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MARBURY V. MADISON AS THE FIRST GREAT ADMINISTRATIVE LAW DECISION

THOMAS W. MERRILL*

I. INTRODUCTION

Marbury v. Madison[1] is our foremost symbol of judicial power. Not only is the decision regarded as the root of judicial authority to strike down statutes as violating the Constitution; it is also taken to mean that "the federal judiciary is supreme in the exposition of the Constitution."[2] In other words, *Marbury* has come to stand for the proposition that courts should enforce their own understanding of the meaning of the Constitution, without deferring or even paying much attention to the views of the other branches.[3]

I will not in this essay engage in yet another analysis of *Marbury*'s justification for judicial review, nor will I debate the virtues and vices of the aggressive judicial review for which the decision has come to stand—at least not directly. Instead, I will approach *Marbury* from a different angle. When the decision was handed down, and for many decades afterwards, *Marbury* was primarily regarded as being about judicial review of executive action, not legislative action. That is, *Marbury* was considered to be an administrative law decision.[4] This essay asks what we can learn by considering *Marbury* from the perspective of the history of administrative law.[5]

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

2. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

3. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997). *See generally* Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5 (2001).

4. This is not surprising if you read the opinion in its entirety. The opinion devotes twenty-two pages to administrative law questions, including whether the Court had jurisdiction. *Id.* at 153-176. By comparison, it devotes only five pages to the power of judicial review. *Id.* at 176-180.

5. *Marbury*'s role in the development of administrative law, although often overlooked, has not been entirely ignored. *See* PETER M. SHANE & HAROLD H. BRUFF, THE LAW OF PRESIDENTIAL POWER 31-46 (1988) (recognizing that *Marbury* is seminal in understanding judicial review of executive branch action); Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

One potential payoff from considering *Marbury* in this light concerns our understanding of the role of the courts in preserving the rule of law. One can readily imagine a modern democratic state in which there is strong respect for the rule of law and yet no judicial review of legislative action.[6] It is much more difficult to imagine a democratic state that adheres to the rule of law but makes no provision for review of executive action by an independent judiciary. *Marbury v. Madison*, as it happens, is the first important statement by the U.S. Supreme Court about how courts should respond to lawless executive action. As such, the decision is worthy of study for what it tells us about the promise and pitfalls of such an undertaking. It is also worth considering how *Marbury*'s solutions to the problem of lawless executive action have fared over time—what has worked, what has been discarded, and what has been importantly modified in response to accumulated experience.

The second payoff from considering *Marbury* as an administrative law decision is that it may teach us something about missed opportunities in the realm of judicial review of legislative action. There are, of course, important differences between judicial review of executive action and judicial review of legislative action. Yet in one critical sense, the two practices raise the same dilemma: how do we prevent courts, in the guise of enforcing their interpretation of the law, from usurping the rightful functions of the elected branches of government? That is, how do we prevent the rule of law from becoming the rule of the judges? By considering *Marbury* as a whole—the administrative law decision as well as the constitutional law decision—perhaps we can see this great symbol of American public law in a less imperial light: as a counsel of judicial strength through restraint, rather than what it has all too often become—a justification for judicial willfulness.

II. *MARBURY*: THE ADMINISTRATIVE LAW DECISION

Administrative law can be defined in a number of ways. At its core, however, administrative law consists of the body of principles and rules that govern judicial review of executive action. So understood, the paradigmatic administrative law controversy involves three actors: an executive actor, usually a department or agency and only rarely the President himself;[7] an individual or

6. Great Britain and some of the nations of the British Commonwealth fit this description.

7. *See* Franklin v. Massachusetts, 505 U.S. 788 (1992) (interpreting Administrative Procedure Act, with its cause of action for judicial review and waiver of sovereign immunity, not to apply to the President); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (holding former President absolutely immune from civil actions seeking damages based on official acts).

entity that claims to have been injured by the executive actor; and a court, which the injured party asks to redress the claimed injury.

Marbury fully conforms to this paradigm. The executive actor was James Madison, Secretary of State to President Thomas Jefferson. The aggrieved individual was William Marbury, who had been nominated by President Adams and confirmed by the lame duck federalist Senate to a five-year term as Justice of the Peace to the District of Columbia. Marbury's complaint was that the commission authorizing him to take up this office had not been delivered by Secretary Madison, and without the commission he could not assume his post.[8] The court from which Marbury sought relief was the United States Supreme Court, where he filed an original action seeking a writ of mandamus directing Madison to deliver the commission.

Given that administrative law is at its core about judicial review of executive action, this law must answer four critical questions: (1) Who can gain access to courts to complain about executive action? (2) What process is required to produce valid executive action, that is, what procedures must executive actors follow to in order to avoid reversal by a court? (3) What standard will the court employ in reviewing the facts found and legal interpretations made by the executive in support of the challenged action? (4) What relief may the court award if it finds the challenged action deficient in one or more respects?

Marbury also qualifies as an administrative law decision from the perspective of these questions. Chief Justice Marshall's opinion for the Court considered at length the first or "who" question, addressing several threshold doctrines that remain vital today in determining who may gain access to courts to complain of executive action. The decision has also played an important role in discussions about the proper standard of review of executive action; the Court engaged in *de novo* consideration of questions of both fact and law, thereby establishing a benchmark against which subsequent debate about the proper standard of review has

8. The shared assumption seems to have been that Marbury needed the physical piece of paper called a commission to take up his office. Some of the discussion in the case suggests that a commission is simply evidence of an appointment, which presumably would be the modern view. *See Marbury*, 5 U.S. (1 Cranch) at 157 ("the commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it"). At one point, however, Marshall discussed what would happen if the original commission were lost. *Id.* at 160-61. He thought that the Secretary of State under those circumstances would be obliged to provide a duplicate copy of the original commission. *Id.* This perhaps suggests the understanding that the appointee would have to have in his possession at all times a physical commission (original or duplicate) in order to serve as justice of the peace.

unfolded. And, perhaps most remarkably, the decision endorsed judicial intervention to compel executive action wrongly withheld—a species of relief at the far end of the spectrum of what courts have been willing to do by way of redressing unlawful executive action. The only major question on which *Marbury* sheds no light is the one concerning the procedures executive actors must follow to avoid judicial invalidation. Nevertheless, it is hardly an exaggeration to say that, on three of the four questions of greatest importance in administrative law, *Marbury* is the seminal American decision.

A. Who May Gain Access to the Courts

Marbury's resolution of the first or "who" question was to have profound consequences for the development of administrative law.[9] After 200 years of evolution, the "who" question is answered today by applying a maze of complicated and partially overlapping doctrines, including jurisdiction, standing, cause of action, sovereign immunity, political question, reviewability, official immunity, finality, ripeness, exhaustion, mootness, and primary jurisdiction.[10] A considerable chunk of this complexity was foreshadowed in *Marbury*. Chief Justice Marshall addressed what we would today call standing, reviewability and cause of action, although he did not use these terms; in addition, he addressed jurisdiction, by that name.

As has been observed many times, Chief Justice Marshall considered the administrative law issues presented in *Marbury* in an odd order.[11] He started with what we would call standing, then proceeded to what we would call reviewability, then went on to consider whether Marbury stated a cause of action for mandamus, and came to jurisdiction last. A more orthodox sequencing of issues, at least today, would probably be to start with jurisdiction, then consider whether the complaint stated a cause of action (which can be resolved on a motion to dismiss), then turn to standing (which is jurisdictional, but may entail the need for discovery),[12] and finally tackle reviewability. I will follow the more orthodox ordering of the issues in describing in greater detail what

9. *See* Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1265 (1973) ("*Marbury v. Madison* was the crucible for the development of both 'who' and 'when' principles").

10. For an overview, see 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE 917-1106 (2002) (primary jurisdiction, exhaustion, finality, and ripeness); 3 *id.* at 1107-1383 (standing, reviewability, cause of action, and sovereign immunity).

11. *See, e.g.*, William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 6-8 (1969).

12. As the qualifiers in the text suggest, a court might alternatively decide to consider standing before cause of action. Certainly this would be logical if the standing question could be resolved on the pleadings.

Marbury, the administrative law decision, decided.

1. Jurisdiction

Jurisdiction was the only issue decided against Marbury, and if it had been considered first, as one would expect today,[13] the opinion would have been considerably shorter. The Chief Justice concluded that Section 13 of the Judiciary Act of 1789[14] conferred original jurisdiction on the Supreme Court to issue writs of mandamus running to "persons holding office" under federal law, including, presumably, the Secretary of Sate.[15] He further concluded that Article III of the Constitution prohibited Congress from conferring this type of original jurisdiction on the Supreme Court.[16] These conclusions set up the famous discussion about whether the Court could enforce a statute that conflicts with the Constitution. Since my theme is *Marbury*'s influence on administrative law, I shall not enter this thicket, other than to note that the answer was no, and that the Court therefore held it was without jurisdiction.

The principal point to make about *Marbury*'s discussion of jurisdiction, from the perspective of administrative law, is that the decision definitively established the principle that no federal court can review executive action unless Congress has first conferred jurisdiction on the court to hear such challenges. This seems self-evident today, but *Marbury* was the first prominent case to so hold, and the ruling was so spectacular that the principle has never been challenged since. The principle is a corollary of two understandings: that federal courts are courts of limited rather than general jurisdiction, and that Congress is the institution empowered by the Constitution to establish the extent of the

13. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (holding that a court must determine that it has jurisdiction before it decides a case on the merits).

14. Judiciary Act of 1789, ch. 20, 13, 1 Stat. 73, 81 (1789).

15. This was a questionable reading of the statute. Section 13 can be read as conferring power on the Supreme Court to issue writs of mandamus only in cases in which it otherwise already has either original or appellate jurisdiction. Ten years later, the Court would interpret the grant of mandamus authority to circuit courts in Section 14 of the Judiciary Act precisely this way. *See* McIntire v. Wood, 11 U.S. (7 Cranch) 504, 505-06 (1813). If Marshall had read the statute this way, the Court could have reversed for want of jurisdiction without reaching the constitutional question. *See* Van Alystine, *supra* note 11, at 14-15.

16. This was a questionable interpretation of Article III. That Article can alternatively be read as listing the categories of cases that must be heard in the Supreme Court as a matter of original jurisdiction, but as giving Congress authority to make "exceptions" from the Court's appellate jurisdiction by transferring them to the Court's original jurisdiction. *Id.* at 30-33. So read, section 13 of the Judiciary Act, even as interpreted by Marshall, would have been constitutional.

courts' jurisdiction. Thus, the principle does not necessarily hold under state administrative law, where courts exercise general jurisdiction. In many states, courts will entertain lawsuits based on common law causes of action such as mandamus, prohibition, certiorari, or injunction in order to review executive action—without any express conferral of jurisdiction by the legislature.[17]

Marshall's opinion in *Marbury* did not flush out the underlying assumptions about federal judicial jurisdiction. But there is little doubt that he fully appreciated them. They had been advanced by the Court before Marshall joined it in the context of diversity jurisdiction,[18] and Marshall himself made them explicit in an early decision about the scope of the power to issue writs of habeas corpus.[19] They were given further emphasis by the Court's 1812 decision in *United States v. Hudson*,[20] disclaiming any federal court jurisdiction to hear common law crimes. In any event, *Marbury* was undoubtedly the most prominent decision of the era to enforce the principle that federal courts may act only within the jurisdiction prescribed for them by Congress. As we shall see, this principle became the biggest stumbling block to the development of a robust body of federal administrative law in the nineteenth century.

2. *Cause of Action*

With respect to whether Marbury had a cause of action, Chief Justice Marshall's discussion is a bit misleading, especially to the casual modern reader. This is because the discussion proceeds entirely on the basis of whether the requisites for a common law writ of mandamus had been satisfied. It is now well established, at least in federal administrative law, that Congress must supply not only jurisdiction to review executive action (as *Marbury* holds), but also a cause of action indicating that the plaintiff is entitled to such review.[21] In *Marbury*, however, the Court seemed to say that

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17. *See generally* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 165-96 (1965).

18. Turner v. Bank of N. Am., 4 U.S. 8, 10 (1799).

19. *See* Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93 (1807) (Marshall, C.J.) ("Courts which originate in the common law possess a jurisdiction which must be regulated by their 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").

20. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). The converse of this proposition, as Marshall himself also recognized, was that once Congress does confer jurisdiction on a federal court, it is obliged to exercise it. *See* Cohens v. Virginia, 6 Wheat. 264, 404 (1821) (Marshall, C.J.).

21. This is implicit, for example, in the many decisions debating whether a particular statutory scheme provides for a private right of action. As the Court observed in *Alexander v. Sandoval*, 532 U.S. 275 (2001):

> [P]rivate rights of action to enforce federal law must be created by Congress. . . . Statutory intent on this . . . point is determinative. . . .

Marbury stated a cause of action under the common law of mandamus, and indeed that he would be entitled to issuance of such a writ, if only the Court had jurisdiction.

The appearance that the Court was upholding the use of a common law cause of action to review federal executive action is illusory, however, and disappears once we attend to the statute under which Marbury sought relief. Section 13 of the Judiciary Act authorized the Supreme Court "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."[22] Thus, Marbury's cause of action was statutory. To be sure, it was a statutory cause of action that expressly incorporated the common law criteria for issuance of the writ ("warranted by the principles and usages of law"), and so it was entirely proper for Marshall to look to Blackstone and Mansfield for the requirements for issuance of the writ.[23] But it was a cause of action expressly authorized by Congress all the same.[24]

The puzzle is why Marshall failed to quote the statute in the section of the opinion discussing mandamus, thereby giving rise to the impression that the cause of action was based on common law. One can only speculate. Perhaps Marshall wanted to avoid the awkwardness of relying on a statute destined to be declared unconstitutional in a later section of the opinion. Or perhaps he relished in creating the impression that federal courts have inherent power to issue common law writs controlling the actions of executive officers, without actually so stating or holding.

Whatever his motivation for ignoring the statute, the key point Marshall developed in his discussion of mandamus was that the availability of the writ did not depend on the nature of the office held by the defendant, but rather on the nature of the "thing to be done."[25] Questions "in their nature political" or questions that entail the exercise of "executive discretion" could never be the

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> Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Id. at 286.

The distinction between jurisdiction and cause of action is not always clear in the cases. Generally speaking, however, jurisdiction concerns the power of a court to entertain a particular type of legal action. Cause of action concerns the power of a particular person to invoke the power of a court to resolve a particular type of legal action. *See* Davis v. Passman, 442 U.S. 228, 239-40 n.18 (1979).

22. *See supra* note 14.

23. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 168-69 (1803).

24. *See id.* at 173-74 (recognizing that federal question jurisdiction was potentially available in some court over the mandamus action "because the right claimed is given by a law of the United States").

25. *Id.* at 170.

subject of the writ.[26] But where an officer "is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President," then mandamus is proper.[27]

Significantly, Marshall acknowledged that no federal statute specifically directed the Secretary of State to deliver a signed commission. But, he said, it was not necessary that the act to be performed be one "expressly enjoined by statute" before mandamus would lie.[28] It was enough that the applicant have a "vested legal right, of which the executive cannot deprive him."[29] What emerges from this discussion—with a little teasing—is the understanding that although Congress must supply the cause of action permitting review of executive action, courts are not confined to federal law in determining whether the challenged action is unlawful. Rather, in determining whether executive action is beyond the pale, "general principles of law," as Marshall put it, are also relevant.[30]

This seems strange to the contemporary reader, conditioned as we are to statutory review of agency action for conformity to the plain meaning of some federal statute. But it would not have seemed odd in the nineteenth century, when one of the principal modes of review of agency action was the officer suit.[31] In such an action, the complainant would charge the offending officer with a common law tort, such as trespass, and the officer would raise as a defense that his action was clothed with statutory authority.[32] Thus, the violation of common law rights would be adjudicated as an integral part of the review process.

Although it seems odd at first, the point about the relevance of general principles of law is in fact of continuing validity today. Federal courts cannot review executive action without having to resolve, at least implicitly, issues that arise under the "general law" of property, contract, agency, and so forth. For example, if an executive official is charged with losing a prisoner's hobby kit, we need to draw upon principles of property and bailment law, and the remedies associated with them, in order to assess the claim.[33]

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26. *Id.*
27. *Id.* at 171.
28. *Id.* at 172.
29. *Id.*
30. *Id.* at 170.
31. *See* David E. Engdahl, *Immunity and Accountability for Positive Government Wrongs*, 44 U. COLO. L. REV. 1, 14-21 (1972) (reviewing early nineteenth century law regarding officer suits); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999) (reviewing the use of officer suits to adjudicate takings claims in the nineteenth century).
32. *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 177 (1804).
33. *See* Parratt v. Taylor, 451 U.S. 527, 543-44 (1981) (dismissing

The rule of law, in other words, includes aspects of the entire *corpus jurus*, not just positive law, even if we are speaking of challenges to actions of federal officials brought in federal courts of limited jurisdiction and legal competence.

As to exactly why the withholding of the commission was unlawful under general principles of law, Marshall invoked (for the second time in the opinion) a hypothetical about a land patent. Suppose a settler has satisfied all the requirements for the purchase of land from the United States, and yet some executive officer like the Secretary of State refuses to issue the settler a patent, *i.e.*, a certificate of title to the land. Surely this would be the type of lawless action that would warrant judicial intervention through issuance of a writ of mandamus to the Secretary. Virtually every lawyer of the day, Marshall included, was an avid real estate speculator.[34] They would not have demurred from the analogy.

In sum, *Marbury* is consistent with, although it does not highlight, the modern understanding that a statutory cause of action is necessary in order to secure judicial review of executive action. Perhaps more importantly, the opinion lays down the understanding that federal courts reviewing executive action are not confined to narrow consideration of whether the executive is in compliance with federal law; instead, the court is free to evaluate the executive's conduct under the full range of legal norms recognized in American law.

3. Standing

The first issue discussed in *Marbury* was what today would be characterized as the issue of standing: did Marbury have a sufficient personal interest to render his dispute with the government the kind of controversy fit for judicial resolution? Admittedly, it is anachronistic to use the standing label to describe the initial inquiry in *Marbury*. The use of the term "standing" to describe one of the prerequisites to gaining access to courts is a development of the twentieth century.[35] Indeed, the notion that

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procedural due process claim brought by prisoner for loss of hobby kit on the ground that there had been no "deprivation" of property given availability of common law action for damages).

34. Marshall invested heavily in lands that were part of the original Fairfax Estate in Virginia, and participated in litigation attempting to gain clear title to these lands. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 165-68, 186 (Henry Holt and Co. ed., 1996). Later in his career, while serving as Chief Justice, he personally led a surveying expedition seeking improved transportation routes to the lands of the trans-Appalachian frontier then being settled. *Id.* at 411-14.

35. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1437 (1988); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1375-76

the "cases" or "controversies" language in Article III requires some demonstration of "standing" in order to permit adjudication of a dispute in federal court did not clearly emerge until around 1970.[36] Still, I would argue that the initial inquiry in *Marbury* was essentially the same as what we would today call standing. The question the Court had to decide was whether the dispute was "traditionally judicial" and thus could properly be resolved by a tribunal limited by the Constitution to the resolution of "cases" or "controversies."[37]

To be sure, Marshall's extensive consideration of the first issue was also a consideration of the merits, or at least of a significant portion of the merits. The discussion was entitled: "Has the applicant a right to the commission he demands?"[38] Some would insist that this is all that was going on in this part of the opinion: Marshall, for strategic reasons, decided to adjudicate the merits first, then considered some threshold issues (reviewability and cause of action), then considered jurisdiction.

I would argue, however, that the initial inquiry in *Marbury* is not just a determination of the merits, but also an intuitive application of what today would be called standing. The central point in support of this conclusion is that the first section is at most only a partial determination of the merits. The conclusion of the inquiry was not that Marbury was entitled to relief, but only that he had a "vested legal right" to the commission.[39] At this point in the opinion, the Court had not even set forth the legal requirements of the cause of action – mandamus. It is not until the third section of the opinion that Marshall decided Marbury had satisfied the elements for securing relief by mandamus.

Why then did Marshall sever the consideration of the merits into two parts—Marbury's right to the commission and Marbury's right to mandamus – and consider the right to the commission in isolation at the outset of the opinion rather than in conjunction with all the required elements to secure relief? The answer, I think, is that Marshall wanted to show up front that Marbury had a serious legal claim of the type that courts traditionally evaluate and enforce; a sufficient claim to warrant the Court in proceeding further to adjudicate the controversy. In other words, one purpose of the first section was to establish that Marbury had the type of

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(1988).

36. The pivotal decisions were *Flast v. Cohen*, 392 U.S. 83, 95 (1968) and *Ass'n of Data Processing Service Organization., Inc. v. Camp*, 397 U.S. 150, 153 (1970). *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975) effectively codified the Article III underpinning.

37. *Cf.* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801 at 50 (1997).

38. *Marbury*, 5 U.S. at 154.

39. *Id.* at 162.

grievance that is sufficiently concrete and adversarial as to be fit for judicial resolution.[40]

In this respect, *Marbury* can be seen as the original progenitor of the provision of the Administrative Procedure Act that confers standing on persons who "suffer[] legal wrong because of agency action."[41] Under this approach, one asks whether the agency has performed an action that, if not legally justified, would constitute an injury to a recognized right of liberty or property. If so, then the claimant who has suffered such an injury has standing to challenge the action.[42] It has long been said that the legal wrong test conflates standing and the merits.[43] True enough, it does. But all of standing law does to one degree or another.[44] This does not take away the fact that it is a doctrine designed to filter out from among the universe of potential claimants those who may properly invoke the powers of the courts to review executive action.

If one purpose of the inquiry into Marbury's right to the commission was to establish his standing, then this part of the opinion has some interesting implications for modern debates about standing. One debate is whether standing is just an invention of the modern Supreme Court, with no foundation in original or early judicial understanding of the limited power of federal courts.[45] If my reading of *Marbury* is correct, the decision stands as a partial refutation of this claim. Another debate is whether American courts before the recent era limited standing to parties seeking to vindicate common law rights.[46] If we view *Marbury* as a standing case, then it would suggest that standing was not so limited. Marbury was seeking the aid of the federal

40. In *Baker v. Carr*, 369 U.S. 186, 208 (1962), Justice Brennan cited *Marbury* in the course of discussing whether individual voters have standing to challenge the constitutionality of legislative apportionment schemes.

41. 5 U.S.C. § 702 (2000).

42. *See, e.g.*, Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137 (1939).

43. *Camp*, 397 U.S. at 153.

44. Modern injury in fact cases appear to inquire whether the claimant has suffered an injury to property or person that would constitute a tort or least would be sufficiently tort-like to survive a motion to dismiss as a common law action. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (claimant must be suffering from actual or imminent injury). The zone of interests test notoriously involves a peek at the merits before it can be resolved. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 175-76 (1997) (zone of interest test involves determination that the injury complained of falls within the zone of interests protected by the statutory provision whose violation forms the basis of the complaint).

45. *See* Ann Woolhandler & Caleb Nelson, Does History Defeat Standing Doctrine? (forthcoming, MICH. L. REV.) (collecting sources).

46. *See, e.g.*, Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1717-18, 1723-24 (1975).

courts to help him secure a government job—a kind of "new property" right of the sort celebrated by Charles Reich and regarded as falling outside due process protection for property before *Goldberg v. Kelly*.[47] Marshall may have invoked analogies to property rights (e.g., land patents) in discussing Marbury's right to the commission. But he clearly recognized that the commission was not conventional property.[48] By recognizing that a vested right to a commission was a sufficient interest to warrant the Court's intervention, *Marbury* thus suggests that the range of interests conferring standing extends some distance beyond the sphere of rights protected at common law.

4. Reviewability

The second question considered in *Marbury*, but probably the last of the "who" questions that would be addressed under modern decisional conventions, was what today would most likely be characterized as reviewability. Marshall entitled the inquiry in this section of the opinion: "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?"[49] This heading might lead one to expect an inquiry into cause of action, or perhaps relief. But as soon as he got rolling, it was clear Marshall was thinking about something close to what today we would call reviewability.

Reviewability is similar to and often overlaps with other doctrines such as the political question doctrine and sovereign immunity. Marshall did not use the terms reviewability or the political question doctrine, with good reason: both concepts were poorly developed at the time *Marbury* was decided, and only later crystallized into distinct threshold issues. Nor did he make mention of sovereign immunity, which, in contrast to these other doctrines, was already reasonably well recognized (recall that *Chisholm v. Georgia*[50] had been decided and overruled by the Eleventh Amendment before *Marbury* was decided).

If we were to pick out one of these modern concepts and use it

47. 397 U.S. 254, 275 (1970); Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

48. At one point in his opinion, Marshall said:

> In order to determine whether he [Marbury] is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

Marbury, 5 U.S. (1 Cranch) at 155. I read this to mean that if Marbury was entitled to the office, he was entitled to receive the "evidences" of the office such as his salary, which once received, would become his property. I do not read it to mean that the office was itself "property."

49. *Id.* at 162.

50. 2 U.S. (2 Dall.) 419 (1793).

anachronistically to describe the inquiry in *Marbury*, I think the most accurate characterization is probably reviewability. The modern political question doctrine requires that a court abstain from deciding a case because full authority to resolve the issue has been vested in one of the politically accountable branches of government.[51] Various factors are consulted in making such a determination, including the historical understanding of the constitutional allocation of the power, whether it is possible to articulate judicially-manageable standards to resolve the question, and whether the court has a realistic way to enforce any judgment it would render.[52]

The reviewability doctrine requires that a court abstain from deciding a case because it entails a discretionary judgment by an executive actor that is not amenable to judicial review. The APA subdivides reviewability into two categories: where "statutes preclude review" and where "agency action is committed to agency discretion by law."[53] The relevant factors consulted in deciding whether an issue is reviewable overlap with those used under the political question doctrine, most prominently whether there are manageable judicial standards to resolve the controversy ("law to apply").[54]

The general tenor of the discussion in *Marbury* is closer to what one finds in modern political question cases than what one finds in reviewability cases. But the most plausible and parsimonious dividing line between the two doctrines is that the political question doctrine applies to challenges based on constitutional claims, whereas reviewability applies to challenges based on nonconstitutional (typically statutory) claims. This explanation, although it has not received any official endorsement, appears to conform to the pattern of the decided cases.[55]

If this explanation is accepted, then *Marbury* should be classified as a reviewability case. Marshall called Marbury's commission a "vested right," and analogized it to a property right. But there was no suggestion that the refusal to deliver the commission was an uncompensated taking of property or that it violated any other constitutional provision. Refusal to deliver the commission was unlawful because under federal statutory law

51. *See* Nixon v. United States, 506 U.S. 224, 228 (1993) (holding that Constitution commits the determination of what it means to "try" an impeachment to the Senate).

52. For a more complete discussion, see Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 244-272 (2002), and authorities cited.

53. 5 U.S.C. §§ 701(a)(1), (a)(2) (2000).

54. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-14 (1971).

55. *See, e.g.*, Webster v. Doe, 486 U.S. 592 (1988) (applying reviewability doctrine to bar statutory claim but not constitutional claim).

Marbury had an irrevocable right to the commission for a five-year term, and because the common law conditions for mandamus incorporated by reference into Section 13 of the Judiciary Act were satisfied. Hence, I believe that if *Marbury* arose today, the inquiry in this part of the opinion most likely would be framed in terms of reviewability.

Marshall began the inquiry by stating what amounted to a presumption in favor of judicial review in cases involving vested rights. "The government of the United States has been emphatically termed a government of laws, and not of men," he famously wrote. "It will certainly cease to serve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[56] The inquiry was therefore cast in terms of whether there was any exception that would take the case out of the presumption. This move, of course, immediately stacked the deck in favor of allowing the case to go forward.[57]

The first possibility for an exception explored by Marshall was whether the challenged action should be "considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive."[58] Marshall immediately said that he did not question but that there were such cases. Some pages later he offered examples: the President's power of nominating and appointing persons to offices subject to Senate confirmation would not be subject to judicial review, nor would actions taken by the Secretary of State in foreign affairs performed at the direction of the President.[59] Marshall observed that "[b]y the constitution of the United States, the President is invested with 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." In other words, certain acts or functions are entrusted by the Constitution to the President and his confidential aids alone; with these acts or functions courts would not interfere.

The second possibility, interwoven with the first and not well developed in this part of the opinion, was that the challenged action entailed the exercise of significant "constitutional or legal discretion."[60] Later, in discussing whether the common law requirements for mandamus had been satisfied, the relevance of discretion was brought forward more emphatically: "The province

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

57. Modern decisional law also embraces the idea that there should be a presumption in favor of review. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967).

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

59. *Id.* at 166-67.

60. *Id.* at 166.

of the courts is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."[61]

Marshall concluded that neither of these possible exceptions to the presumption favoring review was applicable. His argument was in part conceptual; he asserted that "[t]he question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."[62] The argument was also in part analogical. Marshall discussed at length the land patent hypothetical and a hypothetical based on a statute conferring pensions on invalid war veterans. In neither case, he said, would anyone maintain that executive officers violating vested rights of claimants should be beyond the reach of judicial authority. Hence Marshall concluded that the refusal to deliver the commission was a wrong for which the laws of the country afforded Marbury a judicial remedy.

Although Marshall gave extended consideration to what would now be regarded as reviewability, it is significant that he made no mention of sovereign immunity. Other decisions of this era assumed in dicta that the United States could not be sued absent congressional consent,[63] and by the middle of the nineteenth century federal sovereign immunity was securely established.[64] It is not clear why Marshall assumed sovereign immunity was not an issue. The short answer, suggested by David Currie, would be that Congress, by enacting Section 13 of the Judiciary Act allowing the Supreme Court to issue writs of mandamus running to federal officiers, had waived any claim of sovereign immunity for actions traditionally sounding in mandamus.[65] But Marshall did not allude to consent as an explanation. Instead, he cryptically suggested that an action for mandamus was analogous to an officer suit, and that an officer suit would not give rise to a defense of sovereign immunity.[66] Later in the century, the Court decided that federal officer suits sounding in tort are not barred by sovereign immunity.[67] Perhaps mandamus actions against federal officers can be rationalized on a similar basis: the action does not proceed against the United States by name, nor does it interfere with the lawful exercise of

61. *Id.* at 170.

62. *Id.* at 167.

63. *See* Chisholm v. Georgia, 2 Dall. 419, 478 (1793) (Jay, C.J.); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 383-92 (1821) (Marshall, C.J.).

64. The first cases upholding pleas of sovereign immunity by the United States appear to be United States v. McLemore, 45 U.S. (4 How.) 286 (1846) and Hill v. United States, 50 U.S. (9 How.) 386 (1850).

65. DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888 at 67 n.17 (1985).

66. *Marbury*, 5 U.S. (1 Cranch) 137 at 170.

67. United States v. Lee, 106 U.S. 196, 234 (1882).

governmental discretion, but only requires an officer to perform an act already required by the laws of the United States.[68] In any event, the Supreme Court ultimately held, without much discussion, that mandamus actions are not barred by sovereign immunity.[69] This outcome was foreordained by *Marbury*.

B. The Standard of Review

In contrast to the elaborate consideration of threshold issues like jurisdiction and what we would today call cause of action, standing, and reviewability, *Marbury* contains comparatively little discussion bearing on the standard of review to be applied by courts in cases challenging executive action. This is understandable. After all, Marbury's action was an original action filed in the Supreme Court. The Court was acting as both the trial court and the court of last resort. It had to undertake on its own a brief factual investigation of the controversy, featuring two days of oral and written testimony, including an affidavit submitted by John Marshall's brother, James, attesting that he had seen the commissions in the office of the Secretary of State.[70] And when it came time to render a decision, the Court had no previous decision of any governmental entity to which it might defer on questions either of fact or law. Indeed, Secretary of State Madison declined to enter an appearance through counsel in the Supreme Court, so there was not even an executive branch litigating position for the Court to consider.

The tradition in administrative law is that *Marbury* stands foursquare for the proposition that courts must engage in *de novo* or independent review of all questions of law. Under this conception, courts decide questions about the meaning of the law according to their own lights, without any obligation to give weight to the views of other institutional actors like the executive or the legislature. The principal contrasting conception of the standard of review is the deferential standard, under which the court is obliged to accept the interpretation of another institutional actor so long as it is a reasonable one, that is, one that a rational interpreter might adopt given the language and interpretative conventions applicable to the issue in controversy. Indeed, it has become a familiar trope for commentators to characterize the Court's most famous modern decision endorsing a deferential standard of review, *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*,[71] as the "counter-*Marbury*" for the modern

68. Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 699 (1949).

69. Houston v. Ormes, 252 U.S. 469, 472-74 (1920); Minnesota v. Hitchcock, 185 U.S. 373, 386 (1902).

70. SMITH, *supra* note 34, at 315-18.

71. 467 U.S. 837 (1984).

administrative state.[72] Implicit in this characterization is the understanding that *Marbury* is the prototype of the independent judgment model, and *Chevron* the prototype of the deferential model.

There is support in the *Marbury* opinion for the view that the decision contemplates independent judicial judgment on all questions of law. The key legal question in determining whether Marbury was entitled to mandamus was whether he had a vested right to the commission. In reflecting on this question, the Court said: "The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority."[73] And of course, there is the most famous passage of all: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[74] Marshall was of course here speaking of the province and duty of courts to interpret the Constitution, not ordinary statutes. But a key part of his defense of judicial review was that the Constitution is law, and if a provision of the Constitution and a provision of a statute conflict, "the courts must decide on the operation of each."[75] So his assertion of independent judicial authority to interpret the Constitution necessarily also presupposed independent judicial authority to interpret statutes. Indeed, one would think the power to exercise independent judgment in determining the meaning of statutes follows *a fortiori* from the power to exercise such judgment in determining the meaning of the Constitution.

There is, however, another way of reading *Marbury*'s articulation of the applicable standard of review of questions of law. Under this reading, Marshall contemplated not a one-tier standard of review—independent judgment as to all questions of law—but rather a two-tiered standard of review. Tier one was independent judicial judgment; tier two was complete deference to executive judgment about the meaning of the law. In support of this possibility, consider carefully the critical series of paragraphs in which Marshall explains why Marbury's claim is reviewable:

> By the constitution of the United States, the President is invested with 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. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

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72. Cass Sunstein appears to have coined the phrase. *See* Cass R. Sunstein, *Law and Administration after* Chevron, 90 COLUM. L. REV. 2071, 2075 (1990).

73. *Marbury*, 5 U.S. (1 Cranch) at 167.

74. *Id.* at 177.

75. *Id.*

> In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. . . .
>
> But when the legislature proceeds to impose on [such an] officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.[76]

This passage displays to the fullest Marshall's penchant for expressing legal choices in terms of stark dichotomies: political questions entailing the exercise of discretion in matters involving public rights are arrayed on one side; specific legal duties entailing no discretion and affecting individual rights are arrayed on the other. But the critical point for present purposes is that this passage can be read not only as addressing the reviewability of executive action. It also can be read as suggesting a two tier standard of review. Where the Constitution and laws do not confer discretion on the executive, but rather impose clear duties implicating individual rights, then the courts will exercise independent judgment in determining whether the requirements of the law have been satisfied. But where a decision is committed to executive discretion by the Constitution or by Congress, then "whatever opinion may be entertained of the manner in which executive discretion may be used," the legal judgment of the executive "is conclusive."

If this reading of *Marbury* is plausible, then *Marbury* is much closer in spirit to *Chevron* and the modern approach to the standard of review than has been commonly supposed. *Chevron* famously establishes a two-tiered standard of review.[77] The first tier concerns issues of law as to which the meaning of the statutory text is clear or unambiguous. As to these, the court is to exercise independent judgment. The second tier concerns issues of law as to which Congress has delegated authority to an agency to act with the force of law, and the statutory text leaves room for the exercise of discretion.[78] As to these, the court asks only whether the executive agency interpretation is one that a reasonable interpreter of the text might adopt.

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76. *Id.* at 165-66.

77. *Chevron U.S.A.*, 467 U.S. at 842-43.

78. *Id.* On the importance of a delegation of discretionary power to act with the force of law under Chevron, *see* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001); Thomas W. Merrill & Kristan E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 879 (2001).

Notice the similarities between the two-tier *Chevron* approach to the standard of review and my recharacterization of *Marbury* as entailing a two-tier standard of review. Both mandate the exercise of independent judicial judgment over a significant range of issues; both mandate deference to executive views over a significant range of issues; both seem to place emphasis on the clarity or specificity of the legal command in identifying the realm in which independent judgment is appropriate; both seem to identify the delegation of discretion to the executive, either by the Constitution or by Congress, as a major marker in determining the realm in which courts will defer to executive judgment.

The *Chevron* approach and my recharacterized *Marbury* approach to the standard of review differ primarily in two respects. First, *Chevron*'s tier one encompasses all issues of statutory interpretation, whereas *Marbury*'s tier one is limited to issues of law implicating individual rights. Second, *Chevron*'s tier two retains a degree of judicial oversight by directing courts to apply a type of rationality review to legal issues that fall within the delegated discretion category, whereas *Marbury*'s tier two requires complete deference to executive interpretations of law that fall within the delegated discretion category. These differences are important, but on balance I think it is indisputable that my recharacterization reveals a much greater degree of continuity between *Marbury* and *Chevron* than does the standard story about *Marbury* and anti-*Marbury*.

It is also interesting to note that *Marbury* is not completely devoid of consideration of executive views about the law, even with respect to the "tier one" issue whether Marbury had a vested right to his commission. At one point in his rather elaborate consideration of this issue (it is the longest section of the opinion), Marshall tried to imagine what arguments Madison's attorneys might advance in support of the executive's refusal to deliver the commission. He suggested that Madison might argue either that the commission must be delivered to the appointee, or must be accepted by the appointee, before it becomes a vested right.[79] He

79. 5 U.S. (1 Cranch) at 159-62. Marshall failed to consider another possible argument in support of Madison's refusal to deliver the commission, namely, that the office to which Marbury was appointed—a justice of the peace for a fixed term of five years—was unconstitutional. Such a position could not be a judicial position under Article III of the Constitution, because the term of office was limited to five years rather than for good behavior. Nor could the position be an executive position under Article II of the Constitution, because the President must be able to terminate executive officers at will. At least this is what Congress decided in 1789 in debating the question of the President's power to terminate executive officials, *see* Myers v. United States, 272 U.S. 52, 111-36 (1926), and is what the Supreme Court later held the Constitution requires. *Id.* at 176. *But see* Morrison v. Olson, 487 U.S. 654, 689-93 (1988) (qualifying this holding). Given the President's duty to see that

then proceeded to refute these suggestions.

I do not find the refutations particularly persuasive. They all come back to the assertion that the signing and affixing of the seal on the commission are the decisive acts that render the commission a vested right. What is significant for present purposes is Marshall's observation at one point: "That this is the understanding of the government, is apparent from the whole tenor of their conduct."[80] He then proceeds to detail some executive practices with respect to appointments, such as the computation of the salary owed to the officer from the date of appointment rather than the date of delivery or acceptance of the commission, as tending to show executive adherence to the legal view he is expounding.[81] How does Marshall know about these practices? Because, of course, he served as Secretary of State during the period of time when Marbury's commission was signed by the President and sealed by the Secretary of State. He is here testifying from personal knowledge about the practical construction of the law that has been adopted by the executive, and is invoking this executive interpretation in support of the judicial interpretation.

Of course, this kind of invocation of executive practice in support of a legal interpretation does not prove that the Court was deferring in any strong sense to executive legal views. Practical construction is being used here in a manner analogous to a canon of interpretation or other interpretative aids that the Court might invoke as tending to support its reading. The use of such interpretative aids by the Court is not inconsistent with the understanding that the Court is exercising independent judgment in interpretation, because the Court adopts the executive

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the laws are faithfully executed, the President and the Secretary of State could have decided that it would be contrary to law to deliver the commission for an office created in violation of the Constitution.

80. *Marbury*, 5 U.S. (1 Cranch) at 161.

81. I suspect Marshall was playing games here. No doubt he was testifying truthfully about how salary was computed in cases in which a commission was delivered and the office accepted by an appointee. But the telling question would be whether the government would feel compelled to pay any salary in the case of an appointee who rejected the office after the commission was delivered. This happened in the early days of the Republic, given the poor state of communications. *See* Smith, *supra* note 34, at 266-67, 399-400 (recounting episodes—including one involving Marshall himself when he was appointed Secretary of War—in which appointments were rejected after Senate confirmation, and in some cases after commissions were delivered to the appointee). I would be most surprised if any salary would be thought to be owed to the appointee in these circumstances, and this would tend to support the view that the right to the office does not vest until the commission is delivered and accepted. *See also* United States v. Smith, 286 U.S. 6, 47 (1932) (noting that "the Executive Department has not always treated an appointment as complete upon the mere signing of a commission").

interpretation only because it finds it persuasive, not because it is compelled to do so.[82] Still, the longstanding practice of considering executive interpretation of statutes shows that courts have always regarded the views of a coordinate branch as being at least as relevant data. We find such use of executive interpretation even in *Marbury v. Madison*, the supposed standard bearer for independent judicial determination of questions of law.

C. *Relief*

Marbury also says comparatively little about the availability of different kinds of relief for lawless executive action. Here, however, what the Court did (or rather, said it was prepared to do if it had jurisdiction) spoke more loudly than practically anything it could have said.

We can conceptualize judicial relief for unlawful executive action along two dimensions. The first is the passive/active dimension: either the court is involved because its aid has been enlisted by the executive (i.e. the court is passive), or the court is involved because an aggrieved citizen is complaining of executive action and the court agrees to interpose itself between the citizen and the executive (i.e., the court is active). The second is the negative/affirmative dimension: either the court is being asked to block executive action from going forward (i.e., negative relief), or it is being asked to compel the executive to perform some act which it has declined to do (i.e., affirmative relief).[83]

Marbury sanctioned the idea of courts actively intervening to issue affirmative relief compelling executive action unlawfully withheld. The point has potentially great significance for the future development of administrative law: if judicial intervention is proper in these circumstances, then the potential scope of judicial relief for lawless executive action is very wide indeed.

To consider the momentousness of *Marbury*'s willingness to endorse relief in the circumstances of the case, think of the usual posture of a court when an issue about the lawfulness of executive action arises. Usually the court gets involved because the executive has sought to utilize the court's powers in an enforcement proceeding against an individual. A criminal trial is

82. *See* Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 569 (1985); Monaghan, *supra* note 5, at 27-28.

83. These distinctions, although advanced under different rubrics, are central to the analysis in Henry Hart's famous dialogue about the power of Congress to limit the jurisdiction of federal courts. *See* Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953), *reprinted in* PAUL BATOR ET AL., HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 367 (5th ed. 2003). *See* Monaghan, *supra* note 5, at 20-24 (critiquing this aspect of the dialogue).

the most familiar example; actions to enforce a reparations order, impose a tax lien, direct a forfeiture of property, or to condemn property would be others. In each of these cases, the executive has enlisted the aid of the court in imposing some type of coercive action against a citizen. In each of these cases, the court is in a position to interpret the law as it sees fit, and to assist or decline to assist the executive accordingly. The executive can scarcely complain (at least not too much) if the court declines to render assistance, because the executive has asked the court for its assistance. One can imagine a legal system in which courts would never sit in judgment of executive action except when the executive has enlisted the aid of the courts in this fashion. Such a system would present little tension between the executive and the courts, because the courts would pass judgment on the executive only when the executive has tacitly consented to the court's review of the legality of its proposed course of action.

Such a system, however, would be radically incomplete in terms of assuring executive fidelity to the rule of law. The problem is that the executive would always be tempted, in such a system, to take direct action against citizens without enlisting the aid of the courts. It could, to take the most extreme examples, forego a criminal trial and simply seize and incarcerate a citizen suspected of a crime, or take a citizen's property for some public project without offering compensation. To fully assure the rule of law, it is therefore necessary to supplement the courts' willingness to sit in judgment when their aid is sought with modes of relief than can be actively invoked by aggrieved citizens. We need, in other words, habeas corpus, mandamus, injunction, the regulatory takings doctrine – or their statutory equivalents.

Whether it is also crucial that courts be prepared to order affirmative relief is more debatable. The tradition of giving primacy to private rights over public rights is strongly associated with negative orders blocking government from seizing the innocent or invading private property.[84] But *Marbury* did not hesitate to include positive or public rights such as government pensions and commissions for government offices in the list of things that courts must be prepared to order the government to provide, when the law so demands. In this respect, it was well ahead of its time, and quite arguably ahead of even where the Court is today.[85]

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84. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195-96 (1989) (holding that generally an individual has no right to demand affirmative government protection against privately inflicted harms).

85. For example, the Court has never decided that due process guarantees an individual a hearing on a denial of an initial application for government benefits, as opposed to a termination of benefits previously enjoyed. *See* American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 61 n.13 (1999); Thomas

Some of the more memorable passages in *Marbury* appear to be addressed to the proposition that the court must be prepared to provide appropriate relief, even in difficult circumstances in which it is asked actively to intercede and order affirmative relief. Marshall noted 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*."[86] He then quoted passages in Blackstone said to show that the law strives to afford a remedy, even in circumstances where a remedy is not afforded "by mere operation of law."[87] The oft-quoted lines then followed: "The 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."[88] Perhaps this is reading too much into the opinion, but Marshall's strong insistence on the imperative of preserving the rule of law seems designed at least in part to justify the aggressive remedial posture to which he was committed.

III. *MARBURY*'S ROLE IN THE DEVELOPMENT OF ADMINISTRATIVE LAW

One of the ironies of *Marbury*'s current iconic status as the decision that launched judicial review of legislative action is that it was mostly ignored in discussions of this topic for nearly a century. As recently documented by Davison Douglas, *Marbury* was not cited in a single Supreme Court case invalidating federal or state legislation until 1895.[89] Moreover, the decision was often ignored in nineteenth century treatises discussing the power of courts to declare statutes unconstitutional. Not until late in the century did the Supreme Court dust off *Marbury*'s discussion of judicial review of legislation, and begin the process of canonization.

Although *Marbury* was long ignored in discussions of judicial review of legislative action, it is does not follow that the decision

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W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 967 (2000).

86. *Marbury*, 5 U.S. at 163 (emphasis added).

87. *Id.*

88. *Id.*

89. Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison*: The Emergence of a "Great Case"*, 38 WAKE FOREST L. REV. 375, 390 (2003). The first decision to cite to *Marbury* in the course of invalidating a statute on constitutional grounds was *Pollock v. Farmers' Loan & Trust Co*, 157 U.S. 429 (1895) (holding federal income unconstitutional as an unapportioned direct tax). *See also* ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW 116-27 (1989) (detailing the uses to which *Marbury* has been put in subsequent Supreme Court decisions and concluding that it became associated with judicial supremacy in constitutional interpretation only after 1958).

was inconsequential in the development of judicial review of *executive* action. In fact, *Marbury* played a substantial role in the development of administrative law, and this role started early in the nineteenth century, well before the emergence of the modern administrative state. Constraints of space and time do not permit a comprehensive review of *Marbury*'s influence on modern administrative law.[90] Instead, I will dip much more selectively into the stream of history. After offering some observations tending to support the claim that *Marbury* was an important administrative law precedent before it was a constitutional law precedent, I will consider *Marbury*'s historical role in two critical areas: (1) the evolution of congressional control over access to courts for review of executive action, most prominently with regard to jurisdiction; and (2) the evolution of the standard of review in judicial review of executive action.

A. MARBURY IN NINETEENTH CENTURY PUBLIC LAW—AN OVERVIEW

Marbury was cited by the Supreme Court in 56 cases decided during the nineteenth century.[91] The subject for which it was cited most frequently was the scope of the Court's original jurisdiction. Within this category, the specific proposition for which *Marbury* was most frequently invoked was the understanding that Article III of the Constitution strictly limits the categories of original jurisdiction cases Congress may require the Court to hear. This of course was *Marbury*'s actual holding—that Section 13 of the Judiciary Act was unconstitutional because it attempted to confer a new type of original jurisdiction on the Court. However, *Marbury* was also cited in a significant number of nineteenth century cases for the legal requirements of mandamus. As the century progressed, increasing numbers of cases cited *Marbury* for the general distinction between reviewable and unreviewable executive action. In contrast, I found only two decisions in which *Marbury* was cited for the Court's power to hold statutes

90. It would be instructive, for example, to consider the extent to which *Marbury* was invoked in briefs and opinions formulating the modern reviewability and political questions doctrines. *Marbury* was not cited in the Court's first major political question decision, *Luther v. Borden*, 48 U.S. 1 (1849), nor in subsequent decisions such as *Colgrove v. Green*, 328 U.S. 549 (1946), or *Baker v. Carr*, 369 U.S. 186 (1962) (at least with respect to the political question doctrine). In contrast, *Marbury* was cited in a number of early reviewability decisions. *See, e.g.*, Noble v. Union River Logging R. Co., 147 U.S. 165, 171 (1893); Gaines v. Thompson, 74 U.S. 347, 349 (1868); United States v. Arredondo, 31 U.S. 691, 729 (1832).

91. The cases were retrieved using the Shepard's Citation function on Lexis, which tracks all references to a decision in subsequent opinions without regard to form of citation. One citation, which was in a reporter's note appended to a pre-*Marbury* decision, was omitted.

unconstitutional, both handed down toward the end of the century.[92]

Although *Marbury* was regarded as an administrative law decision for most of the nineteenth century, there is little to suggest that it was regarded as a "great" or even an especially important administrative law precedent during this period. Instead, *Marbury* bears all the indicia of a normal precedent: it was cited mostly for what it holds, and occasionally was referred to for its discussion of administrative law doctrines where they are instructive. For example, in *United States v. Schurz*, decided in 1880, the Court drew upon *Marbury*'s discussion of mandamus, noting that although what *Marbury* says on this point may be dicta, "the principles of the opinion have since been repeatedly recognized and acted upon in this court, and the case cited with approval in its definition of the circumstances in which persons holding public office will be compelled to perform certain duties which are merely ministerial."[93]

Particularly striking is the absence in the nineteenth century of any quotation of the more stirring passages from the opinion that have become veritable clichés today, or any suggestion that the decision stands for something important, whether it be judicial review of executive action or legislative action. In Chief Justice Marshall's only reference to *Marbury* in a subsequent opinion he described it flatly as "the mandamus case."[94] In *Kendall v. United States*, probably the most important administrative law decision of the nineteenth century after *Marbury* and the first actually to invalidate executive action at the request of an aggrieved citizen, *Marbury* was mentioned only in passing by the majority and dissenting opinions, on the question of the Court's jurisdiction.[95]

Not until late in the century does one begin to see evidence of *Marbury* being escorted into the administrative law pantheon. The first opinion referring to *Marbury*'s "greatness" I uncovered was written by Justice Bradley in 1888.[96] This reference occurred in connection with a discussion of the law of mandamus. Shortly thereafter, in lectures on constitutional law published by Justice Samuel Miller in 1891, *Marbury* was described as a decision of "immense importance."[97] Justice Miller identified the decision as

92. The first decision that cites *Marbury* in the context of judicial review is *Mugler v. Kansas*, 123 U.S. 623, 661 (1887), which nevertheless goes on to *uphold* the challenged state statute. The proposition cited was that ours is a government of laws, not men. *Id.* The first decision to cite *Marbury* that holds a statute unconstitutional is *Pollack v. Farmer's Loan & Trust*, 157 U.S. 429 (1895). *See* Douglas, *supra* note 89.

93. 102 U.S. 378, 395 (1880).

94. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 100 (1807).

95. Kendall v. United States, 37 U.S. (12 Pet.) 524, 617 (1838).

96. United States *ex rel.* Dunlap v. Black, 128 U.S. 40, 44 (1888).

97. SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE

being important not because of judicial review of legislative action, but because it "subjected the ministerial and executive officers of the Government, all over the country, to the control of the courts, in regard to the execution of a large part of their duties."[98] In short, *Marbury* was identified by the Justices as a great administrative law decision only late in the nineteenth century; not until the twentieth century did it receive that appellation in the context of constitutional law.

How are we to account for *Marbury*'s late-blooming status as a leading decision? One possibility is that its importance did not emerge earlier because neither judicial review of legislative action nor judicial review of executive action were particularly important issues until late in the nineteenth century. The Supreme Court invalidated only two federal statutes in the period before the Civil War,[99] and the executive branch of the federal government performed almost no significant regulatory role until the Interstate Commerce Act was passed in 1887.

This explanation, however, is not fully satisfactory. The Court may have been wary of declaring federal legislation unconstitutional in the early nineteenth century, but it was quite active in invalidating state legislation,[100] and this practice raised almost all the same issues of judicial authority. Similarly, although judicial review of executive action did not arise with the same frequency early in the nineteenth century as it did after the federal regulatory state came on the scene, the Court from an early date was confronted with a steady trickle of cases involving the seizure of prizes, land grants, military pensions, and patents, all of which potentially raised questions about the judicial role in reviewing executive action.[101]

Another or supplemental explanation might be that *Marbury* was regarded for most of the nineteenth century as a controversial precedent. The case grew out of a nasty political fight between the Federalist and Republican Parties over the Adams Administration's attempt to stack the federal courts with midnight judges. It reflected not only this bitter partisan struggle, but also the growing personal animosity between John Marshall and Thomas Jefferson. The Court's discussion in *Marbury* of the importance of correcting lawless executive action reportedly

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UNITED STATES 385 (J.C. Bancroft Davis ed., 1891).

98. *Id.* at 386.

99. Section 13 of the Judiciary Act was invalidated in *Marbury*, 5 U.S. (1 Cranch) at 180, and portions of the Missouri Compromise were invalidated in *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1851).

100. For a sense of the volume of constitutional review of state legislation, see BENJAMIN WRIGHT, THE CONTRACT CLAUSE OF THE CONSTITUTION xiii, 92, 95 (1938).

101. Frederic P. Lee, *The Origins of Judicial Control of Federal Executive Action*, 36 GEO. L.J. 287, 295 (1948).

enraged Jefferson, and was widely disparaged by Republicans as *obiter dicta*.[102] In these circumstances, it is possible that the decision was viewed as "radioactive" during the early decades of the nineteenth century, especially for propositions related to judicial review of executive action. Hence it was invoked primarily for its holding and for relatively uncontroversial doctrinal discussions such as the required elements of a mandamus action.

An analogy here might be the Court's decision in *Bush v. Gore*.[103] I would be surprised if in the next few decades the Court cites *Bush v. Gore* for propositions about the scope of equal protection law. The decision raises too many strong feelings, both among sitting Justices and the Court's wider audience. Many years down the road, who knows? *Bush v. Gore* may become a case of some doctrinal or symbolic significance for a new generation of Justices, either as an inspiring example of what the Court should do (the way *Marbury* is deployed today) or an object lesson in what the Court should not do (the role now played by *Dred Scott*, *Lochner*, and in some circles *Roe v. Wade*). In a somewhat similar fashion, *Marbury* may have been kept under wraps insofar as Supreme Court opinions are concerned until enough time had passed for the emotions associated with the case to die down. It does not follow, however, the opinion was not widely read and studied by lawyers during this period, or that it had no influence on how American lawyers and judges thought about the judicial role in public law – including the judicial role in review of executive action. Similarly, *Bush v. Gore* is widely taught in law schools and has generated an avalanche of commentary, even as it is likely to be discretely ignored by the Justices in their opinions.

B. Access to Judicial Review: Congress as Gatekeeper

Throughout the history of administrative law, there have been multiple doctrines imposing a variety of hurdles on persons seeking judicial review of executive action. As we have seen, *Marbury* considered, explicitly or implicitly, four such doctrines—standing, cause of action, reviewability, jurisdiction—and it ultimately held that Marbury could not obtain review because the Court did not have jurisdiction. Over time, the jurisdictional barrier has gradually fallen away, as has the cause of action barrier.[104] Significantly, the institution that has played the

102. *See* SMITH, *supra* note 34, at 324-25. At one point in the run up to Aaron Burr's treason trial, Jefferson wrote to the U.S. Attorney prosecuting the case: "Stop . . . citing *Marbury v. Madison* as authority. I have long wished for a proper occasion to have the gratuitous opinion in that case brought before the public, and denounced as not law." *Id.* at 361.

103. 531 U.S. 98 (2000).

104. So much so that the latest edition of the leading administrative law treatise has no discussion of the jurisdiction issue. *See* PIERCE, *supra* note 10.

leading role in eliminating these impediments to review has not been the Supreme Court—it has been Congress.

The most important issue in administrative law for most of the nineteenth century was identifying a source of jurisdiction for federal courts to review executive action. *Marbury* set the stage for the centrality of this issue in two ways. First, Marshall's opinion was emphatic about the need to identify a clear source of jurisdiction before a federal court could entertain such an action. Second, *Marbury* eliminated one potential avenue for obtaining such review when it invalidated Section 13 of the Judiciary Act as exceeding the constitutionally permissible scope of jurisdiction. Thus, *Marbury*'s immediate contribution to the development of administrative law was essentially as a retardant: it recognized a major potential impediment to judicial review—jurisdiction—and erected a partial roadblock to review by mandamus based on that impediment.

Soon, the Court erected even more serious roadblocks to the use of mandamus to review executive action. The obscure but fateful dispute involved federal public domain land in Ohio claimed by a plaintiff (or plaintiffs) variously named in the reports M'Intire, M'Cluny or M'Clung.[105] He (or they) demanded the issuance of a certificate of title from the register of the United States land office in Ohio. But this federal officer steadfastly refused to comply with the demand, apparently on the ground that the land belonged to someone else. The first time the dispute reached the Court, in 1813, it held that the federal circuit court had no statutory authority to issue an original writ of mandamus to such an officer.[106] The Court expressed no doubt that Congress had constitutional authority to grant lower federal courts original jurisdiction to issues writs of mandamus. But it construed Section 14 of the Judiciary Act as conferring power on circuit courts to issue writs of mandamus only in aid of jurisdiction independently established on some other basis. The same dispute returned to the Court again in 1817,[107] and made a final visitation in 1821.[108] These return trips resulted in judgments holding that federal circuit courts could not issue writs of mandamus in aid of diversity jurisdiction, and that state courts could not issue original writs of mandamus to federal officers because this was barred by principles of intergovernmental immunity.[109] Thus, M'Clung (or

105. In the last opinion in the sequence, the Court observed that the same parties and land were involved in each of the cases. *See* M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598, 599 (1821).

106. M'Intire v. Wood, 11 U.S. (7 Cranch) 504 (1813).

107. M'Cluny v. Silliman, 15 U.S. (2 Wheat.) 369 (1817).

108. M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821).

109. *M'Clung* (1821) was the source of both of these further restrictions. *M'Cluny* (1817) raised the issue whether mandamus was available on review

whatever his name was), by his persistence, succeeded in closing off virtually all avenues for review of federal executive action by mandamus.

It was not until *Kendall v. United States*, in 1838, that the Court finally discovered a jurisdictional basis for mandamus actions against federal officers.[110] The Court held that the federal Circuit Court for the District of Columbia had original jurisdiction to issue writs of mandamus to executive officers subject to personal jurisdiction in the District. The arcane rationale was that the District of Columbia court was empowered to exercise all the powers that Maryland courts had exercised upon cession of the District by Maryland, and that these powers at the time of cession had included the power to issue original writs of mandamus to executive officers.[111] Since most top level federal executive officers had their offices in the District, *Kendall* meant that this one lower federal court had authority to issue orders compelling federal officers to perform ministerial acts required by law.

After *Kendall*, the promise of judicial review of executive action proclaimed in *Marbury* became a reality—although feebly so. The two recognized vehicles for judicial review were a mandamus action in the District of Columbia, or an officer suit. The mandamus action was of limited utility in any case where the defendant officer could claim that the challenged action entailed some element of discretion, including the interpretation of ambiguous law.[112] The officer's suit was problematic because of the need to establish federal court jurisdiction over a common law tort action, to which the officer would raise federal statutory authority as a defense. Admiralty and diversity were the principal candidates for such jurisdiction, and they were not always or even usually available; under *M'Clung* the action could not be brought in state court.[113]

Slowly, the narrow bridgehead established in *Kendall* began to widen. Later decisions, exploiting the same theory of incorporated Maryland authority, held that the Circuit Court in the District of Columbia could also issue writs of injunction running to federal officers subject to the personal jurisdiction of that court.[114] The injunction action was broader than the

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of a state court judgment, but the Court denied the motion without opinion, leaving the Reporter to speculate in a note about why this result might obtain notwithstanding *Marbury*. 15 U.S. (2 Wheat.) at 370 n.1.

110. 37 U.S. (12 Pet.) 524, 619 (1838).

111. *Id.*

112. *See* Decatur v. Pauling, 39 U.S. (14 Pet.) 497 (1840).

113. Eventually, in 1962, Congress enacted legislation conferring jurisdiction on all federal district courts over actions "in the nature of mandamus" seeking to compel federal officers to perform their duties. 28 U.S.C. § 1361 (2000).

114. Gaines v. Thompson, 74 U.S. (7 Wall) 347, 353-54 (1869); Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 500-01 (1867).

mandamus action, since it was not required to show that the challenged action was strictly ministerial. After Congress adopted general federal question jurisdiction in 1875, the opportunities for review widened even further. It was not long before the writ of injunction previously recognized as being available in the District of Columbia was also held to be available in other federal circuit courts based on federal question jurisdiction.[115] Although the grant of federal question jurisdiction was at that time subject to an amount in controversy limitation, this dramatically increased access to federal courts for challenges to executive action.

The problem with using federal question jurisdiction to review executive action by writ of injunction was that no statutory cause of action authorizing such review existed.[116] Strangely, this potentially fatal objection passed in silence. Part of the reason for the inattention to the problem may have been that federal courts since their inception had exercised broader powers when sitting as courts of equity than as courts of law.[117] This tradition of broader equity powers may have instilled the belief, never fully explained or spelled out, that federal courts have inherent authority when sitting as courts of equity to enjoin executive action in excess of statutory authority.[118] Still, the Court's failure fully to theorize this mode of review probably cast a cloud over its use. The problem was not cured until the Administrative Procedure Act was enacted in 1946, providing explicit statutory authority for what is still confusingly called "nonstatutory review."[119]

The real breakthrough on jurisdiction came with the advent of new federal regulatory regimes starting with the Interstate

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115. *See, e.g.*, Am. Sch. of Magnetic Healing v. McAnnulty, 187 U.S. 94, 97 (1902).

116. The 1875 Act conferred only jurisdiction. The fiction of incorporated Maryland law was not available outside the District of Columbia.

117. *See* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 126-30 (1998).

118. This appears also to be the assumption underlying *Ex parte Young*, 209 U.S. 123, 147 (1908), upholding a suit in federal court seeking an injunction against a state officer for action alleged to be in violation of the federal Constitution. After the fact, the cause of action in an *Ex parte Young* suit can be said to be one implied directly from the Constitution. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 391-94 (1971). But at the time it was rendered, *Ex parte Young* appeared to rest on a belief that federal courts sitting in equity have inherent power to enjoin conduct in violation of federal law without any further specification of a cause of action. 209 U.S. at 147.

119. 5 U.S.C. § 703 (2000):

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

Commerce Act in 1887.[120] In these statutes, Congress typically required that agencies resort to federal court to get orders enforcing their decisions, and/or provided for federal court review of administrative action on the part of parties claiming injury. Thus, the requirements for congressional conferral of jurisdiction and a cause of action typically were resolved together by the organic act establishing each new agency. Just in case this kind of "special statutory review" or statutory "nonstatutory review" was not available, the APA in 1946 also threw in a general cause of action (called "general statutory review") for persons aggrieved by agency action.[121]

In short, *Marbury* exercised a retarding influence with respect to access to federal court to get review of executive action in the nineteenth century: it identified an impediment to judicial review (jurisdiction) and endorsed a cause of action for review (mandamus) that proved to be unsatisfactory. But the hidden virtue in *Marbury*'s treatment of access was that it left it up to Congress to provide statutory means to overcome these impediments. By turning the question of access over to Congress, the Court was able to draw on the support of another branch of government before taking on the executive. Giving Congress the lead also permitted a degree of legislative experimentation with different modes of action, before settling on a final institutional form. Thus, as Professor Monaghan has said in a related context, *Marbury*'s doctrinal hurdles "allowed the current dimensions of judicial review to become established at an acceptable political pace."[122]

As barriers to access have gradually been dismantled by Congress, those that remain under the control of the Court—including most prominently standing, sovereign immunity, and official immunity—have loomed larger. For a time in the early 1990's it appeared that the Court—relying in part on *Marbury*'s dictum that "[t]he province of the court is, solely, to decide on the rights of individuals"—was posed to erect new constitutional standing barriers that would act as a serious impediment to citizen actions seeking to enforce public rights.[123] But the Court

120. Lee, *supra* note 102, at 297-309.

121. 5 U.S.C. § 704 (2000).

122. Monaghan, *supra* note 9, at 1366. *See also* PETER L. STRAUSS ADMINISTRATIVE JUSTICE IN THE UNITED STATES 90 (2002) (observing that the tensions between executive discretion and judicial review have persisted for more than 200 years and suggesting this is a "tension important to maintain, not resolve").

123. Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992) (quoting *Marbury*, 5 U.S. (1 Cranch) at 170); *see also* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998); Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871 (1990).

seems more recently to have retreated from this position.[124] The lesson of history would seem to be that it is preferable to use access filters amenable to congressional revision, since these permit adjustment over time and interplay between the judicial and legislative branches. The Court would be well advised to bear this in mind as it considers whether to reign in private attorney general actions and other apparent innovations in access.

Whatever uncertainties about the current Court's direction, there is no question today that judicial review of executive action is available across an extremely broad range of executive action. For this we owe something to *Marbury*'s ringing words about the importance of the rule of law. But we probably owe much more to Congress's perceptions of the value of judicial review in holding the growth of executive power in check. Congress was able to play this role because *Marbury* disclaimed any judicial role over determining the scope of federal court jurisdiction.

C. Standard of Review: The Rise of the Deference Doctrine

As we have seen, *Marbury* can be read as having endorsed a two-tier standard of review of questions of law. Read this way, one can draw a short and straight line between *Marbury* and the foundational modern decision—*Chevron*. And indeed, if *Marbury* had been read as adopting a two-tiered standard, one would predict that something like *Chevron* would have emerged in the late nineteenth or early twentieth century, roughly at the time the administrative state started to grow and Congress was breaking down the jurisdictional barriers to federal court review of administrative action. But *Marbury* historically has not been read this way. Instead, it has been read as endorsing a single standard of independent judicial judgment in all matters of law. Given this assumption, *Marbury* has cast a long shadow over administrative law—a shadow much longer than the one cast by *Marbury*'s commitment to legislative control over jurisdiction to review executive action.

To be sure, one can find numerous decisions going back to the days of the Marshall Court drawing upon executive interpretations of statutes in support of the judicial interpretation.[125] We have even seen an example of this type of argument in *Marbury* itself. But this kind of invocation of the "practical or administrative construction of a statute"[126] posed no

124. *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 168-170 (2000).

125. *See, e.g.*, United States v. Vowell, 9 U.S. (5 Cranch) 368, 372 (1810).

126. *See* Annotation, *Effect of Practical or Administrative Construction of a Statute on Subsequent Judicial Construction*, 73 L.Ed. 322, 323-378 (1929) (discussing hundreds of cases drawing upon executive interpretation of statutes).

threat to the assumption of judicial supremacy in statutory interpretation. The court in such cases elects to follow the executive interpretation because it finds it persuasive, not because it regards it as legally binding.[127]

More interesting and potentially transformative was the development in the law of mandamus of the understanding that "discretionary" executive action includes that which requires the executive to interpret the law. This was first advanced in *Decatur v. Pauling*[128] as a justification for denying Stephen Decatur's widow any review by mandamus of the Secretary of War's decision declining to issue her a double pension. This move subsequently spilled over into an action based on the writ of injunction, although in circumstances where there was also a strong flavor of the political question doctrine.[129] If this line of authority had been allowed freely to develop, it too might have produced something like my two-tiered version of *Marbury*.

With the coming of the regulatory state and rise of statutory review, however, the notion of independent judgment associated with *Marbury* asserted itself with renewed vigor. The Court's very first judgment invalidating a rate regulation statute on due process grounds did so because the law failed to provide for independent judicial review of rate orders.[130] Eventually, the lawyers who managed industry's rear guard action against the spread of government regulation developed sophisticated arguments to the effect that the Constitution requires *de novo* judicial review in any case in which a regulatory agency takes action that impinges on private property.[131] The requirement of independent judicial judgment was traced either to Article III of the Constitution (with respect to federal regulation) and/or to the Due Process Clauses. These efforts culminated in the leading decision of *Crowell v. Benson*,[132] decided on the eve of the New Deal, which held that certain facts critical to the protection of constitutional rights must be determined by the court *de novo*. *Crowell* also seemed to assume, although it was not essential to the decision, that all questions of law must be decided by the court

127. In today's parlance, it was *Skidmore* deference, not *Chevron* deference. *See* Merrill & Hickman, *supra* note 78, at 852-63.

128. 39 U.S. (14 Pet.) 497, 515 (1840).

129. *See* Mississippi v. Johnson, 71 U.S. 475, 501 (1866) (holding that the Court had no authority to consider an original action by a state challenging the President's implementation of the Reconstruction program).

130. Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 464-65 (1890).

131. For the rear guard action, see generally ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF THE BAR AND BENCH, 1887-1895 (1960).

132. 285 U.S. 22 (1932).

de novo.[133]

The *Crowell* doctrine was hedged in with limitations, the most important being that it applied only to executive action implicating "private rights" and not in cases involving "public rights."[134] After the Justices came to accept the New Deal, the decision was increasingly ignored, even in cases arguably involving private rights. Eventually, about the same time *Chevron* emerged on the scene, the doctrine collapsed under its own weight.[135] But for a significant period of time, the ideas associated with *Crowell*, along with *Marbury*, lent rhetorical force to the proponents of independent judgment, and probably helped slow the arrival of a genuine commitment to deference to executive judgments on matters of law within the area of delegated authority.

What finally happened to open the way to a new and more sympathetic judicial attitude toward sharing of decisional authority with executive branch agencies? In hindsight, the critical development was the gradual acceptance of appellate review as the appropriate model for calibrating the court-agency relationship.[136] In the late nineteenth and early twentieth centuries, Congress experimented with a variety of types of statutory review. Some were based on the model of an original action. Either the agency would file an action seeking enforcement of an agency order, or an aggrieved party would file a civil action seeking invalidation of an agency order.[137] In such a proceeding, it was assumed that the court would conduct a trial, including the taking of evidence and the finding of facts and law, before determining whether to enforce or invalidate the order. This original judicial judgment would then be subject to appellate review by courts further up the judicial hierarchy.

Other statutes were based on the model of appellate review. An aggrieved party could file an action in court seeking review and reversal of the agency order, much the way a losing party in a trial court would seek review in an appellate court.[138] For some years,

133. *Id.* at 49-50, 54; *see also id.* at 88 (Brandeis, J., dissenting).

134. *Id.* at 50-51.

135. The last gasp was probably *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), where Justice Brennan's attempt to rationalize the various exceptions was joined only by a plurality. Crowell's attempt at categorization was supplanted by a general balancing test in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986).

136. The best short account of which I am aware is Lee, *supra* note 101, at 297-309 (discussing the rise of statutory review of administrative action and the gradual evolution of the standard of review in such proceedings from a *de novo* to appellate standard).

137. The Federal Trade Commission Act of 1914 is an example. Ch. 311, 38 Stat. 717, 719-20 (1914) (current version at 15 U.S.C. § 41-51 (1994)).

138. The Interstate Commerce Act, as modified by The Hepburn Act, is an

courts resisted the implication that the review in proceedings adopting the appellate model would be genuinely appellate, in the sense that the agency's findings of fact would be subject to a substantial evidence standard of review and its discretionary determinations would be subject to an abuse of discretion standard of review. Instead, they insisted that the parties were entitled to what amounted to a trial *de novo* even in statutory review proceedings based on the appellate model.[139]

Marbury probably played a part in retarding acceptance of the idea of appellate review of agency action. Recall that *Marbury* assumed that mandamus review of the action of the Secretary of State could proceed only through an original action. It did not even discuss the possibility that the Supreme Court could exercise appellate jurisdiction over a decision of the Secretary of State.[140] This mode of thinking—that appellate review can exist only when a court is reviewing another court, not an executive actor—probably helped perpetuate the notion that judicial review of agency action must always take the form of a trial *de novo*. This assumption was so well entrenched in the middle of the nineteenth century that the Court rendered two decisions suggesting that appellate review of agency action would be unconstitutional.[141]

Eventually, however, the Court retreated on this point. The capitulation came in a series of decisions shortly after the turn of the century under the statutory review provisions of the Interstate Commerce Act.[142] Why the Court retreated is unclear, but it probably had something to do with growing political support for ICC oversight of railroads,[143] and something to do with the sheer volume of litigation such agency action was producing for the courts. Railroad cases dominated the Court's docket at the turn of the century, and the Court desperately needed some device to cut down on the burden of reviewing the complex records these cases presented.

In any event, starting sometime before World War I, when Congress used the appellate model for judicial review of agency action, review became appellate in substance as well as form.[144]

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example. Ch. 104, 24 Stat. 379 (1887), as amended by ch. 3591, 34 Stat. 584 (1906).

139. *See* Lee, *supra* note 101.

140. The argument that the proceeding was appellate had been advanced by Marbury's counsel. *See* WILLIAM E. NELSON, *MARBURY V. MADISON*: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 62 (2000).

141. *See* Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 375 (1867); United States v. Ritchie, 58 U.S. (17 How.) 525, 533-34 (1854).

142. Lee, *supra* note 101, at 304-05.

143. *See* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 226-29 (2001).

144. Nevertheless, the constitutionality of review by appeal was not settled with finality until *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 277-78 (1933).

Frederick Lee described the new synthesis that emerged around this time as follows:

> The court's function was to be one of review. . . .[T]he evidence would be considered by the court in the light of whether it supported or failed to support the order. . . .[The court] would not make and substitute for the administrative order one that the court deemed proper. It would not wholly take over the administrative function. Thus the limited review on fact issue that ultimately became the doctrine of the "conclusiveness" of administrative findings of fact supported by at least some evidence, had its beginnings.[145]

The Administrative Procedure Act in 1946 ratified this understanding with its adoption of the substantial evidence standard of review for questions of fact, and the arbitrary and capricious standard for review of discretionary policy judgments.[146]

Of course, under the traditional appellate model, pure questions of law are subject to *de novo* review by the appeals court. So in this sense, the emergence of the appellate model did not directly undermine the conventional *Marbury* premise of independent judgment on questions of law. But as courts gradually became comfortable with giving appellate-style deference to agency factfinding and agency judgments about policy, it became easier to accept the idea of deference to policy judgments about the meaning of unclear statutes. The turn to appellate review of agency action therefore laid the groundwork for the *Chevron* revolution that would occur later in the twentieth century.

To be sure, the path from judicial acceptance of appellate-style review to *Chevron* was anything but linear. For example, although the APA ratified appellate-style review of questions of fact and discretionary policy judgments, it seemed to reaffirm that courts would exercise independent judgment on pure questions of law.[147] Still, the Court had begun to experiment with a deferential standard of review on questions of law shortly before the APA was enacted,[148] and the APA was not read as precluding further experimentation along these lines in the ensuing decades.

In hindsight, the root cause of the emergence of the *Chevron* standard giving deference to executive interpretations of law was similar to the root cause of the courts' reluctant acquiescence in the appellate standard of review of questions of fact and policy at the turn of the century. Starting in the 1970's, Congress went on another binge of regulatory expansion, this time devoted to environmental protection, civil rights, and consumer safety. These

145. Lee, *supra* note 101, at 305.
146. *See* 5 U.S.C. § 706 (2000).
147. *See id.*
148. *See* NLRB v. Hearst Publ'ns, 322 U.S. 111, 131-32 (1944).

new regulatory schemes, like railroad regulation during the Progressive Era, and banking and securities regulation in the New Deal, enjoyed widespread public support. Moreover, as in the earlier eras, the courts could not keep up with the exploding volume of review proceedings, and the numbing complexity of the issues presented. Perhaps inevitably, they began increasingly to defer to agency interpretations of law, especially where agencies were exercising legislative rulemaking authority.[149] *Chevron* merely offered a formal ratification of this trend.

What happened, in other words, is that courts agreed to share the power "to say what the law is" with the executive not because this was consistent with what Congress wanted, or even consistent with their own conception of the judicial rule going back to *Marbury*. They agreed to share power out of necessity, given the political support for the new forms of regulation and constraints on their own capacities.

Whatever its motivating causes, *Chevron*'s two-step reformulation of the standard of review of questions of law was, in my view, a definite advance over either *Marbury*-style independent judgment, or deference to agency views across the board. *Chevron*'s step one preserves the principle of legislative supremacy. Where the intent of Congress is clear, courts will enforce that understanding against the executive. In this sense *Chevron* continues to provide significant protection for the rule of law. *Chevron*'s step two recognizes, however, that when there is ambiguity, there is a legitimate question as to which institution should have the primary task of resolving the meaning of the law. Here, *Chevron* seems to suggest a blanket preference for the executive interpretation. This is problematic, for reasons I will get to momentarily. But note that even under step two, the court does not automatically accept the executive view. The court still must determine that the executive interpretation is a reasonable one. So *Chevron*, while opening the door to significant sharing of interpretational responsibility, does not give the executive a blank check at step two. It preserves a backstopping or safeguard role for the courts in preventing extreme or flawed executive interpretations from being enforced against the citizenry.

Chevron's step two is problematic, however, insofar as it suggests that the executive displaces the court as the primary interpreter whenever we encounter ambiguity. As the Court's recent *Mead* decision holds,[150] we need a stronger signal of congressional intent to shift primary authority from court to agency. *Mead* identifies the mark of such intent, I think correctly,

149. *See, e.g.*, Heckler v. Campbell, 461 U.S. 458, 466-68 (1983); Batterton v. Francis, 432 U.S. 416, 424-26 (1977).

150. United States v. Mead Corp., 533 U.S. 218 (2001).

to be a congressional delegation to the agency of authority to act with force of law, which delegated power is then used to generate the interpretation in question.[151] What this means is that *Chevron* step two is narrower than first appears. The executive does not act as the primary interpreter of all ambiguities, only those as to which it has been clearly delegated authority by Congress to act with force of law. This formula, the implementation of which very much remains to be developed,[152] allows Congress to remain in control of the allocation of power to resolve ambiguities as between agency and court.

A further implication of *Mead*, which the Court has not even begun to work out, is that the courts retain a critical function in policing the flow of delegated power from Congress to the agency, and from the agency to agency interpretation.[153] Courts, in other words, must assure that agencies are not wielding power that has not been given to them, and that they are not acting in excess of their delegated jurisdiction.[154] In making these sorts of determinations, the court must also exercise independent judgment, just as they do in enforcing clear congressional commands at step one.[155] In both contexts, the same principle is at stake: maintaining the basic rule of law postulate of legislative supremacy.

As these brief ruminations suggest, the judicial implementation of *Chevron* has been anything but steady. Only recently has the Court begun to articulate the understanding of the judicial role underlying the two-step standard of review, and it is far from clear that there is any genuine consensus among the Justices about what that is or might be. Moreover the connections between *Chevron*'s two-step approach and the traditional function of the courts in assuring that agencies stay within the bounds of their delegated authority is only beginning to be perceived. Still, much progress has been made—slowly, painfully and with much backsliding—in articulating a standard of review that preserves the rule of law without opening the doors to judicial usurpation of legitimate executive functions.

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151. *Id.* at 226-27.

152. For some criticisms of the Court's initial steps at implementation see Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 813-14 (2002).

153. For two perspectives, see David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002).

154. This is an old and venerable theme. *See, e.g.*, Monaghan, *supra* note 5, at 32-33.

155. When I say independent judgment here, I mean to include the use of deference to executive views in the nonbinding sense associated with the *Skidmore* doctrine. *See* Merrill & Hickman, *supra* note 78, at 909-13.

IV. THE ENDURING SIGNIFICANCE OF *MARBURY* THE ADMINISTRATIVE LAW DECISION

"The rule of law" is one of those fine phrases that have been used in so many contexts, and in so many different senses, that it is now deployed primarily for rhetorical rather than analytical purposes.[156] Sometimes the rule of law is taken to mean consistency in the interpretation of law. Sometimes it is taken to mean fidelity to the opinions of the Supreme Court. But at its core the rule of law describes an ideal that few would deny is of paramount importance in establishing the type of political system most people would want to live in. This is an ideal in which government officials who wield power over the lives of individuals are constrained by law, and individuals who are harmed by officials who act contrary to law can go to court and obtain redress for their injuries.

Few would disagree with the ideal when stated this way. No one doubts the importance of constraining the behavior of government officials in some way that makes their conduct more "law-like," especially when they wield coercive power. And no one argues that we should dispense with courts as intermediaries between individuals and government officials who wield coercive power, for example in the context of criminal trials. The disagreements emerge when we press further in asking what is meant by "law," and who is to decide on the content of the law.[157] These disagreements, in turn, open up questions about who should have access to courts and in what circumstances, about whether the courts or one of the political branches should assume primary responsibility for interpreting the requirements of the law, and about how far courts should press ahead in devising new remedies for what is determined to be unlawful executive action.

Marbury the administrative law decision presents a variety of perspectives on these large questions. In some respects, *Marbury*'s contribution was salutary. With respect to who should have access to courts, *Marbury* led to a minimalist conception of the judicial role, with Congress being ceded authority to determine the pace of future expansion and the parameters of judicial review. The result was gradualist growth of the institution of judicial review, but one that enjoyed the secure support of two branches of government, and hence could not be resisted by the third, the executive. In this respect *Marbury* embodies what Charles Hobson has identified as the hallmarks of John Marshall's judicial

156. *See* Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (In Florida)?*, 21 LAW & PHILOS. 137, 138-40 (2002).

157. *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 10 n.37 (1997) (citation omitted) ("We at once encounter all the problems raised by the Rule of Law if we ask what precisely in this formula is meant by law").

leadership: "[c]aution, prudence, and moderation." [158]

In other respects, *Marbury*'s legacy has been more problematic. With respect to the standard of review, *Marbury* has been associated with a preference for independent judgment, especially as to questions of law, and with a tradition of ignoring signals from Congress about the allocation of interpretative authority. Eventually, after much resistance, the Court yielded to a different conception of the standard of review, more accommodating to executive fact finding and understandings of law. But it did so largely out of necessity—because it could not keep up with the burgeoning caseload or master the daunting complexity of the cases—rather than conviction. Even today, there is little consensus about the theory that explains the new two-tier standard of judicial review announced in *Chevron*, or how to define a role for the courts that will be constructive without sacrificing the valuable protections associated with the rule of law.

Perhaps *Marbury*'s boldest contribution to American administrative law was its endorsement of the idea that courts will intervene to remedy lawless executive action even in cases where the judiciary has not been asked to enforce that action. This type of aggressive judicial policing of executive action is difficult to sustain over time, and presents many dangers to courts as an institution. But at least as an example, *Marbury* opened up space for future generations of judges to provide an aggressive type of relief they might otherwise have shunned.

Are there any lessons to be drawn from *Marbury* the administrative decision for *Marbury* the symbol of judicial supremacy in judicial review of legislative action? I would suggest two.

First, we have seen that *Marbury* the administrative law decision enunciated a complex access doctrine of many variables. This doctrine evolved slowly over time in a process that has included significant contributions from all three branches of government. The net result is a modulated conception of judicial review of executive action, providing for significant give and take in the relationship between reviewer and reviewed. *Marbury* the constitutional decision, in contrast, went underground for a long period of time, and then reemerged as a symbol of exclusive judicial power in the interpretation of the Constitution. It is no accident that when *Marbury* is quoted in a modern Supreme Court opinion, you can be pretty sure it is going to be a duesy—outlawing a controversial type of social legislation, remaking the ground rules of the political system, or perhaps even deciding an

158. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 155 (1996).

election.[159]

If, like me, you regard the increasingly imperial judiciary as a cause for concern, one small corrective would be to present the next generation of lawyers with a more complex version of *Marbury*. The best way to do this would not be to delete *Marbury* from first year constitutional law, as Sandy Levinson has proposed.[160] Rather, it would be to teach *all* of the decision, not just the snippets dealing with judicial review of legislation. Newly-minted lawyers might then come to appreciate that *Marbury* stands for more than just judicial power to declare the meaning of the Constitution. It stands also for congressional power to the control the jurisdiction of courts, for the idea that some constitutional questions are given to the political branches rather than the courts to decide, and for the understanding that courts are limited to intervening in matters that are traditionally judicial in nature, most prominently, disputes involving the rights of individuals. Presented with a more complex version of *Marbury*, future generations of lawyers might be inclined to view constitutional interpretation as a shared enterprise that involves all branches of government, and even the people, not just the nine lawyers who happen to sit on the Supreme Court. This might help to temper judicial arrogance, which cannot be healthy for a democratic republic in the long run.

Second, I think that the Court's compromise standard of review embodied in the *Chevron* doctrine, for all its puzzles, may reflect a model that could be adapted to good effect to judicial review of legislative action.[161] What we see in *Chevron*, I think, is a combination of two ideas: a commitment to judicial enforcement of superior law when that law is clear, combined with an understanding that the judicial role is otherwise largely one of boundary maintenance. Courts should stand ready to correct clear

159. *Marbury* has been cited in a remarkably high percentage of the Court's most controversial decisions of the twentieth century. *See, e.g.*, Bush v. Gore, 531 U.S. 98 (2000) (deciding the outcome of 2000 Presidential election); United States v. Lopez, 514 U.S. 549 (1995) (reviving limits on Commerce Clause); Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992) (reaffirming core holding of abortion regime established in *Roe v. Wade*); INS v. Chadha, 462 U.S. 919 (1982) (invalidating legislative veto); Furman v. Georgia, 408 U.S. 238 (1972) (holding death penalty unconstitutional as then administered); Griswold v. Connecticut, 381 U.S. 479 (1965) (establishing constitutional right of access to contraceptives); Baker v. Carr, 369 U.S. 186 (1962) (holding equal protection challenge to legislative apportionment to be justiciable).

160. *See* Sandford Levinson, *Why I Do Not Teach* Marbury *(Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003).

161. For a suggestion that *Chevron* has relevance to the Supreme Court's review of questions of state law that arise in constitutional adjudication, see *Bush v. Gore*, 531 U.S. 98, 136 (2000) (Ginsburg, J., dissenting).

mistakes in reading the Constitution whenever they occur, as even Thayer acknowledged.[162] Otherwise, they should devote themselves to maintaining the broad boundaries set forth in the Constitution, boundaries between the different branches of the federal government, between the federal government and the states, and the government and its citizens. When the legislature transgresses an established boundary, then the courts should step in to preserve the constitutional structure. But when the legislature exercises power that clearly falls within the boundaries of its delegated authority, whether it be under the Commerce Clause or Section 5 of the Fourteenth Amendment, the standard of review should be one that asks whether the legislative interpretation is reasonable. Adopting this kind of two-tier version of *Marbury*, or *Chevron*-ized *Marbury* if you will, might take us some way toward assuring that, in our quest to be a nation governed by the rule of law, we do not instead become a nation governed by the rule of judges.

162. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893). For other takes on the relationship between Thayer's conception of judicial review and the *Chevron* doctrine, see Robert A. Schapiro, *Judicial Deference and Interpretative Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 668-69 (2000); Nicholas S. Zeppos, *Deference to Political Decisionmakers and the Preferred Scope of Judicial Review*, 88 NW. U. L. REV. 296, 321-32 (1993).