

Historical Headnotes: A Case Study of a Research Problem

by Amelia Landenberger

This article began as a case study of a legal research problem: how to properly attribute a note that was printed in the margins of a historical case reporter. The article guides the reader through various methods of investigating ambiguities in historical legal texts, including comparing the electronic and print versions of the text, contacting editors at Westlaw and Lexis, conducting research in contemporary newspapers, and researching the author of the document. The article also addresses the importance of early court reporters and court reporting generally. It concludes with a reminder to carefully consider sources of information and the reporters who compile case reports. While today's teams of reporters and editors might be more reliable than those early court reporters, it is a mistake to presume they are infallible. This article is not intended as a definitive answer to a question of historical importance, but rather serves as a roadmap for investigating challenging historical legal research questions.

Marbury v. Madison

*Marbury v. Madison*¹ is such an iconic case in the American legal system that it seems more likely to be a textbook sample problem than the origin of a perplexing legal research question. But that is where this research question began. On my first day of work as a law librarian, I was asked whether a researcher could cite to a note in the case's margin as the work of Chief Justice Marshall, the author of the opinion. The note neatly summarized the case and made a point that was not as clearly stated in the case itself. The question was whether the note in the margin was part of Chief Justice Marshall's written opinion of the Court or whether the note was that of the court reporter, William Cranch. This distinction is very important because, as is discussed below, citations to headnotes or editorial content are not appropriate in legal writing. Citations may be made to the text of the decision of the case, or to the dissenting opinions, but not to the headnotes or summaries, which might not accurately state the decision.²

While the authorship of the text in such a famous case would seem straightforward, the attribution was ambiguous because of the

way the case appeared in the WestlawNext published opinion online. After the headnotes, but before any of the text, was the name MARSHALL, in all capital letters (see figure 1). The text in question involved the three paragraphs immediately following Marshall's name. To confuse the issue further, the page numbering of those first few paragraphs appeared, at first glance, to be completely out of order.

Reviewing the Print Layout

The first step in addressing this problem was to view the page in the original layout. This case is presented on WestlawNext in a searchable text format. However, to solve the page number discrepancy, it was helpful to view the page in its original printed layout. Fortunately, the *United States Reports* have been digitized and are available through the online subscription database HeinOnline. Upon viewing the electronic reproductions of the original pages on HeinOnline, I quickly discovered that WestlawNext's page numbering was not an error. Rather, the paragraph in question was printed in the margins of pages 138 and 139 (see figures 2, 3, and 4). (Disappointingly for those who study marginalia, or marginal notes, this paragraph lacked noteworthy characteristics. It was neither handwritten nor illustrated with gold paint, but was merely printed in the margins of two pages in a very small font.) The body of the text began on page 137, which explains why the numbering initially appeared to be out of sequence. While there are advantages to searchable text, in this particular case, viewing the original document helped me understand the relationship between the blocks of text on the page.

Comparing Lexis Advance and WestlawNext

Having discovered why WestlawNext's page numbering appeared so confusing, I next compared Westlaw's presentation of the case with that of Lexis Advance. On Lexis Advance, the paragraphs in question were clearly marked as the Reporter's Notes in a section titled "Syllabus." Intrigued by this discrepancy, I contacted editors at both Lexis and Westlaw to see whether they could give

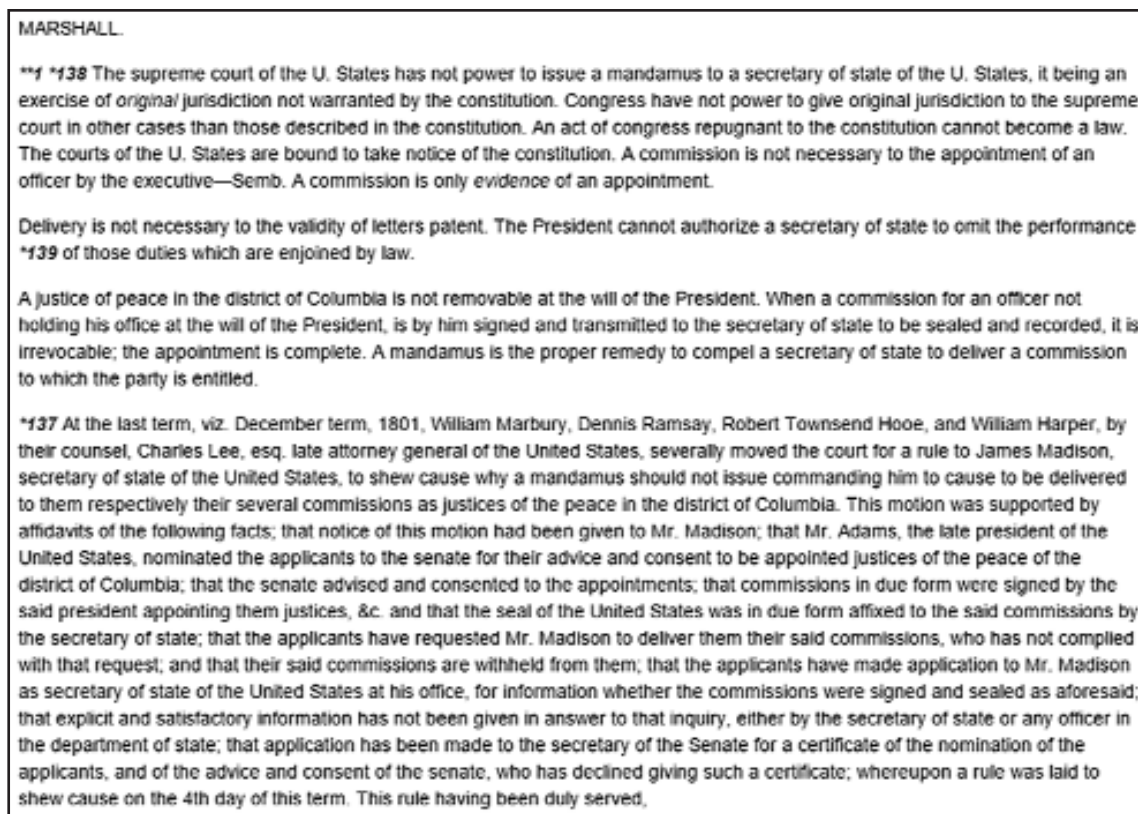
About the Author

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Fig. 1.



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me an attribution for the text in question. I knew I was unlikely to receive a definitive answer because I doubted that either company had the original document for the case. (Both companies rely on the printed versions of the reporters for their information.)

I contacted the Westlaw reference attorneys via email. They informed me that they did not have the original source material and were unable to ascertain who wrote the text in question, although it appears that it was probably not Marshall.³ Similarly, the representative from Lexis suggested that the text was most likely written by the reporter, but Lexis could not confirm the authorship.⁴ They both agreed that although the text was most likely authored by Cranch, it was impossible to say for certain.

Professors and librarians often remind students that the editors of legal documents are not infallible. Students are told to use secondary sources and editorial enhancements as tools, not as authority. However, for someone seeking to interpret or properly attribute an editorial note, contacting the editors themselves may be the most efficient course of action. From my perspective as a researcher, I recommend that anyone questioning why something is presented differently in two legal resources try calling the editors of those resources.

Research in Contemporary Newspapers

The next avenue of research I explored was the newspapers of the day. In 1803, when *Marbury* was decided, some newspapers printed full-text versions of the decision. I searched Gale's "19th-Century U.S. Newspapers" database and found a newspaper that reprinted the entire opinion without the note in question.⁵ This reinforced my growing suspicion that Cranch had added his own notes to the text of Marshall's opinion for publication in his reporter.

Early Supreme Court Reporters

The newspaper research helped me understand the importance of the work of the early Supreme Court reporters and, more specifically, the importance of William Cranch, the second U.S. Supreme Court reporter. Cranch was the nephew of John Adams, who appointed him as an assistant judge of the District of Columbia Circuit Court.⁶ Cranch started reporting on Supreme Court cases following a failed business venture that left him in need of income.⁷

One newspaper I found during my research summarized the case and noted that the full opinion would have to wait until the paper received a copy of the opinion from Cranch.⁸ Today, while case reporters are still important, Supreme Court opinions are released directly to the public on the Court's website. In 1803, it would have been impossible for some members of the bar to have read *Marbury* without Cranch's work.

Cranch was, together with the other early Supreme Court reporters, instrumental in establishing a system of case law reporting in the United States. Yet Cranch, while essential, was not infallible. In the introduction to his first volume, he describes his own work as imperfect, apologizing for his summaries of counsel's arguments and admitting he may have "omitted ideas deemed important, and added others supposed to be impertinent, but in no case ha[d] he intentionally diminished the weight of the argument."⁹ Cranch may have had difficulty summarizing the arguments, but he was able to report the Court's opinion verbatim because he was provided a copy of the opinion in all "cases of difficulty or importance."¹⁰ For this reason, attorneys may cite to Cranch's reports of opinions, but not to his editorial content.

While it is still unclear whether Cranch or Marshall wrote the note in question, it is worth examining a similar situation involving

Fig. 2

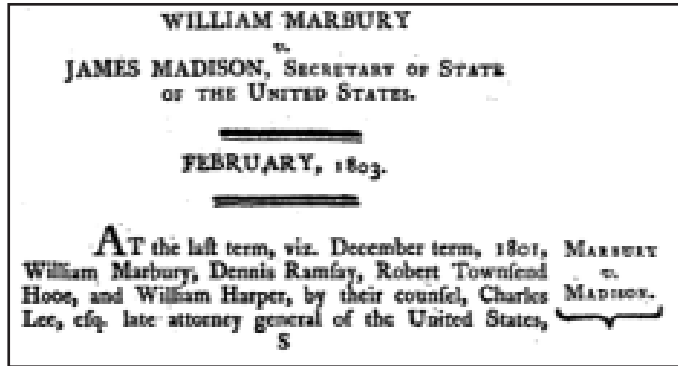


Fig. 3

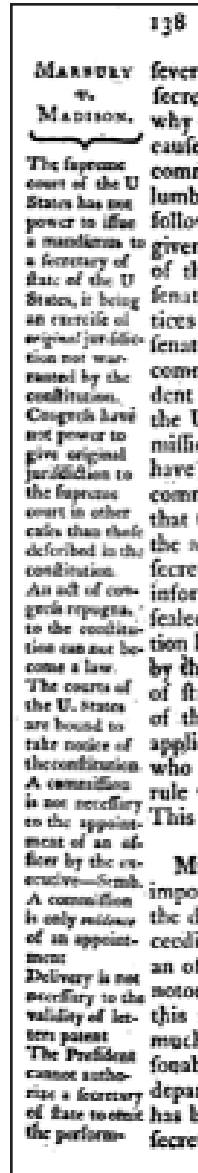
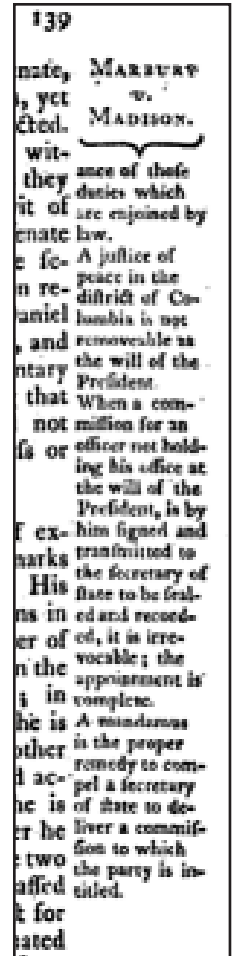


Fig. 4



Cranch’s successor in reporting, Henry Wheaton. Wheaton’s Reports included annotations and marginal notes written by Justice Story.¹¹ This fact, however, was not revealed to the readers. Story wrote, “It is not my desire ever to be known as the author of any of the notes in Mr. Wheaton’s Reports.”¹² It is tantalizing to wonder whether Marshall might have written, but disavowed, the marginal notes in Cranch’s reports.

Citations to Editorial Content Are Forbidden

Today, it is inadvisable for attorneys to cite to the headnotes of a Supreme Court case. *Marbury* is so important in American jurisprudence that one might assume it is the most widely cited case. However, another case is cited even more frequently in the *United States Reports: United States v. Detroit Timber & Lumber Co.*¹³ This 1906 case established the rule that “the headnote is not the work of the court, nor does it state its decision . . . It is simply the work of the reporter, gives his understanding of the decision, and is prepared for the convenience of the profession in the examination of the reports.”¹⁴ Today, every Supreme Court decision contains a footnote citing this case to remind attorneys that the headnotes are not a part of the opinion of the Court.¹⁵

Conclusion

This case study has illustrated some methods for examining a historical citation problem. To research this issue, I explored several approaches: I compared existing versions of the text, asked the modern publishers for input, sought out news articles from the era, read about the reporter himself, and researched the ban on citations of editorial content. There are other methods that could be useful here, such as looking for the original documents themselves. In this instance, I contacted the Cincinnati Historical Society and learned it has some of Cranch’s papers in its holdings. I could have taken my research one step further by reviewing some of these papers, but ultimately I felt I had enough information for my purposes. Although I had not definitively ascertained who wrote the note, my research had led me to the informed conclusion that the note was most likely written by Cranch and should not be cited as the words of Marshall.

Notes

1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
2. See, e.g., *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906) (attorney representing the United States relied on a headnote that misinterpreted the scope of the decision).
3. Email from Westlaw reference attorney to author (July 15, 2015).

4. Online chat between member of Lexis Legal Research Department and author (July 16, 2015).
5. “Supreme Court of United States, February Term, 1803,” *The National Intelligencer and Washington Advertiser* 1 (Mar. 18, 1803).
6. Joyce, “*Wheaton v. Peters: The Untold Story of the Early Reporters*,” *Supreme Court Historical Society Yearbook* 42 (1985).
7. *Id.*
8. “Mandamus. Washington, February 24,” *Chronicle Express* 4 (Mar. 10, 1803) (“Time does not permit at present a more full account of the opinion of the court—which considered each point at great length and with great ability. Besides, it would be too much to hazard a report of the opinion from notes. As soon, however, as a copy can be obtained from the reporter, this interesting and highly important opinion shall be given at length.”).
9. Cranch, *United States Reports* iv (1804).
10. *Id.* at v.
11. Joyce, *supra* note 6 at 52.
12. *Id.* (“Indeed, he said, he had made it ‘an express condition, that the notes furnished by me should pass as his own, and I know full well, that there is nothing in any of them which he could not have prepared with a

very little exertion of his own diligence and learning.' Wheaton was properly grateful, but also embarrassed by the praise bestowed on certain of 'his' annotations. Neither man, however, revealed the deception. Story's son, William, disclosed a portion of the story after the deaths of both of the principals, and the full record is preserved in their correspondence. But it remains a secret in the official reports of the Court they served.").

13. Ginsburg, "Communicating and Commenting on the Court's Work," 83 *Georgetown L.J.* 2119, 2120 (1995).

14. *Detroit Timber & Lumber Co.*, 200 U.S. at 337.

15. Ginsburg, *supra* note 13 at 2120 ("A legend printed on the first page of every decision warns that '[t]he syllabus constitutes no part of the opinion of the Court but has been prepared for the convenience of the reader.' This cautionary note contains a citation to *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906).") ■