7-1-2003

Marshall v Madison: The Supreme Court and Original Intent, 1803-1835

Gordon Lloyd
Pepperdine University, gordon.lloyd@pepperdine.edu

Marshall v Madison:
The Supreme Court and Original Intent, 1803-1835[1]

Gordon Lloyd **School of Public Policy**
July 2003 **Pepperdine University**

I: *Thoughts on Original Intent*

This work was inspired, in part, by the exchange in 1985 between then Attorney General Edwin Meese and Associate Justice William Brennan.[2] This exchange turned on the normative question: Should the justices of the Supreme Court rely on "original intent" as the foundation for constitutional interpretation? Or should they be free to interpret the Constitution in light of hermeneutical approaches created by current philosophies of law? The latter went by various appellations including non-originalism.[3] What I found missing from the normative commentaries in the subsequent law school and political science literature generated by this debate, however, was a serious concern with 1) conceptual clarity and 2) empirical evidence.

There are a number of ways to portray the hermeneutical debate. It seemed to me then, and it still seems to me now, however, that the status of the American founding is central to understanding the debate and to choosing which of the approaches to endorse. I suggest that originalism must appeal to original principles concerning constitutionalism, federalism, and republicanism as decisive and instructive, not just numerically weighty or rhetorically important. Originalists, furthermore, should make a common sense attempt to apply the spirit of the American founding to current constitutional issues. To that end, an appeal to the original records of debates and expositions is a critical component of originalism. On the other hand, non-orginalism must remove the American founding, especially the contemporaneous expositions, from a privileged interpretative position on both intellectual and political grounds. How is it possible, a non-orginalist must argue, to understand the intentions of diverse individuals who lived in the 18th century? How can we usefully perform mental autopsies on the dead minds of the founders? Besides which, the argument must conclude, we, today, have a more relevant and superior understanding

---

[1] This is a revised version of a paper, with the same title, prepared for delivery at The University of London, 30 May 2003 as part of the Bicentennial Reconsideration of Marbury v. Madison and Judicial Review. I want to thank Megan Craine for helping with the appendices and Suzie Tortell for technical advice.

[2] See Jack N. Rakove, ed., Interpreting the Constitution: The Debate Over Original Intent, North Eastern University Press, 1990, for a reproduction of the exchange.

[3] The materials dealing with the issue of originalism and non-originalism are extensive and surprisingly repetitive. See, for example, Rakove above and also Jefferson Powell, "The Original Understanding of Original Intent, Harvard Law Review, 1985, Thomas Grey, "Do we have an Unwritten Constitution?" Stanford Law Review, 1975, Earl Maltz, Boston University Law Review, 1983, Larry Simon, California Law Review, 1985. See also Harry V. Jaffa, Original Intent and the Framers of the Constitution: A Disputed Question, Regnery Gateway, 1994.

of constitutionalism, federalism, and republicanism. Anyway, the Constitution belongs to the living generation of constitutional scholars and federal justices.[4]

In pursuit of the factual record appropriate to the Meese-Brennan debate, I developed an empirical taxonomy of the Burger Court and, then, the Rehnquist Court.[5] This approach was non-scientific by the standards of contemporary social science. For example, I read every case by hand, rather than relying on a computer generated database that could be replicated by others. This initial inquiry produced a surprising result: the Framers were cited more frequently than the literature encouraged this reader to expect and they were cited in cases deemed to be landmark by constitutional scholars. As a consequence of this initial study, I decided to investigate "the whole story" of the Supreme Court and the Framers. Thus I decided to begin at the beginning with the Marshall Court.

There have been two published studies on the use of the Framers by the Marshall Court as part of larger studies of the Supreme Court in the nineteenth century. The first was by Charles W. Pierson in 1925. Without the assistance of a computer, he compiled a list of cases that cited The Federalist. While this was a monumental accomplishment, Pierson did not provide a normative commentary on the usage. Moreover, he limited the compilation to citations of The Federalist. Jacobus tenBroek addressed these two limitations in series of five articles published in 1938-1939. He included, in addition to The Federalist, the use to which the justices put other contemporaneous expositions and he also provided a commentary. His main conclusion was that the justices should not be citing the Framers and when they do it is simply for rhetorical purposes.[6].

Much has been written on the Marshall Court and it is beyond the scope of this essay to explore the merits and demerits of the numerous and various interpretations.[7] What I focus on is this: when I read the opinions of the Marshall Court, am I reading an exposition which takes its bearing from the American Founding or am I reading an interpretation which relies on a philosophy of jurisprudence that can be separated from the Founding? Much twentieth century mainstream constitutional scholarship has been

---

[4] This is a composite argument drawn from the following sources mentioned above and in the appendices.

[5] The initial research was conducted by Gordon Lloyd and Arthur Svenson in the early1990s with the assistance of two grants from The Haynes Foundation of Los Angeles, California.

[6] Charles Pierson, Yale Law Review, 1925, and Jacobus.tenBroek, California Law Review, 1938-1939. James G. Wilson, Brigham Young University Law Review, in 1985, brought Pierson's study into the twentieth century and confirmed, for the most part, tenBroek's conclusion. See also Christopher Jennings's recent article in the Boston Law Review, 2002 which focuses on the use of Federalist 10 by the Supreme Court.

[7] Among the many studies of Marshall that are frequently cited are: Leonard Baker, John Marshall: A Life in Law, Macmillan, 1974, John R. Cuneo, John Marshall, Judicial Statesman, McGraw, 1975, David Goldsmith Loth, Chief Justice: John Marshall and the Growth of the Republic, Greenwood Publishing Group, 1970, and Jean Edward Smith, John Marshall: Definer of a Nation, H. Holt & Co., 1996.

devoted to demonstrating that Marshall was a an astute politician who pulled one over on the Jeffersonian Republicans or that he "invented" judicial review and thus he established the judiciary as the sole interpreter of the meaning of the Constitution. A central feature of the scholarship on the Framers and the Supreme Court is that justices through the ages have paid only lip service to the American Founding. Accordingly, contemporary scholarship concludes that Marshall would invite justices to be non-originalists. There has been a very respectable minority of scholars, however, who portray this Marshallian contribution to jurisprudence as mythological nonsense: If we let Marshall speak for himself, this contrary argument goes, and understand him as he understood him self, then we will discover a Marshallian originalism grounded in the principles of the Constitution and the political teaching of Locke and especially the Madison of The Federalist. [8]

The purposes of this essay are fourfold: 1) to provide a comprehensive account of the use of the Framers by the Marshall Court, 2) address the normative question of the attachment of the Marshall Court to the concept of Madisonian Originalism, 3) return form the empirical and normative journey to take another look at the Marbury decision and 4) provide a tentative assessment of the challenge of the respectable minority of scholars concerning the Marshallian myth. An understanding of when and where the justices of any Supreme Court actually rely on the Framers is valuable in and of itself. But this is particularly important in the case of the Marshall Court because it was, in effect, the Framing Court, thus inviting subsequent generations to explore the linkage between the Framers of the Constitution and the Framers of the Supreme Court. When it comes to the normative commentary, however, I will emphasize the usage of The Federalist and especially Madisonian Originalism because it is to such sources that the respectable minority basically appeal in their attempt to portray Marshall as an originalist. What does rereading Marbury after the long journey reveal? Does this case set the tone for an identifiable Marshallian jurisprudence, which is recognizable throughout the term? Is it a "one-off" decision that is set to one side as the term unfolds?

I read all 1208 cases of the Marshall Court for which the justices delivered an opinion. The Court disposed of an average of 35 cases a year, a light load compared to the150 a year under the Burger Court and the 80 a year decided by the Rehnquist Court. I determined that109 of the Marshall Court cases, or roughly 10%, raised one or more constitutional issues. This number suggests that the Marshall Court, unlike the Burger and Rehnquist Courts, wasn't consumed with constitutional questions. Their ratio is in the 50% range. I concentrated my efforts on these 109 constitutional cases because references to the Framers only occur in constitutional cases. Of the 109 constitutional cases, 33 made one or more references to the Framers of the Constitution. That's about 30%. The ratio is also approximately 30% for the Burger and Rehnquist Courts.

---

[8] Among this respectable minority are Robert K. Faulkner, The Jurisprudence of John Marshall, Princeton, N.J., 1968, R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court, Louisiana State University Press, 2001, Christopher Wolfe, The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law, New York, 1986, and Robert Lowry Clinton, Marbury v. Madison and Judicial Review, University of Kansas Press, 1989.

To get a handle on the Marshall Court and original intent I suggest we create a Madisonian constitutional model with which to examine the decisions of the Marshall Court. In Federalist 39, Madison stated, "a tribunal is clearly essential …to prevent an appeal to the sword and a dissolution of the compact." Let us assume that the tribunal he had in mind was the Supreme Court. One task of a Madisonian Supreme Court, then, is to adjudicate boundary disputes between the federal government and the states in a system that is partly national and partly federal. Whether Madison initially wanted such a mixed system is not pertinent. Another task of a Court opining in harmony with Madisonian Originalism would be to act as an "auxiliary precaution," where appropriate, to help police boundary disputes between the Congress and the Executive without imposing its own will on the branches elected by the people and the states. An independent judiciary is central to Madisonian constitutionalism but that independence does not entail an independence from the majoritarian foundation of the regime. The key to Madisonian originalism, in short, is to prevent one level of government, or one branch of government, from claiming, "we live under a Constitution but the Constitution means what we say it means."

This claim, "that we live under a Constitution but the Constitution means what we say it means," is central to the jurisprudence of non-originalism and goes to the heart of the American Founding, namely the validity of the distinction between a fundamental law, as manifested in the Constitution, and a statutory law passed by national or state legislatures and faithfully executed by the President or Governor. The collapse of such a distinction would mean an end to the Framers' understanding of constitutionalism, federalism and republicanism. Central to Madisonian Originalism is that the meaning of the Framers's understanding is to be discovered in the decisions of the State Ratifying Conventions, the records of the Federal Convention and the First Congress, and such contemporaneous expositions as The Federalist. Moreover, the Constitution requires a "liquidation of meaning" over time; put differently Madisonian originalism requires both "initial consent" and "recurring consent."

As a second way of trying to get a handle on the status of the American Founding, I decided to find out how, and where, and when, the American Founding made an appearance in judicial decisions. I realize that we often process ideas and experiences from the past without making explicit references to when and how we were influenced by a former generation. Thus a justice may have so absorbed the thoughts and events of the American Founding generation that no citation is needed. One might make such a claim, for example, for Marshall. Nevertheless, I rejected this possibility and decided to identify the actual citation of the American Founding generation broadly understood as an important indicator of the presence of a decent respect for the opinions of the American Founders. The absence of such citation would suggest that the justices are operating outside, or at the margins, of an originalist framework.

I propose that we ask the following questions to the Marshall Court. Where do the justices turn for interpretive assistance when the language of the Constitution is unclear? And even when the language is clear, do they seek outside assistance? Does Marshall

stick to the language of the Constitution, or does seek outside assistance? Did the Marshall Court rely on a philosophy of jurisprudence in addition to, or as a substitute for, other modes of interpretation? What weight does Marshall place on contemporaneous expositions of the Constitution? Does he think that justices should defer to the meaning provided by the original State Ratifying Conventions? What is the status of The Federalist at the Marshall Court? Where do they stand on the doctrine of "recurring consent"? Are Marshall and Madison on the same side of the interpretive debate or is it Marshall v. Madison? All of these questions actually boil down to this: Is Marshallian Originalism and Madisonian Originalism in harmony or does the Marshallian variation lend aid and comfort to what has become known in the twentieth century as the jurisprudence of non-originalism?

II *The Framers and the Marshall Court: The Empirical Record*

Appendix I

Appendix I, column one shows the distribution of the 1208 cases by term. The fewest number of total cases, 24, were disposed of in the initial1803 term and the most, 58, were decided in the penultimate1834 term. Clearly, the Marshall Court wasn't dealing with a litigious society nor was the Court particularly aggressive in seeking to hear cases. Column two provides a numerical list of the 109 constitutional cases by term. At least one constitutional case was decided on in every term; the most active constitutional terms were in 1827 and 1834 when the court heard 8 constitutional cases in each term. The final column shows the number of constitutional cases, by term, that cites the Framers of the Constitution. I have called these Framer Cases. Note that 7 of the 33 Framer Cases, or over 20%, occur in 1819 and 1820, and that of the 10 constitutional cases heard in those two years, 7, or 70% cited the Framers. By contrast, in one third of the 32 years of the Marshall Court years, the Framers of the constitution made no appearance whatsoever.

The Marshall Court, or the Framing Court, thus had a relatively low caseload of roughly 35 opinions per year of which roughly 10% per year were constitutional cases and 30% of which cited the Framers. The strongest relationship between constitutional cases and Framer Cases occurred in 1819 and 1820 when 70% of the cases cited the Framers.

Appendix II

Appendix II is made up of four columns. The 109 constitutional cases are listed by term, name, and citation in the first column. The second column itemizes the specific constitutional issue(s) raised in the case. For example, 57 out of 109 raise Article III issues, but only 3 out of 109 raise Article II questions. Marbury raises both constitutional issues. 44 out of the109 deal with Article I matters, especially the powers of Congress (Section 8) and the limitations on the powers of the states (Section 10). Column three indicates whether or not the Framers were cited in the case and specifies the source of the Framer citation. Column four states which of the 109 cases are landmark cases.

Drawing on my previous work with the Burger Court, I divided Framer references in column three into seven categories. [9] "CC" stands for a citation that refers to the work of the Constitutional Convention of 1787. 12 out of the 33 Framer cases refer to the Constitutional Convention and these citations are used overwhelmingly in opinions for the Court. "RC" indicates references to the debates of the State Ratifying Conventions. There are only 5 citations to these ratifying conventions: Marshall cited "RC" in 3 cases, each landmark cases, in writing the opinion of the court. "IC" stands for citations from the First Congress. This Congress proposed that a Bill of Rights be added to the Constitution and the members of that body also passed of the Judiciary Act that provided for the organization and powers of the Judiciary. 8 of the 33 cases cite the First Congress; 6 of them by Marshall in writing the opinion of the Court. "OR" stands for references to such other figures of the founding generation as the Antifederalists, or for a citation of other founding documents, such as the Northwest Ordinance. Only 2 cases use this form of citation: Ogden v. Saunders and Wheaton v. Peters and neither citation is by Marshall. (The "OR" citation has become much more prevalent in the Burger and Rehnquist Courts.) "DR" captures the extent to which the justices cite a precedent—that is when they make a decisis reference—that makes a specific reference to the Framers. The Cherokee Nation v. The State of Georgia is the lone "DR" citation: (Twentieth century Supreme Courts, by contrast, rely heavily on the use of precedent to render decisions.) The sixth mode of citation, "FP," represents citations of The Federalist. 11 of the 33 Framer references include one or more citations of The Federalist. Finally, "GR" refers to generic references to the Framers as a coherent group whose views can be expressed without a citation of a specific source. This mode is used in 25 of the 33 cases.

Nine of the 109 are deemed to be landmark cases by 4 or more of selected textual sources. [10] Three receive that honor from all seven sources: Marbury v. Madison, McCulloch v. Maryland, and Gibbons v. Ogden. Accordingly, it seems sensible to pay closer attention to what these three cases have to teach us about the originalist non-originalist debate. However, Gibbons v. Ogden can be dispensed with rather easily.

---

[9] The Federalist category needs no explanation. Following tenBroek, I have added the Constitutional Convention and the State Ratifying Conventions as contemporaneous sources to which justices might turn. Anderson's contribution to the discussion in the 1950s was to point out the extent to which the justices were inclined to cite the Framers, or some similar nomenclature, as a group. Thus this category is included. My recent work on the Supreme Court has indicated that the justices some times cite Other References, for example Thomas Jefferson and James Madison on the separation of church and state, and they sometimes cite one or more sources from the American Founding if that specific citation occurs in a previous decision. I have added one more contemporaneous source, namely, the First Congress.

[10] To decide which cases should be included in the landmark case category, I compiled a list of landmark cases identified by 6 prominent constitutional law texts and 1 comprehensive documentary source. (These sources are listed in Appendix II and include the work of David Currie, Ralph Rossum, John Cotton, Gerald Gunther, Harold Chase, and William Cohen.) 1 or more of the sources list 43 of the 109 constitutional cases as landmark status.

There are no references to The Federalist in this 1824 decision, although both Marshall for the Court and Johnson concurring make a point of mentioning the work of the Constitutional Convention of 1787. Far more interesting to investigate than Gibbons are Fletcher v Peck, and Cohens v Virginia.

Appendix III

What sort of citation distribution exists among the justices? Do the citations occur more in Court opinions or in concurring or dissenting opinions? In what kind of cases and controversies do the citations take place? Are the citations usually, or rarely, found in landmark cases? Appendix III answers these questions. In column one, I list the 33 Framer Cases by term. In the remaining columns, I itemize the citation of the Framers by individual justices, indicate the type of Framer citation, and note whether or not the citation occurred as an opinion of the Court, a concurring opinion, or a dissenting opinion The Framers were cited in 32 of the 33 opinions of the Court, in 6 concurring opinions and in 9 dissenting opinions. The generic reference, "GR," dominated the Framer citation mode for those justices who wrote the opinions of the Court. Marshall wrote 24 of those opinions, and relied on "GR" on 19 occasions. He cited The Federalist only three times, although never specifically by number. Thompson wrote 5 of the dissenting opinions and cited The Federalist in four of his dissents. In fact, "FP," The Federalist, was the citation of choice—six out of the ten dissents cited The Federalist--by justices who wrote dissenting opinions!

III *An Originalists's Nightmare: Commentary on the Post Marbury Court*

The empirical evidence raises the possibility of An Originalists's Nightmare, namely, having to choose between the originalism of The Federalist and the originalism of Marshall and perhaps waking up realizing that Marshallian Originalism "opens up the Constitution" to the jurisprudence of non-originalism rather than reinforcing Madisonian Originalism. The central question in this section of the paper is what does the Marshall Court in general, and Marshall in particular, have to say, or not say, about the American Founding? In particular when, where, and how do The Federalist and other contemporaneous sources appear in the actual content of the constitutional opinions?

Robert Faulkner's 1968 publication has helped fix the relationship between Marshall and The Federalist. It is a complete commentary on, and the finest exposition of, their relationship. Faulkner's project is to locate Marshall as a constituent member of "the generation that framed the Constitution" and to portray a coherent and recoverable originalist jurisprudence that, in turn, is guided by the Lockean principles of the Madisonian commercial republic. To that end, he states, "it is not open to question that The Federalist helped to fix Marshall's Constitutional constructions." To seal the connection between The Federalist and Marshall, Faulkner correctly observes that Marshall "was later to describe the work from the bench as 'a complete commentary on our constitution,' always 'considered as of great authority,' whose 'intrinsic merit entitles it to this high rank.'" Marshall's endorsement of The Federalist as the authoritative text occurs in Cohens v. Virginia, 1821. Faulkner, in a footnote, informs us that Marshall also cited The Federalist in McCullough. He suggests, finally, that the compatibility between

Marshall and Madison of The Federalist reaches the level of fundamental principle; "In no way would Marshall have differed from Madison in Federalist X; the first object of government is the protection of the 'different and unequal faculties of acquiring property.'" [11]

The empirical evidence, however, raises some doubts about the smoothness of the relationship between The Federalist and Marshall. The relationship is made even more complicated by Marshall's defense of the interstate commerce clause and the obligation of contracts clause. These seem, on the surface, so central to fulfilling the teachings of Federalist 10. Yet not once does Marshall, in any of his decisions, cite an essay from Madison in The Federalist.

A: *Fletcher v. Peck*

Robert Fletcher, from New Hampshire, had purchased several thousand acres of land in Georgia from John Peck of Massachusetts. At issue was whether the 1796 Georgia Rescinding Act, declaring the prior sale of the public land of Georgia land under a 1795 Act, to be invalid. It was passed because of the Georgia legislature found the presence of considerable fraud, bribery, and corruption. But did this second act violate the Contract Clause of the Constitution which, under Article I, Section 10, prohibited the states from "impairing the obligation of contracts?" There is sufficient evidence to suggest that political and economic speculations were driving the case from start to finish.[12] Fletcher and Pack, for example, weren't really adversaries! But I don't want to go down that political path.[13] I'm not interested in whether Marshall played "free and easy with the Framers' intent in order to rationalize and privatize the land market, and was he moved to do so by his long-running war with Virginia over his investment in the Fairfax lands?"[14]

The important question for the orginalist debate is whether or not the Marshall Court's 1810 decision to overturn the Georgia statute that attempted to regulate the economy

---

[11] Robert K. Faulkner, The Jurisprudence of John Marshall, See especially pages 5,19, 117, and 150, Newmyer also places Marshall squarely within the tradition of the Framers, but by way of Hamilton. Newmyer comments that William W. Crosskey's claim in Politics and the Constitution the History of the United States, University of Chicago, 1953-1980, that "Marshall retreated from the unitary nationalism of the Framers is badly flawed…but his argument set me thinking. What Crosskey treats as Marshall's deviation from constitutional truth, I tend to see as the essence of his constitutional jurisprudence—and of his perceptive reading of the Framers' intent as well." P.493. There is a strong tendency among what I have called the respectable minority to see the intent of the Framers as equivalent to the exposition of "unitary nationalism."

[12] See the commentary by Newmyer, pp.222-235.

[13] Luther Martin represented Fletcher in the case and was so drunk, according to Newmyer, that Marshall "had to adjourn the Court until he sobered up." P.227. Martin's insobriety was well known at the Constitutional Convention of 1787. Martin was later to represent Maryland in the McCulloch case in 1819.

[14] Newmyer, p.223.

appealed to the principles of the American Founding concerning federalism and republicanism or whether his opinion played "free and easy with the Framers' intent," period.. Fletcher was a controversial and "far-reaching" opinion—it was the first decision of the Supreme Court declaring an act of a state legislature unconstitutional-- in favor of the sanctity of the private contract between Fletcher and Peck. It turned on Marshall's claim that Fletcher and Peck were innocent third parties. Thus the issue was did the Georgia legislature violate the rule of law? Marshall's opinion was "yes." And in support of this opinion he made a generic reference to the Framers: "Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the Framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are opposed."

Newmyer's ultimate assessment of whether Marshall played fast and loose with Framer Intent in this case is that he didn't. According to Newmyer, Marshall 's decision "comported closely to the general, if not the explicit, intent of the Framers. For him, as for them, private property and liberty were inseparable, and both were guaranteed by the common-law doctrine of contract, which now became a part of the Constitution. In a manner of speaking, public law had been privatized."[15]

It is undoubtedly true, that Madison and the other Framers of Federalist persuasion were concerned that the individual right to private property was in danger from the tyrannical actions of the state legislatures. Madison, in Federalist 10, for example, warned of the injustices created by the redistributive schemes of state legislators who passed legislation in favor of the many who were debtors over against the few who were creditors. After all, the most common and durable source of faction is the question of the distribution of property and unless this question is resolved, the future of republicanism is in danger. Thus Madison called for an enlargement of the orbit of republican government and the ability of the general government to restrain the tyrannical behavior of state majorities. But the intention, and effect, of the policy of the Georgia legislature in 1796 was not

[15] Newmyer, p. 235. Similarly in Ogden v. Saunders, Marshall stood ready to declare the act of New York under review to be "repugnant to the constitution of the United States." He did not turn to The Federalist for assistance. Instead he asserted, in terms reminiscent of Marbury, that "the mind of the Convention," bestows on the Court the task "of preserving the constitution from legislative infraction." To that end, it is the duty of the justices to exercise "their best judgment." His fellow justices disagreed with him and urged a version of Madisonian Originalism. Thompson, Johnson, Washington, and Trimble each wrote opinions for the Court. Thompson observed that the accurate mode of constitutional interpretation was stated in Fletcher v. Peck. There, Thompson notes, the Court stated "whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom or ever to be decided in a doubtful case." Marshall dissented from this moderate Madisonian constitutionalism in Ogden and, intentionally or not, leaves this reader with the impression that the Constitution means what the justices say it means.

tyrannical; rather the objective was to overcome the injustice that a previous state legislature had rendered to the moral presuppositions of a capitalist order.

On Madisonian Originalist grounds, there was no need for a correction by the central government in general, or the Supreme Court in particular. The case for Madisonian "market capitalism" is that exchanges be free of force and fraud and the case for private property is grounded in the idea that privatization is a reward for the exercise of the unequal faculties of acquiring property. Newmyer, discussing Marshall's only dissenting opinion of the Supreme Court, which occurred in Ogden v. Saunders, 1827, says that he did so because he thought his fellow justices had abandoned the relationship between capitalism and morality and he is certainly correct to suggest that Marshall "would have been mystified by the tendency of some recent scholars to separate liberal capitalism and republican morality."[16] But in Fletcher, Marshall certainly stretches the relationship between liberal capitalism and republican morality.

Fletcher is also important because it was the first time the Marshall Court cited The Federalist. But it was not Marshall doing the citing. As we have seen, Marshall cited a "GR," not The Federalist, to support his position that the obligation of contracts must be honored. Justice William Johnson concurred with decision, but had serious reservations about Marshall's opinion because it restrained the reach of state sovereignty in correcting previous legislative corruption. Johnson, in effect, questioned Marshall's claim that the Framers would agree completely with his opinion. He cites The Federalist: "There is reason to believe, from the letters of Publius, which are well-known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the state legislatures. Whether the words, 'acts impairing the obligation of contracts,' can be construed to have the same force as must have been given to the words 'obligation and effect of contracts,' is the difficulty in my mind."

For the first seven years of the Marshall Court, The Federalist was not cited and when it was first cited, it was cited, not by Marshall for the Court on behalf of "democratic capitalism," but by Johnson in "an opinion different from that which has been delivered by the court."

B: *McCulloch v. Maryland*

Marshall's first citation of The Federalist occurred in McCulloch v. Maryland, 1819, one of our three super landmark cases. The state legislature of Maryland had imposed a tax on the Second Bank of the United States, and McCulloch, a cashier at the Bank, refused to the pay the tax. Did Congress have the authority to incorporate a national bank, and could Maryland tax the bank? Marshall said, "yes" to the first question and "no" to the second question. He states that "the Framers of the American Constitution" outlined the important general objectives to be attained, rather than the "minor ingredients" to be followed. "The language" of the Constitution proves this, says Marshall. Accordingly, it

[16] Newmyer, p.253.

is not a specific statute but "a Constitution we are expounding." Marshall refers to no contemporaneous exposition to support his "expounding" of the interstate commerce clause and its relationship to the necessary and proper clause. To be sure, he summarizes Hamilton's remarks, without attribution, from Federalist 33 and 34, to show that the Attorney General of Maryland, Luther Martin, misinterprets the American Founding. But he uses Hamilton's doctrine of concurrent powers in a very Madisonian way. According to Marshall, "under such assurances from those who made, who recommended, and carried, the constitution, and who were supposed best to understand it, was it received and adopted by the people of these United States; and now, after a lapse of nearly thirty years, they are to be informed, [by Mr. Martin] that all this is a mistake." This is Madisonian Originalism at its clearest: Marshall's argument is a suggestive appeal to Madison's "recurring consent" concept of originalist jurisprudence.

Marshall had the opportunity to drive home the compatibility between the Framing Court and The Federalist with respect to the powers of Congress but he didn't:

> In the course of the argument The Federalist has been quoted; and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the constitution. No tribute can be paid to them that exceeds their merit; but in applying their opinions to the cases which may arise in the progress of our government, *a right to judge of their correctness must be retained*; and to understand the argument, we must examine the proposition it maintains, and the objections against which it is directed. (Emphasis added.)

Isn't Marshall saying that despite the respect owed to The Federalist, when it comes to "expounding the constitution," those authors may be incorrect? And is not Marshall also saying that it is "the right" of the Court to determine the meaning of the Constitution? Moreover, we are left wondering about the origin of his understanding of "the necessary and proper clause" If the following loose and bold construction has any roots in the American founding then it is Hamiltonian and not Madisonian: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional." Not surprisingly, Marshall does not cite the Framers in support of this interpretation.[17]

---

[17] The decision caused a considerable controversy in Virginia. R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court, Louisiana State University Press, 2001, summarizes the "vehement, comprehensive, and long-lasting" attack on the decision launched by Spencer Roane and others who accused Marshall of being a consolidationist or "unified nationalist." Newmyer also examines Marshall's nine essays written in response under the *nom de plume* "A Friend of the Constitution," and articulates the fascinating argument that Marshall was actually a prudent two levels of government man defending the Constitution against rabid states's righters. According to Newmyer, "what Marshall assumed he was doing was reaffirming the wisdom of the

While President from 1809-1817, Madison was concerned that the Constitution was becoming whatever the Congress said it was. In other words, the distinction between statutory law and fundamental law was being undermined. Thus he vetoed the Bonus Bill in 1817, which, ironically, would have provided the infrastructure for the commercial republic recommended in Federalist 10. Even though he signed the Second Bank Bill into law, and thus actually agreed with the core of Marshall's decision in McCulloch, Madison nevertheless considered Marshall's "latitudinary mode of expounding the Constitution," to be disturbing. This wasn't primarily an example of the judiciary endorsing a constitutional tradition based on a thirty-year "liquidation" process. Rather, Madison saw Marshall's argument as breaking new and dangerous ground. To invite Congress to completely own the meaning of the necessary and proper clause, said Madison in 1819, is to severe any direct connection between ends and means, and to eliminate any distinction between expediency and constitutionality.[18]

Put differently, Marshall, despite his protestations in his essays defending the decision, which included deferential remarks to the Framers, opened the door to the doctrine "unitary nationalism," and he did so without appeal to the actual intent of the Framers. Instead he seemed to appeal to the logical intent of the Framers. The high-ground position is, I think, that like Hamilton, Marshall is interested in the establishment of good government and not just free government. But the establishment of free government depends on limiting the means and not only the ends. It may seem to be absurd to do so, but that is why so many of the Framers themselves were concerned about the enumeration of powers as a sign of limitation of powers and not just a grant of powers.

C: *Cohens v. Virginia*

The fifth case[19] to cite The Federalist is Cohens v. Virginia, 1821, in which Virginia argued that a sovereign state could not be sued against its will. Marshall argued that

---

Framers," p. 345. To demonstrate that McCulloch defended "two governments,"—or the doctrine of divided sovereignty-- and not one consolidated government, Marshall "cited one of their own. Now it was not just Marshall against Roane, but James Madison, too, who said in Federalist 39 that the Constitution 'is neither a national, nor a federal constitution; but a composition of both,'" pp. 348-349. This is good stuff, even Madisonian stuff. The problem is that it does not leap out at you in the decision and it is the decision, rather than the exchange that is read by future generations. Gerald Gunther, ed., John Marshall's Defense of McCulloch v. Maryland, Stanford University Press, 1969, contains Marshall's essays in defense of McCulloch as well as those of Roane et al who criticized the decision.

[18] Marvin Myers, The Mind of the Founder, University Press of NewEngland, 1981, pp.458-469. See also Drew McCoy, The Last of the Founders, Cambridge University Press, 1989.

[19] The third case to cite The Federalist was Houston v. Moore, 1820. Justice Bushrod Washington wrote the opinion of the Court and provided the first reference to the Judiciary essays in The Federalist, namely, number 82 on concurrent judicial jurisdiction

Article three granted the federal courts jurisdiction where a state was a party to a case or controversy.

Marshall issues the praises cited above by Faulkner as substantiating the critical compatibility between The Federalist and Marshall in this decision. The long, unidentified—it actually comes from Hamilton's Federalist 82-- and favorable citation concerns an understanding of the extent of federal appellate jurisdiction. But even here, the reliance on The Federalist is made conditional. Just prior to the favorable citation, Marshall expresses his support for contemporaneous exposition: "Great weight has always been attached, and very rightly attached, to contemporaneous exposition." And this case, says Marshall, is one of those occasions in which great weight should be attached to The Federalist because "these essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, *are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it*." (Emphasis added.) So despite his endorsement of The Federalist as "a complete commentary on our constitution," the complete commentary may, or may not, be the correct commentary. In this case they "are entitled to the more consideration;" presumably there are other cases where they will be entitled to the less consideration.

Right after the long and favorable citation of The Federalist, Marshall cites another contemporaneous source: "A contemporaneous exposition of the constitution, *certainly*

---

with respect to federal and state courts. (David Currie notes that this is our first encounter with Washington even though he had been on the Court for over twenty years. p.108.) In the same decision, Joseph Story wrote a dissenting opinion in which he referred to Federalist 32, also written by Hamilton. This is the second time that The Federalist had been cited in dissent and the first of only two times that Story would cite The Federalist. The same year, Story cited Federalist 42 in his opinion for the Court in U.S. v. Smith. "It has been very justly observed," said Story, "in a celebrated commentary, that the definition of piracies might have been left without inconvenience to the law of nations, though a legislative definition of them is to be found in most municipal codes." Not exactly a celebration of first principles! This was the first of only five cases in which the Court cited an essay in The Federalist written by Madison. Both Thompson and Trimble cited Madison's Federalist essay number 44, in opinions for the Court in Ogden v. Saunders, 1827. In the other Framer Cases to cite The Federalist, Justice Thompson predominated. Thompson cited the essays in Brown v. Maryland, 1827, Weston v. Charleston, 1829, Cherokee Nation v. Georgia, 1831, joined by Baldwin. In Wheaton v. Peters, 1834, Thompson cited The Federalist 32, 42, and 43 in dissent. Along the way, in Weston, Marshall provided his third and final citation of The Federalist in his opinion of the Court where he reiterates the citation from McCulloch v. Maryland. Of all the constitutional cases considered by the Marshall Court, Ogden generated the largest number of separate opinions thus deviating from the Marshallian plan to have the Court speak with one voice.

of not less authority than that which has just been cited, is the judiciary act itself." (Emphasis added.) With respect to the power of the judiciary, then, Marshall places the First Congress on a position "of not less authority" than The Federalist. His reasoning deserves full citation: "We know than in the Congress which passed the act were many eminent members of the Convention which formed the constitution. Not a single individual so far as is known, supposed that part of the act which gives the Supreme Court appellate jurisdiction over the judgments of the State courts in the cases therein specified, to be unauthorized by the constitution." Matter settled.[20]

But as we shall see, the First Congress made up of the same eminent members didn't think that bestowing original jurisdiction on the Supreme Court to issue a mandamus was unauthorized by the constitution. Marshall, eighteen years earlier in Marbury, said that it was unconstitutional and in doing so, he neglected to even refer to the records of the First Congress. In Cohens, however, the actions of the First Congress are critical. Here he says that Virginia's claim that the Supreme Court could not hear Cohens because it was an appellate case and not a case of original jurisdiction is erroneous. The men of the First Congress knew what they were doing. Are we left with the notion that with respect to Section 25 of the Act, the Cohens section, the members of the First Congress knew what they were doing but concerning Section 13 of the Act, the Marbury section, they didn't know what they were doing?[21]

IV: *Back to the Beginning Again: Marbury v. Madison Revisited*

What exactly is going on in Marbury v Madison and how does that decision relate to the other landmark cases of the Marshall Court?

Was it about partisan politics? I think we are all better off putting to the margins the contentions of Edwin Corwin and Albert Beveridge that Marshall was a shrewd politician who engaged in "calculated audacity." [22] Of course politics was involved in the background although there some dispute about how to resolve the complexities. We do

---

[20] Newmyer states Marshall's argument thus: "the Supreme Court provided for in Article 3, it followed *inexorably*, was inseparable from the supreme law provided for in Article 6. The Founding Fathers, wise from the experience of the Articles of Confederation period, deliberately made it that way; 'contemporaneous expositions,' verified their intent. Chief among contemporaneous expositions of the intent of the Framers, standing right alongside The Federalist, was the Judiciary Act of 1789, most particularly Section 25." (Emphasis added.) P. 373.

[21] Although, Marshall is cautious, about citing The Federalist in support of the doctrine of national supremacy, he does go to considerable lengths to locate the decision within the contemporaneous context of the American Founding. But he does so by focusing on the *logic* of the constitutional text and noting without citation that this is what the Constitutional Convention intended and the people ratified.

[22] Albert J. Beveridge, The Life of John Marshall: The Building of the Nation, 1815-1835, 4 vols., Beard Group, 2002 and John Marshall, Chelsea House Publishing, 1984. See also Edward Corwin, John Marshall and the Constitution: A Chronicle of the Supreme Court, Indipublish.Com, 2002.

know that lame-duck President John Adams, with the advise and consent of the Senate, named 42 justices for five years and that then Secretary of State, John Marshall failed to deliver Marbury's Commission on time. And that the Jeffersonians had made several changes in the Judiciary Act. But more was at stake than short run partisan gain. These "expediency" and "coup d'etat" arguments suggest that Marshall did what he had to do in order to secure the Federalist Party cause. This interpretation, in effect, solves the complications of Marbury by denying that anything principled was taking place.[23] Again, the other landmark decisions were not completely free of a turbulent political context and these later decisions provoked much debate. But I do not think we learn very much about Marshallian jurisprudence and its connection to the American Founding my pursuing this line of argument.

Was Marbury about the establishment of judicial review? After all, the phrase judicial review does not appear in the Constitution. But the problem with this claim is this: the phrase judicial review does not appear in Marbury![24] So it is difficult, simply at the level of terminology, to claim that Marbury established judicial review. But on a substantive level, the right and duty of the Court to review acts of the legislature was agreed to on three separate occasions at the Constitutional Convention of 1787 and it was understood to extend to non-political, or strictly judicial, cases. The Antifederalist Brutus argued that the "equity" language of Article III of the Constitution was an invitation to the judiciary to establish judicial supremacy by means of judicial review. And Hamilton, in response in Federalist 78, explicitly denied that judicial review would lead to judicial supremacy. He defended judicial review on the ground that "a limited constitution" required the judiciary to declare unconstitutional an act of the legislature that violated "the manifest tenor" of the Constitution. Marshall himself, in the Virginia Ratifying Convention of 1788, stated that if the federal legislature passed a law "not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would consider such a law as coming under their jurisdiction. They would declare it void." Madisonian Originalism, even Hamiltonian Originalism, supports this position. Even Jefferson accepted the legitimacy of judicial review in 1788. In response to Jefferson's request that a Bill of Rights be included in the Constitution, Madison asked: How are these rights to be secured? Jefferson responded that the federal judiciary would secure these rights.

If partisan politics and judicial review are not the driving forces undergirding Marbury what then *is* going on here? Newmyer suggests that Marbury is about establishing the

---

[23] The arguments of Charles F. Hobson, editor of The Papers of John Marshall, Chapel Hill, 1974-present, against the expediency and coup arguments are compelling. He outlines the political context of the decision in a way that invites the reader to move beyond the political context. See his The Great Chief Justice: John Marshall and the Rule of Law, University of Kansas Press, 1996.

[24] Matthew Franck has pointed out that the term judicial review is essentially attributable to Corwin and is to be found in two articles by him published in the Michigan Law Review in 1909 and 1910. See also Hobson and Newmyer who argue convincingly that judicial review was not the issue in Marbury.

rule of law. Accordingly, the main issue in the case was not legislative misconduct, but denial by the executive of Marbury's right to his commission. There is much to be said about the executive focus of the decision, but if protecting the established rights of an individual is the essence of Marshallian jurisprudence and thus consistent with principle of the regime that we are a government of laws and not of men, then is the Marbury decision an aberration? Are the other landmark cases similarly situated?

If not partisan politics, judicial review, or the rule of law, what is going on in Marbury? My high-ground argument is that Marshall decided that it was critical in Marbury to establish the premise that the Constitution did not belong to the Congress and/or the President. Both in Marbury and in the other leading cases we have examined, Marshall determined that it was the role of the Judiciary to protect the Constitution from the partisan activities of the states as well as the Congress and the Executive, In doing so, however, he opened up the possibility that the meaning of the Constitution is what the Court says it is. That is the lesson of the thirty-year journey through the Marshall Court.

V: *The Three Parts of Marbury*

1) In Marbury v. Madison, Marshall relies exclusively, in the first part of his opinion, on the specific language of the Constitution. He agreed with counsel that under the administration of John Adams, Marbury had been properly nominated by the then President and properly confirmed by the then United States Senate in accordance with Article II, Section 2 of the Constitution for a federal judicial appointment. Thus, he was constitutionally "an officer of the United States." According to Article II, section 3, continues Marshall, the President "shall Commission all the officers of the United States." This means, in practice, that the Secretary of State, shall deliver the commission. Even though the commission was not delivered by the then Secretary of State during the tenure of the Adams administration, Marshall ruled that neither the newly elected President Jefferson, nor the newly appointed Secretary of State Madison, had "the executive discretion" to withhold the commission. In this matter, Madison had merely a "magisterial," and not a "political" status.

2) In the second part of his opinion, Marshall also appeals to the specific language of the Constitution. Although a mandamus indeed should be issued to order the delivery of Marbury's Commission, states Marshall, the Supreme Court is constitutionally unable to issue that order. According to Article III, Section 2 of the Constitution, "the Supreme Court shall have original jurisdiction in all cases affecting [1] ambassadors, [2] other public ministers and consuls, and [3] those in which a state shall be a party. *In all other cases, the Supreme Court shall have appellate jurisdiction.*" (Emphasis added.) To Marshall, the language of the Constitution imposes a *maximum* of three instances where the Supreme Court can exercise original jurisdiction. Since the authority to issue a mandamus is not specifically enumerated in the original jurisdiction clause, the Supreme Court does not have the constitutional ability to issue a mandamus. That part of the Judiciary Act of 1789, which authorizes the Supreme Court "to issue writs of mandamus in cases warranted by principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States," is, thus, unconstitutional.

Marshall's message is clear: We live under a "written constitution," and the very language of that document expressly places a written limitation not only on Congress, but also on the Executive and the Judiciary. Congress must conform to the language of the Constitution when passing laws, the Executive must conform to the language when executing the law, and so too must the Judiciary when it exercise its judicial function. "The fundamental and paramount law of the nation," limits the power of all 3 branches of the federal government to the language of the written constitution. Judicial review is not only compatible with a written constitution, but derives its very legitimacy from it. At this stage of the argument, Marshall invokes the work of the Framers: he states that his understanding of written constitutionalism conforms "to the solicitude of the convention," and "all those who have formed written constitutions."

This again is good Madisonian stuff. But having taken the long journey to the Marshall Court, I am no longer as innocent on my return to back where we started.

First, the language of Article III is not as clearly prohibitive as Marshall makes it out to be, and certainly doesn't unambiguously support Marshall's interpretation. Prior to discriminating between original and appellate jurisdiction, Article III bestows on Congress the authority to develop the structure of the courts and to install proper judicial procedures. The Framers did not think that it was appropriate for a Constitution to spell out all the operational details; thus it was left to Congress to fill in the details of Article III. Moreover, Congress was granted the power to make "exceptions" with respect to the bestowing of appellate jurisdiction.

Second, making the Court a functional part of constitutional politics was precisely what the First Congress did: they passed the Judiciary Act, one part of one section of which dealt with the power of the Court to issue a writ of mandamus in certain specific situations. As Marshall observed in Cohens v. Virginia, 1821, The First Congress contained many members who had served in the Constitutional Convention, including Madison, and the spectre of violating the principles of a written constitution never haunted the discussions of the Judiciary Act. What Marshall calls "the solicitude of the convention" was in fact identical to what we might call "the solicitude of the First Congress." Here Marshall did not seek any assistance from the records of the First Congress. He simply ignored them. If Representative Madison, who supported the mandamus provision in the 1789 Act, thought it violated the doctrine of limited government, he certainly kept it to himself. Madisonian Constitutionalism does indeed require that the Court declare unconstitutional those acts of Congress, and by implication Executive actions, that are palpable, dangerous, and obvious violations of the Constitution; there should be a respectable deference, but not an obsequious pandering, to the Congress and to the Presidency.[25]

---

[25] David P. Currie quoting Albert Beveridge observes "that all of Marshall's arguments had been rehearsed in the congressional debate over the repeal of the Judiciary Act in 1801, The Constitution in The Supreme Court, The First Hundred Years, 1798-1888, University of Chicago Press, p. 70.

Third, although Madison did not write any of the judicial essays in The Federalist, he would concur with Hamilton's "manifest tenor" argument for judicial review. In Federalist, 78, Hamilton argued that the role of the Court, under a "limited constitution," is to declare unconstitutional those acts of Congress that violate "the manifest tenor" of the Constitution. Hamilton gives two examples: Congress is constitutionally barred from passing bills of attainder and ex-post facto laws. If the Congress does engage in these constitutionally prohibitive activities, it is the duty of the Court to declare them unconstitutional. Clearly there is "an irreconconcilable variance" here between an act of the legislature and the Constitution. So the Madison-Hamilton tests in Marbury would be these: did either the Congress or the newly elected Executive violate the "manifest tenor" of the Constitution when the Congress bestowed original jurisdiction to issue a mandamus and when the Executive refused to issue a commission to Marbury? Do we have "an irreconcilable variance" taking place?

Fourth, I do not mean that Madisonianism would *require*, therefore, that Marshall issue a mandamus to Madison in 1803 because the Judiciary Act was, Marshall to the contrary notwithstanding, actually constitutional. To be sure, Madison was a person holding office under the authority of the United States, and thus covered by the "issuing clause" of the Judiciary Act. But the " operative clause" of the Act, states that a mandamus is authorized only "in cases warranted by principles and usages of law." Relying on language alone, one might ask whether Marbury's request met this test. On Madisonian grounds, Marshall could have ruled that the Judiciary Act was constitutional and still not have issued a mandamus requiring Madison to deliver the commission.

Fifth, there is nothing in the language of the Constitution *per se* that makes it crystal clear that Jefferson and Madison had been reduced from political actors to magisterial conduits in the case of Marbury's commission. Why is it unambiguously clear by the language of the Constitution, that a newly elected President, and a newly appointed Secretary of State, should be compelled to deliver a judicial commission signed by a previous President and undelivered by a former Secretary of State? In fact, Article III states unambiguously that judicial appointments are outside the control of the judiciary and is a matter to be dealt with by the Senate and the President.

Sixth, why is it the province of the judiciary to make the distinction between what is a judicial and what is a political question? Just because Marshall says that this is a judicial matter and that he is not meddling in Presidential affairs doesn't mean that this is a judicial matter and that he is not meddling in Presidential affairs. Again, I suggest that it was possible to uphold the constitutionality of the Judiciary Act, on Madisonian grounds, and at the same time not issue the mandamus: the mandamus wasn't warranted in this case and the issue was political rather than judicial.

3) But there is third and final feature of Marshall's argument that makes it at least possible for him to be claimed as the father of the central principle of non-originalism. Toward the end of Marbury v. Madison, Marshall announces, rather unexpectedly given his previous remarks linking judicial review with judicial restraint that "it is emphatically

the province and duty of the judicial department to say what the law is." This bold remark comes out of nowhere and is uttered after the mandamus matter has been decided and the case put to rest. What really makes me edgy is this: Earlier, Marshall called the constitution, the "paramount *law* of the nation," (emphasis added) which constrained every branch of government including the judiciary. Here, he says it is the duty of the judiciary "to say what the *law* is." Marshall can't possibly mean that since the paramount law is a law then the written constitution, the paramount law, is what the judiciary says it is. Or can he be saying this? Marshall continues: " if two *laws* conflict with each other, the courts must decide on the operation of each," because "this is of the very essence of judicial duty." Doesn't Marshall leave us with the impression that the Supreme Court is the ultimate arbiter of the Constitution?

VI: *Conclusion: Judging the Marshall Court and Original Intent*

Marbury, although 200 years old, is adequately propped up by two life support systems. Both originalists and non-originalists, want to have a living Marbury. The originalists see Marbury, and the decisions of the Marshall Court, as a reaffirmation of the principles of the American Founding and, also, presenting a sensible alternative to current non-originalist jurisprudence. On the other hand, the non-originalists see Marbury, and the decisions of the Marshall Court, as establishing the independence and supremacy of the Court. Moreover, independence is to be understood as independence from the American Founding and supremacy is portrayed as the owner of the Constitution.

My conclusion, based on my empirical and normative journey to the Marshall Court, is that those who wish to maintain a decent respect for the principles of the American founding need to face up to the fact that Marbury, and the decisions of the Marshall Court, sowed the seeds for the separation of the Framers of the Constitution from the Framers of the Court. If originalism means an attachment to a balance between the nation and the states, a balance between the branches of the general government, and an attachment to the teaching that the Constitution not only articulates the ends but also limits the means to those ends, then Marshallian jurisprudence raises serious challenges to these principles. In many ways, McCulloch, Fletcher, and Cohen, are living proof of An Originalists's Nightmare, a nightmare that has its origins in Marbury and its fulfillment in the later decisions.

Prior to the journey, I had been moved by Christopher Wolfe's critique that a non-orginalist interpretation of Marshall is simply "amazing."[26] Robert Lowry Clinton has recently built on this Wolfe's distinction between Marshallian jurisprudence and the twentieth century variety that suggests that the Constitution is what the Supreme Court says it is. At the heart of Clinton's case is that " no exclusive power to interpret the

[26] See Wolfe's The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law, New York, 1986. Like Faulkner, Wolfe locates Marshall within the context of the American Founding and distinguishes his jurisprudence from that of the twentieth century.

fundamental law is claimed for the Court…in Marbury." [27] Marshall's "silence" on exclusive judicial superiority is interpreted by Clinton to mean that "there is no denial [by Marshall] of the legislature's power to do likewise ['look into the Constitution']." Put differently, Clinton claims that Marshall is an originalist because he rejects the notion of judicial supremacy; instead Marshall supports the idea that each branch has the power to look into the Constitution. "That is made clear a few paragraphs later in the opinion: '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'" [28] Does this citation support Clinton's point? No. Marshall is saying that a written constitution not only limits the legislature, it also limits the courts. It is not an invitation to the legislature to open up the Constitution. It is actually a demand that neither the legislature nor the courts, under the Constitution, all branches are limited by the Constitution.

What is troublesome about Clinton's rescue of Marshall from the myth of current judicial scholarship is that Marbury rejects rather than confirms his contention. The Congress in which Madison was a member did interpret Section 13 of the Judiciary Act to be a constitutional exercise of power; Marshall said the power was not constitutional. And the Presidency, of which Madison was a member, did interpret its power to deliver the commission as constitutional; Marshall said the power was not constitutional. Put differently, Marbury, albeit in the name of the rule of law, *denies* the power of the legislature and the executive to do likewise.

Really disturbing is Marshall's swift move from judicial obligation to judicial sight seeing. It is "too extravagant to be maintained," he fumed, "that the intention of those who gave" the judicial power was that "the constitution should not be looked into." A citation from the Founding debates would help, but Marshall offers none. Logical intention strikes again. Marshall seems to be saying that the Framers would support the justices looking into the Constitution? But what does "look into" the Constitution mean?

In Gibbons v. Ogden, Marshall said that the Framers " must be understood …to have intended what they said." Accordingly, he concluded, we know what they intended "by the language" of the Constitution. Marshall shifts the interpretative focus from understanding the language of the Constitution in light of the intentions of the Framers to understanding the intentions of the Framers in light of the language of the Constitution. But how do we understand the language of the Constitution? In McCulloch, Marshall says that meaning turns on maxims: If the end is legitimate then the means are necessary and proper. And even if none of the Framers, except perhaps Hamilton, articulated this position, then the sheer logic of constitutionalism, federalism, and republicanism shows that they should have. To paraphrase Hamilton in Federalist 23: To concur that the end is good and then to be reluctant to grant the means is "absurd." It is absurd because it violates the very maxims of good government. We may live under the language of the Constitution but the Court interprets the language of the Constitution. To interpret the

---

[27] Robert Lowry Clinton, Marbury v. Madison and Judicial Review, University of Kansas Press, 1989, p.98.
[28] Ibid.,p. 99.

language of the Constitution, for Marshall, but not for Madison, is “ emphatically the province and duty of the judicial department.”

Appendix I

Term	Total Cases	Constitutional Cases	Framer Cases
February Term 1803	24	4	1
February Term 1804, 1805	24	2	0
February Term 1806	41	1	0
February Term 1807, 1808	51	2	1
February Term 1809	45	5	2
February Term 1810	38	3	2
February Term 1812, 1813	85	3	0
February Term 1814	47	1	0
February Term 1815	40	1	0
February Term 1816	44	3	1
February Term 1817	42	3	0
February Term 1818	37	4	1
February Term 1819	33	5	3
February Term 1820	26	5	4
February Term 1821	41	4	2
February Term 1822	31	2	0
February Term 1823	30	5	2
February Term 1824	40	4	2
February Term 1825	27	4	0
February Term 1826	33	1	0
February Term 1827	47	8	2
February Term 1828	55	3	0
February Term 1829	43	6	2
February Term 1830	32	2	1
February Term 1830	26	2	1
February Term 1831	40	4	2
February Term 1832	50	3	2
February Term 1833	38	6	1
February Term 1834	58	8	1
February Term 1835, 1836	40	5	0
TOTAL CASES	**1208**	**109**	**33**

Appendix II

February Term 1803	Constitutional Issue	Framer Reference	Landmark Case
Wilson v. Mason 5 U.S. 45	Art. III		
Marbury v. Madison 5 U.S. 137	Arts. II & III - Judicial Review	CC & GR	XXXXXXX
Clarke v. Bazadone 5 U.S. 212	Art. III		
Stuart v. Laird 5 U.S. 299	Art. III - Original & Appellate Jurisdiction		X
Februarv Term 1804, 1805	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
U.S. v. Fisher et al 6 U.S. 358	Arts. I (S8), VI		X
Hepburn & Dundas v. Ellzey 6 U.S. 445	Arts. IV (S2), III - Diversity Jurisdiction		XX
February Term 1806	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
U.S. v. More 7 U.S. 159	Art. III		X
February Term 1807, 1808	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Ex Parte Bollman & Ex Parte Swartwout 8 U.S. 75	Art. III, 4 & 6 Amndmts - Original & Appellate Jurisdiction	1C & GR	XX
Matthews v. Zane 8 U.S. 382	Art. III		
Februarv Term 1809	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
The Hope Insurance Co. of Providence v. Boardman 9 U.S. [illegible]	Art. III		
The Bank of U.S. v. Deveaux et al 9 U.S. 61	Art. III - Diversity Jurisdiction	GR	XX
U.S. v. Peters 9 U.S. 115	Art. VI, 2nd Amndt.		XX
Hodson & Thompson v. Bowerbank & Others 9 U.S. 303	Art. III		X
Owings v. Norwood's Lessee 9 U.S. 344	Art. VI	1C, CC	
February Term 1810	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Fletcher v. Peck 10 U.S. 87	Arts. I (S10), VI - Economic Liberties	GR, CC, FP	XXXX
Durousseau et al v. U.S. 10 U.S. 307	Art. III	1C	
Sere & Laralde v. Pitot et al 10 U.S. 332	Art. IV (S2)		
February Term 1812, 1813	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
U.S. v. Hudson & Goodwin 11 U.S. 32	Art. III		X
The State of New Jersey v. Wilson 11 U.S. 164	Art. I (S10) - Contract Clause / Public Contracts		XX
McIntire v. Wood 11 U.S. 504	Art. III		
February Term 1814	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Armity Brown v. U.S. 12 U.S. 110	Arts. I (S8), II		
February Term 1815	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
The Town of Pawlett v. Daniel Clark et al 13 U.S. 292	Art. III		
Februarv Term 1816	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
The Corporation of New Orleans v. Winter et al 14 U.S. 91	Art. III		
Martin v. Hunter's Lessee 14 U.S. 304	Arts. I (S4&10), II, III, IV, VI, Amndt. X - State Court Review	GR, 1C, RC	XXXX
U.S. v. Coolidge 14 U.S. 415	Art. III (S2)		
Februarv Term 1817	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Slocum v. Mayberry et al 15 U.S. 1	Art. III		X
McCluny v. Silliman 15 U.S. 369	Art. III		
Colson et al v. Lewis 15 U.S. 377	Art. III		
February Term 1818	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Hampton v. McConnel 16 U.S. 234	Art. IV		
Gelston et al v. Hoyt 16 U.S. 246	Art. III		
U.S. v. Bevans 16 U.S. 336	Arts. I (S8), III	GR	X
U.S. v. Palmer et al 16 U.S. 610	Art. I (S8)		
February Term 1819	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Sturges v. Crowninshield 17 U.S. 122	Art. I (S8 & 10) - Contract Clause / Bankruptcy	CC, GR	XX
M'Millan v. M'Neil 17 U.S. 209	Art. I (S10)		X
Bank of Columbia v. Okley 17 U.S. 235	7th Amndt.		
McCulloch v. State of Maryland et al 17 U.S. 316	Arts. 1 (S8), VI, 10th Amndt. - National Powers	RC, CC, GR, FP	XXXXXXX
Trustees of Dartmouth College v. Woodward 17 U.S. 518	Arts. I (S10), III - Property Rights / Economic Liberties	GR, CC	XXXXX
Februarv Term 1820	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Houston v. Moore 18 U.S. 1	Arts. I (S8), II, 2nd & 10th Amndts.	FP (32, 82), GR,IC	X
U.S. v. Wiltberger 18 U.S. 76	Art. III		
U.S. v. Smith 18 U.S. 153	Art. 1	FP(42), GR, CC	
Loughborough v. Blake 18 U.S. 317	Art. 1 (S2,8,9)	CC	X
Owings v. Speed 18 U.S. 420	Art. I (S10)	CC	X
Februarv Term 1821	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Farmer's Mechanics Bank of Pennsylvania v. Smith 19 U.S. [illegible]	Art. 1 (S10)		X
Anderson v. Dunn 19 U.S. 204	Art. I (S5&8)	GR	X
Cohens v. Virginia 19 U.S. 264	Arts. I (S7&8), III, VI, 2nd Amndt. - Constitutional Adjudication	GR, RC, CC, FP, 1C	XXXXX
McClung v. Silliman 19 U.S. 598	Art. III		
February Term 1822	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Ex Parte Kearney 20 U.S. 38	Art. III		
Matthews v. Zane et al 20 U.S. 164	Art. III		
Februarv Term 1823	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Green et al v. Biddle 21 U.S. 1	Arts. I (S10), III	GR	
Buel v. Van Ness 21 U.S. 312	Art. III	GR	
The Society, etc. v. The Town of New Haven et al 21 U.S 464	Art. VI		
Johnson & Graham's Lessee v. M'Intosh 21 U.S. 543	Art. III		X
Childers v. Emory & M'Cleur 21 U.S. 642	7th Amndt.		
February Term 1824	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Gibbons v. Ogden 22 U.S. 1	Arts. I (S8 & 9), VI, 10th Amndt. - Commerce Power / Interstate [illegible]	GR, CC	XXXXXXX
Ex Parte Wood & Brundage 22 U.S. 603	Arts. I (S8), III		
Osborn et al v. Bank of U.S. 22 U.S. 738	Arts. I (S8), III, 2nd Amndt.	GR	XXXX
Bank of U.S. v. Planter's Bank of Georgia 22 U.S. 904	Art. III, 2nd Amndt.		X
February Term 1825	**Constitutional Issue**	**Framer Reference**	**Landmark Case**

Wayman v. Southand 23 U.S. 1	Art. I (S18) - Judicial Provision / Bill of the Rts		X
Steamboat Thomas Jefferson, Johnson et al, Claimants 23 U.S. 428	Art. I (S8) - Judicial Provision / Bill of Rts		X
Darby's Lessee v. Mayer 23 U.S. 465	Art. IV (S1)		
Manro et al v. Joseph Almeida 23 U.S. 473	Art. III		
February Term 1826	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
U.S. v. Ortega 24 U.S. 467	Art. III		
February Term 1827	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Martin v. Mott 25 U.S. 19	Arts. I (S8), II		
Williams v. Norris 25 U.S. 117	Art. III		
Montgomery v. Hernandez 25 U.S. 129	Art. III		
The Post Master General of the U.S. v. Early et al 25 U.S. 136	Art. III		
Ogden v. Saunders 25 U.S. 213	Arts. I (S8&10), III	GR, CC, RC, FP (44), CR	XX
Mason v. Haile 25 U.S. 370	Art. I (S10)		
Brown et al v. The State of Maryland 25 U.S. 419	Art. I (S8&10) - Commerce Clause / Congressional Authority	GR, FP (32)	XX
Ramsay v. Allegre 25 U.S. 611	Art. III		
February Term 1828	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Government of Georgia v. Sundry African Slaves etc. 26 U.S. 513	Art. III, 2nd Amndt.		
American & Ocean Ins. Co's v. 356 Bales of Cotton 26 U.S. 511	Arts. II, III, IV		
Ross v. Doe 26 U.S. 655	Art. III		
February Term 1829	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Jackson v. Twenty Men 27 U.S. 136	Art. III		
Willson et al v. The Black Bird Creek Marsh Co. 27 U.S. 245	Art. 1 (S8) - State Regulation / National Economy		XXX
Foster & Elam v. Neilson 27 U.S. 253	Art. III		XX
Satterlee v. Matthewson 27 U.S. 380	Art. I (S10)	FP (44), GR	
Weston et al v. City Council of Charleston 27 U.S. 449	Arts. 1 (S8), VI	FP (32), GR	X
The Bank of Hamilton v. Lessee of Dudley 27 U.S. 492	7th Amndt.		
February Term 1830	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Jackson v. Lamphire 28 U.S. 280	Art. 1 (S10)		
Parsons v. Bedford 28 U.S. 433	Art. III, 7th Amndt.	GR	
February Term 1830	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Craig et al v. The State of Missouri 29 U.S. 410	Art. I (S10) - Bills of Credit / Bill of Rts.	GR	XX
The Providence Bank v. Billings & Pittman 29 U.S. 514	Art. 1 (S10)		X
February Term 1831	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
The Cherokee Nation v. State of Georgia 30 U.S. 1	Arts. I (S2,3,8,9), III, IV (S2,3), 2nd Amndt. - Judicial Provisions / Bill of	FP, FP (42), CC, CR, GR	XXX
Ex Parte Crane et al v. Samuel Kelly 30 U.S. 190	Art. III	GR	
Lessor of Fisher v. Cockerell 30 U.S. 248	Art. III		X
State of New Jersey v. State of New York 30 U.S. 284	Art. III		
February Term 1832	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Grant et al v. Raymond 31 U.S. 218	Art. I (S8)	GR, 1C	
Green v. Lessee of Neal 31 U.S. 291	Arts. III, VI		
Worcester v. State of Georgia 31 U.S. 515	Arts. I (S3,8), II, VI - Commerce Clause / Congressional Authority	GR	XXX
February Term 1833	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
U.S. v. Wilson 32 U.S. 150	Art. II		
Barron v. The Mayor & City Council of Baltimore 32 U.S. 243	Art. I (S9,10), 5th Amndt. - Bill of Rts. / Due Process	GR, 1C, RC	XXXXXX
Davis, Consul-General of Saxoney v. Packard et al 32 U.S. 276	Art. III		
Lessee of Livingston et al v. Moore et al 32 U.S. 469	Art. I (S10), 7th & 9th Amndts.		
Ex Parte Watkins 32 U.S. 568	8th Amndt.		
Ex Parte Madrazzo 32 U.S. 627	2nd Amndt.		
February Term 1834	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
Byrne v. State of Missouri 33 U.S. 40	Art. I (S10)		
Watson v. Mercer 33 U.S. 88	Art. I (S10)		
Brown v. Keene 33 U.S. 112	Art. III		
Briscoe et al v. Commonwealth Bank of State of Kentucky 33 U.S. 118	Art. I (S10)		
Mayor…NY v. Miln 33 U.S. 121	Art. I (S8) - State Police Power		X
Mumma v. The Potomac Co 33 U.S. 281	Art. I (S10)		
Davis, Consul for King of Saxony v. Packard et al 33 U.S. 312	Art. III		
Wheaton & Donaldson v. Peters & Greigg 33 U.S. 591	Art. I (S8)	FP (43), CR, FP	
February Term 1835, 1836	**Constitutional Issue**	**Framer Reference**	**Landmark Case**
The Mayor etc, of New Orleans v. DeArmes and Cucullo 34 U.S. 224	Art. III		
Beers v. Haughton 34 U.S. 329	Art. III		
Harrison v. Nixon 34 U.S. 483	Art. III		
Owings v. Hull 34 U.S. 607	Art. III		
Livingston v. Story 34 U.S. 632	Art. III		

All landmark cases were cited from one or more of the following:

The Constitution in the Supreme Court, The First Hundred

Years 1789-1888
David P. Currie
University of Chicago Press, 1985

American Consitutional Law, Cases and Interpretations, 3rd Ed.
Ralph A. Rossum and G. Alan Tarr
St. Martin's Press, 1991

The Constitutional Decisions of John Marshall (Vol's 1 & 2)
Joseph P. Cotton, Jr. (Editor)
New York: Da Capo Press, 1969

Constitutional Law, 11th Edition
Gerald Gunther
Mineola, New York: The Foundation Press, Inc., 1985

Constitutional Interpretation, Cases-Essays-Materials, 2nd Ed.
Harold Chase & Craig Ducat
St. Paul Minnesota: West Publishing Co., 1979

Constitutional Law, 11th Edition
William Cohen & Jonathan D. Varat
New York, NY: Foundation Press, 2001

"Full Text Decisions of the U.S. Supreme Court"
USSC CD-ROM
InfoSynthesis, Inc., Version 2000-2

Appendix III

	Marshall	Thompson	Johnson	Story	Washington	McLean	Livingston	Trimble	Baldwin	
February Term 1803										
Marbury v. Madison 5 U.S. 137	**Opinion** GR, CC									
February Term 1807, 1808										
Ex Parte Bollman & Ex Parte Swartwout 8 U.S. 75	**Opinion** GR, 1C									
February Term 1809										
The Bank of U.S. v. Deveaux et al 9 U.S. 61	**Opinion** GR									
Owings v. Norwood's Lessee 9 U.S. 344	**Opinion** CC, 1C									
February Term 1810										
Fletcher v. Peck 10 U.S. 87	**Opinion** GR		**Concur** CC, FP							
Durousseau et al v. U.S. 10 U.S. 307	**Opinion** 1C									
February Term 1816										
Martin v. Hunter's Lessee 14 U.S. 304			**Concur** GR	**Opinion** GR, RC, 1C						
February Term 1818										
U.S. v. Bevans 16 U.S. 336	**Opinion** GR									
February Term 1819										
Sturges v. Crowninshield 17 U.S. 122	**Opinion** GR, CC									
McCulloch v. State of Maryland et al 17 U.S. 316	**Opinion** GR, CC, [illegible] FP									
Trustees of Dartmouth College v. Woodward 17 U.S. [illegible]	**Opinion** GR									
February Term 1820										
Houston v. Moore 18 U.S. 1			**Concur** GR	**Dissent** GR FP #32	**Opinion** GR, 1C FP 82					
U.S. v. Smith 18 U.S. 153				**Opinion** FP #42			**Dissent** GR, CC			
Loughborough v. Blake 18 U.S. 317	**Opinion** CC									
Owings v. Speed 18 U.S. 420	**Opinion** CC									
February Term 1821										
Anderson v. Dunn 19 U.S. 204			**Opinion** GR							
Cohens v. Virginia 19 U.S. 264	**Opinion** GR, CC, [illegible] 1C, FP									
February Term 1823										
Green et al v. Biddle 21 U.S. 1			**Dissent** GR	**Opinion**						
Buel v. Van Ness 21 U.S. 312			**Opinion** GR							
February Term 1824										
Gibbons v. Ogden 22 U.S. 1	**Opinion** GR, CC		**Concur** GR, CC, [illegible]							
Osborn et al v. Bank of U.S. 22 U.S. 738	**Opinion** GR		**Dissent** GR							
February Term 1827										
Ogden v. Saunders 25 U.S. 213	**Dissent** GR, CC	**Opinion** GR, CC, [illegible] FP #44	**Opinion** GR, CC, [illegible]		**Opinion** GR, CC, [illegible]			**Opinion** GR FP #44		
Brown et al v. The State of Maryland 25 U.S. 419	**Opinion** GR	**Dissent** FP #32								
February Term 1829										
Satterlee v. Matthewson 27 U.S. 380	**Opinion**		**Concur** GR FP #44							
Weston et al v. City Council of Charleston 27 U.S. 449	**Opinion** GR, FP	**Dissent** FP #32								
February Term 1830										
Parsons v. Bedford 28 U.S. 433				**Opinion** GR						
February Term 1830										
Craig et al v. The State of Missouri 29 U.S. 410	**Opinion** GR	**Dissent** GR	**Dissent** GR							
February Term 1831										
The Cherokee Nation v. State of Georgia 30 U.S. 1	**Opinion**	**Dissent**	**Concur**						**Dissent**	

Ex Parte Crane et al v. Samuel Kelly 30 U.S. 190	GR, CC **Opinion**	GR FP #42	GR						GR, CC, FP **Dissent** GR	
February Term 1832										
Grant et al v. Raymond 31 U.S. 218	**Opinion** GR, 1C									
Worcester v. State of Georgia 31 U.S. 515	**Opinion** GR					**Concur** GR, RC				
February Term 1833										
Barron v. The Mayor & City Council of Baltimore 32 U.S.	**Opinion** GR, RC, 1C									
February Term 1834										
Wheaton & Donaldson v. Peters & Greigg 33 U.S. 591		**Dissent** FP, OR FP #43								