

IX. *Marbury v. Madison*

According to most accounts it was Chief Justice John Marshall who primarily enlarged judicial review as the keystone and final ingredient in our nation's legal system as late as 1803, sixteen years after the Constitution was ratified. By declaring the Supreme Court's power of review over federal law in *Marbury v. Madison* (1 Cranch, 174), Marshall is said to have established the use of judicial review for ascertaining the constitutional validity of laws passed by Congress, thereby putting its "negative" possibilities into effect. However, Marshall's horizontal use of judicial review relevant to congressional law can also be seen as an essential enlargement of Ellsworth's earlier achievement, which primarily involved the vertical use of judicial review in determining the constitutionality of state laws.

Both applications of judicial review were crucial, and both posed difficulties

of their own in their formulation. Whereas Ellsworth's use of judicial review in order to defend federal sovereignty can be described as having been somewhat duplicitous, Marshall's Supreme Court decision to augment executive constraint on populist excesses turns out to have been fraught with a variety of potential legal violations worthy of challenge. Moreover, Marshall's argument depended on the unavoidable status of the Judiciary Act as being less authoritative than the Constitution itself, an argument that could have equally applied to all other portions of the Judiciary Act inclusive of Section 25 if it could be found in potential contradiction with any portion of the Constitution.

In any case, Marshall's gambit was successful in having completed the establishment of judicial review as the nation's bulwark of legal deliberations at all levels of government and among a selection of the nation's leadership relatively free of political bias. The judiciary became truly as powerful as the legislative and executive branches, whatever the intrinsic contradictions of Marshall's interpretation. If its unique authority was not necessarily declared by the Constitution itself, it should have been.

Marshall specifically achieved this aim by denying the Supreme Court the right to

issue a writ of mandamus. Established by Section 13 in the Judiciary Act, the writ was not included in the Constitution itself and was therefore presumably restricted to the affairs of inferior courts as indicated by Article III's exclusionary wording ("in all other cases," etc.). The Constitution took precedence over the Judiciary Act (a mere law), Marshall explained, so he was obliged to declare Section 13 null and void. He accordingly announced his inability to issue a writ of mandamus that would force James Madison, Jefferson's new Secretary of State, to employ William Marbury, a last-minute political appointee of John Adams.

The immediate victory went to Madison, but on more basic grounds the *Marbury v. Madison* decision was a stunning defeat for his vision of constitutional checks and balances, since it risked the vertical application of judicial review in order to set the stage for the acceptance of the Supreme Court's final and irreversible power to veto federal law as well as state law. During the Convention, Madison had tried to prevent any expansion of judicial authority that would make the Supreme Court the final arbiter of federal law and had expressed his serious reservations when Johnson added his amendment referring to the Constitution itself. Now Madison's worst suspicions were confirmed, and, ironically,

in a case decided in his favor. Nevertheless, as Marshall pointed out, only the Supreme Court possessed the ability and credentials to determine the constitutional validity of specific federal laws. If it made its determination unfavorable to these laws, its negative opinion necessarily constituted their veto for being unconstitutional.

Nor can it be overlooked that Article III prohibited Marshall from declaring Section 13 unconstitutional without awaiting the appeal of its favorable review from inferior courts to the Supreme Court. Enforcing the writ of mandamus for the benefit of Marbury was entirely within Marshall's original jurisdiction, but his jurisdiction was appellate, not original, when it came to rejecting the writ for being unconstitutional. A decision supportive of the writ would first have been needed from a state supreme court, as provided by Section 25 of the Judiciary Act, and then it could be appealed to the Supreme Court for its final dispensation. But most important, Marshall denied Congress its right to incorporate the writ of mandamus into the Judiciary Act as justified by the exceptions and regulations clause of Article III: ". . . with such exceptions, and under such regulations *as the congress shall make*" (italics added).

Amazingly, Marshall dispensed with this entire phrase, featured by the Committee of

Detail to provide for enlarging the authority of the Supreme Court, as “mere surplusage” and “entirely without meaning” (Commager, 193). However, only four sentences later, at a different stage in his argument, Marshall declared, “It cannot be presumed, that any clause in the constitution is intended to be without effect.” Indeed, he was correct here, but at the expense of his earlier argument against Congress’s authority to include the writ of mandamus in the Judiciary Act. If an “effect,” or intended application, were perceived in the exceptions and regulations clause rejected by Marshall, Section 13’s guidelines for imposing the writ of mandamus could be recognized to have been fully constitutional as an “exception” that Congress had chosen to make if, in fact, it were any exception at all.

Finally, of course, Marshall should have disqualified himself from judging the case, since he had served as Secretary of State in the final months of the Adams administration and had been personally responsible for the delay in giving Marbury his last-minute federal appointment. To this extent, at least, the litigation had arisen from negligence on Marshall’s part, and yet he sat in judgment on the case!

Nevertheless, it can be acknowledged in retrospect that the defects and fallacies in Marshall’s judgment against the writ of

mandamus were less important than his defense of the right of the Supreme Court to impose such a judgment, whatever its flaws. By declaring the writ of mandamus unconstitutional, he established by example the inevitability of judicial review over federal law additional to state law. As originally intended, judicial review had been no more than implied in the Constitution, but its use was unavoidable as Marshall explained, and as Johnson and fellow delegates had planned when they added the “arising under” clause to Article III.

Among other potential contradictions was Marshall’s veto of the writ of mandamus without having taken into account the comparable status of the writ of error for making appeals to the Supreme Court as required by Section 25. Both writs were missing from the list of powers granted by Article III, and both were first specified in the Judiciary Act, so both could have been declared unconstitutional by Marshall’s logic. In other words, the judicial review of state laws—vastly more important than the writ of mandamus—was no less susceptible to veto, as in fact Marshall himself argued when he had appeared as a lawyer before the Supreme Court in 1796 (*Ware v. Hylton*, 3 Dallas 199). However, now that he was elevated to Chief Justice, Marshall understandably wanted to preserve the

vertical review of state law as well as adding its horizontal application to federal law. As a result, the intentional ambiguity of Article III pertained to both writs, but with entirely different implications leading to identical results.

Because there was no indication whether state or federal inferior courts would be used, Section 25 of the Judiciary Act, including the writ of error, could be accepted as being constitutional, permitting the Supreme Court's judicial review of state laws. However, because of the exclusionary wording used to convey this ambiguity ("in all other cases," etc.), Section 13, including the writ of mandamus, could be found unconstitutional, thereby establishing the necessity of judicial review for federal law too. Paradoxically, it was only by reducing the Supreme Court's authority that Marshall could enlarge this authority to impose such a reduction.

A double standard seems to have been imposed, in both instances favorable to judicial review. In effect, Marshall denied the Supreme Court the right to use the writ of mandamus because it had incidentally been excluded from the Constitution. But in rejecting it he laid claim to another and more important right, the judicial review of federal law, a right that had been intentionally left

open to interpretation so it could later be imposed.

As to be expected, this mixture of potentially contradictory assumptions was susceptible to challenge. In the 1816 *Martin v. Hunter's Lessee* case (1 Wheat, 304) and the 1821 *Cohens v. Virginia* case (6 Wheat, 264), the Virginia Court of Appeals declared Section 25 unconstitutional on the grounds, apparently consistent with the original intent of the Constitution, that state judiciaries possessed independent authority to interpret the Constitution for themselves. In both cases the Supreme Court reversed their decision based on the arguments of Joseph Story and Marshall that its appellate jurisdiction was unavoidable except for those cases in which it exercised original jurisdiction.

True, there was no reference to the vertical integration of state and federal courts in the Constitution, but, as first intended, there was likewise no word or phrase in the Constitution which prohibited its adoption. And if the jurisdictions of state and federal courts were coextensive and integrated, the same principle of contradiction applied as explained in *Marbury v. Madison*, to the effect that both state and federal laws could be vetoed when found in conflict with the Constitution. In other words, by the principle of omission state and federal courts could

be integrated, and then by the principle of negation (Marshall's dictum, "Affirmative words are often, in their operation, negative of other objects than those affirmed"), state laws found in conflict with the Constitution could be declared null and void. By logic alone, centralization prevailed.

Ill and in retirement when *Marbury v. Madison* was decided, Ellsworth had perhaps even more reason than Madison to be ambivalent about Marshall's line of argument, since he had played a central role in framing both documents Marshall found in conflict with each other. Marshall extended judicial review to federal law by misconstruing the exclusionary wording of Article III, which Ellsworth helped to draft, and Marshall did this in order to reject Section 13 of the Judiciary Act, whose original draft still exists in Ellsworth's handwriting. In and of itself, the writ of mandamus was relatively inconsequential, but it was indeed missing from the Constitution, so Marshall could use its absence to compel its exclusion from the powers exercised by the Supreme Court. By later specifying its use in the Judiciary Act, Ellsworth had ostensibly contradicted himself, and Marshall could use this potential inconsistency as the precedent he needed to justify the judicial review of federal law.

Whether Marshall's interpretation was correct did not deprive him of the right to make it. Ellsworth himself had imposed the Judiciary Act in order to guarantee the Supreme Court's power to review state laws, and now Marshall challenged a very minor portion of this Act in order to help consolidate another of Ellsworth's principal objectives (as specified by the first clause of the Judiciary Act), the Supreme Court's power to review federal laws. So how could Ellsworth complain? Everything was finally in place, more or less.

A makeshift pragmatism had, in fact, been Ellsworth's primary asset throughout the Constitutional Convention and his subsequent career in government. With disdain, Maclay had ridiculed Ellsworth's dependence on caballing, the use of quiet negotiations in the halls of Congress as a supplement to the public eloquence then expected in legislative deliberations (Maclay, 105). However, it was only by caballing that trade-offs could be made, and these trade-offs were essential compromises toward the formation of our government. To help impose the Connecticut Compromise, Ellsworth had twice assumed the distasteful responsibility of addressing the Convention in support of the inclusion of slavery in the Constitution. Also in the spirit of compromise he had participated in the tactic of omitting any

reference to the identity of inferior courts by the Committee of Detail on which he had served. Later, with the Judiciary Act, he had likewise given state courts exclusive original jurisdiction to offset the exclusive final determination granted to the Supreme Court. This might have seemed a generous compromise to opponents of judicial review but it later turned out to provide the Supreme Court with judicial power unprecedented in world history. And of course he participated in the remarkable trade-off whereby the passage of the Judiciary Act had been linked with the passage of the Bill of Rights.

After obtaining the passage of the Judiciary Act in the Senate, Ellsworth sponsored the Bill of Rights in the Senate and worked vigorously for its passage, just as Madison did for judicial review in the House of Representatives. The two were obviously intended to work in coordination with each other. The Judiciary Act gave the Supreme Court its full legal authority, while the Bill of Rights limited this authority relevant to the needs and circumstances of individual citizens as well as state and local governments. The two pieces of legislature fit like a glove.

As the *de facto* Senate majority leader throughout Washington's term in office, Ellsworth was able to guarantee full

support for Washington and Hamilton's Federalist agenda as compared to sustained dissension in the House of Representatives. In the opinion of John Adams, Washington's principal mistake at the end of his presidency was his elevation of Ellsworth to become the Chief Justice of the Supreme Court, thereby jeopardizing the Federalist Party's legislative dominance in the Senate, at that time a more important arena during the inception of the United States.

After a couple years of judicial inactivity, Ellsworth resigned from the Supreme Court to lead a delegation to France in order to negotiate terms with Napoleon in order to avoid the possibility of naval warfare. Ellsworth and his team spent a year in friendly arbitration in Paris, and for a while he was even considered a potential substitute for Adams in the next presidential election. However, the 1798 Alien and Sedition Acts provoked a hostile public reaction that made any federalist victory unlikely, whoever the candidate might have been. Also, Ellsworth's concessions to Napoleon in their 1800 treaty compounded public hostility against the Federalists to such an extent that Jefferson won the presidency by an even greater margin than might otherwise have been the case. Three years later, however, it turned out that these concessions might well have helped to inspire Napoleon's sudden and

presumably inexplicable “giveaway” sale of the Louisiana Territory to the United States despite his dislike of Jefferson. Suddenly the United States was twice its earlier size, and, if there was any connection, Ellsworth’s ability to compromise once again paid substantial dividends.

In the end, however, the sacrifice of the writ of mandamus in order to impose the Supreme Court’s horizontal check upon Congress was the most bizarre compromise linked with Ellsworth’s role, and Marshall rather than Ellsworth himself obtained it. Undoubtedly conspiracy was involved, but its outcome was truly accidental, at least on Ellsworth’s part.