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# REDISCOVERING THE AMERICAN ORIGINS OF JUDICIAL REVIEW: A REBUTTAL TO THE VIEWS STATED BY CURRIE AND OTHER SCHOLARS

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AND

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## INTRODUCTION

When was the power of judicial review allowing federal courts to declare acts of Congress void first exercised? Experts in the fields of constitutional law and history answer this important question with two different responses. Some scholars say that this judicial power was first used in three federal cases<sup>1</sup> decided in the late eighteenth century.<sup>2</sup> Others claim that the doctrine was first used in the early nineteenth century in *Marbury*

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1. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). This case was heard by the Supreme Court, when Attorney General Randolph had petitioned for the issuance of a writ of mandamus to the circuit court. *Id.* "The Court observed, that they would hold the motion under advisement, until the next term; but no decision was ever pronounced, as the legislature, at an intermediate session, provided, in another way, for the relief of the pensioners." *Id.* at 409-10.

William Hayburn had requested that his name should be added to the pension list by the middle circuit court. *Id.* at 409. This court, as well as the other two, nullified the 1792 statute. *Id.* at 410-15. They informed President Washington by letters written by all three circuit courts. *Id.* The letters are included in the note to *Hayburn's Case*. *Id.*

2. The Supreme Court decided *Chandler v. Secretary of War* (February 14, 1794) and *United States v. Yale Todd* (February 17, 1794). Dallas did not report these cases. Nevertheless, they are found in other federal documents. The minutes of *Chandler* are found in 11 ANNALS OF CONG. 903-04 (1802). There are eight pages of documents pertaining to *Todd*. These can be obtained from the National Archives and Records Service in Washington, D.C. (Supreme Court case 2968, Box 321) [hereinafter cited as Docu-

*v. Madison*.<sup>3</sup> Thus, there are two schools of thought, each one using different resources. The purpose of this article is to end this silent debate by gathering all the facts found in the official documents of the late eighteenth and early nineteenth centuries, and then drawing our own conclusions. This article will begin by examining several scholars' theories on the origins of judicial review. Next, the exercise of judicial review during colonial times and under the first state constitutions will be discussed. Then, the attitudes of leading Americans in favor of the power of judicial review will be explored. This article will also review the Invalid Acts of 1792, 1793 and 1794, and the decisions rendered by the federal courts in which they nullified the first two statutes. Lastly we will consider Marshall's use of these earlier cases as precedents for *Marbury v. Madison*.<sup>4</sup>

#### SCHOLARS' THEORIES ON THE ORIGIN OF JUDICIAL REVIEW

In the beginning of the twentieth century scholars reported that the early American leaders favored the power of judicial review.<sup>5</sup> They point out that the federal courts first considered this power in the 1790's<sup>6</sup> when the courts were presented with two congressional enactments: the Invalid Laws of 1792<sup>7</sup> and 1793.<sup>8</sup> Later scholars agreed<sup>9</sup> and support this conclusion by re-

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MENTS]. The *Todd* case was also discussed by Chief Justice Taney in a note at the end of *United States v. Ferreira*, 54 U.S. (13 How.) 43, 56-58 (1851).

These cases can only be found in those federal documents. Letter from Roger F. Jacobs, Supreme Court of the United States Law Librarian (April 5, 1982).

3. 5 U.S. (1 Cranch) 137 (1803).

4. *Id.*

5. C. WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 83 (1922); Beard, *The Supreme Court—Usurper or Grantee?* 27 POL. SCI. Q. 1 (1912).

6. C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 175, 176 & n.11, 177 & n.13, 178 (1959); B. MOORE, 133 THE SUPREME COURT AND UNCONSTITUTIONAL LEGISLATION 129 (AMS ed. 1968); C. WARREN, CONGRESS, THE CONSTITUTION AND THE SUPREME COURT 108-09 (1935); Sherman, *The Case of John Chandler v. The Secretary of War*, 14 YALE L.J. 431 (1905).

7. Act of March 23, 1792, ch. 11, 1 Stat. 243 (expired).

8. Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (expired).

9. These include E. BARRETT & W. COHEN, CONSTITUTIONAL LAW: CASES AND MATERIALS 25-26 (6th ed. 1981); P. BATOR, P. MISHKIN, D. SHAPIRO, H. WECHSLER, HART AND WECHSLER'S, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 85-93 (2d ed. 1973); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 410-11 (1980); G. GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 16-18, 1609 (10th ed. 1980); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 54 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 27, 57 & n.4 (1978); and P. WOLL, CONSTITUTIONAL LAW: CASES AND COMMENTS, 8-9 (1981).

ferring to *Hayburn's Case*,<sup>10</sup> decided in 1792, alone or in conjunction with *United States v. Yale Todd*,<sup>11</sup> decided in 1794. Recent scholars, relying on different resources, arrive at the conclusion that *Marbury v. Madison*<sup>12</sup> was the first case in which the Supreme Court exercised judicial review.<sup>13</sup> They refer to *Hylton v. United States*,<sup>14</sup> decided in 1796, but then concentrate upon *Marbury*.

Several books in constitutional law, published within the last two decades, reveal the now familiar story of how judicial review originated. Professor Wallace Mendelson stated:

The first Congress wrote judicial review of state measures into Section 25 of the Judiciary Act of 1789 and the congressional debates on the Repeal Act of 1802 leave no doubt that judicial review of national legislation was generally contemplated before it was exercised by the Supreme Court in *Marbury v. Madison*.<sup>15</sup>

While recognizing that judicial review did not spring from the fantasy of the Marshall Court, Mendelson still leaves the clear impression that it was first exercised in 1803. The same view was expressed by Professors Shapiro and Hobbs when they flatly stated, "*Marbury v. Madison* (1803) was the first Supreme Court decision to declare a statute unconstitutional. . . ."<sup>16</sup>

We may also consider in some length a passage from Robert F. Cushman's *Cases in Constitutional Law*:

No more vehement argument has ever raged in the field of constitutional law and theory than that over the genesis of the power of judicial review. Did the framers of the Constitution intend to grant the power as part of the checks and balances system in the first three articles? Or did Chief Justice Marshall 'usurp' this power for the judiciary in his decision in *Marbury v. Madison*? Scholars still disagree, and the real intention of the framers will probably never be known. But a number of things are certain. *It is certain that this was the first case in which the Supreme Court openly and clearly held unconstitutional an act of Congress. It is equally certain that the idea of judicial review did not originate*

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10. 2 U.S. (2 Dall.) 409 (1792). The Invalid Act of 1792 was nullified by the circuit court. See *supra* note 1.

11. February 17, 1794. The Supreme Court nullified the acts in 1794. See *supra* note 2.

12. 5 U.S. (1 Cranch) 137 (1803).

13. This statement is made frequently in textbooks on American government and in the literature of constitutional law. We will refer later to several of these books. See *infra* notes 15-18 and accompanying text.

14. 3 U.S. (3 Dall.) 171 (1796). A question was raised about the constitutionality of a carriage tax law. Both parties to this case were in agreement that the Court should decide on the constitutionality of this statute. The Supreme Court decided that this law was valid. *Id.*

15. W. MENDELSON, *THE CONSTITUTION AND THE SUPREME COURT* 2 (2d ed. 1965).

16. M. SHAPIRO & D. HOBBS, *AMERICAN CONSTITUTIONAL LAW: CASES AND ANALYSIS* 11 (1978).

with Marshall. Most of the arguments which he used in his famous opinion had been presented again and again in the debates in Congress on the Repeal Act of 1802, and the basic theory had been advanced by Hamilton in Number 78 of *The Federalist*. Moreover, the lower federal courts, without exciting opposition, had held invalid the act of Congress making them, in effect, claims commissioners for pension claims (a fact pointed out by Marshall in his opinion).<sup>17</sup>

Cushman's statement raises several interesting points. First, if the things that Cushman finds "certain" are certain, then it becomes difficult to explain why he also stated "no more vehement argument has ever raged in the field of constitutional law and theory than that over the genesis of the power of judicial review."<sup>18</sup> This statement makes sense when considered with the assertion made by Professors Kelly and Harbison that "Marshall's argument in favor of the Court's power to declare an act of Congress void was not of major significance at the time he made it, and the importance of *Marbury v. Madison* in the history of judicial review has in fact been somewhat exaggerated."<sup>19</sup> Considering both Cushman's "no more vehement argument" in the light of Kelly and Harbison's statement that "Marshall's argument . . . was not of major significance at the time he made it," we begin to get some idea that the "vehement argument" was of latter-day origin. Chief Justice Marshall's argument was not of major significance because the theoretical and legal precedents cited by Cushman were known to Marshall's contemporaries. As we have asserted, these precedents were recognized by early twentieth century scholars. They have not, however, been noted by contemporary scholars. Thus, recent discussions of the origins of judicial review lack significant evidence which has been lost or ignored.

The second point of interest in the Cushman quotation is his statement that "it is certain that this was the first case in which the Supreme Court openly and clearly held unconstitutional an act of Congress."<sup>20</sup> The key words are "openly and clearly." These words imply that the Court may have declared unconstitutional earlier acts of Congress, but in some ambiguous or unclear manner. In fact two earlier acts of Congress were declared unconstitutional by the Supreme Court, although not

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17. R. CUSHMAN, *CASES IN CONSTITUTIONAL LAW* 4 (5th ed. 1979) (emphasis added). Cushman is the only recent scholar who makes reference to the use of precedents by Chief Justice Marshall in *Marbury v. Madison*.

18. *Id.*

19. A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 217 (5th ed. 1976). The primary problem with the Kelly and Harbison assertion is that they give scant treatment to the evidence that supports this claim.

20. R. CUSHMAN, *supra* note 17.

with the force of *Marbury v. Madison*.<sup>21</sup> Cushman, however, does not discuss these earlier cases, and therefore gave no explanation for qualifying *Marbury* as the first "open and clear" exercise of judicial review.

The third interesting aspect of the Cushman quotation is that, although he cites the circuit courts' striking down of the 1792 law, he views Essay No. 78 in *The Federalist*<sup>22</sup> and the debates surrounding the Repeal Act of 1802<sup>23</sup> as the primary theoretical precedents for the doctrine of judicial review articulated in *Marbury*.<sup>24</sup> As significant as those precedents are, the tradition providing a justification for judicial review is larger and richer than Cushman suggests.

Another scholar's view of the origins of judicial review is found in Professor Currie's article, which was published in the Fall of 1981.<sup>25</sup> This article can be distinguished from all of the contemporary literature in constitutional law because he discussed the three cases from the 1790's, *Hayburn's Case*,<sup>26</sup> *Chandler v. Secretary of War*,<sup>27</sup> and *United States v. Yale Todd*,<sup>28</sup> and reached some interesting conclusions. Currie's facts were drawn from: (1) the debates in Congress over the Repeal Bill in 1802;<sup>29</sup> (2) Chief Justice Taney's note at the end of *United States v. Ferreira*,<sup>30</sup> (3) Marshall's opinion in *Marbury v. Madison*,<sup>31</sup> (4) the Invalid Acts of 1792 and 1793,<sup>32</sup> and (5) other evidence from that time period.<sup>33</sup>

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21. 5 U.S. (1 Cranch) 137 (1803).

22. THE FEDERALIST No. 78 (A. Hamilton).

23. Act of April 29, 1802, ch. 31, 2 Stat. 156. This act is entitled: "An Act to amend the Judicial System of the United States." *Id.*

24. By referring to Marshall's use of earlier decisions as precedents Cushman became the only constitutional scholar to comment upon this fact. R. CUSHMAN, *supra* note 17. The closest that we have come is a statement appearing in David Currie's article. Currie, *The Constitution in the Supreme Court: 1789-1801*, 48 U. CHI. L. REV. 819 (1981). He discussed pages 171-72 in the *Marbury* opinion, but he did not refer to the precedents that are discussed there. *Id.* at 827 n.57.

25. Currie, *supra* note 24.

26. 2 U.S. (2 Dall.) 409 (1792).

27. February 14, 1794. For further information, see *supra* note 2.

28. February 17, 1794. For further information, see *supra* note 2.

29. Currie, *supra* note 24, at 827 n.57.

30. *Id.*

31. *Id.*

32. Currie, *supra* note 24, at 822 & n.20.

33. Letter dated February 21, 1794, sent by the Secretary of War to Congress. *Id.* at 821 & n.12. Three letters sent by the circuit courts to President Washington. *Id.* at 821 & n.12. Letter from the Attorney General to the Secretary of War, dated August 9, 1793. *Id.* at 826 & n.52. U.S. CONST. art. III, § 2, cl. 2. *Id.* at 828 & n.61.

Concerning *Chandler* and *Todd*, Currie made the following observations. First, neither *Chandler* nor *Todd* appealed the lower court decision.<sup>34</sup> Second, these cases were subject to the original jurisdiction of the Supreme Court.<sup>35</sup> Third, the opinions were not published.<sup>36</sup> Currie noted that the three circuit courts "concluded that the [1792] statute was unconstitutional because it attempted to subject court decisions to revision by the Secretary of War."<sup>37</sup> Yet shortly thereafter he stated that it would be "improper to conclude," as some had done, "that the Supreme Court in *Chandler* or *Todd* held the 1792 pension statute unconstitutional."<sup>38</sup>

His conclusion appears to be logical and sound until additional facts unknown to Currie are introduced. If he had researched the congressional debates of 1792, 1793 and 1794, rather than the *Annals of Congress* in 1802,<sup>39</sup> and if he had realized that a new statute was enacted in 1794<sup>40</sup> to replace the earlier laws, then Currie may have arrived at a different conclusion.

The facts, evidence and experiences of the latter part of the eighteenth century, in addition to the three cases decided in the 1790's, tell a different story about the origins of judicial review from that which we so often hear. It seems appropriate at this time, as we are approaching the bicentennial celebration of the framing of the Constitution, to examine all the evidence and re-

34. Currie, *supra* note 24, at 827.

35. *Id.*

36. *Id.* Currie may have been in error. It is true that there are only extracts of the minutes in these two cases. Nevertheless, Mr. Edmond, the attorney for *Chandler*, made reference "to the order and adjudication of the honorable James Iredell and Richard Law, Esq's, judges of the circuit court of the United States." 11 ANNALS OF CONG. 904 (1802). There are eight pages of documents for the *Todd* case, including a two and one half page lower court decision. DOCUMENTS, *supra* note 2, at 3-5. Professor Currie also noted that Marshall discussed the reasons why a writ of mandamus was not issued in *Chandler*. Currie, *supra* note 24, at 827 n.57.

37. Currie, *supra* note 24, at 822.

38. *Id.* at 827.

39. For example, Currie noted that one of the Court's reporters "concluded that until 1800, the written opinion was the exception, not the rule." *Id.* at 825 n.48 (citing DAVIS, APPENDIX TO THE REPORTS OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, 131 U.S. app. at XV-SVI (1889)).

The 1792 debates in Congress contain a suggestion made by Representative Murray in response to *Hayburn's Case*. 3 ANNALS OF CONG. 557 (1792). Murray suggested "the necessity of passing a law to point out some regular mode in which the Judges of the Courts of the United States shall give official notice of their refusal to act under any law of Congress, on the ground of unconstitutionality." *Id.* There is a brief comment after Murray made his proposal. "No regular motion, however, was made on the subject, which lies over for future consideration." *Id.*

40. Act of June 7, 1794, ch. 57, 1 Stat. 392 (obsolete). This act is entitled: "An Act concerning Invalids." *Id.*

construct the history of judicial review within the American system of government.

#### ORIGINS OF JUDICIAL REVIEW IN THE COLONIES AND IN THE EARLY STATES

Americans first became familiar with judicial review during the colonial period. The Privy Council in England possessed a power to disallow laws adopted by the thirteen colonial assemblies.<sup>41</sup> This disallowance power was exercised when the colonial legislatures exceeded their authority in adopting certain laws and when colonial laws conflicted with superior laws adopted by Parliament.<sup>42</sup> According to Charles Grove Haines, the Privy Council reviewed 8563 acts adopted by the colonial assemblies in the years between 1696 and 1776, and "469 or 5.5 percent were disallowed by orders in council."<sup>43</sup> E. Russell stated that the power to disallow colonial laws was similar to that "assumed by the Supreme Court of the United States after the formation of the new government."<sup>44</sup> As a consequence of this power the colonial assemblies realized that their legislative authority was limited. The same could later be said about the state legislatures, because they too discovered that their law-making power was limited by judicial review. This was demonstrated prior to the Constitutional Convention of 1787, when several state courts claimed that they had the power of judicial review.<sup>45</sup> On at least two occasions state courts nullified state laws.<sup>46</sup>

The power to disallow colonial laws and the power of judicial review appeared the same in both intent and consequence. The Privy Council, however, disallowed colonial laws either because the assemblies had exceeded their authority, or the laws conflicted with parliamentary statutes. On the other hand, when judicial review was used, a law was nullified because it violated constitutional principles.<sup>47</sup> Though the doctrine of judicial review seemed to be intimately connected to the idea of a written constitution, not a single state constitution granted this

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41. E. RUSSELL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* 227 (1976).

42. *Id.* See also C. HAINES, *supra* note 6, at 46.

43. C. HAINES, *supra* note 6, at 49; see generally C. HAINES, *supra* note 6, at ch. 3.

44. E. RUSSELL, *supra* note 41, at 227.

45. C. HAINES, *supra* note 6, at 88-121.

46. *Id.* at 109-20.

47. Under some circumstances, state laws will conflict either with a federal law or a treaty of the United States. In those instances, the state law becomes inoperative and not unconstitutional. U.S. CONST. art. VI, cl. 2.



power of judicial review to the state courts.<sup>48</sup> The United States Constitution was also silent about judicial review and the federal judiciary.<sup>49</sup>

#### AMERICAN ATTITUDES ABOUT JUDICIAL REVIEW

The early Americans who were opposed to the power of judicial review were not among the national leaders, and were too few in number to constitute a majority. Only two delegates at the Constitutional Convention, Mercer and Dickinson,<sup>50</sup> reacted negatively to this judicial power.<sup>51</sup> On the other hand, eight delegates supported judicial review, and they were truly among the political leaders.<sup>52</sup>

Judicial review became a topic for discussion at the Constitutional Convention only after a proposal to adopt a Council of Revision had been considered. The proposed council would have been comprised of the President and members of the judiciary, exercising the veto power against congressional bills when appropriate. The Council of Revision was rejected primarily because the delegates perceived it as violating the constitu-

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48. Yet the state courts claimed that they had this power to nullify state laws. C. HAINES, *supra* note 6, at 88-121.

49. The Constitution of the United States does authorize the state courts to exercise this power in certain circumstances. Art. VI, cl. 2 of the Constitution states:

This Constitution and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary, notwithstanding.

U.S. CONST. art. VI, cl. 2 (emphasis added).

50. John Mercer "disapproved of the doctrine, that the Judges . . . should have authority to declare a law void." JOURNAL OF THE CONSTITUTIONAL CONVENTION KEPT BY JAMES MADISON 533 (E. Scott ed. 1893) [hereinafter cited as MADISON'S JOURNAL]. John Dickinson supported Mercer's argument. *Id.* at 534.

51. Another negative reaction to the power of judicial review occurred when the Superior Court of Judicature in Rhode Island declared a state law unconstitutional, and shortly thereafter ran into difficulties with the state legislature. C. HAINES, *supra* note 6, at 105-12. The Rhode Island case was *Trevett v. Weedon* (1786). *Id.* But this was the exception and not the rule, as was so often the case in Rhode Island. That state was not represented by delegates at the Constitutional Convention.

52. Included among them were James Madison, Alexander Hamilton, James Wilson, Elbridge Gerry, Luther Martin and George Mason, who were certainly political leaders at that time. Therefore, when Elbridge Gerry, an advocate of judicial review, informed his colleagues at the convention that this power was claimed by several state courts, and that this was done with general approval, there was no opposition to his contention. MADISON'S JOURNAL, *supra* note 50, at 101.

tional principle of the separation of powers.<sup>53</sup> A secondary reason for rejecting the Council may have been that the delegates assumed the power of judicial review already existed. This can be seen in an exchange between Delegates Luther Martin of Maryland and George Mason of Virginia. Martin maintained:

[A]s to the constitutionality of laws, that point will come before the Judges in their official character. In this character *they have a negative on the laws*. Join them with the Executive in the revision, *and they will have a double negative*.<sup>54</sup>

Mason agreed with Martin about the existence of judicial review. He disagreed, however, with Martin's claim of "a double negative." Mason observed that judges "could impede, in one case only, the operation of laws. They could declare an unconstitutional law void."<sup>55</sup> This was the only basis on which judges could reject legislation. Constitutional laws, which were nevertheless "unjust, oppressive or pernicious," would have to be given "a free course."<sup>56</sup> In other words, Mason felt that Martin had failed to draw a distinction between two negative powers. The first negative power permitted the judges to nullify unconstitutional laws. The second negative power permitted the judges to veto bills adopted by Congress and was to be exercised whenever the judges reached a conclusion that was not limited to questions of constitutionality. What is significant for our purposes is the clear assumption underlying Martin's objection to the Council of Revision: the Court already had a negative power in the form of judicial review. While Mason was in favor of the Council of Revision, he still agreed with Martin on the existence of judicial review.

Discussion of judicial review at the Constitutional Convention was slight. Some commentators have emphasized that both the relative silence of the members of the Convention on the subject of judicial review, and the silence of the Constitution, is evidence that we cannot know what the framers intended with regard to this power.<sup>57</sup> It is altogether reasonable to reach an-

53. *Id.* at 104-05, 107. The final vote on this motion was three states in favor (Delaware, Maryland and Virginia) and eight opposed. *Id.* at 533.

54. *Id.* at 402 (emphasis added).

55. *Id.* at 403.

56. *Id.* at 403-04.

57. We should recall a statement by Cushman. "Scholars still disagree, and the real intention of the framers will probably never be known." R. CUSHMAN, *supra* note 17.

So many of the contemporary scholars state that we do not know what the intention of the framers was. For example, Professor Wasby states, "[a]lthough the jurisdiction of the courts generally and of the Supreme Court in particular was spelled out, and although supremacy of national law was established, *not a word was said regarding the power of these federal*

other conclusion: to the extent that judicial review was discussed, the power was assumed and referred to with approval. At least some members of the Convention regarded judicial review as a natural part of the judicial power within the constitutional system.<sup>58</sup> Just as certain powers were assumed to be part of the presidential power, judicial review was assumed to be part of the judicial power. This is the logic of Hamilton's argument in Essay No. 78 of *The Federalist*.<sup>59</sup> Hamilton's reasoning is paralleled fifteen years later by the Marshall Court in *Marbury v. Madison*.<sup>60</sup> Hamilton's argument also was consistent with the tenor of opinions expressed years earlier at the Constitutional Convention. While serving as a delegate from North Carolina to the Constitutional Convention, James Iredell, later to be a member of the Supreme Court, received a letter from Richard Dobbs Spaight. Spaight complained of a usurpation of authority by North Carolina judges, who had recently declared a state law to be a violation of that state's constitution. He concluded that this action "must produce the most serious reflection in the breast of every thinking man and of every well wisher to his country."<sup>61</sup> Charles Warren, however, wrote that this was one of the only letters taking that position at the time.<sup>62</sup> Iredell's response embodied the same reasoning to be found later in *The Federalist* and in *Marbury*:

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*courts to invalidate laws contrary to the Constitution.*" S. WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 35-36 (1978) (emphasis added).

58. There is every likelihood that most of the delegates and other leading American citizens either advocated judicial review or at least accepted it as being part of the constitutional system. This was demonstrated by Charles Beard in 1912 and more recently by Kelly and Harbison. Beard identified twenty-five delegates "whose character, ability, diligence and regularity of attendance, separately or in combination" were the "dominant element" in the Constitutional Convention. Beard, *supra* note 5, at 4. He then noted that seventeen "declared, directly or indirectly, for judicial control." *Id.* Kelly and Harbison indicated that before 1803, a majority of the bench and bar had considered judicial review a necessary part of the constitutional system, and this support was maintained until the debate over the controversial Repeal Act of 1802. A. KELLY & W. HARBISON, *supra* note 19, at 217.

59. In 1788, Hamilton's essays, which were later incorporated into *The Federalist*, were published in New York newspapers. Essay No. 78 provided one statement on what was or was becoming the American doctrine of judicial review. Just as Marshall was to borrow heavily from Hamilton's reasoning in deciding *McCulloch v. Maryland*, 17 U.S. 316 (1819), so too, there is parallelism between Hamilton's statement in *The Federalist* and the reasoning of the Marshall Court fifteen years later in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

60. 5 U.S. (1 Cranch) 137 (1803).

61. C. WARREN, *THE MAKING OF THE CONSTITUTION* 434 (1937).

62. *Id.*

Either the fundamental irrevocable law must be obeyed by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people. . . . It is not that the Judges are appointed arbiters and to determine, as it were, upon any application whether the Assembly have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must, unavoidably, determine one way or another.<sup>63</sup>

This was also the conclusion drawn by Representative Dana in 1802, when he considered the *Chandler* case:

We here find that the authority of judges to decide questions arising under the Constitution was fully recognised. The first President of the United States, the Congress, and the Judges of the Supreme Court, all sanctioned the opinion by their official proceedings. And it is well known that many of them were members of the General Convention or of State Conventions, which agreed to the Constitution.<sup>64</sup>

Speaking at the Pennsylvania Ratifying Convention, James Wilson, second only to Madison in terms of his influence on the drafting of the Constitution, and later to be a Justice of the Supreme Court, stated the classical position on judicial review:

If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void. For the power of the constitution predominates. Anything therefore, that will be enacted by Congress contrary thereto, will not have the force of law.<sup>65</sup>

We should also consider Thomas Jefferson's support of judicial review.<sup>66</sup> In a December, 1787 letter to Madison concerning the new Constitution, Jefferson did not seem to realize that the federal courts would have a negative power, and he complained about this deficiency:

I like the negative given to the Executive with a third of either house, *though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power.*<sup>67</sup>

Later, Jefferson either discovered or was influenced by others

63. *Id.* at 435.

64. 11 ANNALS OF CONG. 925 (1802).

65. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788 354 (J. McMaster & F. Stone eds. 1970).

66. Beard maintained that when Jefferson became President, he "frequently attacked judicial 'usurpation' with great vehemence." Beard, *supra* note 5, at 35. But Beard also stated that Jefferson's comments regarding judicial review before the new constitutional system had been established were fully in support of this judicial power. *Id.*

67. 12 THE PAPERS OF THOMAS JEFFERSON 440 (J. Boyd ed. 1955) (emphasis added) [hereinafter cited as THOMAS JEFFERSON].

that the judiciary had a negative power.<sup>68</sup> In March 1789, Jefferson wrote another letter to Madison, discussing the proposed Bill of Rights. He stated:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me, the legal check which it puts into the hands of the judiciary. This is a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity.<sup>69</sup>

This portion of the letter was aimed at persuading Madison not to be troubled by the addition of a Bill of Rights to the Constitution. Several months later, in the House debates over a proposed Bill of Rights, it was argued by some that such amendments would be meaningless, because no branch of the federal government could protect those liberties. Echoing Jefferson, Madison responded to this argument, maintaining that:

[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.<sup>70</sup>

Madison seemed to be influenced by Jefferson much as the latter was persuaded either by Hamilton's argument in *The Federalist*<sup>71</sup> or by a similar argument from another source regarding the powers of the judiciary.

One of the most interesting figures to address the entire range of issues relating to the judiciary under the new Constitution was the anti-Federalist writer "Brutus." Perhaps better than any other eighteenth century American, Brutus perceived the potential power that resided in this proposed federal judiciary. It was Brutus' perceptions that ultimately led him to oppose the Constitution. Brutus objected to the Constitution because its judiciary "will be authorised to decide upon the meaning of the constitution, . . . not according to the natural and obvious meaning of the words, but also according to the

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68. Jefferson did not say who had influenced him to arrive at a new conclusion. We know that Essay No. 78 of *The Federalist* was published in the New York newspapers in 1788, and Hamilton's statements might have influenced the change in Jefferson. But there was a change that occurred between December 1787 and March 1789. In the latter letter to Madison, Jefferson stated that the judiciary must be "independent, and kept strictly to their own department." 13 THOMAS JEFFERSON, *supra* note 67, at 659 (contains Jefferson's letter to Madison, dated March 15, 1789). And the judiciary would protect the liberties stated within the Bill of Rights. *Id.*

69. *Id.*

70. 1 ANNALS OF CONG. 457 (1789).

71. THE FEDERALIST No. 78 (A. Hamilton).

spirit and intention of it.'"<sup>72</sup> Brutus added, "If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature."<sup>73</sup> Clearly Brutus was not debating whether the federal courts should have this power. He anticipated that judicial review was an inherent part of the constitutional system.<sup>74</sup> Thus, just as the Federalists, Brutus assumed that judicial review actually existed although nowhere in the Constitution is this power spelled out. Of course, he differed from the Federalists in terms of how he evaluated this power, and it was this difference that caused him to oppose the Constitution.

Concerning Jeffersonian Republicanism, Charles Warren, traced the early history of the judiciary and observed that although the attitudes of Southern statesmen and anti-Federalists may have subsequently been changed, in the beginning it was clear that they supported judicial review.<sup>75</sup> For example, Warren discussed the responses of several prominent Southerners to a proposed bill that would have made the Secretary of Foreign Affairs removable by the President.<sup>76</sup> To those who suggested that Congress should not legislate in this area, that the Court and not Congress should decide on the President's removal power, Abraham Baldwin of Georgia responded: "It is their province to decide upon our laws and if they find them to be unconstitutional, they will not hesitate to declare it so."<sup>77</sup> Even the Court's anti-Jeffersonian actions in *Marbury* did not lead the administration to challenge judicial review. According to Kelly and Harbison, "[t]he reaction of the Republicans to the *Marbury* decision was limited and less critical than were their responses to some of Marshall's later decisions."<sup>78</sup> Accordingly, "the portions of the opinion affirming the Court's right to declare acts of Congress void aroused relatively little opposition."<sup>79</sup>

We can now add to the list of "things certain" provided by

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72. THE ANTI-FEDERALISTS 354-55 (C. Kenyon ed. 1966) (reproducing the letters of Brutus).

73. *Id.*, at 355.

74. Indeed one recent commentator wrote that "Brutus' description of what we call judicial review is already more comprehensive than that described by either Hamilton in Federalist LXXVIII, or Marshall in *Marbury v. Madison*." Diamond, *The Anti-Federalist "Brutus"*, 6 POL. SCI. REV. 249, 270 (1976).

75. C. WARREN, *supra* note 5, at 83.

76. *Id.*

77. *Id.*

78. A. KELLY & W. HARBISON, *supra* note 19, at 218.

79. *Id.* at 218-19.

Professor Cushman.<sup>80</sup> It should be recalled there were three things of which he felt certain: (1) *Marbury v. Madison* was the first case in which the Court "openly and clearly" voided a congressional statute; (2) judicial review did not originate with the Marshall Court; and (3) the lower federal courts declared a law unconstitutional before 1803.<sup>81</sup> We can add to this list the views of political leaders from the founding era, who were almost unanimously in favor of the doctrine of judicial review. The preponderance of evidence suggests the framers intended the courts to have the power of judicial review.

It should be recalled that there was only a brief discussion of this judicial power at the Constitutional Convention when the delegates had considered a proposal to adopt a Council of Revision. Because some of those delegates had supported this doctrine in such positive terms, it is ambiguous why they did not move that judicial review become a specific part of the Constitution. There are two possible reasons for their failure to act. Either they remained silent over this power because of their concern over the adoption of the Constitution, or they regarded judicial review as a natural part of the total judicial power. The delegates who treated judicial review as an assumed power of the court did not feel that it was necessary to vest this power in the judiciary. So many contemporary scholars have accepted the first answer that it has become conventional wisdom. From the evidence discussed in this section, however, we would accept the second answer.

There is sufficient evidence to make a decision. As was demonstrated at the Constitutional Convention and thereafter, most of the leading political figures supported this negative power of the courts either explicitly or implicitly. And while no one can deny the great power of Chief Justice Marshall's reasoning in *Marbury*, his statements were matched by earlier formulations of the classical defense of judicial review: Hamilton's Essay No. 78 in *The Federalist*, James Iredell's response to Richard Dobbs Spaight, and James Wilson's statements at the Pennsylvania Ratifying Convention. There were other formulations as well, including the correspondence between Jefferson and Madison,<sup>82</sup> the latter's statement on June 8, 1789 in the First

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80. R. CUSHMAN, *supra* note 17.

81. *Id.* See *supra* notes 17-20 and accompanying text.

82. In 1789, Madison and Jefferson authored the Virginia and Kentucky Resolutions against the federal Alien and Sedition Acts. 4 ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 528-29, 540-45 (J. Elliot ed. 1888). These resolutions were responded to by seven other states. *Id.* at 532-39. Five of the states had contended that an unconstitutional law was to be nullified by the federal judiciary. *Id.* Madison answered these objections in his report on

Congress, and the thoughtful opponent to the Constitution, the anti-Federalist Brutus. All of these statements provided a theoretical framework for the doctrine of judicial review. This power was exercised by the circuit courts<sup>83</sup> and by the Supreme Court<sup>84</sup> before *Marbury v. Madison* in 1803.<sup>85</sup> Marshall drew upon this rich, theoretical background in writing his opinion in *Marbury*, and what is more, he actually used the precedents in that decision.<sup>86</sup>

#### THE INVALID PENSION LAWS

The Invalid acts were statutes which provided pensions for disabled veterans of the Revolutionary War. The federal government had taken over this responsibility from the states in 1789, and paid the pensions under regulations promulgated by the President.<sup>87</sup> The law of 1789 only appropriated money for one year, so Congress enacted new bills in 1790<sup>88</sup> and 1791<sup>89</sup> to extend those payments.

The next two laws to extend pension payments raised constitutional questions. Under the 1792 law, Congress authorized the Secretary of War to correct mistakes made by the circuit courts.<sup>90</sup> Section four of this act described the duties and responsibilities of the Secretary, who could overturn judgments rendered by the judges.<sup>91</sup> The Secretary of War would place the names of claimants to pensions on the list with this proviso: "*Provided always*, That in any case, where the said Secretary shall have cause to suspect imposition or mistake, he shall have power to withhold the name of such applicant from the pension

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the Virginia Resolution. *Id.* at 549. He said that while he supported judicial review, in this particular instance the federal courts could not use this power. *Id.*

This had occurred after the federal courts had nullified the laws of 1792 and 1793. Therefore, it is irrelevant to the subject.

83. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410-15.

84. *Chandler v. Secretary of War* (February 14, 1794) and *United States v. Yale Todd* (February 17, 1794). For further information on these cases, see *supra* note 2.

85. 5 U.S. (1 Cranch) at 137.

86. *Id.* at 171-72.

87. Act of July 16, 1789, ch. 24, 1 Stat. 95 (expired). This act is entitled: "An Act providing for the payment of the Invalid Pensioners of the United States." *Id.*

88. Act of July 16, 1790, ch. 27, 1 Stat. 129.

89. Act of March 3, 1791, ch. 24, § 2, 1 Stat. 218 (obsolete).

90. Act of March 23, 1792, ch. 11, § 4, 1 Stat. 243 (expired). This act is entitled: "An Act to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims to Invalid Pensions." *Id.*

91. *Id.* at § 4.



list,"<sup>92</sup> and he should then report this to Congress.<sup>93</sup> What this meant seemed clear to the judges serving on circuit courts: judges were being utilized as executive officials, with their findings subject to being overturned by the Secretary of War.<sup>94</sup> This appeared to be a clear violation of the principle of separation of powers. It was this section of the law that was nullified by the circuit courts.

It is necessary to understand the composition of the circuit courts in order to discuss their reaction to the 1792 Invalid Pension Act. Congress created the district and circuit courts under its constitutional authority.<sup>95</sup> Section four of the Federal Judiciary Act of 1789 divided the United States into three circuits and created the eastern, middle and southern circuit courts.<sup>96</sup> Each of these courts was to consist "of any two justices of the Supreme Court, and the district judge of such districts, and any two of whom shall constitute a quorum."<sup>97</sup> When the circuit courts responded to the 1792 statute, there were only five members of the Supreme Court, one seat being vacant.<sup>98</sup> Chief Justice Jay and Justice Cushing were members of the eastern circuit.<sup>99</sup> Justices Wilson and Blair sat on the middle circuit court in Philadelphia.<sup>100</sup> Justice Iredell was the only member of the southern circuit.<sup>101</sup> In the letters sent to President Washington, all five members of the Supreme Court expressed serious doubts as to the constitutionality of the Invalid Act of 1792, al-

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92. *Id.* (emphasis in original).

93. *Id.*

94. This conclusion is drawn from the statements made in the letters from the circuit courts to Washington, in which the 1792 law was declared unconstitutional. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410-15.

95. Judiciary Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. This act is entitled: "An Act to establish the Judicial Courts of the United States." *Id.*

96. *Id.* at § 4.

97. *Id.*

98. Moore reported that Johnson had taken his seat on the Court in August 1792, after the letters were written by the circuit courts. B. MOORE, *supra* note 6, at 38 n.3. A letter to President Washington from the Supreme Court included the signature of Justice Johnson. The letter was dated August 9, 1792. 3 ANNALS OF CONG. app. 1318 (1792).

This explains one point made by Professor Currie. He stated that the Supreme Court was equally divided over a petition from the Attorney General. Currie, *supra* note 24, at 823. Apparently the action was taken in *Hayburn's Case* in August or sometime after. *Hayburn's Case*, 2 U.S. (2 Dall.) at 409.

99. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410.

100. *Id.* at 411.

101. *Id.* Judge Sitgreaves, a district court judge was also in the southern circuit. *Id.* One provision of the Judiciary Act of 1789 said that two judges would constitute a quorum. Judiciary Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73 (obsolete).

though they responded in various ways.<sup>102</sup>

The circuit courts raised doubts about this statute, and at least one of them nullified this law.<sup>103</sup> The law did not recognize that the federal courts were judicial, and neither Congress nor the President could "constitutionally assign the judicial any duties, but such as are properly judicial, and to be performed in a judicial manner."<sup>104</sup> After having expressed these doubts about the law's constitutionality, the eastern circuit court judges then stated:

As, therefore, the business assigned to this court, by the act, is not judicial, nor directed to be performed judicially, the act can only be considered as appointing commissioners for the purposes mentioned in it, by *official* instead of *Personal* description. That the judges of this court regard themselves as being the commissioners designated by the act, and therefore, as being at liberty to accept or decline that office.<sup>105</sup>

Wilson and Blair stated that this law was void, "[b]ecause the business directed by this act is not of a judicial nature."<sup>106</sup> A similar objection was voiced by Iredell and Sitgreaves in their letter to Washington.<sup>107</sup>

These judicial responses, and particularly the action that was taken by the middle court in *Hayburn's Case*,<sup>108</sup> received a great deal of public attention. Farrand wrote that the "newspapers of the day indicate that not a little interest was aroused by the first Hayburn Case."<sup>109</sup> Professor Warren noted that "the decision [in the *Hayburn Case*] evidently caused considerable excitement not only in Congress but in the community."<sup>110</sup> There was no opinion in *Hayburn's Case*.<sup>111</sup> Nevertheless, on the following day, April 13, 1792, William Hayburn petitioned Congress, noting that the court had refused to proceed upon his case.<sup>112</sup> He stated that the judges were opposed to this law for several reasons, one being that the Secretary of War could cor-

102. This can be demonstrated by each of the letters. *Hayburn's Case*, 2 U.S. (2 Dall.) at 410-15.

103. The middle circuit court voided this law. *Id.* at 411.

104. A statement made by Jay and Cushing, and Duane, a district court judge. *Id.* at 410.

105. *Id.* at 411 (emphasis in original).

106. *Id.*

107. *Id.* at 412-13.

108. *Id.* at 411.

109. Farrand, *The First Hayburn Case, 1792*, 13 AM. HIST. REV. 281, 284 (1908).

110. C. WARREN, *supra* note 5, at 72. He then devoted five pages to lengthy excerpts from letters and newspaper articles addressed to the controversy. *Id.* at 72-77.

111. See *supra* note 39.

112. Statement made in this petition. 3 ANNALS OF CONG. 556 (1792).

rect the mistakes made by the judges.<sup>113</sup>

Subsequently, in the discussion within the House, it was noted:

This being the first instance in which a court of justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion. At length a committee of five was appointed to inquire into the facts contained in the memorial, and to report thereon.<sup>114</sup>

There were two other points made at this time. Members of the House were told that the judges of the eastern circuit would act in the capacity of commissioners for one hour a day after their judicial roles.<sup>115</sup> Secondly, Representative William Murray suggested to Congress that it enact a law which would provide "some regular mode" whereby the federal judges "shall give official notice of their refusal to act under any law of Congress, on the ground of unconstitutionality."<sup>116</sup>

In August 1792, Attorney General Randolph had written to President Washington, urging him to run for reelection. One of the issues he discussed was the circuit courts' nullifying the law of 1792:

It is much to be regretted, that the judiciary, in spite of their apparent firmness in annulling the pension-law, are not, what some time hence they will be, a resource against the infractions of the constitution, on the one hand, and a steady asserter of the federal rights, on the other. So crude is our judiciary system, so jealous are state-judges of their authority, so ambiguous is the language of the constitution, that the most probable quarter, from which an alarming discontent may proceed, is the rivalry of those two orders of judges . . . the precedent, fixed by the condemnation of the pension-law, if not reduced to its precise principles, may justify every constable in thwarting the laws.<sup>117</sup>

While Randolph regretted that the federal courts had nullified this law, he did not recommend overturning this power by a con-

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113. *Id.* The Secretary of War was required to inform Congress of the judges mistakes, and Congress would revise them. *Id.* In addition, Hayburn stated the judges were opposed to this law because the judges would have to sit for five days to hear these claims, whether they were presented or not, and the law left "nothing to the discretion and integrity of the judges" to hold court as long as they had cases to decide. *Id.*

114. *Id.* at 557.

115. *Id.*

116. *Id.* We noted this earlier, *see supra* note 39. Professor Warren treated this suggestion as one more example of "a complete and early recognition in Congress that the Judges would continue to exercise this power." C. WARREN, *supra* note 5, at 72.

117. 32 THE WRITINGS OF GEORGE WASHINGTON 135 n.28. (J. Fitzpatrick ed. 1939).

stitutional amendment.<sup>118</sup>

President Washington notified both houses of Congress about the letters he received from the circuit courts, pointing out that the 1792 law was unconstitutional.<sup>119</sup> Since Congress had copies of these letters in its possession, each house could see how the law would have to be changed. On February 28, 1793, Congress enacted a new statute concerning invalid pensions.<sup>120</sup> A resolution appeared before section one. It stated that the law of 1792 was unable to prevent the admission of improper claims to the pensions and sought to overcome the difficulties by discovering a method for allowing valid claims.<sup>121</sup> The new statute reworked the first four sections of the 1792 law. Sections two and three described the responsibilities of the district courts (not the circuit courts) and the Secretary of War.<sup>122</sup> The judges would submit the names, including the evidence, to the Secretary of War who would then compare them to the "muster-rolls, and other documents in his office."<sup>123</sup> The Secretary would report on each case to Congress, and include remarks and circumstances necessary for the legislature to reach a proper decision.<sup>124</sup> This meant that the legislature had taken over control from the Secretary. Therefore, Congress' actions were again superior to the decisions rendered by the district courts.

One of the innovative features of the new law was the involvement of the Supreme Court for the first time. Section three authorized the Secretary of War and the Attorney General to take whatever action was necessary to have the United States Supreme Court decide the validity of any rights that were claimed by the applicants.<sup>125</sup> The Attorney General had used this provision in urging the Supreme Court to issue a writ of mandamus to the Secretary of War, commanding him "to put on the pension list one of those who had been approved by the judges, acting in the character of Commissioners."<sup>126</sup> Earlier, in

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118. *Id.* Randolph's real concern was whether Washington would serve for a second term in the presidency. He said that this was necessary in order that Washington could continue to exercise leadership and maintain popular confidence in the governmental system. *Id.*

119. 3 ANNALS OF CONG. 123, 127-28 (1792) (letters dated April 16th and 23rd). Washington later reported to Congress in November that he received a letter from the southern circuit about the unconstitutionality of this law. *Id.* at app. 1317-18 (1792).

120. Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (expired). This act is entitled: "An Act to regulate the Claims to Invalid Pensions." *Id.*

121. *Id.*

122. *Id.* at §§ 2-3.

123. *Id.* at § 2.

124. *Id.*

125. *Id.* at § 3.

126. This letter is found in 11 ANNALS OF CONG. 924 (1802).

*Hayburn's Case*,<sup>127</sup> Randolph requested that the Supreme Court issue a writ of mandamus, commanding the circuit court for the district of Pennsylvania to proceed in Hayburn's petition.<sup>128</sup> Randolph did not succeed in either effort. He informed Secretary Knox that the Court was unwilling to act:

[T]wo of the Judges having expressed their disinclination to hear a motion in behalf of a man who had not employed me for that purpose, and I being unwilling to embarrass a great question with little intrusions, it seemed best to waive the motion until some of the invalids themselves should speak to counsel.<sup>129</sup>

#### THE *CHANDLER* AND *TODD* CASES

On February 5, 1794, Attorney General Randolph's wish was fulfilled when John Chandler requested that the Supreme Court issue a writ of mandamus to the Secretary of War.<sup>130</sup> Ten days later, the United States appealed a judgment in *Todd*<sup>131</sup> rendered against them by the eastern circuit court.<sup>132</sup> The Court thus had two opportunities to consider the facts in these cases and whether these laws of 1792 and 1793 were constitutional.<sup>133</sup>

Only the extract of the Court's minutes in the *Chandler* case is available today,<sup>134</sup> and it is incomplete. Five justices were present on February 5, 1794, when the Supreme Court heard this case. Mr. Edmond, Chandler's attorney, moved:

[F]or a mandamus to the Secretary of War, for the purpose of directing him to cause the said John Chandler to be put on the pension list of the United States, as an invalid pensioner, conformably to the order and adjudication of the honorable James Iredell and Richard Law, Esq's, judges of the circuit court of the United States.<sup>135</sup>

It took nine days for the Court to reach a decision. Then on February 14, 1794, the Court stated that it had considered the two acts of Congress and decided "that a mandamus cannot issue, to the Secretary of War, for the purpose expressed in said motion."<sup>136</sup>

127. 2 U.S. (2 Dall.) at 409.

128. *Id.*

129. 11 ANNALS OF CONG. 924 (1802).

130. Extract of the Minutes in *Chandler*. 11 ANNALS OF CONG. 904 (1802).

131. February 17, 1794. For further information on case, see *supra* note 2.

132. Todd was a resident of Connecticut and requested that the eastern circuit court place his name on the pension list. DOCUMENTS, *supra* note 2, at 3-4.

133. It will be pointed out momentarily that this was the question presented at least in *Todd*. See *infra* note 149 and accompanying text.

134. See *supra* note 2.

135. 11 ANNALS OF CONG. 904 (1802).

136. *Id.*

Why did the Court refuse to issue a writ of mandamus to the Secretary of War? One probable answer is that the five justices responded the same way that the middle circuit court had two years earlier<sup>137</sup> when Wilson and Blair declared the 1792 law unconstitutional “[b]ecause the business directed by this act is not of a judicial nature.”<sup>138</sup> We will consider the implications of this case after we have discussed *Todd*.

There are more facts and information in *Todd* than in *Chandler*. The eastern circuit court considered a petition from Yale Todd on May 3, 1792,<sup>139</sup> and decided in favor of the applicant. This court, with the judges acting as commissioners, decided that Todd ought to be placed on the pension list and paid two-thirds of his original salary.<sup>140</sup> The court also added one hundred and fifty dollars for arrears.<sup>141</sup>

William Bradford, then the Attorney General of the United States, appeared before the Supreme Court on February 15, 1794.<sup>142</sup> He informed the justices that on May 1, 1793, Todd owed the United States \$172.91.<sup>143</sup> He told the Court that Todd had agreed to repay the money, but subsequently refused to do so.<sup>144</sup> The claim of the United States was for three hundred dollars in repayment and damages.<sup>145</sup> Bradford noted that the eastern circuit court had issued a certificate in favor of Todd, which was submitted to the Secretary of War. On September 2, 1792, Todd received a sum of \$150 in arrears and an additional sum of \$22.91 for his pension.<sup>146</sup> The documents of the *Yale Todd* case include two statements by Bradford, and a two and one-half page lower

137. *Hayburn's Case*, 2 U.S. (2 Dall.) at 411.

138. *Id.*

139. DOCUMENTS, *supra* note 2, at 3.

140. *Id.* at 5. Todd's wages were “[e]ight dollars and one third per month.” *Id.*

141. *Id.* One statement in the circuit court's opinion referred to Todd's “wounds.” *Id.* In 1775, “he was a private in the Regiment then Commanded by the late General David Wooster. . . . [He] was with the rest of 3d Regiment ordered into Canada where by the hardships to which he was Exposed he Contracted a lameness which terminated in a fever sore or ulcerated leg for which on the 31st of December 1782 being Certified as an invalid he was discharged by his Excellency the Commander in Chief as appears by his discharge of that date. It also appears that his said leg is still greatly affected thereby and to Such a degree as almost Entirely to disqualify and disable him from pursuing his usual Employment and day labor.” *Id.*

142. *Id.* at 1.

143. *Id.*

144. *Id.*

145. In his first statement before the Court, Bradford said that the total amount, including damages, was three hundred dollars. *Id.* at 2. In his second statement Bradford said that the United States claimed “one hundred and Seventy two dollars and ninety one Cents damages.” *Id.* at 6.

146. This was the money paid to him as an invalid. *Id.*

court decision.<sup>147</sup>

On the same day, John Hallowell, the attorney for the appellee, argued before the Supreme Court that Todd did not agree to pay any amount of money to the United States.<sup>148</sup> The Supreme Court had to resolve this problem by deciding either in favor of the United States or Yale Todd. The issue was presented to the Court by Attorney General Bradford and Todd's counsel:

Now it is agreed if this Court shall be of opinion that *the Said judges of Said Circuit Court Sitting as Commissioners and not as a Circuit Court has power and authority by virtue of [Pension] Act so to order and adjudge of and Concerning the premises that then judgement shall be given for the defendant—*Otherwise for the United States for one hundred and seventy two dollars and ninety one cents damages and Six Cents Cost.<sup>149</sup>

On February 17, 1794, the Supreme Court found for the United States. Its decision can only be found in the extract of the Court's minutes. The Court said it had "also taken the Same into Consideration [and arrived at the] opinion that Judgement be Entered for the plaintiff in the Above suit."<sup>150</sup> Apparently, the Supreme Court had nullified the 1792 statute for exactly the same reasons that were stated by the middle court two years earlier.<sup>151</sup>

Since the extract said nothing about the 1792 law being null and void, can Professor Currie's view that the Supreme Court in *Chandler or Todd* did not hold the 1792 pension statute unconstitutional<sup>152</sup> be correct? Professor Currie only discussed the Invalid Acts of 1792 and 1793,<sup>153</sup> not the law adopted by Congress in

147. Altogether these documents include: (1) the initial statement of Bradford; (2) Todd's attorney, John Hallowell's presentation to the Supreme Court; (3) the decision rendered by the eastern circuit court; (4) the second Bradford statement; and (5) the extract from the minutes of the Supreme Court of the United States, including the judicial action taken on February 17, 1794. *Id.* at 1-7. The eighth page contains testimony by William Thomas Carroll, the Clerk of the Supreme Court, dated March 8, 1852. *Id.* at 8. According to Susan R. Falb of the Judicial, Fiscal and Social Branch, Civil Archives Division, National Archives and Records Services, Washington, D.C. "The document was copied in 1852 from original Supreme Court files, now destroyed . . ." Letter dated July 29, 1982.

We do not know why Currie said, "[n]either *Chandler* nor *Todd* sought review of a lower court decision." Currie, *supra* note 24, at 827. The circuit court decision in *Yale Todd* became a part of the record, and the Supreme Court was requested to rule on this opinion. DOCUMENTS, *supra* note 2, at 3-6.

148. *Id.* at 2-3.

149. *Id.* at 6-7 (emphasis added).

150. *Id.* at 7.

151. *Hayburn's Case*, 2 U.S. (2 Dall.) at 411.

152. Currie, *supra* note 24, at 827.

153. *Id.* at 822-28.

1794.<sup>154</sup> If he had considered additional facts, such as the statements subsequently made by two executive officials, and the actions taken by Congress in February 1794, to adopt another Invalid Bill, he may have reached a different conclusion, that this statute was voided by the Supreme Court. The Attorney General, the Secretary of War and Congress agreed that it was void.

On the same day that *Todd* was decided, Bradford notified Secretary of War Knox that the Supreme Court considered whether judges could style themselves as commissioners in deciding those claims. Bradford then said that the court in *Todd* held "such adjudications are not valid."<sup>155</sup> On February 21, 1794, Knox reported to each house of Congress about the judgment of the Court.<sup>156</sup> Vice President Adams:

[L]aid before the Senate a communication from the Secretary for the Department of War, stating *certain defects in the act passed at the last session of Congress*, entitled 'An act to regulate the claims to Invalid Pensions;' which was read and ordered to lie for consideration.<sup>157</sup>

On the same day,

[t]he Speaker laid before the House a Report from the Secretary of War, communicating an adjudication of the Supreme Court of the United States, declaring the claims of certain invalid pensioners under the act, entitled 'An act to provide for the settlement of the claims of widows and orphans . . . and to regulate the claims to Invalid Pensions,' *not to be valid*, which was read, and ordered to lie on the table.<sup>158</sup>

If there is still doubt about whether the Supreme Court nullified one law or both of these laws, it can be removed by noting that on February 27, 1794, the House created a new three man committee to report upon the alterations or amendments to the 1793 statute.<sup>159</sup> Boudinot submitted his committee report on

154. Act of June 7, 1794, ch. 57, 1 Stat. 392 (obsolete).

155. 11 ANNALS OF CONG. 924-25 (1802).

156. 4 ANNALS OF CONG. 458-59 (1794).

157. *Id.* at 51 (emphasis added).

158. *Id.* at 458-59 (emphasis added). We believe that it was necessary to include these two quotations. Note that the Vice President stated that the Court found "certain defects in the act passed at the last session." *Id.* at 51. He then used the title of the act adopted in 1793. *Id.* The Speaker of the House made a similar comment, but he identified the law of 1792. *Id.* at 458-59. We cannot explain this other than the fact that the Supreme Court had "considered the two acts of Congress" in the *Chandler* case. 11 ANNALS OF CONG. 904 (1802). Only the 1792 law was considered in *Yale Todd*, the lower court's opinion. DOCUMENTS, *supra* note 2, at 3-6.

159. "Ordered, That the Committee of the Whole House be discharged from the farther consideration of the said Report; and that Mr. Boudinot, Mr. Greenup, and Mr. Bailey, be a committee to report whether any, and what, alterations or amendments are in their opinion necessary to the act 'to regulate the claims to Invalid Pensions.'" 4 ANNALS OF CONG. 468 (1794).



March 21, and it "was read, and ordered to be committed to a Committee of the Whole House on Monday next."<sup>160</sup> Nothing was done with this committee report before May and June of that year,<sup>161</sup> and then a new act was adopted by Congress on June 7, 1794.<sup>162</sup>

Under the new statute, the Secretary of War was directed "to place upon the list of invalid pensioners . . . all persons who have been returned as such by the judges of the several districts under the act of Congress of the twenty-eight of February [1793]."<sup>163</sup> What is more, this law stated, "all persons placed by virtue of this act on the list of invalid pensioners, shall receive such sums as the returns of the district judges have respectively specified, and be paid, in the same manner as invalid pensioners are paid, who have been heretofore placed on the list."<sup>164</sup>

This provision in the new law was different from those in the 1792 and 1793 statutes. Under the earlier two laws, the judges had to decide whether they could hold themselves out as commissioners, and whether the decisions rendered by the courts could be overturned by the Secretary of War under the 1792 law, or by Congress under the 1793 act. At least one of the circuit courts and the Supreme Court had responded negatively to these two questions. Congress had agreed with these two judicial standards in adopting a new law in 1794. Therefore, it had accepted the constitutional adjudication of the courts.

#### THE PRECEDENTS FOR THE MARSHALL COURT

With the exception of Cushman,<sup>165</sup> we have not been able to discover any literature in constitutional law that refers to Marshall's use of the 1790's decisions as precedents.<sup>166</sup> In fact, Professor Pritchett stated:

Furthermore, though Marshall cited no precedent, state courts had already found occasion to strike down state statutes because they were in violation of state constitutions. Alexander Hamilton in No. 78 of *The Federalist* had argued strongly in favor of judicial

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160. *Id.* at 527.

161. Actions were taken by the House and the Senate and are recorded. *Id.* at 120, 123, 127-28, 527, 734, 766, 779-80.

162. Act of June 7, 1794, ch. 57, 1 Stat. 392 (obsolete). The 1794 law was replaced in 1795. The latter is brief in its contents, comprising only two sections. Act of Feb. 21, 1795, ch. 24, 1 Stat. 418 (obsolete).

163. Act of June 7, 1794, ch. 57, 1 Stat. 392 (obsolete).

164. *Id.*

165. R. CUSHMAN, *supra* note 17.

166. Currie discussed pages 171 and 172 in *Marbury*, but for a different purpose. Currie, *supra* note 24, at 827 n.57.

review. . . .<sup>167</sup>

In *Marbury v. Madison*,<sup>168</sup> Marshall discussed the American uses of mandamus and cited the 1790's cases in which the federal courts had stricken down national legislation.<sup>169</sup> Marshall traced briefly the history of judicial review at the federal level, beginning his discussion with the statement: "[t]his opinion seems not now, for the first time, to be taken up in this country."<sup>170</sup> He then noted that the 1792 act was declared unconstitutional.<sup>171</sup> In his discussion, Marshall reported that some of the judges thought of their duties under this law as commissioners in placing persons on the pension list. This raised a legal question.<sup>172</sup> When the 1792 statute was held unconstitutional, it was repealed, and a new system was introduced. Marshall noted that the same legal question would still have to be decided. Congress, therefore, authorized the Attorney General and the Secretary of War to take any action necessary to have the Supreme Court of the United States rule on the validity of the applicants' rights.<sup>173</sup>

John Chandler<sup>174</sup> requested that a mandamus be issued to the Secretary of War, "commanding him to place on the pension list, a person stating himself to be on the report of the judges."<sup>175</sup> There was no doubt in Marshall's mind that the Supreme Court would now answer this legal question. The Court decided "that a mandamus ought not to issue in that case—the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right."<sup>176</sup> This judgment, Marshall said, was "understood to have decided the merits of all claims of that description. . . ."<sup>177</sup> Marshall then concluded with a statement, which is supportive of our thesis. He said that this "*doctrine, therefore, now advanced, is by no means a novel one.*"<sup>178</sup>

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167. C. PRITCHETT, *THE AMERICAN CONSTITUTIONAL SYSTEM* 79 (3d ed. 1971).

168. 5 U.S. (1 Cranch) at 137.

169. *Id.* at 171-72.

170. *Id.* at 171.

171. *Id.*

172. *Id.*

173. *Id.* at 171-72.

174. Marshall does not list Chandler by name, yet it was apparent from the things he said that this was the person who requested that the Supreme Court issue a writ of mandamus to Secretary Knox.

175. *Marbury*, 5 U.S. (1 Cranch) at 172.

176. *Id.*

177. *Id.*

178. *Id.* (emphasis added).

The Marshall opinion clearly demonstrated that the Supreme Court reached its decisions at least in part, by using the cases from the 1790's as precedents. By using them, the Marshall Court had a justification for voiding one provision of the Judiciary Act of 1789.<sup>179</sup> What this meant was that the Court used, rather than created, the power of judicial review in deciding *Marbury*. Some political scientists and legal scholars have accused Chief Justice Marshall of usurping this power.<sup>180</sup> Actually judicial review was exercised by the circuit courts and by the Supreme Court in the 1790's. This power was approved by the vast majority of the American political leaders during the founding period of the Constitution and thereafter. *Marbury*, therefore, should be identified as one more example of this negative power being exercised by the federal courts, not as the first use of judicial review.

This is not to deny the significance of *Marbury v. Madison*.<sup>181</sup> Since the Court supplied no reasoning for its position taken in *Chandler* and *Todd*, the student of judicial review is not going to find much there that will aid him or her in understanding the nature of this judicial power. Thus, when Cushman wrote that *Marbury* "was the first case in which the Supreme Court openly and clearly held unconstitutional an act of Congress,"<sup>182</sup> he was correct to some extent. But to be the first case in which an act is openly and clearly held to be unconstitutional is not the same as to be the first case in which an act is voided. It was Marshall's reasoning in *Marbury* that makes that decision so important, not the fact that part of an act of Congress had been found to be unconstitutional. And, for all the power of Marshall's pen in *Marbury*, all of the key ideas that are found there had been very much in evidence and articulated by others during the preceding two decades.<sup>183</sup>

*Marbury* was also significant because it served to institutionalize the doctrine of judicial review for mid-twentieth century scholars. Thus, "Marshall's argument in favor of the Court's power to declare an act of Congress void was not of major significance at the time he made it. . . ."<sup>184</sup> Today's scholars

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179. It declared unconstitutional one provision of section 13 of the Judiciary Act of 1789. *Marbury*, 5 U.S. (1 Cranch) at 137.

180. This was the pointed out by Beard, *supra* note 5, at 1 & n.2. Professor Cushman also questioned whether Marshall usurped this power. R. CUSHMAN, *supra* note 17.

181. 5 U.S. (1 Cranch) at 137.

182. R. CUSHMAN, *supra* note 17.

183. We can recall the statements made by Wilson, Iredell, Hamilton, Madison, Jefferson, Martin and Mason fifteen and sixteen years before *Marbury*. See *supra* notes 54-56, 63-70 and accompanying text.

184. A. KELLY & W. HARBISON, *supra* note 19, at 217.

turned to *Marbury* as a result of having lost sight of what judicial scholars earlier in the century had presented so well. The Marshall Court did not create judicial review. Rather, it presented a classical statement on behalf of judicial review. That statement, however, was neither new nor shocking in 1803.

#### CONCLUSION

At the beginning of this article, a question was raised about when the federal courts had first used judicial review in striking down national legislation. Our answer is that this doctrine was first used by the federal courts in nullifying the two Invalid Acts of 1792 and 1793<sup>185</sup> in *Hayburn's Case*,<sup>186</sup> *Chandler v. Secretary of War*<sup>187</sup> and *United States v. Yale Todd*.<sup>188</sup> This answer is based upon the facts and the evidence gathered from the official documents of the late eighteenth century.

The views of others—that the delegates to the Constitutional Convention simply remained silent about judicial review, or that the delegates wanted only to see the Constitution adopted so they refused to include anything that was controversial, or that the Marshall Court had usurped this power in 1803<sup>189</sup>—are no longer persuasive. Neither is Professor Currie's view that the Supreme Court did not hold the 1792 pension statute unconstitutional.<sup>190</sup>

The discussion of this doctrine at the Constitutional Convention was noted and, of those delegates who made any comment about judicial review, the majority were in favor of this power. Those early American leaders treated judicial review as an assumed power of the federal courts. Among those early American leaders who supported judicial review were James Madison, Alexander Hamilton, James Wilson, James Iredell, Luther Martin, George Mason and Thomas Jefferson. When Brutus, the opponent to the Constitution, is added to the list it appears that today's scholars are in error with their comments.

This is an appropriate time to rediscover the American origins of judicial review. The American people are now looking forward to 1987, the bicentennial of the founding of the American constitutional system. Now there are reasons for constitu-

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185. The laws of 1792 and 1793 were stricken by the federal courts in 1792 and 1794.

186. 2 U.S. (2 Dall.) at 411.

187. See *supra* note 2.

188. *Id.*

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

190. Currie, *supra* note 24, at 827.

tional scholars to agree upon the origins of judicial review. If these reasons are accepted, then the silent debate will rest.