AWESOME stories

THE CASE for JUDICIAL REVIEW

Battles between Marshall (a Federalist) and Jefferson (a Democratic-Republican) continued throughout Jefferson's time as president. Marshall was Chief Justice of the United States for 34 years. His mark on Constitutional interpretation, and his legacy, affect us still.

Marshall's ruling (that only the Supreme Court can declare a law unconstitutional) was almost minuscule compared to the actual scope of his decision (that the Supreme Court can interpretively mold the Constitution to achieve what the justices believe are important societal and institutional goals).

People have argued about Marshall's decision ever since he issued it.

With *Marbury v Madison* in hand, the Supreme Court (according to some judges and legal scholars) has the right to fit the Constitution within the climate of current culture. It is almost like the Supreme Court has an ongoing Constitutional Convention among nine people (since the justices do not permit anyone, including their law clerks, to attend case conferences).

Other judges and scholars not only disagree with that approach, they are appalled that nine unelected individuals, serving life terms, could possibly possess such power. After all, they declare, it is the people - and *only* the people - who can amend the Constitution.

Asserting that activist judges engage in judicial overreaching, such scholars claim even Marshall would never have taken judicial review that far.

Although *Marbury v Madison* declares the Supreme Court has the final say over the Constitution's meaning, Marshall never said the Court is all-powerful. In fact, the court turns away far more cases than it accepts.

By exercising its "rules of avoidance," the justices can dodge any number of political "hot buttons."

Marshall, the Federalist interested in expanding federal power, actually avoided a political brawl with Jefferson since he did not order Madison to give Marbury his judgeship. But Jefferson could see what was coming. He was concerned less about the specifics of the Marbury case, and more - *much* more - about the general power Marshall had given the court.

As Federalists (like Alexander Hamilton and John Adams) died, or faded from power, their agenda was marginalized.

By the election of 1804, (when Jefferson's opponents ran an attack ad depicting the President as a white-faced rooster with Sally Hemmings as a dark-faced hen), Federalists were no longer a factor in American politics. No longer a factor, that is, except on the high court. There, the President's cousin continued to issue his Federalist-inspired decisions.

Jefferson's public comments about the *Marbury* decision (when Marshall first issued it and later) were scathing:

> *If this opinion be sound, then indeed is our Constitution a complete felo de se* [act of suicide]*...The Constitution on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please.* (Letter from Jefferson to Spencer Roane, 1819.)

> *This member of the Government* [the federal judiciary] *was at first considered as the most harmless and helpless of all its organs.* [See, for example, Federalist 78] *But it has proved that the power of declaring what the law is, ad libitum, by sapping and mining slyly and without alarm the foundations of the Constitution, can do what open force would not dare to attempt.* (Jefferson to Edward Livingston, 1825 - the year before Jefferson's death.)

> [How] *to check these unconstitutional invasions of ... rights by the Federal judiciary? Not by impeachment in the first instance, but by a strong protestation of both houses of Congress that such and such doctrines advanced by the Supreme Court are contrary to the Constitution; and if afterwards they relapse into the same heresies, impeach and set the whole adrift. For what was the government divided into three branches, but that each should watch over the others and oppose their usurpations?* (Jefferson to Nathaniel Macon, 1821.)

Jefferson went to his grave upset that the Supreme Court had "usurped" the power of judicial review. But Marshall would have known, before he wrote *Marbury* and even before the U.S. Constitution was ratified, that American colonial judges had struck down laws which violated colonial constitutions.

Perhaps, for Marshall, that was all the precedent he needed.

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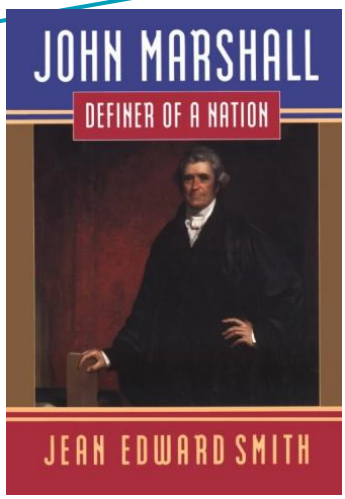

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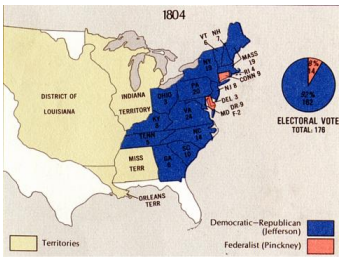

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