

1992

## Book Review: Judicial Review and the Law of the Constitution. by Sylvia Snowiss.

R. Kent Newmyer

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

---

### Recommended Citation

Newmyer, R. Kent, "Book Review: Judicial Review and the Law of the Constitution. by Sylvia Snowiss." (1992). *Constitutional Commentary*. 863.

<https://scholarship.law.umn.edu/concomm/863>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

**JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION.** By Sylvia Snowiss.<sup>1</sup> New Haven, Conn.: Yale University Press. 1990. Pp. vii, 228. Cloth, \$25.00.

*R. Kent Newmyer*<sup>2</sup>

This short book aims to set the historical record straight about the origins, development, and true nature of judicial review, an issue that the author maintains has never been understood—except gropingly by Alexander Bickel in his *The Least Dangerous Branch*.<sup>3</sup> A “misreading” of the basic sources of judicial review for the formative years, from 1776 to *Marbury v. Madison* in 1803, “pervades all modern scholarship.” What scholars have overlooked, the point which dooms their effort to understand subsequent developments, is the difference between “ordinary law” and “fundamental law,” the latter being that which claims to control the sovereign power itself. Violations of fundamental law, because of the magnitude of the issue, could be rectified only “by electoral or other political action,” or wanting these, by “revolution or the threat of revolution.” When the federal courts exercised judicial review in the pre-1801 period, as admittedly they did, they did so only under duress, so to speak—only when the violation of fundamental law was unmistakably clear and then only “as a substitute for revolution.” Judicial enforcement of the Constitution “was understood to be an entirely separate undertaking from the judicial enforcement of ordinary law.”

All this, Snowiss argues, changed under Chief Justice John Marshall, indeed because of him. In his hands the Constitution lost its meaning “as vehicle of explicit fundamental law” and became “supreme ordinary law.” Judicial review was no longer a last-ditch “revolutionary defense” but part of the regular business of the federal courts. The Constitution had been “legalized.”

This radical transformation, which took “about half a century to complete,” was largely in place by the end of the 1820s. Marshall, with “single-minded purposive skill,” had taken charge of the Court and then put the Court in charge. Not only had he effected a revolution, he covered his tracks so well that neither contemporaries nor subsequent students of the Court appreciated what happened. The key to his “statesmanlike deviousness”—Bickel’s phrase cited with approval by Snowiss—lay in Marshall’s subtle,

---

1. Professor of Political Science, California State University, Northridge.

2. Professor of History, University of Connecticut.

3. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale U. Press, 2d ed. 1986).

manipulative conflation of fundamental law as the late eighteenth century understood it and the Court's work-a-day law.

The idea that the modern doctrine of judicial review was not cut from whole cloth by the framers or the pre-Marshall interpreters of the Constitution is, of course, not new; nor is the idea that Marshall was the great modernizer. What is new, and what Snowiss is obliged to prove, is that the pre-Marshall understanding of judicial review was in fact perfectly clear and not simply inchoate and that Marshall singlemindedly and singlehandedly perverted that understanding. Her argument, she tells us, will "use no new material but consists in a rereading of existing sources." Among the most important for the period up to 1788 are Sir William Blackstone's *Commentaries on the Laws of England*, some but not all of the nine pre-1788 state cases relating to judicial review, and Max Farrand's *Records of the Federal Convention of 1788*, all of which are treated in a chapter of forty-four pages. The key sources for the remainder of the pre-Marshall period are Justice James Iredell's pro-judicial review essay, "To the Public,"<sup>4</sup> Hamilton's *Federalist* 78, and a selection of state and federal cases on judicial review (with special emphasis on the Virginia case of *Kemper v. Hawkins*,<sup>5</sup> Justice Paterson's opinion in *Vanhorn's Lessee v. Dorrance*,<sup>6</sup> and Justice Chase's in *Calder v. Bull*<sup>7</sup>). James Wilson's *Lectures on Law*<sup>8</sup> also figures prominently. Little use is made of relevant secondary scholarship and there is no formal bibliography.

Here is a bold thesis argued with intelligence and considerable force. It will, and should, enter into the heated scholarly debate now raging about the origins of judicial review.<sup>9</sup> The problem, as I see it, is one of research design and proof. The sources used, even if they were analyzed in great depth, which they are not in this brief book, are inadequate to the large chore at hand, which is nothing less than a reconstitution of the constitutional understanding of the founding generation. There is no reference to developments before 1776, which surely must have left some mark on the ideas of the Founders. Missing also is any discussion of the state debates on the ratification of the Constitution, even though they are no less impor-

---

4. *To the Public*, in Griffith J. McRee, ed., *Life and Correspondence of James Iredell* 145-49 (Peter Smith, 1949).

5. 1 Va. Cases 20 (1793).

6. 2 U.S. (2 Dall.) 304 (1795).

7. 3 U.S. (3 Dall.) 386 (1798).

8. James Wilson, *Lectures on the Law*, in Robert M. McCloskey, ed., *2 The Works of James Wilson* (Harv. U. Press, Belknap Press, 1967).

9. See, for example: Robert L. Clinton, *Marbury v. Madison and Judicial Review* (U. of Kansas Press, 1989); Jack M. Sosin, *Aristocracy of the Long Robe* (Greenwood Press, 1989); Christopher Wolfe, *The Rise of Modern Judicial Review* (Basic Books, 1986).

tant and often more revealing than the debates at Philadelphia. Especially is this true of the definitive edition of the ratifying debates currently being published at the University of Wisconsin under the direction of John P. Kaminski and Gaspare J. Saladino. Particularly relevant is the Virginia ratifying convention, where John Marshall spoke on the role of the federal courts under the new Constitution. The antifederalist critique of judicial power constitutes another key source which is not consulted, and most conspicuous in its absence here are the Brutus essays (probably written by Robert Yates) which are arguably the most prescient statement of the period concerning the power of the federal courts. Hamilton's famous Federalist 78 was in fact written to refute Brutus and cannot, as Jack Sosin shows conclusively in his *Aristocracy of the Long Robe*,<sup>10</sup> be understood except by reference to Yates' argument. Sosin's excellent analysis of the documentary validity of the state judicial review cases also demonstrates how precarious it is to say anything with certainty about the meaning of these cases.

Missing in Snowiss's account, also, is an analysis of Section 25 of the Judiciary Act of 1789, though it is directly relevant to the book's central thesis. That statute was framed by Oliver Ellsworth and James Paterson, both of whom were at the convention and both of whom served on the Supreme Court; it was also at the very heart of the antebellum debate between John Marshall and states' rights constitutional theorists. Most importantly, by providing statutory authority for judicial review of state decisions adverse to claims made under the Constitution, Section 25 would appear to make constitutional adjudication part of the ordinary legal business of the Supreme Court—a development which Snowiss argues came much later and under the cloak of darkness. The fact that both parties in *Hylton v. U.S.*<sup>11</sup> agreed in contriving a case that invited the Supreme Court to rule on the constitutionality of a federal statute taxing carriages also suggests a strong pre-Marshall tendency toward regularizing judicial interpretation of the Constitution.

Snowiss's argument concerning Marshall's role in the transformation of judicial review rests on her analysis of the pre-1801 understanding of judicial review. Thus after comparing key parts of Marshall's opinions to key documents from the pre-1801 period, she concludes that *Marbury* was not the radical departure that it is often thought to be but only prepared the ground "for judicial exposition of the constitutional text that was to begin at some opportune time in the future." Ms. Snowiss is correct that *Marbury* was incon-

---

10. See Sosin, *Aristocracy of the Long Robe* (cited in note 9).

11. 3 U.S. (3 Dall.) 171 (1796).

clusive—and her argument here is corroborated by Robert Clinton's *Marbury v. Madison and Judicial Review*.<sup>12</sup> Its inconclusiveness, however, might be evidence that Marshall himself did not yet see the full potential of judicial review, that his ideas were embryonic. Snowiss does not consider this possibility, but argues instead that the Chief Justice, though his written references to the issues were "exceedingly brief and characteristically cryptic," understood the matter exactly as Snowiss herself has seen it, presumably with all the subtleties and distinctions of her own dazzling exegesis intact.

The difficulty is that we don't know if and how Marshall read Wilson or Madison or what he got from reading Blackstone or many of the other sources cited by Snowiss. We do know that he was not inclined to scholarly analysis in either law or politics, that instead he had a genius for learning by listening. Would it not, therefore, make sense to start with the assumption that Marshall, however much he led his age, was also a part of it? One is reminded here of Justice Holmes' observation that the Chief Justice, like all great men, represented "a great ganglion in the nerves of society," that he was a "strategic point in the campaign of history, and part of his greatness consists in his being there."<sup>13</sup>

To illustrate Holmes' approach, take the idea of a written constitution, which, as Snowiss correctly points out, is the foundation of all of his great decisions. A careful look at the Virginia ratifying debates indicates that the thirty-two-year-old delegate from Richmond and Henrico County had already begun to see the potential of the fact that the supreme law was written; one sees too, in his speech on the federal judiciary, a clear forecast of the kind of textual analysis that would be his hallmark. But there is also evidence that others at the convention understood the radical potential of written fundamental law; and the fact that the convention decided to consider the Constitution clause by clause indicates that textual exegesis itself was already becoming part of the accepted logic of the written document. Marshall even as a novice statesman contributed to the debate, but he also learned from it.

Or take as another example of Marshall's symbiotic relationship with his age the process by which constitutional exegesis became a part of the regular work of the Court. Surely part of this process, which Snowiss writes of in conspiratorial terms, is explained by the jurisdictional obligations imposed by Article III of

---

12. See Clinton, *Marbury v. Madison and Judicial Review* (cited in note 9).

13. Oliver Wendell Holmes, Jr., *Collected Legal Papers* 267-68 (Harcourt, Brace and Howe, 1920).

the Constitution and the Judiciary Act of 1789. Marshall was simply "there," as Holmes put it, when those cases which turned on the meaning of the Constitution presented themselves. When Marshall said, as he frequently did in his opinions, that he had no choice but to interpret the Constitution, perhaps we ought to pay attention. In any case, it was not Marshall alone who did the interpreting, since by his own admission, the deliberations of the Court were collective. Reasoning exclusively from appellate decisions, without benefit of private correspondence of any sort (even John Marshall's), is sure to miss the point.

Placing Marshall and the Court in the larger context of historical change, which is the gravamen of my argument, permits us to see that judicial review, as it unfolds from *Marbury* to *McCulloch v. Maryland* and beyond, was not born as a Platonic idea in the mind of the Chief Justice; nor did the transformation of judicial review during his tenure take place unbeknownst to contemporaries. For all of his prescient insight, he was, like other statesmen of the founding period, forced to learn on the job. His view of judicial review changed in response to a wide range of historical changes of a fundamental nature: the rise of a national market, the appearance of sectional nationalism after the War of 1812, and particularly the emergence of a states' rights constitutionalism that challenged Marshall and the Court at every turn. The powerful anti-court movement of the 1820s—the granddaddy of all subsequent such movements—makes it clear that the changes in the status of the Court which were taking place under Marshall's astute leadership were well known.

**PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY.** By Jennifer Nedelsky.<sup>1</sup> Chicago: University of Chicago Press. 1990. Pp. xiii, 343. \$29.95.

*Mark Tushnet*<sup>2</sup>

Jennifer Nedelsky's long-awaited discussion of Federalist theories of property is a major contribution to the literature on the founders' political theory and its relation to contemporary constitutional

---

1. Associate Professor of Law and Political Science, University of Toronto.  
2. Professor of Law, Georgetown University Law Center.