

MARBURY'S LEGACY OF JUDICIAL REVIEW AFTER TWO CENTURIES

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The case of *Marbury v. Madison*¹ involves facts familiar to all lawyers because for most of the twentieth century, before the explosion of constitutional law, a professor could spend weeks asking question after question about every aspect² of the famous case:³ original jurisdiction,⁴ vested rights and the importance of delivery in property disputes,⁵ political questions,⁶ remedies for violations of individual rights,⁷ statutory interpretation to avoid constitutional controversy,⁸ and ordering issues to avoid unnecessary constitutional questions.⁹ These intricacies provided innumerable law professors¹⁰ with instruments for torture of many law

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

2. The most comprehensive and systematic study of the legal issues in *Marbury* — used by many law professors preparing to teach the case to law students — is William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969).

3. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 47 (1996) (calling *Marbury* “a landmark, perhaps the most prominent, of American constitutional law”); Van Alstyne, *supra* note 2, at 2 (noting that none of Marshall's decisions “has been more acclaimed or seems more secure as enduring precedent than his decision in *Marbury v. Madison*”); Gordon S. Wood, *The Origins of Judicial Review Revisited, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787, 788 (1999) (“Marshall, nearly everyone acknowledges, was the greatest Chief Justice in American history . . . [who] helped to lay the foundations for both the Supreme Court's eventual independence and the constitutional supremacy of the national government over the states [and] more important . . . his decision in *Marbury v. Madison* was supposed to have created the practice of judicial review.”) (citation omitted).

4. See U.S. CONST. art. III, § 2, cl. 2; *Marbury*, 5 U.S. (1 Cranch) at 343.

5. *Marbury*, 5 U.S. (1 Cranch) at 162-63, 167.

6. *Id.* at 165-66.

7. *Id.* at 163.

8. Van Alstyne, *supra* note 2, at 14-16, 30-33.

9. *Id.* at 6-8.

10. Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301, 301 n.2 (“The case of *Marbury v. Madison* is studied in virtually every constitutional law and federal courts course, as well as many

students. The facts and issues of *Marbury* may stir memories, but a nostalgic tour of the case's details would not only be boring; it would also be misleading and unrealistic. Today's law professors often do not have time to discuss all or most of these issues, and some have decided to drop the case from their introductory classes altogether.¹¹ In a course jam-packed with moral and political controversies despite scarce time,¹² and in a culture and a profession¹³ losing touch with history with tragic efficiency,¹⁴ *Marbury*'s importance needs remembrance and restatement.¹⁵

administrative law classes. It is reprinted in most casebooks on constitutional law, federal jurisdiction, and administrative law and is discussed in numerous books and articles.”); Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 554 (2003) (describing *Marbury* as “the icon taught in our [law school] courses”).

11. Levinson, *supra* note 10, at 553, 557 (expressing doubt that professors have time to discuss the historical background of the case and concluding “I would . . . be extremely surprised if I ever again teach *Marbury* at an American law school, outside of some specialized seminar.”).

12. *Id.* at 559-60 (arguing that scarce time in constitutional law courses should be devoted to important issues and more important historical subjects, such as slavery).

13. David E. Marion, *The State of the Canon in Constitutional Law: Lessons from the Jurisprudence of John Marshall*, 9 WM. & MARY BILL RTS. J. 385 (2001) (arguing “the character and implications of the debate centered on the teaching of constitutional law warrant special attention by persons interested in the cultural evolution of America”).

14. Levinson, *supra* note 10, at 560 (asserting that law “students are woefully ignorant of American history”).

15. The literature on John Marshall and *Marbury v. Madison* is extensive. Two recent works defend the reputation of Marshall and his most famous case with the traditional analysis and arguments. See CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* (1996); R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* (2001). Other recent works taking the traditional view include ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989), which defends Marshall's *Marbury* opinion as “a precedent for all seasons” based on sound constitutional doctrine, GEORGE L. HASKINS & HERBERT A. JOHNSON, *FOUNDATIONS OF POWER: JOHN MARSHALL 1801-15*, at 183-86 (1981), and Dean Alfange, Jr., *Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329, 330 (expressing skepticism about claims of recent scholars that earlier academics “fundamentally misunderstood” *Marbury* and Marshall after a lifetime of study).

The continuing fascination with *Marbury* is apparent in other useful, if controversial, recent works. SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990) (emphasizing the “vast difference” between judicial review as conceived in *Marbury* and as understood and practiced today); Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUP. CT. REV. 439; David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279 (1992) (arguing that the prevailing opinion that Marshall did not assert that the courts had an exclusive power to interpret the Constitution derived from a sincere agreement with Thomas Jefferson's theory of “concurrent review” or “departmental judicial review”); Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87

The famous case arose from one of the most bitter presidential elections, the election of 1800. The two parties — the Jeffersonian Republicans and the Federalists — had attacked the character and the patriotism of the two leading contenders, incumbent president John Adams and his Vice President and onetime friend, Thomas Jefferson. The issues were profound: the Alien and Sedition Laws of 1798, conflicting theories of the Union and the Constitution, a conflict between nationalism and states' rights, and a conflict between skeptical republicanism and a more democratic faith.¹⁶

In 1800, the votes of the electoral college guaranteed that John Adams would be turned out of office, but it took the votes of the House of Representatives to elect Jefferson. In the days before Jefferson's March 4 inauguration, the Federalists worked hard to preserve for themselves a place in the national government. They did all they could to seize the judiciary. In January, Adams appointed John Marshall to the office of Chief Justice while Marshall continued to serve as Secretary of State. In the last month of Adams' presidency, a lame-duck, Federalist Congress created judicial offices while Adams cooperated with the party's efforts to nominate and confirm as many Federalist partisans to judicial posts as time allowed. In the last three days before Jefferson's inauguration the Senate confirmed Adams' appointees. By March 4, inauguration day, the Secretary of State — John Marshall — had failed to deliver some of the judicial commissions. President Jefferson then directed the new Secretary of State, James Madison, not to deliver the commissions, including the commission of one William Marbury as Justice of the Peace for the District of Columbia.

VA. L. REV. 1111 (2001) (arguing that *Marbury* is not as important as generally taught and described); Marion, *supra* note 13; James O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992) (criticizing Marshall's argument about the "province and duty" of courts to interpret the Constitution as little more than the "the hackneyed litany of the Federalists"); Wood, *supra* note 3, at 787.

16. See, e.g., Alfange, *supra* note 15, at 350 ("[T]o discuss *Marbury* without placing it in its political context is exactly like trying to analyze Hamlet's behavior without attaching any significance to his father's murder."); Levinson, *supra* note 10, at 554 (arguing that understanding of *Marbury*'s political background is central to teaching the case). Among the multiplicity of works discussing the conflict between the Jeffersonian Republicans and the Federalists, compare more recent treatments such as BERNARD A. WEISBERGER, *AMERICA AFIRE: JEFFERSON, ADAMS AND THE FIRST CONTESTED PRESIDENTIAL ELECTION* (2000) and JAMES F. SIMON, *WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL AND THE EPIC STRUGGLE TO CREATE A UNITED STATES* (2002), with an older, traditional treatment of 1800 presidential election from a decidedly Jeffersonian perspective found in DUMAS MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* (1962). An excellent introduction to the events leading up to the Court decision in *Marbury* is Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory* in CONSTITUTIONAL LAW STORIES (Michael C. Dorf, ed. 2004).

Marbury took his case to the Supreme Court of the United States. Normally, the Supreme Court is an appellate body, but Marbury invoked the Court's "original jurisdiction." This meant that Marbury was to have his trial before the Chief Justice of the United States — John Marshall — the man who, as Secretary of State, prepared most of the disputed commissions, even while serving as Chief Justice. Among the witnesses offering testimony on disputed facts — the existence of the commissions, the failure of delivery, and the reasons for failure — was James Marshall, brother of the Chief Justice.¹⁷ Never has such judicial greatness¹⁸ come from so petty a partisan squabble and so obvious a conflict of interest.¹⁹

While the case of William Marbury hibernated on the docket of John Marshall's Court for almost two years, Thomas Jefferson and his allies did all they could to undermine the independent judiciary. The Jeffersonians sought to repeal the legislation that had created many of the judicial positions assumed by Federalists just before Adams left the presidency. The Jeffersonians succeeded, and Congress passed the repeal act just before the *Marbury* decision was announced.²⁰ All believed that a conflict between the two Virginians, President Jefferson and Chief Justice Marshall, was imminent.

When a unanimous Court decided *Marbury v. Madison*, the Court ruled that it lacked jurisdiction. It sounds like an anticlimax. Court watchers had expected the Chief Justice to order the Secretary of State to deliver the commissions.²¹ He did not. Instead, Marshall ruled that the Court could not order the Secretary to do his duty because the Court lacked jurisdiction to do so.²² With this resolution, the Chief Justice carefully reached conclusions that avoided conflict between the executive and judicial branches.²³

17. NEWMYER, *supra* note 15, at 160 (questioning the earlier traditional academic views that Marshall manufactured the *Marbury* case for political purposes).

18. "Like a great work of art, *Marbury* yields different meanings to different viewers at different times — which may be the true mark of greatness." *Id.* at 158.

19. There is no dispute that the chief justice should have recused himself from deliberations. Van Alstyne, *supra* note 2, at 8.

20. The Jeffersonian assault on the independent judiciary was deliberate, as even admirers of Jefferson concede. DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801-1805*, at 119 (1970) (arguing "there was no doubt whatsoever in [Jefferson's] mind about the desirability of repealing the judiciary law").

21. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 232 (1922) (anticipation and reaction focused on the Court's power in relation to the executive branch).

22. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 175-76 (1803).

23. In *Marbury*,

[T]he Chief Justice coupled his argument for judicial review to an effective maneuver: he exercised judicial review to strike down a law that would have augmented the judicial power and enabled the Federalist judiciary to protect a Federalist appointee. Not only did the outcome placate the Court's republican

Marshall admitted that some duties entrusted to the chief executive are political, and the decision of the President in the performance of such functions is conclusive.²⁴ But Marshall took an opportunity to wag his finger at the President. The Chief Justice held the President in minimum high regard.²⁵ And so he could not resist the temptation to declare that the President broke the law and violated Marbury's rights, before he declared he had no jurisdiction and, thus, no power in the case. Today, we might say that the Chief Justice was full of dicta.²⁶ Professor Robert McCloskey has offered a more sophisticated view. *Marbury* was "a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another."²⁷ The Court was "in the delightful position . . . of rejecting and assuming power in a single breath."²⁸

To avoid conflict with the President — or, more precisely, to avoid giving the President the opportunity to strike a fatal blow at the Supreme Court by

opponents, but the Court's willingness to impose constitutional limits on its own power made it appear a more trustworthy exponent of the power it claimed.

Eisgruber, *supra* note 15, at 446 (citation omitted).

24. *Marbury*, 5 U.S. (1 Cranch) at 165-66.

25. Chief Justice Marshall believed that President Jefferson was a "speculative theorist" with ideas that would "sap the fundamental principles of the government." NEWMYER, *supra* note 15, at 148. The feeling was mutual. "The distrust between Jefferson and Marshall was palpable." SIMON, *supra* note 16, at 76. Ironically, Jefferson had wanted to see Marshall serve in "what Jefferson conceived to be the innocuous role of a judge" rather than in Congress. Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 218 (1955).

26. And many have said the same through the years. Critics of Marshall's propensity for dicta included Thomas Jefferson. "This practice of Judge Marshall of travelling out of his case to prescribe what the law would be in a moot case not before the Court is very irregular and very censurable." Letter from Thomas Jefferson to William Johnson (June 12, 1823), *reprinted in* JEFFERSON: WRITINGS at 1474 (Merrill D. Petersen ed., 1984).

27. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 25 (Stanford Levison ed., rev. 2d. ed. 1994).

28. *Id.* at 27. Professor McCloskey's analysis is one of the most frequently quoted and debated. Compare, e.g., Engdahl, *supra* note 15, at 324 n.146 (disputing McCloskey's "absurd, romanticized account of Marshall's opinion as a 'masterwork of indirection'") (quoting MCCLOSKEY, *supra* note 27, at 25), and O'Fallon, *supra* note 15, at 219 & n.3 (noting the influence of McCloskey and disputing his "traditional view of *Marbury* as a statesmanlike opinion that clearly established the Supreme Court's authority as the final arbiter of the Constitution while distracting the Republicans' attention and avoiding a conflict with the executive branch"), with Alfange, *supra* note 15, at 382 (McCloskey's analysis "is a perfectly accurate observation, one that captures Marshall's approach precisely and insightfully."), and Levinson, *supra* note 10, at 553-54 (arguing McCloskey's analysis of *Marbury* is an adequate substitute for assigning the actual opinion, because it "provides students with enough information to make them 'culturally literate'").

disobeying its ruling — the Chief Justice manipulated the issues, or at least many analysts so believe.²⁹ Marshall examined the statute, which declared that the Court could issue writs when it had jurisdiction, and presumed that the statute increased the Court's jurisdiction whenever someone asked for a writ.³⁰ Using this less-than-compelling interpretation of the statute to create an unnecessary and unlikely constitutional issue, Marshall then interpreted the vague words of Article III to hold that Congress could not add to the Court's original jurisdiction.³¹

Having found — or manufactured — a conflict between statute and Constitution, the Chief Justice was ready to reach for the prize: the power to define constitutional law.³² For, of course, the issue for which *Marbury* is remembered is not whether the Supreme Court had jurisdiction in cases in which a person sought a writ of mandamus.³³ Rather, *Marbury* is remembered

29. Bloch & Marcus, *supra* note 10, at 327-28 ("Throughout the 1790's, the Court adjudicated cases brought under section 13 without ever questioning the constitutionality of that section. . . . Marshall's suggestion that section 13 was unconstitutional was a 'novel' idea."); *id.* at 336 ("[I]n *Marbury*, the Court turned its back on a decade of jurisprudence. By prohibiting Congress from enlarging the original jurisdiction of the Supreme Court, the Court said, in effect, that it could no longer entertain suits like those it had considered in the 1790's.") (citation omitted); Van Alstyne, *supra* note 2, at 7-8 (suggesting, but not concluding, that Marshall's decision to address the jurisdictional question last may have been justified because resolution of the question required a ruling on the constitutionality of an act of Congress).

30. 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 128, 133 (1919) (arguing the Chief Justice's interpretation that § 13 was unconstitutional was a "pretext" for establishing the Court's power of judicial review).

31. *Marbury*, 5 U.S. (1 Cranch.) at 175-76. Ironically, the early conventional view of judicial power taught that the Court should refuse to strike down laws of doubtful validity. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 150 (1893) (arguing for judicial restraint and a rule that courts should strike down a law only when the lawmakers have made a "clear mistake"). Nevertheless, in *Marbury*, the Chief Justice established the power of judicial review by holding "unconstitutional an act of undoubted validity," LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMER'S CONSTITUTION* 87-88 (1988), while subsequently upholding as constitutional a law that was almost as certainly unconstitutional, *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (upholding the repealer act of 1802). *See also, e.g.*, Levinson, *supra* note 10, at 556 (describing *Stuart v. Laird* as "a far more significant capitulation by the Federalist majority to the determination of the Jeffersonians to escape the judicial handcuffs crafted by [the] Adams [administration]").

32. A careful read of *Marbury* reveals that Marshall did not challenge the theory of "departmental review," which is the theory that each branch of government has a coordinate and equal power to render interpretations of the Constitution. *See, e.g.*, Engdahl, *supra* note 15 (arguing that Marshall did not claim that the courts' had either an exclusive or supreme authority to interpret the Constitution).

33. Levinson, *supra* note 10, at 559 (noting the "substantive legal topic of *Marbury*" was of "no real significance"). However, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), *Marbury* provided at least oblique support for a *Marbury*-like holding that Congress could not

for a more fundamental, more indispensable issue: “whether an act, repugnant to the constitution, can become the law of the land.”³⁴

It has become fashionable to discount John Marshall's case for judicial review. At one time, admirers and critics of the Chief Justice³⁵ described his opinion as a coup,³⁶ in all senses of the word: a usurpation and an achievement, a foundation for constitutional nationalism,³⁷ and a bedrock of

act to expand the power of the federal courts beyond the powers conferred by the case-and-controversy language of Article III. *Id.* at 576.

34. *Marbury*, 5 U.S. (1 Cranch) at 176. The traditional view, of course, is that “to lawyers of today, the significance of Marshall's opinion lies in the establishment of the power of the Court to adjudicate the validity of an act of Congress, the fundamental decision in the American system of constitutional law.” 1 WARREN, *supra* note 21, at 232. Professor Levinson argues that law professors should educate “our students as to the ways that issues of fundamental importance for ordinary human beings . . . are treated when they become legalized.” Levinson, *supra* note 10, at 559. As true as Professor Levinson's view of professors' role is, the influences and weaknesses of *Marbury's* rationale remain central to the “legalization” of political and moral questions. Professor Levinson may be correct in his revisionist and theoretical view that *Marbury v. Madison* should not have assumed such preeminent importance. Still, *Marbury's* analysis — as well as criticisms of the analysis — have deeply influenced generations of lawyers, judges and Supreme Court justices. The preeminence of *Marbury* is a historical fact that ought not be concealed by a recent academic insight.

35. Traditional praise for the “great Chief Justice” often blends a celebration of his statecraft along with muted criticism of intellectual contributions. For example, his admiring biographer, Senator Albert J. Beveridge, could describe the *Marbury* opinion as “a coup as bold in design and as daring in execution as that by which the Constitution had been framed,” 3 BEVERIDGE, *supra* note 30, at 142, while at the same time rendering a judgment that “[i]n establishing this principle [of judicial review] Marshall was to contribute nothing new to the thought upon the subject,” *id.* at 116. In other words, Beveridge admired Marshall for the chief justice's “acts and words [that] were those of a statesman of the first rank.” *Id.* at 143; Eisgruber, *supra* note 15, at 439 (describing the “paradoxical” modern judgment of John Marshall's judicial opinions as “the greatest the American judiciary has produced” and also as containing “technical errors that would shame a first-year law student”); Richard A. Posner, *The Accidental Jurist*, NEW REPUBLIC, Dec. 17, 2001, at 36 (arguing, in a book review of R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT (2001), that “Marshall established the Court as a powerful branch of the federal government and the Constitution as a charter of national power”); see also Engdahl, *supra* note 15, at 330 (“Although capable of very strong convictions, Marshall was an eminently fair and pragmatic man, candidly open to rational persuasion and ready to weigh alternative views fairly. He strongly believed in national authority, but also in its limitation — under a Constitution that does . . . grant the national government great, but enumerated and limited powers. He was not a ‘result-oriented’ judge.”) (citation omitted).

36. Posner, *supra* note 35, at 36 (asking whether “Marshall [could] have achieved this coup by being a ‘good judge,’ . . . scrupulous about the facts, respectful of precedent, insistent on deciding a case on the narrowest possible grounds,” and answering “I doubt it.”).

37. Despite all critiques and reservations, there is little dissent from the judgment of Marshall's admiring biographer that the Chief Justice was the man who “rewrote the

law in a democratic republic.³⁸ Now, however, too many observers — neither admirers nor critics — tend to demote the decision as a reflection of prevailing ideas, as conventional and unoriginal, and not quite as important as once assumed.³⁹ And as usual, there is enough evidence to supply a rational basis for the next law review article or the doctoral thesis on either side of the debate.⁴⁰

Chief Justice Marshall's case has simplicity. First, *the purpose of a Constitution was to enforce limits of popular sovereignty on government*. The Constitution was an exercise of the people's "original right" and "supreme will" to establish a form of government to their liking. As such, the Constitution not only creates and allocates power, it also establishes limits — "limits not to be transcended by those departments"⁴¹

fundamental law of the Nation," making it "capable of growth, capable of keeping pace with the advancement of the American people." 4 BEVERIDGE, *supra* note 30, at 308 (addressing the contribution of Marshall in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

38. HOBSON, *supra* note 15, at 213. Chief Justice Marshall "'legalized' the Constitution, made it amenable to routine judicial exposition and implementation. The Constitution, in short, became 'supreme ordinary law,' operating as a legal restraint on sovereign power in a way analogous to the legal restraint of ordinary law on individuals." *Id.*

39. HASKINS & JOHNSON, *supra* note 15, at 190 (stating that "the idea of judicial review was hardly a new one when *Marbury* was decided"); NEWMYER, *supra* note 15, at 171 (arguing "the idea of judicial review set forth in *Marbury* [was] not original"); Klarman, *supra* note 15, at 1113, 1126 (arguing that *Marbury* "is a great deal less important than is commonly supposed" because it "confirmed the existence of a power that already was widely assumed to exist"); Wood, *supra* note 3, at 793 ("[T]he sources of something as significant and forbidding as judicial review never could lie in the accumulation of a few sporadic judicial precedents, or even in the decision of *Marbury v. Madison*, but had to flow from fundamental changes taking place in the Americans' ideas of government and law").

40. However, as Professor Alfange argued:

We have a right to be dubious . . . when a present-day author . . . claims to have discovered the true interpretation of judicial decisions or legal writings that had simply been missed or misunderstood by all those who had gone before [A]ny approach that dismisses all previous understandings as misconceived, and starts afresh with a new theory that everyone else was supposedly too benighted to perceive even though the evidence was before them all along, is more likely to lead to a dead end than to a new horizon.

Alfange, *supra* note 15, at 444-46.

41. NEWMYER, *supra* note 15, at 173 ("In *Marbury* . . . the chief justice spoke for the unified Court to the American people themselves. It was a lesson in republican civics, concerning the relation of the sovereign people to the written Constitution, and to the Supreme Court, and finally to the supreme law of the land."); *see also, e.g.*, Wood, *supra* note 3, at 793-94 (arguing that judges could keep legislators within the limits assigned by the Constitution because "legislators were not really sovereign" and it was in fact "'far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority'")

Second, to serve as an effective limit on the power of government, *the Constitution must be supreme, paramount, and controlling as law*. Otherwise, “written constitutions are absurd attempts . . . to limit a power, in its own nature illimitable.”⁴² Judicial review is nothing but an inference from the fact that our people chose to have a written constitution and expected it to be taken seriously.⁴³

Finally, but most critically, *the judiciary cannot ignore the Constitution when performing its duty of saying what the law is*.⁴⁴ Marshall built on the idea that a written constitution is supreme and fundamental, but he also succeeded in showing that it must operate as a reality in the legal systems of the federal government and the states. “America’s constitutions may be higher laws, special acts of the people in their sovereign capacity, but they are just like all the other lowly laws in that they are implemented through the normal practice of adversarial justice in the regular courts.”⁴⁵

In structure and substance, after Marshall makes these three basic points, the rest is illustration, elaboration, and restatement. As most law professors try to teach law students, the logic does not quite add up. Indeed, as Alexander Bickel pointed out:

The opinion is very vulnerable. . . . Not only are the props it provides weak, and hence dangerous; they also support a structure that is not quite the one we see today. Marshall’s proofs are not only frail, they are too strong; they prove too much. *Marbury v. Madison* in essence begs the question. What is more, it begs the

(quoting THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961)).

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

43. HOBSON, *supra* note 3, at 55-56.

44. *Marbury*, 5 U.S. (1 Cranch) at 177-78. The Court stated:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply. Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

Id.

45. Wood, *supra* note 3, at 799.

wrong question. . . . Marshall knew (and, indeed, it was true in this very case) that a statute's repugnancy to the Constitution is in most instances not self-evident; it is, rather, an issue of policy that someone must decide. The problem is who⁴⁶

The controversy of our day is whether unelected judges should be permitted to expound — and sometimes revise — the meaning of the open-ended and aspirational elements of a constitution's text.⁴⁷ *Marbury* does not provide an explanation for the idea that lawyers, appointed by the President and confirmed by the Senate but unaccountable to the people, should be arbiters of our nation's faith, morals, and ideals.⁴⁸ *Marbury* is one reason the "least dangerous" branch⁴⁹ has become the most powerful court the world has ever known.⁵⁰ The opinion itself, however, fails to explain why.⁵¹

46. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 2-3 (2d ed. 1962). The academic and scholarly attack on Marshall's logic has been intense, relentless, and basically unrefuted. See, e.g., Alfange, *supra* note 15, at 422 (arguing that though a reader of Marshall's judicial review argument "is all but helplessly swept along to its conclusion," his argument rests on "deductive logic [that] can be proved erroneous if any part of the reasoning rests on a fallacy. For this reason, it can be said with certainty that Marshall's argument for judicial review in *Marbury v. Madison* was wrong."); Frankfurter, *supra* note 25, at 219 ("The courage of *Marbury v. Madison* is not minimized by suggesting that its reasoning is not impeccable and its conclusion, however wise, not inevitable.") (citation omitted); Klarman, *supra* note 15, at 1117 ("*Marbury*'s arguments in defense of judicial review are . . . thoroughly unpersuasive."); Van Alstyne, *supra* note 2, at 24 (responding to *Marbury*'s famous passage, and noting "it was 'emphatically the province and duty' of legislative departments to say what the law is, and the customary duty of judicial departments was merely to apply the law to the case once the meaning and formal authenticity of the law were established").

47. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 41 (1980).

48. "The decision offered no arguments in justification of judicial review that would have persuaded anyone who still questioned the legitimacy of the practice in 1803. *Marbury* implicitly confirmed qualifications on the judicial review power that dramatically limited its scope and significance. Finally, the ruling did nothing to facilitate the Court's acquisition of the political stature necessary to make judicial review practically as well as theoretically significant." Klarman, *supra* note 15, at 1126.

49. *THE FEDERALIST* No. 78, at 522 (Alexander Hamilton) (J. Cooke ed., 1961).

50. Wood, *supra* note 3, at 801 ("This accumulative body of constitutional law in America is now over two hundred years old; there is nothing quite like it anywhere else in the world.").

51. CLINTON, *supra* note 15, at 23 (arguing that *Marbury*'s treatment of the Constitution as law that cannot be ignored by a court does not "inexorably" lead to modern judicial activism); HOBSON, *supra* note 15, at 70 ("Only in an indirect sense can *Marbury* be said to have laid the groundwork for modern judicial power."); Klarman, *supra* note 15, at 1120, 1122-23 (noting that if the Court had adhered to the limited and qualified form of judicial review established in cases up to and including *Marbury*, it would not have been possible to "invalidate racial segregation, school prayer, legislative malapportionment, the death penalty, abortion

When assessing the contribution of judicial review to the American experiment, it is easy to presume that its impact has been positive. Today, we take for granted religious freedom, expressive liberty, racial equality, gender equality, limits on abusive police practices, guarantees of a fair trial, and personal privacy. Or perhaps more precisely, we think of these rights as God-given, but secured by the Court. Almost all of this refers to decisions rendered in the past half century.⁵² However, if one asked a scholar fifty years ago about the contribution of the Court through American history, the assessment would probably be quite different and surprising. As Henry Steele Commager wrote in 1943, "The conclusion is almost inescapable that judicial review has been a drag upon democracy — and what we may conceive to be the same thing — upon good government."⁵³ Why would he say such a thing? Because as a historian, he had examined the record.

The second case in which the Court wielded the power claimed by Marshall in *Marbury* was the infamous 1857 *Dred Scott* case.⁵⁴ The Court chose to protect the imagined rights of southern slave owners⁵⁵ against the considered choices of political majorities led by Thomas Jefferson, Henry Clay, Daniel Webster, Sam Houston, and others, including an increasingly agitated lawyer in Illinois named Abraham Lincoln. The Court set aside the original understanding of the Constitution, the plain meaning of text, and the common sense of the matter to decide that Congress could not abolish slavery in the western territories and that no black man could ever become a citizen.⁵⁶

But a single tragic case is not the only proof of Commager's assertion. After the Civil War, Congress passed a variety of civil rights laws including antilynching laws and, in 1875, a visionary, idealistic statute designed to guarantee that black people would have the same access to hotels, restaurants,

restrictions, campaign finance reform, affirmative action, or most of the other myriad statutes stricken by the Supreme Court in the last half century"). But see Marion, *supra* note 13, at 410 ("Marbury also stands as the preeminent precedent for the principle that the judiciary has a special responsibility to protect private rights.").

52. See, e.g., *infra* notes 72-89 and accompanying text.

53. Henry Steele Commager, *Judicial Review and Democracy*, reprinted from HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* (1943), in *JUDICIAL REVIEW AND THE SUPREME COURT* 73 (Leonard W. Levy ed., 1967).

54. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

55. *Id.* at 468.

56. See, e.g., Abraham Lincoln, Address at Cooper Institute (Feb. 27, 1860), in ABRAHAM LINCOLN, *SPEECHES AND WRITINGS 1859-1865*, at 111, 117 (Don E. Fehrenbacher ed., 1989); see also DON E. FEHRENBACHER, *THE DRED SCOTT CASE* 348-49, 350 (1978) (arguing that Chief Justice Roger Taney's "historical narrative" regarding the status of blacks and free blacks at the time of the Constitution's adoption "was a gross perversion of the facts," and that Taney's logic begged the question when he asserted that patterns of legal discrimination proved blacks "had no rights which the white man was bound to respect").

and other public accommodations. The Supreme Court struck down these measures banning race discrimination and racially motivated violence.⁵⁷

In the early decades of the twentieth century, the Supreme Court used its power to strike down progressive labor and welfare legislation of Congress and the states. Government could not regulate hours of work.⁵⁸ Protecting children from excessive work was not a legitimate goal entrusted to Congress by the Constitution.⁵⁹ Neither Congress nor the states could keep employers from insisting that employees not join unions.⁶⁰ Though the Court often used federalism to explain why Congress could not act, it did not see respect for states as a restraint on its own power. Indeed, between 1898 and 1936, the Supreme Court struck down 401 state statutes or policies. Of these, 212 were invalidated on the basis of the Fourteenth Amendment and its Due Process Clause.⁶¹ In one case, the Justices upheld the claim of a street car company to a return of 7.44% of the value of its assets; the Court held that a return of 6.26% was confiscatory and a violation of "due process."⁶²

All this judicial activism favoring property, wealth, and business came at the same moment in time when the justices were ruling that segregation did not violate the Equal Protection Clause,⁶³ and that tests and devices resulting in mass disenfranchisement of black voters did not violate the Fifteenth Amendment's promise of racial equality in voting.⁶⁴ Further, most questions of police and criminal procedure were not questions of due process: the Court did not question prosecutorial comment on a defendant's decision to remain silent⁶⁵ or even a mob's terrorizing of a jury to secure a conviction and death sentence.⁶⁶

57. The Civil Rights Cases, 109 U.S. 3, 11 (1883) (holding that Congress lacked authority to restrict behavior of private persons when enacting the Civil Rights Act of 1875); *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1875) (holding that Congress lacked authority to pass antilynching legislation without focusing on rights incident to U.S. citizenship).

58. *Lochner v. New York*, 198 U.S. 45, 64 (1905).

59. *Hammer v. Dagenhart*, 247 U.S. 251, 275 (1918).

60. *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adair v. United States*, 208 U.S. 161, 172 (1908).

61. Leonard W. Levy, *Editorial Note* to Walton H. Hamilton, *The Path of Due Process of Law*, in *AMERICAN CONSTITUTIONAL LAW: HISTORICAL ESSAYS* 130 (Leonard W. Levy ed., 1966).

62. *United Railways v. West*, 280 U.S. 234, 252 (1934).

63. *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896).

64. *Williams v. Mississippi*, 170 U.S. 213, 225 (1898) (holding that literacy tests and poll taxes that excluded blacks from voting and jury service did not violate Fourteenth and Fifteenth Amendments).

65. *Twining v. New Jersey*, 211 U.S. 78, 110 (1908) (stating that the privilege against self-incrimination "is not fundamental in due process of law, nor an essential part of it").

66. *Frank v. Mangum*, 237 U.S. 309 (1915). *But see id.* at 347 (Holmes, J., dissenting)

The pattern of decisions showed that Professor Commager was correct in his 1943 assessment. In no case did the Court protect free speech from congressional attack or racial minorities from federal discrimination. On the other hand, in case after case, the justices struck down efforts of Congress to free slaves, to guarantee civil rights, to protect working people, to outlaw child labor, and to make more humane a modern and industrialized world.⁶⁷

A year after Commager wrote, in *Korematsu v. United States*,⁶⁸ the Court approved of military internment of American citizens of Japanese ancestry based on doubtful and disputed predictions of one ethnic group's loyalty.⁶⁹ This was despite explicit constitutional restrictions on the power of government to punish treason⁷⁰ and despite explicit precedent defining limits on the military when civil courts are operating.⁷¹

Much has changed since World War II.⁷² As one sample of the Court's contributions, we might consider what all courts, state and federal, have done with Jefferson's promise in the Declaration of Independence that "all men are created equal."⁷³

Americans have always understood that there is more than a little trickery in the way lawyers think. One of the old maxims of traditional legal education is that the common law is nothing but reason; indeed, lawyers once claimed, law is nothing less than the perfection of reason. Hardly anyone in the young republic — besides lawyers — believed this. In Andrew Jackson's day, one critic of lawyers responded by saying that "[l]aw is the perfection of human reason, — just as alcohol is the perfection of sugar."⁷⁴

The metaphor is useful. When it comes to legal reasoning, there is much distillation. The product of this distillation can often be disorienting and even toxic. When consumed in large quantities, the distilled elixir of legal

(arguing that "[m]ob law does not become due process of law by securing the assent of a terrorized jury").

67. Commager, *supra* note 53, at 72-73.

68. 323 U.S. 214 (1944).

69. Eugene A. Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945) (describing the World War II cases upholding military restrictions and internment of Japanese-American citizens as the "worst blow our liberties have sustained in many years").

70. See U.S. CONST. art. III, § 3.

71. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

72. "The twentieth century certainly has witnessed an extraordinary expansion of the Court's power, an expansion that has gone beyond anything that Marshall or his colleagues even could have imagined." Wood, *supra* note 3, at 789.

73. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

74. ANTONIN SCALIA, A MATTER OF INTERPRETATION 11 (1997) (quoting Robert Rantoul, Oration at Scituate (July 4, 1836)).

reasoning can fire the imagination, inflame the senses, create illusions of omnipotence and omniscience, and destroy all common sense.⁷⁵

On the other hand, the process of distillation can be purifying. Our early ideas about equality were fragmentary and inconsistent; they were marred by prejudice; they were confined by racism, sexism, hatred of foreigners, and fear of the unknown.⁷⁶ Law and judicial review have improved our ideas of equality, though it took some time.

A man and woman may love and marry, even if one is black and the other is white.⁷⁷ Employers may not use most forms of educational testing or even a person's arrest record when deciding who to hire.⁷⁸ Women may not be barred from serving in jobs dedicated to law enforcement and security, such as police officers, fire fighters, and prison guards.⁷⁹ Men may not be barred from nursing schools.⁸⁰ Women may not be barred from military academies.⁸¹

States may not use one age limit for drinking alcohol for males, and another for females.⁸² States may not withhold welfare benefits to residents who have not lived in the state for a year.⁸³ Local communities may not prevent homes for the mentally retarded from being constructed in their boundaries.⁸⁴

States may not use literacy tests or poll taxes to decide who may vote.⁸⁵ States may not categorically bar aliens, even illegal aliens, or illegitimate children — now, we say nonmarital children — from various public and legal benefits.⁸⁶ A state may not pass a constitutional amendment prohibiting

75. *See id.*

76. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 10-16 (2nd ed. 1997).

77. *See* *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

78. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (holding that tests that disproportionately exclude blacks violate Title VII of the Civil Rights Act of 1964); *Green v. Mo. Pac. R.R.*, 523 F.2d 1290, 1295-96 (8th Cir. 1975) (barring the use of arrest records under Title VII).

79. *See, e.g.,* *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977) (holding that minimum height and weight standards, which excluded women from prison guard jobs, violate Title VII of the Civil Rights Act of 1964).

80. *Miss. Univ. of Women v. Hogan*, 458 U.S. 718, 723 (1982).

81. *United States v. Virginia*, 518 U.S. 515, 519 (1996) (holding the Virginia Military Institute must admit women).

82. *Craig v. Boren*, 429 U.S. 190, 192 (1976).

83. *Shapiro v. Thompson*, 394 U.S. 618, 622 (1969).

84. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

85. *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966) (upholding statutory restrictions on literacy tests); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding that poll taxes violate the Equal Protection Clause).

86. *Sugarman v. Dougall*, 413 U.S. 634, 646 (1973) (holding that the exclusion of aliens from civil service positions violates equal protection); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that the exclusion of nonmarital children from protection under a wrongful

homosexuals from seeking relief through ordinary political processes.⁸⁷

State courts have used the power of judicial review to interpret their own state constitutions in pursuit of the ideal of equality. Many states cannot allow local school districts to spend widely different amounts of money per child attending public schools.⁸⁸ And in Oklahoma, local communities cannot keep children out of pool halls.⁸⁹

Thomas Jefferson was prophetic, but we may reasonably doubt that he foresaw much of this when he wrote the words "all men are created equal." John Marshall's greatness is beyond doubt,⁹⁰ but he too probably had little of

death statute is unconstitutional).

87. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

88. *Compare, e.g., Serrano v. Priest*, 487 P.2d 1241, 1244 (Cal. 1971), *amended by* 569 P.2d 1303 (Cal. 1977) (state constitutional principles mandate approximately equal public school financing), *with Fair Sch. Fin. Council of Okla., Inc. v. State*, 1987 OK 114, ¶ 1, 746 P.2d 1135, 1137 (rejecting claim based on state constitutional principles).

89. *Callaway v. City of Edmond*, 1990 OK CR 25, ¶ 12, 791 P.2d 104, 107 (holding that a ban on children in pool halls is an irrational classification violating state constitutional equal protection principles); Harry F. Tepker, Jr., *The Trouble with Pool Halls: Rationality and Equal Protection in Oklahoma Law*, 3 EMERGING ISSUES ST. CONST. L. 151 (1990).

90. If law professors and the people have failed to take care of the Chief Justice's fame, federal judges continue to nurture John Marshall's honor. "[R]emember . . . that there fell to Marshall perhaps the greatest place that ever was filled by a judge . . . [I]f American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be but one alone, and that one John Marshall." Oliver Wendell Holmes, *John Marshall: In Answer to A Motion that the Court Adjourn, on February 4, 1901, the One Hundredth Anniversary of the Day on Which Marshall Took His Seat as Chief Justice* (Feb. 4, 1901), *reprinted in* THE ESSENTIAL HOLMES 206 (Richard A. Posner ed., 1992). Perhaps there is some envy in some of the descriptions, as Felix Frankfurter noted, but Marshall retains respect for his "undimmed vision of the union of states as a nation." Frankfurter, *supra* note 25, at 218. Despite the views of revisionists about what ought to be remembered, Chief Justice William H. Rehnquist credits Marshall as the man who "added to [the Court's] normal function of a court of last resort the awesome responsibility of being the final arbiter of the meaning of the United States Constitution." WILLIAM H. REHNQUIST, THE SUPREME COURT 120 (1987).

Even realistic assessments and criticisms of the Chief Justice suggest not only admiration, but a measure of pride in Marshall's ambition and determination. Richard Posner notes Marshall "pursued [his] goals unremittingly, at times disingenuously, and even unscrupulously. . . . Marshall treated the constitutional text as putty for judges to knead into constitutional law." Posner, *supra* note 35, at 36. He adds: "Marshall's attitude toward constitutional law was goal-oriented, manipulative, ideological, and at times politically partisan. It was not craftsmanlike, logically rigorous, or self-restrained." *Id.* Nevertheless, Judge Posner seems to judge the Chief Justice as a useful "buccaneer" who achieved results, whatever might be said about his methodology:

Some people think that the Court took a wrong turn in Marshall's day, that he made the Supreme Court too powerful in relation to the other, more democratic branches of the federal government, and the federal government too powerful in relation to the states; that he succeeded too well in 'identifying the Court with the

this in mind when he wrote *Marbury*.⁹¹

So, the record is mixed, probably no better and no worse on balance than the work of the other two branches of the federal government. At times, *Marbury*'s creation — judicial review — has “dwarfed the political capacity of the people,”⁹² striking down the wise and pragmatic, the egalitarian and the moral. More recently, the Court has endeavored to redeem and rehabilitate our nation's claim to be deserving of democracy, reminding us that principle must limit even majorities and the most powerful. And in the last analysis, it has always seemed that we favor judicial review of constitutional questions not because of the record, but because of our hopes, because of what the justices might do for justice next. Despite all the ammunition provided to cynics, we hope that the courts — “our branch” of government — will remain committed to principle; that it will give us just cause for our professional faith when so many of our fellow citizens find it difficult to believe in principle or in law.

Constitution.’ But the danger that the new nation might dissolve back into the loose association created by the Articles of Confederation, or even into a set of completely independent nation-states, was considerable in the first quarter of the nineteenth century, and John Marshall’s Court did much to check these fissiparous tendencies. For this, most of us are profoundly grateful.

Id.

91. Marion, *supra* note 13, at 402 (Marshall’s “declaration in *Marbury* that the United States will cease to deserve to be called a nation of laws if our laws do not protect rights, along with his defense of an independent judiciary armed with the power to review the constitutionality of the actions of coordinate branches of the government, anticipated by more than a century the role that courts would play in articulating First, Fifth, and Fourteenth Amendment rights and in enforcing limits on governmental power.”).

92. BICKEL, *supra* note 46, at 22 (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 106-07 (1901)) (“The tendency of a common and easy resort to [judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.”); Eisgruber, *supra* note 15, at 477 (arguing that “during the last fifty years, the Court’s greatest failures have come when it declined to act, and its greatest moments have come when it intervened most boldly”).