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The True Story of Marbury v. Madison

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Of all the excuses for the abuse of judicial power offered by leftist judges and their defenders, none is more disingenuous than, "John Marshall made me do it."

Though normally not friends of original intent or legal tradition, today's judicial "activists" like to trace their lineage back to the (purported) original judicial activist, to the great Chief Justice who was the first to persuade the Supreme Court to strike down a law of Congress.

According to this conceit, which is now the standard interpretation enshrined in countless histories and hornbooks, *Marbury v. Madison* was the breakthrough that demonstrated how truly powerful the judiciary could be. In this famous case, decided 200 years ago, Marshall supposedly showed that the Constitution is an elastic document or at least could be turned into one. Therefore, the "living Constitution" is nothing new: John Marshall's own example and authority prove that judicial activisim is as American as apple pie.

Strangely, many conservatives accept this strained interpretation, though for different reasons. They agree that judicial activism is an exaggerated form of judicial review and that the problem is endemic to the Constitution. Reluctantly, they conclude that judicial review is an undemocratic flaw in the constitutional order that needs to be excised or constrained, perhaps by a constitutional amendment that would empower Congress to overrule the Court.

Yet both liberals and conservatives are mistaken, because the prevailing account of *Marbury* on which they rely is itself wrong.

This is what happened.

When Thomas Jefferson learned in December 1800 of his narrow electoral victory over John Adams, he fully intended to accomplish what he would later call "The Revolution of 1800." He wanted to purge Federalists from the bureaucracy and went so far as to claim that any appointments that John Adams made after December 1800 were "mere nullities." As the lame duck session of Congress developed, Jefferson made up his mind to have the Judiciary Act of 1801 repealed, to reverse support for constructing a national road, and to jettison the navy yards and ship construction John Adams had put in place.

But political reality set in. Though the electoral college had voted Adams out of office, it had not voted Jefferson in. He and Aaron Burr were tied in the electoral count, throwing the decision to the House of Representatives, which itself deadlocked. Jefferson sent letters (which he almost certainly knew would be leaked) darkly hinting at a civil war if the will of the people were frustrated. At the same time, Alexander Hamilton asked the

Federalists in the House to allow Jefferson, not Burr, to ascend to the presidency. But it was James Bayard, a leading Federalist Congressman from Delaware, who may have broken the deadlock. Bayard approached an aide of Jefferson and asked whether Jefferson would consider allowing current Federalist holders of office, particularly the lucrative posts of Collectors of the Ports, to remain in place until they resigned voluntarily. The aide reported that Jefferson was amenable to the idea. Shortly afterwards, Federalists in the House withheld their votes from Burr, allowing Jefferson to be elected.

Although Jefferson always denied making such a deal, he didn't, in fact, fire any of the Collectors of the Ports, and he kept most of Adams's other appointments. The only ones he did let go were the last-minute marshals and U.S. Attorneys, who serve at the president's pleasure. When he discovered serendipitously that commissions for justices of the peace had not been delivered, he thought he could withhold them as well—without seeming to engage in a wholesale firing.

The Federalists in Congress presumed that Jefferson had made such a deal. To them it was confirmed by his surprisingly conciliatory inauguration speech, and his hiring of a vehement Federalist, Jacob Wagner, as his temporary secretary until the arrival of Meriwether Lewis. The Federalists, therefore, were willing to let go the firings of marshals, U.S. attorneys, and even the justices of the peace. Only James Marshall, John Marshall's brother and a judge on the Circuit Court of the District of Columbia, thought the last action by Jefferson hypocritical, and contrary to the District of Columbia bill passed by Congress that had provided five-year terms for justices of the peace.

The honeymoon unraveled, however, in the spring of 1801. At that time, the Federalist governor of Connecticut began firing Republican state office-holders. In response to desperate pleas from Connecticut Republicans, Jefferson in retaliation fired the Federalist collector of the port of New Haven and replaced him with someone who was anathema to the New Haven merchants. The Federalists regarded Jefferson's action as a betrayal of the deal that had brought him to the presidency, and began a broad counterattack against Jefferson's patronage policy.

The Federalists turned to the Federalist judiciary to assist them in their battle. One possible vulnerability of Jefferson's was his failure to deliver the justice of the peace commissions. Unlike federal attorneys and marshals and collectors of the ports, all of whom clearly served at the president's discretion, the office of justice of the peace was a five-year appointment under federal law. If the Federalists could show that Jefferson was acting illegally here—especially if he were to refuse a Supreme Court order to deliver the commissions—it would politically undermine his patronage policy across the board.

Thus, William Marbury brought suit, with three other complainants, represented by John Adams's former Attorney General, Charles Lee. There is no evidence that Marbury had any burning interest in whether he got his commission back. He already held a presitigous position in Georgetown society and was financially well off. Rather, it is

evident that with some of his Federalist colleagues, he was out to discredit the President politically.

* * *

In December 1801, when John Marshall first issued the show cause order in the case of *Marbury v. Madison*, he found the Court at the center of an ideological battle between the two parties. The Federalists wished to enlist the Court in their plan to embarrass Jefferson, and the Jeffersonians wanted to reduce the power of the federal courts and eventually replace Federalist judges with Republican judges, even if it took an impeachment to do so.

Neither side any longer wanted a balanced constitution, the kind that John Adams had written about and which had influenced the framers in Philadelphia in 1787. By 1800, each of the two parties sought a kind of one party state with all branches allied in accomplishing the ideological program of the party.

In 1802, the partisan battle continued around two major issues. The Republicans succeeded in replacing the Judiciary Act of 1801 and sent packing the Federalist circuit judges appointed under it. But was the repeal constitutional? The question was debated in letters among members of the Supreme Court, as well as in the press. Congress had arranged the calendar of the Supreme Court so that it could not meet in 1802, thus preventing it from possibly declaring the repeal unconstitutional. Of course, everyone understood the mechanism of judicial review. It was not an invention of John Marshall to be revealed in *Marbury* a year later.

The second issue roiling the country was Louisiana. During 1802, it became clear that the Spanish were handing back Louisiana to the French. It was also clear that the new leader of France, Napoleon, had ambitions. Though the Federalists called for a military buildup and some even called for a preemptive military action, the Jefferson Administration held back and hoped that diplomacy would solve the problem.

Thus when *Marbury v. Madison* reached the Supreme Court in February 1803, the Federalists thought they were closing in on Jefferson. The decision on the constitutionality of the repeal of the Judiciary Act of 1801 was still pending. Meanwhile, the threat that a French army in Louisiana would pose was becoming palpable; and the Jefferson Administration had taken few military precautions to face it.

The Federalists had little to lose in being narrowly partisan on these issues. They had lost badly in the 1802 Congressional elections. The Senate was now 25-9 in favor of the Republicans, and the House was 102-39. There were serious murmurs of secession by Federalist New England. A decision by the Supreme Court ordering Jefferson to deliver commissions illegally withheld and a subsequent refusal to deliver them would fit very nicely into the Federalist strategy to rebuke and delegitimize Jefferson.

The Trial

The standard story of *Marbury v. Madison* is that John Marshall cleverly demonstrated how lawless and improper Jefferson's actions had been in ordering Marbury's commission withheld; yet avoided a confrontation by denying the Court's jurisdiction in the case; all the while adroitly grabbing for power by asserting the right of judicial review over acts of Congress. Neat trick, eh? But this account only makes sense if one assumes that Marshall was acting in the same partisan fashion as were Jefferson and the Federalists.

The big loser in the case was not Jefferson. The big loser was the Federalist Party's program of enlisting the judiciary in its partisan ideological cause. The Federalists hoped Marshall would be an ally.

In fact, Marshall's opportunity to embarrass Jefferson came during the trial when Marbury's attorney, Charles Lee, subpoenaed Levi Lincoln. Lincoln, then acting Secretary of State, had been present with Jefferson in the State Department when the two had come upon the pile of undelivered commissions.

In reading the sparse report of the dialogue at the trial, one senses an enormous respect between Lincoln and Marshall. Like Marshall, and unlike so many other Federalists and Republicans, Lincoln was wedded to the rule of law. On the other hand, Marshall had no respect for the Secretary of State's chief clerk, Jacob Wagner, who had testified earlier. It was Wagner whom Jefferson had asked to be his temporary secretary pending the arrival of Meriwether Lewis. It was Wagner who should have recorded the commissions in the department's record book. As Marshall made clear in his opinion, the commissions were only evidence of the underlying appointment. If they were missing, one would simply check the department's record book for the notation of the commission, and, if necessary, a new one could be issued. But Wagner had not recorded the commission, as he should have. It was Wagner who waited upon Jefferson at Jefferson's lodgings when the new president returned from taking the oath of office. And almost certainly, it was Wagner who informed Jefferson of the existence of the undelivered commissions. This caused Jefferson to relieve the then acting Secretary of State John Marshall and place Levi Lincoln in his stead. The day after the Inaugural, Jefferson paid a visit with Lincoln to the offices of the Secretary of State. Wagner, formerly one of the most vigorously partisan Federalists, would keep his job under Jefferson and Madison as chief clerk for seven years. At the trial, as he testified about his lack of knowledge of the commissions, Marshall knew he was lying, and he knew why he was lying; and Marshall was silent.

It was different with Jefferson's man. As Cranch reported,
Mr. Lincoln, attorney general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.

1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and

2d. He ought not to be compelled to answer any thing which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every secretary of state should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.

The court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.

Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.

The court granted it and postponed further consideration of the cause till the next day.

At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last which he did not think himself obliged to answer fully. The question was, what had been done with the commissions. He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison [Jefferson's Secretary of State], nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.

Everyone in the Court knew the answer to that question. It would be, "The president ordered me to destroy the commissions." It would have been the same as saying, "The president ordered me to commit an illegal act." It was just what the Federalists were waiting for.

The reporter does not give us a sense of the timing of Marshall's answer, but I suspect it came after a pause.

The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause, what had been done with them by others.

John Marshall not only saved Jefferson from embarrassment, but he did not flinch in pursuit of his legal duty as an officer of the law. Since this was a suit to recover a commission that supposedly had come into the hands of Madison, then all the Court needed was testimony respecting that fact, not how the documents had been deflected or disposed of.

The Opinion

Marshall's opinion in *Marbury v. Madison* is an essay on the balanced Constitution. It was modeled on the thought of John Adams and the example of George Washington. His opinion is an essay on the virtue of governing. He faced down the self-interested programs of both the Jeffersonians and the Federalists with a statement on the moral obligations of those in power.

Chief Justice Marshall was not making a grab for power. That is the greatest historical calumny to be placed upon the man, a libel that continues to this day. Rather, his point in *Marbury v. Madison* was to demonstrate the constitutional obligations of those in power to be restrained in the exercise of their office.

Look at the facts. Marshall didn't invent judicial review. The framers presumed it would exist, the Court practiced it in the 1790s (even though they hadn't yet struck down a law of Congress), and the Jeffersonians accepted it. That is why the Republicans delayed the Court's session throughout 1802 so that the justices would not have a chance to review the 1802 Judiciary Act before it had gone into effect.

What did the unanimous Court's act of judicial review accomplish? In substance, it said to Congress that you cannot add to our original jurisdiction (which is a miniscule part of its jurisdiction anyway), but you can remove appellate jurisdiction from us as you wish. In other words, it left all the power with Congress to determine what cases the Court could hear under the federal jurisdiction provisions of Article III of the Constitution. It was precisely the opposite of a grab for power.

Marbury declared that the Court had no business in interfering with the discretionary powers of the President, and established what we call the political question doctrine in a far greater sweep than the modern court has accepted.

Marshall left the court solely in the position of deciding the content of the positive law—that is, the common law, the law of the statute, and the law of the Constitution. He plied his craft with exactitude. Recall in the opinion his analysis of the Judiciary Act and its meaning, his discussion of the question of legal remedies, the analysis of the equitable writ of mandamus, and his textual analysis of Article III of the Constitution. He was practicing the rule of law.

When Marshall finally came to declare that the grant of original jurisdiction was improper in this case, he did not state that his view of the Constitution was superior to Congress's. Instead, he stated that as a moral matter, he could not enforce a law that was not a law. His guide was the Constitution and the oath he made to God to support it.
It is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

Whether they realize it or not, the Federalists, the Jeffersonians, and many modern politicians want the justices to be the knowing instruments for violating what they swear to support.

Marshall concludes:
Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

With these words, Marshall shows himself to be the worthy follower of his mentor, George Washington.

In this opinion we see the tremendous gulf between the historical John Marshall and the prevailing caricature of him. Today, many liberal lawyers, law professors, and judges seek to employ judicial review in order to effectuate a partisan ideological program in place of the rule of law. In *Marbury v. Madison*, Chief Justice John Marshall employed judicial review to remove the Court from ideological contest and to establish the rule of law.