1990

Book Review: Marbury V. Madison and Judicial Review. by Robert Lowry Clinton.

Kent Newmyer

raphy and, conversely, what would society lose if it banned "sheer pornography," which is, after all, most pornography? The standard answers are that all expressions do, or at least may, contain something of value, and that the loss sustained in any restriction of freedom of expression is always greater than the gain. But why should we believe that?

Of course, these questions do not answer themselves; they are proposed here only as worth discussing seriously. Indeed, they must be discussed if we are to make sense of our constitutional freedom of speech. Downs seems to be aware of them, even though in the end he retreats into a slightly modified orthodox liberalism. But his book will have served a purpose if it helps to crack the shell of liberal denial that pornography is in any sense a problem, and makes it possible once again to face the questions that it raises.

MARBURY v. MADISON AND JUDICIAL REVIEW. By Robert Lowry Clinton.[1] Lawrence, Kan.: University of Kansas Press. 1989. Pp. xii, 332. $35.00 cloth.

Kent Newmyer[2]

Marbury v. Madison has always been the centerpiece in the history of judicial review. Its precise significance has, of course, been controversial. Some scholars, downplaying the originality of Marshall's opinion, argue that the Court simply spelled out the logic of the Constitution itself. Others contend—some approvingly, others disapprovingly—that the Chief Justice went far beyond what the framers intended and essentially created judicial review. A few see the decision as almost entirely political—a shootout for power between Federalists and Jeffersonians as represented by those implacable enemies, Marshall and Jefferson. Even those scholars who leave some law in Marshall's opinion often emphasize the deft political maneuvering which got the Chief Justice to the legal position he wanted to reach. But whether the opinion is seen as declaratory of constitutional intent, or usurpatory, or somewhere in between, traditional scholarship recognizes *Marbury* as the special moment in the development of judicial power.

Professor Robert Clinton challenges this fundamental proposition head on. Reading Marshall's opinion in light of contemporary canons of interpretation, derived from English common law as well

1. Assistant Professor of Political Science, Southern Illinois University.
2. Professor of History, University of Connecticut.

as colonial and early state practice, he concludes that *Marbury* was not meant to, and did not, establish a broad doctrine of judicial review. The sweeping modern concept of judicial authority, argues Clinton, appeared only in the late nineteenth century as the justification for the activist role assumed by the Supreme Court under Fuller and Waite in protecting corporate property rights. As part of this same ideology, the broad interpretation of *Marbury* gained acceptance. This mistaken interpretation has been accepted uncritically by twentieth century scholars and given credence by the large role assumed by the modern Court—in both its conservative and its liberal moments.

If Professor Clinton is correct, much that has been written about *Marbury* and judicial review (and about John Marshall himself) needs revision. While it may be too soon to tear up your dog-eared lecture notes, Clinton's highly intelligent, sharply reasoned argument makes a strong case for some hard rethinking of traditional assumptions. The Court did for the first time void a congressional act, to be sure, and did declare in the case at hand that the executive branch was bound by the law of the land. But what Marshall did *not* say, we are reminded, is as important as what he did say. He did not put forth the Court as the sole interpreter of the Constitution or maintain that its word was definitive and binding on the coordinate branches. Instead, says Clinton, *Marbury* focused on the Court's own duties under the Constitution—which were important but far from the broad supervisory function generally attributed to the decision. Others have touched on this point, but Clinton goes beyond them to argue that this constricted version of judicial review was not judicial double-speak or part of some devious political strategy but rather followed the commonly accepted interpretive canon of the age, embodied in the English common law as transmitted to America by Blackstone's *Commentaries*. This interpretive principle, which did not distinguish statutory from constitutional construction, held that courts may void legislative acts *only* when to enforce them would introduce into the court's ruling "absurd consequences, manifestly contradictory to common reason."[3]

It is difficult, perhaps impossible, to prove beyond question that Blackstone's view of the matter was accepted universally in America, though his *Commentaries* were admittedly the main source of common law learning in the new republic. Clinton does show, however, that the state judicial review cases which predated the Constitution and influenced the framers' position on the judicial

3. W. BLACKSTONE *Tenth Rule of Construction* in COMMENTARIES.

branch were consistent with the Blackstonian position. Nothing in the debates at the convention nor in the Constitution itself nor in *The Federalist* is inconsistent with it. And the Court in *Marbury* did confront a contradiction which demanded resolution. By conflating jurisdiction with remedy, Marbury's standing was made to rest on an exceptionally expansive reading of section 13, whereas original jurisdiction in article III was limited, for good reason, to ambassadorial officials ("ambassadors, other public ministers, and consuls"). In choosing article III over section 13, the Court followed article VI, which made the Constitution the supreme law of the land. The Court did not presume to *repeal* section 13, which remained in effect except in cases like *Marbury*. Put simply, Clinton accepts Marshall's description of what the Court did and why. If, said the Chief Justice, "both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. *This is of the very essence of judicial duty.*"[4] This concept of the judicial role, maintains Clinton, was what contemporaries—following colonial practice, state precedent and Blackstone—agreed it should be.

By taking Marshall at his word, Clinton introduces the remarkable notion that the Court actually said what it meant and meant what it said. His reading of *Marbury* is as heretical as it is simple, and it is attractive because it explains aspects of the decision that traditional accounts gloss over. For example, Clinton's reading makes it unnecessary to attribute to Marshall ideas that he did not express in the opinion. It comports with the fact that there was very little contemporary criticism (or even notice) of the Court's ruling on section 13. Here Clinton confronts John Bannister Gibson's dissent in *Eakin v. Raub* (1825), which he argues convincingly is a much overrated critique of judicial review, one which in any case did not mention *Marbury* and may even in fact have been in general accordance with it. Clinton's argument also accounts for *Marbury* not being cited by the antebellum Court as authority for judicial review, and more importantly helps explain the Court's unusual deference to acts of Congress until *Dred Scott* (1857).

Without undertaking to describe all the nuances of Clinton's analysis, let me say simply that his argument that *Marbury* has been overrated and misunderstood has much to recommend it. But does it follow, as Clinton claims, that a broad tradition of judicial governance did not exist before the 1870s? A minimalist *Marbury*, I

4. 5 U.S. (1 Cranch) 137, 178 (1801).

submit, doesn't mean a minimalist Court. Without rehearsing the constitutional history of the antebellum period, let me suggest several reasons for concluding that even without an expansive *Marbury*, a remarkably broad role for the Supreme Court was established during this period. First, it should be noted that limiting the Court's ruling to the parties in the case (which Clinton claims Marshall did in *Marbury* and which Jefferson said he should do in all cases) is not such a great curtailment of judicial authority as Clinton supposes. Congress and the president may not be obliged to accept the constitutional interpretations of the Court, but as long as parties bring disputes to it, the Court will have the last word and that word is law in any meaningful sense of the word.

More importantly, consider the impact of judicial review of state law on general notions of judicial power. Clinton is well aware of the distinction between judicial review over the coordinate branches and judicial review of state law. But the difference may have been less important in the perception of contemporaries than it is in the refined analysis of modern legal scholars. Holmes among others was right when he noted many years ago that the federal review of state law was the great issue of antebellum constitutional history—the one on which the Court cut its institutional teeth. *Martin v. Hunter's Lessee* (1816) and *Cohen v. Virginia* (1821), for example, were probably as important as *Marbury* in shaping the Court's powers—not to mention the course of history. And those cases called forth bold statements of judicial authority. Consider especially Story's statement in *Martin* upholding the constitutionality of section 25 of the Judiciary Act of 1789. Not only did Congress have the power to pass the law, declared Story, it was *obliged* to do so. This aggressive, not to say arrogant, act of constitutional exegesis had Marshall's full approval, down to the last word.[5]

One is reminded by Story's ruling in *Martin* that the Court's claim to power was made during this period chiefly in cases *upholding* congressional acts. Which brings us to *McCulloch v. Maryland*, arguably the great case of judicial review that *Marbury* is not. Clinton mentions *McCulloch* only to note that the Court deferred to congressional authority, which of course it did by upholding the congressional act chartering the Bank. But it is hard to read the Chief Justice's olympian exposition of the framers' intent (especially in conjunction with his anonymous essays in defense of his opinion in the newspapers) without concluding that he believed the Court

5. For a discussion of Story's opinion in *Martin*, *see* R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY 106-14 (1985).

had a special pipeline to constitutional truth.[6] Indeed, he declared explicitly, as he had not in *Marbury*, that acts of Congress in violation of the Constitution would be struck down by the Court.[7] Whatever he may have intended in *Marbury*, in *McCulloch* Marshall did not limit this power to statutes dealing with the judiciary.

Southern reaction to *Martin*, *Cohens*, and especially *McCulloch* indicates clearly that the Court had laid claim to extraordinary powers of governance. Such was the view, for example, of Thomas Jefferson, Spencer Roane, John Taylor of Caroline County, John Randolph of Roanoke, Beverly and St. George Tucker, and ultimately John C. Calhoun. Even some of the Court's fiercest critics—for example, Spencer Roane after *McCulloch*—agreed with Marshall that the Court could invalidate unconstitutional acts of Congress, regardless of whether those acts pertained to the judicial function as in *Marbury*. Indeed, the massive anti-court movement of the 1820s is unmistakable evidence that the Supreme Court was well along in consolidating itself as a force in American government. Joseph Story put the case in the broadest possible terms when he answered Calhoun's attack on judicial review in his *Commentaries on the Constitution* (1833). His defense rested not just on *Marbury*, but on a composite of the major decisions of the Marshall Court and its predecessors.[8] Story was right: when it comes to defining the nature of judicial authority, the whole is greater than the sum of its parts and certainly greater than any one part, even *Marbury*. When, in 1857, the President and Congress looked to the Supreme Court, in the pending *Dred Scott* case, for a definitive statement on the constitutional meaning of slavery in the territories, and when the Taney Court pridefully acceded to their wishes, they took for granted a degree of judicial authority that had moved far beyond the arguably narrow Blackstonian notion of judicial review set forth in *Marbury*. American constitutional law had become, as Daniel Webster put it, an "American question."

This line of criticism, however, does not detract from the value of Clinton's reinterpretation of *Marbury*, and his fine description of how *Marbury* was misinterpreted in the late nineteenth century to justify judicial activism. Judicial review, as Carl Brent Swisher noted many years ago, did take on a new meaning in this period. Clinton clearly demonstrates that *Marbury* myth-makers played an important role in this transformation.

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6. Marshall's essays are reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (G. Gunther ed. 1969).

7. 17 U.S. (4 Wheat.) 316, 422 (1819).

8. R. NEWMYER, STORY 190-92.