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Marbury's Mixed Messages

Glenn Harlan Reynolds

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It is generally bad manners to deprecate the celebrant at a birthday party. I am afraid, though, that by that standard my comments in this two-hundredth anniversary symposium honoring *Marbury v. Madison*[1] will seem ill-mannered indeed. That is because I intend to suggest that *Marbury* is a less important decision than scholars and lawyers generally maintain, and that it is perhaps less important today than it has ever been.

To be fair, *Marbury* plays to all our prejudices about what ought to be important. It is a Supreme Court decision, and lawyers—and especially law professors—love Supreme Court decisions. *Marbury* is an *old* Supreme Court decision, and age retains a certain dignity even today. It is a Supreme Court decision that aggrandizes Supreme Court powers, something that naturally flatters the interests of lawyers. Furthermore, *Marbury* is a very *clever* Supreme Court decision, and lawyers (and law professors) tend, like James Branch Cabell's eponymous protagonist Jurgen, to prize cleverness above all else.[2]

Jurgen, however, eventually learned that his faith in cleverness was misplaced, and I think that lawyers and law professors might benefit from the same lesson. At any rate, I will do my best to make the case that they, or perhaps I should say "we," do so suffer.

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

2. *See* JAMES BRANCH CABELL, JURGEN: A COMEDY OF JUSTICE 292 (Dover Publ'ns, Inc. 1977) (1921). In the text, Jurgen has just met Koshchei the Deathless, "who made things as they are." *Id.* at 290. The full passage reads:

> Jurgen perceived that this Koshchei the Deathless was not particularly intelligent. Then Jurgen wondered why he should ever have expected Koshchei to be intelligent. Koshchei was omnipotent, as men estimate omnipotence: but by what course of reasoning had people come to believe that Koshchei was clever, as men estimate cleverness? The fact that, to the contrary, Koshchei seemed well-meaning, but rather slow of apprehension and a little needlessly fussy, went far toward explaining a host of matters which had long puzzled Jurgen. Cleverness was, of course, the most admirable of all traits: but cleverness was not at the top of things, and never had been.

Id. at 292. Jurgen, who has always prided himself on his cleverness, learns much from this encounter. Jurgen's observations about Koshchei may apply to the Supreme Court (which as Justice Robert H. Jackson noted is not final because it is infallible, but is infallible because it is final) as well. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result).

I. *MARBURY* IN THE CLASSROOM

One of the reasons why *Marbury* seems especially important is that it is the very first case taught in most constitutional law courses. It is even the first case in many constitutional law casebooks.

Traditionally, the case is taught in a somewhat schizophrenic way. On the one hand, we (that is, we law professors) tend to criticize *Marbury* as, well, tricky. In doing so, we generally crib rather heavily from William Van Alstyne's classic, *A Critical Guide to* Marbury v. Madison[3]—the honest ones among us admit it, the less-honest pretend they worked it all out themselves. Marshall's various tricks are outlined in some detail, and the opinion is, by the end, presented as a bit of rather clever sleight-of-hand. The suggestion, usually buttressed with the obligatory references to Alexander Bickel and James Bradley Thayer, is that with such a shaky foundation there is something slightly fishy about the whole enterprise of judicial review.

Yet, after this suggestion has been made, the emphasis shifts to just how clever Marshall was and to how important judicial review is today. Indeed, it is interesting that although we in the academy often criticize *Marbury*, few are willing to take that criticism seriously enough to suggest that *Roe*, or *Miranda*, or *Brown*[4] should not be regarded as binding precedent. Indeed, one of the constitutional law casebooks that breaks with the tradition of putting *Marbury* at the front simply replaces *Marbury* with *Brown*, thus assuming the legitimacy of the judicial review practice that *Marbury* established.

This endorsement of *Marbury*'s precedent, coupled with the critique of its foundations, sends another signal to our students, to the bench and bar, and perhaps even to ourselves: Marshall may have been tricky, and perhaps a shade dishonest, but he got away with it, and that is a good thing. By implication, then, tricky judging—at least in a good cause—is a good thing so long as you get away with it.

This schizophrenic approach has produced an entire field of literature, relating to the "countermajoritarian difficulty," which I have discussed elsewhere at tiresome length.[5] In brief, I regard the countermajoritarian difficulty as far less important than the extensive scholarly attention it has received might suggest, not least because the scholarly commentary treats the Supreme Court as far more important, and, paradoxically, far more fragile, than it really is.

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3. William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1.

4. Roe v. Wade, 410 U.S. 113 (1973); Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

5. Glenn Harlan Reynolds, *Sex, Lies and Jurisprudence: Robert Bork,* Griswold *and the Philosophy of Original Understanding*, 24 GA. L. REV. 1045 (1990).

II. ON THE UNIMPORTANCE OF *MARBURY* AND THE SUPREME COURT

As I mention above, *Marbury* tends, by its very nature, to exaggerate the importance of the Supreme Court. It was an original jurisdiction case, meaning that the spotlight shone on the Supreme Court undimmed by passage through the usual cloud of lower-court fact-finding and reasoning. *Marbury* represented a head-on confrontation between a politically powerful President and a rather weak Supreme Court. Additionally it took place at a time when there were few lower courts, making what the Supreme Court did far more important.

Now, of course, things are rather different. Some of these differences make *Marbury* less important, while others tend to diminish the importance of the Court itself. Original jurisdiction cases are rather rare nowadays and are always inconsequential (in itself, I suppose, a sort of legacy of *Marbury*). Political confrontations between the Court and Presidents are rare, and the Court is in a far, far stronger position than it enjoyed in Marshall and Jefferson's time. President Franklin D. Roosevelt's court-packing plan[6] rebounded on him (though it may—or may not—have changed the Court's behavior), and the Supreme Court's ruling in *Bush v. Gore*,[7] though unpopular among law professors, seems to have done no real harm to the Court's position, nor to have inspired even the faintest possibility of disobedience from losing Presidential candidate Albert Gore, Jr. Even fans of the Supreme Court's *Bush* opinion will, I think, agree that the Court felt no pressure to display Marshallian cleverness. Similarly, it was decades after *Marbury* before the Supreme Court struck down another act of Congress, while such action by the Court is routine today.

It is thus no surprise that the Supreme Court finds itself the focus of most constitutional law scholarship today, although a cynic might conclude that this is also because it is easy to study a single institution. The Court is the focus of numerous journals and nearly every law school offers at least one course of the "Supreme Court Seminar" variety. Major news services have Supreme Court correspondents. And Supreme Court confirmation battles have become so bruising that even the prospect of one inspires nervousness in both parties.

Although the Court is stronger in relation to the other branches than it was when *Marbury* was decided, it is probably less important in the grand scheme of things, which makes *Marbury* less important as well. Lower courts were few in the *Marbury* era, but now they are plentiful.

The Supreme Court's caseload continues to fall, with the Court producing 76 signed opinions last year, down from 129 thirty years before. And this drop has occurred despite a dramatic growth in the number of opinions issued by lower federal courts and state supreme courts. In the twelve months ending

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6. *See generally* WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

7. 531 U.S. 98 (2000).

September 30, 2002, the regional Courts of Appeals decided 27,758 cases on the merits, compared to a mere 777 for the year ending March 31, 1973.[8] The result is that, as a percentage of the whole, virtually no lower-court opinions are reviewed by the Supreme Court. A given opinion in a trial court, in fact, is probably less likely to see Supreme Court review than the trial judge issuing it is to be struck by lightning.

Traditionally, this is not supposed to matter. In the classical view, lower-court judges faithfully apply Supreme Court decisions to cases in front of them, meaning that the Court need issue only general guidance. It is not clear at all that this is true, or ever has been: one is reminded of Truman's famous comment about Eisenhower and the bureaucracy.[9] But whether it was true in the past, it seems rather obvious that lower courts today are acting like bureaucrats who tend to follow their own institutional agendas, not like junior Platonic guardians who faithfully attend to instructions from on high.

That, at least, is what Brannon Denning and I have found in a multiyear survey[10] of lower-court opinions responding to the Supreme Court's holdings in the *United States v. Lopez*[11] and *United States v. Morrison*[12] opinions. Our research, in fact, suggests that lower courts are acting like the imaginary judge described by Judge Gilbert S. Merritt in a prophetic *Yale Law Journal* article written over two decades ago.

> I am a manager of events, appointed to get a job done, and that what is important is not so much the process and the creative act but the result, the practical consequences, the effect on society. Like senators, university administrators, newspaper publishers, and major executives, I must concentrate on the big picture and delegate responsibility to others to carry out my orders. Nobody reads district court opinions these days except the parties. Gone are the days of the poets and philosophers of the law like Marshall, Shaw, Holmes, Hand, Cardozo, and Traynor.[13]

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8. These figures were compiled by Sibyl Marshall of the University of Tennessee College of Law's Joel A. Katz Law Library.

9. One political historian has described the context and the quote as follows:

> In the early summer of 1952, before the heat of the campaign, President Truman used to contemplate the problems of the General-become-President should Eisenhower win the forthcoming election. "He'll sit here," Truman would remark (tapping his desk for emphasis), "and he'll say, 'Do this! Do that!' *And nothing will happen.* Poor Ike—it won't be a bit like the Army. He'll find it very frustrating."

RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER 9 (1980).

10. Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003).

11. 514 U.S. 549 (1995).

12. 529 U.S. 598 (2000).

13. Gilbert S. Merritt, *Owen Fiss on Paradise Lost: The Judicial Bureaucracy in the Administrative State*, 92 YALE L.J. 1469, 1471 (1983).

In short, all too often a "desk-clearing mentality"[14] is in the driver's seat. Following is a short description of what we found, followed by some further thoughts on what this means for the importance (or lack thereof) of the Supreme Court.

In short, we thought that the Supreme Court's decision in *Lopez* offered an interesting opportunity to watch a major doctrinal shift percolate through the lower courts. Prior to *Lopez,* the conventional wisdom was that Congress could do essentially anything it wanted under the Commerce Clause, something that, as Deborah Merritt noted, had became a law-school joke by the 1980s.[15] Indeed, as Lynn Baker and Ernest Young have pointed out, federalism had by that time become part of a "Constitution in exile."[16] Observing the lower courts' response to this change seemed likely to provide some insight into how lower courts respond to Supreme Court doctrine generally.

And it did, though at first things were a bit unclear. The initial installment of our project, published in the *Wisconsin Law Review* in 2000, was subtitled "What if the Supreme Court Held a Constitutional Revolution and Nobody Came?"[17] There, we concluded that lower courts seemed strangely slow to respond to the *Lopez* decision, but suggested that Supreme Court clarification might improve matters.

> *Lopez* decisions provide a background for two very different, though not necessarily entirely inconsistent, stories. One story—not very flattering to court of appeals judges—is that of an ossified intermediate bench in the throes of "judicial sclerosis," unable or unwilling to apply Supreme Court decisions that depart too sharply from business as usual. This story seems particularly compelling in the context of the drug and firearms cases, where the courts' impatience with constitutional arguments that might keep unpopular offenders out of jail is palpable, and where *Lopez* issues are dismissed in terse paragraphs containing little or no analysis.
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> But there is another story, too; this one is not very flattering to the Supreme Court. The view of appellate judging provided in most law school classes is a fairly simple one: Higher courts select principles, which lower courts then apply faithfully. As any lawyer with even a modicum of practice experience can attest, the situation in the real world is more complex. For example, that the lower courts are supposed to apply principles articulated by higher courts presumes that the principles of the upper courts are easily identifiable and readily available for application by the lower courts. But as the multiplicity of readings to which *Lopez* has been subject suggests, higher

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14. The phrase is William Van Alstyne's. Denning & Reynolds, *supra* note 10, at 1309.

15. Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 691 (1995).

16. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 75 (2001).

17. Glenn H. Reynolds & Brannon P. Denning, *Lower Court Readings of* Lopez, *or What if the Supreme Court Held a Constitutional Revolution and Nobody Came?*, 2000 WIS. L. REV. 369.

courts (in this case, the United States Supreme Court) do not always fulfill this responsibility.

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In *Lopez*, the Supreme Court struck a bold and telling blow for limited government and a return to the first principles of the Constitution. Or it didn't. Or maybe it did, but it just did not say it very well. After all, it does not matter how loudly you speak if you mumble when you do so.

How will we know which? The cynical—and, perhaps sadly, correct—answer in this case is, we will know when the Supreme Court tells us. Given the Court's decision this Term to resolve the split in the circuits over the Violence Against Women Act occasioned by the *Brzonkala* decision, as well as the scope of the federal arson statute, perhaps Supreme Court resolution is not too far away.[18]

Though the Supreme Court was almost certainly unmoved by our pleas, it did grant certiorari in those very cases, and in both it seemed to underscore the importance of the *Lopez* decision in terms that seemed to remove most excuses for lower-court foot-dragging. A couple of years later, we authored the next installment of our survey.[19] Unfortunately, we found that lower courts were, in fact, doing little to put *Lopez*'s reasoning into effect. Examining the large number of lower-court cases addressing Commerce Clause issues, we found ample evidence of a desk-clearing mentality at work. We concluded:

But if ideology is not the source of lower court resistance—or, if any sustained inquiry is likely to result in the old Scots verdict, "not proven"—is there an explanation for lower courts' behavior? Research by other scholars suggests that the problem here, to paraphrase former presidential candidate Michael Dukakis, is not ideology, but rather competence. What we are seeing in lower courts' Commerce Clause decisions may be only symptomatic of a larger problem in the federal judiciary: that of courts responding to an increasingly unmanageable caseload by resorting to corner-cutting, resulting in an overall reduction in the quality of courts' work product.

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The Supreme Court is the highest court in the land. Lower courts follow its precedents. The makeup of the Supreme Court is thus the most important influence on American constitutional law. These are statements so taken for granted that they are seldom even examined. But in fact, reality seems to be more complex than that.

That complexity holds a number of lessons. One is that the way we teach constitutional law is simplistic: the way that Supreme Court opinions affect the system is far more complex and indeterminate than the casebooks suggest. That complexity exists in a variety of forms, but the way in which Supreme Court precedents do (or do not) percolate down through the lower courts is surely more important than the standard tale would make it seem. Another is

18. *Id.* at 397, 399-400 (footnotes omitted).

19. Denning & Reynolds, *supra* note 10.

> that the lower courts simply are not living up to the general expectations we have had for them, in terms of thoughtfulness, fairness, and a willingness to give a hearing to litigants regardless of their stature or of the crimes of which they are accused. This failure is a serious one, not only for justice but for the very legitimacy of the system.[20]

In light of the above, it seems fair to say that *Marbury*, and the whole train of chin-pulling articles on the legitimacy of judicial review that it inspired, is far less important than is generally supposed. If no one listens to the Supreme Court (and that is no great exaggeration of what we found in the *Lopez* context), then the judicial review established in *Marbury* simply is not very important. The Supreme Court may strike down a statute here and there, but if the lower courts do not go along, as they in some settings are not, its power is quite limited, especially when it takes only a few dozen cases a year.

III. PAYING MORE ATTENTION

In one sense, *Marbury* and the mindset that its scholarly reception has created seems to have distracted us from the real source of judicial power. While everyone focuses on the Supreme Court, the real and effectively unreviewable power is exercised by the Courts of Appeals. That power is less controversial because it is exercised less often in ways that make waves: like good bureaucrats, the Courts of Appeals tend to avoid controversy, and to make their output sufficiently boring that few will bother to read it in search of the controversial bits anyway.

One response to this—and one that I certainly endorse—is to start paying more attention to lower courts, and in particular to do so less on the grounds of ideology than of competence. Unfortunately, it is not clear who besides the legal academy will be willing to do so.

Another response is to recognize that the Courts of Appeals have managed to achieve much more autonomy than the traditional model of judicial review allows for because of the tremendous growth in federal caseloads. When the Court of Appeals' output increases drastically while the Supreme Court's ability to hear cases does not, the result is bound to be more freedom of action for the lower courts. Judicial review, like any public good, tends to be overused, and the consequences of that overuse are that it is not always available when it is genuinely needed.

Most importantly, I think that *Marbury* has encouraged us to focus on the Supreme Court in isolation, when perhaps we should be looking at the entire judicial system as, well, a system[21]—and a system that is, itself, embedded in an even more complex system that includes the legislative and executive

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20. *Id.* at 1303, 1310 (footnote omitted).

21. *See* Glenn Harlan Reynolds, *Chaos and the Court*, 91 COLUM. L. REV. 110 (1991) (describing such an approach).

branches, and even the polity at large.[22] Such narrow focus has its advantages, of course. But perhaps it is time to take a broader view.

22. For a discussion of courts as complex systems embedded in a larger polity that is also a complex system, see Glenn Harlan Reynolds, *Is Democracy Like Sex?*, 48 VAND. L. REV. 1635 (1995); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407 (1996).