The Myth Of Marbury Vs. Madison

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The common understanding of the famous Marbury v. Madison case is that it established the authority of the Supreme Court to determine what the Constitution says. From there, it's held that the Court gets to determine the limitations placed on the federal government as well as the states. In short, the rest of the federal government, and the states, are bound by what the Supreme Court decides.

But is that the truth? A paper from Northwestern University School of Law Constitutional Theory Colloquium Series seeks to clear up the myths associated with the Marbury decision. In the first sentence of his 2004 paper, "The Irrepressible Myth of Marbury," Michael Stokes Paulsen sets the mood for the rest: Nearly all of American constitutional law today rests on a myth.

> "A long, long time ago — 1803, if the storyteller is trying to be precise — in the famous case of Marbury v. Madison the Supreme Court of the United States created the doctrine of 'judicial review.' Judicial review is the power of the Supreme Court to decide the meaning of the Constitution and to strike down laws that the Court finds unconstitutional."

This myth, he continues, allows the Supreme Court to dictate what the Constitution means via "opinions," i.e. ex cathedra pronouncements. Though those rulings are supposed to be binding and create a firm precedent, this doesn't stop them from being overruled by future courts.

"Nearly every feature of the myth is wrong," Paulsen writes. "For openers, Marbury v. Madison did not create the concept of judicial review, but (in this respect) applied well-established principles. The idea that courts possess an independent power and duty to interpret the law, and in the course of doing so must refuse to give effect to acts of the legislature that contravene the Constitution, was well accepted by the time Marbury rolled around, more than a dozen years after the Constitution was ratified."

Alexander Hamilton addressed this in Federalist No. 78, writing that the Constitution itself was supreme over any law or ruling.

> The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to

> them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; **or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents**. . . .(emphasis added).

Yet, Paulsen says, the power of judicial review was "never understood by proponents and defenders of the Constitution as a power of judicial supremacy over the other branches, much less one of judicial exclusivity in constitutional interpretation."

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