The 200th Anniversary of Marbury v. Madison: 
The Reasons We Should Still Care About the Decision, and The Lingering Questions It Left Behind

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Today, February 24th, 2003, marks the 200th anniversary of an extraordinary legal event: the Supreme Court's decision in the case of Marbury v. Madison. There, the Court - in an opinion authored by Chief Justice John Marshall - ruled that it was not bound by an act of Congress that was "repugnant to the Constitution."

William Rehnquist has described Marbury as "the most famous case ever decided by the United States Supreme Court." But, at the time it was issued, neither Marshall nor his chief adversary (and cousin), Thomas Jefferson, could have imagined the further growth and acceptance of the power of judicial review that Marbury declared.

But why should we still care about this decision?

Marbury's Context: A Feud Between Political Factions

The formal dispute that the case resolved was itself of minor significance. It was an issue of political patronage, pitting the ascendant Jeffersonians against the (soon-to-be) departing Federalists. The simmering feud between them was intense. The case can only be understood against the background of the election of 1800, in which Thomas Jefferson defeated the incumbent president, John Adams, and his Democrat-Republican party also gained control of the Congress.

In those days, there was a long lame duck period between the November election and the inauguration of a new president. And the Congress that met in December 1800 was the old Congress. So the Federalists still controlled the government until March 4, 1801. Adams appointed John Marshall as Secretary of State, and then appointed him also as Chief Justice of the United States when that position became vacant. The Federalist-dominated Congress passed the Judiciary Act of 1801, which created circuit courts of appeal much like they are today, and relieved the justices of the Supreme Court of their obligation to "ride circuit." It also increased the jurisdiction of the federal courts. Adams immediately appointed 16 new judges to these courts—all Federalists—and all were confirmed by the Senate.

On February 27, 1801, just days before Jefferson was to take office, Congress passed another bill. The Justice of the Peace Act provided Adams with the opportunity to appoint 42 justices of the peace to five-year terms in Washington and Alexandria. Most of Adams's nominations went to deserving Federalists, and all were confirmed by the Senate. William Marbury was one of those appointed.

The judicial commissions were signed by Adams, and the seal of the United States affixed, on March 3rd. These were known as the "Midnight Judges." John Marshall, as Secretary of State, was responsible for delivering the commissions. Historians differ on whether none or some of the commissions were delivered. But of those not delivered, one belonged to Marbury. Jefferson ordered his Secretary of State, James Madison, not to deliver the commissions, although eventually some were (but not Marbury's).

Marbury, born in Maryland on a tobacco plantation, had achieved great success as a financier, with strong ties to the Federalists, and he had become quite prominent in Washington. Marbury and several others
brought a lawsuit to compel Madison to deliver their commissions. They asked the Supreme Court, in its original jurisdiction, to issue a writ of "mandamus" -- a court order directing Madison (but really Jefferson) to carry out his lawful and non-discretionary duty to deliver the commissions. Thus the name of the case, *William Marbury, et al. v. James Madison*.

**Marbury's Initial Quiescence**


The opinion did not even mention the *Marbury* case, which was not cited as an authority for judicial review until 1887. And not until 1895 was it employed in actually striking down an act of Congress. As of the end of 2002, the Supreme Court had struck down 158 provisions of federal statutes. (Eleven of those came in the years 2000-2002 alone! The Rehnquist Court, it turns out, is far more activist in this regard than the Warren Court ever was.)

**Marbury's Profound and Lasting - If Delayed - Impact**

Virtually all constitutional law courses in America's colleges and law schools begin with the *Marbury* case. And there are good reasons for this. With the possible exception of the Supreme Court's 1819 decision in *McCulloch v. Maryland* - which held that Congress had broad "implied" powers under Art. I, Sec. 8, Clause 18 (the "Necessary and Proper" clause), and is generally considered to be the foundation of the modern state - no other case from this period offers so much.

Despite its archaic language, *Marbury* comes alive for students. They respond to its intrigue and machinations, to Marshall's epic confrontation with Jefferson, to his disputed rationale for recognition of the power of judicial review, and his skillful manipulation of institutional strength and weakness. In all of these, they recognize the blueprint of a hybrid legal/political Supreme Court in the making. The full realization of *Marbury*, thus, is largely a product of the 20th century.

*Marbury*'s visibility and influence now extends far beyond America's borders. It has been an inspiration and a model for many of the world's constitutions - particularly those created or redrafted after World War II, and then after the demise of the Soviet bloc.

*Marbury* is cited worldwide as an authority on a host of fundamental questions relevant to any country with a constitution and courts: What should the role of constitutional courts be? What should the shape and extent of judicial review be? What are the limits of judicial activism? Why are checks and balances, and the idea of limited government, essential to constitutional government? How can, and why should, a country commit itself to constitutional rule and the rule of law?

Meanwhile, with respect to the U.S.'s own law and history, there are several "issues" relating to the *Marbury* case, and John Marshall's rationale for assumption of the power of judicial review, that deserve continued reflection and debate.

**Issue #1: The Origins of the Marbury Case and the Legitimacy of Judicial Review**

Although judicial review seems to have survived the test of history, its origins remain troublesome. To understand why, some explanation of the relevant facts of the case is in order.

In all other cases, Article III makes clear, the Supreme Court has only appellate jurisdiction. Article III also says that the Court's appellate jurisdiction is subject to "such Exceptions and . . . Regulations as the Congress shall make." No such provision is made with respect to the Court's original jurisdiction. The Constitution thus implicitly suggests that, in contrast, the Court's original jurisdiction is not subject to congressional regulation.

All of this legal detail is by way of introduction to the dilemma that John Marshall faced in *Marbury*. The fundamental question was, did the Supreme Court have the jurisdiction (for example, the constitutional authority) to issue the writ of "mandamus" that Marbury sought?
Marshall argued that in Section 13, Congress had improperly attempted to add to the Court's original jurisdiction, as Article III implied Congress could never do. Congress did so, according to Marshall, by conferring on the Supreme Court power to issue a writ of mandamus - that is, an order compelling an official to carry out a non-discretionary ("ministerial") act.

But there are numerous problems with this argument - as should be clear if one reflects that the Constitution and Section 13 shared the same drafters, and were not meant to conflict, but to be entirely consistent with each other.

First, Article III appears to prohibit Congress from making "exceptions" to (that is, subtractions from), or "regulations" of the Court's original jurisdiction. Yet it never says Congress cannot add to that jurisdiction.

Second, in what sense does the power to issue a writ of mandamus that Section 13 granted actually add to the Court's jurisdiction at all? A writ of mandamus is not a new type of case. And jurisdiction, according to Article III as well as the common understanding of the term, has to do with types of cases (or parties), not mechanisms of judicial power.

Marshall could easily have assumed that Section 13 merely gave the Supreme Court the power to issue a writ of mandamus in cases in which it already had jurisdiction. But Marshall understood that otherwise the Court had no authority to hear Marbury's case in its original jurisdiction (Marbury was obviously not an "ambassador, public minister or Consul). This would have removed the opportunity for him to proclaim the power of judicial review because Congress would not then have acted unconstitutionally.

Thus, Marshall was able to hold that Marbury was entitled to his commission, and that the Jeffersonians were wrongfully denying him his judgeship, while at the same time claiming he was unable to order Madison to deliver the commission (an order which Jefferson almost certainly would have directed Madison to disobey), and acquire the vastly more important power of judicial review. It was, for Marshall and the Supreme Court as an institution, a great bargain!

At the same time as he was interpreting the Constitution both narrowly (holding that Section 13 was unconstitutional) and broadly (that even though it was not mentioned specifically, judicial review was implied by Article III), Marshall was establishing an important duality: although the Constitution was "higher law," paramount to all other law, and not to be easily amended, it could nevertheless be interpreted and molded to achieve important societal and institutional goals.

**Issue #2: Why Did Marbury Choose to Invoke the Supreme Court's Original Jurisdiction--and Then Not Bring His Case to a Lower Court Where He Surely Would Have Won?**

Another mystery of Marbury is this one: the Supreme Court, as we have seen, denied Marbury and the other plaintiffs the remedy they sought, even though they were properly "entitled" to it. The Court refused to grant the writ of mandamus on the ground that Section 13, which had conferred that power on the Court, was unconstitutional. But the plaintiffs were not at a loss. They had another option. But didn't use it. Why?

After losing in the Supreme Court the plaintiffs could have applied to the Circuit Court of the District of Columbia for the writ of mandamus that would have gotten them their commissions. The D.C. Circuit clearly had the power to issue the writ. So why didn't the plaintiffs go there? (And for that matter, why didn't they go to the D.C. Circuit Court first, before going to the Supreme Court?).

Georgetown Law professor Susan Low Bloch has recently offered an explanation to solve this mystery. She suggests that perhaps the plaintiffs really weren't interested in the commissions. After all, they were to a low level court, and expired in only three years.

(Indeed, it is not even clear that Marshall was correct when he implied that Jefferson had deprived Marbury of his commission by not delivering it to him. Marshall himself said that when the commission was signed and sealed correctly; Marbury was entitled to it. Why was the delivery of the commission even necessary? Why then didn't Marbury just assume his new role as a justice of the peace?)

Why, therefore, did the plaintiffs seek the writ of mandamus in the Supreme Court? It appears that this may
have been part of a plan by radical Federalists to compel Chief Justice Marshall to escalate the political conflict with the Jeffersonians. The "High" Federalists apparently hoped that Marshall would issue the commissions, and thus further aggravate conflict between the parties when Jefferson prevented their delivery.

But Marshall, despite his critics, was more of a centrist than a radical Federalist. And so he sought to avoid, not precipitate, a confrontation with Jefferson.

Marshall knew full well that Jefferson would not permit delivery of the commissions. So he wrote an opinion for the Court that did not order Jefferson to do so. But at the same time, Marshall used the opportunity to claim the more important power of judicial review. Circumstantial evidence thus suggests that even if he played no role in devising Marbury's strategy, Marshall must have been aware of it.

**Issue #3: Should the Judiciary Have a Monopoly on Constitutional Interpretation?**

Certainly Marshall made a strong argument for judicial review as a power of the Supreme Court. But his argument for exclusive "monopoly" power is weak at best. He argued that "it is, emphatically, the province and duty of the judicial department, to say what the law is." But while he establishes fidelity to the Constitution as the judiciary's duty, he does not necessarily demonstrate that it is only the judiciary's province - as opposed to the province of all three branches of government. For example, Marshall notes that in a written constitution of enumerated powers, the constitution is superior to ordinary law. But his deductive argument that this implies exclusive judicial review is not compelling.

Marshall noted that the judges take an oath to honor the Constitution. But he neglected to say that so do members of the other branches of government, and therefore they are equally bound to act constitutionally. Why is the judgment of constitutionality the Court's job alone?

These are good questions, but Marshall's view, whatever its logical and historical shortcomings, has endured. That's because judicial review has worked reasonably well, and no one has come up with a better idea. Alternate theories, for example, that each branch may interpret the Constitution's meaning for itself, or that the first branch to interpret a provision of the Constitution prevails, have never commanded much support.

To say that the Supreme Court has designated itself as the final arbiter of the Constitution's meaning, is not to say that the Court is "all-powerful." It dodges some questions on the ground that they are too "political" and should be decided by the other branches. And as Louis Fisher and others have noted, the Court's judgments are not always final, or obeyed. Talk about "judicial supremacy" thus is usually more rhetorical than real.

There are other gaps in the Court's alleged control of constitutional meaning. For example, there are many issues about which the Constitution is "silent," or where the Court has simply not spoken. These include, for example, the grounds for impeaching a president (what are "high crimes and misdemeanors?") whether a president can pardon himself, and the extent of the president's "war powers." These constitutional issues, and others like them, are governed by what might be called "constitutional understandings"-- norms that prevail by agreement or circumstance unless and until the Court addresses them.

For all these reasons, while the Supreme Court is certainly no longer the "least dangerous branch" that Alexander Hamilton described in Federalist 78, it is also not all powerful, nor always "supreme in its exposition of the constitution.".

**Issue # 4: How much Judicial Review was Marshall Claiming? How Should the Constitution be Interpreted?**

How much judicial review was Marshall claiming? Not an easy question when the Constitution does not even mention such a power. Technically, one could describe the outcome in *Marbury* as a "defensive" maneuver--the Court claiming only enough power to protect itself from powers improperly conferred on it by Congress--and thus only a modest and limited charter of judicial review, under which each branch could protect itself from the unconstitutional actions of the other branches. And one can certainly see in Marshall's
opinion concerns about the consequences of judicial overreaching.

But most of the language of Marshall's opinion is couched in broader terms. There is here (as in some others of Marshall's opinions) a strategic ambiguity, designed to avoid controversial issues or future entanglements. Perhaps the opinion is better described as passive-aggressive rather than merely defensive.

It would be difficult to find a better primer of judicial activism than the Marbury opinion. Indeed, in his originalist treatise, The Tempting of America, Robert Bork conceded that Marbury was an activist opinion that epitomized a "loose construction" of the Constitution, but embraced the decision nonetheless because it had produced a good result. Even originalism can be flexible when necessary!

**Issue #5: Judicial Review and Democracy**

Finally, and perhaps most important, there is the issue of the compatibility of judicial review with principles of democracy. Robert McCloskey once observed, sagely, that there is an inescapable tension between the rule of law and popular sovereignty. Today the implications of that dilemma are debated in the framework of Alexander Bickel's contention that judicial review poses a "countermajoritarian difficulty."

Bickel argued that because of this tension, non-elected judges must show great restraint in overturning laws passed by the people's representatives. They have an obligation to make "principled" decisions, and to intervene in the political process only when absolutely necessary--when there has been a "clear mistake."

Bickel's critics note, however, that ours is not a pure majoritarian system. It is a constitutional democracy with a commitment to individual rights that presupposes limits on majority rule. No one can "solve" this debate, but no one can ignore it either!

**Why Marbury, For So Many Reasons, Still Matters**

The bottom line is that Marbury v. Madison, with all its imperfections and contradictions, continues to warrant our attention.

It created a model of judicial independence. It established the fundamental architecture of constitutional review. It planted the seed for the political questions doctrine, and enriched the separation of power principle through Marshall's emphasis on the distinction between ministerial acts--which judges could review--and discretionary political acts which it could or should not. And it perennially compels us to think about the evolving nature of democratic governance.

A final legacy of Marbury is particularly trenchant today. Marshall's efforts to protect the Court by avoiding a major brawl with Jefferson have been replayed time and again, as the Supreme Court has deferred to the President in reviewing his authority, particularly in times of war and emergency. Marshall let Jefferson off the hook; to hold him to strict accounts would have been too risky, both for Marshall himself (he regarded contemporary efforts to impeach him as serious), and for the Court itself. The Warren Court refused to confront Presidents Johnson and Nixon on the legality of the war in Vietnam. Will the Supreme Court, when asked to make a constitutional assessment of the "war on terrorism," do the same for George W. Bush and John Ashcroft?

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