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1992

Book Review

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Recommended Citation
McAffee, Thomas B., "Book Review" (1992). *Scholarly Works.* Paper 538.
http://scholars.law.unlv.edu/facpub/538

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goes on to summarize the contents of each record group identified by its listed series number.

Since many of the series record groups are either unindexed or inconveniently organized to permit researchers to go quickly and efficiently to the location of materials bearing on specific cases, the volume also has a valuable set of appendices. These include a useful section describing the old forms of common law actions, and another offering helpful "suggestions for locating case papers" (p. 102). The book concludes with a detailed bibliography of published reference works to assist the researcher in early New York case materials.

With the publication of this short volume, not only legal historians, but also New York State historians, specialists in the Early Republic, and many others have an indispensable guide to pursue research in these valuable records of New York law and its legal system in the first half of the nineteenth century.

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Robert Lowry Clinton, *Marbury v. Madison and Judicial Review*. Lawrence, Kansas: University Press of Kansas, 1989. XII, 310 pp. $35.00.

Chief Justice Marshall's legendary opinion in *Marbury v. Madison* has always been the center-piece of debate over the legitimacy and scope of the power of judicial review. Unsurprisingly, then, Robert Lowry Clinton's thesis that recent arguments about the judicial power reflect a modern revisionism centers on the claim that the famous opinion has been pervasively misunderstood in modern scholarly thought. Clinton's *Marbury v. Madison and Judicial Review* develops the view that *Marbury* was written to defend a very limited defensive power of courts to disregard statutes that conflict with constitutional provisions that directly govern the judicial function. The modern view that the founders contemplated the Supreme Court as the ultimate arbiter of the Constitution, and considered judicial rulings on constitutionality as in general binding on the other branches, is thus an ahistorical vision that rests on a misreading of the *Marbury* case itself.

Clinton arrives at these conclusions through an elaborate set of arguments that attempt to explain the historical and theoretical underpinnings of the *Marbury* argument. In brief, Clinton claims that *Marbury* can be understood only as an outgrowth of (1) Blackstone's famous Tenth Rule of construction, by which judicial review is perceived as a form of statutory construction, and (2) James Madison's explication of the jurisdiction granted the judiciary as to cases "arising under" the Constitution in terms of those cases deemed to be "of a judiciary nature" (p. 23). According to Clinton, when modern thinkers miss the point that judicial review was conceived as a form of construction rather than as a "revisionary" power, they adopt a view which "leads inexorably to judicial activism" (p. 23). The better view is that the Constitution is "implied within every act of valid legislation" so that judicial review becomes an act of avoiding contradiction in applying the "law" rather than an act of repeal of enacted law (p. 24).

Moreover, even this Blackstonian form of review was further limited by the Madisonian requirement, rooted in separation of powers thinking, that the invalidated law conflict with commands given exclusively to the judicial branch of government (pp. 27-29). And since courts can directly control only their own judgments, this scheme of review is consistent with a very limited notion of judicial finality that conflicts with the claims for judicial supremacy that have

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abounded through the twentieth century (pp. 29-30). According to Clinton, these more limited views of judicial power dominated American constitutional thought until late in the nineteenth century (pp. 161-66).

Unfortunately, Clinton's analysis provides neither a fair reading of *Marbury* nor a useful explication of the history of the power of judicial review. In the first place, the analysis in *Marbury* rejects the assumptions that informed Blackstone's rule of construction. The Tenth Rule of construction was designed to harmonize Blackstone's doctrine of legislative sovereignty with Lord Coke's famous dictum that courts might give effect to common right and reason. It rested on the premise that judicial power to declare a clear statute invalid would place the judiciary above the legislature and thus be subversive of government. Marshall's entire argument, like the treatment in Federalist No. 78 that preceded it, was designed in part to answer this very objection to judicial review by focusing on the sovereignty of the people and the limited nature of the delegation of power to the legislature. If the people are sovereign, and not the legislature, judicial review does not imply judicial supremacy over the legislature but only the supremacy of the will of the people embodied in their Constitution.[1]

Marshall thus used the conflict between the statute granting jurisdiction to the Court and Constitution, and the resulting voidness of the statute, as starting points for analyzing the issue of the Court's power. The question became whether such a law could, notwithstanding its invalidity, bind the courts.[2] All of this reasoning appears immediately to reject the idea that the Constitution is considered to be "implied within" challenged statutes, and the issue is presented as one of resolving conflict rather than of reading constitutional and statutory provisions harmoniously.

Thus although Clinton attempts to argue that the confederation-era decision of *Rutgers v. Waddington*[3] "is ancestral to *Marbury*" (p. 51), the court there declined the invitation of counsel to refuse to enforce the statute outright (as *Marbury* did) and expressly rejected the idea of a power to invalidate a law unequivocally violating common law principles. Instead, the court adopted counsel's alternative argument based on Blackstone's rule of construction, and made it emphatically clear that the legislature had the power to override the decision by an unequivocal statutory command.[4] Justice Marshall does not so much as hint that Congress could confer jurisdiction beyond constitutional limits merely by enacting a more explicitly worded statute.

Nor did Justice Marshall indicate in any way that his argument for judicial review would apply only to provisions specifically directed at the judiciary as in the case before him. Marshall's notion of the judicial power to invalidate laws rested on the duty of courts to give effect to the superior law of the Constitution whenever it conflicts with the inferior law of the legislature. When "both the law and the constitution apply to a particular case,"[5] according to Marshall, courts must choose. But that choice is presented whenever a litigant asserts that the law of the Constitution secures an asserted right or prohibits the exercise of government power that affects her preexisting, common law rights.

1. See The Federalist No. 78, in J.E. Cook, ed., The Federalist (Wesleyan University Press, 1961), p. 525.

2. 5 U.S. (1 Cranch) 137 (1803).

3. Though unreported, the opinion in *Rutgers* is set forth in Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton* Columbia University Press, 1964), p. 392.

4. For counsel's argument, see id., pp. 367-68, 382, 380-91. For the court's disposition, see id., pp. 395-97, 415-19.

5. 5 U.S. (1 Cranch) 137, 177 (1803).

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As illustrated by the *Rutgers* case treated above, which concerned an apparent conflict between a statute and the law of nations, such a choice is not presented to courts only when judicial functions are directly at issue.

Marshall posed this question: "And if [the courts] can open [the Constitution] at all, what part of it are they forbidden to read or to obey?"[6] Clinton answers, contrary to the thrust of Marshall's rhetorical question, that courts can only read and obey the portions specifically regulating the judiciary. But that is a view of judicial power which cuts against the grain of Clinton's own description of the "rule of construction" rationale. If the Constitution is implied in *every* valid act of legislation, courts properly should be required to honor that aspect of the statute whenever the statute affects the rights of parties properly before the court, regardless of to whom the constitutional command is addressed. This argument is so persuasive that at one point Clinton himself seems to adopt it (p. 29), even while at most points rejecting it (pp. 23, 99).

More specifically, Marshall pointed to the prohibitions on state laws imposing taxes or duties on exported products and the bans on bills of attainer of ex post facto laws as examples of provisions that would require courts to prefer the Constitution over the law. All of these limitations, however, are directed at the legislature, not the judiciary, as Marshall recognized when he added to these examples the provision regulating proof of treason and made a point of noting that its language was "addressed especially to the courts."[7]

While Madison did believe that the power of judicial review was limited to cases of a judicial nature, as Clinton asserts, it is not clear that his view of the underlying concept conforms to Clinton's. In presenting his proposed bill of rights to Congress, Madison asserted that these provisions would be enforceable by the courts, consistent with Hamilton's insistence in Federalist No. 78 that courts would be "the bulwarks of a limited constitution."[8] The commands in the bill of rights obviously go beyond ones directed to the judiciary.

Similarly, Marshall's opinion in *McCulloch v. Maryland* conforms with a broader reading of *Marbury* defended here, and clearly assumes the power of the courts to rule on constitutional questions concerning the reach of congressional powers that are unrelated to the power of courts generally. Moreover, contrary to Clinton's assertion (pp. 106-07), Joseph Story defended the power of courts to determine the constitutionally of acts of Congress unrelated to judicial power and argued that Supreme Court decisions on such issues bound other branches and levels of government.[9]

Clinton correctly questions whether the broadest formulations of the judicial function trumpeted in modern times are consistent with Marshall's view that judicial review was incidental to a court's ordinary role in giving effect to binding sources of law.[10] Even so, his narrow reading of *Marbury* and of the idea of cases "of a judiciary nature" mislead as much as the view he is opposing.

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6. Id., p. 179.

7. Id.

8. See The Federalist No. 78, in J.E. Cook, ed., The Federalist (Wesleyan University Press, 1961), p. 526; Helen E. Veit, Kenneth R. Bowling, and Charlene Bangs Bickford, *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* (Johns Hopkins University Press, 1991), reprinting James Madison's June 8, 17789 speech to Congress, pp. 83-84.

9. Joseph Story, *Commentaries on the Constitution of the United States* (De Capo Press reprint, 1833 ed.), vol. I, pp. 347-50.

10. See Gerald Gunther, *Constitutional Law* (Foundation Press, 12th ed. 1991), pp. 26-27.