Further Thoughts on *Marbury v. Madison*

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It is risky to undertake a new interpretation of an old event, especially when doing so casts a national icon in an unfavorable light. Such is the case here. I have re-read my original article (PS: Political Science and Politics, April 2003) and concluded that it can stand on its own feet. What I will do here is expand upon a few points.

First, let me say I am not arguing that judicial review is invalid because its foundation in *Marbury v. Madison* is invalid. I thought I made that clear when I said, “Judicial review is firmly established; it is not going to be undone, and rightfully so” (2003, 213). Judicial review is a concept whose ancestry can be traced back through Aquinas to Cicero, if not further, and I agree with the principle that a law which contradicts a higher law is void. Also, I am familiar with the 78th Federalist and its arguments and concede that Marshall’s theoretical justification of judicial review in *Marbury v. Madison* is persuasive, especially on first impression. My problem is with the foundation or beginning premise of that justification.

Second, we should recall that Marshall’s predecessor as Chief Justice, Oliver Ellsworth, had been a prominent member of the Constitutional Convention and was the principal author of the Judiciary Act of 1789 as a member of Congress (Brown 1905, 184–199). Albert J. Beveridge says Ellsworth was “one of the greatest lawyers of his time and an influential member of the Constitutional Convention” and goes so far as to call the Judiciary Act of 1789 the Ellsworth Judiciary Act. Beveridge continues that 12 other Framers, including James Madison, were members of the first Congress and voted for the act (1919, III, 128–129). Thus, if we may be so bold as to assume they knew the Convention’s intentions, it is not likely that the Judiciary Act of 1789 would have contained a provision that violated the Constitution. And, I find it strange that John Marshall, who had been neither a delegate to the Convention nor a member of the first Congress, should know more about the Constitution and the law in question than 13 men who had done both.

Speaking of the Judiciary Act of 1789, Beveridge continues:

Furthermore, from the organization of the Supreme Court to that moment, the bench and bar had accepted it, and the Justices of the Supreme Court, sitting with National district judges, had recognized its authority when called upon to take action in a particular controversy brought directly under it. The Supreme Court itself had held that it had jurisdiction, under Section 13, to issue a mandamus in a proper case, and had granted a writ of prohibition by authority of the same section. In two other cases this section had come before the Supreme Court, and no one had even intimated that it was unconstitutional (129–130).

Thus, precedent to the time of *Marbury v. Madison* had affirmed the validity of Section 13.

Third, if we grant, for the sake of argument, that Marshall was correct in ruling section 13 of the Judiciary Act of 1789 unconstitutional, the constitutional breach it committed was infinitesimal compared to that of the Judiciary Act of 1802. It will be recalled that the Judiciary Act of 1802 repealed the Judiciary Act of 1801 and thereby returned the Judiciary Act of 1789 to full force and effect. Though its timing was bad, the Judiciary Act of 1801 was actually a good piece of legislation in that it created 16 new circuit judgeships so that Supreme Court Justices no longer had to ride circuit. Out-going President John Adams nominated and the lame-duck Senate confirmed the new judges just days before Jefferson was inaugurated on March 4, 1801.

Recall that Article II, Section 4 of the Constitution reads as follows (and I am quoting it correctly): “The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” Recall also that Article III, Section 1, sentence 2 says, “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” If, then, we may assume that judges fall under the term “civil Officers,” they may be removed only by impeachment, an occurrence that has transpired a few times down through the years (Van Tassell and Finkelman 1999). Yet, the Judiciary Act of 1802 removed those 16 new circuit judges simply by abolishing their positions and, needless to say, the compensation that went with them. Let us suppose that, today, the Republican majority in Congress and the Republican president in the White House undertook to remove President Clinton’s two nominees to the Supreme Court by abolishing their positions, i.e., changing the size of the Court from nine justices to seven, effective immediately. That would be analogous to what President Jefferson and his Congressional colleagues did in 1802, and they succeeded whereas today such an effort is unthinkable.

This matter reached the Supreme Court in the case *Stuart v. Laird* (5 U.S. 299 [1803]), the opinion of which was announced six days after *Marbury*. Chief Justice Marshall ruled against it, as I believe he should have done in *Marbury,* “having tried the case in the Court below,” and Justice Paterson delivered the Court’s short and perfunctory opinion. No one, however, will ever convince me that Marshall did not orchestrate the outcome from behind the scenes because the political environment was much too dangerous for him to allow the Court to proceed without his guidance on such an important matter.

The removal of the 16 circuit judges was addressed in this manner:

> . . . Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper, and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power.

Paterson continued:

Another reason [assigned by counsel] for reversal is, that the judges of the
supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed (5 U.S. 299, 309).

From this we may reach two conclusions: (1) that Congress may "abolish from time to time such inferior tribunals as they may think proper" as well, thereby removing from their benches their duly-nominated and duly-confirmed judges in spite of Article II, Section 4 and Article III, Section 1, sentence 2 as quoted above; and (2) 12 to 13 years (1789-1802) of practice settled the question of the constitutionality of requiring Supreme Court Justices to ride circuit. That principle, however, certainly did not apply to Section 13 of the same Judiciary Act of 1789 in Marbury.

My critics dismiss Jefferson and the volatile political environment of the Marbury decision as discussed in my original article whereas I say the decision cannot be understood apart from that environment, and Stuart v. Laird provides further proof of the politics of the situation. If the Supreme Court had addressed the truly serious Constitutional breach of removing duly-appointed judges by abolishing their positions by declaring the Judiciary Act of 1802 unconstitutional, it is very probable that the Jeffersonians in Congress would have cleared the bench by impeachment. Beveridge makes it clear that this was a distinct possibility about which Marshall was greatly concerned (ch. IV). That being entirely too risky, Marshall turned his attention to a defenseless orphan, Section 13 of the Judiciary Act of 1789, which he could attack without fear of reprisal even though, according to Beveridge, he himself believed the Judiciary Act of 1802 to be unconstitutional (122).

About this Shane and Bruff say that there was substantial opinion that the repealer was unconstitutional, and would be invalidated by the courts. . . . The possible defects in the legislation were that it deprived the new circuit judges of their jobs, and that it made Justices part-time inferior court judges by restoring circuit-riding. . . . Marbury was small potatoes next to Stuart. The latter raised broad issues about the shape of the federal judiciary, and the challenged legislation was obviously a major part of the partisan war over the courts. . . . If the doctrine of judicial review had been announced—and enforced—in Stuart . . . the Court would have invited serious retaliation by outraged Republicans in Congress (1996, 82-83, references omitted).

Fourth, another topic not mentioned by my critics is the other scholars I consulted and cited. It was Edward S. Corwin who wrote, "In short there was no valid occasion in Marbury v. Madison for any inquiry by the court into its prerogative in relation to acts of Congress . . . . To speak quite frankly, this decision bears many of the earmarks of a deliberate partisan coup" (1914, 542-543). And, William W. Van Alstyne said that

The clause readily supports a meaningful interpretation that the Court's original jurisdiction may not be reduced by Congress, but that it may be supplemented by adding to it original jurisdiction over some cases which would otherwise fall only within its appellate jurisdiction. Such a reading makes sense and makes no part of the clause surplusage (1969, 31-32, emphasis added).

There is no need to repeat that entire section of my article here; suffice it to say that I quote three other scholars in addition to Corwin and Van Alstyne to the same effect. Thus, five of the best-known constitutional scholars of the 20th century have declared Marshall's reasoning in this particular section of his Marbury opinion to be questionable. Other scholars, to be discussed below, do likewise. What I attempted to do in my article, with some success, I believe, was to go beyond such expressions as "irreducible minimum" and "far from obvious" and add some meat to those bones, so to speak, by explaining how his reasoning was flawed, i.e., how he used his misquotation in crafting his opinion. Let me now continue that endeavor.

Let us return to the last sentence of the quote from David P. Currie in my original article: "Marshall himself was to reject the implications of the Marbury reasoning in Cohens v. Virginia [19 U.S. 392, (1821)], where he declared that Congress could grant appellate jurisdiction in cases where the Constitution provided for original" (1985, 69). Marshall and his supporters would, no doubt, disagree with this contention but it is undeniable that: (1) Article III, section 2, paragraph 2, sentence 1 says that "In all cases . . . in which a State shall be party, the supreme Court shall have original Jurisdiction." Please note the phrase "In all cases"; (2) the state of Virginia was a party to this case; and (3) pursuant to section 25 of the Judiciary Act of 1789, the Supreme Court heard the case under its appellate jurisdiction. Now, it seems to me that an exception has been made here somewhere. Moreover, if appellate can be an exception to original, as in Cohens, why can't original be an exception to appellate, as in Marbury, per Van Alstyne? The answer, of course, is that it can be because making an exception to appellate jurisdiction could mean changing it to original jurisdiction. 2

About Cohens, Currie later states that

It was further contended that, if the Supreme Court could exercise jurisdiction at all, that jurisdiction must be original rather than appellate . . . . Marshall had two answers for this argument . . . . The first required the embarrassment of retracting much of the reasoning he had used in Marbury v. Madison; . . . he demonstrated in Cohens that the Framers could hardly have meant to prohibit Congress from giving appellate jurisdiction where the Constitution provided for original, and he left the Marbury holding essentially benefic of support (100-101).

There is no compelling reason the Constitution would not have allowed Congress to grant the Supreme Court the mandamus power under its original jurisdiction, and there is a very compelling reason for it to do so: the Court might need it. The mandamus power is one of the most basic powers any court has to do its work and, apart from the volatile political ramifications of the case, as previously discussed at length, it was absurd of Marshall to strip that power from the Supreme Court. Furthermore, the Framers proved themselves capable of prohibiting that which they wished to prohibit. They, for example, prohibited tariffs on exports, bills of attainder, ex post facto laws, and religious tests for office, but it would have been silly for them to deny the mandamus power to the Supreme Court under its original jurisdiction and they did not do so. In addition, it seems to me that Section 13 could have been sustained by means of the "necessary and proper clause" had
that been congruent with Marshall’s purpose, but we know, of course, that it was not. As Currie put it, “In contrast to his predecessors, who had construed a statute narrowly to avoid holding it unconstitutional, Marshall went out of his way in Marbury to create a conflict by statutory interpretation” (196–197).

Andrew C. McLaughlin says that “There was . . . no real need” of declaring a certain portion of the Judiciary Act of 1789 unconstitutional. I do not believe any court would now take that position: The learned Justice really manufactured an opportunity to declare an act void” (1928, 157).

J. A. C. Grant puts it this way:

Even after deciding that Marbury was entitled to his commission and that mandamus was a proper writ, there was no necessity for holding that the statute involved was unconstitutional . . . the correctness of the Court’s conclusion that Congress cannot add to the original jurisdiction of the Supreme Court is anything but certain . . . There are two very different views as to the proper interpretation of this [the exceptions] clause. The first is that the grant was non-exclusive and could be added to by Congress. This was the view, according to the Court, taken by the first Congress in 1789, in giving it jurisdiction to issue writs of mandamus in cases not otherwise falling within its jurisdiction. The contrary view is that the grant was exclusive, and could not be altered by Congress. This was the view taken by Marshall and the Court [and by my critics]. However, this construction has not been consistently followed . . . the Court itself has rejected Marshall’s narrow construction of this provision of the Constitution. If the value of the two doctrines be considered, apart from any narrow legal question, the view of Congress is undoubtedly the better. . . . Thus we are led to conclude . . . that the statute, properly construed, . . . raised no issue of constitutionality (1929, 676–677).

An analysis by Mark A. Graber gives insight into how Marshall approached difficult cases. In “The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power,” Graber argues that Marshall, when faced with a situation where a politically powerful party to a case likely would not obey an unfavorable ruling, would talk big but act small by ruling in favor of the Supreme Court’s power to resolve the case but, at the same time, rule in favor of the defendant on the merits of the case. This, according to Graber, Marshall did in both the Marbury and Cohens cases. Graber says that

the Marshall Court frequently manipulated various federal statutes and jurisdictional grants in order to avoid handing down blunt judicial challenges to hostile political forces (1995, 68) . . .

Marshall’s manipulation of Virginia and federal law in Cohens supports claims that he and his brethren were willing to twist legal authorities to reach predetermined results . . . In Cohens and Marbury, the court strained legal texts and precedents to reach judicial rulings that by their very nature could not be disobeyed by hostile political forces. Just as scholars believe that Marshall manipulated the Judiciary Act of 1789 to avoid ordering Jefferson to hand over William Marbury’s judicial commission, so Marshall seems to have deliberately misread federal law in order to avoid overturning Virginia’s ban on the sale of out-of-state lottery tickets. . . . As used by the Marshall court in Cohens and Marbury, the passive-aggressive virtues were the means by which judicial power could be asserted without actually being exercised. Thus, when scholars look at what the Marshall Court did in Cohens and other cases instead of what the Justices said, the evidence indicates that judicial review was not well established by 1821. In what sense, after all, can a court be thought to possess the power to declare laws unconstitutional when the Justices consistently distort legal texts to get results that will not have to be enforced? (70–71, emphasis added)

Interesting words, indeed. And, agreeing with Currie’s point noted above, Graber later says that

The Marshall Court unanimously ruled that “a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union whoever may be parties to the case.” Contrary to a literal reading of Article III, Section 2 and explicit statements in Marbury, the Justices found that Congress could constitutionally vest the Supreme Court with the power to hear appeals from cases in which a state was a party (78–79, footnotes omitted).

He also says,

Marbury declares that the president is not above the law, but, on very dubious grounds, finds that the Court lacks the jurisdiction necessary to order the president to perform his legal duties (89, emphasis added) . . . Marshall Court opinions may have announced bold principles of constitutional law, but in cases where the Justices feared hostile political forces, they used the passive-aggressive virtues to avoid issuing rulings that might antagonize the judiciary’s more powerful opponents. John Marshall challenged the constitutional pretensions of Jefferson in Marbury and Virginia in Cohens. He did not, however, order his bitter rivals to perform actions that evidence suggests neither Jefferson nor Virginia were prepared to do. The Marshall Court tended to declare laws unconstitutional only when, as was the case in McCulloch and Gibbons v. Ogden, national and local forces could be trusted to support that tribunal’s decision (90, footnote omitted, emphasis added).

Thus, once again, if I understand the phrase “on very dubious grounds” correctly, we have yet another scholar who sees Marshall’s interpretation of Section 13 of the Judiciary Act of 1789 and of Article III, section 2 as something less than perfectly clear. And, while Graber does not identify the misquote (and neither do McLaughlin nor Grant), he does identify the aspect of Marshall’s genius which enabled him to negotiate the political raps of the early 19th century so successfully.

Finally, I will address the issue of the intentionality of the misquote. Obviously, Graber’s argument above supports my contention that Marshall’s misquote of Article III was intentional. This issue will always be a matter of opinion, but I believe the evidence is persuasive.

First is the matter of certain ethical ambiguities in Marshall’s early career on the bench. I am disturbed by the fact that he served as both secretary of state and chief justice at the same time, continuing in the former after he had been sworn in as the latter until the end of Adams’ term. The Marbury case would never have arisen had he, as secretary of state, not failed to deliver Marbury’s commission, and that tells me Marshall should have recused himself from the case. He had absolutely no business participating in a case that his own negligence had caused. Yet, he did so. Of this James Bradley Thayer says, “It may reasonably be wondered that the Chief Justice should have been willing to give the opinion in such a case, and especially that he should have handled the case as he did. But he was sometimes curiously regardless of conventions” (1907, 62, emphasis added).

There is also the issue of his biographies of Washington, which he undertook
as a money-making venture shortly after becoming chief justice. Speaking of the first volume, Beveridge says that, "The volume is poorly done; parts are inaccurate. . . . Marshall admits that every event of the Revolutionary War has been told by others . . . and that he had copied these authors, *sometimes using their very language*" (242-243, emphasis added). Beveridge also observes that "It would seem that for a long time Marshall tried to conceal the fact that he was to be the author; and, when the first volume was about to be issued, strenuously objected to the use of his name on the title-page" (228). Thus, parts of the book were inaccurate; in some instances he had copied the words of other authors *verbatim*, and wanted the money from the venture but not his name on the title page. That is understandable.

It goes without saying that the Aaron Burr treason trial in 1807 was another controversial episode. Of its many parts, the most relevant here is what is called the Wickham dinner party in Richmond, Virginia. Marshall was presiding over the case while riding circuit and had released Burr on bail. Wickham was an old friend and Burr's chief counsel; he had a dinner party at his home to which he invited both Burr and Marshall, and they both attended. There is disagreement about whether Marshall knew beforehand that Burr had been invited; Beveridge says that it was "most improbable that he knew that Burr was to be at the Wickham dinner" (396) but Thayer says that Marshall "accepted the invitation before he knew that Burr was to be of the company" but then learned that Burr was going to be there and attended anyway (1967, 64). Thayer continues that "He [Marshall] sat . . . at the opposite end of the table from Burr, had no communication with him, and went away early" (65). Regarding Burr, I cannot determine what Marshall knew and when he knew it but I can state that he knew, when he accepted his invitation, that Wickham was Burr's chief counsel. They may have been old friends who had known one another for years but it was highly improper for Marshall to attend such a function in Wickham's home at that time. And, if Marshall did know that Burr would be present, his breach of ethics was even more severe. Thayer ends his discussion of the subject with these words: "But we must still wonder at an act which he himself afterwards much regretted" (65).

Second are references such as that of Samuel Eliot Morison: "By a legal twist, which the Jeffersonians considered mere chicanery, the Chief Justice managed to deliver an opinion which has become classic" (1965, 363, emphasis added). Another is that of Henry J. Abraham: "John Adam's great achievement was his appointment of John Marshall. No one has had a more profound impact on Court and Constitution than the crafty, hedonistic, and brilliant Virginian" (1999, 61, emphasis added). And, another is from Beveridge: "It was not, then, Marshall's declaring an act of Congress to be unconstitutional that was innovating or revolutionary. The extraordinary thing was the *pretext* he devised for rendering that opinion—a *pretext* which, it cannot be too often recalled, had been unheard of and unsuspected hitherto" (133, emphasis added). Beveridge continues on the same page, "Nothing but the *emergency* compelling the insistence, at this particular time, that the Supreme Court has such a power, can fully and satisfactorily explain the action of Marshall in holding this section [13] void" (emphasis added).

Other references come from Max Lerner, who put it this way:

By a *maneuver* he managed to administer a public spanking to the administration, assert judicial supremacy, yet leave Jefferson helpless to strike back . . . It mattered little to Marshall that if his conclusion was valid and the Court had no jurisdiction, everything before it was superfluous—a vast *ostium dictum* that was sheer political *maneuver*. It mattered little to him that none of the opposing counsel had argued that the section of the Judiciary Act was unconstitutional, and that in order to declare it so he had to *wrench* it beyond all principles of statutory interpretation (1939, 407, emphasis added).

Since one of my critics likes to consult the dictionary, let us do so now. Merriam-Webster's *Collegiate Dictionary*, 10th edition (1993) defines "twist" as follows: "a distortion of meaning or sense" (1277); "crafty" as "marked by subtlety and guile" (270); "pretext" as "a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs" (924); "emergency" as "an urgent need for assistance or relief" (377); "maneuver" as "an adroit and clever management of affairs often using trickery and deception" (707); and "wrench" as "to pull or strain at something with violent twisting" (1367).

I do not believe the choice of these words is accidental. Neither do I believe that Marshall's *misquote of Article III, Section 2, paragraph 2 is accidental. It is not that the source was obscure. It is not that the relevant passage was long or convoluted. It is not that he had little time to prepare the opinion. To the contrary, the source was readily available, it is short in length, and he had plenty of time (a year or so, since Congress had given the Court a 14-month vacation) to prepare the opinion. Moreover, if he can quote the Constitution and Blackstone correctly in several other places, he could have quoted the Constitution correctly in this instance had he wanted to.

My critics cannot deny the misquote but they deny its relevance. They are mistaken when they do so. It is relevant because it changes the meaning of the sentence to the way Marshall needed it to read to accomplish his objective of finding an option in addition to the unacceptable options of denying Marbury's petition for want of jurisdiction or issuing the writ of mandamus to Madison. The most effective way, if not the only way, to find Section 13 unconstitutional was to remove the exceptions clause. If this is not true, why did Marshall *not* quote it correctly? How hard would it have been to get it right? Does it not matter? Was he simply careless and sloppy? I think not. Beveridge says that, "Marshall determined to annul Section 13 of the Ellsworth Judiciary Act of 1789" (132). To do so, he rewrote the relevant part of the Constitution to establish the *pretext* that Section 13 violated the Constitution, and history has not called his hand for 200 years. It is really quite simple, his defenders to the contrary notwithstanding.

Marshall revealed his intentions two paragraphs prior to the misquote:

The act to establish the judicial courts of the United States authorizes the supreme court, "to issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office, under the authority of the United States." [This is another correct quote.] The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of this description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional.

**Res ipsa loquitur:** the thing speaks for itself. Thus, in derivation but not influence one may conclude that *Marbury v. Madison* is a gigantic hoax. No, it
was not lofty jurisprudence; it was utterly saturated with politics. Max Lerner put it this way:

From a legalistic standpoint alone, *Marbury v. Madison* has a nightmarish fascination. If ever the history of the Court is written with the proper cosmic irony, here will be the cream of the jest. Upon this case, as legal precedent, rests the power of judicial review. Yet every part of its reasoning has been repudiated even by conservative commentators and by later Supreme Court decisions, which none the less continue to exercise the power it first claimed. "Nothing remains of Marbury v. Madison," writes Professor J. A. C. Grant, "except its influence." Everything else has been whirled away. But its influence continues to grin at us from the Cimmerian darkness like the disembodied smile of the Cheshire cat (408, footnote omitted).

Lerner was more correct than he realized. Grant continues, it [the Marbury opinion] has been born of all but its historical importance and stands as a warning to those [such as my critics] who would attempt to expound the rules of constitutional law simply through a process of analytical reasoning, ignoring the very important contributions of economics and politics (1929, 681).

### Notes

2. Exception defined as "a case to which a rule does not apply."
3. Both McLaughlin (1928, 157) and Grant (1929, 678) also call attention to this issue.
4. From the way Beveridge put it, his meaning was that Marshall used the words without permission or attribution.

### References


