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## MARBURY, McCULLOCH, GORE AND BUSH: A COMMENT ON SYLVIA SNOWISS

STEPHEN B. PRESSER\*

Professor Snowiss' paper is a dazzling performance, and uniquely appropriate for this kind of a gathering, a symposium in honor of John Marshall. She uses Marshall as a starting point, and ends up talking about grand constitutional themes.

I do not know if I really disagree with any of Professor Snowiss' doctrinal analysis, or her exquisitely careful historical research, but I do dissent from her conclusions, and from her understanding of contemporary constitutional jurisprudence. There was a familiar ring to this paper, which at first I had a hard time precisely discerning. The more I read, though, the more it became clear that Professor Snowiss was doing an interesting riff on early legal realism—her paper was a lot like Holmes' *Common Law*<sup>1</sup> or Jerome Frank's *Law and the Modern Mind*.<sup>2</sup> Just like theirs, her point was, if I may put words in her mouth: "Let's be serious—Our Constitutional adjudicators have discretion, they've nearly always had it, and it's always going to be there. They ought to wake up to that fact, stop pretending that they are fettered by original understanding, and get on with the business of legislating."

Perhaps I'm alone among modern law professors, but that still makes me nervous. Call me old-fashioned, but I still believe that judges are supposed to judge and legislators are supposed to be the ones doing the legislating. The notion of keeping the two separate is what we mean by the Rule of Law, I thought. But did John Marshall believe in the Rule of Law? Was he a judicial legislator? I suspect he would say he was not, and would not make the kind of extravagant claims for *Marbury*<sup>3</sup> that we now make. For most of us, constitutional law begins with *Marbury*, and Marshall gets the credit for inventing judicial review. To Professor Snowiss' credit, she understands that this is not true,

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1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).
2. JEROME FRANK, *LAW AND THE MODERN MIND* (1930).
3. *Marbury v. Madison*, 5 U.S. (1 Cranch) 37 (1803).

and although she nods in the direction of *The Federalist No. 78*, she appears to think the real credit belongs elsewhere, maybe to Iredell writing in 1786, or *Wilson's Law Lectures*, or to the early Virginia cases.<sup>4</sup> I think the origin goes back a bit before.

We can find, for example, in 1768, Thomas Hutchinson writing his *Dialogue between Europe and America*, and having America claim that "Judges . . . should decide not to enforce immoral laws or laws contrary to the purposes of government . . ."<sup>5</sup> In short, you do not even need a written Constitution to do judicial review, though a writing makes it easier, and solves the problem of the uncertainty of what laws are contrary to the purposes of government.

In any event, the remarkable thing for me about *Marbury* is not the assertion of judicial power to nullify an Act of Congress. It is the Court's refusal to do it, and to let Jeffersonian misconduct go unpunished. This is not constitutional law-making, at best it's prudence, at worst cowardice. Chase had urged Marshall to join him in declaring the 1802 Judiciary Act unconstitutional,<sup>6</sup> but Marshall ducked that,<sup>7</sup> and *Marbury* was a weak slap on the wrist to Marshall's cousin Jefferson, very little more.<sup>8</sup> Indeed, three years earlier, in Richmond, while Marshall was in the audience, possibly absorbing Chase's pronouncements for later use,<sup>9</sup> Chase, in the *Callender* case,<sup>10</sup> laid out almost the precise words describing judicial review, grounded in Article III, that Marshall would later use in *Marbury*. Chase gets none of the credit for our institution of judicial review, and indeed, he probably deserves

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4. Sylvia Snowiss, *Text and Principle in John Marshall's Constitutional Law: The Cases of Marbury and McCulloch*, 33 J. MARSHALL L. REV. 973 (2000).

5. THOMAS HUTCHINSON, A DIALOGUE BETWEEN EUROPE AND AMERICA (1768); STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, LAW AND JURISPRUDENCE IN AMERICAN HISTORY 91 (3d ed. 1995) (excerpting from BERNARD BAILYN, THE ORDEAL OF THOMAS HUTCHINSON (1974)). Hutchinson's AMERICA is using arguments of a kind employed by James Otis, Jr., in the *Writs of Assistance* case, when he misread Coke's opinion in *Doctor Bonham's case* (1610) as a sort of precursor of American-style judicial review. See generally PRESSER AND ZAINALDIN, *supra*, at 66-68.

6. See, e.g. STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING: THE ENGLISH, THE AMERICANS, AND THE DIALECTIC OF FEDERALIST JURISPRUDENCE 162-163 (1991) (discussing Chase's correspondence with Marshall, where Chase urged the Chief Justice to declare the 1802 Judiciary Act unconstitutional).

7. See, e.g. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 308-09 (1803) (upholding the 1802 Judiciary Act on narrow technical grounds).

8. See PRESSER, *supra* note 6, at 163 and 243 n.51 (suggesting a federal common law basis for granting the relief sought by *Marbury*).

9. 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 39 (1919) (telling the story of Marshall's possible use of Chase's arguments).

10. *United States v. Callender*, 25 Fed. Cas. 239 (C.C.D. Va., 1800) (No. 14,709).

none, because, as Professor Snowiss acknowledges,<sup>11</sup> Paterson had made the same point, and I dare say many of the other pre-Marshall Justices had as well.

Now what about *McCulloch*?<sup>12</sup> I recently put a constitutional law casebook together with Doug Kmiec,<sup>13</sup> and had the occasion to re-read *McCulloch* for the first time in many years, and I have to tell you, I was shocked. I find it difficult to understand the limits of the power it gives to the federal legislature, and my first reaction is to concede that Professor Snowiss is correct, that *McCulloch* is up to something different from *Marbury*, and is a sort of license for judicial law-making. But would Marshall have believed that? I suspect Marshall knew that he was out on a limb, because the question of Congress's having the general power of incorporation had come up in the Philadelphia Convention, as well as the question of incorporation of a national bank, and neither power had been explicitly granted.<sup>14</sup> But Hamilton thought we needed a national bank, and he and Marshall found the justification in the Necessary and Proper Clause. Maybe a national bank really was "necessary" if we were going to be a viable commercial republic, and maybe if the Necessary and Proper Clause means anything it means you can do things that you believe are absolutely necessary.

But even if a national bank was absolutely necessary for a commercial nation, still I can not help but hope that Marshall would have been horrified to see Professor Snowiss use *McCulloch* as an indirect way of suggesting that it's alright for the Supreme Court to textualize a prohibition on anti-abortion legislation,<sup>15</sup> or as a basis for much of the civil rights jurisprudence of the late twentieth century.<sup>16</sup>

More intriguingly, Professor Snowiss suggests that the fast and loose jurisprudence she believes that *McCulloch* exemplifies was also that of the second Justice Harlan, as demonstrated in his dissent in *Poe v. Ullman*<sup>17</sup> and his concurring opinion in *Griswold*,<sup>18</sup> and Harlan's brand of constitutional adjudication is

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11. See generally Snowiss, *supra* note 4.

12. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1817).

13. DOUGLAS W. KMEIC & STEPHEN B. PRESSER, *THE AMERICAN CONSTITUTIONAL ORDER: HISTORY, CASES, AND PHILOSOPHY* (1999).

14. See generally JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 351, 419 (1996) (telling of Madison's recollection that the Philadelphia Convention had rejected a general incorporation proposal for the federal government, and of the recollection of other framers that a proposal granting the specific power to incorporate a national bank had been rejected as well).

15. Snowiss, *supra* note 4, at 995-97.

16. *Id.* at 993-94.

17. *Poe v. Ullman*, 367 U.S. 497, 522-555 (1961).

18. *Griswold v. Connecticut*, 381 U.S. 479, 499-507 (1965).

also what the plurality was doing in *Planned Parenthood v. Casey*.<sup>19</sup> Indeed, at the end of her paper, Professor Snowiss gives a ringing endorsement to Justice Harlan, and to the notion of “substantive due process” as employed by the plurality in *Casey*. She goes so far as to declare that the Court has now accepted the legitimacy of substantive due process.<sup>20</sup>

I am not so sure about that. I think the Supreme Court’s rejection of a “right to die” which was purportedly grounded in substantive due process, indicates some hesitation over the concept.<sup>21</sup> In any event, whatever the views of a plurality or majority of the current Supreme Court, I have not accepted substantive due process. I think *Casey* is flat-out wrong. I’ve done a book length rant on this,<sup>22</sup> but suffice it to say here that Michael Paulsen and Daniel Rosen got it right when they suggested that, if the rationale of *Casey* is correct, that *stare decisis* demands we follow the admittedly dubious established precedent of *Roe v. Wade*, then *Brown* should never have overruled *Plessy*,<sup>23</sup> but I digress.

Professor Snowiss makes a neat, brief acknowledgment that there are those out there who hold views that are critical of the “living constitution” jurisprudence she advocates, and there is a nod of sorts in the direction of Justice Scalia.<sup>24</sup> However, Professor Snowiss hints that Scalia is not to be taken seriously because he acknowledged that his First Amendment opinions are not grounded in original understanding,<sup>25</sup> and rely on *stare decisis* really (although Professor Snowiss did not say this explicitly) to the same extent as *Casey* does. She has a point, but even Homer nodded occasionally, and if Scalia got it wrong in the First Amendment area, it does not mean he is wrong when he talks about the illegitimacy of *Roe*,<sup>26</sup> *Casey*, or even *Lee v. Weisman*.<sup>27</sup>

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19. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

20. Snowiss, *supra* note 4, at 995-96.

21. See *Washington v. Glucksberg*, 521 U.S. 702 (1997) (telling of the United States Supreme Court’s refusal to extend the substantive due process rationale of *Casey* to enforce a “right to die”); See also *Vacco v. Quill*, 521 U.S. 793 (1997).

22. See STEPHEN B. PRESSER, *RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED* (1994) (arguing that original understanding is a jurisprudential philosophy vastly preferable to the kind of “living constitution” jurisprudence of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)).

23. See Michael Stokes Paulsen & Daniel N. Rosen, *Brown, Casey-Style: The Shocking First Draft of the Segregation Opinion*, 69 N.Y.U. L. Rev. 1287 (1994) (purportedly reporting the discovery of a previously lost draft opinion in *Brown v. Board. of Education*, 347 U.S. 483 (1954), which would have reaffirmed *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

24. Snowiss, *supra* note 4, at 989.

25. *Id.*

26. *Roe v. Wade*, 410 U.S. 113 (1973).

I also wonder whether it makes sense to take Harlan's weird behavior in *Poe* and *Griswold* as somehow tied in with his general philosophy of judicial restraint. I think the Harlan who believed that the Warren Court got it wrong in *Miranda*,<sup>28</sup> *Mapp v. Ohio*,<sup>29</sup> *Reynolds v. Sims*<sup>30</sup> and *Baker v. Carr*,<sup>31</sup> is the real Harlan. That Harlan would dissent from Professor Snowiss' invocation of him as a guide for the innovative constitutional jurisprudence she advocates. "The Constitution is not a panacea for every blot upon the public welfare," Harlan said, "nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements."<sup>32</sup>

But let us move to another level. Professor Snowiss raises a crucial problem when she wonders whether we should really apply the "doubtful case" rule, and limit judicial nullification of statutes to those that clearly violate the Constitution.<sup>33</sup> She seems to suggest that such a case would never actually occur, because the Court would be too weak really to combat a political branch bent on ignoring the Constitution. Somehow, for Professor Snowiss, that serves as justification for giving the Court authority to nullify legislation in cases which do not meet the strictures of the "doubtful case" rule, but precisely how eludes me. However, can the Court really resist clearly unconstitutional acts? How did the framers deal with this anticipated difficulty?

Who was supposed to see that judicial determinations of unconstitutionality were implemented? This was the most daring suggestion in *The Federalist*. That is what the checks and balances were all about, that's what the impeachment provisions were supposed to be about, and that is what all that talk about integrity and virtue necessary for republican government was concerned with. I think the framers actually trusted the American people to elect officials noted for virtue and integrity, at least for the Senate and for the Presidency.<sup>34</sup> Their virtue and integrity were presumably to be enlisted in the service of the rule of law, and in support of determinations by the Supreme Court.

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27. *Lee v. Weisman*, 505 U.S. 577, 646 (1992) (Scalia, J. dissenting). See generally ANTONIN SCALIA, 'A MATTER OF INTERPRETATION 41-47 (1997) (giving a recent limning of Justice Scalia's objection to these and other Supreme Court exercises which abandon the original understanding).

28. *Miranda v. Arizona*, 384 U.S. 436, 524 (1966) (Harlan, J., dissenting).

29. *Mapp v. Ohio*, 367 U.S. 643, 686 (1961) (Harlan, J., dissenting).

30. *Reynolds v. Sims*, 377 U.S. 533, 624 (1964) (Harlan, J., dissenting).

31. *Baker v. Carr*, 369 U.S. 186, 330-349 (1962) (Harlan, J. dissenting).

32. *Reynolds*, 377 U.S. at 624-25.

33. Snowiss, *supra* note 4, at 964-70.

34. See, e.g. THE FEDERALIST NO. 64 (John Jay) (arguing, with regard to the Senate and President, that the Constitutionally-specified selection procedure was supposed to result in the election of "those men only who have become the most distinguished by their abilities and virtue . . .").

But if this was what they believed, the Seventeenth Amendment<sup>35</sup> and the development of political parties have all but eliminated the idea of disinterested virtue in our public officials. All you need to do is look at the sorry reception those of us who believed that virtue and honor were questions important to resolving impeachment charges received in the Senate about a year ago.<sup>36</sup> Time and taste do not permit me to talk about the ludicrous idea of looking for virtue in the current incumbent of the oval office.

But if the essential reinforcing mechanism of virtue in the Legislature and the Executive is no longer there, and it is not, does that mean that the kind of constitutional jurisprudence Professor Snowiss advocates is the only answer? Forgotten in all of this is the method of constitutional change proposed by the framers. It is the Article V amendment procedure.<sup>37</sup> If the Constitution is to be changed, I say let the people do it, not the courts, lest we lose any pretensions at all to republican government.

Let me end by considering Bob Novak's recent column in the *Chicago Sun Times*.<sup>38</sup> Novak claimed that Scalia has taken the position that there are only two Justices who really care about the Constitution any more, him and Clarence Thomas.<sup>39</sup> They are the only two, according to this view, who still believe in interpretation according to original understanding.<sup>40</sup> Also, according to Novak, Scalia has said that if Al Gore is elected, he will resign, because Gore will only pack the Court with more living constitution types.<sup>41</sup> Now many in the legal academy might well look at the prospect of a Scalia resignation and think: "I'd been wavering, but now I have a reason to vote for Al Gore," but I hope they'll hesitate. Because if we hold with Marshall that "we must never forget that it is a [C]onstitution we are expounding,"<sup>42</sup> that Constitution has to have some fixed meaning, and the arguments in *Marbury* and *The*

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35. U.S. CONST. AMEND. XVII (providing for the popular election of Senators, and replacing the old method of selection by state legislatures).

36. Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666 (1999) (making the case for impeachment as a device to promote virtue and honor on the part of federal officials, at least in the case of President Clinton). This article contains an edited version of testimony given before the House of Representatives Subcommittee on the Constitution. The comment in the text about the "sorry reception" of this view flows from the Senate's rejection of the House's recommendation of removal of the President.

37. U.S. CONST. art. V.

38. Robert Novak, *Scalia Hints He'll Quit High Court if Gore Wins*, THE CHICAGO SUN TIMES, April 2, 2000, at 32.

39. *Id.*

40. *Id.*

41. *Id.*

42. *McCulloch v. Maryland*, 4 Wheat (17 U.S.) 316, 407 (1819).

*Federalist No. 78* make no sense unless this is true.<sup>43</sup> *McCulloch* makes me nervous, but even if the result in that case was wrong, the statement on judicial review in *Marbury*, though not original, was correct, and I am going to vote for Bush, hoping Scalia stays on the Court.

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43. This is because those arguments, especially in FEDERALIST NO. 78, accept the notion that the judiciary exercises only judgment, not will, and is only implementing the will of the people, acting as the people's agents. For this to be true, the directions of the principal have to be clear, singular in meaning, and understandable by the agents. *See generally* THE FEDERALIST NO. 78 (Alexander Hamilton).



