

Marbury's Myths:  
John Marshall, Judicial Review and the Rule of Law  
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## INTRODUCTION

*Marbury v. Madison*<sup>1</sup> is justly celebrated as one of the most famous and influential decisions of the United States Supreme Court.<sup>2</sup> Decided more than two hundred years ago by a fledgling court in a newly established frontier republic, on the edges of what European culture then regarded as the civilized world, *Marbury* is known today by judges and lawyers around the world as one of the most sophisticated, brilliant and ambitious justifications ever advanced for the doctrine of judicial review.<sup>3</sup> Its author, Chief Justice John Marshall, is regarded as one of the world's great jurists, and his reputation stems in large measure from his momentous opinion in his case.<sup>4</sup> In the United States and around the world, *Marbury* is regarded as the keystone of American constitutionalism and the foundation for the broad powers of judicial review now routinely exercised by federal courts in the United States.<sup>5</sup>

But if *Marbury* is one of the most famous Supreme Court decisions, it is also one of the

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<sup>1</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>2</sup> See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 567 (1985) (Powell, J. Dissenting) (calling *Marbury* “the most famous case in our history”); JETHRO K. LIEBERMAN, MILESTONES! 200 YEARS OF AMERICAN LAW vi-vii (1976) (1974 American Bar Association poll of lawyers, judges, and law professors ranks *Marbury v. Madison* as the most important Supreme Court case ruling in America History); LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 394 (1981) (“[*Marbury v. Madison*] is rightly considered . . . one of the most significant—if not the most significant—in the history of the United States Supreme Court.”).

<sup>3</sup> See Davidson M. Douglas, *The Rhetorical Uses of Marbury v. Madison: The Emergence of a “Great Case”* 38 WAKE FOREST L. REV. 375, 376 (2003).

<sup>4</sup> See, e.g., CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 47 (Wilson Carey McWilliams & Lance Banning eds., 1996) (calling *Marbury v. Madison* Marshall’s first “Great case”).

<sup>5</sup> See Douglas, *supra* note 3, at 378, 401; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 39 (2d ed. 2002).

most misunderstood.<sup>6</sup> For example, many American lawyers and judges believe that Chief Justice Marshall's justification for judicial review in *Marbury* rests upon separation of powers arguments.<sup>7</sup> If pressed further, they would probably say that judicial review is a critical function of a separate and independent judiciary to limit the powers of Congress and the President. And as for why the Supreme Court decisions on the constitutionality of legislation should bind the other branches of government, they would probably point to Marshall's assertions that "it is emphatically the province and duty of the judicial department to say what the law is."<sup>8</sup> They would explain that reviewing the constitutionality of legislation and the legality of government action are inherently judicial functions, entrusted exclusively (or at least with finality) to the Judiciary under the American constitutional system.<sup>9</sup> Thus, the separation of powers principles undergirding the Constitution require that they be performed by the judicial branch.<sup>10</sup>

This answer would reflect the general thrust of American legal education concerning *Marbury* and judicial review. In the typical course on American constitutional law, students learn at the very beginning of the course that interpreting the Constitution, determining the constitutionality of legislation, and enforcing the law against the other branches of government are the hallmarks of the "judicial power" assigned to the courts by Article III of the

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<sup>6</sup> See, e.g., Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235 (2003) (examining and rebutting countless criticisms of *Marbury*).

<sup>7</sup> See, e.g., CHEMERINSKI, *supra* note 5, at 38-39.

<sup>8</sup> See *Marbury*, 5 U.S. at 177.

<sup>9</sup> See, e.g., LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 35-36 (4th ed. 2001).

<sup>10</sup> See *id.*

Constitution.<sup>11</sup> They learn that *Marbury* is the leading case recognizing constitutional review of legislative and executive action as a function of the federal courts.<sup>12</sup> In most constitutional law casebooks, the decision appears at the beginning of the chapter on judicial power (usually at the front of the book), in the section of the casebook that lays out the basic principles of American separation of powers.<sup>13</sup> Thus, it should be no surprise that the conventional wisdom is that *Marbury* is, at bottom, a separation of powers decision.

Paradoxically, while *Marbury* is celebrated for establishing judicial review, it is frequently criticized for being a “political” opinion.<sup>14</sup> Critics delight in pointing out Marshall’s political biases and his role in the events giving rise to the lawsuit. They also claim that he deliberately manipulated settled legal doctrine in misconstruing the statute that he held unconstitutional, and that he plainly should not have decided the politically sensitive merits of a

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<sup>11</sup> See *id.* at 35-36.

<sup>12</sup> See, e.g., *id.* at 35-46; THE CONSTITUTIONAL DECISIONS OF JOHN MARSHALL xxvi (Joseph P. Cotton Jr. ed., 1969); Thomas E. Baker & James E. Viator, *Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution*, 76 IOWA L. REV. 739, 741 (1991)(noting how almost every constitutional law casebook and first year constitutional law course begins with *Marbury v. Madison*).

<sup>13</sup> See, e.g., FISHER, *supra* note 9, at 46-51; CHEMERINSKI, *supra* note 5, at 39-46; GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW (4th ed 2001); JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS & QUESTIONS 1-8 (9th ed 2001); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 3-5 (7th ed. 2003); WILLIAM LOCKHART ET AL., CONSTITUTIONAL RIGHTS AND LIBERTIES 1-8 (8th ed. 1996); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 2-19 (14th ed. 2001).

<sup>14</sup> See, e.g., Weinberg, *supra* note 6, at 1349 n.426 (countering *Marbury*’s criticisms) (quoting DAVID LOTH, CHIEF JUSTICE: JOHN MARSHALL AND THE GROWTH OF THE REPUBLIC 177 (1949) (intimating that *Marbury* was a Federalist feigned case); 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 205 (1926) (stating *Marbury* was “a purely political move on the part of the Federalist Party.”); EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 9 (1962) (1914) (stating *Marbury* was “a deliberate partisan coup”); Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1158 (2001) (calling *Marshall*’s work an act of “brilliant political gamesmanship. . .”); Robert Lowry Clinton, *Classic Legal Naturalism and the Politics of John Marshall’s Constitutional Jurisprudence*, 33 J. MARSHALL L. REV. 935, 936 (2000)(noting Marshall’s “clever” politics in *Marbury*); Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENTARY 67, 88 (1995) (stating that *Marbury* was manipulated “to maximize the number of controversial constitutional and political issues Marshall could address. . .”).

case which, as the opinion eventually concedes, the Court had no jurisdiction.<sup>15</sup> Hence, the conventional scholarly wisdom is that *Marbury* is a politically motivated and legally indefensible opinion.<sup>16</sup>

Finally, *Marbury* has become central to debates over judicial review around the world.<sup>17</sup> Unless their constitutions explicitly provide for or prohibit judicial review, other nations that consider the role courts should play in their nations legal system must reckon with *Marbury*.<sup>18</sup>

This was brought home to us through personal experience, when we accepted an invitation to discuss judicial review with high court judges in the People's Republic of China. There has been a sharp debate over what role, if any, judicial review should play in the modern Chinese legal system.<sup>19</sup> We were told that the argument against adopting judicial review is that this doctrine, as articulated in *Marbury*, is understood to be an essential part of the American system of the separation of powers and checks and balances. In China, however, all governmental power, including judicial power, flows from the National People's Congress;<sup>20</sup> and the NPC possesses, among its powers, the ultimate authority to interpret China's Constitution.<sup>21</sup>

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<sup>15</sup> See HOBSON, *supra* note 4, at 48 (“Nearly all contemporary criticism of *Marbury* centered on its ‘dicta,’ its discussion of matters not essential to the determination of the case.”);

<sup>16</sup> See *infra* Part IV (recounting legal criticisms of *Marbury*).

<sup>17</sup> See WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 104-113 (2000) [hereinafter NELSON, ORIGINS] (identifying several other countries that have adopted rationales similar to Marshall's in *Marbury v. Madison* to support their systems of judicial review).

<sup>18</sup> See *id.*

<sup>19</sup> See RANDALL P. PEERENBOOM, *CHINA'S LONG MARCH TOWARD RULE OF LAW* 264-68 (2002).

<sup>20</sup> See DANIEL E.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 80-81 (2003).

<sup>21</sup> See Peter Corne, *No Pain, No Gain: Steps Toward Securing the Future of China's Legal System*, in *THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM* 57 (The Mansfield Center for Pacific Affairs ed., 2000).

For *Marbury* to serve as a template for judicial review in other legal cultures, including those as different as China's, its reasoning must extend beyond the unique characteristics of the American legal system. To the extent that *Marbury's* theory of judicial review depends upon the governmental structure of the United States, it may not survive transplantation to other legal cultures. If one applies the conventional scholarly and popular wisdom, therefore, *Marbury* can provide a persuasive justification for judicial review in foreign legal systems that are based on a separation of powers; to the extent foreign legal systems do not rest upon separation of powers principles, under this traditional view, *Marbury* provides little support for a theory of judicial review.

Thus, the conventional wisdom provides an account of *Marbury's* origins, justification, and transportability to other legal cultures. We believe that, in each instance, the conventional wisdom is wrong.

Separation of powers was not the main thrust of Chief Justice Marshall's reasoning in *Marbury*. Instead, his ultimate justification for the power of judicial review – defined broadly as the power of the courts to interpret the law (including the Constitution) and to use the processes of litigation to enforce its commands against the other branches of government – is the rule of law. Rule of law is a theme that runs through all facets of the *Marbury* opinion, binding them together. It supplies the logic for the opinion's organizational structure and internal architecture. It is the ultimate foundation for judicial review, and the ultimate reason why *Marbury's* assertion of judicial review attained general acceptance in the American legal system.

Of course, the rule of law is a complex phenomenon that can contain a variety of

components, some complementary and some contradictory.<sup>22</sup> In the discussion that follows, we are not asserting that the principles in *Marbury* are, individually, inherent components of any governmental system that aspires to the rule of law, or that these principles, collectively, comprise the rule of law. Rather, our purpose is to identify the rule of law principles upon which Marshall based his opinion in *Marbury*, to trace the historical origins of these principles, to show the ways which judicial review effectuates these principles, and to suggest some implications for determining the role of judicial review in other legal systems.

In this article, we show that Marshall's arguments for judicial review in *Marbury* were not based on any unique characteristics of the American political or legal system. Rather, Marshall's rule of law argument was derived from British law and legal scholarship, particularly the writings of Blackstone.<sup>23</sup> To be sure, there is something deeply ironic about the argument that *Marbury* – the origin and symbol of American-style judicial review – ultimately rests upon rule of law principles inherited from English law. England did not have a written constitution, its legal system was based on the doctrine of legislative supremacy, and there was no separation of powers. Instead, executive, legislative and judicial powers were each represented in, and derived their authority from, Parliament.<sup>24</sup> However, a careful reading of Marshall's opinion, juxtaposed with Blackstone's writings, leave little doubt about the British influence on this most American of legal institutions.

Finally, just as our review of Blackstone's conception of the rule of law helps to explain

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<sup>22</sup> For a recent examination of the different meanings that are attributed to the rule of law, see David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK L. REV. 307 (2003).

<sup>23</sup> See *infra* Part V (discussing origins of judicial review).

*Marbury's* origins, it may also teach us something about *Marbury's* future. In particular, the rule of law argument that underlies *Marbury* has important implications for judicial review in countries with different legal cultures. Many other nations (not to mention the international legal system itself) have not adopted the American system of separation of powers, yet all advanced legal systems share a commitment to the rule of law.<sup>25</sup> If *Marbury* rested upon separation of power principles, then its arguments would not support the institution of judicial review in legal systems that did not adopt the separation of powers concept. But if *Marbury* ultimately rests upon a rule of law rationale, then it can support judicial review in any legal system that aspires to this principle.

Hence, this paper is an effort to explain *Marbury* and, in the process, exorcise *Marbury's* myths. Our argument proceeds as follows. In Part I of the article, we review the political events that surrounded and led to the legal dispute that brought *Marbury v. Madison* to the Supreme Court.<sup>26</sup> Although these events are generally fairly well known to students of constitutional law, they set a necessary foundation for understanding *Marbury*. In Part II, we begin by examining why this case was filed in the Supreme Court.<sup>27</sup> We then look at the arguments of both sides in *Marbury*<sup>28</sup> and trace the steps of Marshall's deft resolution of the difficult issues that were

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<sup>24</sup> See *infra* notes 297-300, 310 and accompanying text (discussing English structure of government).

<sup>25</sup> See Heinz Klug, *Civil Liberties in a Time of Terror: The Rule of Law, War or Terror*, 2003 WISC. L. REV. 365, 365 (praising worldwide adoption of rule of law).

<sup>26</sup> See *infra* notes 43-68 and accompanying text for discussion of political events surrounding *Marbury*.

<sup>27</sup> See *infra* Part II.A for discussion of Charles Lee's litigation strategy.

<sup>28</sup> See *infra* Part II.B for discussion of Charles Lee's arguments before the Court in *Marbury*.



presented.<sup>29</sup>

In Part III, we examine Marshall’s opinion, showing that it invokes and is based upon several principles associated with the rule of law, including legal positivism,<sup>30</sup> the right of individuals to claim the protection of the laws,<sup>31</sup> the ideal that government is constrained by and subject to the laws,<sup>32</sup> and the role of courts in constitutional government.<sup>33</sup> Marshall used the concept of the rule of law flexibly and made no direct attempt to define its contours. But his entire opinion rests on the thesis that the actions of government officials, whether legislative, executive, administrative or judicial, should conform to and be bounded by previously established and applicable constitutional, statutory or court-made rules that have been promulgated to govern their conduct. His concept of the rule of law does not preclude the exercise of governmental discretion, nor did it remove every element of uncertainty through the mechanical application of rules, but it did treat discretion as circumscribed and channeled by

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<sup>29</sup> See *infra* Part II.C (laying foundational arguments in *Marbury*).

<sup>30</sup> See *infra* Part III.A (discussing principles of legal positivism).

<sup>31</sup> See *infra* Parts III.A, B, C (articulating how Marshall applied the rule of law to the to protect violated rights).

<sup>32</sup> See *infra* Parts III.B, C, D (showing how the rule of law ensures protection of rights from government).

<sup>33</sup> See *infra* Parts III.E & F (analyzing constitutional limits on courts to redress rights in order to maintain rule of law).

controlling legal directives. The corollaries to this thesis are that government officials should exercise self-restraint by limiting their actions to those authorized by law, that they should be held accountable for their excesses, so that individuals who are harmed by governmental abuses of authority should be afforded legal redress in the courts.

Marshall's opinion in *Marbury* is also a test case for the application of these rule of law principles. Many of Marshall's critics claim that this celebrated decision contains deliberate legal miscues that were, by design, made to solve the political problems facing the Supreme Court. If this were true, *Marbury* would be vulnerable to charges of judicial hypocrisy-- a decision that instructs the nation on the necessity of adhering to the rule of law while itself circumventing the law through political manipulations. In Part IV, we address these criticisms in some detail.<sup>34</sup> We attempt to show that Marshall's disposition of the disputed legal issues is at least defensible, and probably correct in light of the then prevailing legal conventions. We do not contend that *Marbury* was perfect, or even that it was necessarily correct in its treatment of the issues. Our thesis does not require such proof. Instead, we maintain, that *Marbury's* analysis falls within a range of acceptable legal discourse given the legal conventions of the time and hence was not inconsistent with the rule of law principles the Court espoused.

In Part V, we then examine the sources of the rule of law principles that underlay the doctrine of judicial review as articulated in *Marbury*.<sup>35</sup> We maintain that those principles were drawn from established English law. Although the Framers of our Constitution rejected the

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<sup>34</sup> See *infra* notes 196-275 and accompanying text for in depth analysis of criticism of *Marbury's* reading of Section 13 as jurisdictional, Part IV.A; the nature of the Supreme Court's original and appellate jurisdiction, Part III.B; and Marshall's reversed jurisdictional argument, Part IV.C.

<sup>35</sup> See *infra* notes 276-310 for discussion of the rule of law sources of judicial review.

English system of parliamentary supremacy, and instead instituted a system of government based on the separation of powers and checks and balances, the rule of law principles that had been developed in England were readily transplantable into the American legal system and formed the bases for constitutional review by the judiciary.

Part VI deals with the debate surrounding judicial review during the ratification of the Constitution.<sup>36</sup> The principle of judicial review as articulated in *Marbury* was generally understood and largely accepted at the time of the framing and was often acknowledged during the ratification process. Leading supporters and opponents of the Constitution understood that the federal courts would have the power to declare acts of Congress null and void. There was a serious debate, however, about the relationship of judicial review to the structure of government (particularly the separation of powers),<sup>37</sup> about the role of courts in protecting individual rights,<sup>38</sup> and about the potential for judicial abuse of power.<sup>39</sup> This debate ultimately focused on whether judicial review as operating under the Constitution would support or diminish the rule of law. In Part VII, we discuss how eventually these concerns led to a breakdown in consensus about judicial review, with President Jefferson championing an alternative view of the separation of powers that had been adopted in the organic laws of the French Republic.<sup>40</sup> In our view, the rule

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<sup>36</sup> See *infra* notes 311-375 (discussing predominant disputes over judicial review during the Ratification).

<sup>37</sup> See *infra* Part VI.A for discussion of potential threats judicial independence from the exercise judicial review.

<sup>38</sup> See *infra* Part VI.B for analysis of debate surrounding differences in states' protection for individual rights and concern for lack of federal protection.

<sup>39</sup> See *infra* Part VI.C (detailing Anti-Federalists main concern over judicial supremacy).

<sup>40</sup> See *infra* Part VII and notes 376-384 and accompanying text (describing Jefferson's French influences on his thoughts of judicial review).

of law themes in *Marbury* were in part an attempt to answer those who feared that the power of judicial review would lead to judicial supremacy.

Finally, in the Conclusion, we return to the issue that began our quest: *Marbury's* relevance to decisions regarding judicial review in other nations.<sup>41</sup> Since it is based on rule of law principles, *Marbury's* theory of judicial review can be adapted to the legal systems of other countries, even nations that do not follow the American scheme of the separation of powers and checks and balances. We close by commenting on *Marbury's* significance for judicial review in other nations currently debating the issue of judicial review, most notably the People's Republic of China.<sup>42</sup>

## I. THE POLITICAL PRELUDE TO *MARBURY*

*Marbury* was decided during a period of great political tension in the United States.<sup>43</sup> American democracy had just survived one of its greatest tests when, in the 1800 national elections, the Federalist party lost control of Congress and the Presidency to the Republicans.<sup>44</sup> John Adams, the Federalist President, was defeated by the Republican challenger, Thomas

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<sup>41</sup> See *infra* notes 385-402 and accompanying text (discussing international application of judicial review as based on the rule of law)

<sup>42</sup> See *infra* notes 403-406 and accompanying text (discussing rule of law based judicial review implications for the PRC).

<sup>43</sup> See 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-1815, at 50-51 (Paul A. Freund ed., 1981) (describing the clash of the Republican and Federalist ideological solutions for determining the fabric of society that would arise from the "principles embodied" in the newly ratified Constitution during the election of 1800).

<sup>44</sup> See *id.* The nation experienced its first great test of commitment to political democracy in 1796, when President Washington, the great hero of the American Revolution, *voluntarily* stepped down from office and was replaced through an orderly election. Although that election was held in an environment of sharp political division occasioned by the emergence of two major competing political parties, Adams was, like Washington, a leader of the Federalists and retained most of Washington's cabinet. The election of 1800 was the first instance in which the party in power lost its power to a competing political party.

Jefferson, and the nation prepared for its first transfer of power from one political party to another. In other nations, similar events have proved to be the occasion for a military coup, widespread arrests of political prisoners, or the outbreak of civil war, but in the case of the United States the transfer of power proceeded peacefully.<sup>45</sup>

One cannot say, however, that the transfer of power happened amicably. On the contrary, it was an occasion for strained political relations and a growing regional political division. Although both contending parties were national in scope, the Republicans had their strongest political bases in the South and West,<sup>46</sup> while the Federalists had their strongest political base in New England. The antagonism between these parties was profound. The Republicans thought the Federalists were so intent on maintaining favorable diplomatic and trade relations with Great Britain that they were in danger of surrendering, through appeasement of British interests and demands, much of the independence the United States had won by force of arms from the British Crown.<sup>47</sup> The Federalists thought the “Jacobin”<sup>48</sup> Republicans were so eager to forge an alliance with France that they were likely to throw the United States into a potentially disastrous war with England that would destroy the nation’s emerging mercantile economy and invite invasion of the

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<sup>45</sup> R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 146 (Betram Wyatt-Brown ed., 2001).

<sup>46</sup> At that time, the “West” was the area west of the Appalachian Mountains and east of what was then the national western border, the Mississippi River.

<sup>47</sup> See 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 15 (1919); HASKINS, *supra* note 43, at 70-71; William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 929 (1978) [hereinafter Nelson, *Background*].

<sup>48</sup> This was a derogatory term that signified what the Federalists believed were the Republicans’ undue and dangerous sympathies for France.

Northern states by British armies launched from Canada.<sup>49</sup> Tensions were aggravated when the Electoral College, charged under the U.S. Constitution with electing the President, deadlocked,<sup>50</sup> forcing the election to be thrown into the House of Representatives.<sup>51</sup> In the end Jefferson prevailed, and a peaceful transfer of power occurred, but there was a substantial residue of ill-will on both sides.

In the waning days of the Adams presidency, with the transfer of power to the Republicans imminent but not yet accomplished, the Federalists decided to pack the federal courts with Federalist judges. The primary vehicle for doing so was the Judiciary Act of 1801, which expanded federal court jurisdiction (including vesting the federal trial courts with jurisdiction over all cases arising under the Constitution, laws and treaties of the United States) and created a new, and much-needed, intermediate appellate court in the federal system.<sup>52</sup> The Act also created 16 new judicial positions, to which President Adams promptly named Federalist stalwarts.<sup>53</sup> Although the Act instituted some enlightened reforms in the federal judicial

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<sup>49</sup> HASKINS, *supra* note 47, at 71; *see* Nelson, *Background*, *supra* note 47, at 929.

<sup>50</sup> NELSON, *ORIGINS*, *supra* note 17, at 49. The deadlock was an accident. It was caused by the fact that the Republican electors (who held a clear majority over the Federalist electors) cast the same number of votes for Thomas Jefferson, their candidate for President, and Aaron Burr, their candidate for Vice President, producing a tie vote in the Electoral College. At the time the Constitution did not provide for separate Presidential and Vice-Presidential ballots, a mistake that was corrected by the adoption of the Twelfth Amendment.

<sup>51</sup> *Id.* at 49; William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 3 (1969). In the House of Representatives the Federalists tried (in the end, unsuccessfully) through intense political maneuvering to cut a deal with Aaron Burr, the Republican candidate for Vice President, that would have prevented Thomas Jefferson from winning the Presidency. *See* MILTON LOMASK, 1 AARON BURR: THE YEARS FROM PRINCETON TO VICE PRESIDENT 1756-1805, at 275-276 (1979).

<sup>52</sup> *See* Judiciary Act of February 13, 1801, ch. 4, 2 Stat. 89.

<sup>53</sup> BEVERIDGE, *supra* note 47, at 56-57; HASKINS, *supra* note 43, at 108; Van Alstyne, *supra* note 51, at 4.

system,<sup>54</sup> its passage stirred loud outcries of foul play from the incoming Republicans.<sup>55</sup> At about the same time, Congress also adopted an Organic Act to establish a government for the District of Columbia, the newly created federal district in which the new capital, Washington, was located.<sup>56</sup> This law authorized appointments of 43 justices of the peace, minor judicial officers, for five year terms; and in the last two days of the Adams administration, these positions were also filled with Federalist appointees.<sup>57</sup> John Marshall, who served in the final two months of the Adams administration both as Chief Justice of the Supreme Court *and* as Secretary of State, had the job of preparing, signing (along with President Adams) and delivering the official commissions to these individuals.<sup>58</sup> He asked his brother James Marshall to make the actual deliveries.<sup>59</sup> Unfortunately, brother James failed to deliver some of the commissions, including William Marbury's, before the Federalists left office and the Republicans took over the federal executive branch. They were literally sitting on the Secretary of State's desk when the new administration moved in.<sup>60</sup>

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<sup>54</sup> In addition to giving the federal trial courts jurisdiction in cases arising under federal law and creating intermediate appellate courts, the Act ended the absurd and exhausting practice of the Supreme Court justices "riding circuit." *See generally* Judiciary Act of 1801, ch. 4, 2 Stat. 89.

<sup>55</sup> *See* BEVERIDGE, *supra* note 47, at 57.

<sup>56</sup> *See* Act of February 27, 1801, ch. 15, § 11, 2 Stat. 103, 107.

<sup>57</sup> *See* HASKINS, *supra* note 43, at 126-27.

<sup>58</sup> HASKINS, *supra* note 43, at 129.

<sup>59</sup> *Id.*

<sup>60</sup> *See* Letter from Thomas Jefferson to William Johnson (June 12, 1823), *in* THE COMPLETE JEFFERSON 321 (Saul K. Padover ed., 1943) ("Among the midnight appointments of Mr. Adams, were commissions to some federal justices of peace for Alexandria. These were signed and sealed by him, but not delivered. I found them on the table of the Department of State, on my entrance into office, and I forbade their delivery. Marbury, named in one of them, applied to the Supreme Court for a mandamus to the Secretary of State, (Mr. Madison) to deliver the commission intended for him.").

After taking office, President Jefferson declared the Federalist court-packing effort a “nullity.”<sup>61</sup> He asked congress to repeal the Judiciary Act of 1801;<sup>62</sup> and he instructed his acting Secretary of State, Levi Lincoln, not to deliver any of the remaining justice of the peace commissions. The legal battle over the undelivered commissions commenced when William Marbury, represented by Adams’ Attorney General, Charles Lee, filed a petition in the Supreme Court of the United States, seeking a writ of mandamus ordering Secretary of State James Madison to deliver his judicial commission.<sup>63</sup> Although the case did not initially receive a great deal of attention, it came to sudden prominence when the Supreme Court issued an order to Madison to show cause why the writ of mandamus should not be issued.<sup>64</sup> On Jefferson’s direction, Madison did not respond to the order to show cause, thereby effectively challenging the authority of the Supreme Court to decide the case.<sup>65</sup> The timing of the case closely paralleled debates in Congress over the repeal of the Circuit Judges Act and, along with another case, *Stuart*

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<sup>61</sup>See HASKINS, *supra* note 43, at 152; LIEBERMAN, *supra* note 2, at 73.

<sup>62</sup>HASKINS, *supra* note 43, at 152. See also JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 301 (1996) (noting that repeal legislation was introduced by Senator Breckenridge of Kentucky, presumably at Jefferson’s behest). The degree of political antagonism between the Republicans and Federalists over the judiciary is sometimes overdrawn. Repeal of the Circuit Judges Acts was not a first priority of the Jefferson administration. Nevertheless, it was one of the main legal “reforms” instituted by the Republican-controlled Congress, with President Jefferson’s encouragement and support. For a general description of the legislative events leading up to *Marbury*, see *id.* at 301-05; JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 147-51 (2002).

<sup>63</sup>BEVERIDGE, *supra* note 47, at 110. Lincoln served as Jefferson’s Attorney General. He briefly served as Acting Secretary of State until James Madison’s appointment to that position could be confirmed by Congress. So it was actually Lincoln’s order which arrested delivery of Marbury’s commission. By the time Lee filed suit, however, Madison held the position of Secretary of State; hence Lee named Madison as defendant when he filed his petition for mandamus in the Supreme Court.

<sup>64</sup>SIMON, *supra* note 62, at 163.

<sup>65</sup>As Marshall would laconically observe, “[n]o cause has been shewn.” *Marbury*, 5 U.S. at 154.



*v. Laird*,<sup>66</sup> was seized by the Federalists as an opportunity to challenge what they regarded as Jefferson's efforts to control the judiciary. Marbury's commission thus became a symbolic focal point of a potentially explosive inter-branch power struggle between the Executive and the Courts, or, to put it more personally, between President Jefferson and Chief Justice Marshall.<sup>67</sup> Marbury and Madison were the nominal parties, but in many respects the real contestants were the President and the Chief Justice, champions of two branches of government, two competing political parties, and two opposing views of judicial authority.<sup>68</sup>

## II. THE LITIGATION

Marbury's decision to file his action directly in the Supreme Court of the United States proved to be the most fateful tactical decision in the case. To put the Supreme Court's decision in its proper perspective, it is helpful to understand the jurisdictional dilemma faced by Marbury's counsel, Charles Lee, about which court the lawsuit should be filed, his reasons for suing directly in the Supreme Court and his arguments to the court.

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<sup>66</sup> 5 U.S. (1 Cranch) 299 (1803).

<sup>67</sup> See NEWMYER, *supra* note 45, at 162.

<sup>68</sup> See *id.* at 148.

### A. *Suing Directly in the Supreme Court*

Two important procedural choices on Charles Lee’s part determined the ultimate course of the litigation. First, Lee chose to seek a writ of mandamus, an important common law writ inherited from the English courts that enabled the judiciary to command a government official to perform a legal duty.<sup>69</sup> When it set up the federal judiciary in 1789, Congress authorized the granting of writs of mandamus.<sup>70</sup> Under established common law principles, to obtain such a writ of mandamus the petitioner had to show that he had a legal right to the performance of the duty in question, and that he had no other specific legal remedy.<sup>71</sup> Second, Lee chose to file his petition directly in the Supreme Court itself. He did so in reliance on a provision in Section 13, which gave the Supreme Court the power “to issue . . . writs of *mandamus* in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”<sup>72</sup> Ultimately, the Supreme Court would dismiss Marbury’s mandamus petition on the ground that it did not have jurisdiction over the case because this provision purporting to grant the Court jurisdiction to grant mandamus against public officials as unconstitutional.<sup>73</sup> Because Lee understood that there was a serious jurisdictional problem,<sup>74</sup> and

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<sup>69</sup> See *id.* at 163-64.

<sup>70</sup> See Judiciary Act of 1789, ch. 20 § 13, 1 Stat. 73, 80-81. For the full text of Section 13 see *infra* note 201.

<sup>71</sup> See *Marbury*, 5 U.S. at 147, 152-53.

<sup>72</sup> See *id.* at 148; Judiciary Act, § 13, 1 Stat. at 80-81.

<sup>73</sup> *Marbury*, 5 U.S. at 176. See *infra* Part IV.A (discussing Section 13).

<sup>74</sup> See *Marbury*, 5 U.S. at 146-49, for Lee’s argument that the Supreme Court did have jurisdiction in the case.

because the federal trial courts and the state courts would have had jurisdiction,<sup>75</sup> his decision to file the case directly in the Supreme Court has been the subject of considerable scholarly attention. Several considerations may have played a role. No doubt Lee went to the Supreme Court with reasonable confidence that he would receive a sympathetic hearing. After all, each member of the Supreme Court was a Federalist; and the Chief Justice himself had signed the commissions and directed that they be delivered, just before vacating his office as Secretary of State.<sup>76</sup> Moreover, Lee could rely on two prior cases in which the Supreme Court had entertained petitions for mandamus in actions brought directly to the Court. (Although the Court had denied both petitions on the merits, in neither instance had it suggested doubts about jurisdiction).<sup>77</sup> In addition, many commentators have hypothesized that Lee sued directly in the Supreme Court because that would be the Federalists' best vehicle for embarrassing the new Administration, by showing that Jefferson had violated the laws of the country, and by, if necessary, provoking a major confrontation between the President and the Supreme Court.<sup>78</sup>

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<sup>75</sup> See pp. xx and notes yy, *infra*.

<sup>76</sup> See HASKINS, *supra* note 43, at 129.

<sup>77</sup> See *Marbury*, 5 U.S. at 148-49 (Lee's argument). Marshall discusses one of these cases at some length in *Marbury* to demonstrate that mandamus was the appropriate remedy. *Id.* at 171-72.

<sup>78</sup> See Weinburg, *supra* note 6, at 1240-42, 1263, 1308 & n.284 (discussing critics claim that *Marbury* was purposely brought to the Supreme Court to face Jefferson administration head on).

As Professor Weinberg has shown in a recent article,<sup>79</sup> this hypothesis is not fully satisfying. The Federalist composition of the Supreme Court could explain why Lee would prefer to litigate there rather than in the state courts of Maryland or Virginia, both of which were staffed with Republican judges. But it does not explain why he did not bring the case in the lower federal courts, also staffed with staunch Federalists, which would have had clear jurisdiction over the case.<sup>80</sup> Moreover, the earlier cases in which the Supreme Court entertained petitions for mandamus did not present the same jurisdictional problem as Marbury's case.<sup>81</sup> For these reasons, Professor Weinberg concludes that Lee's reasons for bringing the case directly to the Supreme Court remain mysterious.<sup>82</sup>

Actually, there were sound legal reasons for Lee's decision to sue directly in the Supreme Court. The writ of mandamus appeared to be the perfect, and probably only, remedy for Marbury. To any lawyer steeped in the English common law system it would have made sense that such a remedy, when directed against a high executive official, would be available only in the Supreme Court. Mandamus originated in early English cases in which petitioners had been

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<sup>79</sup> *See id.* at 1305-08.

<sup>80</sup> *See id.* Marbury's claim was based on the constitutional provisions governing the appointment of federal officials and the five-year tenure in office guarantee of the statute creating the justice of the peace positions. His case therefore arose under federal law. *See Marbury*, 5 U.S. at 147 (Lee's argument), 173-74 (opinion of the court) (The judicial power of the United States "is expressly extended to cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States"). The Judiciary Act of 1801, which gave the lower federal courts jurisdiction in cases arising under federal law (what we now know as general "federal question" or "arising under" jurisdiction), was still in effect when Lee filed Marbury's case. It also appears that the Circuit Court for the District of Columbia had federal question jurisdiction under separate legislation. Weinberg, *supra* note 6, at 1307 -09.

<sup>81</sup> Weinberg, *supra* note 6, at 1324-26.

<sup>82</sup> *See id.* at 1310.

wrongly denied or removed from public office,<sup>83</sup> and it was also used to command the production of public records<sup>84</sup> (which could include Marbury's commission). Section 13 of the Judiciary Act of 1789 authorized the Supreme Court to issue writs of mandamus to federal officials (as well as to the lower federal courts).<sup>85</sup> Nothing in the Act authorized the lower federal courts to grant the writ of mandamus. This omission might seem inadvertent, but for two considerations. First, under the common law, only the King's Bench could issue the writ of mandamus.<sup>86</sup> Granting that authority only to the Supreme Court would be consistent with this common law rule. Second, one should compare the grant of mandamus power to the Supreme Court in Section 13 with the grant of habeas corpus power in Section 14, which was given to *both* the Supreme Court *and* the federal trial courts.<sup>87</sup> Why the difference? The answer lies in English legal history. In its early history, the writ of habeas corpus, like the writ of mandamus, could be issued only by the King's Bench. But when the Crown began arresting political prisoners while that court was in recess, individual judges of the King's Bench assumed the authority to issue the writ. Later, that common law power was also assumed by the judges of the Court of Common Pleas, by practice that eventually would be recognized by the King's Bench.<sup>88</sup> Thus in England,

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<sup>83</sup> See CHESTER ANTIEU, 1 THE PRACTICE OF EXTRAORDINARY REMEDIES 291(1987); 3 WILLIAM BLACKSTONE, COMMENTARIES \*109-10. The most famous early case is *Janes Bagge's Case*, 11 Co. Rep. 94 (1615), in which the King's Bench, in an opinion by Sir Edward Coke, ordered the restoration of a burger of Plymouth to his office.

<sup>84</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*110.

<sup>85</sup> See, *infra* note 201, for the full text of Section 13.

<sup>86</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*109-10.

<sup>87</sup> For the full text of Section 14, see *infra* note 211.

<sup>88</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*262-63. The habeas corpus act extended the authority to grant the writ to judges of the courts of chancery and exchequer as well. See *infra*, note 224.

by the late 18<sup>th</sup> Century, the power to issue writs of habeas corpus extended to both the King's Bench and the lower courts, while the power to issue writs of mandamus resided in the King's Bench alone. The author of the 1789 Judiciary Act, Oliver Ellsworth,<sup>89</sup> followed the common law rules inherited from England in drafting both the mandamus power in Section 13 and the habeas corpus power in Section 14 -- even to the level of detail of granting the habeas power to the individual judges.<sup>90</sup> Thus, although the federal trial courts would have had jurisdiction over Marbury's case, they would not have had the power to issue the only effectual remedy, the writ of mandamus, since that power had been given in Section 13 only to the Supreme Court.<sup>91</sup>

As for suing in the state courts of Maryland or Virginia, Charles Lee surely would have hesitated, given the political inclinations of those judges. But invoking the jurisdiction of the state courts also would have presented an exceptionally serious constitutional question: could state courts issue writs of mandamus against federal officials (here, the Secretary of State no less, one of the most high-ranking of all federal officials)? In order to obtain that remedy, Lee would have to argue for, and have established, the proposition that the state courts have the power to determine the legality of the actions of the federal government and to issue coercive orders to

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<sup>89</sup> Ellsworth, of course, was a delegate to the Constitutional Convention, a signer of the Constitution, and later served as Chief Justice of the Supreme Court.[cite]

<sup>90</sup> See *infra* note 354. Indeed, there is a remarkable parallel between Ellsworth's treatment of mandamus and habeas corpus in the Judiciary Act of 1789 and Blackstone's discussion of the writs in his Commentaries. 3 WILLIAM BLACKSTONE, COMMENTARIES \*110-11, \*129-38. One can almost imagine the relevant volume of Blackstone open to those pages on Ellsworth's desk as he penned Sections 13 and 14 of the Judiciary Act. For further discussion of Blackstone's impact on American thinking about judicial power, see *infra* Part V.

<sup>91</sup> What is now known as the All-Writs Act, codified in the first sentence of Section 14 of the 1789 Judiciary Act, would not have helped Marbury because it authorized the issuance of writs "which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." Judiciary Act of 1789, § 14, 1 Stat. 73, 81-82 (1789). It was not consistent with the principles and usages of the common law for a trial court to issue the writ of mandamus against a public official.

force compliance with those determinations. Particularly in the wake of Jefferson's nullification pronouncements in the Kentucky Resolutions,<sup>92</sup> this proposition would appear to Federalists like Charles Lee as a constitutional heresy. Winning the case on this ground would have given new meaning to the term Pyrrhic victory. Furthermore, it is practically inconceivable that a Supreme Court led by John Marshall would possibly allow such a proposition to become the law of the land. Indeed, when presented with the opportunity, the Marshall Court later held that no state court could issue a writ of mandamus against federal officials.<sup>93</sup>

Viewed in this light, Lee's decision to sue directly in the Supreme Court appears to have

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<sup>92</sup> Kentucky Resolutions of 1798 & 1799, in 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 540 (Jonathon Elliot, ed. 2nd ed. Washington 1836). The original draft of the first resolution states:

That the several states composing the United States of America are not united on the principle of unlimited submission to their general government; but that, by compact, under the style and title of a Constitution for the United States...they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each state to itself, the residuary mass of right to their own self-government; and that whensoever the general government assumes undelegated powers, its acts are unauthoritative, void, and of no force;...that this government, created by this compact, was not made the exclusive or final judge of the extent of the powers delegated to itself, since that would have made its discretion, and not the Constitution, the measure of its powers; but that, as in all other cases of compact among parties having no common judge, *each party has an equal right to judge for itself, as well of infractions as of the mode and measure of redress.*

*Id.* (Original Draft of First Resolution by Thomas Jefferson, 1798). The final draft of the first resolution had even stronger language:

That, if those who administer the general government be permitted to transgress the limits fixed by that compact, by a total disregard to the special delegations of power therein contained, an annihilation of the state governments, and the creation, upon their ruins, of a general consolidated government, will be the inevitable consequence: That the principle and construction, contended for by sundry of the legislatures, that the general government is the exclusive judge of the extent of the powers delegated to it, stop not short of *despotism* – since the discretion of those who administer the government, and not the *Constitution*, would be the measure of their powers: and, *That a nullification, by those sovereignties, of all unauthorized acts done under color of that instrument, is the rightful remedy.*

*Id.* at 540 (First Resolution, Kentucky House of Representatives, 1799).

<sup>93</sup> *McCung v. Silliman*, 19 U.S. (6 Wheat.) 598, 604-05 (1821).

been based on sound legal strategy. As between suing in courts which plainly had jurisdiction but could not issue a remedy, suing in state courts which ought not to have the power to issue coercive orders against federal officials, and suing in a Supreme Court that plainly could issue the necessary remedy but whose jurisdiction was questionable, a competent attorney would choose the last of these alternatives.

### *B. The Legal Arguments*

Compared to Charles Lee's jurisdictional problems, persuading the Supreme Court that his client's rights had been violated must have seemed relatively easy. Consequently, his argument on the merits was simple and straightforward. Like any experienced litigator, Lee led with these arguments because they were his best. The Constitution, Lee maintained, prescribes the rules for appointing federal officials, and those rules had all been satisfied in Marbury's case: Marbury had been nominated by the President, approved by the Senate and appointed by the President. Having been duly appointed, Marbury could not be removed from the office, because the Organic Act creating the justice of the peace positions guaranteed five-year terms of office. Hence, the Secretary of State's refusal to deliver Marbury's commission, which prevented him from assuming his office, violated that federal law.<sup>94</sup>

Lee's argument for obtaining the writ of mandamus also was fairly straightforward and relied heavily on the English precedents.<sup>95</sup> His challenge in this part of the argument was to establish that Madison had a judicially-enforceable legal duty to deliver the commission. Lee conceded that, in his opinion, the President himself was not subject to the processes of any court

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<sup>94</sup> See *Marbury*, 5 U.S. at 151-52 (Lee's arguments).

<sup>95</sup> See *id.* at 147, 152-53.



for the exercise of his executive functions.<sup>96</sup> He therefore acknowledged that the Secretary of State would not be liable for political acts taken as the President's agent.<sup>97</sup> But the Secretary's duties associated with the delivery of commissions, he argued, had been assigned by Congress, not the President, and were ministerial duties owed to the public.<sup>98</sup> For such duties, he argued, an order of mandamus from the Supreme Court was an appropriate remedy that would not interfere with executive discretion.<sup>99</sup> Since Marbury's commission had been duly signed by President Adams, and since the Seal of the United States had been affixed to it,<sup>100</sup> Marbury had a vested legal right to his office, which obligated delivery of the commission. Madison had no legal authority to withhold the commission, and the court had power to order the performance of that ministerial public duty.<sup>101</sup> Under well-established common law, mandamus was the appropriate writ for accomplishing such redress.

Lee's other challenge was to persuade the Supreme Court that it had jurisdiction to hear the case. Clearly, the case fell within one of the Article III categories of federal judicial power.

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<sup>96</sup> *Id.* at 149.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* 150-52.

<sup>99</sup> *See Marbury*, 5 U.S. at 149-50.

<sup>100</sup> Lee established the existence of the commission and the attachment of the seal through affidavits (including one from James Marshall) and the live testimony of Levi Lincoln, Jefferson's Attorney General, who as noted above, *see* note 63 and accompanying text, had briefly served as Acting Secretary of State in the first days of Jefferson's administration. Presumably, Lee could have called John Marshall as a witness, but this would have required Marshall to recuse himself from participating in the case. One of the enduring curiosities of the case is that Marshall presided over a matter that concerned events in some of which he had been personally involved.

<sup>101</sup> *See Marbury*, 5 U.S. at 151.

Marbury's case arose under the laws of the United States<sup>102</sup> because his claim was that Madison had violated the Organic Act by effectively removing him from the office to which he had been duly appointed for a statutory five-year term. The problem, however, was that Article III specifies that the category of cases "arising under the Constitution, laws and treaties of the United States" is within the appellate jurisdiction of the Supreme Court.<sup>103</sup> It appeared that, by proceeding directly to the Supreme Court, Lee was invoking the Court's original jurisdiction. Lee's principal answer to this was to argue that the writ of mandamus was actually appellate in nature. He pointed out that, under both the common law and Section 13 of the Judiciary Act, the writ could be issued to lower courts, which appeared to be an exercise of appellate jurisdiction, even though the petition would be filed directly with the higher court. It was appellate because the writ functioned to revise the lower court's decision. Lee argued by analogy that the issuance of mandamus to a federal official was also an exercise of appellate jurisdiction (to revise the decision of that official), even though the petition was filed directly in the Supreme Court.<sup>104</sup> As a subsidiary argument, Lee asserted that even if this were considered an original action for mandamus, Congress could authorize that action because it had the power to add to the Supreme Court's original jurisdiction.<sup>105</sup>

There was no argument of counsel for the government, because President Jefferson had

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<sup>102</sup> *Id.* at 147 (Lee's argument). *See also* note xx, *supra*.

<sup>103</sup> *See* U.S. CONST. art. III, § 2, cl. 2.

<sup>104</sup> *Marbury*, 5 U.S. at 147-48.

<sup>105</sup> *Id.* at 148 ("Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution.").

directed Madison not to respond to the Court's order to show cause.<sup>106</sup> Jefferson also persuaded Congress to delay the scheduling of the Court's term for nearly a year, evidently at least in part to delay a decision in the case.<sup>107</sup> To ascertain the arguments on the other side, then, we must look beyond the legal documents of the case. Many of the arguments supporting the Administration's position, however, were aired in debates in Congress, and the Court was surely aware of the President's position.<sup>108</sup>

The Jefferson administration denied the authority of the Court, claiming that the delivery of commissions was entirely a matter of Presidential discretion, and that in any event he and his officers were answerable to the people, not the courts, for any alleged dereliction of their duties.<sup>109</sup> By directing Madison not even to respond to the order to show clause, Jefferson signaled at least the possibility that his administration would not comply with any order the Court

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<sup>106</sup> See NEWMYER, *supra* note 45, at 153; cf. Nelson, *Background*, *supra* note 47, at 938. ("When summoned before the Court in the preliminary stages of the case, Department of State officers had claimed not only to be under no obligation to deliver Marbury's commission, but also to be privileged, by virtue of executive status, not to testify about any transactions concerning the commission.")

<sup>107</sup> Nelson, *Background*, *supra* note 47, at 937 n.241. At that time, the Supreme Court, which had a very limited docket, sat in the nation's capital for limited terms, each of which lasted only a matter of several weeks. At other times the Justices were obliged to "ride circuit," sitting with local judges in trial courts in different geographical regions of the country. See Act of April 29, 1802, ch. 31, 2 Stat. 156. The hearing on *Marbury* was delayed because Congress altered the timing of the Court's terms in such a way that a year went by before the next scheduled term of the Court occurred. *Id.*

<sup>108</sup> See Thomas Jefferson, President's Message to the Congress (Dec. 8, 1801), in 11 ANNALS OF CONG. 15-16 (1802)(stating that "[t]he Judiciary System of the United States, and especially that portion of it recently erected, will, of course, present itself to the contemplation of Congress; and that they may be able to judge of the proportion which the institution bears to the business it has to perform. . . ."). See also 11 ANNALS OF CONG. 23-42, 46-183, 362-65, 470-81, 509-986, 1205-36, 1247-48 (1801-02)(Congressional debates on the Judiciary); David. E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 322 (1992)(noting how Marshall must have been influenced by debates on the repeal of the 1801 Judiciary Act, which aired all thoughts on the power of the judiciary).

<sup>109</sup> See HASKINS, *supra* note 43, at 160. Jefferson also claimed that Marbury's appointment had not been completed because he did not receive the commission. Jefferson likened the commission to a deed of land. See *infra* note 118 (quoting letters from Thomas Jefferson to George Hay and Justice William Johnson).

might issue.<sup>110</sup> The Republican press, no doubt with the President's encouragement, issued warnings to the Court not to overstep its bounds.<sup>111</sup> Even if Jefferson ultimately would have complied with an adverse Supreme Court decision, the threat of non-compliance was implicit and could not have been lost on John Marshall and his colleagues on the Court.

This placed the Court in a delicate position. Ruling in Marbury's favor might provoke the Republicans into a vendetta against the courts. Ruling against Marbury on the merits, on the other hand, could appear to be submission in the face of a hostile President. As Marshall's conduct in the later case of *United States v. Burr*<sup>112</sup> demonstrates, he was not afraid of a showdown with the President if one were legally necessary.<sup>113</sup> But his instincts were to seek a more moderate course if one were both available and legally defensible.

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<sup>110</sup> Although many commentators assume as a matter of certainty that Jefferson would not have obeyed an adverse Supreme Court order in Marbury's case, there is no contemporaneous evidence of Jefferson's intentions. Professor Weinberg has argued persuasively that this is ultimately a matter of speculation. Weinberg, *supra* note 6, at 1275-77. Although Madison ignored the order to show cause, administration officials did testify, albeit reluctantly and somewhat obstructively, in the preliminary evidentiary proceeding in the case. *Marbury*, 5 U.S. at 143-46. It is far from certain that Jefferson would have risked his public standing by defying a court order, and that is even more questionable about James Madison, the person to whom the order would have been directed. Professor Weinberg also points out that Jefferson complied with Marshall's subpoena in the 1807 treason trial of Aaron Burr, while at the same time denying the court's authority to issue the subpoena. Weinberg, *supra* note 6, at 1266, 1276-77. But this, too, is ambiguous as it relates to Marbury's case. Jefferson had a powerful reason for complying with Burr's subpoena: he desperately wanted Burr convicted, and the case could have been dismissed if the President withheld evidence considered relevant by the court. No such reason for compliance existed in Marbury's case.

Thomas Jefferson and John Marshall were masters of strategy and tactics. For those of us who are not, it seems pointless to try to predict with any degree of confidence what Jefferson would have done, and how Marshall would have reacted, and what Jefferson would then have done. Nevertheless, the very uncertainty of what this Sphinx-like President might do could itself have had an effect on the Court's deliberations.

<sup>111</sup> "Any attempt 'of federalism to exalt the Judiciary over the Executive and Legislature, and to give that favorite department a political character & influence' would 'terminate in the degradation and disgrace of the judiciary.'" BOSTON INDEPENDENT CHRONICLE (1803), *reprinted in* NELSON, ORIGINS, *supra* note 17, at 58 (quoting Republican press warning Marshall not to overstep his bounds in *Marbury*).

<sup>112</sup> 25 F. Cas. 30 (C.C.D. Va. 1807)(No. 14,692); 25 F. Cas. 187 (C.C.D. Va. 1807)(No. 14,694).

<sup>113</sup> In *Burr*, Marshall ordered President Jefferson to submit evidence regarding meetings with high level administration officials that the defense claimed would supply exculpatory evidence. 25 F. Cas. at 191.

### *C. The Decision*

Marshall's opinion in this difficult case first acknowledged the merits of Marbury's claim. In arguments that closely tracked Lee's, he concluded that Marbury had a valid legal claim to his commission and upheld the general propriety of issuing a writ of mandamus against Madison as the proper form of redress. Then, in an abrupt departure from Lee's argument, Marshall's opinion declined jurisdiction, on the ground that Section 13 of the Judiciary Act was unconstitutional in purporting to authorize the Supreme Court to issue mandamus in an original action against federal officials. In the process, throughout his analysis, Chief Justice Marshall proclaimed the authority of the courts to engage in the process of judicial review, including the authority to interpret and enforce constitutional limits on the powers of all three branches of government.

Contrary to the popular belief of American lawyers, separation of powers did not play a pivotal role to play in reaching this conclusion. This is true for at least two reasons.

First, although the Constitution, departing from the English system, separates the three branches and provides for no review or appeal of Supreme Court decisions in Congress, the Constitution does not define the "judicial power of the United States" to include judicial review. Nor does it deny comparable authority to the other branches of government. Indeed, the Constitution fails to say anything at all about how its provisions are to be enforced within the system of separate powers. The lack of any explicit reference to judicial review should not be taken as evidence that the power was *denied* to the federal courts. To the contrary, there is substantial evidence in the debates in the Constitutional Convention, and in the subsequent

debates over ratification of the Constitution, that there was a consensus among both the supporters and opponents of the Constitution that judicial review was implicit in federal judicial authority.<sup>114</sup> But nothing in the Constitution, including its scheme of separation of powers, confirms that authority in the judicial branch, let alone the finality of that authority.

Second, in the context of a case like *Marbury v. Madison*, a plausible and fairly persuasive separation of powers argument can be advanced against the authority of the Supreme Court to enforce the Constitution against Congress and the President. Just as the argument in favor of judicial review draws upon the authority and responsibilities of the judiciary, the argument against judicial review draws upon the authority and responsibility of the executive branch.

The argument against judicial review begins with the fact that the lawsuit in *Marbury* challenged the performance of an executive function. This sets the case apart from other typical judicial proceedings, so that the functions and authority of the judiciary in such ordinary litigation have no direct bearing on its powers in a case like *Marbury*. Since the case involves questions of executive power, it concerns matters that have been entrusted by the Constitution to the executive branch, not the courts. Indeed, the Constitution specifically grants the power to make judicial appointments to the President, subject only to the advice and consent of the Senate, not the courts.<sup>115</sup> The Constitution further provides that the executive is accountable for its decisions only to the Congress (through impeachment),<sup>116</sup> or to the people (by election, through

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<sup>114</sup> See *infra* Part VI. See also RANDY BARNETT, RESTORING THE LOST CONSTITUTION xx (2003).

<sup>115</sup> See U.S. CONST. art. II, §2.

<sup>116</sup> See U.S. CONST. art. II, § 3.

the filter of the Electoral College).<sup>117</sup> The Constitution makes no explicit provision for judicial decisions regarding the legality of such executive action. Hence, for the Court to assert powers of judicial review in such a case insinuates the judicial branch into executive matters, a place where the judiciary does not belong, creating a new form of accountability beyond what the Constitution provides.

These arguments were not presented directly to the Court in *Marbury* because, as we have said, the government refused to participate in the litigation. Nevertheless, they were well known, discussed contemporaneously in Congress, and held firmly by President Jefferson, who never accepted the opinion in *Marbury* as law.<sup>118</sup> As noted above, Charles Lee's argument shows that

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<sup>117</sup> See U.S. CONST. arts. II, III.

<sup>118</sup> Jefferson's view of the opinion in *Marbury* was expressed in particularly confrontational terms during the 1807 trial of Aaron Burr. Early in those proceedings, Burr's counsel cited *Marbury* for the principle that the court could order executive officials to conform their ministerial acts with the court's opinion of their legal obligations. 1 D. ROBERTSON, REPORTS OF THE TRIAL OF COLONEL AARON BURR 33 (De Capo ed. 1969). Jefferson received daily copies of the trial transcript; and when he read this citation to *Marbury*, he promptly wrote a letter to the attorney who was prosecuting the case for the government:

I observe that the case of *Marbury v. Madison* has been cited, and I think it material to stop at the threshold the citing that case as authority, and to have it denied to be law . . . . The Constitution intended that the three great branches of the government should be co-ordinate and independent of each other. As to acts, therefore, which are to be done by either, it has given no controul to another branch. . . .

On this construction I have hitherto acted; on this I shall ever act, and maintain it with the powers of the government, against any controul which may be attempted by the judges. . . . I presume, therefore, that in a case where our decision is by the Constitution the supreme one, and that which can be carried into effect, it is the constitutionally authoritative one, and that by the judges was *coram non judice*, and unauthoritative, because it cannot be carried into effect. I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, and denounced as not law; and I think the present a fortunate one, because it occupies such a place in the public attention.

Letter from Thomas Jefferson to George Hay, counsel for the government in the trial of Aaron Burr (June 2, 1807), in 11 THE WRITINGS OF THOMAS JEFFERSON 214-15 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903). Hay did not act on Jefferson's invitation to use Burr's trial as "the proper occasion to have the gratuitous opinion in *Marbury* . . . denounced as not law," no doubt because the trial judge in Burr's case was Chief Justice Marshall.

Jefferson never feigned from displaying his contempt for "the opinion" as he described *Marbury* in a letter

he was well aware of these challenges to his position, particularly those concerning the powers of the executive, and he took great pains to deflect them.<sup>119</sup> In fact, Lee, who as Attorney General had been President Adams' principal legal counsel, acknowledged that the separation of powers argument against judicial review had force with respect to certain executive functions. He confined his appeal for a judicial remedy to the limited circumstance of the delivery of a judicial commission, which, he argued, did not involve the kind of discretionary political decisions that the Constitution entrusted exclusively to executive authority. Similarly, Marshall's opinion for the Court also displays an awareness of these issues, particularly in his discussion of the propriety of mandamus as a remedy, and in his discourse on questions "political in nature," which are not susceptible of judicial resolution.<sup>120</sup> This acknowledgment of what was to become known as the "political question doctrine" allowed the court a means of deferring to executive authority in certain situations without surrendering its adherence to the rule of law.

Probably the best that can be said of the competing separation of powers perspectives in *Marbury* is that they cancel each other out, leading to a constitutional stalemate. Given this

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apologizing to Abigail Adams after his new judicial appointments removed her son from commission. He wrote, "But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch." Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 11 *id.* at 51. Jefferson's anger over the *Marbury* decision did not diminish with age. *See, e.g.*, Letter from Thomas Jefferson to Justice William Johnson (June 12, 1823), *in* 15 THE WRITINGS OF THOMAS JEFFERSON (1904), *supra*, at 448 ("[T]his case of *Marbury* and *Madison* is continually cited by bench and bar, as if it were settled law, without any animadversion on its being merely an *obiter* dissertation of the Chief Justice."); Letter from Thomas Jefferson to Thomas Ritchie (Dec. 25, 1820), *in* 15 *id.* at 297-98 (lamenting "[L]ay bare these wounds of our Constitution, expose the decisions *seriatim*....An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his mind, by the turn of his own reasoning....A judiciary independent...of the will of the nation is a solecism...").

<sup>119</sup> *Marbury*, 5 U.S. at 149-52 (summary of arguments of counsel).

<sup>120</sup> *See* NELSON, ORIGINS, *supra* note 17, at 58-60, 62-63, 67-70 (acknowledging that Marshall's position



situation, Marshall could not rely on separation of powers arguments alone to justify his resolution of *Marbury*. Instead, most of his reasoning relies on an entirely different set of principles: those we associate with the concept of rule of law.

### III. THE RULE OF LAW ANALYSIS IN *MARBURY*

The influence of rule of law analysis appears from the very beginning of Marshall's opinion. He began by asking the three questions that had been addressed by Marbury's counsel: whether Marbury's "rights" were violated by the denial of the office to which he had been appointed, whether he had a "right" to a judicial remedy, and whether mandamus was the appropriate form of remedy for the redress of this asserted right.<sup>121</sup> To borrow the modern language of the Federal Rules of Civil Procedure, without an affirmative answer to each of these three questions, Marbury would have failed "to state a claim upon which relief could be granted," and his petition would be dismissed.<sup>122</sup> Marshall proceeded to examine each question in turn, answering each in the affirmative.<sup>123</sup> At each step he appealed to the rule of law, albeit to different principles or understandings of that doctrine.

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allowed for some executive discretion).

<sup>121</sup> See *Marbury*, 5 U.S. at 146, 154.

<sup>122</sup> See Fed.R.Civ.P. 12(b)(6).

<sup>123</sup> See *Marbury*, 5 U.S. at 162, 167-68, 173.

### A. Positivism and Marbury's Legal Rights

With respect to Marbury's right to receive the commission, Marshall stressed that all the necessary steps to appointment of a judge set out in the Constitution and federal statutes – the *law* of judicial appointment – had been completed.<sup>124</sup> The President (Adams, before he left office) had nominated the individual and submitted his name to the Senate; the Senate had confirmed the choice; and the President had completed the appointment of his nominee by signing his judicial commission, to which the Seal of the United States had been affixed.<sup>125</sup> In contemplation of law, Marshall argued, the appointment was complete.<sup>126</sup> The only remaining step, the “transmission of the commission,” was, he ruled, “a practice directed by convenience, but not by law.”<sup>127</sup> Withholding the commission, therefore, was effectively an attempt to remove Marbury from his office, an action which violated the Organic Act's guarantee of five-year terms for justices of the peace:

Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and, as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country. To withhold

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<sup>124</sup> *Id.* at 162.

<sup>125</sup> *Id.* at 155.

<sup>126</sup> *Id.* at 162.

<sup>127</sup> *Id.* at 160. This was Marshall's response to Jefferson's argument likening the commission to a deed of land. *See* note xx, *supra*. Marshall also commented that if “the original commission [were] necessary to authorize a person, appointed to any office, to perform the duties of that office, . . . then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the Secretary of State, would be, to every intent and purpose, equal to the original.” *Id.*

his commission, therefore, is an act deemed by the court not warranted by law, but violative of vested legal right.<sup>128</sup>

The appeal here to rule of law was unmistakable. Here, Marshall relied on a positivist conception that law generates rules that give clear answers to specific controversies. In this instance, the pre-existing constitutional and statutory directives regarding judicial appointment and tenure of justices of the peace defined and constrained executive discretion concerning the prerequisites for a completed judicial appointment. Marshall argued that neither the President nor the Court were free to decide for themselves what the judicial appointment process entails.<sup>129</sup>

Rather, both departments were bound by the steps specified in the Constitution and the laws regulating the process and duration of judicial appointment, which alone determined when the appointment was complete and whether it could be revoked.<sup>130</sup> While the law afforded the President discretion to halt the judicial appointment process at an earlier stage, once the appointment had been completed, his discretion was at an end.<sup>131</sup> “[H]is power over the office is terminated in all cases, where, by law, the officer is not removable by him.”<sup>132</sup> Since justices of the peace in the District of Columbia were not removable at will by the President, but were given five-year terms in the enabling legislation, the appointment, certified by the signing and sealing

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<sup>128</sup> *Marbury*, 5 U.S. at 162.

<sup>129</sup> *See id.* at 155, 158.

<sup>130</sup> *See id.* at 158.

<sup>131</sup> *See id.* at 162. Marshall acknowledged that *Marbury*’s rights would not have been violated if he served at the pleasure of the President. “But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled.” *Id.*

<sup>132</sup> *Id.*

of the commission “vested in [Marbury] legal rights, which are protected by the laws of his country” and thus could not be legally withdrawn.<sup>133</sup>

*B. “A Government of Laws, and Not of Men”*

The appeal to principles of rule of law became even stronger, and its conception much broader, in Marshall’s analysis of the next question, Marbury’s entitlement to a remedy. Marshall began this part of the opinion with a declaration of the rule of law as a doctrine that allows individuals to claim the protections of the law and, as a corollary, subjects government officials to the law’s restrictions: “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. One of the first duties of government is to afford that protection.”<sup>134</sup> Marshall thus claimed that the obligation to provide redress for legal violations is a duty of all governments, not just constitutional governments, or governments committed to the separation of powers. He then particularized this obligation in “the government of the United States,” which he characterized in one of the opinion’s most famous passages as intended to be “a government of laws, and not of men.”<sup>135</sup> The government “will certainly cease to deserve this high appellation,” he argued, “if the laws furnish no remedy for the violation of a vested legal right,” such as Marbury’s already-established right to receive his judicial position.<sup>136</sup> Thus, according to Marshall, the rule of law entails not only the search for discretion-limiting and principles, it also affords affected

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<sup>133</sup> *See Marbury*, 5 U.S. at 162.

<sup>134</sup> *Id.* at 163 (emphasis added).

<sup>135</sup> *See id.*

<sup>136</sup> *See id.*

individuals a right to redress when those principles have been broached or violated by the government.

### *C. Political Questions and Legal Duties*

Marshall did not maintain, however, that every violation of a legally vested right automatically entitled the claimant to a remedy. Rather, by conceding that some discretionary executive acts were not subject to judicial examination, Marshall recognized a more qualified remedial principle. If the law, through separation of powers, places final decision-making authority in the President or Congress, it necessarily follows that the Judiciary cannot always intervene to protect individual rights. This tension between the separation of powers and “a government of laws, and not of men” is not easily resolved, and Marshall devoted considerable discussion to this issue.<sup>137</sup>

Marshall began by flatly rejecting the assertion that *all* executive acts were necessarily of an unreviewable political character:

Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

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<sup>137</sup> See 5 U.S. at 163-67, 169-73.

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law.<sup>138</sup>

Indeed, to give the President such broad authority would allow him to act as judge in any dispute in which the President was himself an interested party, and this would totally contravene the notion of a “government of laws, not of men.”<sup>139</sup> Here, Marshall linked the rule of law to themes of official accountability and restraint.

Nevertheless, Marshall recognized the seeming paradox that in a government of laws, the Constitution and statutes might, for reasons of public policy, contain commands that would constrain the courts from vindicating individual rights.<sup>140</sup> This would occur where the law specified processes of decision-making and forms of accountability that precluded or were fundamentally incompatible with judicial redress. To maintain consistency with the rule of law, Marshall reverted to a positivist approach: the only way that an individual (like Marbury) whose legal rights had been violated could be denied a remedy is if that were denied by the *law itself*.<sup>141</sup>

And this would be true only if the Constitution or laws of the United States interposed some barrier to the granting of relief. “It behoves us then,” wrote Marshall, “to enquire whether there be in its composition any ingredient which shall exempt [this case] from legal investigation, or

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<sup>138</sup> *Marbury*, 5 U.S. at 164-65.

<sup>139</sup> *See id.* at 163.

<sup>140</sup> Congress’ power of impeachment and the President’s pardoning power are two familiar examples. *See, e.g., Nixon v. U.S.*, 506 U.S. 224, 235 (1993) (“Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the ‘important constitutional check’ placed on the Judiciary by the Framers.”) (quoting THE FEDERALIST NO. 79 (Alexander Hamilton)); *United States v. Klein*, 80 U.S. 128, 142 (1871) (“[T]he President’s power of pardon ‘is not subject to legislation. . . . Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.’”) (citations omitted).

exclude the injured party from legal redress.”<sup>142</sup>

In effect, Marshall’s solution to reconciling this form of legal positivism with the rule of law was judicial review. Even on the question of whether an executive action was immune from judicial inquiry, Marshall insisted that “*there must be some rule of law to guide the court in the exercise of its jurisdiction.*”<sup>143</sup> And, “[t]he question of whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authorities.”<sup>144</sup>

Following Charles Lee’s argument, Marshall concluded that the case was not exempt from judicial resolution on separation of powers grounds.<sup>145</sup> After conceding that the Constitution gave the President “certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience,”<sup>146</sup> Marshall distinguished those powers from “other duties” imposed by

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<sup>141</sup> See *Marbury*, 5 U.S. at 166.

<sup>142</sup> *Id.* at 163.

<sup>143</sup> *Id.* at 165 (emphasis added).

<sup>144</sup> *Id.* at 167.

<sup>145</sup> See *id.* at 149-50 (Lee’s argument), 164-66 (opinion of the Court).

<sup>146</sup> *Marbury*, 5 U.S. at 165-66. This of course is the origin of the “political question” doctrine. In *Marbury*, Marshall recognized that the power of deciding whom to appoint as federal officials, including judges, ordinarily would present a non-justiciable “political question.” *Marbury*’s claim differed from such non-justiciable matters because the appointment was completed and subject to an irrevocable five-year term. Similarly, in *McCulloch*, Marshall stated that the operational scope of the implied powers (as codified in the Necessary and Proper Clause) was largely an issue to be resolved by the political branches:

But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

*McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819). Viewed from this perspective, President Andrew Jackson’s veto of the law re-chartering the Second Bank of the United States in 1832 was consistent with *Marbury*. Jackson observed that in *McCulloch*, the Supreme Court had left to the political branches the question of whether the

operation of the law, through acts of the legislature.<sup>147</sup> When, by operation of law, an executive official “is directed peremptorily to perform certain acts” and “when the rights of individuals are dependent on the performance of those acts,” the President or his agent becomes an “officer of the law” who “is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.”<sup>148</sup> In such circumstances, because the “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.”<sup>149</sup> Marshall was thus able to invoke rule of law principles to determine the scope of Presidential discretion, confine that discretion to certain political functions, and provide remedies to individuals who have been harmed by the failure to perform specific legal duties that lie outside the limits of presidential discretion.<sup>150</sup> And, of course, the underlying principle was judicial review: the President and all other executive officials being “amenable to the laws” means that they are answerable to the courts; similarly, the individual who has “a right to resort to the laws of his country” should be able to find that refuge in the courts.

Applying these principles, Marshall had no difficulty determining that Marbury’s claim

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Bank was in fact necessary or useful in effectuating the enumerated powers. 2 MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 576 (James D. Richardson ed., Bureau of Nat’l Literature & Art, 1909) (1897). Exercising that portion of the legislative power vested in the President, Jackson decided that the Bank was not necessary, and hence unconstitutional, and on the ground that he vetoed the proposed legislation. *Id.* at 588-89.

<sup>147</sup> *Marbury*, 5 U.S. at 165.

<sup>148</sup> *Id.* at 165-66.

<sup>149</sup> *Id.* at 166.

<sup>150</sup> *See id.*



for redress could be considered in court.<sup>151</sup> The duty of sealing and delivering the commission was a ministerial act that had been assigned to the Secretary of State by a statute and was distinct from the Secretary's policy responsibilities as an agent of the President.<sup>152</sup> It thus lay outside the "political" areas of the Secretary's field of responsibility.<sup>153</sup> Thus, Marshall concluded that Marbury did indeed have a legally redressable vested right.<sup>154</sup>

#### *D. A Coercive Remedy Against the Government*

This conclusion led the Court to face the third question, whether the Court could grant the requested remedy of a writ of mandamus.<sup>155</sup> Marshall subdivided this question into two parts: whether mandamus was an appropriate remedy; and whether the Court had power to grant the remedy in the circumstances of this case.<sup>156</sup>

Marshall answered the first sub-question affirmatively, and in this segment of the opinion, he began by applying a formalistic distinction.<sup>157</sup> He acknowledged that some might view the granting of the requested relief as an attempt by the court to "intermeddle with the prerogatives of the executive," but he denied the justice of such an accusation.<sup>158</sup> By granting the

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<sup>151</sup> *See id.* at 167-68.

<sup>152</sup> *Marbury*, 5 U.S. at 164-65. At the time *Marbury* was decided, the duties of the Secretary of State included a wide range of administrative functions that were distinct from the subject of foreign affairs, including administrative responsibilities over the functioning of the federal courts. *See SMITH, supra* note 62, at 270-71.

<sup>153</sup> *Marbury* at 158-59, 164-65.

<sup>154</sup> *Id.* at 162.

<sup>155</sup> *See id.* at 168.

<sup>156</sup> *See id.* at 154, 168.

<sup>157</sup> *See id.* at 173.

<sup>158</sup> *See Marbury*, 5 U.S. at 169-70.

requested relief, the Court would not intrude into the “secrets of the cabinet.” Instead, it would simply be ordering the delivery of “a paper, which, according to law, is upon record, and to a copy of which the law gives a right.”<sup>159</sup> But he quickly returned to the broader conception that the government must be held accountable to the law. To deny the authority of the Court to make such an order would be to put officers of government dangerously above the law:

[W]hat is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

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<sup>159</sup> *See id.* at 170. At this stage of the case, Marshall’s opinion treats Marbury’s petition almost as though it were the nineteenth century counterpart to a modern “freedom of information” request. Marbury was not asking the Court to seat him as a judge. He was only asking the court to order the government to produce his commission, to turn the evidence of his appointment over to him, although this would, as a practical matter, provide him with the necessary entitlement to his position. In this respect, Marshall’s decision in *Marbury* prefigured his conclusion, sitting as a Circuit Justice in the treason trial of Aaron Burr, that the Court had the authority to subpoena documentary and testimonial evidence from the Jefferson administration, including a subpoena directed to the President himself. *See supra* note 159. The decision also prefigured the Court’s decision approximately 170 years later requiring President Nixon to produce the infamous Watergate tapes that brought about the demise of his presidency. *See Nixon v. United States*, 418 U.S. 683 (1974).

If one of the heads of departments commits any illegal act, under the color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?<sup>160</sup>

Given the vested nature of Marbury's right and the non-discretionary, legally imposed nature of Secretary Madison's duty, the only legal impediment to mandamus would arise if there were another available remedy, such as an action in "detinue," presumably for money damages.<sup>161</sup> But Marshall rejected such a possibility since "[t]he value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing."<sup>162</sup>

#### *E. Setting the Limits of Article III*

This left only one final issue, whether the Supreme Court, acting within its original jurisdiction, had the authority to grant the requested writ.<sup>163</sup> This question the Court answered in the negative, concluding that Marbury's case lay beyond the constitutional limits of the Court's jurisdiction.<sup>164</sup> Here, the Court turned its rule of law analysis, cast as a doctrine of judicial self-restraint, onto the question of its own power.

Marshall began this portion of the opinion by inquiring whether Section 13 of the Judiciary Act of 1789 granted the Supreme Court authority to issue the requested writ of

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<sup>160</sup> *Marbury*, 5 U.S. at 170.

<sup>161</sup> *See id.* at 173.

<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

mandamus.<sup>165</sup> In doing so, he began the inquiry into judicial power where federal courts consistently begin that analysis to this day – with the question whether jurisdiction has been authorized by Congress. By giving the language of Section 13 a broad interpretation, and by relying on earlier cases in which the Supreme Court had entertained petitions for mandamus against government officials, Marshall concluded that Section 13 did attempt to confer jurisdiction.<sup>166</sup> Hence, “if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.”<sup>167</sup> Note that Marshall’s analysis continued to follow the rule of law paths he had earlier outlined: In a case such as this, the law ought to give a remedy for official violation of a vested legal right unless *the law itself* “exclude[d] the injured party from legal redress.”<sup>168</sup>

Unfortunately for Marbury, Marshall went on to determine that the “law itself,” through the Constitution, limited the scope of the Supreme Court’s original jurisdiction, denied the Court jurisdiction to grant the requested mandamus and hence “excluded” Marbury from obtaining the “legal redress” he was seeking.<sup>169</sup>

Marshall once again drew on a positivist method of consulting the literal commands of

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<sup>164</sup> *See id.* at 178.

<sup>165</sup> *See Marbury*, 5 U.S. at 173.

<sup>166</sup> *See id.*

<sup>167</sup> *Id.*

<sup>168</sup> *See id.* at 163.

<sup>169</sup> *See id.* at 178.

law regarding the distribution of jurisdiction among the Courts of the United States.<sup>170</sup> Article III of the Constitution contemplated the creation of both a Supreme and inferior courts.<sup>171</sup> With respect to the Supreme Court, the Constitution described both “original” and “appellate” jurisdiction.<sup>172</sup> Cases within the original jurisdiction could be initiated in the Supreme Court,<sup>173</sup> but cases within the appellate jurisdiction must be initiated in some other court.<sup>174</sup> In what proved to be a key step to his reasoning, Marshall held that the Constitution’s grant of original jurisdiction to the Court was exhaustive – the Court could exercise jurisdiction only over the cases so described, not over any others.<sup>175</sup> Otherwise, he reasoned, there would have been no point to delineating separate spheres of original and appellate authority: “If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.”<sup>176</sup> Since the ground for jurisdiction advanced by Marbury – jurisdiction over a case arising under the laws of the United States -- fell in the category of appellate jurisdiction defined by the Constitution, the Court was not at liberty to entertain Marbury’s petition for mandamus in

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<sup>170</sup> See *Marbury*, 5 U.S. at 173-74.

<sup>171</sup> See *id.* at 173.

<sup>172</sup> *Id.* at 174.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 175.

<sup>175</sup> See *Marbury*, 5 U.S. at 175.

<sup>176</sup> See *id.*

its original jurisdiction.<sup>177</sup>

Having apparently anticipated this very problem, Charles Lee had argued that the exercise of the mandamus power could be considered appellate in nature.<sup>178</sup> Marshall's response was to provide a legal definition for the appellate jurisdiction. He asserted that the essential criterion of the appellate jurisdiction was that it was invoked to revise or control a previous judicial determination of a legal claim. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted."<sup>179</sup> In *Marbury's* case, however, the legal claim was brought for the first time in the Supreme Court. This, according to Marshall, involved the exercise of the Court's original jurisdiction. This conclusion required the Court to nullify Section 13 of the Judiciary Act insofar as it purported to authorize the Supreme Court to issue writs of mandamus against federal officials.<sup>180</sup>

#### *F. The Role of Courts in Constitutional Government*

The last phase of the case posed a particularly important question: when faced with conflicting statutory and constitutional commands, how should a court in a governmental system committed to the rule of law respond? Marshall answered this question with his now-classic defense of judicial review.<sup>181</sup>

On this phase of the case, as in all the others, rule of law themes emerge, especially those

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<sup>177</sup> *Id.* at 175-76.

<sup>178</sup> *See supra* notes 102-05 and accompanying text (describing Charles Lee's argument for jurisdiction).

<sup>179</sup> *Marbury*, 5 U.S. at 175.

<sup>180</sup> *See id.* at 176.

<sup>181</sup> *See id.* at 176-80.

associated with official accountability and restraint. The first relates to the nature of a written constitution. Marshall posited that the Constitution was adopted not only to authorize governmental exercise of power, but also to limit and restrain it:

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.<sup>182</sup>

Those limitations, moreover, were not merely symbolic, but real, and to be real they must be enforced:

To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.<sup>183</sup>

Marshall's fundamental proposition was that the Constitution was not merely a political document that set out aspirations for the government. Instead, it was a law, indeed the "superior, paramount law" of the land. The choice was said to be between two alternatives:

The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. ... If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.<sup>184</sup>

Posed this way, the only option that comported with both the rule of law and the principle of limited government was to recognize the superiority of the Constitution over statutes.

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<sup>182</sup> *Id.* at 176.

<sup>183</sup> *Id.* at 176-77.

<sup>184</sup> *Marbury*, 5 U.S. at 176-77.

“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.”<sup>185</sup>

The only remaining question, then, was what mechanism existed for establishing the superiority of constitutional limits on legislative power.<sup>186</sup> This issue necessarily brought Marshall to examine the role of courts in constitutional government were the courts the appropriate body to recognize the Constitution’s superior command and hence to nullify conflicting legislation?<sup>187</sup> Marshall answered this question with a resounding affirmative.

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<sup>185</sup> *Id.*

<sup>186</sup> *See id.* at 177

<sup>187</sup> *See id.* at 177-78.



In what is perhaps *Marbury's* most celebrated passage, Marshall based his reasoning on the general proposition that “[i]t is emphatically the province and duty of the judicial department to say what the law is” – in other words, to ascertain and apply rules of law.<sup>188</sup> Performance of this duty in a non-constitutional case was well established. “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.”<sup>189</sup> From this proposition he drew the inference that courts must perform a similar function in a case raising constitutional questions. Courts must be able to interpret and apply rules of law drawn from the Constitution, itself the paramount source of law. There was, however, one important corollary: in cases of conflict between the Constitution and statutory law the Court must follow the Constitution’s superior command.<sup>190</sup> Any other conclusion, he reasoned, would frustrate the principle of constitutional superiority and put the legislature beyond the rule of law:

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.<sup>191</sup>

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<sup>188</sup> *See id.* at 177.

<sup>189</sup> *Marbury*, 5 U.S. at 177.

<sup>190</sup> *See id.* at 177-78.

<sup>191</sup> *Id.* at 178.

That such an argument “reduces to nothing” the constraining effect of the written constitution was “of itself . . . sufficient” reason “for rejecting the construction.”<sup>192</sup>

Marshall buttressed this logical conclusion with specific references to various provisions in the Constitution which, he contended, showed that the Constitution was intended to govern the judiciary and supply rules for decision in judicial cases.<sup>193</sup> But, although pointing to specific provisions that are consistent with his thesis of judicial review, Marshall used them only to assert that “the particular phraseology of the constitution of the United States confirms and strengthens” a duty of judicial review already implicit in the concept of a written constitution.<sup>194</sup> His argument for judicial review thus did not rest on legal positivism alone; nor did it hinge on the separation of the judiciary from the other branches of government. Rather, Marshall invoked rule of law principles related to the nature of the Constitution, the institutional functioning of courts in constitutional government and the special competence of judges “to say what the law is.” The result was a new constitutional doctrine embedded in the rule of law: the interpretation and enforcement of the Constitution, like any other law, “is emphatically the province of the judicial department,” and ultimately of the Supreme Court.

Because the Constitution precluded the exercise of original jurisdiction in *Marbury*’s case, and because the Court was obliged to follow the Constitution rather than the conflicting provision of the Judiciary Act, Marshall held that the Court lacked jurisdiction to decide

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<sup>192</sup> *Id.*

<sup>193</sup> *See id.* at 179-80 (pointing to the bill of attainder, ex post facto and treason clauses).

<sup>194</sup> *Marbury*, 5 U.S. at 180. Marshall relied on the provisions extending the judicial power of the United States to all cases arising under the Constitution, requiring judges to take an oath to support the Constitution, and declaring that the Constitution and laws made in pursuance thereof are the supreme laws of the land. *Id.* at 178-80.

Marbury's claim.<sup>195</sup> Marbury, it turned out, was in the wrong court. However just his claim might be, however appropriate the remedy he sought, fidelity to the rule of constitutional law meant that the Court lacked jurisdiction to hear his case, so "[t]he rule must be discharged."<sup>196</sup>

The Marbury decision advances a series of propositions, all of which Marshall claimed were demanded by the rule of law. The application of these principles actually limited the potential scope of the Supreme Court's jurisdiction. But that of course was a small price for greatly expanding the "judicial power" of constitutional review over the President and Congress.

As generations of American law student have learned, Marshall and his Court may have "lost the battle" over Marbury's commission, but they "won the war" of judicial power by securing the principle of judicial review.

#### **IV. WAS *MARBURY* DECIDED CORRECTLY?**

In asserting a power of constitutional judicial review, Marshall's opinion in *Marbury* confirmed a view of judicial power that had been widely accepted in the ratification debates of 1788, and that had surprisingly deep roots in English common law. In Part V we examine the origins of the rule of law principles that Marshall adopted in *Marbury*, including those that underlay his thesis of judicial review. Before doing that, however, we must consider the chorus of scholarly criticism that *Marbury v. Madison* was, at bottom, a political decision that did not itself adhere to the rule of law principles Marshall claimed to be advancing. If this criticism were accurate, it would certainly detract from *Marbury's* claim to be a rule of law decision. However,

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<sup>195</sup> See *id.* at 176.

<sup>196</sup> See *Marbury*, 5 U.S. at 180.

while we agree that Marshall's opinion cleverly defused a potentially explosive political situation, in our view the critique of *Marbury* on this score is largely overdrawn. There is more merit than manipulation in Marshall's handling of the legal issues in the case.

Viewed in the context of the political dilemma facing the Supreme Court, Marshall's resolution of the case is of course exceptionally deft. He asserted enormous authority in the Supreme Court but, by refusing to issue the writ of mandamus against Madison, avoided a direct confrontation with the Jefferson administration. Until recently the conventional wisdom of American scholars has been, not unnaturally, that such a perfect solution to the Court's political problem could not have been the coincidental result of objective judicial decision-making.<sup>197</sup> *Marbury's* magic, the critics suspect, must be the product of some legal *legerdemain*.

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<sup>197</sup> Apparently, Professor Corwin was the first scholar to raise these criticisms of the *Marbury* decision and to conclude that Marshall must have deliberately misapplied the law to reach a desired political result. CORWIN, *supra* note 14, at 7-9. The most powerful modern critique is William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, *supra* note 51. A sampling of other critiques would include 2 WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1035-46 (1953); Klarman, *supra* note 14; Alfange, *supra* note 14; Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989) (challenging only Marshall's construction of Section 13); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* 75 (1988); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646 (1982).

Interestingly, most of these scholars do not dispute Marshall's conclusions that the Jefferson administration had violated Marbury's rights, or that the courts could issue a coercive order against the Secretary of State to remedy this violation, or that mandamus was the appropriate remedy, or even that the Supreme Court had the power to declare acts of Congress unconstitutional.<sup>198</sup> Instead, they focus on more technical aspects of the decision – Marshall's treatment of Section 13 as a jurisdictional statute, his interpretation of the allocation of the Supreme Court's original and appellate jurisdiction, and his deciding the merits of a case in which he ultimately determined that the Court had no jurisdiction.<sup>199</sup> These arguments might be minimized as quibbling about an otherwise brilliant opinion. But the charge of Marshall's critics goes deeper. They contend that his decisions on these relatively technical legal issues are so

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<sup>198</sup> *But see* James M. O'Fallon, Marbury, 44 STAN. L. REV. 219, 255 (1992)(criticizing the decision on the merits). While accepting Marshall's conclusion that the courts have the power of judicial review, some of these scholars are critical of the quality of that portion of the decision. *See, e.g.*, Klarman, *supra* note 14, at 1117-20 and authorities cited therein.

<sup>199</sup> See Weinberg, *supra* note 6, for discussion of criticism of *Marbury's* treatment of Section 13 (citing EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT 53-85 (1919); Sanford Levinson, *Why I Do Not Teach Marbury (Except To Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 558, 562 (2003); L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren and Rehnquist Courts*, 38 WAKE FOREST L. REV. 697, 698 (2003); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 995 (2001); Graber, *supra* note 14, at 70; Alfange, Jr., *supra* note 14, at 384, 393, 397-97; Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 389 & n.60 (1982); Van Alstyne, *supra* note 51; Andrew C. McLaughlin, *Marbury vs. Madison Again*, 14 A.B.A. J. 155, 157 (1928)). For an analysis of critics' attack on *Marbury's* allocation of original and appellate jurisdiction see Weinberg, *supra* (citing DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 68 (1985); MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 11 (1980); Edward S. Corwin, *Marbury v. Madison and the Doctrine of Judicial Review*, 12 MICH. L. REV. 538, 541-42 (1914), reprinted in CORWIN, THE DOCTRINE OF JUDICIAL REVIEW *supra* note 14, at 5-7; THOMAS REED POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 7-23 (1956); 2 CROSSKEY, *supra*, at 1041-42; Forrest McDonald, *Book Review*, 16 L. & HIST. REV. 617, 619 (1998); Alfange, *supra*, at 397; James M. O'Fallon, Marbury, 44 STAN. L. REV. 219, 255 (1992); Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WISC. L. REV. 301, 320; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U PA. L. REV. 741, 778 (1984); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 5, 8 (1983)). For review of criticism of Marshall deciding the merits before jurisdiction see Weinberg, *supra* (citing CORWIN, JOHN MARSHALL AND THE CONSTITUTION, *supra*, at 541-42; 2 CROSSKEY, *supra*, at 1041-42; Van Alstyne, *supra*, at 68).

plainly incorrect that they must represent a manipulation of legal doctrine to achieve a desired political result. If this charge were correct, it would undermine *Marbury's* claim that rule of law principles dictated the outcome of the case

Marshall does have defenders as well. In two recent articles, Professors Pfander and Weinberg present exhaustive rebuttals to Marshall's critics.<sup>200</sup> We offer here a somewhat different and, we think, in some ways a more direct defense of the *Marbury* opinion. In doing so, we do not claim that Marshall wrote a perfect opinion in *Marbury*, or even that his resolutions of these disputed issues are *necessarily* correct. As noted above, the rule of law is a complex concept that can include multiple meanings. It does not require incontestability. No reasonable conception of the rule of law assumes that judicial opinions are perfect, or that judges will never err. It does assume, as embedded in this country's polity, a baseline level of legal knowledge, impartiality, objectivity and transparency of both process and rationale that distinguishes the judiciary from the branches of government that are supposed to act politically. The question, therefore, is whether Marshall's treatment of these disputed issues is sufficiently consistent with legal principles that were accepted at the time of the decision to be classified as a good faith application of those principles.

#### A. *Section 13 as a Grant of "Power"*

Was Section 13 of the 1789 Judiciary Act a remedial statute, or a jurisdictional statute, or both? Marshall treated the statute as both. His critics say that the plain language of the text shows it to be a remedial statute only. Since no other statute purported to give the Supreme

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<sup>200</sup> James E. Pfander, *Marbury, Original Jurisdiction and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515 (2001); Weinberg, *supra* note 6.

Court jurisdiction over Marbury's case, the critics argue that the petition for mandamus should have been dismissed simply for want of statutory jurisdiction. It would therefore follow that the constitutionality of Section 13 should not have been at issue, so that Marshall had no warrant, in this case, for asserting the power of the courts to declare statutes unconstitutional.

The last clause of Section 13 granted the Supreme Court "power" to issue writs of mandamus against federal officials and lower federal courts "in cases warranted by the principles and usages of law."<sup>201</sup> Of course, the term "power" is ambiguous -- it might refer to jurisdiction, as does the term "judicial power" in Article III, or it might refer to remedial authority, as the term "power" does in certain other sections of the 1789 Judiciary Act.<sup>202</sup>

Marbury's critics propose two readings of the mandamus clause in Section 13. One is that it simply authorizes the Supreme Court to grant that writ as a remedy in cases in which the Court

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<sup>201</sup> The full text of Section 13 is as follows:

*And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against, ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.*

Judiciary Act of 1798, ch. 20 § 13, 1 Stat. 73, 80-81 (1789)(emphasis added).

<sup>202</sup> See Amar, *supra* note 197, at 456-58. As discussed *infra*, the term "power" appears to be used both ways in Section 14 of the Act.

has appellate jurisdiction. This reading assumes that the mandamus clause is part of, and modifies, the appellate jurisdiction clause.<sup>203</sup> Professor Amar has identified a grammatical problem with this reading: it turns on the meaning of a semi-colon, which can act as either a comma or a period. If the semi-colon functioned as a comma, then the mandamus clause would modify the appellate jurisdiction clause. If the semi-colon separating the clauses acted as a period, however, then the mandamus clause would be independent of the clause on appellate jurisdiction.<sup>204</sup> Professor Pfander's recent scholarship suggests strongly that this second construction represents a more accurate view of Section 13 as it was enacted.<sup>205</sup> When the semi-colon is read to function as a period, Marshall's reading of the mandamus clause as an independent grant of power is certainly defensible.

But what kind of grant of power? The other reading of the mandamus clause asserted by the critics is that Congress authorized the Supreme Court to grant the writ as a remedy in cases in which it otherwise had jurisdiction. Section 13 does not explicitly say that the Supreme Court has subject-matter jurisdiction over mandamus actions. In our post-Title 28 world, we are accustomed to separate statutory authorizations for federal court jurisdiction and for remedies. Viewed through modern lenses, Section 13 would appear to be a remedial statute only. But did that principle underlie the 1789 Judiciary Act and its early treatment by the Supreme Court?

One might conclude that the early Supreme Court understood the need for a specific

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<sup>203</sup> See Van Alstyne, *supra* note 51, at 15; Currie, *supra* note 197, at 653.

<sup>204</sup> Amar, *supra* note 51, at 454.

<sup>205</sup> Professor Pfander's research shows that, as originally enacted in 1789, Section 13 did in fact have the clauses on prohibition and mandamus grammatically separate from the appellate jurisdiction clause (by using a colon after the appellate jurisdiction and beginning the clauses on the writs with "And," with the semi-colon appearing in the subsequent edited publication of the Statutes at Large in 1842). Pfander, *supra* note 200, at 1535-46.



jurisdictional statute based on an 1807 Marshall opinion, *Ex parte Bollman*,<sup>206</sup> which begins as follows:

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare, that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court. . . .<sup>207</sup>

This statement would seem powerfully to support the critics of Marshall's decision in *Marbury*<sup>208</sup> – unless one examines the remainder of the case in which the statement appears.

The *Bollman* case was brought by two of Aaron Burr's associates, Bollman and Swartwout, who had been arrested and charged with treason for their part in Burr's alleged scheme to create a new country that he would rule.<sup>209</sup> They were committed to prison without bail by order of the Circuit Court for the District of Columbia.<sup>210</sup> They then filed petitions for

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<sup>206</sup> 8 U.S. (4 Cranch) 75 (1807).

<sup>207</sup> *Bollman*, 8 U.S. at 93.

<sup>208</sup> Even Professor Weinberg, who is otherwise a fierce defender of *Marbury*, concedes, relying in part on this statement from *Bollman*, that Section 13 is a remedial statute only. Weinberg, *supra* note 6, at 1311, 1321-23. She then constructs an argument that Marshall's apparent treatment of Section 13 as jurisdictional was actually a kind of rejoinder to Charles Lee – to the effect that since Lee argued that Section 13 was jurisdictional, Marshall accepted this solely for the sake of argument and showed that the statute would be unconstitutional as a basis for Lee's motion if construed the way Lee intended. *See id.* at 1311-16. This argument does not appear persuasive because Marshall did not write the opinion that way. And if Marshall understood that Section 13 was not a jurisdictional statute, the simplest response to Lee's argument would have been to say just that, in the same way that Marshall rejected Lee's argument that mandamus to a public official was appellate in nature. *See Marbury*, 5 U.S. at 175-76. And in *Bollman* itself, Marshall explicitly rejected the argument of counsel that the federal courts have inherent habeas corpus jurisdiction. 8 U.S. at 93-94.

<sup>209</sup> *Bollman*, 8 U.S. at 125-26, 129.

<sup>210</sup> *See id.* at 75-76.

habeas corpus directly in the Supreme Court, invoking Section 14 of the Judiciary Act, which gave the Supreme Court the power to issue writs of habeas corpus to determine the legality of the confinement of persons held in jail under the authority of the United States.<sup>211</sup> Bollman and Swartwout maintained that the evidence provided by the government to sustain their arrests did not support a charge of treason as it is defined in the Constitution.<sup>212</sup>

There were two opinions in *Ex Parte Bollman* – the first on whether the Supreme Court had jurisdiction to issue the writ of habeas corpus,<sup>213</sup> and the second on the merits<sup>214</sup> – both of which Marshall wrote. The beginning of the first opinion, in which Marshall emphasized that the Supreme Court’s jurisdiction to grant habeas corpus must be grounded in positive law, is quoted above. This passage (which has rule of law overtones reminiscent of the themes in *Marbury*) repudiated the argument of Bollman’s attorney that all courts of the United States had

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<sup>211</sup> The full text of Section 14 is as follows:

*And be it further enacted, That all the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And either of the justices of the supreme court, as well as judges of the district court, shall have the power to grant writs of habeas corpus, for the purpose of an inquiry into the cause of commitment; Provided, that writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.*

Judiciary Act of 1798, ch. 20, § 14, 1 Stat. 73, 81-82 (1789)(emphasis added).

<sup>212</sup> *Bollman*, 8 U.S. at 133-34. See U.S. CONST. art. III, § 3, cl. 1 (“Treason against the United States, shall consist only in levying War against them, or in adhering to the Enemies, giving them Aid and Comfort. No person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.”).

<sup>213</sup> *Bollman*, 8 U.S. at 93.

<sup>214</sup> *Id.* at 125.

the inherent power to grant habeas corpus.<sup>215</sup> Marshall stressed that in all cases where the federal courts are asked “[to take] cognisance of any question between individuals, or between the government and individuals,” the power to adjudicate those cases “must be given by written law.”<sup>216</sup>

Bollman’s and Swartwout’s cases arose under federal law, and were within the Article III jurisdiction of the federal courts, because they claimed that the evidence against them did not meet the constitutional definition of treason.<sup>217</sup> Indeed, all petitions for habeas corpus challenging the confinement of prisoners held under the authority of the United States necessarily arise under federal law -- what else besides the violation of federal law could be the basis for granting the writ? But the issue was whether the Supreme Court had jurisdiction to hear these petitions that had been “given by written law.” Marshall determined that it had -- *and that the necessary jurisdictional statute was Section 14 of the 1789 Judiciary Act, which was, he said, a “substantive grant” of adjudicatory power.*<sup>218</sup> We put this statement in italics because Section 14’s grant of habeas power is written exactly like Section 13’s grant of mandamus power. To modern eyes, Section 14 looks like a remedial statute. It speaks in terms of “power to grant writs of habeas corpus,” not in terms of jurisdiction over habeas corpus cases. Neither Section

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<sup>215</sup> *Id.* at 79-83 (Harper’s arguments), 93-94 (opinion of the Court)(“The reasoning from the bar . . . may be answered by the single observation, that for the meaning of the term *habeas corpus*, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.”). Swartwout’s attorney, Charles Lee, rested his jurisdictional argument on statutory and constitutional grounds. *Id.* at 77-79 (Lee’s argument).

<sup>216</sup> *Bollman*, 8 U.S. at 94.

<sup>217</sup> This was emphasized by Charles Lee at the beginning of his argument in *Bollman*. *See id.* at 77.

<sup>218</sup> *Id.* at 94. *See id.* at 94-100 for Marshall’s analysis.

14 nor any other statute explicitly gave subject-matter jurisdiction to the Supreme Court or the district courts in habeas corpus cases. Nevertheless, Section 14 was treated by the Supreme Court as both a remedial and a jurisdictional statute – exactly the same construction the Court gave to Section 13 in *Marbury*.

In *Bollman*, the Court read Section 14 as giving it the “power” to adjudicate petitions for habeas corpus submitted by federal prisoners who claimed that they were being confined in violation of federal law – that is, prisoners whose cases arose under the Constitution, laws or treaties of the United States). This is precisely the way that the Supreme Court had treated Section 13 in *Marbury* – as giving the Supreme Court the “power” to adjudicate petitions for mandamus submitted by persons who claimed that federal officials had violated their rights under federal law.

Section 14 has two parts. The first is the precursor of the modern All-Writs Act.<sup>219</sup> It gives all federal courts the “power” to issue all writs when “necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.”<sup>220</sup> This provision plainly operates as a remedial statute.<sup>221</sup> *Bollman*, however, involved the second part of Section

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<sup>219</sup> 28 U.S.C.S. § 1651 (2001). Writs. “(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”

<sup>220</sup> See *supra* note 211. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (1789)

<sup>221</sup> In *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), the plaintiff had sought a writ of mandamus in a federal trial court under the All-Writs Act in a case arising under federal law. *Id.* at 504-05 (argument of counsel). The All-Writs Act does not purport to give the lower federal courts specific authority to issue writs of mandamus. The Supreme Court held that the All-Writs Act did not grant the lower federal courts the power to adjudicate the case, and, since general arising under jurisdiction had not been granted to the federal trial courts, dismissed the action. *Id.* at 505-06.

There was a simpler way of dismissing this case. The Supreme Court probably should have held that the lower federal courts could not award this remedy at all. Mandamus is not mentioned by name in the All-Writs Act. See § 14, 1 Stat. 73, 81-82. That act provided that the courts could issue “all other writs not specifically provided

14, which the Court treated as an *explicit* grant of power to the Supreme Court and the federal trial courts to issue writs of habeas corpus for prisoners held in confinement under the authority of the United States. Marshall treated this specific grant of the habeas corpus power as both remedial and jurisdictional. He pointed out that certain other forms of habeas could be issued as remedies in aid of a court's jurisdiction.<sup>222</sup> For example, the writ of habeas corpus *ad testificandum*, which was an order to produce the prisoner to give testimony, was certainly a remedial order in aid of underlying criminal jurisdiction.<sup>223</sup> But the writ of habeas corpus to determine the legality of confinement - the Great Writ - was, at common law, an independent action that was not incidental to a court's criminal jurisdiction (indeed, the writ could be issued by courts that did not possess any criminal jurisdiction).<sup>224</sup> Thus:

the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.<sup>225</sup>

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for by statute," *id.*, but the authority to issue mandamus was provided for by statute -- Section 13, which authorized the Supreme Court (and not the federal trial courts) to issue the writ of mandamus to the lower federal courts and federal officials. Judiciary Act of 1798, ch. 20 § 13, 1 Stat. 73, 80-81 (1789). The All-Writs Act also provided that the requested remedy must be "agreeable to the principles and usages of law." § 14, 1 Stat. at 82. Mandamus was a common law remedy that could be issued only by the King's Bench; no inferior court had the authority to issue mandamus. See *supra* notes 87-89 and accompanying text.

<sup>222</sup> See *Bollman*, 8 U.S. at 97-98. In analyzing the various writs of habeas corpus, Marshall relied, as he had in *Marbury*, on Blackstone. See *id.* at 97-99.

<sup>223</sup> See *id.* at 98.

<sup>224</sup> See 3 WILLIAM BLACKSTONE, COMMENTARIES \*134 33. At common law, the Court of Common Pleas could issue the writ even though it did not possess any criminal jurisdiction. See note xx, *supra*. The famous Habeas Corpus Act of 1679, 31 Car. II, c. 2, which Blackstone considered "another *magna carta* of the kingdom," 3 WILLIAM BLACKSTONE, COMMENTARIES \*135 6, extended the authority to grant the writ to the courts of Chancery and Exchequer. *Bollman*'s attorney argued this point at some length, *Bollman*, 8 U.S. at 80-82.

<sup>225</sup> *Bollman*, 8 U.S. at 101.

In short, Marshall treated Section 14 as granting the Supreme Court and the federal trial courts the adjudicatory power to grant the writ of habeas corpus on behalf of any federal prisoner held in confinement in violation of the Constitution, laws or treaties of the United States.<sup>226</sup>

It is not surprising that the Supreme Court would give such a broad construction to Section 14. The writ of habeas corpus is known as the Great Writ for good reason. It was, according to Blackstone, “the most celebrated writ in the English law.”<sup>227</sup> It was the “great and efficacious writ” that enforced the commands of Magna Carta by challenging “all manner of illegal confinement.”<sup>228</sup> Habeas corpus is the only common law writ mentioned in the Constitution, and that document prohibits its suspension “unless when in Cases of Rebellion or Invasion the public Safety may require it.”<sup>229</sup> One might legitimately assume, therefore, that when Congress gave the Supreme Court and the federal trial courts the power to issue writs of habeas corpus for prisoners held in confinement under the authority of the United States, it intended that grant of power to be “great and efficacious.”

A narrower reading of the habeas power in Section 14 – that it is a remedial statute only – would produce consequences that would appear to be contrary to any reasonable attribution of Congressional intent. Since there was no other statute giving the Supreme Court the arising under (that is, federal question) jurisdiction – whether generally or specifically to consider

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<sup>226</sup> This is a situation in which the term “power” appears to have different meanings, depending on context, in the same section of the Judiciary Act. *But see* Amar, *supra* note 197, at 457-60 (arguing that the term “power” is always used as remedial in the Judiciary Act).

<sup>227</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*129.

<sup>228</sup> 3 *id.* at \*131.

<sup>229</sup> U.S. CONST. art. I, § 9, cl. 2.

petitions for *habeas corpus* from federal prisoners – it would follow from a strictly remedial reading of Section 14 that the Court could not entertain such petitions directly, because even though the “power” was given specifically in Section 14, the necessary statutory subject matter jurisdiction would be lacking. Nor would the lower federal courts (including individual Supreme court justices sitting on circuit courts) have jurisdiction over petitions for writs of *habeas corpus*, because there was no separate jurisdictional statute authorizing such proceedings.<sup>230</sup> Being an independent action at common law, the writ of habeas corpus was not considered incidental to a court’s criminal jurisdiction.<sup>231</sup> Moreover, Congress’ decision to grant the Supreme Court the habeas power for federal prisoners could not be characterized as incidental to its power to decide criminal cases because the 1789 Judiciary Act did not give the Supreme Court appellate jurisdiction in federal criminal cases.<sup>232</sup>

This does not mean that the Supreme Court would have had absolutely no jurisdiction to

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<sup>230</sup> Marshall understood that the remedial-only restrictive reading of Section 14 would prevent any federal court from issuing the writ of habeas corpus to determine the legality of the confinement of federal prisoners. *See Bollman*, 8 U.S. at 96 (“Whatever motives might induce the legislature to withhold from the supreme court the power to award the great writ of *habeas corpus*, there could be none which would induce them to withhold it from every court in the United States. . . .”)(emphasis added).

<sup>231</sup> As pointed out in note 224, *supra*, the writ was an independent action at common law and could be granted by courts that did not have criminal jurisdiction. Marshall followed this common law view by observing in *Bollman* that a court may issue a writ of habeas corpus for a prisoner who was ordered incarcerated by a different court. *Bollman*, 8 U.S. at 100. *See also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 110-13 (1866) (discussing length how *habeas* proceedings are independent civil actions). In modern times, the historical characterization of the Great Writ as civil proved troublesome. *See Harris v. Nelson*, 394 U.S. 286, 293-94 (1968)(criticizing the “civil” label as “gross and inexact,” refusing to apply the Federal Rules of Civil Procedure to habeas proceedings, and suggesting that those proceedings are “unique” independent actions).

<sup>232</sup> The 1789 Judiciary Act contained only one specific grant of arising under jurisdiction to the Supreme Court – in Section 25, which allowed for appeals from the state courts in certain federal question cases. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87 (1789). However, the habeas power in Section 14 was limited to prisoners held under the authority of the United States, and Section 25 could not be used as a basis for appellate jurisdiction over a district court’s consideration of a habeas petition. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (1789).

exercise the habeas corpus power, just that its jurisdiction would be minimal. Theoretically, the Supreme Court could issue writs of habeas corpus in cases brought within the two categories of its constitutionally-granted original jurisdiction. One of those categories (cases in which a State is a party) would be inoperative because the habeas power related only to persons held under the authority of the United States, and a State simply would not be a party to such a proceeding. The other category (cases affecting foreign ministers and ambassadors) is a hypothetical possibility. That is, if a foreign minister or ambassador were arrested and held in custody by federal officials, he or she could challenge the legality of that confinement in the Supreme Court. However, that would be the entire extent of the Supreme Court's habeas corpus power under a remedy-only reading of Section 14.

In our view (and evidently in Marshall's), this outcome does not pass the straight-face test of statutory construction. Could Congress have possibly intended, when it enacted Section 14, to turn the Great Writ into a mini-writ, which could apply for the benefit of foreign officials but not citizens of the United States?<sup>233</sup> To borrow a favorite Marshallian phrase, this is a position "too extravagant to be maintained."

*Marbury* and *Bollman* are not anomalies. The early patent laws<sup>234</sup> and the litigation

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<sup>233</sup> Marshall made the same point less colloquially. Given the importance of the writ of habeas corpus, Congress "must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." *Bollman*, 8 U.S. at 95.

<sup>234</sup> Section 4 of the Patent Act of 1790, ch.7, § 4, 1 Stat. 109, 111 (1790), provided that patent infringers would be liable for damages "which may be recovered in an action on the case founded on this act." *Id.* This was amended by the Patent Act of 1793. Patent Act of 1793, ch. 11, 1 Stat. 318 (1793). Section 5 of that Act provided that patent infringers would be liable for treble damages "which may be recovered in an action on the case founded on this act, in the circuit court of the United States, or any other court having competent jurisdiction." *Id.* at 322. Literally, these statutes provide for a cause of action and remedies but do not explicitly vest subject-matter jurisdiction. Neither the Circuit Court nor any other federal court had general federal question jurisdiction (there was no counterpart to 28 U.S.C. §1331 (2001)), and there was no specific jurisdictional statute for patent



concerning the Bank of the United States<sup>235</sup> also involved statutes that were interpreted as giving arising under jurisdiction to the federal courts through statutes that, read literally, merely created causes of action, remedies or standing to sue but did not specifically provide for subject-matter jurisdiction. The Supreme Court decided that Congress must have intended to vest subject-matter jurisdiction because all cases brought under these statutes would necessarily present federal questions.<sup>236</sup>

What we have said about the grant of habeas power in Section 14 applies to the grant of mandamus power in Section 13. Although not of the exceptional significance of habeas corpus, the writ of mandamus was another important independent common law action that was

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infringement cases (in contrast to today's statute, 28 U.S.C. §1338 (2001)). Nevertheless, as Marshall observed, the Circuit Court's subject-matter jurisdiction over infringement cases could not be seriously challenged: patent infringement cases themselves arise under the laws of the United States, and Congress must have intended to provide for subject-matter jurisdiction in the Patent Acts cited above, or the patent laws would have been unenforceable in the courts of the United States. *See Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 826 (1824).

<sup>235</sup> In *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809), the Bank brought a lawsuit in a federal trial court (the Circuit Court of Georgia) and asserted as the basis of jurisdiction the provision in its Congressional charter authorizing it "to sue and be sued . . . in courts of record, or any other place whatsoever." *Id.* at 85. Under present doctrine, we would dismiss this out of hand as a jurisdictional statute because facially it only provides standing to sue. In keeping with our view, the Supreme Court, in a Marshall opinion, held that this statutory provision did not provide jurisdiction because it did not expressly authorize a suit in the federal trial courts. *Id.* at 85-86. When the Bank was re-chartered following the War of 1812, however, Congress got the message and changed this provision to provide that the Bank was authorized "to sue and be sued . . . in all State Courts having competent jurisdiction, and in any Circuit Court of the United States." *Osborn*, 22 U.S. at 817. This cured the problem identified in *Deveaux*, but this statute still looks to modern eyes as though it simply provided the Bank with standing to sue; it did not specifically authorize federal court jurisdiction, nor did any separate statute give general arising under jurisdiction. Nevertheless, the Supreme Court, again through Marshall, held that this statute provided the Circuit Courts with the arising under jurisdiction to decide cases brought by the Bank. *Id.* at 817-18.

Viewed as a determination of Congressional intent, the statutory interpretation in *Osborn* appears correct. The Supreme Court had told Congress in *Deveaux* that the sue and be sued clause did not provide for federal court jurisdiction because it did not specify suits in the federal trial courts. Congress made precisely that change in the sue and be sued clause when it re-chartered the Bank. A plausible -- and probably necessary -- interpretation of this change is that Congress intended to cure the jurisdictional problem identified in *Deveaux*.

<sup>236</sup> *Osborn*, 22 U.S. at 823-27. Marshall offered another example -- the statutes which authorized officers of the United States to sue in their own names in the federal trial courts. In Marshall's view, these operated as jurisdictional statutes within the arising under power because every action of the officials is authorized by federal law. *Id.* at 824-25.

considered essential to the preservation of civil liberties and due process.<sup>237</sup> Congress gave the Supreme Court the explicit power to issue writs of mandamus to both the lower federal courts and federal officials. Such cases involve claims that the lower courts or federal officials violated the Constitution, laws or treaties of the United States. They necessarily fall within Article III's arising under jurisdiction.<sup>238</sup> But if one were to adopt a remedial-only construction of Section 13, given that there was no separate jurisdictional statute, such a restrictive construction would shrink Section 13 in a manner similar to Section 14. The Court would possess mandamus authority in only a very narrow class of cases.<sup>239</sup>

Finally, the cases supporting Marshall's treatment of the mandamus clause in Section 13 cannot be discounted by the observation that they, too, were written by Marshall. There are also precedents that pre-date and post-date the Marshall Court.

The earliest Supreme Court decision in which a writ was granted pursuant to Section 13

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<sup>237</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*109-11.

<sup>238</sup> Our position is not the same as Professor Pfander's. He argues that mandamus and habeas corpus are free-standing writs and that Congress may authorize the Supreme Court to issue them as an exercise of supervisory power that is outside of the subject-matter limitations of Article III. Pfander, *supra* note 200, at 1560-1606. We adhere to the orthodox view that all exercises of the judicial power of the United States must be within the Article III limits of subject-matter jurisdiction. Our contention is that, like the patent laws, Sections 13 and 14 of the 1789 Judiciary Act were properly construed as representing an Congressional intent to vest substantive powers in the federal courts to adjudicate cases in which, by the explicit limits of those statutes, federal questions would necessarily arise (with Section 13 limited to mandamus against federal courts and federal officials, and Section 14 limited to habeas corpus for federal prisoners). Our view of these statutes settles both their character as jurisdictional and their compliance with the boundaries of Article III. The only remaining question is how those statutes operate within the allocation of the Supreme Court's original and appellate jurisdictions.

<sup>239</sup> As with Section 14, the remedial-only construction of Section 13 would allow writs of mandamus to be issued by the Supreme Court in original actions involving ambassadors and other foreign officials. Unlike Section 14, it is also possible to envisage writs of mandamus being issued in original Supreme Court actions brought by states against federal officials. *See Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 109-10 (1861). Although Marshall's interpretation of Article III meant that the Supreme Court could not issue writs of mandamus directly against federal officers in its appellate jurisdiction, the writ could be issued by the Supreme Court against the lower federal courts. *See infra* note 262.

is *United States v. Peters*,<sup>240</sup> decided in 1795. That case involved the authority of the Supreme Court to issue the writ of prohibition.<sup>241</sup> In the same clause as the mandamus power, Section 13 of the Judiciary Act of 1789 gave the Supreme Court the “power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction.”<sup>242</sup> Along with mandamus and habeas corpus, prohibition was the third important common law writ that originated as a prerogative writ of the King’s Bench in England. At common law, prohibition was another independent action, filed directly in the King’s Bench, by which that court had the authority to order any inferior court to cease acting on a case over which it did not have jurisdiction.<sup>243</sup>

In *Peters*, the United States invoked Section 13 by filing a petition for writ of prohibition against Judge Peters directly with the Supreme Court.<sup>244</sup> The government claimed that the district court was acting in violation of federal laws and treaties with France in entertaining a prize action for a vessel seized by a French naval vessel on the high seas.<sup>245</sup> The attorneys representing Judge Peters argued, among other things, that if indeed the prize action was unlawful, the proper remedy was to await Judge Peters’ adjudication and appeal the decision to

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<sup>240</sup> 3 U.S. (3 Dallas) 121 (1795).

<sup>241</sup> *Peters*, 3 U.S. at 121.

<sup>242</sup> Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (1789). *See* note 201, *supra*, for the text of Section 13.

<sup>243</sup> *See* 3 WILLIAM BLACKSTONE, COMMENTARIES \*111-12. Blackstone observes that the most important applications of the writ of prohibition occurred in the conflicts of jurisdiction between the ecclesiastical and secular courts. 3 *id.* at \*112-14.

<sup>244</sup> *U.S. v. Peters*, 3 U.S. at 129.

<sup>245</sup> The claim was that federal law and treaties with France required the prize action to be determined in French courts. *Id.* at 127-30.

the circuit court under Section 21 of the Judiciary Act and, if necessary, then to the Supreme Court under Section 22.<sup>246</sup> Evidently rejecting this argument, the Supreme Court decided the case on the merits and issued the writ of prohibition.<sup>247</sup>

As with the mandamus and habeas corpus grants of judicial power, cases seeking petitions for writs of prohibition necessarily arise under federal law (because they claim that the district court was acting without jurisdiction), yet there was no statute, other than Section 13 itself, that purported to give the Supreme Court the adjudicatory power over these cases.<sup>248</sup> By deciding the petition on the merits in *Peters*, and issuing the writ of prohibition, the Supreme Court was necessarily treating Section 13 as a substantive grant of adjudicatory power – that is, as a statute that vested subject-matter jurisdiction.

And, as with the mandamus and habeas corpus grants of power, a remedial-only construction of the prohibition grant in Section 13 would reduce it to a virtual nullity. The

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<sup>246</sup> *Id.* at 129. Section 21 provided:

That from the final decrees in a district court in causes of admiralty and maritime jurisdiction, ... an appeal shall be allowed to the next circuit court, to be held in such district.

Judiciary Act of 1789, ch. 20, § 21, 1 Stat. 73, 83-84 (1789). Section 22 provided:

And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court . . . be re-examined and reversed or affirmed in the Supreme Court. . . .

Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84 (1789).

<sup>247</sup> *Peters*, 3 U.S. at 129-32.

<sup>248</sup> The United States was the petitioner in *Peters*, and cases in which the United States is a party represent another category of the Article III appellate jurisdiction. But no act of Congress gave the Supreme Court jurisdiction to decide such cases, except on appeal from the final decisions of the circuit courts. See The Judiciary Act, § 22, *supra* note 246.

purpose of a writ of prohibition is to halt a plainly illegal judicial proceeding, ideally in its early stages. How could the Supreme Court obtain jurisdiction to issue a writ of prohibition to a district court acting as an admiralty or maritime court? Like the arising under jurisdiction, the admiralty and maritime jurisdiction falls within the Supreme Court's appellate jurisdiction. Not only was there no separate statute (that is, other than Section 13) authorizing the Supreme Court to exercise its appellate jurisdiction in direct petitions for prohibition relating to admiralty and maritime cases, but there was not even a statutory right to appeal such cases from the district courts to the Supreme Court. Section 21 of the 1789 Judiciary Act provided for appeals from the district courts to the circuit courts in admiralty and maritime cases, and even then only from the "final decrees" of the district courts.<sup>249</sup> Under a narrow reading of Section 13, therefore, the Supreme Court could issue writs of prohibition to the district courts in admiralty and maritime cases only if, by pure happenstance, a case fell within the Supreme Court's original jurisdiction.<sup>250</sup> In all other instances the Court would lack jurisdiction to grant the writ of prohibition until *after* the district court proceeding had run its course, and that would, of course, have the practical effect of nullifying the Court's authority to issue the writ.

The precedent that post-dates the Marshall Court is *Ex parte Yerger*,<sup>251</sup> decided in 1869

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<sup>249</sup> See The Judiciary Act, § 21, *supra* note 246.

<sup>250</sup> Professor Weinberg dismisses the significance of *Peters* by observing that the case fit within Marshall's definition of appellate in *Marbury* because the Supreme Court was asked to review and revise the decision of a lower court. Weinberg, *supra* note 14, at 1323-24. This does help solve the problem, discussed below, of whether Marshall correctly held that *Marbury's* case was an original and not appellate action. But that nevertheless begs the question of how the Supreme Court could have had appellate jurisdiction in *Peters* to decide the case on the merits and to issue a writ of prohibition, if, as Professor Weinberg believes, Section 13 is merely a remedial statute.

<sup>251</sup> 75 U.S. (8 Wall.) 85 (1869).

during the conflicts over Reconstruction. Yerger filed a petition for *habeas corpus* directly with the Supreme Court under Section 14 of the 1789 Judiciary Act.<sup>252</sup> The government maintained that the Supreme Court did not have jurisdiction over Yerger's petition. After reviewing the decisions, including *Bollman*, in which the Court had treated Section 14 as a jurisdictional statute, Chief Justice Chase said:

We have carefully considered the argument against [jurisdiction], made in this case, and are satisfied that the doctrine heretofore maintained is sound.

The great and leading intent of the Constitution and the law must be kept constantly in view upon the examination of every question of construction.

That intent, in respect to the writ of *habeas corpus*, is manifest. It is that every citizen may be protected by judicial action from unlawful imprisonment. To this end [Section 14 of] the act of 1789 provided that every court of the United States should have power to issue the writ. *The jurisdiction thus given in law to the Circuit and District Courts is original; that given by the Constitution and the law to this court is appellate. Given in general terms, it must necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted*

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<sup>252</sup> *Yerger*, 75 U.S. at 88. Yerger went directly to the Supreme Court under Section 14 because of the following sequence of events. In 1867, Congress passed a statute authorizing the circuit courts to grant writs of *habeas corpus* "in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty or law of the United States"; and the statute provided a right of appeal to the Supreme Court. *See id.* at 87. In 1868, Congress repealed the portion of the statute which allowed for appeals to the Supreme Court. *Id.* The evident (and successful) purpose of the repeal was to prevent the Supreme Court from deciding *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), which was then pending. *See Yerger*, 75 U.S. at 87. The circuit court had denied Yerger's petition for *habeas corpus*, and the repealing of the statute prevented him from appealing that denial to the Supreme Court. *Id.* at 87-88. He therefore invoked Section 14 of the 1789 Judiciary Act and filed a *habeas* petition directly in the Supreme Court. *Id.* at 88.

from it.<sup>253</sup>

Ultimately, the issue in cases such as *Marbury*, *Bollman*, *Peters* and *Yerger* is one of Congressional intent. When Congress gave the Supreme Court the “power” to issue the three most important writs in English law – habeas corpus, mandamus and prohibition – and when it did so in terms by which all such cases would arise under federal law,<sup>254</sup> did the Congress nevertheless intend that those were remedial statutes that could be used only in the exceptionally rare instances of cases falling within the Supreme Court’s original jurisdiction? It takes more than modern views of federal jurisdiction and pleading to prove that Congress intended such a

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<sup>253</sup> *Yerger*, 75 U.S. at 101. The Court went on to hold that the Act of 1867 did not impliedly repeal Section 14 of the 1789 Judiciary Act. *Id.* at 105-06.

<sup>254</sup> These statutes were drafted carefully to cover only cases arising under federal law. The Supreme Court was not given the complete powers of habeas corpus, mandamus and prohibition that could be exercised by the King’s Bench at common law. The King’s Bench had the authority to issue the Great Writ on behalf of any prisoner held under color of any law. 3 WILLIAM BLACKSTONE, COMMENTARIES \*131. In Section 14 of the Judiciary Act, the Great Writ was limited to prisoners held in confinement under the authority of the United States; it did not include state prisoners who were held allegedly in violation of state law. § 14, 1 Stat. at 82. Similarly, although the King’s Bench could issue the writ of mandamus to all officials, persons, corporations and lower courts, 3 *id.* at \*110, Section 13 authorized the Supreme Court to issue mandamus only to federal officials and to the lower federal courts. § 13, 1 Stat. at 81. By the same token, the King’s Bench could issue the writ of prohibition to any other court in England, 3 *id.* at \*112, while Section 13 empowered the Supreme Court to issue prohibition only to federal district courts acting as admiralty or maritime courts. § 13, 1 Stat. at 81. In all these instances Congress restricted the writs in question when necessary to preserve the independence of the state courts, but preserved their common-law breadth and significance in cases involving federal courts, federal questions, and federal authority.

result. It is more reasonable to conclude, as Marshall and his predecessors and successors did, that Congress intended to empower the Supreme Court to issue those writs to the lower federal courts or to federal officials, as the case may be, for violations of the Constitution, laws and treaties of the United States.



## B. The Supreme Court's Original and Appellate Jurisdiction

### 1. Statutory Construction

*Ex parte Bollman* presented another jurisdictional issue, one that seemed to be a reprise of *Marbury v. Madison*. The petitions for habeas corpus were filed directly in the Supreme Court and therefore appeared to invoke the Court's original jurisdiction. The basis for awarding the writ was the violation of federal law (the constitutional definition of treason). Article III jurisdiction existed in these cases (as indeed, in every habeas corpus case involving the legality of confining federal prisoners) because they arose under federal law. Inasmuch as such federal question cases fall within the Supreme Court's appellate jurisdiction, it could follow from *Marbury* that Section 14 could not be applied constitutionally to authorize a habeas corpus petition filed directly in the Supreme Court.<sup>255</sup>

No doubt intent on avoiding another jurisdictional defeat, the ubiquitous Charles Lee, who represented Swartwout, anticipated this issue. He argued that the Supreme Court was actually exercising appellate jurisdiction in this case because the petition was, in effect, an appeal of an allegedly illegal and erroneous order of the Circuit Court.<sup>256</sup> Marshall agreed. He recalled that the definition of appellate jurisdiction in *Marbury* was that it sought to revise or correct a prior court judgment. Here, the Supreme Court was being asked to revise "a decision of an

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<sup>255</sup> Justice Johnson dissented in *Bollman* on precisely that ground. *Bollman*, 8 U.S. at 101-07. The government declined to argue the jurisdictional issues, *id.* at 79, perhaps because that would have required the Attorney General to rely on the precedent of *Marbury v. Madison*. See note 118, *supra*. Justice Johnson, who was Jefferson's first appointee to the Supreme Court, relied heavily on *Marbury*, see *Bollman*, 8 U.S. at 103-06, and described it as a "very able decision." *Id.* at 104.

<sup>256</sup> *Id.* at 79.

inferior court, by which a citizen has been committed to jail.”<sup>257</sup> Marshall reasoned: “The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore [is] appellate in its nature.”<sup>258</sup>

Was Marshall being disingenuous either here or in *Marbury*? After all, Lee had argued in *Marbury* that mandamus was appellate in nature and used as his example the authority given to the Supreme Court in Section 13 to issue the writ of mandamus to the lower federal courts.<sup>259</sup> He also relied on *Peters*, in which a writ of prohibition had been issued the district court.<sup>260</sup> But a careful reading of *Marbury* suggests that Marshall was not trying to have it both ways. He had acknowledged Lee’s argument, agreed that the appellate jurisdiction could be exercised in a variety of forms, and even accepted that the issuance of mandamus against the lower federal courts could be an exercise of the appellate jurisdiction (as the issuance of prohibition had been in *Peters*).<sup>261</sup> His problem with *Marbury*’s case was that there had been no prior judicial proceeding which the Court was being asked to revise. His conclusion in *Marbury* was not that Section 13 was unconstitutional in its entirety, but only as applied to writs of mandamus directed

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<sup>257</sup> *Id.* at 101.

<sup>258</sup> *Id.*

<sup>259</sup> Lee had argued that a mandamus petition sought to correct a prior decision of a government officer and therefore (on a rough analogy to a modern appeal of an administrative ruling) ought to be regarded as appellate, but the Court proved unwilling to stretch the concept of appellate jurisdiction that far. See *supra* notes 102-105 and accompanying text for Lee’s jurisdictional argument in *Marbury*.

<sup>260</sup> *Marbury*, 5 U.S. at 148-49.

<sup>261</sup> *Marbury*, 5 U.S. at 175. According to Blackstone, the use of mandamus by the King’s Bench to “superintend all inferior tribunals” and “obviate[e] their denial of justice” was at that time its most important function. 3 WILLIAM BLACKSTONE, COMMENTARIES \*110-11. On *Peters* as an appellate case, see *supra* note 248.

to public officials: “The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, *to issue writs of mandamus to public officers*, appears not be warranted by the constitution. . . .”<sup>262</sup> Consequently, his position in *Marbury* is not inconsistent with his position in *Bollman* three years later.

## 2. *Constitutional Construction and the Exceptions Clause*

In *Marbury*, Marshall read Article III as prohibiting Congress from adding to the two prescribed categories of original jurisdiction. Although scholars have criticized Marshall’s limiting construction of the original jurisdiction, it is consistent with a “plain meaning” construction of Article III.<sup>263</sup> In addition, it appears that Marshall’s construction of Article III is consistent with the Framers’ intent as expressed in the Constitutional Convention.<sup>264</sup> Perhaps more importantly, this was not the first time that John Marshall had thought about this question. In the Virginia Ratification Convention, he and Edmund Pendleton were selected by the supporters of the Constitution to explain and defend Article III. Here is Pendleton’s explanation

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<sup>262</sup> *Marbury*, 5 U.S. at 176 (emphasis added). Although Marshall’s interpretation of the appellate jurisdiction meant that Section 13 could not be applied to federal officials, it saved the remainder of Section 13 as well as Section 14 – that is, the writ of prohibition could be granted to the district courts acting as admiralty or maritime courts; the writ of mandamus could be granted to any lower federal court; and the writ of habeas corpus could be granted on behalf of federal prisoners.

<sup>263</sup> Article III states:

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cl. 2.

<sup>264</sup> See the careful and detailed analysis in Pfander, *supra* note 274, at 1550-58. See also Amar, *supra* note 273, at 469-76; Weinberg, *supra* note 274, at 1361.

of the original jurisdiction:

The next clause settles the original jurisdiction of the Supreme Court, confining it to two cases – that of Ambassadors, Ministers and Consuls – and those in which a State shall be a party. – It excludes its original jurisdiction in all other cases.<sup>265</sup>

Similarly, Alexander Hamilton represented in *The Federalist No. 81* that the two expressed categories of original jurisdiction were exclusive.<sup>266</sup>

Nevertheless, there is a strong argument that, through the Exceptions and Necessary and Proper Clauses, Congress could, in effect, transfer a category or sub-category of cases from within the appellate to the original jurisdiction of the Supreme Court. That argument would be structured on the breadth of the enumerated and implied powers as later articulated by Marshall

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<sup>265</sup> Debates of the Virginia Convention (June 19, 1788), in 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1399 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter 10 DOCUMENTARY HISTORY]. Pendleton then goes on at some length about the kinds of exceptions and regulations that Congress can make to the appellate jurisdiction. He does not mention taking a category, or sub-category, of the appellate jurisdiction and adding it to the original jurisdiction. 10 *id.* at 1399-1401.

<sup>266</sup> “The Supreme Court is to be invested with original jurisdiction *only* ‘in cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party.’” THE FEDERALIST NO. 81, at 397 (Alexander Hamilton) (Terence Ball ed., 2003) (emphasis added). “[W]e have seen that the original jurisdiction of the supreme court would be confined to two classes of causes, and those of a nature rarely to occur. In all other causes of federal cognizance, the original jurisdiction would appertain to the inferior tribunals; and the supreme court would have nothing more than an appellate jurisdiction, ‘with such *exceptions* and under such *regulations* as the congress shall make.’” *Id.* at 398. “[I]n the partition of this authority a very small portion of original jurisdiction has been reserved to the supreme court, and the rest consigned to the subordinate tribunals . . .” *Id.* at 400. Hamilton suggests some very ingenious Congressional regulations of federal court jurisdiction, including even the possibility of giving appellate jurisdiction to the lower federal courts over the state courts. But not even Hamilton contemplated transferring cases from the appellate to the original jurisdiction.

Professor Amar points out that geography provides a major reason for these representations on the scope of the original jurisdiction. Amar, *supra* note xx at yy. A substantial concern over the creation of federal courts was that individuals and state officials would be regularly summoned for trials to be held at tremendous distances in the (as yet undetermined) federal capital. When we recall that the maximum speed at which persons or information could travel was the speed of one’s horse (on a good road and in good weather), we can understand the basis for this concern. The supporters of the Constitution responded by pointing to the limited scope of the Supreme Court’s original jurisdiction and the power of Congress to locate the federal trial courts within each of the states. *See* THE FEDERALIST NO. 81, *supra*, at 396.

in *McCulloch v. Maryland*<sup>267</sup> and *Gibbons v. Ogden*.<sup>268</sup>

Without necessarily disagreeing with that argument,<sup>269</sup> we believe it should be sufficient

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<sup>267</sup> 17 U.S. (4 Wheat.) 316 (1819).

<sup>268</sup> 22 U.S. (9 Wheat.) 23 (1824). The argument goes something like this: The Exceptions Clause is an enumerated power, and, like all other enumerated powers, it should be construed broadly, with an attendant full complement of implied authority as to means under the Necessary and Proper Clause. Statutes that *either* eliminate altogether a category or sub-category of cases from the appellate jurisdiction *or* take that category or sub-category out of the appellate jurisdiction and moves it into the original jurisdiction are, literally, “exceptions” to the appellate jurisdiction; and a broad construction of the Exceptions Clause could allow for both. Congress also has a broad choice of means in effectuating the Exceptions Clause. The Framers may have singled out cases in which a state is a party and cases affecting foreign ministers and ambassadors for the Supreme Court’s original jurisdiction because those cases, which might touch on delicate matters of sovereignty, are so important as to warrant an immediate resolution from the nation’s highest court. But there might be other specific situations within one of the broad categories of appellate jurisdiction that might make desirable, if not essential, the same kind of prompt adjudication by the Supreme Court. Cases involving petitions for mandamus against federal officials alleging violations of federal law, or petitions for prohibition against district courts exceeding their admiralty or maritime jurisdictions, or petitions for habeas corpus from federal prisoners alleging that they are being held in custody in violation of federal law, may be three such examples. Whether it is “necessary” for Congress to vest in the original jurisdiction these sub-categories of the arising under jurisdiction, is a political decision for Congress to make. And, finally, Article III, Section 2, Clause 2 does not literally prohibit this action. It plainly would prevent Congress from adding a new category of jurisdiction that is beyond the scope of Article III; but it does not explicitly prohibit adding new categories or sub-categories to the original jurisdiction, provided they are within the scope of “judicial power” set out in Article III. *See* U.S. CONST. art III, § 2, cl. 2.

<sup>269</sup> *But see* Weinberg, *supra* note 6, at 1348-79. Professor Weinberg stresses in detail the practical and structural problems that would be occasioned by the exercise of such power by Congress. Of particular concern to her is that there is no principled limit to the exercise of this power, with the possible result that Congress could crush the Supreme Court with trials in a broad variety of cases that are otherwise assigned to the appellate jurisdiction. Weinberg, *supra* note 6, at 1370-89. She acknowledges, however, that the Supreme Court was hardly overworked in 1803, *id.* at 1381, and adding (as Congress might have thought that it did in §§ 13 and 14) the powers to issue prohibition against the district courts in admiralty or maritime cases, mandamus against federal officials and habeas corpus for federal prisoners would have hardly threatened the functioning or stature of the Supreme Court. It should be noted, in this regard, that the Supreme Court figured out how to hold trials in both *Marbury*, *see* 5 U.S. at 137-46, and *Bollman*, 8 U.S. at 108-24. Moreover fundamentally, however, under *McCulloch* and *Gibbons*, the argument of no limits just does not work. The teaching of those cases is that the scope of Congress’ enumerated powers is plenary, that Congress – and not the courts – decide on the workability and desirability of the means that are chosen, and that limits on the scope of these powers are therefore determined in the political processes. Professor Weinberg might be quite correct that the benefits of allowing for the transfer of cases from the appellate to the original jurisdiction of the Supreme Court are much less than the dangers of opening a Pandora’s Box. That is a good reason for Congress to exercise its power with care; it is not a reason for denying the power to Congress.

*United States v. Peters*, 3 U.S. (3 Dallas) 121, *supra* notes 244-50 and accompanying text, provides an illustration of the reasons why Congress could believe that it was necessary for a case to be heard immediately by the Supreme Court. When Judge Peters assumed jurisdiction in the prize case involving a ship captured by the French navy on the high seas, that action precipitated a serious diplomatic dispute between the France and the United States. *Peters*, 3 U.S. at 130-31. That dispute was resolved quickly, but only because the United States was able to seek and obtain a writ of prohibition directly from the Supreme Court. *See id.* at 132. If the ordinary

for our present purposes to point out that *McCulloch* and *Gibbons* were barely twinkles in the Supreme Court's eyes (they were decided, respectively, sixteen and twenty-one years after *Marbury*); that *Marbury* itself was a necessary foundation for those decisions; and that our present understanding of those decisions is filtered through the study of constitutional law for two centuries. Marshall should not be faulted for applying a positivist "plain meaning" reading of Article III, with the knowledge that this reading was consistent with the public representations made by leading supporters of the Constitution in urging its ratification. Marshall's more limited view of the scope of original jurisdiction was certainly defensible, even if it failed to give Congress' "exceptions and regulations" authority a broad sweep.

### *C. Jurisdiction and the Merits*

The final major criticism of the opinion in *Marbury* is that, once the Court concluded it did not have jurisdiction in the case, it was wholly inappropriate for Marshall to examine the merits of Marbury's claim. Jefferson and his supporters regarded the decision that Marbury had a right to his commission, that the Jefferson administration had violated Marbury's right by failing to deliver it, and that the courts of the United States could order an appropriate remedy, as *obiter dictum* that had no relevance to the disposition of the case but was designed simply to embarrass Jefferson politically.<sup>270</sup>

There is, of course, a well-established rule that a court should determine its jurisdiction

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course of litigation and appeals specified in the Judiciary Act had been followed (a trial and final decree by Judge Peters, an appeal to the circuit court and finally an appeal to the Supreme Court), the matter would have lingered and the dispute may have ripened into a conflict.

<sup>270</sup> See *supra* notes 78 and 118.

before deciding the merits of a case.<sup>271</sup> But *Marbury* presented a countervailing rule – that a court should, if possible, avoid deciding on the constitutionality of an act of Congress.<sup>272</sup> If the Supreme Court concluded that *Marbury*'s rights had not been violated, or that there was no possible remedy that could be given by the courts, the case could have been dismissed without reaching the question of the constitutionality of Section 13 of the 1789 Judiciary Act.<sup>273</sup>

Marshall appears to have been caught between the proverbial rock and hard place. If he decided the merits before the jurisdictional issue, he opened himself (and the Court) to Jefferson's charge of delivering *obiter dicta*. Although there was precedent for judicial review, it had not yet been firmly established in the Supreme Court,<sup>274</sup> and the Court had yet to nullify an

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<sup>271</sup> See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 514 (1869) (holding that “[w]ithout jurisdiction the court cannot proceed at all in any cause.”); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) (stating that “the first and fundamental question is that of jurisdiction.”). In *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998), the Court traces this rule back to *Capron v. Van Noorden*, 6 U.S. (2 Cranch) 126 (1804), where a judgement was set aside on the basis of a lack of federal jurisdiction.

<sup>272</sup> See, e.g., *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157-58 (1984); *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Mobile v. Bolden*, 446 U.S. 55, 60 (1980); *Kolender v. Lawson*, 461 U.S. 352, 361 n.10 (1983); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring); *Light v. United States*, 220 U.S. 523, 538 (1911); *Siler v. Loiusville & Nashville R. Co.*, 213 U.S. 175, 193 (1909); *Burton v. United States*, 196 U.S. 283, 295 (1905).

<sup>273</sup> In disposing of previous petitions for mandamus, the Supreme Court had denied the petitions on the merits without discussing jurisdiction. See, e.g., *United States v. Lawrence*, 3 U.S. (3 Dall.) 42, 53 (1795); *Amar*, *supra* note 197, at 462 & n.93 (1989) (noting that an unreported, *pre-Marbury* mandamus case, *United States v. Hopkins*, decided in 1794, did not discuss jurisdiction of the Court to order the writ). See *supra* notes 244-50 and accompanying text for discussion of *United States v. Peters*, 3 U.S. (3 Dall.) 121 (1795) (issuing writ of prohibition without discussing Court's jurisdiction to order it).

<sup>274</sup> There were two precedents supporting, but not establishing, judicial review of Congressional statutes. In *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), two Supreme Court justices, sitting on circuit, held that an act of Congress requiring the justices to perform executive functions was unconstitutional, *id.* at 409; and three other justices expressed that view in letters to the President that we would now regard as advisory opinions, *id.* at 410. The Attorney General petitioned the Supreme Court for a writ of mandamus to the circuit court. *Id.* at 409. While the case was pending, Congress repealed the allegedly offending portions of the statute; and the Supreme Court dismissed the case as moot. *Id.* In *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796), four justices upheld the constitutionality of a federal taxing statute and necessarily assumed (as did the parties, with the United States represented by Alexander Hamilton) that the Court had the power of judicial review. *Id.* at 175.

act of Congress as unconstitutional.<sup>275</sup> *Marbury*'s case was within the Article III limits of federal court jurisdiction because it arose under the laws of the United States; the jurisdictional question was which federal court could decide the merits of the case. If Marshall had issued a "purely" jurisdictional decision that announced the power of judicial review and then applied it to strike down a Congressional statute, he (and the Court ) would have been open to a charge of unnecessarily aggrandizing judicial power in a case that was, according to Jefferson and his supporters, utterly without merit. Such a step would probably have fanned the flames of further distrust between Congress and the courts. While these considerations would not support an

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<sup>275</sup> In *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800), decided only three years before *Marbury*, four justices discussed the power of a court to declare a Georgia confiscation law as in violation of the Georgia Constitution. In upholding the law, all justices agreed that the Supreme Court had the power to declare statutes in collision with the Constitution as void. Justice Chase stated:

It is, indeed, a general opinion, it is expressly admitted by all this bar, and some of the Judges have, individually, in the Circuits, decided, that the Supreme Court can declare an act of congress to be unconstitutional, and, therefore, invalid; but there is no adjudication of the Supreme Court itself upon the point.

*Id.* at 19. Chase himself had made such a declaration in *United States v. Callender*, 25 F. Cas. 239, 254-58 (C.C.D.Va. 1800). Although this case is more famous because of the role it played in Chase's impeachment, his arguments in support of judicial review are perhaps the most detailed and extensive before *Marbury*. See also *The Case of Fries*, 9 F. Cas. 924, 932-33 (1800) (Chase, J.) (stating (in another politicized trial) that "[i]f congress should pass a law contrary to the constitution, such law would be void, and the courts of the Unites States possess complete authority, and are the only tribunal to decide, whether any law is contrary to the constitution.").



attempt to examine issues lying completely outside the case, they arguably supported the Court's attempt to harmonize two conflicting doctrines of judicial restraint by examining potential non-constitutional grounds for denying the writ before addressing fundamental constitutional questions of legislative and judicial power.

For these reasons, we think that Marshall's opinion in *Marbury* is consistent with the ideals of the rule of law that he so brilliantly advocated. We do not claim to have vanquished *Marbury's* critics, but we do maintain that there was sufficient foundation for the Court's analysis to support our contention that the decision was consistent with the rule of law. We therefore turn next to an examination of the origins of these rule of law principles and their applications to the doctrine of judicial review.

## V. THE SOURCES OF *MARBURY'S* PRINCIPLES OF JUDICIAL REVIEW

Marshall's argument for judicial review in *Marbury* was not original. It was prefigured by several early state court decisions holding that the courts had the power to declare that state laws violated the state constitutions.<sup>276</sup> The most notable of these decisions was written by George Wythe, the Chancellor of Virginia, who was then generally regarded as the greatest judge in the United States and, as a law professor, counted among his many students Thomas Jefferson, Spencer Roane, John Marshall and James Madison's father.<sup>277</sup> Although the Supreme Court had

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<sup>276</sup> See, e.g., *Commonwealth v. Caton*, 4 Call. 5, 9-13 (Va. Ct. of App. 1782); *Kemper v. Hawkins*, 3 Va. 20 (Va. 1788); *Caldwell v Commonwealth*, 1 Sneed (Ky) 129 (Ky. Ct. of App. 1802); *DBayard v. Singleton*, 1 Martin 48 (N.C. 1787). See also Douglas, *supra* note 3, at 378 & n.11 (2003) (discussing other pre-*Marbury* state court cases invoking judicial review: *Holmes v. Watson* (N.J. 1780); *Rutgers v. Waddington* (Mayor's Ct., City of N.Y. 1784); *Trevett v. Weedon* (Superior Ct. of R.I. 1786)).

<sup>277</sup> *Caton*, 4 Call. at 5. Five of the other six judges on the Virginia Court of Appeals agreed with Wythe's opinion that the court had the power to declare an act of the legislature unconstitutional. *Id.* at 19-20. On Wythe's career as a law professor at William & Mary, see Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527, 533-37 (1990).

yet to hold a Congressional statute unconstitutional, there were precedents in that Court that would support such an exercise of power.<sup>278</sup> Moreover, judicial review appears to have been an accepted doctrine by most delegates in the Constitutional Convention<sup>279</sup> and by the leading figures on both sides in the state ratification debates,<sup>280</sup> where many of those who commented on judicial review associated it with the rule of law. Indeed, Marshall's arguments in *Marbury* echo Alexander Hamilton's arguments for judicial review in *The Federalist No. 78*.

Still, this begs a larger question: on what basis did so many of the Founders of the American Republic assert, without qualification, that judicial review would be an important, albeit not explicitly stated, component of the government they were creating? We believe they grounded their support for judicial review on several rule of law principles inherited from English common law through its chief contemporary exponent, William Blackstone.

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<sup>278</sup> See the cases discussed in notes xx and yy, *supra*. See also, e.g, Mark Graber, *The Scholarship of Sanford Levinson: Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609 (2003)(reviewing the precedents for judicial review).

<sup>279</sup> See HENRY HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 14-16 (1953).

<sup>280</sup> We discuss the references to judicial review in the ratification debates in Part VI. See *infra* notes 310-74 and accompanying text. See also RANDY BARNETT, *RESCUING THE LOST CONSTITUTION* \_\_\_\_ (2003).

This conclusion may appear counter-intuitive and paradoxical. England did not have a written constitution, its legal system was based on the doctrine of Parliamentary supremacy, and there was no separation of governmental powers – the executive, legislative and judicial branches of the government were each represented in, and derived their ultimate authority from, a single Parliament. Nevertheless, the American lawyers and judges who created our Republic were raised on English law, with their principal guide being William Blackstone’s *Commentaries*,<sup>281</sup>

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<sup>281</sup> We have mentioned the importance of Blackstone before. See pp. xx and notes yy, *supra*. One index of Blackstone’s significance is the frequent citation to and reliance on his *Commentaries* in federal and state courts during the early years of the Republic. For example, volumes 1 - 5 of the United States Reports contain the early decisions of the United States and Pennsylvania Supreme Courts. In addition to *Marbury*, in which it was cited as authority four times by Marshall, William Blackstone’s *Commentaries* were cited as authority 58 times by counsel or by the court in these five volumes. ( This number only includes the Pennsylvania and U.S. Supreme Court cases. If the lower federal and state courts were included, the number would reach over 400 cites.) See, e.g., *Welsh v. Murray*, 4 U.S. (4 Dall.) 320, 320 (Pa. 1805)(cited twice by counsel); *Deshler v. Beery*, 4 U.S. (4 Dall.) 300, 300 (Pa. 1804)(cited once by counsel); *Hepburn v. Auld*, 5 U.S. (1 Cranch) 321, 329 (1803)(cited once by counsel); *M’Fadden v. Parker*, 4 U.S. (4 Dall.) 275, 277 (Pa. 1803)(cited once by counsel); *Jones v. Insurance Co. of North America*, 4 U.S. (4 Dall.) 246, 249 (Pa. 1802)(cited once by counsel); *Commonwealth v. Gibbs*, 4 U.S. (4 Dall.) 253, 254 (Pa. 1802)(cited once by counsel); *Commonwealth v. Franklin*, 4 U.S. (4 Dall.) 255, 259, 261 (Pa. 1802)(cited by counsel); *Austin v. M’Lure*, 4 U.S. (4 Dall.) 227, 228 (Pa. 1801)(cited twice by counsel); *Commonwealth v. Dallas*, 4 U.S. (4 Dall.) 229, 230 (Pa. 1801)(cited three times by counsel); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 12 (1801)(cited once by counsel); *Commonwealth v. Addison*, 4 U.S. (4 Dall.) 225, 225 (Pa. 1801)(cited once by attorney general); *Priestman v. U.S.*, 4 U.S. (4 Dall.) 28, 31 (1800)(cited by counsel); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 38 (1800)(cited three times by counsel); *Commonwealth v. Coxe*, 4 U.S. (4 Dall.) 170, 192, 196 (Pa. 1800)(cited twice by counsel); *Busy v. Donaldson*, 4 U.S. (4 Dall.) 206, 206 (Pa. 1800)(cited once by counsel); *Williamson v. Kincaid*, 4 U.S. (4 Dall.) 20, 20 (1800)(cited once by counsel); *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 17, 18 (1800)(cited twice by counsel); *Respublica v. Wray*, 3 U.S. (3 Dall.) 490, 491 n.1 (Pa. 1799)(cited once by the Court, Shippen, J.); *Breckbill v. Turnpike Co.*, 3 U.S. (3 Dall.) 496, 499 (Pa. 1799)(cited once by counsel); *Clarke v. Russel*, 3 U.S. (3 Dall.) 415, 420 (1799)(cited once by the Court, Ellsworth, C.J.); *N.Y. v. Conn.*, 4 U.S. (4 Dall.) 1, 6 (1799) (cited in the Court’s opinion); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391, 396, 398-9 (1798)(cited three times by the Court, Chase, J.); *Pemberton’s Lessee v. Hicks*, 3 U.S. (3 Dall.) 479, 482 (Pa. 1798)(cited twice by the Court); *M’Kee’s Lessee v. Pfout*, 3 U.S. (3 Dall.) 486, 487, 488 (Pa. 1798)(cited four times by counsel); *Fenimore v. U.S.*, 3 U.S. (3 Dall.) 357, 362, 363 (1797)(cited twice by counsel); *U.S. v. La Vengeance*, 3 U.S. (3 Dall.) 297, 299, 300(1796)(cited three times by attorney general); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 266 & n.9 (1796)(cited by the Court, Patterson, J.); *Robert’s v. Kay’s Ex’rs*, 2 U.S. (2 Dall.) 260, 261 (Pa. 1796)(cited once by counsel); *Ruston’s Ex’rs v. Ruston*, 2 U.S. (2 Dall.) 243, 243 (Pa. 1796)(cited once by counsel); *M’Donough v. Dannery*, 3 U.S. (3 Dall.) 188, 197 (1796)(cited by Cushing, J., concurring); *Cagnet v. Pettit*, 2 U.S. (2 Dall.) 234, 234 (Pa. 1795)(cited by counsel); *DeWiller v. Smith*, 2 U.S. (2 Dall.) 236, 236 (Pa. 1795)(cited by the Court); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133,140, 143, 145, 147 (1795)(cited three times by counsel); *Respublica v. Richards*, 2 U.S. (2 Dall.) 224, 225 (Pa. 1795)(cited by counsel); *Bingham v. Cabot*, 3 U.S. (3 Dall.) 19, 28, 35, 39 (1795)(cited by the Court and counsel); *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 66, 71, 74, 76 (1795)( cited three times by plaintiff’s counsel and twice by defendant’s counsel); *U.S. v. Hamilton*, 3 U.S. ( 3 Dall.) 17, 17 (1795)(cited by counsel); *U.S. v. Insurgents of Pa.*, 2 U.S. (2 Dall.) 335, 338 (Circuit Court Pa. District 1795)(cited by counsel); *Commonwealth v. Chambre*, 4 U.S. (4 Dall.) 143, 143 (Pa. 1794)(cited by

and, at least since the Glorious Revolution of 1688, rule of law principles were accepted as part and parcel of Great Britain's (unwritten) constitution. These principles were naturally transplanted into the new republic.<sup>282</sup>

English rule of law principles are explicit in Marshall's assertions in *Marbury* that the government is subject to the law and that individuals may seek recourse in the courts for illegal actions by executive officials. Following his celebrated statement 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>283</sup> Marshall observed pointedly that "[i]n Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."<sup>284</sup> Marshall then quoted from Blackstone that "it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy,

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counsel); *Glass v. Sloop Betsey*, 3 U.S. (3 Dall.) 6, 6, 9, 11, 14, 15 (1794)(cited five times by counsel); *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 2 (1794)(cited four times by counsel); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 437, 442, 443, 444, 458 & n.11, 460, 462 (1793)(cited nine times by the Court, Iredell, J.); *Conrad v. Conrad*, 4 U.S. (4 Dall.) 130, 130 (Pa. 1793) (cited twice by counsel); *Field v. Biddle*, 2 U.S. (2 Dall.) 171, 171 (Pa. 1792)(cited by counsel); *Haldane v. Duche's Ex'rs*, 2 U.S. (2 Dall.) 176, 177 (Pa. 1792)(cited by counsel); *Austin v. Snow's Lessee*, 2 U.S. (2 Dall.) 157, 157 (Pa. 1792)(cited by counsel); *Commonwealth v. Dillon*, 4 U.S. (4 Dall.) 116, 116 (Pa. 1792)(cited twice by counsel); *Thompson's Lessee v. White*, 1 U.S. (1 Dall.) 424, 426 (Pa. 1789)(cited by the Court, M'Kean, C.J.); *Thomson v. Musser*, 1 U.S. (1 Dall.) 458, 462, 465, 467 (Pa. 1789)(cited by the Court, M'Kean, C.J. and Rush, J., concurring); *Hooton v. Will*, 1 U.S. (1 Dall.) 450, 450 (Pa. 1789) (cited by counsel); *Levinz v. Will*, 1 U.S. (1 Dall.) 430, 431, 432, 433 (Pa. 1789) (cited three times by counsel); *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 358, 360, , 363 (Pa. 1788) (cited by the Court and counsel); *Respublica v. Oswald*, 1 U.S. (1 Dall.) 319, 321, 322 (Pa. 1788)(cited by the Court and counsel); *Sliver v. Shelback*, 1 U.S. (1 Dall.) 165, 165 (Pa. 1786)(cited three times by counsel); *Pirate v. Dalby*, 1 U.S. (1 Dall.) 167, 167 (Pa. 1786)(cited four times by counsel); *Respublica v. Steele*, 2 U.S. (2 Dall.) 92, 92 (Pa. 1785)(cited once by counsel); *Respublica v. Doan*, 1 U.S. (1 Dall.) 86, 86, 87 (Pa. 1784)(cited twice by the Court); *Respublica v. Chapman*, 1 U.S. (1 Dall.) 53, 54 (Pa. 1781)(cited by counsel).

<sup>282</sup> As noted in the introduction, the discussion that follows does not assume that these principles are necessarily linked to any particular governmental system based on to the rule of law. Rather, our purpose is to trace the historical origins of principles that were identified in *Marbury* – and generally accepted in this country – as components of the rule of law.

<sup>283</sup> *Marbury*, 5 U.S. at 163.

<sup>284</sup> *Id.*

and every injury its proper redress.”<sup>285</sup> Immediately following this statement drawn from Blackstone is Marshall’s famous pronouncement that “[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”<sup>286</sup>

Marshall also drew support from English law for his holding that the federal courts have the power to order executive officials, even the heads of departments such as Madison, to comply with the law. The English courts had exercised jurisdiction, and ordered remedies against, the government’s ministers for at least a century before the American Constitution was enacted. The idea that the Executive was immune from a judicial remedy could not, Marshall said, “derive countenance from the doctrines of the common law.”<sup>287</sup> To the contrary, English law supported principles of accountability:

Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular decisions may be, the theory of this principle will certainly never be maintained. No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to subject is presumed to be impossible, Blackstone, vol. 3, p. 255, says, “but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice.”<sup>288</sup>

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 165.

<sup>288</sup> *Id.* at 164-65.

Thus, Marshall’s claim that the judiciary had the power to hold executive officers accountable for the legality of their conduct depended directly on Blackstone and English common law.

Marshall’s arguments for judicial review of legislation do not cite English rule of law principles but nevertheless derive from them. Let us first recall that Marshall’s assertion of judicial review rests on five subsidiary propositions:

1. In a case properly before it, the court is bound by an oath to decide according to the law;
2. If two laws are in conflict in that case, the court must choose which law to apply;
3. If one of the laws is superior to the other in importance and authority, that law must be held by the court to nullify the lesser law;
4. The Constitution is a superior law to an ordinary statute and therefore must be held by the court to nullify a statute whose terms conflict with the Constitution; and
5. It is the special province of the judiciary to determine the meaning of all laws, including the Constitution.<sup>289</sup>

The first of these principles could have been taken verbatim from Blackstone, who wrote that judges “are bound by an oath to decide according to the law of the land.”<sup>290</sup> The second principle – that courts must decide between conflicting laws – was a familiar principle of English law that is also found in and discussed by Blackstone.<sup>291</sup> The third principle – the hierarchy of

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<sup>289</sup> *Id.* at 177. *See supra* Part II.C.

<sup>290</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*69.

<sup>291</sup> 1 *id.* at \*89. Blackstone gives the same example as Hamilton would later pose in *The Federalist No. 78* – that if two statutes apparently conflict, the courts will try to construe the statutes to make them compatible and, if that is not possible, will hold that the more recently enacted statute supercedes the earlier one. THE FEDERALIST

laws – was also firmly established in England. In Blackstone’s words: “When the common law and a statute, differ, the common law gives place to the statute . . . .”<sup>292</sup> And Blackstone further maintained that the actions of the executive are subordinate to both the common law and statutes: “The principal duty of the king is, to govern his people according to law. . . . And this . . . has always been esteemed an express part of the common law of England, even when [royal] prerogative was at the highest.”<sup>293</sup>

Marshall’s fourth principle – that the Constitution is superior to an act of Congress – of course finds no counterpart in English law. Nor is it stated unambiguously in the Constitution. Although the Supremacy Clause establishes the hierarchy of federal over state law, it does not explicitly make the Constitution superior to acts of Congress or federal treaties.<sup>294</sup> The revolutionary doctrine in *Marbury*, then, is not judicial review; rather, it is that the Constitution is a superior law to all other laws, including statutes enacted by Congress. This explains why Marshall went to such lengths to prove the doctrinal supremacy of the Constitution, which we now consider obvious. By establishing that the Constitution is itself a law, and supreme to all other federal laws, Marshall could then place the Constitution at the apex of the hierarchy of laws and apply accepted English rule of law principles to establish judicial review.

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No. 78, *supra* note 266, at 380 (Alexander Hamilton).

<sup>292</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*89.

<sup>293</sup> 1 *id.* at \*233.

<sup>294</sup> The Supremacy Clause declares that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, . . . under the Authority of the United States, shall be the supreme Law of the Land.” U.S. CONST. art. VI, cl. 2. The term “laws made in pursuance thereof” is of course ambiguous – it could mean statutes that are consistent with the Constitution, or statutes enacted after the Constitution is ratified, or the two in concert. The second, narrowest interpretation is supported by the reference to “treaties made under the authority of the United States,” which includes treaties (such as the Treaty of Peace of 1783) that predated the Constitution.

That brings us to Marshall's fifth principle. His opinion in *Marbury* asserts more than simply the authority of the courts to interpret the Constitution and laws and decide conflicts between them. Importantly, it further asserts the authority of the courts to bind the other branches of government by its decisions, because "it is emphatically the province and duty of the judicial department to say what the law is."<sup>295</sup> This is, of course, the feature of judicial review that gives it teeth and makes it such a formidable addition to the arsenal of judicial power.

This principle – that the courts are the authoritative interpreters of the law – is a product of English law. To Blackstone, the judges were the "living oracles" of the law. By whom, Blackstone asked, would the meaning of the law be determined?

The answer is, by the judges in the several courts of justice. They are the depositaries of the law; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of the law is derived from experience and study . . . and from being long personally accustomed to the judicial decisions of their predecessors.<sup>296</sup>

There was no separation of powers in the government of England. But there was a clearly delineated separation of *functions* between the three branches of government.<sup>297</sup> In particular, the

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<sup>295</sup> *Marbury*, 5 U.S. at 177.

<sup>296</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*69.

<sup>297</sup> Blackstone emphasized that the three branches of government (executive, legislative and judicial) each performed different functions in Parliament and that it was necessary to maintain a balance of power between the branches in order to secure liberty. As he describes:

[T]he constitutional government of this island is admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution.

*Id.* at \*51-52.



legislative branch enacted laws, and the judicial branch interpreted the laws.<sup>298</sup> The courts' interpretations of the law could be overruled in Parliament, but only by an appeal to the House of Lords, which, functioning through the Law Lords, acted as the highest court of the land. Parliament could change the law with new legislation, but it could not overrule the judicial interpretation of a statute through legislation – a point emphasized by Hamilton in discussing the finality of Supreme Court interpretations of the Constitution:

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<sup>298</sup> This is why, according to common law principles, legislation is presumed to be prospective, while judicial decisions, even those overruling prior decisions, are presumed to be retroactive. *See* RICHARD CAPPALLI, *THE AMERICAN COMMON LAW METHOD* ch. 13 (1996). Blackstone justified the retroactivity of court decisions on the notion that the law itself had not changed – the judges in the subsequent decision had simply corrected earlier mistakes of interpretation. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*45-46, \*70-71 .

It is not true . . . that the parliament of Great Britain, or the legislatures of the particular states, can rectify the exceptionable decisions of their respective courts, in any other sense than might be done by a future legislature of the United States. The theory neither of the British, nor the state constitutions, authorizes the reversal of a judicial sentence, by legislative act. Nor is there anything in the proposed constitution more than in either of them, by which it is forbidden. In the former as well as in the latter, the impropriety of the thing, on the general principles of law and reason, is the sole obstacle. A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases. This is the principle, and it applies in all its consequences, exactly in the same manner and extent, to the state governments, as to the national government, now under consideration.<sup>299</sup>

Although the proponents and opponents of the Constitution disagreed on practically everything else, there was a uniform consensus in the ratification debates that the courts would have the power to nullify unconstitutional legislation, even though that power was not stated explicitly in Article III.<sup>300</sup> We believe this remarkable consensus derives in significant measure from that fact

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<sup>299</sup> THE FEDERALIST NO. 81, *supra* note 266, at 394 (Alexander Hamilton).

<sup>300</sup> For some examples of references to judicial review in the ratification debates, see, e.g., Debates of the Pennsylvania Convention (Dec. 1, 1787), *in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 450-51 (Merrill Jensen ed., 1976) [hereinafter 2 DOCUMENTARY HISTORY](James Wilson)(“I had occasion, on a former day, to state that the power of the Constitution was paramount to the power of the legislature, acting under that Constitution. For it is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges – when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void.”); Debates of the Pennsylvania Convention (Dec. 4, 1787), *in* 2 DOCUMENTARY HISTORY, *supra*, at 492 (James Wilson)(“It is said that if [the federal judges] dare to decide against the law, one house will impeach them, and the other will convict them. . . . The judges are to be impeached because they decide an act null and void that was made in defiance of the Constitution! What House of Representatives would dare to impeach, or Senate to commit judges for the performance of their duty?”); Debates of the Pennsylvania Convention (Dec. 7, 1787), *in* 2 DOCUMENTARY HISTORY, *supra*, at 517 (James Wilson)(“If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of the government being defined, will declare such law to be null and void.”); Debates of the Connecticut Convention (Jan. 7, 1788), *in* 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 553 (Merrill Jensen ed., 1978) [hereinafter 3 DOCUMENTARY HISTORY] (Oliver Ellsworth) (“If the general legislature should at any time overleap their limits, the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void. On the other hand, if the states go beyond their limits, if they make a law which is an usurpation upon the general government, the law is void; and upright, independent judges will declare it to be so.”); Debates of the Virginia Convention (June 16, 1788), *in* 10 DOCUMENTARY HISTORY, *supra* note 209, at 1327 (George Nicholas)(“[W]ho is to determine the extent of such powers? I say, the same power which in all well regulated communities determines the extent of Legislative powers

that both the proponents and opponents of the Constitution shared common ground in their understanding and acceptance of English rule of law principles. If we are correct that judicial review was understood to follow from the application of basic English rule of law principles to a written constitution, that consensus is understandable. And that consensus included the proposition that the Supreme Court’s decisions on the constitutionality of legislation would be binding on the other branches of government. Judicial review was not described in the passive sense of courts merely refusing to enforce laws that they determined to be unconstitutional. To the contrary, both the advocates and opponents of the Constitution spoke of judicial review in active terms – the Supreme Court would declare unconstitutional laws to be “void” or “null and void.”<sup>301</sup> They understood from their training in English law that it was indeed “the province and duty of the judicial department” both “to say what the law is”<sup>302</sup> and to enforce it.

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– If they exceed these powers, the Judiciary will declare it void.”); Debates of the Virginia Convention (June 20, 1788), *in* 10 DOCUMENTARY HISTORY, *supra*, at 1420-21 (Patrick Henry)(“If Congress, under the specious pretence of pursuing this [power], altered it . . . the Federal Judges, if they spoke the sentiments of independent men, would declare their [law] nugatory and void.”); 10 *id.* at 1431 (John Marshall)(“Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard: . . . – They would declare it void.”). *See also* THE FEDERALIST NO. 78, *supra* note 226, at 379 (Alexander Hamilton) (the courts’ “duty . . . must be to declare all acts contrary to the manifest tenor of the constitution void”); 1 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 380 (2nd ed William S. Hein & Co. 1996) (Jonathan Elliot ed., 1891) (Maryland Convention) (Luther Martin)(“Whether, therefore, any laws or *regulations* of the Congress, any acts of *its President* or *other officers*, are contrary to, or not warranted by, the Constitution, rests only with the judges, who are appointed by Congress, to determine; by whose determinations every state must be *bound*.”). *See infra* note 323 (statements of George Mason and William Grayson). *See also* BARNETT, *supra* note \_\_, at \_\_\_\_.

In one respect, the debates over ratification may be more persuasive evidence than those in the Convention, because the former were held in public (and were widely publicized in the media), while the former were held in secret (with Madison’s notes of those debates not being published until after his death many years later). Of the speakers quoted above, Wilson, Ellsworth, Nicholas, Marshall and Hamilton were leading supporters of the proposed Constitution, while Henry, Martin, Mason and Grayson were leading opponents. (Wilson, Ellsworth, Hamilton, Martin and Mason were also delegates to the Constitutional Convention).

<sup>301</sup> *See supra* note 300.

<sup>302</sup> *Marbury*, 5 U.S. at 177.

We do not mean to contend that the Founders thought of judicial review as the exclusive mode of constitutional interpretation. Rule of law principles also require the President and members of Congress to make constitutional decisions. They take the same oath as judges to support the Constitution,<sup>303</sup> and the President’s special obligation to “take Care that the Laws be faithfully executed”<sup>304</sup> has its origin in the English rule of law principle that was codified in the first article of the 1689 Bill of Rights.<sup>305</sup> If the Constitution is a law that is superior to all others, including Congressional statutes, it necessarily follows that members of Congress must consider the constitutionality of proposed legislation, and that the President must also make determinations of constitutionality in determining whether to veto proposed statutes or enforce existing ones. Thus, in the ratification debates, supporters of the proposed Constitution referred to the power and duty of the executive branch, as well as the judicial branch, to prevent the execution of statutes that exceeded the powers granted to Congress.<sup>306</sup> And in *Marbury* itself,

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<sup>303</sup> U.S. CONST. art. VI, cl. 3.

<sup>304</sup> U.S. CONST. art. II, § 3.

<sup>305</sup> See Robert J. Reinstein, *An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST.L.Q. 309, 320-21 n.50 (1975). The first grievance of the Bill of Rights was that King James II had endeavored to subvert the laws and liberties of the kingdom “[b]y Assuming and Exercising a Power of Dispensing with, and Suspending of Laws, and the Execution of Laws, without Consent of the Parliament.” W. & M., Sess. 2, c.2 (1689). Corresponding to this grievance was the first article of the Bill of Rights: “That the pretended Power of Suspending the Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament, is illegal.” *Id.*

<sup>306</sup> In the Pennsylvania Ratification debate, after asserting unequivocally that the judges would declare unconstitutional legislation void, James Wilson added: “In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.” Debates of the Pennsylvania Convention (Dec. 1, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 300, at 451. Similarly, in *The Federalist No. 44*, Madison stated:

If it be asked what is to be the consequence, in case the Congress shall misconstrue this part of the Constitution [the Necessary and Proper Clause], and exercise powers not warranted by its true meaning, I answer; the same as if they should misconstrue or enlarge and other power vested in them. . . the same, in short, as if the State legislatures should

Marshall not only acknowledged that the Constitution vested certain decisions in the political branches of the government;<sup>307</sup> he also ended his opinion with the conclusion “that a law repugnant to the constitution is void; and that *courts* as well as other departments, are bound by that instrument.”<sup>308</sup> But as to the finality and binding nature of judicial interpretations of the Constitution on the other branches, Hamilton stated the prevailing understanding: “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.”<sup>309</sup>

Several conclusions emerge from this effort to place *Marbury* in historical context. *Marbury’s* concept of judicial review was neither a departure nor an aberration from accepted legal norms. It was anticipated in the state courts, discussed during ratification, and comported with a widely held understanding of judicial power. Marshall’s defense of judicial review drew on deeply rooted rule of law principles having their origins in English common law, particularly as that law had been authoritatively expounded by Blackstone. Indeed, all of Marshall’s arguments on judicial review in *Marbury* either directly rely on or echo passages of Blackstone’s

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violate their respective constitutional authorities. In the first instance, the success of the usurpation will depend on the executive and judiciary departments, which are to expound and give effect to the legislative acts. . . .

*Id.*, *supra* note 266, at 221 (James Madison).

<sup>307</sup> See *supra* notes 114-120 and accompanying txt.

<sup>308</sup> *Marbury*, 5 U.S. at 180 (emphasis in original).

<sup>309</sup> THE FEDERALIST NO. 78, *supra* note 266, at 379 (Alexander Hamilton).

*Commentaries*. Marshall simply applied Blackstone's rule of law arguments to a written constitutional scheme, placing the Constitution itself at the apex of the hierarchy of laws. Judicial review could have arisen even if the Framers of our Constitution had rejected the separation of powers altogether.<sup>310</sup>

Yet the consensus in favor of judicial review that existed during the formative constitutional period had plainly fractured by the time of the *Marbury* decision. It is a mistake to attribute this result solely to the political antagonism of the Republicans towards the Federalist-dominated judiciary. The fissures were present at the creation. Although judicial review was accepted almost universally as a matter of principle, reconciling and applying judicial review consistently with other constitutional principles, including federalism, the separation of powers and the protection of individual rights, became the subject of profound disagreement in the debates over ratification. Moreover, an alternative system of republican government had emerged in revolutionary France which was based on pure notions of the separation of powers and rejected court-centered constitutional review. This system held great attraction for Thomas Jefferson and his followers. With the emergence of two competing political parties that controlled different branches of the government, the consensus over judicial review would break

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<sup>310</sup> For centuries, the central principle of the English constitution has been that the laws passed by the Parliament in Westminster represented the supreme and final authority of government. The courts of England could not, therefore, nullify any law enacted by Parliament. *See, e.g.,* WILLIAM BLACKSTONE, *COMMENTARIES* at \*xx. However, when Great Britain joined the European Union, the issue naturally arose as to the supremacy of EU law over the statutes of Parliament. The result has been that the English courts have in fact applied EU law over inconsistent national statutes. *See* Regina v. Secretary of State for Transport *ex parte* Factortame Ltd. (*Factortame II*), [1991] 1 A.C. 603, 659 (“Under the terms of the [European Communities] Act of 1972 it has always been clear that it was the duty of a United Kingdom court . . . to override any rule of national law found to be in conflict with any directly enforceable rule of Community law.”); JOSEPHINE STEINER & LORNA WOODS, *TEXTBOOK ON EC LAW* 76-77 (6th ed. 1999).

down, and the debate would re-emerge whether judicial review was a necessary or appropriate feature of the American constitutional scheme. By establishing judicial review on the basis of the rule of law, Marshall appealed to principles that would transcend the specific features of particular constitutional schemes and momentary political divisions.

## VI. JUDICIAL REVIEW IN THE DEBATES OVER RATIFICATION

Today, we view judicial review as an essential component of checks and balances. In the debates over ratification, the supporters of the Constitution did point to judicial review as a check on Congress.<sup>311</sup> Over the last century, it has become one of the most potent checks on legislative power, rivaling and at time even surpassing the presidential veto as a restraint on Congress. But this argument had surprisingly little persuasive force in the debates. The Anti-Federalists accepted that judicial review could prevent Congress from exceeding the powers granted to it in Article I, but they had more confidence in their own state courts than in the new federal judiciary to exercise this power.<sup>312</sup> And, as discussed below, Anti-Federalists argued that federal judicial review would be dangerous for the preservation of existing individual rights<sup>313</sup> and would actually lead to the expansion of the scope of power that Congress could exercise under the Constitution.<sup>314</sup> More significantly, however, the Anti-Federalists' central reason for opposing the Constitution was that, independently of judicial review, the document granted Congress too

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<sup>311</sup> See *infra* text accompanying notes 316-18, 322-23.

<sup>312</sup> See *infra* text accompanying notes 322-24.

<sup>313</sup> See *infra* text accompanying notes 324-28.

<sup>314</sup> See *infra* text accompanying notes 328-48.

much power. In other words, the Anti-Federalists were not primarily concerned that Congress would exceed the powers given to it by the Constitution – their overriding concern was that Congress would fully exercise the powers that were granted. Accordingly, judicial review was not viewed by either side as a major factor in checking Congressional power; and the supporters of the Constitution pointed to other provisions which, they argued, would restrain Congress in the exercise of its enumerated powers.<sup>315</sup>

Although the opponents of the Constitution accepted the premise of judicial review, they used that premise to raise important questions of how judicial review would operate in the new Republic. These questions would go to the independence of the judiciary, the future of federalism and individual rights, and whether judicial review would enforce the rule of law or turn into the rule of judges.

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<sup>315</sup> These provisions included the bicameral legislature, with the requirement that each House must agree precisely on the terms of legislation; substantial control of the Senate by the states; the frequency of elections for the House of Representatives; and the President’s qualified veto power. *See, e.g.*, Debates of the Pennsylvania Convention (Dec. 1, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 300, at 451-53 (James Wilson). *See also* THE FEDERALIST NO. 51, entitled “Checks and Balances,” which does not even mention judicial review.



### A. *Impeachment, Judicial Independence and Political Accountability*

In the Pennsylvania Ratification Convention, James Wilson, an important architect of the Constitution, stated three times that the courts would declare laws made in contradiction to the Constitution “null and void.”<sup>316</sup> None of the Anti-Federalists in the Convention disagreed with these statements, but one argued that the separation of powers was not strict enough to insure impartial constitutional decision-making.<sup>317</sup> He objected to Congress’ power to impeach federal judges and remove them from office. He predicted that federal judges who rendered controversial decisions striking down legislation would be subject to impeachment and removal if they dared to so defy Congress – to which Wilson responded that judges could not be impeached for doing their judicial duty.<sup>318</sup>

President Jefferson and his Republican followers would unleash the impeachment weapon against federal judges. The impeachment of Justice Chase rested on the accusation that his behavior and decisions in controversial cases (particularly in those involved in the enforcement of the hated Sedition Act of 1798) marked him as a political partisan unfit to serve

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<sup>316</sup> 2 THE DOCUMENTARY HISTORY, *supra* note 300, at 450-51, 492, 517. One of these speeches on judicial review was considered so important that a newspaper account of it was reprinted 11 times from Vermont to South Carolina. 2 *id.* at 524-25 & n.1.

<sup>317</sup> Debates of the Pennsylvania Convention (Dec. 4, 1787), in 2 *id.* at 492. Hamilton was less dismissive of the impeachment power. In defending the courts against the charge of judicial supremacy over Congress, he pointed to impeachment as an “important constitutional check . . . . There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it, while this body was possessed of the means of punishing their presumption by degrading them from their stations.” THE FEDERALIST NO. 81, *supra* note 266, at 395 (Alexander Hamilton).

<sup>318</sup> Debates of the Pennsylvania Convention (Dec.4, 1787), in 2 THE DOCUMENTARY HISTORY, *supra* note 300, at 492.

on the federal judiciary.<sup>319</sup> Chase's acquittal in the Senate<sup>320</sup> was understood by Jefferson, correctly as history turned out, as laying to rest the only potential constitutionally-based method for restraining the courts.<sup>321</sup> Judicial independence and political accountability are of course inversely proportional to one another, and judicial independence has prevailed.

### *B. Threats to the State Courts and Individual Rights*

In the Virginia Ratification Convention, supporters of the Constitution, including John Marshall, Edmund Pendleton and George Nicholas, asserted that the federal courts would declare laws inconsistent with the Constitution to be "void."<sup>322</sup> The Anti-Federalists, led by the formidable Patrick Henry and George Mason, did not disagree. Indeed, Henry surpassed the rhetoric of the Federalists in endorsing judicial review: "I take it as the highest encomium on this country, that the acts of the Legislature, if unconstitutional, are liable to be opposed by the

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<sup>319</sup> See Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 FORDHAM L. REV. 263, 274-75 (1986)(discussing Justice Chase's backing of the Sedition Laws); Christopher D. Man, *Extradition and Article III: A Historical Examination of the "Judicial Power of the United States,"* 10 TUL. J. INT'L & COMP. L. 37, 65 n.184 (2002)(noting Justice Chase's controversial judicial career).

<sup>320</sup> The Senate voted in favor of impeachment on all three charges with a majority of the vote, but did not reach the two-thirds vote required to convict. 14 ANNALS OF CONG. 666-69 (1805); Man, *supra* note 301, at 65 n.184. The House voted 73-32 for impeachment. 13 ANNALS OF CONG. 1180-81 (1804); Man, *supra* note 301, at 65 n.184.

<sup>321</sup> See Thomas Jefferson, *Autobiography* (Jan. 6, 1821), *reprinted in* Jefferson Writings 73-74 (Merrill D. Peterson ed., 1984). Jefferson wrote about the impeachment:

[I]t is not from [Congress] we have most to fear....The judiciary of the United States is the subtle corps of sappers and miners constantly working under ground to undermine the foundations of our confederate fabric. They are construing our Constitution from a co-ordination of a general and special government to a general and supreme one....We shall see if they are bold enough to take the daring stride their five lawyers have lately taken. If they do,...I will say, that 'against this every man should raise his voice,' and more uplift his arm....Having found from experience, that impeachment is an impracticable thing, a mere scare-crow, they consider themselves secure for life; they skulk from responsibility to public opinion, the only remaining hold on them, under a practice first introduced into England by Lord Mansfield.

Letter from Thomas Jefferson to Justice William Johnson (June 12, 1823), *in* 15 THE WRITINGS OF THOMAS JEFFERSON (1904), *supra* note 118, at 297-98.

<sup>322</sup> 10 THE DOCUMENTARY HISTORY, *supra* note 265, at 1327 (Nicholas), 1427 (Pendleton), 1431 (Marshall).

Judiciary.”<sup>323</sup> But, Henry observed, the state court judges of Virginia were already exercising the power of judicial review and were quite capable of protecting its citizens from Congressional overreaching. Henry then launched an assault on Article III. Federal courts, he argued, were wholly unnecessary for judicial review given the existing powers of the state courts; there was no reason for Virginians to trust federal judges (who would be, after all, federal officials); and the extensive jurisdiction given to the federal courts in Article III would vitiate the power of the state courts.<sup>324</sup>

Henry and Mason also pointed to the contradiction of judicial review in a Constitution that did not contain a bill of rights.<sup>325</sup> Without a bill of rights, Congress could enact legislation that would violate such rights as freedom of speech and the right to trial by jury, which were protected by the state constitutions. Given the obligation of the federal courts to enforce the Constitution and acts of Congress as against contrary state laws or constitutional provisions, federal judicial review could therefore result in the extinguishment of existing fundamental rights. “The Judiciary are the sole protection against a tyrannical execution of laws. But if by this system we lose [the protections] of our [state] Judiciary, and they cannot help us, we must sit down quietly, and be oppressed.”<sup>326</sup>

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<sup>323</sup> Debates of the Virginia Convention (June 12, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 265, at 1219. See also 10 THE DOCUMENTARY HISTORY, *supra*, at 1361 (George Mason), 1420-21 (Patrick Henry), 1448 (William Grayson).

<sup>324</sup> Debates of the Virginia Convention (June 12, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 265, at 1219-22.

<sup>325</sup> 10 THE DOCUMENTARY HISTORY, *supra* note 265, at 1401-09 (George Mason), 1419-25 (Patrick Henry).

<sup>326</sup> Debates of the Virginia Convention (June 20, 1788), in 10 THE DOCUMENTARY HISTORY, *supra* note 265, at 1420 (Patrick Henry). Opponents of the Constitution also used judicial review as a premise to attack one of the most hotly contested provisions of Article III -- the grant of federal court jurisdiction in cases between states and citizens of other states or foreign countries. In the Virginia Convention, John Marshall complained that this jurisdictional provision “has been

The ratification of the Constitution did not end these arguments, and the Anti-Federalists would wind up both losing and winning. The Virginia courts would refuse to acknowledge the legitimacy of the Supreme Court's appellate jurisdiction over them, which would in turn lead to the landmark decisions in *Martin v. Hunter's Lessee*<sup>327</sup> and *Cohen v. Virginia*.<sup>328</sup> But the Anti-Federalists' insistence that the Constitution without a Bill of Rights could become an instrument of oppression, with the federal courts becoming agents for the destruction of individual rights, carried the day. Thanks to the Anti-Federalists, the Bill of Rights became an essential component of American constitutionalism.

### C. Federalism, the Rule of Law and the Rule of Judges

The most interesting debate occurred in connection with ratification in New York. Prospects for ratification in New York were uncertain, and that state's convention was scheduled before, with its outcome bound to affect, the Virginia convention. *The Federalist Papers*, which have had such an enormous influence on constitutional decision-making from the time of their publication to the present, were addressed "to the people of the State of New York" to secure a favorable vote in that state's ratification convention. The excerpts from *The Federalist No. 78* which contain Hamilton's arguments supporting the doctrine of judicial review – arguments which Marshall would later adopt in *Marbury* –

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decried with unusual vehemence." 10 *id.* at 1433. He stated that the provision was designed to allow a state to sue as a plaintiff but not to be sued without its consent. (Hamilton made the same representation in THE FEDERALIST NO. 81). The Anti-Federalists responded that the federal courts would be bound by the literal language of this provision and would necessarily declare unconstitutional Congressional attempts to limit it. See Debates of the Virginia Convention (June 21, 1788), in 10 THE DOCUMENTARY HISTORY, *supra*, at 1448 (William Grayson)("It is fixed in the Constitution that [the states] shall become parties. This is not reciprocal. If the Congress cannot make a law against the Constitution, I apprehend that they cannot make a law to abridge it. The Judges are to defend it. They can neither abridge nor extend it."); Debates of the Virginia Convention (June 17, 1788), in 10 THE DOCUMENTARY HISTORY, *supra*, at 1361(George Mason)("Implication will not do. . . . When this matter comes before the Federal Judiciary, they must determine according to this Constitution.").

<sup>327</sup> 14 U.S. (1 Wheat.) 304 (1816).

<sup>328</sup> 19 U.S. (6 Wheat.) 264 (1821).

are reproduced in many constitutional law casebooks. But Hamilton did not write this paper simply as an essay on judicial review. Numbers 78 and 81 were written as defenses of the scope of the “judicial power” given to the federal courts, and of the structural and jurisdictional provisions in Article III, in response to a sophisticated set of letters authored by Judge Richard Yates, an Anti-Federalist who published under the pseudonym of “Brutus.”<sup>329</sup>

Yates’ first ten letters were carefully argued criticisms against the breadth of power given to Congress under the proposed Constitution.<sup>330</sup> One of his major arguments was that the supporters of the Constitution had minimized the actual scope of federal power by dismissing the probable effect of the Necessary and Proper Clause.<sup>331</sup> His next five letters addressed the scope of federal judicial power, a subject which, he noted, had not yet been carefully considered in the debates over the proposed document.<sup>332</sup>

In his entire discussion of federal judicial power in Article III of the Constitution, Yates’ premise was that the federal courts would have the power to declare unconstitutional acts of Congress and of the state legislatures.<sup>333</sup> He then asserted that the Constitution made the federal judges independent in two

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<sup>329</sup> Although the identity of Brutus has apparently never been established with certainty, he was most likely Judge Yates. Yates was a New York delegate to the Constitutional Convention who walked out in protest after the Virginia Plan was adopted in principle. See “Brutus” (Yates), *Letters I-XVI*, N.Y.J.(1787-1788), reprinted in, *THE FEDERALIST WITH LETTERS OF BRUTUS* 436 (Terrence Ball, ed., 2003).

<sup>330</sup> Brutus (Yates), *Letters I-X*, *supra* note 329, at 437-501.

<sup>331</sup> Brutus (Yates), *Letters V-VII*, *supra* note 329, at 465-85. Three days after Yates’ first letter appeared, Madison wrote to Edmund Randolph that “a new Combatant . . . with considerable address and plausibility, strikes at the foundation [of the proposed constitution].” Letter from James Madison to Edmond Randolph (October 21, 1787), in *THE FEDERALIST WITH LETTERS OF BRUTUS*, *supra* note 329, at 453; IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION* 165 & n.7 (1950).

<sup>332</sup> Brutus (Yates), *Letters XI- XVI*, *supra* note 329, at 501-29.

<sup>333</sup> Brutus (Yates), *Letter XI*, N.Y.J. (Jan. 24, 1788), *supra* note 329, at 501-04; Brutus (Yates), *Letter XII*, N.Y.J. (Feb. 7, 1788), *supra*, at 507; Brutus (Yates), *Letter XV*, N.Y.J., (March 20, 1788), *supra*, at 524-25, 527. The textual basis

respects. First, they had a practical security of life tenure. Removal through impeachment was only for high crimes and misdemeanors. This required proof that judicial decisions were the result of “wicked and corrupt motives.”<sup>334</sup> Federal judges could not be removed “for making ever so many erroneous adjudications.”<sup>335</sup> Second, the federal judiciary was independent because its decisions could not be revised by any other branch of government. The Supreme Court’s interpretations of the Constitution were final:

The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because [the court is] authorised to decide in the last resort. The legislature must be controuled by the constitution, and not the constitution by them.<sup>336</sup>

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for Yates’ premise was the Article III grant of judicial power in “cases arising under the Constitution.”

<sup>334</sup> Brutus (Yates), *Letter XV*, *supra* note 333, at 526.

<sup>335</sup> Brutus (Yates), *Letter XI*, *supra* note 333, at 501.

<sup>336</sup> *Id.* at 504.

Yates then made a nuanced argument that the Supreme Court would, through the power of judicial review, expand the powers given to Congress in the Constitution.<sup>337</sup> Those powers, he noted, were drafted broadly (“in general and indefinite terms”<sup>338</sup>) and were reinforced by both the Necessary and Proper Clause and by the nationalistic terms of the Preamble.<sup>339</sup> The language and spirit of the document therefore invited a broad construction of Congressional power. Yates also thought that the interpretation of the Constitution by the Supreme Court would “lean strongly in favour of the general government”<sup>340</sup> for institutional reasons. The power of the federal judiciary was largely dependent on the exercise of power by Congress: “Every extension of the power of the general legislature . . . will increase the powers of the courts. . . .”<sup>341</sup> “[I]t is easy to see,” he said, “that in their adjudications they may establish certain principles, which being received by the legislature, will enlarge the sphere of their power beyond all bounds.”<sup>342</sup> Yates therefore conceived that the federal judicial power would “operate [incrementally] to effect . . . an entire subversion of the legislative, executive and judicial powers of the individual states.”<sup>343</sup>

But Yates reserved his major criticism of Article III for the federal judicial power itself. He foresaw Article III as creating a Supreme Court that “would be exalted above all other power

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<sup>337</sup> *Id.* 504-05.

<sup>338</sup> *Id.* at 504.

<sup>339</sup> *Id.* at 504-05; Brutus (Yates), *Letter XII*, *supra* note 333, at 507-10.

<sup>340</sup> Brutus (Yates), *Letter XI*, *supra* note 333, at 504. Not surprisingly, he asserted that the state courts would be more objective in maintaining an appropriate federal-state balance of power. Brutus (Yates), *Letter XIII*, N.Y.J., (Feb. 21, 1788), *supra* note 329, at 522-23.

<sup>341</sup> Brutus (Yates), *Letter XI*, *supra* note 333, at 505.

<sup>342</sup> Brutus (Yates), *Letter XII*, *supra* note 333, at 507.

<sup>343</sup> Brutus (Yates), *Letter XI*, *supra* note 333, at 504.

in the government, and subject to no controul.”<sup>344</sup> The combination of the power of judicial review, the guarantee of life tenure, and the finality of Supreme Court decisions meant that the Supreme Court’s power “is superior to that of the legislature.”<sup>345</sup>

There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under the heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.<sup>346</sup>

Yates thought that one of the three principles underlying Article III had to give. Either the legislature should be the ultimate judge of its powers,<sup>347</sup> or the federal judges should not have life tenure,<sup>348</sup> or, preferably to the other two, there should be a system in place akin to England’s in which the decisions of the Supreme Court could be appealed to a division of Congress modeled on the House of Lords (except of course not on hereditary grounds).<sup>349</sup> Otherwise, Yates concluded, the Constitution would contain its own engine for the destruction of

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<sup>344</sup> Brutus (Yates), *Letter XV*, *supra* note 333, at 524.

<sup>345</sup> *Id.* at 526.

<sup>346</sup> *Id.* at 525.

<sup>347</sup> Brutus (Yates), *Letter XIII*, *supra* note 340, at 513.

<sup>348</sup> Brutus (Yates), *Letter XV*, *supra* note 333, at 524-26.

<sup>349</sup> *Id.* at 527.



both state sovereignty and republican government.

Yates' arguments are direct challenges to the conventional wisdom that judicial review is a necessary product of the separation of powers or checks and balances. Yates foresaw the combination of judicial review, life tenure, and the separation of powers as inviting judicial supremacy and the rule of judges exercising unlimited authority in the guise of enforcing the rule of law.

Alexander Hamilton responded to Yates' attack on Article III in *The Federalist Nos. 78* and 81, which have become classics.<sup>350</sup> Hamilton might have deflected Yates' arguments by denying or questioning his central premise – that the Supreme Court would have the ultimate authority over the interpretation of the Constitution. But Hamilton not only accepted that premise, he elaborated on it, explaining the power of judicial review as a necessary consequence of applying established (and inherited) rule of law principles in a government with a written constitution.<sup>351</sup> Hamilton then defended life tenure by arguing at length that the importance of judicial review required the federal judges to be secure against threats of removal or intimidation by the other branches of government.<sup>352</sup>

Hamilton also answered Yates' argument that the combination of judicial review and the

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<sup>350</sup> Brutus' (Yates') Letters XI-XV on the judiciary were published between January 31 and March 20, 1788. Hamilton's rejoinders, *The Federalist Nos. 78-83*, were all published on May 28, 1788. Actually, Hamilton responded to each of Yates' arguments except one – that the federal courts would broadly construe the enumerated powers of Congress. Hamilton's silence on this matter may simply reflect his hope that Yates would indeed turn out to be correct in this prediction. See Alexander Hamilton, *Opinion on the Constitutionality of the Bank* (Feb. 23, 1791), in *THE PAPERS OF ALEXANDER HAMILTON* 97 (Harold C. Syrett ed., 1965). Yates' prediction that the federal courts would construe the powers of Congress broadly and thereby expand federal power was in fact accurate. Many of the arguments that he feared were advanced by Marshall in the landmark decisions on federalism.

<sup>351</sup> *THE FEDERALIST NO. 78*, *supra* note 266, at 379-80 (Alexander Hamilton).

<sup>352</sup> *Id.* at 381-83.

functional independence of the courts would create the danger of judicial supremacy. The interpretation of the Constitution was ultimately a judicial question.<sup>353</sup> This did not make the judiciary superior to the legislature – the existence of judicial review implied only that the will of the people, as expressed in the Constitution, was “superior to both.”<sup>354</sup> He insisted that the fear of unaccountable federal judges was unwarranted (“in reality a phantom”<sup>355</sup>). The federal judiciary was the weakest and “least dangerous” branch.<sup>356</sup> Because it could only interpret the laws, not draft and enact them, it could endanger the liberties of the people only if united with the legislative branch.<sup>357</sup> And the English model of an appeal from the courts to a branch of the legislature was, Hamilton argued, wholly inappropriate for a government with a written Constitution. It could not be expected “that men who had infringed the constitution, in the character as legislators, would be disposed to repair the breach, in the character of judges.”<sup>358</sup> Moreover, those selected to represent the people as legislators might be ill-suited to the work of deciding particular legal controversies:

[T]here is a still greater absurdity in subjecting the decisions of men selected for their knowledge of the laws, acquired by long and laborious study, to the revision and control of men, who for want of the same advantage cannot but be deficient in that knowledge. The members of the legislatures will rarely be chosen with a view to those qualifications which fit men for the stations of judges. . . .<sup>359</sup>

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<sup>353</sup> *Id.* at 379.

<sup>354</sup> *Id.* at 380.

<sup>355</sup> THE FEDERALIST NO. 81, *supra* note 266, at 395 (Alexander Hamilton).

<sup>356</sup> THE FEDERALIST NO. 78, *supra* note 266, at 378 (Alexander Hamilton).

<sup>357</sup> *Id.*

<sup>358</sup> THE FEDERALIST NO. 81, *supra* note 266, at 393.

<sup>359</sup> *Id.* at 394

Although Hamilton’s position prevailed in the ratification debates, one should not underestimate the force of Yates’ arguments.<sup>360</sup> Consider Hamilton’s insistence that judicial review does not amount to judicial supremacy but rather represents the superiority of the will of the people. The federal judiciary was, he said, “an intermediate body between the people and the legislature” whose function was “to keep the latter within the limits assigned to their authority.”<sup>361</sup> Yet if the people are superior to the Congress, and the Supreme Court is empowered to stand between the people and Congress, why would it not follow that the Supreme Court is as superior to Congress as it is inferior to the people?<sup>362</sup>

Moreover, the English analogy, which Hamilton used to such great effect, is not perfect. Hamilton was plainly correct that the English courts had the final say on interpreting the law. Since the Constitution is a law, Hamilton thought that it necessarily follows from inherited English doctrine that the Supreme Court must have the final say on the interpretation of the Constitution. But, although the Constitution is certainly a law, it does not operate like an ordinary statute. If the Parliament believed that the courts were erroneously interpreting (or making) laws, it could change this condition prospectively by enacting amending legislation. Congress has no power to amend the Constitution, and the amendment process is orders of magnitude more difficult than what is required to enact new statutes.<sup>363</sup>

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<sup>360</sup> Modern variants of Yates’ arguments can be found in the work of such prominent scholars as Raoul Berger and Robert Bork. [cites].

<sup>361</sup> THE FEDERALIST NO. 78, *supra* note 266, at 379 (Alexander Hamilton).

<sup>362</sup> See Gottfried Dietze, *Judicial Review in Europe*, 55 MICHIGAN L. REV. 539, 556 n.73 (1957).

<sup>363</sup> Under Article V, the Constitution can be amended in two different ways – by a vote of two-thirds of each House and ratification by three-fourths of the state legislatures; or, upon application of two-thirds of the state

At least some of Yates' concerns were shared by an unlikely source – Hamilton's co-author of *The Federalist*, James Madison. In the Constitutional Convention, Madison repeatedly attempted (unsuccessfully) to establish a Council of Revision, which would have included representatives of both the executive and judicial branches, with the power to veto federal and state legislation. As commentators have noted, both opponents and supporters of this proposal presupposed that the federal courts would have the power of judicial review.<sup>364</sup> Several of the opponents argued that, since the federal courts would be deciding on the constitutionality of legislation in the course of deciding cases, their participation in the veto power would create a conflict of interests.<sup>365</sup> Several of the supporters responded that the power to declare legislation unconstitutional in litigation was not sufficient, and that the judiciary should be given the additional power of joining with the executive in preventing the enactment of bad, but not necessarily unconstitutional, legislation.<sup>366</sup> Ultimately, of course, the opponents of the Council of Revision prevailed.

But it appears that Madison had another agenda in proposing the Council of Revision.

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legislatures, by a new Constitutional Convention, whose proposed amendments must be ratified by three-quarters of the states. U.S. CONST. art. 5.

<sup>364</sup> *E.g.*, HENRY HART & HERBERT WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 14-16 (1953).

<sup>365</sup> JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787*, at 61 (Adrienne Koch ed. 1966)[hereinafter *MADISON'S NOTES*](Elbridge Gerry & Rufus King), 338 (Elbridge Gerry), 340 (Luther Martin), 342-43 (Nathaniel Gorham), 343 (John Rutledge), 462 (Charles Pinckney).

<sup>366</sup> *Id.* at 61, 336-37 (James Wilson), 79-80, 337-38, 340-41, 343 (James Madison), 337 (Oliver Ellsworth), 338, 341-42 (George Mason), 342 (Gouverneur Morris). *But see id.* at 462 (John Francis Mercer “disapprov[ing] of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void”); *see also id.* at 463 (John Dickinson commenting that he was “strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the Law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute.”).

After the Constitution had been ratified (that is, after the dust had settled<sup>367</sup>), Madison returned to the problems of judicial review and his proposed Council of Revision. He expressed Yates' concern that the finality of judicial review implied that the judiciary was indeed "paramount in fact to the legislature, which was never intended, and can never be proper."<sup>368</sup> Although he presented his proposal in the Convention as a means of limiting legislative power, Madison also appears to have viewed the Council of Revision as a means of limiting judicial power.<sup>369</sup> By combining the judiciary with the executive in the veto power, the Council of Revision would have bridged the separation of powers in a manner that would have made the judiciary more politically accountable. Moreover, the Council of Revision would have the final word on the constitutionality of legislation – any law approved by the Council could not later be declared unconstitutional by the courts.<sup>370</sup>

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<sup>367</sup> Virginia ratified the Constitution on June 25, 1788. Madison's comments on the Council of Revision, which follow, were written on October 15, 1788. 11 THE PAPERS OF JAMES MADISON 292-93 (Robert A. Rutland & Charles F. Hudson eds., 1977).

<sup>368</sup> 11 *id.*

<sup>369</sup> In the Convention itself, after his proposed Council of Revision had been finally defeated, Madison made two proposals to ensure that judicial review would not be a complete substitute. When William Samuel Johnson moved to add "this Constitution" into the arising under jurisdiction, Madison "doubted whether it was too far to extend the jurisdiction of the Court generally to cases arising under the Constitution & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department." MADISON'S NOTES, *supra* note 365, at 538-89. Johnson's motion passed unanimously, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature." *Id.* at 539. But just to make sure that the federal courts would be confined to exercising judicial review only in the context of deciding cases that were within the scope of their limited jurisdiction, Madison moved to substitute "the judicial power" in place of "the jurisdiction of the supreme Court" at the beginning of what would become Article III, Section 2; and this motion also passed unanimously. *Id.*

<sup>370</sup> 11 THE PAPERS OF JAMES MADISON, *supra* note 367, at 293 ("It [should] not be allowed the Judges or the Ex[cutive] to pronounce a law thus enacted, unconstitu[tiona]l & invalid.") In this respect, Madison's Council of Revision would have operated similarly to the French *Conseil Constitutionnel*. And, like the *Conseil constitutionnel*, it might have evolved into an institution that functioned as a court in all but name. *See infra* notes 397-99 and accompanying text.

Madison appears to have changed his mind once more during the period of constitutional formation. The absence of a bill of rights was the strongest argument against ratifying the Constitution. After receiving Madison's detailed report on the Constitution, Jefferson lectured him that the justification offered by the document's supporters for omitting a bill of rights "might do for the Audience to whom it was addressed, but is surely a gratis dictum . . . . [A] bill of rights is what the people are entitled to against every government on earth, general or particular . . . ." <sup>371</sup> In order to secure the necessary votes for ratification, Madison and the other Federalists promised to have the Constitution amended immediately after ratification with the addition of a bill of rights. <sup>372</sup> Madison made good on that promise and introduced the Bill of Rights in the first Congress. He then tied the protection of the Bill of Rights to judicial review:

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<sup>371</sup> Letter of Thomas Jefferson to James Madison (Dec. 20, 1787), *reprinted in* 8 THE DOCUMENTARY HISTORY 250 (John P. Kaminski & Gaspare J. Saladino eds., 1988).

<sup>372</sup> *See, e.g.,* James Wilson, An Address to a Meeting of Citizens of Philadelphia (1787), *reprinted in* 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 528 (1971). The key vote in the Virginia Ratification Convention was whether a bill of rights would be a condition precedent or subsequent to ratification. IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 224-27 (1950). If the Anti-Federalists had prevailed in making it a condition precedent, that would have required the calling of a new Constitutional Convention and likely would have doomed the Constitution. *See* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301. The Federalists won this vote by a narrow (88-80) margin. 3 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 653-54 (2d ed. William S. Hein & Co. 1996) (Jonathan Elliot ed., 1891).

If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.<sup>373</sup>

There is no suggestion in this celebrated statement of Madison's previous concerns about the potential for judicial supremacy. Perhaps his positions can be reconciled by the contours of the issue. During the ratification debates, judicial review was viewed by each side primarily in the context of restraining Congressional power as against the states – what were the most appropriate means of insuring that judicial review served the purpose of limiting Congress to the powers granted to it by the Constitution? In that context, the concerns of politically unaccountable judges exceeding the proper scope of their powers could naturally arise. But Madison may not have regarded these same issues implicated in judicial review directed towards insuring that Congress did not violate fundamental individual rights. There, “guardians” were needed to create “impenetrable bulwarks” to protect those rights. Or perhaps these positions are in fact contradictory and indicative of Madison's ambivalence about vesting the ultimate power of constitutional review in independent judges.<sup>374</sup>

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<sup>373</sup> 1 ANNALS OF CONG. 457 (Joseph Gales ed., 1789)(statement of James Madison).

<sup>374</sup> See, e.g. Ralph L. Ketcham, *James Madison and Judicial Review*, 8 SYRACUSE L. REV. 158 (1957). The author observes that in retirement Madison became a firm defender of judicial review in response to emerging threats of nullification and secession. He hypothesizes that “Madison shifted his position in the course of a genuine and steadfast search for the most reliable protector of liberty, which in the long run he decided was the doctrine of judicial review as interpreted by the Supreme Court of the United States.” *Id.* at 165.

When one examines the debates over judicial review in the formative period of our Constitution, two conclusions emerge. First, there was a strong consensus that, as a consequence of inherited rule of law principles, the courts would have the final authority to determine the constitutionality of governmental acts, including statutes enacted by Congress. But second, there was no consensus on how this power of judicial review would affect other fundamental decisions concerning the allocation of governmental power. Controversy persisted over several subsidiary yet critical issues: whether the federal judges would have authority over the state courts; whether those judges should have life tenure; whether the federal judiciary should be separated from the legislature, or whether, as in England, its decisions should be subject to review and revision by a branch of the legislature; whether different structures should be used to preserve federalism and individual rights; and whether the combination of judicial review, life tenure and the absence of accountability was a necessary condition for the operation of constitutionalism or the ingredients for a rule of judges that is antithetical to the rule of law.<sup>375</sup>

In short, participants in the ratification debates uniformly recognized judicial review as deriving from essential rule of law principles; but they fiercely debated its implications for how the government should be structured (particularly with respect to the separation of powers) so that judicial review would serve, and not undermine, the rule of law.

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<sup>375</sup> For a thoughtful argument that the Founders adopted the separation of powers in order to promote rule of law values, see John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 58-68 (2001).



## VII. A BROKEN CONSENSUS, ANOTHER CONSTITUTIONAL MODEL AND HISTORICAL VINDICATION

As time went on in the early republic, controversy over the subsidiary questions surrounding judicial review eroded the initial consensus, so that by 1801, when the Republican Party took control of the Presidency and Congress, the constitutional status of judicial review itself was an open question. This shift had a number of causes. While Republicans such as Madison were prepared to embrace judicial review as essential to enforcing the Bill of Rights, the federal courts had not only upheld the constitutionality of the detested Sedition Act but had enforced that law with evident enthusiasm. This experience galvanized the Republicans' distrust of the federal judiciary, which, in the control of Federalists such as John Marshall, appeared as a reactionary force that could obstruct their proclaimed Second American Revolution.

In addition, there was another constitutional model that held a particular appeal to Thomas Jefferson.<sup>376</sup> The Republic established in the wake of the French Revolution was based on a strict doctrine of the separation of powers. According to the Declaration of the Rights of Man, issued one year after the United States Constitution was ratified, "any society, in which the enforcement of rights is not guaranteed and the separation of powers not definitely stated, does not possess a constitution."<sup>377</sup> The organic laws of the new French Republic provided that each branch of the government had the authority to decide on the legality of its own acts.<sup>378</sup> The famous 1790 statute that restructured the judiciary required the courts to apply to the legislature

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<sup>376</sup> We are indebted to Professor Achilles Skordas of the University of Athens for the observations in this paragraph.

<sup>377</sup> Article 16 of the Declaration of the Rights of Man and Citizen of August 20, 1789.

for the interpretation of statutes and prohibited the courts from suspending or obstructing the operation of statutes or decrees.<sup>379</sup> The creators of the French Republic harbored deep distrust of the courts, which had been instruments of the Crown and the aristocracy prior to the Revolution. They were unwilling to give the courts any power over the other branches of government, and they cited the separation of powers as the primary reason for denying to the courts authority to decide on the legality of legislative or administrative acts.<sup>380</sup>

To be sure, the idea of the rule of law required the French state to introduce some impartial procedure for the protection of citizens' rights; consequently, the task of dispute resolution was entrusted to administrative agents, who began to operate distinctly from those who performed regular governmental decision-making. But control of legislation was treated differently. The efforts to introduce a procedure for constitutional review of legislation, proposed in particular by Sieyès, one of the main political figures of the revolution, were rejected.<sup>381</sup>

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<sup>378</sup> See JOHN BELL, FRENCH CONSTITUTIONAL LAW 20-21 (1992).

<sup>379</sup> Law of 16-24 August 1790, Title II, Art. 10, 12, in 1 J. B. Duvergier, COLLECTION COMPLETE DES LOIS 310, 311 (1834). See James Beardsley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189, 192.

<sup>380</sup> See Beardsley, *supra* note 379, at 191-200; BELL, *supra* note 378, at 20-21.

<sup>381</sup> See BELL, *supra* note 379, at 21.

In the early stages of the development of a constitution for a republican France, Jefferson was the American ambassador to that country and a behind-the-scene advisor to the authors of its new organic laws.<sup>382</sup> One can see in the basic laws of the French Republic – and particularly in their application of the separation of powers – the origin of Jefferson’s position that each branch of the government should decide on the scope of its powers.<sup>383</sup> To a Francophile such as Thomas Jefferson, judicial review was not the necessary product of a constitutional system based on individual rights and the separation of powers. On the contrary, the judges in France had been the enemies of reform; and their counterparts in the United States, led by John Marshall, could easily play the same role.

One of Marshall’s signal achievements in his *Marbury* opinion was to successfully defend judicial review in a manner that reached back to the consensus that had prevailed during ratification. He did this by downplaying separation of powers and checks and balances themes – themes that would have aroused Republican suspicions of a Federalist judicial power grab – in

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<sup>382</sup> Jefferson represented the United States in Paris from 1785 through 1789. He was not merely an observer of the Revolution but consulted with those creating a new republic and advised them on the drafting a French declaration of human rights and the development of a French constitution. Lafayette sought Jefferson’s comments and input on a draft bill of rights as he asked Jefferson for “the Bill of Rights with your notes” and “To Morrow I present my bill of rights....Be pleased to consider it Again, and Make Your observations.” These entreaties were on July 6 and 9, 1789, days before Lafayette presented his draft to the National Assembly. See Letter from Lafayette to Jefferson (July 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 118, at 249; Letter from Lafayette to Jefferson (July 9, 1789), *supra*, at 255. Jefferson also hosted a neutral meeting for French nationals to discuss elements of their new constitution that were in dispute. See Letter from Lafayette to Jefferson (Aug. 25, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON *supra*, at 354-55. See generally Editor’s Notes, in 15 THE PAPERS OF THOMAS JEFFERSON, *supra*, at 231-33 (detailing and presenting different drafts of the Declaration of Human Rights, showing where Jefferson’s influence was prevalent).

<sup>383</sup> In Lafayette’s draft of the Declaration of Human Rights, it reads “Tout government a pur unique but le bien commun;\* les pouvoirs Legislatif, executive, et Judiciaire doivent etre distincts et defines; nul corps et nul individu ne pouvant avoir une Autorite qui n’emane expressement de La Nation.” At the asterisk Jefferson inserted a caret and wrote in the margin, “This is best promoted by a division of it’s powers [above the word: ‘magistracy’] into Legislative, Judiciary and Executive.” Lafayette went on to change this provision to reflect Jefferson’s comment. 15 THE PAPERS OF THOMAS JEFFERSON, *supra* note 118, at 232 n.3.

favor of rule of law principles that drew on broadly accepted common law traditions. It is some measure of Marshall's success that the Republican press, which often virulently attacked perceived Federalist excesses, did not respond to the opinion in *Marbury* with any serious criticism of the Court's theory of judicial review. What had appeared before the decision like a major inter-branch confrontation turned out to be almost a political nonevent, in which the Court's exercise of the power of judicial review received more acquiescence than opposition.

From the vantage of 200 years' hindsight, *Marbury* appears to have vindicated Hamilton's arguments for judicial review in *The Federalist*. If so, that might be on account of the inherently superior logic of Hamilton's arguments, or of his genius for prophecy.<sup>384</sup> Or, it might be the result of a convergence of unpredictable historical forces and events that caused our governmental system to work largely in the way that John Marshall set in motion in *Marbury v. Madison*. Whatever the reasons, the country has come to accept the Supreme Court's power of judicial review as essential to a national commitment that government must operate by, and be subject to, the ideals of the rule of law.

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<sup>384</sup> *But cf.* Glendower's boast ("I can call spirits from the vasty deep") and Hotspur's rejoinder ("Why, so can I, or so can any man; But will they come, when you do call for them?"). WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 3, sc. 1, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* 532 (Harper Collins 1994).

## CONCLUSION: SOME TRANSNATIONAL IMPLICATIONS

The rule of law arguments we have traced in *Marbury*, with their antecedents in English common law and in the debates over the ratification of the United States Constitution, have important implications for judicial review in other nations with different legal cultures. Although many other nations have decided not to implement the American scheme of sharply delineated separation of powers and intergovernmental checks and balances, all advanced modern legal systems share a commitment to the rule of law. Indeed, commitment to the rule of law is fast becoming a precondition for full participation in the global economy, under the auspices of such international authorities as World Trade Organization and the European Union. If *Marbury*'s justification for judicial review depended solely upon separation of powers or checks and balances principles, its argument would not support the institution of judicial review in legal systems that did not adhere to those concepts. If, however, as we contend, *Marbury*'s rationale relies foremost on rule of law principles, then it supports judicial review in any legal system that aspires to those principles. How judicial review is exercised may require some adjustment to take into account a different relationship among the various branches and departments of government within a particular political system.<sup>385</sup> But the basic concept of a judiciary that is empowered to interpret law, including organic law, to declare the illegality of government action that exceeds the boundaries of law, and to enforce such judgments by means that include, when necessary, the invalidation of unauthorized legislation or administrative regulation, can apply in

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<sup>385</sup> See, e.g., NELSON, ORIGINS, *supra* note 17, at 104-13 (stating that other countries have adjusted the concept of judicial review to take into account their governmental system).

nations committed to the rule of law, even where the national legal system does not follow the American model of a strict separation of legislative, judicial and executive powers.

*Marbury's* rule of law themes may also help to explain the recent transnational trend toward judicial review. Internationally, there is growing recognition of judicial review across a range of legal systems, as well as systems that blend governmental functions rather than separate them.<sup>386</sup> In the European Union,<sup>387</sup> Japan,<sup>388</sup> Canada,<sup>389</sup> South Africa,<sup>390</sup> India,<sup>391</sup> and Latin American countries such as Brazil and Argentina,<sup>392</sup> the principles of judicial review are being recognized both in theory and practice as an important component of judicial power, despite sharp differences among these legal cultures over the distribution of political power among the various departments of government.

The developments in France and Great Britain are particularly instructive. In France, the use of administrative agents to determine the legality of the actions of the administration<sup>393</sup>

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<sup>386</sup> See generally Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91 (2000).

<sup>387</sup> See Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 484-85 (2003).

<sup>388</sup> See HIROYUKI HATA & GO NAKAGAWA, CONSTITUTIONAL LAW OF JAPAN 45-46 (1997); NELSON, ORIGINS, *supra* note 6, at 106-07.

<sup>389</sup> See generally Mark Tushnet, *Judicial Activism or Restraint in a Section 33 World*, 53 U. TORONTO L.J. 89 (2003) (stating that “[f]or all practical purposes the debate among constitution designers over parliamentary supremacy versus judicial review is over. Proponents of judicial review have carried the day, and what remains to be discussed are details about designing judicial review.”).

<sup>390</sup> See Hirschl, *supra* note 386, at 93, 134-38; NELSON, ORIGINS, *supra* note 17, at 110.

<sup>391</sup> NELSON, ORIGINS, *supra* note 17, at 107-08.

<sup>392</sup> *Id.* at 104.

<sup>393</sup> See *supra* notes 376-81 and accompanying text (discussing developments in the French Republic).

evolved into a system of courts (operating separately within the *Conseil d'Etat*) that performed that function.<sup>394</sup> Efforts to introduce constitutional control of legislation through the case law of the *Conseil d'Etat* failed during the 19<sup>th</sup> century and the first half of the 20<sup>th</sup> century.<sup>395</sup> The doctrine of the separation of powers constituted a main obstacle to the development of judicial review.<sup>396</sup> But in 1958, General de Gaulle's Constitution of the Fifth Republic created the *Conseil constitutionnel*, with full jurisdiction on the control of the constitutionality of statutes.<sup>397</sup> This body may have originally been established, similarly to Madison's proposed Council of Revision, as a mechanism to bring greater control of the legislature by the executive.<sup>398</sup> But the desire for government based on the rule of law, and the idea that constitutional issues should be

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<sup>394</sup> See L. NEVILLE BROWN & JOHN BELL, FRENCH ADMINISTRATIVE LAW 79-82, 126-36, 237-50 (1998).

<sup>395</sup> See BELL, *supra* note 378, at 23-27; Beardsley, *supra* note 379, at 194-98.

<sup>396</sup> See BELL, *supra* note 378, at 23-27. The advocates of judicial review relied heavily on Marshall's opinion in *Marbury* and on *The Federalist* No. 78. Beardsley, *supra* note 379, at 198-200. The opponents of judicial review invoked the separation of powers; some also, in the early 20<sup>th</sup> century, pointed to the United States Supreme Court's decisions during the period of economic substantive due process to argue that judicial review had degenerated into the political rule of judges. *Id.* at 203-06.

<sup>397</sup> See, e.g., BELL, *supra* note 378, at 13-14, 30-33. Professor Skordas describes the developmental process as follows: "The rule of law was the motor behind any change in that area; the principle of legality in particular, as well as the need to protect the individual against arbitrary acts of the authorities led to 'step by step' reforms and to the gradual separation of the administrative courts and of the Council of State from the administration, enlarged the power of the courts and ended in the establishment of the *Conseil constitutionnel*." Letter from Prof. Achilles Skordas, University of Athens, to Dean Robert Reinstein (August 3, 2003) (on file with Dean Reinstein, Temple University Beasley School of Law).

<sup>398</sup> See BELL, *supra* note 378, at 19-20, 27-29. The members are appointed by either the President of the Republic, the President of the Senate, or the President of the National Assembly for staggered nine-year terms. Not all members of the *Conseil constitutionnel* are judges; in fact, there are no formal qualifications for appointment. The *Conseil constitutionnel* has the responsibility, with compulsory review, to determine the constitutionality of organic statutes (e.g., those relating to the judiciary, the composition of Parliament, finance laws and the procedures of the *Conseil*) before they take effect. In addition, it has the authority to rule on the constitutionality of any statute passed by Parliament, before it has taken effect, if the matter is referred to it by the appropriate government official (President of the Republic, National Assembly or Senate, or Prime Minister) or by 60 members of the Assembly. *Id.* at 31-34. The decisions of the *Conseil constitutionnel* are binding on all branches of the government, including the courts. *Id.* at 48.

treated as legal and not political, have caused an evolutionary process so that, regardless of its original design, the *Conseil constitutionnel* appears to function “as a court in all but name.”<sup>399</sup>

Even Great Britain, despite its long tradition of Parliamentary supremacy, has taken steps to strengthen the practice of judicial review. Under laws enacted to facilitate integration with the structure of the European Union, courts in the United Kingdom now have the authority to determine that domestic laws are in conflict with fundamental human rights. In 1998, Parliament enacted the Human Rights Act, which embedded into domestic law most of the guarantees of individual rights in the European Convention on Human Rights.<sup>400</sup> This necessarily raised the potential for conflict between those rights and acts of Parliament. The solution in the Human Rights Act was to direct the British courts, if possible, to construe statutes to conform with the embedded rights. If that conformity was not possible, the courts are to declare that the statute is inconsistent with an embedded right and refer the matter to Parliament for a fast-track consideration on amending the statute.<sup>401</sup> Since it is unlikely that Parliament would refuse to amend a non-conforming statute, this system effectively establishes judicial review and serves the same rule of law functions established in *Marbury*, while preserving the ultimate legal

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<sup>399</sup> *Id.* at 55-56. Although there are no formal qualifications for appointment to the *Conseil constitutionnel*, most of its members have been legally trained. A survey of the *Conseil constitutionnel*'s membership between 1958 and 1992 found that of the 48 members, only 11 had no legal training. Fifteen of the members were sitting judges, and 11 were law professors. *Id.* at 35-36. Professor Skordas advises that eight of the nine present members of the *Conseil constitutionnel* are legally trained. Letter from Prof. Skordas, *supra* note 397. The arguments before, and opinions of, the *Conseil constitutionnel* have the same qualities of technical legal analyses and constitutional policy determinations that are characteristic of the United States Supreme Court. *See* BELL, *supra* note 378, at 229-30.

<sup>400</sup> *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *AMERICAN JOURNAL OF COMPARATIVE LAW* 707, 709 (2001).

<sup>401</sup> *See id.* at 732-38.



supremacy of Parliament.<sup>402</sup>

Where else might the concept of judicial review take root? As stated earlier, this article began in a dialogue with Chinese judges. Since in China, all governmental power, including judicial power, is vested in the National People's Congress,<sup>403</sup> the separation of the courts from the legislature would be inconsistent with organic Chinese law.<sup>404</sup> But this is not a reason to reject judicial review. To the contrary, it presents a structure under which judicial review could operate. China could well agree with Richard Yates that, to secure accountability, the courts' decisions should be reviewable by a branch of the legislature. One possible solution would be to adapt the historical English model, with its Parliamentary "Law Lords," by providing an appeal from the courts to a branch of the standing committee of the NPC, which would be composed of judges and others with substantial legal training and would effectively function as the highest court of the nation. Another possible solution would be to establish a body within the NPC standing committee along the lines of Madison's Council of Revision or the French *Conseil constitutionnel*. Finally, China could consider the manner in which England adopted a form of judicial review when it finally adopted a bill of rights. Under this approach, if a Chinese court

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<sup>402</sup> See *id.* at 735-36, 738-39. On the other hand, for conflicts between domestic law and directly enforceable European Union law, the British courts apply the form of judicial review enunciated in *Marbury*. See note 285, *supra*.

<sup>403</sup> See DANIEL E.K. CHOW, THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 80-81 (2003).

<sup>404</sup> See CHOW, *supra* note 403, at 49-50.

determined that a law conflicted with the Chinese constitution, it could refer the matter to a body within the NPC for expedited determination. That body could then make a recommendation to the full NPC as to whether the law in question required repeal or revision.

Judicial review does not intrinsically amount to judicial supremacy.<sup>405</sup> The PRC has expressed a commitment to the rule of law and is moving towards the implementation of the rule of law in its judicial system.<sup>406</sup> A central question that the PRC must resolve is the nature of its Constitution. If the Chinese Constitution is a political document, judicial review will remain a foreign concept. But if the Chinese Constitution is regarded as a law – as the supreme law of the land that governs the actions of the government – then the rule of law principles that are at the heart of Chief Justice Marshall’s opinion in *Marbury v. Madison* can apply, and judicial review may be embraced as a fundamental component of the Chinese system of government.

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<sup>405</sup> See Van Alstyne, *supra* note 51, at 20; Robert F. Nagel, *Marbury v. Madison and Modern Judicial Review*, 38 WAKE FOREST L. REV. 613, 615-16 (2003); Daniel A. Farber, *Judicial Review and its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415, n.15 (2003) (stating that judicial supremacy as opposed to judicial review means that written opinions of the courts are binding on all other branches of government); *but see* WILLIAM SEAGLE, MEN OF LAW 271-72 (1947).

<sup>406</sup> See Albert H.Y. Chen, *Towards a Legal Enlightenment: Discussion in Contemporary China on the Rule of Law*, in THE RULE OF LAW: PERSPECTIVES FROM THE PACIFIC RIM 14-17 (The Mansfield Center for Pacific Affairs ed., 2000); PEERENBOOM, *supra* note 19, at 49.