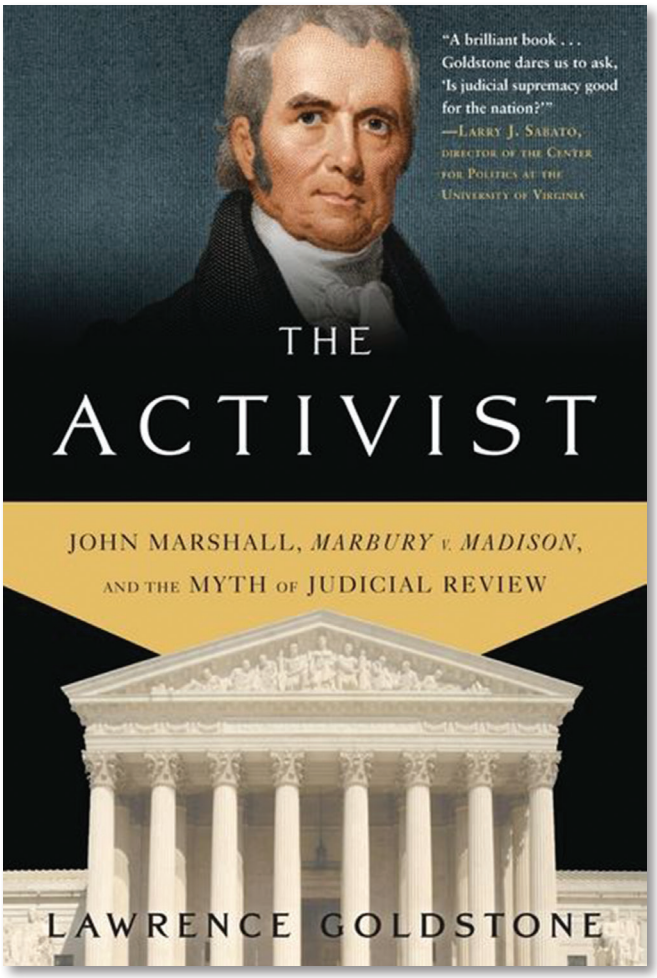
BOOK REVIEW

By STEVEN R. SHER

A Seminal Case

How Chief Justice John Marshall Came to His Monumental Decision

The Activist: John Marshall, "*Marbury v. Madison*", and the Myth of Judicial Review
Written by Lawrence Goldstone
304 pages
$18.00, Walker Books, 2008



Senate confirmation hearings for a nominated Supreme Court justice have always fascinated me, even more so since I began to teach a course titled "Government Regulation of Business," covering federal-state relations and other constitutional issues such as preemption and the Supremacy Clause. Always intensely interested in a potential justice's interpretation of the Constitution, I make it important to my Gov. Reg. students as well.

So, when I recently found, buried away in one of my piles of books, Lawrence Goldstone's "The Activist," subtitled "John Marshall, *Marbury v. Madison*, and the Myth of Judicial Review," I grabbed it.

Marbury v. Madison - a seminal case if there ever was one, a case we all "remember" from law school as having established the theory of judicial review - how much do most of us really know about it? After asking several of my colleagues who don't practice constitutional law, I was not surprised that they (like me before Gov. Reg.) knew little more than the holding, and that the facts included a midnight judicial appointment of some kind, at the very transition of presidents from Adams to Jefferson, of somebody named Marbury.

Having read only textbook abridgements of the case, I really didn't know how the case arose, nor did I understand how Chief Justice John Marshall came to his monumental decision. The book's appendix, however, has the full opinion. Reading it was revelatory. That, plus Goldstone's telling of the real-life milieu, which generated both the case and the opinion, put it into a logical and now easily understood perspective, one showing that very local and fairly petty politics may have had as much influence on Marshall's opinions as did notions of lofty constitutional ideals.

In briefly limning the major "schools" of constitutional interpretation, Goldstone goes much deeper into what most "lay lawyers" (those not well versed on the details of constitutional interpretation) know as "strict construction" (generally the conservative view) and "broad construction" (generally the liberal view). Commentators, such as the late Ronald Anderson, often referred to these, respectively, as the "bedrock" view and the "living document" view. But, as Goldstone points out, there are many shades to these interpretation theories, especially on the strict, or conservative, side.

For example, one shade of interpretation you are probably aware of is that of "original intent," whose

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adherents seek to ascertain what the framers specifically intended by their words. Then there is what's known as "originalists" or "textualists." The proponents of the textualist school care only for what the very words are and the fairly understood meaning of those words at the time they were put into the Constitution. The late Justice Scalia was a textualist, who "didn't … care about the intent…[or] if the framers… had some secret meaning in mind when they adopted its words…"

Marbury was a fairly strict construction decision. But this can be compared with Marshall's broad construction of the "necessary and proper" clause in *McCulloch v. Maryland*. Consistency a hobgoblin? Not for Marshall.

Goldstone tells us the Supreme Court took 15 months to decide *Marbury* and "…with inspired misdirection [Marshall] began his opinion with a complete validation of Marburys' claim. The chief justice then used… a ploy that allowed him to shift the argument from the validity of Marbury's suit to the validation of Section 13 [of the Judiciary Act of 1789]," which, he ruled, violated Article III of the Constitution. In doing so, Marshall had no choice but to deny to Marbury the very relief that the chief justice had just said Marbury was entitled.

What was the problem with Section 13 of the act? It provided that the Supreme Court, as part of its original jurisdiction, could use the remedy of *mandamus*, a remedy that Article III of the Constitution did not specifically provide for, so that portion of the 1789 act had to be set aside. Because of this, Marshall ruled that the remedy Marbury sought, even if justly deserved, was simply not available to him. Fascinating.

All the sources I have read say that there was no debate at the Constitutional Convention about whether there would be a federal judiciary. That was understood to be a given. What jurisdiction those courts would have, however, was subject to debate. But, the concept of judicial review was not part of those debates, and constitutional scholars have long opined it was because this power was simply assumed to exist.

It is this assumption, however, that Goldstone seeks to disprove. His thesis is that it was never debated at the convention because the framers never considered the possibility that unelected officials with lifetime tenure could have so much power in a checks and balances governmental system! This is serious deviation from generally accepted wisdom.

Reading the entire *Marbury* opinion, and Goldstone's introductory chapter outlining his thesis, was enough, by itself, to whet my curiosity. Well done. So, does he make his point? Does it carry? If you care, read the book.

But strict, broad, original intent, textulism, *et. al*., are not only judicial philosophies, they are also political positions. It is the spillover of these terms from the area of the theoretical legal philosophy into the political arena that is another theme of Goldstone's book. And he asks: Are the justices judicial or political beings? The Constitution, he offers, is not only the nation's "supreme legal instrument, but also its preeminent political document."

The conclusion that the court is as political as the other two branches takes up most of the rest of the book.

This sets up an ironical twist, as he tries to balance the purely legal application of the schools of interpretation with the political application that, he says, is still at the root of our present-day debate over strict versus broad construction. Trying to "disentangle the political and the judicial qualities of both the Constitution and the [Supreme] Court" constitutes a crucial purpose of the book.

The twist is that in broadly construing that the court has inherent power to interpret the Constitution and the law made under it, i.e., creating the power of judicial review, Marshall in the same opinion then strictly construed the Article III powers by finding that the granting of the power of mandamus in the judiciary Act of 1793 violated the Constitution because no such power was expressly granted to the Court. So the textualists, who overturn legislation by "trying" and failing to find permissible powers if they weren't expressly mentioned, do so using judicial review, a power that was not specifically mentioned in the Constitution. How about that!

After setting forth his major theses early in the book, Goldstone, in the other 22 chapters, variously describes aspects of U.S. history as it relates to these theses. We have the Constitutional Convention; the ratification process; Adams and Jefferson's enmity; the legislative and presidential elections; the first chief justices (John Jay, John Rutledge, Oliver Ellsworth); U.S. foreign policy, including the Jay Treaty and the XYZ Affair; the career and ascendency of John Marshall, his supporters and opponents pre- and post- his appointment to the Court; all of which set up and culminate in how Marshall came to his *Marbury v. Madison* opinion.

Much of this I did not know, and what I did know was expanded in great detail, -- so much so that I admit I got lost in the minutia. All the tiny, intimate details of the political infighting, with its many characters, was, to me, difficult reading. I started to skim at times, but that was with the perspective of the timely writing of this review. However, in the near future I intend to tackle it again… it's just too interesting to let go. ■

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