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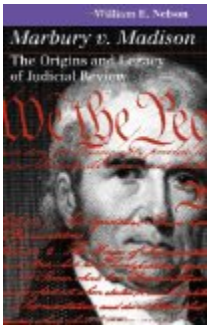
William E. Nelson. *Marbury v. Madison: The Origins and Legacy of Judicial Review.* Lawrence: University Press of Kansas, 2000. vii + 142 pgs. $29.95 (cloth), ISBN 978-0-7006-1062-4.



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Contextualizing <cite>Marbury</cite>

Contextualizing *Marbury*

William Nelson's *Marbury v. Madison* is a slim book (125 pages of text) that covers a good deal of ground–judicial review in theory and practice, domestic and international, from the eighteenth century until the present. Nelson, the Edward Weinfeld Professor of Law at New York University School of Law, emerges as a strong defender of Chief Justice John Marshall's decision–both in its political and judicial contexts. More imaginatively, he offers a clear and convincing survey of how judicial review changed from a politically neutral to a politically charged concept.

Nelson states in his introduction that his "main objective is neither to criticize nor to praise *Marbury v. Madison*." Rather, he seeks to understand the decision "as a step in the ongoing elaboration of American, and, more recently, global constitutionalism."

In a narrow context, that disclaimer holds true, but in fact, Nelson offers a sophisticated defense of *Marbury* from a historian's viewpoint, reminding us of the need to view the decision in the context of its time rather than our own. *Marbury*, Nelson contends, embodied the distinction between law and politics central not only to the era's legal thinking but also to its political culture. Americans of the early 19th century, he notes, looked askance at the increasingly firm partisan split between the Federalists and the Republicans; even after the bitter election of 1800, they hoped that the day of political parties would not be permanent. As part of that belief, they viewed certain questions–such as property rights–as inherently the province of the judiciary, and therefore a proper topic for judicial review rather than the legislative arena.

Nelson stresses how Marshall, whom he carefully paints as a moderate, operated within this legal and cultural framework in writing his opinion in *Marbury*. Because William Marbury's commission clearly represented property, finding for Secretary of State James Madison on the grounds of the case would undermine the distinction between law and politics and would give the political branch excessive power on such questions. But to compel Madison to grant Marbury his commission would involve the Supreme Court squarely in the political dispute still brewing between Federalists and Republicans, and perhaps lead to Marshall's impeachment. And so the decision declared unconstitutional a section of the Judiciary Act of 1789 which, Marshall contended, incorrectly thrust the judiciary into politics in the first place.

This duality–that both halves of the Marbury decision fell on the legal side of the legal/political divide–explains the decision's durability and popularity on all sides of the political spectrum. Nelson reasons that judicial review took root "only because Marshall and his contemporaries believed, at some level, that the principles underlying constitutional government were nonpolitical–that is, that those principles existed independently of the will of the political actors."

With judicial review existing as a last resort to preserve the wall between law and politics, the concept grew in popularity as the nineteenth century progressed, especially at the state level. After the Civil War, however, the

doctrine became controversial in two steps. The first occurred in the latter part of the nineteenth century, when questions that previously had been considered as solely in the constitutional realm–namely, the protection of private property–began to be viewed as political. As later Supreme Courts, from the Gilded Age Court through the Taft era of the 1920s, struck down laws aimed at lessening the power of monopolies and achieving regulation of economic behemoths, reformers began targeting the Court as an anti-democratic bastion determined to protect the interests of the business community at the expense of the people. By the 1920s, then, judicial review had become an inherently controversial issue, defended by conservatives but attacked by reformers.

In theory, at least, the judicial conservatives of the Gilded Age and Taft Courts argued, as had Marshall, that property questions did not belong in politics. Therefore judicial review represented an appropriate response by the Court. Of course, Chief Justices such as William Howard Taft lacked the political tact that had served Marshall so well. But even the original ideological justification for judicial review vanished after the New Deal, as part of the more general shift in which the Court tended to defer to the legislature on economic questions but position itself as the vanguard of the rights-related liberal movement. In line with this transformation of the Court's role, judicial review became a frequently used tool to protect the rights of minorities against legislative majorities. This framework produced a concept of judicial review that, almost by its nature, has forced Justices to confront political decisions.

This latter argument is solidly put–although not, of course, original to Nelson. His interpretation of Marshall's activities is impressively argued, and his reasoning for why judicial review became controversial convincingly points to the Gilded Age Court rather than *Marbury*. Only the book's concluding section, which looks at the expansion of judicial review internationally, since 1945, seems forced: the issues under discussion here struck me as veering a long way from Marshall. Otherwise, this book offers a fine review of the topic, filled with original insights and particularly useful for courses in constitutional or legal history.

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