"Hither Shall You Go, But No Further"

George Wythe and the Origin of Judicial Review

Constitutional law turns 200 years old in February with the anniversary of Chief Justice John Marshall's judicial review statement in *Marbury v. Madison*. To be exact, it was February 24, 1803, when Marshall declared "[I]t is emphatically the province and duty of the judicial department to say what the law is."

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By Dennis J. Callahan

For us to consider *Marbury* the birth of constitutional law is not hyperbole. Supreme Court opinions dominate the modern day Constitutional Law 101 classroom, whether it is a decision delimiting the reach of legislative authority under the Commerce or Takings Clauses, or the Court's review of legislation as applied by executive branch officials or administrative agencies. Even separation of powers discussions typically revolve around Supreme Court decisions such as *Morrison v. Olson* and *The Steel Seizure Cases*. Few constitutional law courses meaningfully engage congressional debates concerning the constitutionality of proposed legislation or the Justice Department's Office of Legal Counsel opinions on constitutional issues. Even fewer constitutional law courses address any of the 50 state constitutions.

The two main players in *Marbury*—John Marshall and Thomas Jefferson—are rightly celebrated for setting the trajectory of constitutional law as we know it today. What many lawyers do not know is that Marshall and Jefferson honed their understanding of constitutional interpretation under the guidance of one of the most influential law professors ever, George Wythe. Wythe (pronounced "with") was a seminal figure in the development of legal education and the establishment of judicial review, and he played a critical role in the adoption of the Constitution. Wythe's legacy has been overshadowed by that of other founders because crippling arthritis limited his written output and because many of his writings have been lost or destroyed. However, the surviving historical record captures Wythe's genius and influence, and reveals that this law professor merits recognition in the pantheon of constitutional law.

Wythe was widely regarded as the best lawyer in Colonial Virginia and one of the best in America. He mentored Jefferson in law for three years in the early 1760s. Wythe risked his life and his elite position by signing the Declaration of Independence. In 1779, Governor

Jefferson established the first professorship of law in the New World at the College of William and Mary. George Wythe was the natural choice for the job.

Creating the curriculum from scratch, Wythe developed a model of legal education that still dominates American law schools 220 years later. Wythe mixed lectures with Socratic method, and his innovations included mock legislative sessions and moot courts. John Marshall was among Wythe's first class of students, and Wythe's roster of students reads like a who's who of the founding and early national periods. In addition to Jefferson and Marshall, Wythe taught James Monroe, Henry Clay and eight other senators, as well as numerous House members and state governors.

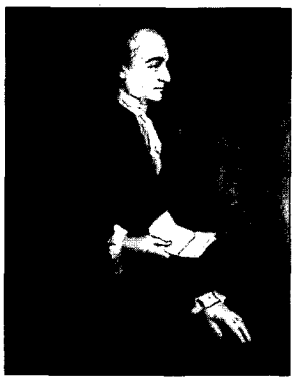
Wythe also played a critical role in the ratification of the Constitution. Virginia was the country's richest and most populous state at the time of the state ratification conventions. In the summer of 1788, the conventions of the North's anchor state of New York and that of Virginia kept tabs on each other's progress. Without ratification by both of these key states, the success of the Constitution could not be guaranteed. George Wythe was elected to preside over the fierce debates at the Virginia Ratification Convention, which included many delegates who were his former students. In 1788, Wythe was a revered 62-year-old legend, and his strong support of the Constitution, and his call for a vote after an arduous month of debate likely were the deciding factors leading to the 89-to-79 ratification. New York followed Virginia's lead and ratified the Constitution one month later.

By now, most of us know the story of Marbury's mislaid commission. Federalist President John Adams and the Federalist-controlled Senate, sensing their party's collapse, appointed and confirmed dozens of "midnight judges" in the final days of the Adams administration. In this closing rush of business, Secretary of State John Marshall, who had recently been confirmed as Chief Justice, failed to deliver a stack of judicial commissions. Upon assuming the secretary of state's office, James Madison found these commissions on his desk and President Thomas Jefferson instructed Madison to withhold delivery of some of them, Marbury's included.

Marbury sued Madison for delivery of his commission under the provision of the Judiciary Act of 1789 conferring original jurisdiction upon the Supreme Court to issue writs of mandamus ordering executive branch officials to do their sworn duty. Marshall, a staunch Federalist himself, sought to elevate the Supreme Court to coequal status with the Congress and president, and thus wished to avoid an early head-on collision with Jefferson, his ideological nemesis and distant cousin. In his unanimous *Marbury* opinion, Chief Justice Marshall agreed that Marbury had a right to his commission and that Madison had a duty to deliver it. Marshall nonetheless refused to issue the writ, reasoning that the jurisdictional component of the Judiciary Act contradicted the Constitution by expanding the Supreme Court's original jurisdiction beyond the narrow limits prescribed in Article III. "[A]n act repugnant to the Constitution" could not become law, Marshall wrote, because the Constitution is "a superior paramount law, unchangeable by ordinary means."

Though *Marbury v. Madison* was an undeniably brilliant decision, Chief Justice Marshall owed a great debt to his mentor for it. While teaching at William and Mary, Wythe remained an active member of Virginia's highest court. In the 1782 case of *Commonwealth v. Caton,* Judge Wythe established judicial review of legislation under the Virginia Constitution. With Marshall and other dignitaries packing the courtroom, Wythe read his opinion from the bench. *Marbury* would echo it 21 years later. Wythe announced:

> [I]f the whole legislature, an event to be deprecated, should attempt to over-leap the bounds, prescribed by them by the people, I, in administering the public justice of the country, will meet the united powers, at my seat in this tribunal; and pointing to the constitution, will say to them here is the limit of your authority; and hither shall you go, but no further.



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At the bicentennial of judicial review, while we rightly reflect on the constitutional checks and balances given life by Marshall, we should also honor his teacher who has been largely lost to history. Having adopted judicial review under the state constitution six years before leading the federal Constitution's ratification in Virginia, George Wythe surely expected a similar judicial check on the other branches of the federal government. A patriot, scholar, innovative teacher, renowned lawyer, eminent jurist, and champion of the Constitution, George Wythe holds a unique spot in our nation's constitutional history and in our history of legal education. On February 24, 2003, while commemorating Marshall, Jefferson, and the *Marbury v. Madison* decision, we should recognize Wythe's contributions along with those of his more famous students. ■

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