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# Marbury v. Madison and the Foundation of Law

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## ARTICLE

### MARBURY V. MADISON AND THE FOUNDATION OF LAW

Jeffrey C. Tuomala<sup>†</sup>

#### I. INTRODUCTION

*Marbury v. Madison* enjoys pride of place among United States Supreme Court decisions.<sup>1</sup> The National Archives has placed it as the only Supreme Court case on display in the company of the Declaration of Independence and the United States Constitution.<sup>2</sup> *Marbury* is the first case that most American law students study in their introductory course on constitutional law.

It is not hard to imagine why the *Marbury* opinion accompanies the Constitution. Chief Justice John Marshall's opinion in *Marbury* established the principle that the Constitution is law that courts are to interpret and to apply in cases and controversies before them, and that the Constitution is in fact "fundamental and paramount law."<sup>3</sup> It is also in *Marbury* that the Chief Justice charged the reader to remember that the "government of the United States has been emphatically termed a government of laws, and not of men."<sup>4</sup>

As scholars often miss the importance of the relationship of the Constitution to the Declaration of Independence as organic law, it is not surprising that they miss the relationship of *Marbury* to the Declaration as well. This is quite remarkable considering the fact that the Declaration not only serves as the articles of incorporation of the United States of America, but also articulates the jurisprudence upon which Marshall based the doctrine of judicial review. The Declaration of Independence explains the origin and relationship of the right and will of the people to declare their

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<sup>†</sup> Jeffrey C. Tuomala, Associate Dean for Academic Affairs and Professor of Law, Liberty University School of Law. The author is indebted to Dean Herbert W. Titus for numerous insights into Chief Justice John Marshall's jurisprudence and the relationship between the Declaration of Independence and the United States Constitution.

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

2. CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION*, at ix-x (2009). The original *Marbury* decision appears alongside the Declaration of Independence, the Constitution, and the Bill of Rights at the National Archives in the "Charters of Freedom" hall. *Id.* *Marbury* is also featured in the National Archives online version of the "Charters of Freedom." Archives.gov, Charters of Freedom, [http://www.archives.gov/exhibits/charters/charters\\_of\\_freedom\\_8.html](http://www.archives.gov/exhibits/charters/charters_of_freedom_8.html) (last visited Oct. 16, 2009).

3. *Marbury*, 5 U.S. (1 Cranch) at 177.

4. *Id.* at 163.

existence as an independent nation-state and to establish a form of government they believe is best designed to secure their God-given rights.<sup>5</sup>

The main purpose for which *Marbury* is studied is that it unequivocally established the rule that courts have the power to review the constitutionality of certain executive and legislative acts. Since most students know, even before entering law school, that courts possess the power of judicial review, one would assume that law professors teach *Marbury* in order to firmly ground the exercise of that power. And even if professors do not believe that Marshall's opinion provides firm ground, one would expect professors to encourage students to carefully consider the main reason that Marshall expressly gave for concluding that the Constitution is paramount law. Although an observer cannot necessarily discern the focus of class discussions by surveying the content of Constitutional Law casebooks or of teacher's manuals that accompany those casebooks, one might reasonably conclude that Marshall's express rationale is generally not carefully considered.<sup>6</sup>

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5. *Id.* at 176.

6. Some of the most prominent constitutional law textbooks fail to note that Marshall used language in *Marbury* that mirrors language found in the Declaration of Independence. These textbooks also fail to include any discussion on whether law-of-nature jurisprudence influenced Marshall's concept of judicial review in *Marbury*. See, e.g., RANDY E. BARNETT, CONSTITUTIONAL LAW CASES IN CONTEXT (2008); JEROME A. BARRON, C. THOMAS DIENES, WAYNE McCORMACK & MARTIN H. REDISH, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY, CASES AND MATERIALS (7th ed. 2006); PAUL BREST, SANDFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, PROCESS OF CONSTITUTIONAL DECISIONMAKING CASES AND MATERIALS (5th ed. 2006); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (3d ed. 2006); DAVID CRUMP, EUGENE GRESSMAN, DAVID S. DAY & CHARLES W. "ROCKY" RHODES, CASES AND MATERIALS ON CONSTITUTIONAL LAW (5th ed. 2009); DANIEL A. FARBER, WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (4th ed., Thomson Reuters 2009) (1993); DOUGLAS W. KMIEC, STEPHEN B. PRESSER, JON C. EASTMAN & RAYMOND B. MARCIN, THE HISTORY, PHILOSOPHY, AND STRUCTURE OF THE AMERICAN CONSTITUTION (3d ed. 2009); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (7th ed., Thomson West 2004) (1978); NORMAN REDLICH, JOHN ATTANASIO & JOEL K. GOLDSTEIN, CONSTITUTIONAL LAW (5th ed. 2008); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (9th ed., Thomson Reuters 2009) (1981); GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, CONSTITUTIONAL LAW (5th ed. 2005); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (15th ed. 2004) (1937); JONATHAN D. VARAT, WILLIAM COHEN & VIKRAM D. AMAR, CONSTITUTIONAL LAW (13th ed., Thomson Reuters/Foundation Press 2009) (1959); RUSSELL L. WEAVER, STEVEN I. FREIDLAND, CATHERINE HANCOCK, DONALD E. LIVELY & WENDY B. SCOTT, CONSTITUTIONAL LAW: CASES, MATERIALS & PROBLEMS (2006). Dean Sullivan's textbook includes a thoughtful discussion of the "historical antecedents" of the theory of judicial review. SULLIVAN &

The doctrine of judicial review is not the only doctrine set out in *Marbury* that Marshall grounded in the jurisprudence of the Declaration of Independence. Marshall referred to the “general principles of law” that, along with acts of Congress, bind the courts.<sup>7</sup> It is most reasonable to conclude that these general principles can be traced to the same source as the “general principles of commercial law” upon which Justice Joseph Story based his opinion in *Swift v. Tyson*.<sup>8</sup> It is widely acknowledged that Story believed that “general principles of commercial law” are found in the law of nature and that those principles bind all courts and provide them with rules of decision.<sup>9</sup> While *Swift* is completely discredited or even entirely ignored today, the holding (if not the rationale) in *Marbury* is still honored.

The issue to which Marshall devoted the most attention in *Marbury* was that of distinguishing between matters that are purely political in nature and those that are suitable for adjudication.<sup>10</sup> Actions of executive officers that

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GUNTHER, *supra*, at 15-17. Although she notes that Marshall’s theory of judicial review might be a product of the “the spread of general ideas [in the 1780s] conducive to the acceptance of judicial review”—such as “the view that the will of the people as expressed in a constitution was superior to any legislative enactment”—she, like many of her contemporaries, fails to note the relationship between the words chosen by Marshall in *Marbury* and the Declaration of Independence. *Id.* at 15 (citing BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969); William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 *CONN. L. REV.* 329 (1995)). In addition, Sullivan labels as a “remote and tangential byway[.]” the suggestion that judicial review is grounded in Lord Coke’s notion that “the common law will controul acts of parliament, [and] adjudge them to be utterly void when the acts are against common right and reason.” *Id.* (internal quotation marks omitted). Perhaps modern scholars fail to see that Marshall rooted his theory of judicial review on the law-of-nature jurisprudential principles contained in the Declaration of Independence because they are blinded by an “evolutionary” view of the law as “a repository of shifting social values,” and they reject the idea of law as a “set of universal principles.” Herbert W. Titus, *Moses, Blackstone and the Law of the Land*, *CHRISTIAN LEGAL SOC’Y Q.*, Fall 1980, at 5, 7 (citing FRED. V. CAHILL, JR., *JUDICIAL LEGISLATION: A STUDY IN AMERICAN LEGAL THEORY* 22-23 (1952); G. Edward White, *Reflections on the Role of the Supreme Court: The Contemporary Debate and the ‘Lessons’ of History*, 63 *JUDICATURE* 162, 171 (1979)).

7. *Marbury*, 5 U.S. (1 Cranch) at 170.

8. *Swift v. Tyson*, 41 U.S. (1 Pet.) 1, 18, 22 (1842).

9. *Id.*

10. Justice Marshall asked,

Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme

are political in nature, and that are therefore matters of discretion, are not subject to judicial review.<sup>11</sup> However, when acts of Congress prescribe or circumscribe actions of executive branch officers with a certain degree of particularity, they often create positive legal rights in individuals that may be remedied in courts of law.<sup>12</sup> The ground for the distinction and relationship between the political and judicial is also found in the Declaration of Independence. It is the law of nature and nature's God.<sup>13</sup>

The dispute in *Marbury*, whether the plaintiff was entitled to delivery of his commission as justice of the peace, may not be especially momentous, but Marshall's opinion is particularly instructive for teaching the foundational principles of jurisprudence.<sup>14</sup> The "laws of nature and nature's God" provide the grounding for three basic legal doctrines: judicial review, general principles of law, and the distinction between political and judicial powers.<sup>15</sup> These three doctrines are central to Marshall's opinion. The failure to engage the law-of-nature jurisprudential basis for the doctrines of judicial review, general principles of law, and the distinction between political and judicial powers represents a willful blindness to, or deliberate

executive; and for any misconduct respecting which, the injured individual has no remedy?

*Marbury*, 5 U.S. (1 Cranch) at 164.

11. *Id.* at 166.

12. *Id.*

13. There is no reason to give the "law of nature" as used in the Declaration of Independence a different meaning than that which Blackstone gave it—the "will of [man's] maker is called the law of nature." 1 WILLIAM BLACKSTONE, COMMENTARIES \*39. In other words, "the law of nature" is not something that inheres in nature that is independent of and equally ultimate to God. Blackstone believed that the law of nature has universal applicability and is superior to all positive law: "This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other." *Id.* at \*41. Blackstone also defined three other categories of law—natural law, revealed law, and human law. Revealed law, or that which is revealed in Scripture, is the law of nature "expressly declared so to be by God . . ." *Id.* at \*42. The natural law, in distinction, is that which mankind "in it's [sic] present corrupted state" only "imagine[s]" the law of nature to be through the "assistance of human reason." *Id.* Therefore, the revealed law is "of infinitely more authority than what we generally call the natural law." *Id.* All human laws, explained Blackstone, depend "[u]pon these two foundations, the law of nature and the law of revelation," rather than upon the natural law. *Id.* It is very interesting to note that Blackstone believed that God has so intertwined the happiness of man with obedience to the law of nature, that the law of nature might be reduced to one maxim—"that man should pursue his own happiness." *Id.* at \*41. When the Declaration declares the "unalienable" right of the "pursuit of happiness," it is in effect equating that right with the positive duty to obey the law of God. Neither Blackstone nor the Declaration promotes utilitarianism.

14. *Marbury*, 5 U.S. (1 Cranch) at 164.

15. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

shunning of, a jurisprudence that contemporary jurists and writers find unacceptable or even contemptible.<sup>16</sup> Yet these jurists and writers continue to cite *Marbury* because they are eager to find validation for their own conclusions in matters of constitutional interpretation.<sup>17</sup>

## II. BACKGROUND TO *MARBURY V. MADISON*

The basic facts of *Marbury* are familiar to most lawyers and law students and are easily summarized. In the waning days of his administration, President John Adams appointed William Marbury to serve as a Justice of the Peace for the County of Washington of the District of Columbia, an office created under the Judiciary Act of 1789.<sup>18</sup> Adams signed Marbury's commission, and Secretary of State John Marshall affixed the seal of the United States to it but failed to deliver it to Marbury before Adams' successor, Thomas Jefferson, took office.<sup>19</sup> Jefferson's Secretary of State, James Madison, refused to deliver the commission, so Marbury filed a lawsuit against Madison in the Supreme Court seeking a writ of mandamus ordering Madison to deliver the commission.<sup>20</sup> Madison failed to answer Marbury's complaint, failed to respond to an order to show cause issued from the Court explaining why judgment should not issue against him, and

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16. The influence of modern epistemology on the modern legal tradition may account for the dismissal or outright opposition that contemporary scholars display toward the law-of-nature jurisprudence upon which Marshall based his theory of judicial review. "Modernist epistemology," according to G. Edward White, gave rise to new schools of judicial philosophy in the twentieth century, such as Sociological Jurisprudence and Legal Realism. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES*, at xi (3d ed. 2007). White explains, "Modernist epistemology replaced the external causal agents of a premodern worldview—God, nature, the cycles of history, stratified social roles, the 'iron laws' of political economy, and the 'law' as a collection of immanent and timeless principles—with human will and power." *Id.* Furthermore, the acceptance of modern epistemology among legal scholars caused them to reject the "oracular theory of judging" practiced by John Marshall—"understanding of judicial decision-making . . . as an exercise in 'finding' rather than 'making' law, with 'law' being conceived as a body of finite and immutable principles . . ." *Id.* at viii-ix, 125.

17. Scholar Fred V. Cahill explains that the legal theorist has a tendency to justify his theory of "judicial legislation" by "tak[ing] account of . . . [previous] developments and . . . mak[ing] his theory of law congruous with them." See CAHILL, *supra* note 6, at 21. Although the law-of-nature jurisprudence on which Marshall based his theory of judicial review in *Marbury* is foreign to most contemporary theories of constitutional interpretation, perhaps the tendency of contemporary legal scholars to invoke *Marbury* as a means to support their theories is an example of the phenomenon described by Cahill.

18. *Marbury*, 5 U.S. (1 Cranch) at 155.

19. *Id.*

20. *Id.* at 154-55.

failed to appear at trial, either personally or through counsel. The Court proceeded to trial in Madison's absence.<sup>21</sup>

Marshall identified three issues in *Marbury*. First, did Marbury have a legal right to possession of the commission?<sup>22</sup> Second, even if he had a legal right to the commission, did the law provide him with a remedy?<sup>23</sup> Finally, did the Court have jurisdiction to afford the remedy of mandamus?<sup>24</sup> Marshall structured his opinion to address each of these three issues in the order listed.<sup>25</sup>

The Court found that Marbury had a legal right to the commission, because the law only required that it be signed to perfect his appointment.<sup>26</sup> Affixing the seal provided proof that it was the President's signature and that the appointment had therefore been perfected.<sup>27</sup> Delivery was not a condition or element of the appointment.<sup>28</sup> The appointment having been perfected, Madison had a duty to deliver the commission evidencing the appointment to Marbury.<sup>29</sup> This conclusion was based on the general principle of law that where there is a legal duty, there must be a legal remedy.<sup>30</sup> Courts therefore may order executive officers to perform duties that have been made obligatory by law; such duties are no longer matters of executive discretion.<sup>31</sup>

Few commentators fail to note that courts normally address jurisdictional issues first, and that if a court finds it has no jurisdiction, it does not address the merits of the case.<sup>32</sup> Marshall did not follow that order and instead addressed the jurisdictional issue last, concluding the Court had no

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* Incidentally, the issues in *Marbury* reflect the three essential components of a complaint filed in federal court—a cause of action, a demand for remedy, and a statement of the basis upon which it is alleged that the court has jurisdiction. FED. R. CIV. P. 8(a).

26. *Marbury*, 5 U.S. (1 Cranch) at 168.

27. *Id.* at 167-68.

28. *Id.* at 160.

29. *Id.* at 159.

30. *Id.* at 166. Marshall explained, "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.*

31. *Id.* at 162.

32. For example, Professor Massey asks whether Marshall's approach to the issues in *Marbury* constitutes "[p]olitical [g]uile" because the Chief Justice decided the jurisdictional issue last. CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES* 14 (3d ed. 2009).

jurisdiction to issue a writ of mandamus.<sup>33</sup> The basic conflict, as Marshall framed it, between the statute in issue and the Constitution was that the statute purported to give the Supreme Court original jurisdiction in this type of case, but Article III of the Constitution limits original jurisdiction to two categories of cases.<sup>34</sup> Marbury's case did not fall into either of these two categories—"Cases affecting Ambassadors . . . and those in which a State shall be Party."<sup>35</sup> Marshall concluded that because the Constitution is superior to statutory law, any act of Congress that conflicts with the Constitution is not law.<sup>36</sup> Although Marbury may have had a right to the commission, the Supreme Court had no jurisdiction to issue a writ of mandamus because the statute purporting to give jurisdiction conflicted with the Constitution.<sup>37</sup> In so ruling, Marshall unequivocally established what has become generally referred to as the power of judicial review.

### III. *MARBURY*—THE NATURE OF THE CONSTITUTION AND THE POWER OF JUDICIAL REVIEW

Modern positivists, be they liberal, conservative, or something else, believe that the Constitution is law.<sup>38</sup> They also generally believe that the Constitution, either as written in 1787 or as rewritten in the consciences of the People and revealed through Supreme Court decisions over the past 200 years, is superior to acts of Congress. On the other hand, they usually treat the Declaration of Independence and the theories of law and government found in it as statements of political rhetoric with little or no juridical

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33. *Marbury*, 5 U.S. (1 Cranch) at 154, 168, 176, 180.

34. *Id.* at 173-74.

35. *Id.*

36. *Id.* at 177, 180.

37. *Id.* at 176, 180.

38. Legal positivists believe that positive laws—judicial norms established by the state—are the only laws. *See, e.g.*, EDGAR BODENHEIMER, *JURISPRUDENCE: THE PHILOSOPHY AND METHOD OF LAW* 97, 296 (4th ed. 1981).



relevance.<sup>39</sup> As a result, they miss the presupposition upon which Marshall based his opinion in *Marbury*.<sup>40</sup>

Marshall began his exposition of the power of judicial review by drawing a distinction between the people's original and supreme right and their original and supreme will in establishing a form of government.<sup>41</sup> The people of the United States have the right to establish a form of government, and through an act of their collective will they exercised that right by organizing a government and assigning powers to various departments within it.<sup>42</sup> In essence, the people, possessing the supreme law-making power, exercised that power by adopting a written constitution that took effect in 1789.<sup>43</sup> Because the people exercised their legislative will in accordance with their right to do so, the Constitution of the United States is, by nature, law.<sup>44</sup>

The Constitution delegates limited and defined powers to the national government and provides for the election or appointment of officers to exercise those powers.<sup>45</sup> To Congress, the people delegated the power to make laws that are limited to those objects enumerated in the

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39. See, e.g., Douglas Laycock, *The Declaration Is Not Law*, CHRISTIAN LEGAL SOC'Y Q., Fall 1991, at 8 (arguing that the Declaration of Independence is part political philosophy, part "political propaganda from another age, with more power to embarrass than to inspire," but no part "is law unless enacted into law"). But see Herb Titus, *The Declaration Legally Established a New Nation*, CHRISTIAN LEGAL SOC'Y Q., Fall 1991, at 6-8 (arguing that the Declaration was a legal document written in the name of the people of the colonies that made a legal case establishing a new nation based on the laws of nature and nature's God).

40. Some of the most prominent constitutional law textbooks fail to note that Marshall used language in *Marbury* that mirrors language found in the Declaration of Independence. See *supra* note 6.

41. *Marbury*, 5 U.S. (1 Cranch) at 176.

42. *Id.* Jesus Christ created all "thrones," "powers," "rulers," and "authorities," including civil authorities, for Himself. *Colossians* 1:16 (New International Version) (all Bible references made hereinafter are from the New International Version); *Romans* 13:1. And all authorities, including civil authorities, are subject to him. *Ephesians* 1:18-23. The people, however, have a role to play, as secondary causal agents, in establishing particular forms of government. This was true even of ancient Israel. A monarchy was not forced on Israel. The people, through a congress of elders, insisted that they have a king "such as all the other nations have." *1 Samuel* 8:1-5. The people of Israel also enthusiastically affirmed Saul as King; he was not forced on them. *1 Samuel* 10:24. Israel even had a written constitution for the regulation of its government. *1 Samuel* 10:25. The king, however, was not to govern as kings of the other nations did. He was not only under God, he was under law. In fact, Moses had in advance written laws specifically for the regulation of the kingship. See *Deuteronomy* 17.

43. *Marbury*, 5 U.S. (1 Cranch) at 176-77.

44. *Id.*

45. *Id.*

Constitution.<sup>46</sup> Acts of Congress and provisions of the Constitution are laws that bind the courts.<sup>47</sup> But when there is a conflict between a provision of the Constitution and an act of Congress, the courts must treat the enactment as void, for in reality it is not law.<sup>48</sup>

Congress, as an agent of the people, has the power to make laws because the people, who are the principal possessing the supreme legislative power, have delegated a portion of that power to Congress through the Constitution. Congress must act within the scope of its delegated powers, because an agent has no greater power than what the principal gives the agent.<sup>49</sup>

To the courts, the people have delegated the judicial power. The exercise of the judicial power entails the interpretation of the law and its application in particular cases. When there is a conflict between the Constitution and acts of Congress, judges must apply the Constitution as paramount law.<sup>50</sup>

What then is the source of the people's original right to exercise the original will, which is necessary for the adoption of a Constitution? Although *Marbury* did not expressly cite the Declaration of Independence, it is clear from the language Marshall used that he was referring to that document and the principles it sets out. The Declaration of Independence is the instrument by which the people of the United States announced that they were a people separate from the English people, and it served as the articles of incorporation for a new nation-state—the United States of America. That founding document also lays out the jurisprudential principles Marshall presupposed in writing his opinion in *Marbury*.<sup>51</sup>

46. *Id.*

47. *Id.*

48. *Id.* at 178.

49. Jesus Christ reinforced the fact that Christian rulers are not to be rulers like those of all the other nations. They are not to lord their authority over the people, but rather are to be servants of the people. Even today, we refer to civil rulers as public servants, though they may not act like servants.

Jesus called them together and said, "You know that the rulers of the Gentiles lord it over them, and their high officials exercise authority over them. Not so with you. Instead, whoever wants to become great among you must be your servant, and whoever wants to be first must be your slave—just as the Son of Man did not come to be served, but to serve, and to give his life as a ransom for many."

*Matthew* 20:25-28.

50. *Marbury*, 5 U.S. (1 Cranch) at 178.

51. A number of scholars recognize that Marshall invoked the principles of the Declaration of Independence in *Marbury*. Lewis E. Lehrman explains:

In [the *Marbury*] opinion, often cited by both judicial supremacists and legal positivists who reject natural law, Marshall considers "the question, whether an

Whereas the Declaration serves as the articles of incorporation, the Constitution serves as the bylaws of the United States of America.<sup>52</sup> It is a generally recognized principle of corporate law that bylaws must be read in light of their corresponding articles of incorporation.<sup>53</sup> A nation-state is a corporate body.

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act, repugnant to the Constitution, can become the law of the land. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it." And by what *principle* shall it be decided? To which Marshall had an unequivocal answer: "That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is *the basis* on which the whole American fabric is erected." "The principles, therefore, so established, are deemed fundamental." But why or how is Marshall so absolutely sure of "the basis" and "the principles" deemed fundamental to the Constitution—to the "whole American fabric?" Because, in fact, Marshall draws the very words of this part of his opinion almost exactly from the Declaration of Independence itself—from the second paragraph, which reads "it is the right of the people . . . to institute new government laying its foundation on such principles . . . as to them shall seem most likely to effect their safety and happiness."

Lewis E. Lehrman, *On Jaffa, Lincoln, Marshall, and Original Intent*, 10 U. PUGET SOUND L. REV. 343, 348 (1987) (footnotes omitted); see also Richard J. Dougherty, *Originalism and Precedent: Principles and Practices in the Application of Stare Decisis*, 6 AVE MARIA L. REV. 155, 184-85 (2007); Wilson Huhn, *Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 847-48 (2002); Harry V. Jaffa, *What Were the Original Intentions of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351, 435 (1987) ("The resemblance of the language of the Declaration and that of *Marbury* can no more be coincidental than the resemblance of the language of the Declaration to certain passages in Locke's Second Treatise."); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706, 2712 (2003) ("In a sense, the premises of the Declaration of Independence thus parallel the premises of judicial review, and one can hear distinct echoes of American revolutionary thought in the opening lines of Marshall's argument in *Marbury* . . .").

52. The author is indebted to Herbert W. Titus, founding dean of the Regent University School of Law, for this understanding of the relationship between the Declaration of Independence and the U.S. Constitution. Titus traces his understanding to a conversation that he had with John Brabner-Smith at a Christian Legal Society Conference in the fall of 1977. Brabner-Smith served as founding dean of the International School of Law, which eventually became the George Mason School of Law.

53. See REV. MODEL BUS. CORP. ACT § 2.06 (2002) ("The bylaws of a corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation."); see also *Scotts African Union Methodist Church v. Conference of African Union First Colored Methodist Protestant Church*, 98 F.3d 78, 95 (3d Cir. 1996) ("provisions of a corporation's charter or articles of incorporation enjoy priority over contradictory or inconsistent by-laws."); *Associated Grocers of Ala. v. Willingham*, 77 F. Supp. 990, 995-96 (N.D. Ala. 1948) ("By-laws are

Marshall wrote in *Marbury*: “That the *people* have an *original right* to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.”<sup>54</sup> It is obvious that Marshall adopted this principle, and even borrowed language, from the Declaration of Independence, which states: “[I]t is the *Right of the People* . . . to institute [a] new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”<sup>55</sup>

What then is the source of this original right? Is it something that is inherent to human nature? Is it the grant of a superior earthly sovereign? Is it something that the people as political sovereign simply posit? The answer is, “None of these!” The right of any people to establish their own civil government originates in the law of God, the lawgiver, and it is to Him that they are responsible. The people of the United States claimed it was the “Laws of Nature and of Nature’s God” that entitled them to declare independence and establish their own form of government.<sup>56</sup> The people made these claims of original right on July 4, 1776, when they announced to the world that they had “assume[d] among the powers of the earth the separate and equal station” of an independent and sovereign nation.<sup>57</sup> In *Marbury*, Marshall presupposed that there is a fundamental law as summarized in the Declaration of Independence that governs the affairs of men and nations in their formation, in their internal governance, and in their relations with other nations.

That preexisting law provides the right to exercise the political will to declare independence, to adopt a constitution, and to delegate to Congress the power to enact positive laws that comply with the law of God. It is on the basis of this fundamental legal right that Marshall wrote: “This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description.”<sup>58</sup> This also is a reference to the language of the Declaration of Independence quoted above—“to

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valid only when consistent with the charter and those by-laws which are not consistent with the charter but are in conflict with and repugnant to it are void.”)

54. *Marbury*, 5 U.S. (1 Cranch) at 176 (emphasis added).

55. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added); see sources cited *supra* note 51.

56. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

57. *Id.*

58. *Marbury*, 5 U.S. (1 Cranch) at 176.

institute [a] new Government, laying its foundation on such principles and organizing its powers in such form"—and reinforces the fact that *will* must be exercised in conformity with *right*.<sup>59</sup> The Declaration makes a further connection between the law of God and the right to delegate the powers of civil government. It states that the purpose of civil government is to secure "certain unalienable rights" with which men "are endowed by their Creator,"<sup>60</sup> and that "Governments are instituted among Men, deriving their just powers from the consent of the governed,—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."<sup>61</sup> The Constitution establishes a form of government that the people structure in such a way as they believe will most effectively secure preexisting, God-given rights.<sup>62</sup>

It is well-settled that the Constitution is law and that it is superior to acts of Congress. Therefore, few within the legal profession believe that courts have a duty to uphold legislative or executive acts that violate the Constitution. The Constitution as law is superior to statutes because the people as legislators are superior to Congress. Jurists therefore agree with Marshall that "[c]ertainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."<sup>63</sup>

At the same time, many seem perplexed by the fact that Marshall did not rely on the supremacy clause or any other text of the Constitution in ruling that the courts have the power of judicial review. Marshall made reference to several clauses in Articles I, III, and VI of the Constitution as providing additional evidence that courts have the power of judicial review, but he did not base his holding on textual arguments.<sup>64</sup> For many it is equally

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

60. All three persons of the Trinity were involved as one God in creating all things—God the Father (*Deuteronomy* 32:6), God the Son (*John* 1:1-15), and God the Holy Spirit (*Genesis* 1:2). The Gospel of John proclaims the Son's role:

In the beginning was the Word, and the Word was with God, and the Word was God. He was with God in the beginning.

Through him all things were made; without him nothing was made that has been made. In him was life, and that life was the light of men. The light shines in the darkness, but the darkness has not understood it.

*John* 1:1-5.

61. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

62. *Id.* ("That to secure [unalienable rights], governments are instituted among men . . .").

63. *Marbury*, 5 U.S. (1 Cranch) at 177.

64. *Id.* at 178-80.

perplexing that Marshall did not rely on any of the numerous cases that he could have cited as precedent for invoking the power of judicial review. Nor did Marshall make an appeal to original intent, though Alexander Hamilton specifically addressed the question of judicial review in *The Federalist Papers*.<sup>65</sup> And Marshall did not base his argument on necessity, custom, or evolving social norms.

Marshall relied instead on the political and legal theories embodied in the Declaration of Independence, theories that had been worked out, fought over, and died for during the course of several centuries, including the eighteenth century in America.<sup>66</sup> For any number of reasons, those theories of law are unacceptable to most contemporary lawyers, judges, and professors.<sup>67</sup> As a result, jurists resist acknowledging the significance of the references to the Declaration of Independence upon which Marshall based

65. THE FEDERALIST NO. 78 (Alexander Hamilton).

66. Contrary to the belief of Leon Skousen expressed in *The 5000 Year Leap*, liberty was not rebirthed in 1787 in Constitution Hall, in Philadelphia after a 5,000 year hiatus. LEON SKOUSEN, *THE 5000 YEAR LEAP* 1-6 (National Center for Constitutional Studies 2006) (1981). Liberty was birthed in A.D. 0, in a manger in Bethlehem, and ever since that time has been growing and will continue to grow until it fills the whole earth. See *Daniel* 2; *Matthew* 13:31-33.

67. Law-of-nature jurisprudence is unacceptable to secular liberals and conservatives. To both, any serious reference to civil law being based on the law of God is embarrassing and threatening. On the one hand, the "liberal" has reason to fear that a law-of-nature jurisprudence would mean the imposition of limits on the imagination in the creation of rights. As G. Edward White explains, modern liberalism criticized and eventually discredited the oracular theory of judicial decision-making—"understanding of judicial decision making as the exercise of 'finding' rather than 'making' law, with 'law' being conceived as a body of finite and immutable principles"—on account of the refusal of judges in the late nineteenth century and early twentieth century, generally employing the oracular theory, to adapt to social change and reach legal results "that sustained affirmative governmental action to alleviate economic and social inequalities," as liberalism demanded. See WHITE, *supra* note 16, at vii-ix, 129. On the other hand, the conservative fears a law-of-nature jurisprudence because he believes it will give fuel to the imagination in conjuring up new rights. Robert Bork's attitude toward natural law reflects those fears:

The judge can have nothing to do with any absolute set of truths existing independently and depending upon God or the nature of the universe. If a judge should claim to have access to such a body of truths, to possess a volume of the annotated natural law, we would, quite justifiably, suspect that the source of the revelation was really no more exalted than the judge's viscera.

Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 30 (1971).

the doctrine of judicial review, despite the fact they are unable to provide any other explanation with which they are able to satisfy even themselves.<sup>68</sup>

It is common to refer to the process of striking an act of Congress that is inconsistent with the Constitution as the power of judicial review, as though it were a power severable from the power of interpreting and applying the law in particular cases. Marshall's position, however, was that judicial review is part and parcel of the judicial power, because the essence of judicial duty necessarily entails determining which of two conflicting rules applies in a given case.<sup>69</sup> It is, in part, a failure to reckon with the judicial philosophy upon which *Marbury* is based that one could believe that the Constitution is law but that legislators can bind courts to Congress's interpretation of the Constitution. Every officer of the United States and of the several states is bound by oath to support the Constitution and must therefore interpret that document in the performance of his or her duties.<sup>70</sup>

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68. For the most part, commentators appear oblivious to the fact that Marshall's opinion in *Marbury* is based upon presuppositions of a law-of-nature jurisprudence, and, as a result, they fail to recognize the importance of distinguishing frame-of-government issues from general-principles-of-law issues when interpreting the Constitution. In short, they are positivists who believe that law is essentially the command of the sovereign with courts exercising a lawmaking function. For them, law is fundamentally and exclusively a product of human will. The "triumph-of-the-will" jurisprudence of the legal positivists is the logical conclusion of the legal revolution spawned by the concept of evolution that displaced the jurisprudence of the nineteenth century. See CAHILL, *supra* note 17, at 22.

69. *Marbury*, 5 U.S. (1 Cranch) at 177 ("If two laws conflict with each other, the courts must decide on the operation of each."). One of the problems that arises for the writers in dealing with Marshall's opinion is that they make a distinction between judicial power and the power of judicial review, a distinction that Marshall did not make. This problem is related at least in part to the issue of whether Congress or the courts are the ultimate interpreter of the law. Clearly, it would seem that all three branches have a duty to interpret the Constitution in order to perform their duties. The problem is further compounded by the philosophy that courts make law. As a principle of utility it would then seem that one law interpreter or the other must have the final say in the matter, and today the assumption is that the courts are the ultimate law interpreters. This position has been bolstered by quoting only the first of the following sentences from *Marbury* without quoting the other two: "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." *Id.* Although Marshall said that it is the province of the Court to interpret the law, the Court's power to authoritatively interpret extends only to the particular case before it. Marshall did not say that it is the exclusive province of courts to interpret law that binds those who are not parties, or that courts make law. For Marshall, the exercise of judicial power, among other things, includes judging which law applies when laws conflict by applying the supreme law in the case at hand. *Id.*

70. *Id.* at 180.

Congress has a duty not to enact unconstitutional laws, and the courts, pursuant to the judicial power delegated from the people, have a duty not to enforce unconstitutional laws.<sup>71</sup> Marshall believed that the essence of judicial power entailed the duty to apply the superior of inconsistent laws.<sup>72</sup> If courts were bound to apply statutes without considering their lawfulness, they would not possess judicial power.

The failure of lawyers, judges, law professors, legislators, and other government officials to recognize that the will of the people must be grounded in right and that right originates in "the Laws of Nature and Nature's God," leads to a view that law is simply the product of will.<sup>73</sup> Marshall believed that law must be grounded in right. The belief that law is based solely on acts of the will or commands of the sovereign—be it a sovereign king, parliament, or people—is legal positivism, which is the prevailing jurisprudence today in one or another of its many forms. This is so notwithstanding the horrors of the twentieth century with which this belief system is associated.<sup>74</sup>

Just as Marshall began his treatment of judicial review by drawing a distinction between right and will, Thomas Aquinas (1225-1274) began his "Treatise on Law" with a discussion of the relationship between reason and will.<sup>75</sup> The distinction and relationship between right or reason and will was

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71. *Id.* at 178.

72. *Id.* at 177.

73. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

74. Legal positivism was the legal philosophy of some of the most notorious totalitarian regimes of the twentieth century. Professor John C.H. Wu explained that law in the Soviet Union pushed legal positivism to its logical end: "The will of the dominant class becomes the essence of law, and reason becomes the handmaid of will." JOHN C.H. WU, *THE FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW* 44 (1955).

75. THOMAS AQUINAS, *SUMMA THEOLOGICA*, reprinted in *GREAT BOOKS OF THE WESTERN WORLD* 205-337 (Robert Maynard Hutchins ed., Encyclopedia Britannica, Inc. 1971) (1952).

Thomas Aquinas discussed four categories of law—external, natural, human, and divine. *Id.* at 208-11. These correspond to Blackstone's four categories—law of nature, natural law, human law, and revealed law. *See supra* note 13. For present purposes, the main point of difference between Aquinas and Blackstone is that Blackstone placed a greater emphasis upon the need for revealed law due to man's sin nature that affects his powers of reasoning. *See supra* note 13. Aquinas is more positive regarding the efficiency of man's reason unaided by Scripture to attain the truth. The essential difference between Aquinas and Blackstone is not the content of the eternal law and the law of nature; it is the relative ability of man to know the truth without resort to Scripture.

While Aquinas' distinction between reason and will is parallel to Marshall's distinction between right and will and is very useful in dispelling the errors of positivism, this is not an endorsement of Roman Catholic natural law jurisprudence. That jurisprudence



central to Aquinas' view of law. He posed the question: "Whether Law is Something Pertaining to Reason?"<sup>76</sup> His answer was that law pertains primarily to reason, and that will, exercised contrary to reason, is not law.<sup>77</sup> He concluded that the will of the sovereign must be exercised in accord with reason; otherwise, it would "savour of lawlessness rather than law."<sup>78</sup> Civil law proceeds from the exercise of will in harmony with reason. Reason and will constituted Marshall's dual foundation for identifying the Constitution as law deriving from the people. The American people adopted the Constitution as an exercise of their original right and will, according to Marshall in *Marbury*.<sup>79</sup> Professor Wu summarized the proper role of reason and will in the law:

Of course, both will and reason enter into the making of a law. Will is not to be despised, because it is given by God to man and belongs to his spiritual nature. As St. Thomas has said, "All law proceeds from the reason and the will of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason." In other words, "in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason."<sup>80</sup>

Aquinas' view of the relationship between will and reason was not limited to theological and philosophical discussions; it was central to an understanding of the common law as practiced in England. Lord Bracton (1210-1268), a contemporary of Aquinas and widely regarded as the "Father of the Common Law," incorporated in similar terms the relationship between reason and will into his treatise *De Legibus et Consuetudinibus Angliae*.<sup>81</sup> Bracton wrote that the "king himself [ought to

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is based upon insufficiently Christian views of the Creator-creature distinction, the effect of sin on human nature, and God's revelation. See Jeffrey C. Tuomala, *Book Review: Robert George's The Clash of Orthodoxies: Law, Religion, and Morality in Crisis*, 3 LIBERTY U. L. REV. 77, 89-93 (2009) (reviewing ROBERT P. GEORGE, *THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS* (2001)).

76. AQUINAS, *supra* note 75, at 205.

77. *Id.* at 205-06.

78. *Id.* at 206.

79. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

80. WU, *supra* note 74, at 74 (citations omitted).

81. *Id.* at 71.

be] under God, and under the Law, because the Law makes the king. . . .  
 [T]here is no king where will, and not Law, wields dominion."<sup>82</sup>

The law of God not only provides the right of the people to form the type of government they believe will most effectively secure their other rights, but it also provides the basic content of those rights government is designed to secure. The law of God provides the "general principles of law" to which Marshall appealed and which Part IV of this Article addresses.<sup>83</sup> While a constitution is adopted by the people's act of political will, which is based upon a legal right to institute a form of government, the Declaration of Independence asserts that government is instituted for the purpose of securing "unalienable rights," which include "life, liberty and the pursuit of happiness." These are rights with which all men are "endowed by their Creator."<sup>84</sup>

Many of these inalienable rights are enumerated in the United States Constitution, just as they are, in part, enumerated in the Declaration of Independence. For example, the Fifth Amendment states that no one shall be "deprived of life, liberty, or property, without due process of law."<sup>85</sup> The Ninth Amendment, on the other hand, states that, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>86</sup> While the Declaration and Constitution expressly list some of the preexisting rights the frame of government is designed to secure, those documents do not offer an exhaustive listing or exposition of these rights. These inalienable rights are closely linked to the general principles of law discussed below in Part IV.

Because those constitutional provisions listing or summarizing inalienable rights and those dealing simply with the framework of government have different origins, they are of a different nature from each other and are subject to different methods of interpretation. Controversies arise regarding proper methods of interpretation, in part, due to the failure to recognize differences between positive law and the law of nature. A constitution, as contemplated by Justice Marshall, is comprised both of a form of government that is instituted by the will of the people as a God-given right and of a partial listing or general statement of inalienable

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82. *Id.* at 73 (citing BRACON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE, I, at 16 (1915)).

83. *Marbury*, 5 U.S. (1 Cranch) at 170.

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

85. U.S. CONST. amend. V.

86. U.S. CONST. amend. IX.

rights.<sup>87</sup> These rights are preexisting and unchanging. Forms of government are devised, based on a people's prudential or political judgments as to which form will best secure these rights. Prudential or political judgments must always be made in the context of, and not contrary to, the law of nature. Provisions of the Constitution that delegate powers reflect the prudential judgments of the people, and thus the text and original intent should be the focus of interpretation. Those provisions which are declarative of preexisting rights, and those fundamental rights and principles of law that are not expressly identified in the Constitution, are not interpreted solely or even primarily on the basis of the text or original intent. A constitution then is a frame of government prudentially adopted for the purpose of applying a preexisting body of rights and law.

If the right to enact positive law, be it constitutions adopted by the people or statutes enacted by their agents, is founded upon the law of nature, certain implications must follow. Marshall asserted that if a statute conflicts with the Constitution, it is not law, and therefore the courts are not to apply it.<sup>88</sup> The logical implication is that if a provision of a constitution conflicts with the law of nature, it is not law, and the courts are not to apply it because it is not law. Just as Congress receives its authority to legislate from the people and may not exceed the scope of that delegation, the people receive their right to adopt a constitution from God and may not exceed the scope of that delegation. The judiciary must interpret and apply lawful acts of Congress, lawful provisions of the Constitution, and general principles of law when deciding particular cases.

#### IV. *MARBURY*—THE GENERAL PRINCIPLES OF LAW

The right to form a Constitution is grounded in preexisting law (original right), and the Constitution is designed to give effect to preexisting law (inalienable rights).<sup>89</sup> God's law not only provides the right to establish a

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87. *Marbury*, 5 U.S. (1 Cranch) at 176. It was the American practice to include in colonial, state, and federal constitutions a partial listing of legal rights that all men enjoy as a gift of their Creator. DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 9 (1998).

88. *Marbury*, 5 U.S. (1 Cranch) at 178.

89. Because Jesus Christ is Creator, *John* 1:1-5, and Supreme Ruler, *Hebrews* 2:6-8, He is also Supreme Lawgiver, superior to Moses who was the first lawgiver. *Hebrews* 3. Although "the law was given through Moses; grace and truth came through Jesus Christ." *John* 1:17. Jesus made it clear that He did not change the law. *Matthew* 5:17-20; 22:34-40. But in Him the truth did appear in the flesh, *John* 1:14, and in His flesh He bore the curse of the law. *Galatians* 3:13. The origin of Western rule-of-law jurisprudence is grounded in the

framework of government, but it also identifies the rights—life liberty, and the pursuit of happiness—that the framework is designed to secure. God’s law also provides other general principles of law that all courts possessing judicial power are to apply in deciding cases. In *Marbury*, Chief Justice Marshall made clear that the courts are to adjudicate legal claims of individuals against executive officers based on “acts of congress and the general principles of law.”<sup>90</sup> Marshall asserted that the “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”<sup>91</sup> He wrote further, quoting Blackstone, “that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that law is invaded.”<sup>92</sup>

Similarly, Marshall’s references to the judicial power—“province of the court . . . to decide on the rights of individuals,” “the province and duty . . . to say what the law is,” and the “very essence of judicial duty”—pointed to a law of the nature of judicial power.<sup>93</sup> He presupposed a preexisting law, whose source is identified in the Declaration of Independence, that grounds the right to establish a government, provides the general principles of law, and defines the nature of judicial power.

Marshall’s “general principles of law” may be identified in part with the “general principles of commercial law” to which Justice Story appealed in *Swift v. Tyson*.<sup>94</sup> It is generally recognized that Story’s opinion in *Swift* was grounded in law-of-nature jurisprudence.<sup>95</sup> *Swift* held that, in the exercise of diversity jurisdiction, federal courts were to apply general principles of law even if those principles were contrary to the holdings of state supreme court cases.<sup>96</sup> The implication is that the exercise of judicial power entails the application of general principles of law as a court understands them to be, and that only in matters purely local in nature should a federal court defer to

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truth that there is a transcendent lawgiver. The general principles of law derive from the law of nature, whose author is Jesus Christ.

90. *Marbury*, 5 U.S. (1 Cranch) at 170.

91. *Id.* at 163.

92. *Id.* (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*23).

93. *Id.* at 170, 177-78.

94. *Id.* at 170; *Swift v. Tyson*, 41 U.S. (1 Pet.) 1, 18, 22 (1842).

95. The author has used the term “law-of-nature” jurisprudence to distinguish it from the “natural law” philosophies of the Greco-Roman world, traditional Roman Catholic jurists, Protestant Arminian theologians, Deists, and even many Reformed Protestants. In general, those natural law philosophies fail to acknowledge, or at least compromise, the distinction between the Creator and the creation, and the effect of Adam’s sin on human nature, especially in regard to man’s ability to reason rightly without Scripture.

96. *Swift*, 41 U.S. (1 Pet.) at 18-19.

a state court's interpretation of law.<sup>97</sup> In short, *Swift* was based on the law-of-nature jurisprudence set out in the Declaration of Independence, that law is not simply a human convention. This jurisprudence provided the basic rule of law upon which thousands of decisions in federal diversity cases were premised until 1938, when the Supreme Court overruled *Swift* in the case of *Erie Railroad Co. v. Tompkins*.<sup>98</sup>

Because most contemporary lawyers, judges, and law professors do not recognize any law superior to the Constitution that is necessary to justify a people establishing their own form of government, they logically cannot recognize that such rights as life, liberty, and property have an existence independent of and preexistent to the will of man. This means they will not recognize the existence of general principles of law as articulated in *Marbury* and *Swift*, nor will they admit of any law superior to the written words of a constitution.<sup>99</sup>

The problem of defining the concept of general principles of law is intertwined with the problem of defining "common law." Today, common law has no generally accepted meaning, though it is often referred to as judge-made law. This assertion is made despite the fact that Article I of the

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97. *Id.*

98. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938).

99. Legal positivists are not likely to take James Otis' argument in the writs of assistance case as recounted in Page Smith's biography of John Adams seriously, and anyone who does take it seriously will likely be dismissed:

Otis' listeners, according to their predilections, were thrilled or startled to hear such a daring statement of the case against the writs. Otis had placed what would, before many years, be called "colonial opposition" on the high ground of principle rather than on the uncertain footing of precedent. He had boldly enunciated the view that acts of Parliament which conflicted with the unwritten and highly nebulous British constitution or, even more broadly, with "natural equity"—a phrase that might not improperly be translated "fair play"—were of no effect, and must be so declared by the King's courts. It was extraordinary, astonishing and fateful. Adams was stirred in his deepest being, swept by the speaker's power from all mooring of skepticism or hesitation, transfixed by Otis' masterful use of classical quotation, of common law, of history, and of Scripture. It is only given a man to be once so moved, so transported as John Adams was. These are the experiences that touch and transform; these are the moments in which truth seems to have descended from heaven in the inspired word. An old man's hindsight must have its due, for it is indeed in such moments that men are remade and revolutions conceived. Born from the authentic word, they grow in the darkness of men's hearts and minds until they are ready to dispute with the powers of this world the issue of man's destiny on earth.

1 PAGE SMITH, JOHN ADAMS 56 (1962).

U.S. Constitution and probably all state constitutions vest the power to make law in a legislative body separate from the courts.<sup>100</sup> The judge-made view of law, unless it recognizes a preexisting law, is a form of legal positivism—that law is simply the command of the sovereign. At other times, the common law is described as an accumulation of social customs that courts take note of and expressly articulate as holdings in the context of particular cases. This view reflects a more sociological jurisprudence and obviates the problem of courts making law.<sup>101</sup> Under a sociological view, courts may be viewed as simply discovering, interpreting, and applying law. But unless the common law is something more than social custom as mediated by the courts, it too is simply another form of legal positivism. Moreover, the courts seldom limit their role to mediating the public consensus and instead attempt to formulate a new consensus.<sup>102</sup>

It is generally accepted, based at least in part on his opinion in *Swift v. Tyson*, that Justice Story viewed the common law very differently.<sup>103</sup> Justice Story expressly stated that court opinions are not law, though they may provide evidence of what the law is.<sup>104</sup> This would hold true, it seems,

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100. U.S. CONST. art. I. That such assertions are routinely made and go unchallenged provides tribute to *Erie's* mind-numbing effect.

101. According to the founder of American sociological jurisprudence, Roscoe Pound (1870-1964), the law is “a social institution [designed] to satisfy social wants.” BODENHEIMER, *supra* note 38, at 118 (citing ROSCOE POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 47 (1954)). Oliver Wendell Holmes communicated a sociological jurisprudential perspective when he stated:

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

*Id.* at 122 (citing OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1923)).

102. According to Professor Lino A. Graglia, the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 397 (1954), marked the end of the Court's role as “a defender of the status quo and a brake on social change,” which it first adopted in *Dred Scott v. Sandford*, 60 U.S. 393 (1856), and the start of its current role as “the nation's primary initiator and accelerator of social change.” Lino A. Graglia, *Constitutional Law Without the Constitution: The Supreme Court's Remaking of America*, in A COUNTRY I DO NOT RECOGNIZE: THE LEGAL ASSAULT ON AMERICAN VALUES 1, 24-25, 27 (Robert H. Bork ed., 2005).

103. It is safe to assume that what Justice Story believed about general commercial law and its relation to the law of nature holds true for the common law as a whole. Certainly that is the understanding that the U.S. Supreme Court in *Erie* and *York* derived from *Swift*. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

104. *Swift v. Tyson*, 41 U.S. (1 Pet.) 1, 18 (1842).

for federal court opinions as well as for state court opinions. In *Swift*, Justice Story cited opinions from multiple jurisdictions and different periods in history, not as evidence of some broader social custom, but as evidence of what the law of God is on a particular matter of commercial law.<sup>105</sup> The *Swift* opinion embodies the view that law is “permanent, uniform and universal.”<sup>106</sup> It does not change; it applies to everyone equally; and it applies in every part of the world. This was Blackstone’s view of the common law, and it was also Lord Coke’s view of the common law. Coke’s *Institutes of the Lawes of England* and Blackstone’s *Commentaries on the Laws of England* were the primary texts used in training American lawyers for over 200 years.<sup>107</sup> Neither Blackstone nor

105. *Swift*, 41 U.S. (1 Pet.) 1.

106. 1 WILLIAM BLACKSTONE, COMMENTARIES \*44. In addressing questions of general commercial law, such as the construction of contracts, Story explained that the Supreme Court and State courts have a similar function: “to ascertain, upon general reasoning and legal analogies . . . what is the just rule furnished by the principles of commercial law to govern the case.” *Swift*, 41 U.S. at 19. The decisions of local tribunals on the subject do not constitute law, but “only evidence of what the laws are.” *Id.* at 18. Story pointed to the law that governs general questions of commercial law by invoking Cicero’s statement, “*Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes, et omni tempore una eademque lex obtinebit.*” *Id.* at 19 (quoting Cicero as adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. 883, 887). The permanent, uniform, and universal nature of the law to which Story alluded in *Swift* is better understood when the words which Story attributed to Cicero are read in the context of Cicero’s entire statement:

[L]aw in the proper sense is right reason in harmony with nature. It is spread through the whole human community, unchanging and eternal, calling people to their duty by its commands and deterring them from wrong-doing by its prohibitions. When it addresses a good man, its commands and prohibitions are never in vain; but those same commands and prohibitions have no effect on the wicked. This law cannot be countermanded, nor can it be in any way amended, nor can it be totally rescinded. We cannot be exempted from this law by any decree of the Senate or the people; nor do we need anyone else to expound or explain it. *There will not be one such law in Rome and another in Athens, one now and another in the future, but all peoples at all time will be embraced by a single and eternal and unchangeable law; and there will be, as it were, one lord and master of us all—the [G]od who is the author, proposer, and interpreter of that law.*

Cicero, *The Republic*, in THE REPUBLIC AND THE LAWS 68-69 (Niall Rudd trans., 1998) (emphasis added).

107. Alan F. Day, *Lawyers in Colonial Maryland, 1660-1715*, 17 AM. J. LEGAL HIST. 145, 153-57 (1973); Clement Eaton, *A Mirror of the Southern Colonial Lawyer: The Fee Books of Patrick Henry, Thomas Jefferson, and Waightstill Avery*, 8 WM. & MARY Q. (3D SER.) 520, 520-34 (1951); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731, 759-67 (1976); see also

Coke were judicial or sociological positivists. Professor Wu provides the following summary of Coke's view of the common law:

In *Calvin's Case*, [Coke] declared that "the law of nature is part of the law of England," . . . and that "the law of nature is immutable." He identified the law of nature with the *eternal law*. He said, "The law of nature is that which God at the time of creation of the nature of man infused into his heart, for his preservation and direction; and this is *lex aeterna*, the moral law, called also the law of nature. And by this law, written by the finger of God in the heart of man, were the people of God a long time governed, before the law was written by Moses, who was the first reporter or writer of the law in the world." Again, in *Dr. Bonham's Case*, [Coke] laid down the principle of judicial review: "And it appears in our books, that in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and judge such an Act to be void."<sup>108</sup>

Justice Story had written similarly that "[t]here never has been a period in which the common law did not recognize Christianity as lying at its foundations."<sup>109</sup>

*Swift* dealt specifically with a question of commercial law in a diversity case where the parties were citizens of two different states.<sup>110</sup> Hopes for resolving problems related to interstate commerce were a major impetus for adopting the Constitution of the United States. In Europe and England, there had long been commercial or mercantile courts distinct from other

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READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION (Dennis R. Nolan ed., 1980).

108. Wu, *supra* note 74, at 91.

109. Joseph Story, *Address Discourse Pronounced upon the Inauguration of the Author, as Dane Professor of Law in Harvard University, August 25th, 1829*, in *THE LEGAL MIND IN AMERICA: FROM INDEPENDENCE TO THE CIVIL WAR 178* (Perry Miller ed., Cornell University Press 1969) (1962) ("One of the beautiful boasts of our [United States] municipal jurisprudence is, that Christianity is part of the Common Law, from which it seeks the sanction of its rights, and by which it endeavors to regulate its doctrines . . . . There never has been a period in which the common law did not recognize Christianity as lying at its foundations.").

110. *Swift*, 41 U.S. (1 Pet.) 1.



courts.<sup>111</sup> Those courts applied a commercial law common to all peoples—"lex mercatoria"—that was especially responsive to the need to resolve conflicts arising amongst members of the commercial class engaged in international trade.<sup>112</sup> The parties needed judges with an expertise in commercial matters; they needed uniformity; and they needed responsive procedures.<sup>113</sup>

Certainly the Framers had similar concerns related to the commercial life of the Republic in mind when they drafted the various diversity clauses in Article III of the Constitution.<sup>114</sup> Section 2 of Article III contains a series of clauses addressing the sorts of problems that are common to international law.<sup>115</sup> The Article III "diversity clause" and section 34 of the Federal Judiciary Act of 1789 were certainly designed, at least in part, with a view to providing a satisfactory resolution to the kinds of problems that frequently arise with international commercial relations.<sup>116</sup>

The standards of commercial law cannot simply be imposed by any one nation if it hopes to participate in and benefit from free international trade. There must be mutually recognized legal standards. Those general standards are reflected particularly in a shared Christian culture.<sup>117</sup> The efficacy of the right common moral basis, and therefore legal basis, upon which it is possible to conduct interstate commerce is reflected in the Article IV "Full Faith and Credit" clause of the U.S. Constitution.<sup>118</sup> Because the several American states shared a common law, in Coke's sense of the term, they could be confident that few problems would arise in giving effect to the laws and other acts of sister states. God has established an

111. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 346 (1983).

112. *Id.* at 348.

113. *Id.* at 346-48.

114. U.S. CONST. art. III.

115. U.S. CONST. art. III, § 2.

116. U.S. CONST. art. III, § 2; Judiciary Act of 1789 § 34, 1 Stat. 73.

117. One might ask whether we can have rule of law if most people do not recognize basic standards of right and wrong. The answer is "No, unless people act according to Christian principles despite their own professed lack of Christian beliefs." For example, it is no coincidence that the concept of the rule of law over the state and the earliest secular legal systems, including feudal, manorial, mercantile, urban, and royal, have their origin in the Papal Revolution, a time when Christianity was the faith of the West. See BERMAN, *supra* note 111, at 273-75, 292-94. Specifically, mercantile law developed only after the emergence of a "Christian social theory" that viewed economic activities as "a path to salvation, if carried on according to the principles laid down by the church," i.e., "a system of law based on the will of God as manifested in reason and conscience." *Id.* at 339.

118. U.S. CONST. art. IV, § 1.

international regime of multiple nation-states with limited territorial jurisdiction that are mutually dependent upon one another.<sup>119</sup> If they are to interact, they must have a common basis for law. To have a common legal basis, they must have a common Lawgiver.<sup>120</sup> In a world of multiple jurisdictions in which no one political entity can impose unity by an act of will, unity comes only through common submission to right that precedes and gives direction to will.<sup>121</sup>

This raises a difficult question, a question that is separate from, but related to, the question of whether the general common law is to be identified with God's law.<sup>122</sup> Assuming for the moment that *Swift* is right, and there is a body of general common law that federal courts are bound to apply, what language in the Constitution can be identified as recognizing this law as the rule of decision in particular cases?<sup>123</sup> This same question must be asked of section 34 of the Federal Judiciary Act of 1789.<sup>124</sup> Section 34, as quoted in *Swift*, provided: "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply."<sup>125</sup>

*Swift* held that the phrase "laws of the several states" does not include state judicial decisions regarding general commercial law, but rather "local statute or positive, fixed or ancient local usage."<sup>126</sup> Section 34 says nothing about general principles of law, common law, or commercial law providing rules of decision. The Constitution likewise appears to be silent regarding

119. See, e.g., *Deuteronomy* 32:8; *Isaiah* 60; 1 *Kings* 5; 1 *Kings* 10; see also *infra* note 121.

120. "There is only one Lawgiver and Judge, the one who is able to save and destroy." *James* 4:12.

121. In Paul's speech to the Greeks, he stated:

From one man he made every nation of men, that they should inhabit the whole earth; and he determined the times set for them and the exact places where they should live. God did this so that men would seek him and perhaps reach out for him and find him, though he is not far from each of us.

*Acts* 17:26-27.

122. Even if one embraces *Erie* and rejects *Swift*, these questions cannot be avoided, because under *Erie* states must look to something to determine what the general common law is, and federal courts must look to something to determine what the federal common law is.

123. *Swift v. Tyson*, 41 U.S. (1 Pet.) 1, 19 (1842).

124. *Id.* at 18.

125. *Id.* (quoting Judiciary Act of 1789 § 34, 1 Stat. 73).

126. *Id.*

general principles of law as binding the courts of the United States.<sup>127</sup> This same issue arises with regard to customary international law. What language in the Constitution provides authority to apply customary international law in U.S. courts? Article VI 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 States to the contrary notwithstanding.<sup>128</sup>

General principles of law and customary international law are not made pursuant to the Constitution. They exist independently of the existence of the United States. The power to apply general principles of law and customary international law derives from Article III, Section 1, "The judicial Power of the United States."<sup>129</sup> Any court, anywhere, at any time, that is given "judicial power," has by its very nature the power and duty to apply "general principles of law." An ostensible grant of judicial power that does not confer that power would not truly be a grant of judicial power. Certain territorial, subject matter, and other limitations may be placed on particular courts, but when they are granted judicial power, they may never be required to apply any rule contrary to the "general principles of law." This is consistent with Marshall's view of the power of judicial review. It is not a power separate from that of deciding cases and controversies.<sup>130</sup> Essential components of judicial power include, first, determining which of two conflicting rules is superior, and second, interpreting and applying the general principles of law where applicable.<sup>131</sup>

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127. Even if one agrees with *Erie* that there is no general common law, one is faced with the same problem when trying to discern the "federal common law" of admiralty, copyright, or international law. The federal common law frequently deals with "state law matters" of negligence, contract, property, and even commercial paper. See, e.g., ERWIN CHERMERINSKY, FEDERAL JURISDICTION 353 (2003).

128. U.S. CONST. art. VI, cl. 2. Arguably, general principles of law and customary international law fall under the phrase in Article III, "this Constitution, [and] the laws of the United States . . ." U.S. CONST. art. III, § 2, cl. 1. It would seem that "laws of the United States" as it appears in Article III, Section 2, clause 1 means the same thing as it does in Article VI, clause 2, where it is specifically qualified by the phrase "which shall be made in pursuance [of the Constitution]." U.S. CONST. art. III, § 2, cl. 1; U.S. CONST. art. VI, cl. 2.

129. U.S. CONST. art. III, § 1.

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

131. *Id.*

Marshall's opinion in *Marbury v. Madison* and Story's opinion in *Swift v. Tyson* recognize the existence of general principles of law in addition to the original right to establish constitutions. Those principles of the law of nature include the necessity to provide remedies for legal wrongs, standards of conduct for government officers, and obligations of individuals who engage in commercial transactions. Marshall in *Marbury*, just as Story in *Swift*, treated both the acts of Congress and general principles of law as applicable in the federal courts.<sup>132</sup>

Marshall and Story's view of the law prevailed in federal diversity cases until 1938, when the Supreme Court decided the landmark case of *Erie Railroad Co. v. Tompkins*.<sup>133</sup> Justice Brandeis, writing for the Court in *Erie*, overruled *Swift* and held that "[t]here is no federal general common law."<sup>134</sup> Henceforth, the "laws of the several states" that federal courts were to apply in diversity cases included the decisions of state courts interpreting common law.<sup>135</sup> The federal courts were no longer to apply general principles of law because "no clause in the Constitution purports to confer such a power upon the federal courts."<sup>136</sup> Brandeis made it clear not only that he believed courts had no constitutional warrant to apply general principles of law, but also that he believed there was no such law: "The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it . . .'"<sup>137</sup>

Brandeis concluded that courts make law and that there is no law for the courts to apply except that which the state courts or legislatures make: "The authority and only authority is the State, and, if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word."<sup>138</sup> The Supreme Court in *Erie*, and soon thereafter in *Guaranty Trust Co. v. York*, went out of its way to make it clear that the primary problem with *Swift* was not faulty statutory construction, or even faulty constitutional interpretation.<sup>139</sup> The problem was even more fundamental than *Swift*'s failure to recognize that courts

132. *Id.* at 173; *Swift v. Tyson*, 41 U.S. (1 Pet.) 1, 19 (1842).

133. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79-80 (1938).

134. *Id.* at 78.

135. *Id.* at 78-79; Judiciary Act of 1789 § 34, 1 Stat. 73.

136. *Erie*, 304 U.S. at 78.

137. *Id.* at 79 (quoting *Swift*, 41 U.S. (1 Pet.) 1).

138. *Id.* (alteration in original) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 535 (1928) (Holmes, J., dissenting)).

139. See *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945).

make law. The Supreme Court in *Erie* broke not merely with *Swift*, but with a legal tradition dating back at least to Bracton.<sup>140</sup> It made a radical declaration that law does not pertain primarily to reason, but rather to will. *Erie* marked the culmination of a shift from an order of civil law based on right or reason *and* will to an order that is the product *solely* of the human will.

Justice Frankfurter, writing for the Court seven years later in *Guaranty Trust Co. v. York*, proclaimed that *Erie* had not only overruled a long-established precedent, but that it had actually established an entirely different way of looking at the law.<sup>141</sup> Frankfurter, following Brandeis' lead, also quoted Holmes, but this time depicted natural law jurisprudence in pejorative terms as a "brooding omnipresence."<sup>142</sup> And, perhaps in reference to Thomas Aquinas, Blackstone, and others, he wrote that law was no longer seen as based on "Reason."<sup>143</sup> Frankfurter wrote:

In overruling *Swift v. Tyson*, *Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare. Law was conceived as a 'brooding omnipresence' of Reason, of which decisions were merely evidence and not themselves the controlling formulations.<sup>144</sup>

From at least the thirteenth century, the foundational principle of Christian common law jurisprudence was that human will must be exercised in accord with right or reason to be law. *Erie* changed that. The Court rejected Bracton, who had written that the "king himself [ought to be] under God,

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140. See *supra* text accompanying notes 81-82.

141. *Guaranty Trust Co.*, 326 U.S. at 101.

142. *Id.* at 102.

143. *Id.*

144. *Id.* at 101-02 (citations omitted).

and under law, because the law makes the king . . . ."<sup>145</sup> Thus, in American jurisprudence, *Erie* marked the "Triumph of the Will."<sup>146</sup>

#### V. *MARBURY*—THE NATURE OF THE JUDICIAL AND POLITICAL POWERS

The distinction and relationship between original right and original will was foundational to Marshall's conclusion that the Constitution is paramount law and that the courts have the duty to apply that law in cases before them.<sup>147</sup> In addressing the power of courts to review the legality of acts of the executive branch, Marshall drew a distinction between obligatory and discretionary acts. This is closely related to the distinctions he drew between *right* and *will*, and between *judicial* and *political*.<sup>148</sup> He wrote that certain acts of the President that may be deemed discretionary are by nature political and are therefore not subject to judicial review.<sup>149</sup> However, when Congress by proper enactment places particular obligations on the President, these become legal duties that courts have the power to interpret and enforce.<sup>150</sup> In other words, an exercise of executive will that is contrary to right or law is subject to judicial review because the act is no

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145. See WU, *supra* note 82, at 73 (citing Bracton). Ironically, Justice Robert Jackson who joined the Court's opinion in *Guaranty Trust Co. v. York* was to become the chief U.S. prosecutor at Nuremberg. In his widely acclaimed opening statement before the International Military Tribunal, Justice Jackson appealed to "brooding omnipresence" jurisprudence. Not only did he invoke the Declaration of Independence in referring to the "natural and inalienable rights in every human being," but he also submitted that "even rulers are, as Lord Chief Justice Coke put it to King James, 'under God and the law.'" 2 INTERNATIONAL MILITARY TRIBUNAL: TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL (1948).

146. "Triumph of the Will" is the name of a much-heralded Nazi propaganda film produced by Leni Riefenstahl. TRIUMPH OF THE WILL (Universum Film AG 1935). "Why We Fight," a film produced by Frank Capra, was America's response to "Triumph of the Will." WHY WE FIGHT (U.S. Army Pictorial Services 1942). Every United States Marine knows why we fight: "First to fight for right." MARINES' HYMN (U.S. Marine Corps 1929). The "American fabric" is that even war, which entails the imposition of will by the most extreme means of force in the most perilous of situations, must be grounded in right and must be prosecuted rightly. It was on the proper relationship between right and will that the nation was founded and its Constitution adopted, and it is only by maintaining the proper relationship between right and will that it will be preserved.

147. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

148. *Id.* at 165-66, 176.

149. *Id.* at 166.

150. *Id.*

longer discretionary or political in nature but rather is obligatory.<sup>151</sup> Madison had an obligation to deliver the commission.<sup>152</sup>

The people, in the exercise of their original right, delegated the judicial power to a branch of government separate from the legislative and executive branches. In order to exercise this power properly, the courts must define the nature or essence of the judicial power and distinguish it from the political powers. The Constitution itself does not define any of the three powers. Just as Marshall presupposed the nature of a constitution, he also presupposed the natures of the judicial and political powers.<sup>153</sup> He made no appeal to original intent, engaged in no textual exposition, cited no case precedent, divined no social consensus, and conducted no utilitarian analysis. Likewise, the people, as an exercise of prudence, allocated the judicial and political powers to separate branches of government, but in so doing simply treated the definition of those powers as a given. They presupposed a distinction that derives from the law of God and that is modeled in His way of ruling the world—He rules as both Judge and Governor.<sup>154</sup>

Because Madison chose not to answer Marbury's complaint or the Court's show cause order, Marshall was forced to speculate as to defenses Madison might have raised had he appeared in court.<sup>155</sup> Marshall assumed Madison would argue that the decision not to deliver the commission was political in nature and therefore was not subject to judicial review.<sup>156</sup> This defense might have taken one of two forms. One form would be to argue that the power of appointment is purely political by its very nature and is therefore a matter left solely to the President's discretion. Even if the decision to deliver the commission was not political in nature, a second form of defense would have been that the status of the executive department

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151. *Id.*

152. *Id.* at 168.

153. *Id.* at 177. Marshall presumed that: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void." *Id.*

154. The distinction and relationship between law and policy shows up repeatedly, though sometimes in different guises, throughout Constitutional law. An understanding of that distinction and relationship is necessary for understanding Marshall's opinion, and *Marbury* presents an excellent opportunity to lay the foundation for subsequent cases. *Psalm* 9:7-8 describes God ruling as judge and governor: "The Lord reigns forever; he has established his throne for judgment. He will judge the world in righteousness; he will govern the peoples with justice."

155. *Marbury*, 5 U.S. (1 Cranch) at 154.

156. *Id.* at 164.

as a separate branch of government made it immune to judicial process. Madison would likely bolster this defense by claiming that it would be improper for the Court to inquire into the "intimate political relation" of the President and department heads and that it would constitute an intermeddling "with the prerogatives of the executive."<sup>157</sup> Marshall conceded the principle that if delivery were by nature a matter of discretion, the court would have no power to review it, but he denied that Madison had the discretion not to deliver it under the applicable facts and law.<sup>158</sup> Marshall also denied that the "peculiarly irksome, as well as delicate" nature of inter-branch relations made it a decision over which the Court had no power of review.<sup>159</sup> Marshall acknowledged that, "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."<sup>160</sup> But Marshall denied that either of these limitations on the exercise of the judicial power was applicable in *Marbury's* case.<sup>161</sup>

Congress has the right to establish various departments of government that it believes are necessary for achieving constitutional objectives. For example, Congress created the Department of State and the Office of Secretary of State with the duty to act at the direction of the President.<sup>162</sup> Official acts within the scope of the statutory grant of authority and not circumscribed by particular statutory obligations or prohibitions are discretionary in nature.<sup>163</sup> Likewise, the President's appointment of persons to hold various offices is a matter of discretion.<sup>164</sup> Also, the President's

157. *Id.* at 169-70.

158. *Id.* at 150-51.

159. *Id.* at 165, 169.

160. *Id.* at 170. The context of Marshall's statement is as follows:

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

*Id.*; see also *id.* at 165-66.

161. Political and executive restraints on the Supreme Court's judicial power would have applied in *Marbury* had the delivery of *Marbury's* commission depended on the exercise of "executive discretion," rather than performance of a legal duty under an act of congress and the "general principles of law." *Id.* at 170.

162. 1 Stat. 28 (1789); *Marbury*, 5 U.S. (1 Cranch) at 139.

163. *Marbury*, 5 U.S. (1 Cranch) at 166, 170.

164. *Id.* at 166.



power to remove an officer who holds an at-will appointment is discretionary in nature.<sup>165</sup>

President Adams' decision to appoint Marbury as a justice of the peace was discretionary in nature and not subject to judicial review.<sup>166</sup> The law may not direct the appointment of any particular person.<sup>167</sup> However, because the office was for a fixed term of five years, the decision to remove from office or withhold the commission was no longer discretionary once the appointment was perfected.<sup>168</sup> When Congress imposes specific duties on an officer and directs him by law to perform those duties, they are a matter of obligation, and when rights of individuals depend on the performance of those obligations, the courts must order officers to perform their duties.<sup>169</sup> Madison, as Secretary of State, had a legal duty to deliver the commission to Marbury, and failure to do so injured Marbury, entitling him to an appropriate remedy.<sup>170</sup> No longer were the President's actions ones that were only politically examinable by an appeal to the ballot box or conscience; they were judicially examinable in a court of law.<sup>171</sup>

An analysis of the distinction between judicial and legislative powers is often focused on differences in two elements—one is the element of time, and the other the element of applicability. The distinction based on the element of time is described in an oft-quoted passage from Justice Holmes:

A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.<sup>172</sup>

Professor Dickinson placed emphasis on the second element, that of applicability: "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied

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165. *Id.* at 172.

166. *Id.* at 165-67.

167. *Id.*

168. *Id.* at 167-68.

169. *Id.* at 166.

170. *Id.* at 166, 168.

171. *Id.* In the cases of justices of the peace, Congress had circumscribed the power of removal by creating a right upon appointment to a five-year term of office. *Id.* at 155. Marbury's appointment was perfected when President Adams signed the commission and the Secretary of State affixed the seal of the United States. *Id.* at 158-59. Marbury thus had a right to possession of the commission and Madison an obligation to deliver it. *Id.* at 163.

172. *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226 (1908).

in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity."<sup>173</sup>

The action of legislating, which includes the adoption of a constitution, is forward-looking or prospective in nature. The focus in the legislative process is not upon determining what happened at some particular time in the past in some discrete situation. The focus is on formulating rules best designed to achieve some lawful object of government. The process of legislation may entail codifying preexisting law, be it inalienable rights or general principles of law, but its distinguishing characteristic is that it designs positive enactments to best achieve legitimate government objectives. The second characteristic that distinguishes the legislative from the judicial process is that legislation is framed in general terms regulating all persons similarly situated.

The process of adjudication, on the other hand, has a focus that is backward-looking in nature. Adjudication is designed to determine what happened to a relatively limited number of persons at some discrete time in the past. A court applies already existing law, be it acts of Congress, general principles of law, or the Constitution, to the facts of a case in order to determine whether a legal duty has been breached. If it has been, the court applies a remedy focused on restoring the victim, not achieving some future objective. Adjudication applies with particularity to a limited number of persons who are parties to a lawsuit.

The exercise of the executive power, which like the exercise of the legislative power is forward-looking in nature, is designed to best achieve the legislative objects. The executive and legislative powers, as well as the power of appointment, are political or prudential in nature. In addition to being forward-looking in nature, the political powers have in common the fact that they emphasize the imposition of will, though always circumscribed by law. Alexander Hamilton made the following distinction between the political and judicial branches:

[I]n a government in which [the different departments of power] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution . . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active

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173. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 21 (Law Book Exchange, Ltd. 2003) (1927).

resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . . .<sup>174</sup>

Congress, in exercising the legislative power, makes judgments as to the best means of achieving constitutional objectives or ends. The President makes his best judgment in allocating resources and applying force to achieve those ends. The necessity and expediency of those political judgments are not subject to judicial review. The judicial power does not entail the exercise of will (courts do not make law; the law already exists), and it does not entail the use of force (courts do not execute their own judgments; they depend upon the executive branch). Courts exercise only judgment—not political judgment that is forward-looking, but judicial judgment that is backward-looking in nature.

Marshall articulated his view of the legislative power more fully in *McCulloch v. Maryland*.<sup>175</sup> He asserted that the key to interpreting Congress's constitutional powers (the Constitution itself being legislation of the people) is to contemplate the objective of a given enumerated power.<sup>176</sup> Congress, in turn, must design legislative acts to accord with enumerated constitutional objectives. The necessary legislative means are those which are "convenient, or useful, or essential," "most beneficial to the people," and "really calculated to effect" those constitutional objects.<sup>177</sup> The President has the power of implementing measures, if need be by force, to achieve those legislative objectives.

In *Marbury*, Marshall devoted considerable attention to describing the nature of the judicial power. A judge has no political power, as the "province of the court is, solely, to decide on the rights of individuals . . . ."<sup>178</sup> A judge, in deciding the rights of individuals, must "apply the rule to particular cases."<sup>179</sup> In order to apply the law, a judge must "expound and interpret that rule" which is applicable to the case at hand.<sup>180</sup> Marshall's statement, "It is emphatically the province and duty of

174. THE FEDERALIST NO. 78 (Alexander Hamilton).

175. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

176. *Id.* at 411. The Preamble to the Constitution states in general terms the ends that it is designed to achieve. It also makes clear that we the People have established a frame of government not only for ourselves but also for "our Posterity." U.S. CONST. pmb. The enumerated powers are themselves to be defined in terms of their ends or objects; there is a future orientation and general applicability to the body politic. *McCulloch*, 17 U.S. (4 Wheat.) at 411.

177. *McCulloch*, 17 U.S. (4 Wheat.) at 413, 420, 423.

178. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803).

179. *Id.* at 177.

180. *Id.*

the judicial department to say what the law is,"<sup>181</sup> is often quoted out of context to promote the idea of judicial supremacy. But Marshall goes on to say, "Those who apply the rule to particular cases, must of necessity expound and interpret that rule."<sup>182</sup> The judicial power is limited to particular cases; it may not be employed to make law.<sup>183</sup>

A necessary incident of judicial judgment also includes the power to pronounce a proper remedy.<sup>184</sup> In fact, Marshall claimed that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>185</sup>

In the particular case of *Marbury*, the essential facts were that President Adams, following the advice and consent of the Senate, signed a commission thereby appointing Marbury, and the Secretary of State affixed the seal of the United States to that commission.<sup>186</sup> It was not for the Court to decide whether the creation of the office of justice of the peace was the best means of governing the District of Columbia or whether any particular person was best qualified to hold that office.<sup>187</sup> Those were political decisions, one delegated to Congress (creation of the office) and the other to the President (appointment of Marbury).<sup>188</sup>

Just as the doctrines of judicial review and general principles of law are grounded in the jurisprudence of the Declaration of Independence, so also is the doctrine distinguishing between the judicial and political powers. Civil officers exercise those powers in a manner that is reflective and imitative of the manner in which God governs the affairs of men and nations—as

181. *Id.* Marshall states:

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.

*Id.* at 177-78.

182. *Id.* at 177.

183. *Id.*

184. *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*109.)

185. *Id.*

186. *Id.* at 155.

187. *Id.* at 166, 170.

188. *Id.* at 164, 166.

“Supreme Judge of the World”<sup>189</sup> and as “Divine Providence.”<sup>190</sup> The exercise of judicial power as an application of established law to past

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189. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). Thomas Jefferson had not included the phrase “appealing to the Supreme Judge of the world for the rectitude of our intentions” in his original draft of the Declaration. PAULINE MAIER, *AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE* 241 (1997). The final inclusion of the title of God as “Supreme Judge of the world” makes it clear that those who adopted the Declaration, as agents of the people of the thirteen colonies, were not appealing to a detached and impersonal God of Deism or of the French Enlightenment. There is ample evidence that biblical Christianity was a far more powerful ideological force among the people and their agents than faddish European heresies of the day. Donald Lutz compares the relative influence of the Bible and Enlightenment writers in late and early colonial history:

The relative influence of European thinkers on American political thought is a large and complex question not to be answered in any but a provisional way here. We can, however, identify the broad trends of influence and which European thinkers need to be especially considered. One means to this end is an examination of the citations in public political literature written between 1760 and 1805. If we ask which book was most frequently cited in that literature, the answer is, the Bible. . . . [B]iblical tradition accounted for roughly one-third of the citations in the sample. However, the sample includes about one-third of all significant secular publications, but only about one-tenth of the reprinted sermons. Even with this undercount, Saint Paul is cited about as frequently as Montesquieu and Blackstone, the two most-cited secular authors, and Deuteronomy is cited almost twice as often as all of Locke’s writings put together. A strictly proportional sample with respect to secular and religious sources would have resulted in an abundance of religious references.

LUTZ, *supra* note 87, at 140. That being the case, it is most likely that many, if not most, of the signers recognized Christ not only as Creator and Lawgiver, but also as Supreme Judge before whom all men will one day appear:

Then I saw a great white throne and him who was seated on it. Earth and sky fled from his presence, and there was no place for them. And I saw the dead, great and small, standing before the throne, and books were opened. Another book was opened, which is the book of life. The dead were judged according to what they had done as recorded in the books. The sea gave up the dead that were in it, and death and Hades gave up the dead that were in them, and each person was judged according to what he had done.

*Revelation* 20:11-13. The nature of judicial power is not only exemplified in Christ’s session as the Supreme Judge of the world, but it is also supremely demonstrated in his sacrificial atoning death upon the cross (*Romans* 3:25-26), which was a judicial judgment upon men’s sins and a substitutionary punishment (*Isaiah* 53:5) and payment (1 *Peter* 1:18-19) for those sins in satisfaction of the demands of the law. In Christ, God has judged sins committed beforehand—our actions and even “the rectitude of our intentions”—that we might be spared the just remedy—condemnation (*Romans* 8:1-4). (The phrase “the rectitude of our intentions” comes from THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776)). By that same law, God judges even “between the nations.” *Isaiah* 2:1-6.

190. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776). Nor did Jefferson include the phrase “with a firm reliance on the protection of divine providence” in his draft.

conduct is demonstrated through the operation of the office of Supreme Judge of the World. In fact, the Declaration comprises the essential elements of a legal complaint—a statement of the judge’s jurisdiction to hear the case (“Supreme Judge” with universal jurisdiction), a cause of action (“long train of abuses” that violated “unalienable rights”), and a remedy (independence/separation from England).<sup>191</sup>

God also directs and governs, by His will and His law, that which He has created. The reference to God as “Divine Providence” describes Him in that office as the One who sees the end from the beginning and governs all things toward their appointed ends.<sup>192</sup> The signers of the Declaration of Independence, convinced of the rightness of their cause and bound to one another by oath, moved forward with a firm reliance on God’s protection.<sup>193</sup> The nature of political powers as forward-looking and directed to enumerated ends is demonstrated through the operation of the office of Divine Providence.

The Declaration of Independence was also in effect a declaration of war. Though the signers did not want war, they knew that it would follow as a result of their actions. The Declaration bears the imprint of just war doctrine that had been refined by theologians and jurists over a period of many centuries.<sup>194</sup> War is not primarily a political instrument used for promoting national interest; it is a judicial instrument. James Kent wrote that it is a special kind of lawsuit: “War . . . is one of the highest trials of

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MAIER, *supra* note 189, at 241. It was added later. *Id.* Given the historical context of the Declaration, dangers that its signers faced, and solemnity of the accompanying mutual “pledge to each other our lives, our fortunes, and sacred honor,” it is clear that the signers did not think of God as disinterested or detached. They likely believed that it is God “who works out everything in conformity with the purpose of his will.” *Ephesians* 1:11. In fact, it is Christ the Creator and Judge in whom “all things hold together” as Divine Providence. *Colossians* 1:17.

191. THE DECLARATION OF INDEPENDENCE paras. 1, 2, 32 (U.S. 1776).

192. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

193. *Id.* The signers were men of faith and action, clearly operating on the truth reflected in several confessions of the day—although “God from all eternity did . . . freely and unchangeably ordain whatsoever comes to pass,” He offers no violence “to the will of the creatures, nor is the liberty or contingency of second causes taken away, but rather established.” WESTMINSTER CONFSSION OF FAITH Ch. III.I (Free Presbyterian Publications 1990) (1646).

194. The founders were well-versed in international law as expounded by Vattel and Grotius. Just war doctrine is a combination of legal and prudential elements. Jeffrey C. Tuomala, *Just Cause: The Thread That Runs So True*, 13 DICK. J. INT’L L. 1, 47-59 (1994).

right; for as princes and states acknowledge no superior upon earth, they put themselves upon the justice of God, by an appeal to arms."<sup>195</sup>

Just war doctrine is comprised of both legal and prudential elements, and both elements are reflected in the Declaration. The decision to go to war requires that a lawfully constituted authority make a judgment that there is just cause in that international law has been broken. That authority must then determine what use of force is proportionate to the wrong.<sup>196</sup> The Declaration of Independence maintained that each of these legal elements had been satisfied. It asserted that the American "people [had the right] to dissolve the political bands which ha[d] connected them with another" people, as they had been subjected to "a long train of abuses and usurpations" which were designed to "reduce them under absolute Despotism."<sup>197</sup>

Just war doctrine is also comprised of a number of prudential elements, including exhaustion of peaceful means of redressing grievances, right intentions, reasonable hope of success, and hope of peace and reconciliation with one's enemies.<sup>198</sup> The Declaration states that the people "[i]n every stage of . . . [o]ppressions . . . [p]etitioned for Redress in the most humble terms" in order to resolve matters peacefully, invited God to judge "the rectitude of [their] intentions," placed their hope for success in the "protection of divine Providence" and their mutual "pledge," and expressed their hope that with England they would be "in Peace friends."<sup>199</sup>

The distinction between *judicial* and *political* power, whether addressing domestic or international issues, is basic to Marshall's opinion in *Marbury* and to the Declaration of Independence, which best embodies the "American fabric" of which Marshall wrote. The nature of those powers is rooted in the character of God and the manner in which He rules the affairs of men and nations.

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195. JAMES KENT, COMMENTARIES ON AMERICAN LAW 26 (William Hardcastle Browne ed., 1894).

196. The three legal elements of just war are right authority, just cause, and proportionality. Tuomala, *supra* note 194, at 51-58.

197. THE DECLARATION OF INDEPENDENCE paras. 1-2 (U.S. 1776).

198. Tuomala, *supra* note 194, at 58-59.

199. THE DECLARATION OF INDEPENDENCE paras. 30-32 (U.S. 1776). The signers seemed mindful of the truth found in the *Magnificat* that is both promise and warning: "He has performed mighty deeds with his arm; he has scattered those who are proud in their inmost thoughts. He has brought down rulers from their thrones but has lifted up the humble." *Luke* 1:51-52; *see also Job* 12.

## VI. CONCLUSION

Marshall based the doctrine of judicial review upon the belief that the American people had by an act of original will exercised their original right to adopt the Constitution as paramount positive law.<sup>200</sup> The Declaration of Independence identifies the source of the people's right to establish a sovereign and independent nation-state and framework for governing themselves. That right is derived from the laws of nature, of which God is the Author.<sup>201</sup> Those laws of God not only provide the original right to establish civil government, but they also grant certain inalienable rights, including the rights of life, liberty, and pursuit of happiness.<sup>202</sup> The first order of government is to secure these rights. Two other fundamentals given less prominence in *Marbury* are the general principles of law and the nature of the judicial and political powers. These too are grounded in the jurisprudence of the Declaration.

The Declaration of Independence is a legal document, not simply a statement of political aspirations. It served as the articles of incorporation of the United States of America; it served as a bill of complaint in a lawsuit prosecuted by war; and it contains a philosophy of law in which God, the Author of law and rights, is acknowledged as Lawgiver, Creator, Judge, and Divine Providence.<sup>203</sup> It should come as no surprise that so many lawyers, judges, and law professors wish to divorce the Constitution and Chief Justice Marshall's opinion in *Marbury v. Madison* from the Declaration of Independence, for it is the legal document of a people whose legal profession believed in the triumph of right—not triumph of the will.

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200. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

201. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

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

203. These four offices find their fullest manifestation in Jesus Christ: Creator (*see* THE DECLARATION OF INDEPENDENCE, *supra* note 84), Lawgiver (*see* THE DECLARATION OF INDEPENDENCE, *supra* note 56), Judge (*see* THE DECLARATION OF INDEPENDENCE, *supra* note 189), and Divine Providence (*see* THE DECLARATION OF INDEPENDENCE, *supra* note 190).