

# *Mistretta* versus *Marbury*: The Foundations of Judicial Review

Maxwell Stearns\*

At the beginning of my course on constitutional law, I ask my students to consider why nearly every casebook on the subject,<sup>1</sup> begins with *Marbury v. Madison*.<sup>2</sup> Except for the suspended June and December 1802 terms,<sup>3</sup> the historical record suggests that the Court's plate was quite full long before *Marbury*. Indeed, such pre-chestnuts as *Hylton v. United States*,<sup>4</sup> *Ware v. Hylton*,<sup>5</sup> and *Calder v. Bull*,<sup>6</sup> laid much of the conceptual foundation for the doctrine of judicial review. But in contrast with these cases, *Marbury* alone succeeded in carving out of the amorphous boundaries of political science, the unique discipline of constitutional law. *Marbury* did so by resting final decisional authority for questions of constitutional interpretation in a single locus, the federal judiciary. Chief Justice John Marshall's assertion that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"<sup>7</sup> separated, and insulated, constitutional interpretation from the power plays—or politics—that would otherwise have governed critical disputes on constitutional interpretation among the three branches or between the federal and state sovereigns.

Perhaps a more provocative question—or at least one more consistent with this minisymposium's overall theme<sup>8</sup>—is how I would begin teaching

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\* Associate Professor of Law, George Mason University School of Law. B.A. 1983, University of Pennsylvania; J.D. 1987, University of Virginia School of Law. I would like to thank the following for their helpful comments and suggestions: Bruce Kobayashi, Peter Letsou, David Lombardaro, Sid Moore, and Erin O'Hara.

1. *But see* DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* (1993) (beginning with *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

2. 5 U.S. (1 Cranch) 137 (1803).

3. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 30 (2d ed. 1991).

4. 3 U.S. (3 Dall.) 171 (1796) (discussing, but not exercising, the power of judicial review).

5. 3 U.S. (3 Dall.) 199 (1796) (exercising judicial review of state law).

6. 3 U.S. (3 Dall.) 386 (1798) (debating the issue of whether the power of judicial review of state laws is limited to violations of the Constitution's express text). For a detailed discussion of these and other pre-*Marbury* Supreme Court cases, see David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 655-56 (1982).

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

8. The soliciting letter stated: "Please do not feel constrained to write on a case that others will be familiar with—in fact, cases off the beaten path may prove to be the most interesting and useful."

constitutional law *but for Marbury*. In this hypothetical, non-*Marbury* world, I would begin with *Mistretta v. United States*,<sup>9</sup> a case written two hundred, rather than a mere fifteen, years after the ratification of the Constitution. In contrast with *Marbury*, which, although masking several deeply important inquiries,<sup>10</sup> possesses a near irrefutable logic within our constitutional scheme, *Mistretta* edifies our understanding of constitutional jurisprudence by getting the comparably important normative inquiries that it masks wrong.

The *Mistretta* Court rejected a separation of powers challenge to the United States Sentencing Commission. The Commission, housed in the judicial branch, has seven members including three Article III judges, all appointed by the President. Its mandate is to issue and to revise periodically a set of uniform sentencing guidelines, which shall become effective and binding upon all federal judges within six months of enactment unless superseded by statute.<sup>11</sup> The critical passage from Justice Blackmun's opinion for the Court, upholding the Sentencing Commission, states:

Prior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them. The Sentencing Commission does no more than this, albeit basically through the methodology of sentencing guidelines, rather than entirely individualized sentencing determinations.<sup>12</sup>

In teaching *Mistretta*, I ask my students whether the Commission's functions, as Blackmun has described them, sound judicial or legislative. While the majority of students invariably chooses the latter, they find themselves at a loss when asked to articulate why. In their second year of law school, my students find themselves in the awkward position of being unable to answer a question that most admit they could have answered in the sixth grade, namely what the difference is between adjudication and

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While *Mistretta* is not obscure, it certainly is a better candidate for nonobviousness than is *Marbury*.

9. 488 U.S. 361 (1989).

10. For a particularly edifying discussion of the inevitability in *Marbury* of masking the question "who gets to decide who gets to decide what the law is?" and the antecedent question, "who gets to decide that question?", and so on, see John M. Rogers and Robert E. Malzon, *Some Lessons about the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 1003-05 (1992) (explaining the inevitable self-reference problem created in the establishment of judicial review).

11. *Mistretta*, 488 U.S. at 368-70; see also Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1387 n.241 (1995) (outlining the statutory scheme).

12. *Mistretta*, 488 U.S. at 395.

legislation. And oddly enough, I believe, this inability results from good, rather than deficient, legal training.

My students readily reject the most obvious distinctions. It is simplistic to suggest that legislatures create law and that courts apply law. Nor, admitting that both institutions make law, do legislatures do so broadly, affecting large numbers of people, and courts, narrowly, affecting only, or even principally, the parties before them. And even admitting that both institutions make law affecting large numbers of people, it is not the case that legislatures alone do so exclusively with prospective effect, while courts resolve retroactive rights and liabilities. Modern constitutional litigation defies all three of these easy divisions. Courts and legislatures make law and lots of it. Class actions and large institutional litigation have rendered the number of persons on the margins of major constitutional precedents as large, if not larger, than those of even the most expansive statutes. Finally, declaratory judgment actions and modifications of such doctrines as ripeness and mootness have created precedents whose essential operations are prospective.

Nonetheless, I argue, two distinctions remain, both of which are thwarted by Justice Blackmun's aggregation principle. The legitimacy of judicial, including constitutional, lawmaking, rests upon the premise that courts will limit their lawmaking powers—whether broad or narrow and whether primarily prospective or retroactive—to an *ad hoc* and as-needed basis. Courts are assumed to exceed their lawmaking powers when they resolve issues other than as needed to resolve cases properly before them.<sup>13</sup> In building no less than two qualifications into the power of judicial review—a constitutional grant of jurisdiction and appropriate deference to the constitutional prerogatives of the co-equal branches—Marshall implicitly recognized both of these critical distinctions.

In the famous *Marbury* quote set out above, Marshall spoke not only of the federal judiciary's "province," but also of its "duty." Duty suggests that in some cases, courts cannot avoid making law, even when doing so requires striking down a federal statute. But in adding two limits to the Court's lawmaking powers, Marshall also recognized that the power to say what the law is *is not* the power to make law at will. That power rests with Congress. Ironically, perhaps, Congress's greatest lawmaking power, which the term "duty" reveals the federal judiciary lacks, is the power *not* to make law. Congress, unlike the federal judiciary, is entirely the master of its own timing in lawmaking. The passivity of judicial, as opposed to

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13. For my fuller treatment of this distinction and its relationship to standing, see Stearns, *supra* note 11 (setting out a social choice theory of standing); see also Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. PA. L. REV. 309 (1995) (providing comprehensive empirical support for a social choice theory of standing).

legislative, timing legitimates judicial lawmaking, including constitutional judicial review.

The issue in *Mistretta* was not whether the cumulative impact of individualized sentencing approaches that of uniform sentencing guidelines. Instead, it was whether an agency housed in the federal judiciary has the constitutional authority to make aggregate sentencing guidelines, which are not made on an *ad hoc* and as-needed basis. Consistent with *Marbury*, the answer is almost certainly no.

In my first week as a law student, a professor told the class that after we become lawyers we will never be able to “go back” and think about problems in a manner unaffected by our training. I have repeated that to my own students. For this constitutional law professor, a favorite opinion is not one that adds layers of complexity to my already transmogrified—or lawyerly—view of the world. Instead, it is one that forces me to try to go back. I do not imagine that my hypothetical sixth graders, however precocious, would have devised my explanation for the difference between adjudication and legislation. *Mistretta* is my favorite opinion because it has forced me, using a lawyer’s training, to bridge the gap between my present knowledge and what I have long known made good sense.