The Marbury v. Madison Mantra
by Chuck Baldwin's Son, Timothy Baldwin
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[Note: My son, Tim, writes today's column. He is an attorney who received his Juris Doctor degree from Cumberland School of Law at Samford University in Birmingham, Alabama. He is a former felony prosecutor for the Florida State Attorney's Office and now owns his own private law practice. He is author of a soon-to-be-published new book, entitled FREEDOM FOR A CHANGE. Tim is also one of America's foremost defenders of State sovereignty.]

The arguments against the power of the states to arrest federal tyranny are as predictable as the sun coming up in the morning, and they are as philosophical in nature as the Declaration of Independence. One of the most commonly used arguments against such a State power is the United States Supreme Court (US S CT) dicta opinion in Marbury v. Madison in 1803, written by Chief Justice John Marshall. Before getting into the misunderstandings and misapplications of that infamous decision, we must first recognize the source and character of Marshall's opinion. As Marshall himself admitted that the US is to be a country of "laws, not men," we must establish that Marshall's opinion does not equate to the "supreme law of the land" which the states and individuals are bound to obey. If our submission only requires that the US S CT speak, then we do not live as freemen, but as slaves.

Marshall was an ardent member of the Federalist Party (a pro-centralist party) and served as the Secretary of State in the pro-centralist administration of President John Adams, who appointed Marshall to the US S CT in 1801 at the "midnight" hour before Thomas Jefferson was sworn into office as President of the US. Marshall's nationalist opinions were no secret either. Marshall believed that the US Constitution and Union were formed by the aggregate whole of the American people, and not by a compact of the states; that the Union formed "one nation, indivisible" and not a confederation of states; that State sovereignty as expressed in the Tenth Amendment equated more to a general idea than to any real applicable and relevant State power over the federal government; that the Constitution must be liberally interpreted for the sake of expanding federal powers at the expense of State sovereignty; and that the idea of State sovereignty was literally ridiculous. By the way, even most self-called conservatives today probably subscribe to these political beliefs, not even knowing the real historical facts behind such fallacious ideology.

Concerning Marshall's philosophical belief relative to the formation of the USA, this historical fact must be admitted. It is crucially important for our discussion today in America. Historian and politically-motivated author, Edward Samuel Corwin, said of Marshall in his book, "John Marshall and the Constitution" (New Haven, CT, Yale Univ. Press, 1920), p. 34: "[Marshall's] attitude [to strengthen the national power and to curtail State legislative power] was determined not only by his sympathy for the sufferings of his former comrades in arms and by his veneration for his father and for Washington . . . but also by his military experience, which had

RENDERED THE PRETENSIONS OF STATE SOVEREIGNTY RIDICULOUS IN HIS EYES." (Emphasis added.) There is no question that Marshall had a pre-destined belief against State sovereignty in favor of national power. Corwin describes Marshall's political belief regarding the US as a "nationalistic creed."

So, is the nationalistic political persuasion of one man (appointed by a nationalistic President) and one court to form the basis of the true understanding of the nature and character of the USA? After all, Marshall admitted that the US is established by the rule of law, and not the rule of men. So, by Marshall's own definition in Marbury v. Madison, a US S CT opinion does not establish law, but rather should reflect what the paramount law already is: "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it." So, as the age-old question has gone: who determines whether or not the federal government has usurped power from the people of the states and from the State governments? The Marbury v. Madison believers are likely jumping up and down right now, raising their hands, saying, "Oh! Pick me! Pick me! I know! I know!" I can just see smirks on the faces of most ABA-law school graduates as they condemn anyone who would advocate another position to be true which is contrary to what Marshall presupposed to be true. Of course, their rationale goes as deep as a kiddy-pool and their thought process as far as an inner-city driveway.

Since 1803, the nationalists have pointed to Marshall's declaration to conclusively say the states have no power over the opinion of the US S CT, for as Marshall states: "It is emphatically the province and duty of the judicial department to say what the law is." From this, most American lawyers and law students come to the conclusion that there is no authority above and beyond the US S CT's interpretation of the US Constitution. Whatever the US S CT rules becomes "settled law" and the states are completely bound--of course, unless the US S CT says something different later. I was taught this in law school and every other ABA-accredited law school in America teaches this. But a true legal study of Marbury v. Madison reveals that Marshall's opinion (which was actually dicta) never addressed the issue of State sovereignty whatsoever. American historian, Forrest McDonald, reveals this fact in his book, "State's Rights and the Union: Imperium in Imperio, 1776-1876." McDonald states, "Marshall was careful not to claim that the Supreme Court was the SOLE or FINAL ARBITER of acts of Congress." (Emphasis added.) Ibid., (Lawrence, KS, Univ. Press of Kansas, 2000), p. 56. This is, in fact, the case.

Perhaps most telling about Marshall's silence on the issue of being the sole or final arbiter is the fact that just a few years prior to his decision, Thomas Jefferson and James Madison, through the Virginia and Kentucky Resolutions of 1798 and 1799, had advocated the State's ability to actively nullify and resist unconstitutional actions from the federal government. Since Marshall's opinion was mostly dicta anyway--meaning it had no relevance to the issue at hand--why not go ahead and state that the US S CT is the ONLY final arbiter of the US Constitution? But Marshall never did, and neither has any US S CT decision since Marbury v. Madison.

Thus, when someone suggests that the states possess the sovereign power to arrest federal encroachments outside of constitutionally enumerated powers, the nationalists emphatically argue their unsupported conclusion that the USA is one nation, indivisible, where the US S CT possesses the sole authority as the final arbiter on all matters politically relative to the US

Constitution, and to suggest otherwise is treason!--even when the most authoritative sources have been so pointedly laid out to the contrary. Marshall's opinions have not settled this matter, and the USA must come to grips with who we are, what we are and how we are.

What's more, Marshall's opinions of national expansion were conclusively derived from one main principle: that the USA is a nation formed by the whole people and not by individual states through a compact. This fact was admitted by Marshall-lover, Corwin, in 1920. Corwin clearly expresses this point as follows:

"The great principles which Marshall developed in his interpretation of the Constitution from the side of national power . . . were the following: '(1) THE CONSTITUTION IS AN ORDINANCE OF THE PEOPLE OF THE UNITED STATES, AND NOT A COMPACT OF THE STATES. (2) Consequently it is to be interpreted with a view to securing a beneficial use of the powers which it creates, not with the purpose of safeguarding the prerogatives of state sovereignty. (3) The Constitution was further designed . . . to be kept a commodious vehicle of the nation life . . . . (4) [The national government] is a sovereign government, both in its choice of the means by which to exercise its power and in its supremacy over all colliding or antagonistic powers. (5) The powers of Congress to regulate commerce is an exclusive power, so that the States may not intrude upon this field even though Congress has not acted. (6) The National Government and its instrumentalities are present within the States, not by the tolerance of the States, but by the supreme authority of the people of the United States.' Of these several principles, THE FIRST IS OBVIOUSLY THE MOST IMPORTANT AND TO A GREAT EXTENT THE SOURCE OF THE OTHERS." "John Marshall and the Constitution," pp. 144-145. (Emphasis added.)

Corwin admits that all of Marshall's opinions were based upon the presumption that the USA is a nation formed by the whole people as one body politic, and not by the individual, sovereign states via a compact. From this premise comes the vast expansion of federal power under the guise of constitutionality. Thus, if it were to be contrarily presumed that the USA is in fact a compact acceded to by the states, then the rules of interpretation that Marshall and subsequent US S CT justices used were wrong and require a different outcome. This fact cannot be overstated and is the source of all of the federal tyranny that many of you reading this article complain about. Thus, it behooves Americans to truly know WHAT IS THE TRUE NATURE AND CHARACTER OF OUR UNION: is it a National government formed by the whole people, or is it a compact among the states and acceded to by the states (otherwise known as a Confederacy)?

This article does not allow me to expound upon this subject in great depth, but it should be sufficient at this point at least to call into question Marshall's presupposition regarding the nature and character of the USA by referring to some of the most authoritative sources on the subject during the formation of the US Constitution. Let us start with James Madison, who was one of the Federalist Paper authors and considered to be the Father of the US Constitution. In Federalist Paper 39, Madison examines the nature and character of the formation of the Union under the US Constitution. He admits that the US was formed by a federative (league of states) and NOT a national act. Madison proclaims:

"[T]he Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but . . . this assent and ratification is to be given by the people, NOT AS INDIVIDUALS COMPOSING ONE ENTIRE NATION, BUT AS COMPOSING THE DISTINCT AND INDEPENDENT STATES TO WHICH THEY RESPECTIVELY BELONG. It is to be the ASSENT AND RATIFICATION of the SEVERAL STATES . . . The act, therefore, establishing the Constitution, will NOT BE A NATIONAL, but a FEDERAL act.

"That it will be a federal and NOT A NATIONAL ACT . . . THE ACT OF THE PEOPLE, AS FORMING SO MANY INDEPENDENT STATES, NOT AS FORMING ONE AGGREGATE NATION, IS OBVIOUS from this single consideration, that it is to result neither from the decision of a MAJORITY of the people of the Union, nor from that of a MAJORITY of the States. It must result from the UNANIMOUS ASSENT OF THE SEVERAL STATES that are parties to it . . . [T]he new Constitution will . . . be a FEDERAL, and not a NATIONAL constitution." (Emphasis added.)

Madison pens in the clearest of terms that the US Constitution is a compact assented to by the State sovereigns in their legal capacities as individual bodies politic, and NOT as one mass of people, forming one body politic. If this were not enough to at least raise a serious question as to what has been shoved down our throats for 150 years, consider that even Alexander Hamilton confirms that the US Constitution is a compact between the states, and NOT a national act of the whole people. He says in Federalist Paper 85:

"To its complete establishment throughout the Union, [the US Constitution] will therefore REQUIRE THE CONCURRENCE OF THIRTEEN STATES . . . [T]he necessity of moulding and arranging all the particulars which are to compose the whole, in such a manner as to satisfy all the parties to the COMPACT . . . WE MAY SAFELY RELY ON THE DISPOSITION OF THE STATE LEGISLATURES TO ERECT BARRIERS AGAINST THE ENCROACHMENTS OF THE NATIONAL AUTHORITY." (Emphasis added.)

Just in these two short excerpts from Founding Fathers, James Madison and Alexander Hamilton, we see that Marshall's premise that the USA is a nation formed by the whole of the people and not by the compact of the states is seriously called into question, which, of course, calls into question all of the principles of constitutional interpretation and resulting conclusions which derive from that false premise.

An honest look at the presumption that only the US S CT has the power to interpret federal encroachments on State sovereignty will reveal that the states have more power than what has been admitted ever since Marshall took the position of chief justice of the US S CT. For as Marshall admits in Marbury v. Madison, "questions [that are] in their nature political . . . CAN NEVER BE MADE IN THIS COURT." (Emphasis added.) By definition, issues of State sovereignty are in their nature political, just as a treaty between the USA and foreign countries regards the matter of political sovereignty. Therefore, when our states begin to assert their natural and sovereign right of self-defense against federal tyranny, each State will answer to their sovereign--the people--and NOT to the United States Supreme Court.

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