in his *Autobiographical Sketch*, he "was confirmed in the habit of considering America as my country, and congress as my government."<sup>16</sup> Conversely, one notes his deep distrust of state government from the 1780s through the 1790s and throughout his career on the Court.<sup>17</sup> Looking at judicial review in action during his judicial tenure, it becomes immediately clear that, as a working concept, it was aimed primarily at state legislatures and at state judicial decisions upholding state legislation. This concentration was most obvious in the long series of contract clause decisions – most famously *Fletcher v. Peck*<sup>18</sup> and *Dartmouth College v. Woodward*,<sup>19</sup> in which Marshall set forth the controlling doctrine. But even Marshall's most nationalistic opinions (those cited most often to support the modern bureaucratic, regulatory state) were aimed mainly at curtailing the evils of state legislation.<sup>20</sup> Consider the twin pillars of constitutional nationalism: *McCulloch*, which announced the doctrine of implied powers, and *Gibbons v. Ogden*, which provided an open-ended definition of federal commerce power. In both cases, Marshall used the definition of national authority not to create an activist interventionist nation state, but rather as a means for striking down state laws interfering with private property, contractual sanctity, and the creation of a national market in general.

Also consider the fact that the Court's power to review state legislation did not depend on *Marbury v. Madison*, which was not cited as authority in such cases. Remember, too, that judicial review of state laws was the great

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THE UNITED STATES (Paul A. Freund & Stanley N. Katz eds., 1988) (providing authoritative and comprehensive account of period).

15. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-78 (1803) (refusing to issue writ of mandamus).

16. AN AUTOBIOGRAPHICAL SKETCH BY JOHN MARSHALL 9-10 (John Stokes Adams ed., 1937).

17. See 1 ALBERT BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 200-49 (1916) (providing general discussion of this period of Marshall's life). See generally 2 ALBERT BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1916) (same).

18. 10 U.S. (6 Cranch) 87 (1810).

19. 17 U.S. (4 Wheat.) 518 (1819).

20. R. Kent Newmyer, *John Marshall and the Southern Constitutional Tradition*, in AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 105, 105-24 (Kermit L. Hall & James W. Ely, Jr. eds., 1989).



issue of the day. When the Court exercised that power, it acted almost exclusively under the authority of a congressional statute: Section 25 of the Judiciary Act of 1789.<sup>21</sup> This section made the Supreme Court the final appellate tribunal in federal cases which at that time could be tried in the first instance in state courts. Without the Supreme Court's right to review such decisions – which right Section 25 supplied – each state would have remained the final judge as to the meaning of the Constitution. This power to make states the final arbiters in constitutional disputes is what the Virginia and Kentucky Resolutions were all about, which is why Marshall feared their consequences. This power is what Thomas Jefferson and Spencer Roane wanted. John C. Calhoun, the greatest southern constitutional theorist of the age, also saw the pivotal significance of Section 25. In his nationalist phase he supported it – remarkably as late as 1823 when he approved of Marshall's defense of Section 25 in *Cohens v. Virginia*.<sup>22</sup> Calhoun came to realize, though, as did other Southern thinkers after *McCulloch*, that Section 25 gave away the family farm – or rather the family plantation. If that section could be repealed, which could be done by a simple majority vote of Congress, the South's constitutional problems would be solved once and for all. When repeal failed – and only when it failed – Calhoun and the Southern states implemented nullification as a way to make states dominant in the constitutional adjudication of federal questions.

If I am right about this view of Section 25, then the Court's decisions justifying judicial review under Section 25 deserve a place in the Pantheon right next to *Marbury*: Story's opinion in *Martin v. Hunter's Lessee*<sup>23</sup> and Marshall's in *Cohens v. Virginia*,<sup>24</sup> his most forthright and expansive definition of the Court's appellate jurisdiction. Absolutely central to the development of judicial review, I would argue (if I had more time), was *McCulloch v. Maryland*.<sup>25</sup> Marshall's opinion in that case spelled out clearly for the first time what the power of review, as set forth in *Marbury*, really meant. Southern constitutional thinkers got the message. What made them sit up straight, what made them take out after Marshall and the Court in the 1820s, was not the fact that Marshall presumed to review an act of Congress (in *McCulloch*, the 1816 charter of the Bank). What distressed them was that the Court did *not* strike it down. Instead, it upheld the charter of the Bank and voided Maryland's tax on it. Ironically, Marshall's great nationalist opinion consolidated the forces of states' rights resistance that brought on the Civil War.

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21. 1 Stat. 20 (1789).
  22. 19 U.S. (6 Wheat.) 264 (1821).
  23. 14 U.S. (1 Wheat.) 304 (1816).
  24. 19 U.S. (6 Wheat.) 264 (1821).
  25. 17 U.S. (4 Wheat.) 316 (1819).

States' rights constitutional theorists cut their teeth on *McCulloch*. Marshall, as we know, answered them brilliantly in his anonymous newspaper essays in defense of *McCulloch*<sup>26</sup> and finally in *Cohens v. Virginia*.<sup>27</sup> But in many ways the states' rights folks won the day – at least until Ulysses S. Grant and the armies of the North had their say. In the meantime, however, Jefferson, Jackson, and the American people who elected them taught Marshall the most painful constitutional lesson of his life: namely, that the decisions of the Supreme Court are not necessarily final, *Marbury* and *Cohens* to the contrary notwithstanding. States can and did resist them (witness *Chisholm v. Georgia*,<sup>28</sup> *New Jersey v. Wilson*,<sup>29</sup> *Green v. Biddle*,<sup>30</sup> and *Worcester v. Georgia*,<sup>31</sup> to mention only some). More fundamentally, the American people can elect a new president who can appoint new Justices who can change the direction of constitutional law. Precisely this situation occurred when the American people elected Andrew Jackson in 1828 and when Jackson reconstituted the Court along states' rights lines. John Marshall saw the writing on the wall in 1831. Despite the accolades that poured in on him during his final years as Chief Justice, he died thinking he had failed.

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26. See JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed., 1969) (reprinting essays of Justice Marshall and essays attacking Marshall's opinion).

27. 19 U.S. (6 Wheat.) 264 (1821).

28. 2 U.S. (2 Dall.) 419 (1793).

29. 11 U.S. (7 Cranch) 164 (1812).

30. 21 U.S. (8 Wheat.) 1 (1823).

31. 31 U.S. (6 Pet.) 515 (1832).

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