Tulsa Law Review

Volume 38
Number 4 *The Scholarship of Sanford Levinson* Volume 38 | Number 4

Summer 2003

# Establishing Judicial Review: Marbury and the Judicial Act of 1789

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# ESTABLISHING JUDICIAL REVIEW: *MARBURY* AND THE JUDICIAL ACT OF 1789*

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*Marbury v. Madison*[1] occupies a place of pride in American constitutional law.[2] Constitutional commentators regard that 1803 decision as a judicial landmark, one of the most important cases decided by any court in any country. *Marbury*'s declaration that a provision in the Judiciary Act of 1789 was unconstitutional, scholars of all constitutional persuasions and professional affiliations agree, provided the necessary and sufficient foundations for judicial review in the United States. Such claims as "John Marshall's famous opinion in *Marbury* . . . established the Court as the final arbiter of the meaning of the Constitution"[3] litter the scholarly literature on constitutional law, theory, politics, and history. American constitutional law, in the received pedagogical canon, is largely a footnote to *Marbury*. "Judging from existing constitutional law casebooks," Professor Sanford Levinson observes, "apparently everyone needs to know *Marbury v. Madison*."[4]

Professor Levinson, the honoree at this symposium, abhors this pedagogical practice. Throughout his career, he has fought a powerful rearguard action against the canonization of *Marbury*. Although the casebook he co-edits includes a lengthy excerpt of John Marshall's opinion,[5] Professor Levinson steadfastly

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* Distinguished scholars are known by the work they do and the work they make possible. While most essays in this symposium discuss the work Professor Levinson has done, this essay is better described as a work Professor Levinson has made possible. His work has inspired a younger generation of scholars to explore the meaning of the Constitution outside the courts and the possibility of constitutional change. Numerous younger scholars, most notably myself, would not have had successful scholarly careers had we not had Professor Levinson's help, encouragement, and example. Much thanks to Keith Whittington, Howard Gillman, Scot Powe, and James Pfander.

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

2. *See* J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 1010 (1998) (noting the consensus that *Marbury* is the "crown jewel in the constitutional canon").

3. Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Confirmations* 35 (W.W. Norton & Co. 1994).

4. Balkin & Levinson, *supra* n. 2, at 1008; *see* Jerry Goldman, *Is There a Canon of Constitutional Law?*, L. & Cts. Sec. Am. Pol. Sci. Assn. Newsltr. 2-4 (Spring 1993).

5. Paul Brest, Sanford Levinson, J.M. Balkin & Akhil Reed Amar, *Processes of Constitutional Decisionmaking: Cases and Materials* 82-96 (4th ed., Aspen L. & Bus. 2000).

refuses to require students to read *Marbury* when he teaches constitutional law.[6] That decision, he declares, is "intellectually dishonest," requires more history than law students are likely to know, proffers an unoriginal defense of judicial review, and promotes the pernicious impression that the federal judiciary has a monopoly on constitutional decisionmaking.[7] Professor Levinson in 2003 is celebrating the bicentennial of the Louisiana Purchase, an event he maintains has had a far more enduring impact than *Marbury* on American political and constitutional development.[8]

This essay furthers Professor Levinson's struggle to knock *Marbury* off the constitutional pedestal. John Marshall's opinion is a minor episode in American constitutional development, particularly when compared with westward expansion. The reasons Professor Levinson gives for not teaching *Marbury*, however, do not adequately distinguish that case from other cases he enthusiastically teaches. A professor in the legal realist tradition might revel in "intellectually dishonest" opinions. Scholars concerned with judicial supremacy should address how the proper interpretation of *Marbury* plays a crucial role in contemporary debates over judicial power.[9] The more serious problem with *Marbury*'s place in the constitutional canon is how that case is taught. Constitutional casebooks promote the jurocentric view that Justices, acting without outside political support, successfully established judicial review when they declared in judicial opinions that Justices have the power to declare laws unconstitutional. This popular notion that *Marbury* established judicial review by judicial fiat is nonsense. Judicial power in the United States and other countries is primarily established by elected officials. Congress and the president during the first two decades after ratification did far more than the Supreme Court to build the necessary and sufficient foundations for judicial review (and judicial supremacy). The Judiciary Act of 1789[10] did far more than *Marbury v. Madison* to establish judicial power in the United States.

Constitutional law casebooks and commentaries weave a creation myth about judicial review that emphasizes judicial power. Justices, in the received tradition, acted alone when establishing their authority to interpret the

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6. *See* Sanford Levinson, *Why the Canon Should Be Expanded To Include the Insular Cases and the Saga of American Expansionism*, 17 Constitutional Commentary 241, 246 n. 18 (2000) (noting that he does not assign *Marbury* when teaching constitutional law); Balkin & Levinson, *supra* n. 2, at 1008 n. 137 (same).

7. Sanford Levinson, *Law as Literature*, 60 Tex. L. Rev. 373, 389 (1982); *see* Sanford Levinson, Bush v. Gore *and the French Revolution: A Tentative List of Some Early Lessons*, 65 L. & Contemp. Probs. 7, 20, 21 (2002) [hereinafter Levinson, *French Revolution*] (noting "the absolutely remarkable conflict of interest presented by the spectacle of Marshall deciding on the legal status of a commission that he himself had signed," and "tendentious interpretations of misquoted texts"); Sanford Levinson, *Book Review*, 75 Va. L. Rev. 1429, 1439 (1989) (same).

8. Sanford Levinson, *Why Professor Lynch Asks the Right Questions*, 31 Seton Hall L. Rev. 45, 48 (2000).

9. *See* Robert Lowry Clinton, Marbury v. Madison *and Judicial Review* (U. Press Kan. 1989); Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (Yale U. Press 1990); Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001).

10. 1 Stat. 73 (1789).

Constitution. Judicial review was established solely by judicial opinions, not by federal statutes, constitutional provisions, or executive decisions. Elected officials, when mentioned at all in this constitutional story, are depicted as opposing judicial rulings or as passively acquiescing in judicial assertions of judicial power. Many casebooks include Abraham Lincoln's claim that his administration would not be bound by the Supreme Court's decision in *Dred Scott v. Sandford.*[11] None include any of the numerous congressional and presidential speeches given during the 1850s calling on the federal judiciary to hand down decisions settling the constitutional status of slavery in the territories.[12]

Professor Robert McClosky, Professor Levinson's mentor at Harvard, penned the most famous account of how Justices by themselves established judicial review when he described *Marbury* as:

> a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.... [T]he touch of genius is evident when Marshall ... seizes the occasion to set forth the doctrine of judicial review.... The attention of the Republicans was focused on the question of Marbury's commission, and they cared very little how the Court went about justifying a hands-off policy so long as that policy was followed.[13]

Professor Akhil Reed Amar, Professor Levinson's co-author, similarly asserts that "John Marshall managed to empower his branch even as he backed away from a fight with a new and popular President."[14] Debate exists over whether Jefferson opposed judicial review in theory or merely opposed any exercise of judicial power that interfered with Republican policies.[15] Still, casebooks on constitutional law and more scholarly commentaries on *Marbury* do not discuss any instance during the first decades after ratification when an elected official took proactive steps that helped establish the judicial power to declare laws unconstitutional. The Marshall Court performed a constitutional solo when establishing judicial review.

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11. 60 U.S. 393 (1857); *see The Collected Works of Abraham Lincoln* vol. IV, at 267-68 (Roy P. Basler ed., Rutgers U. Press 1953).

12. For a random sampling of the speeches, *see* Cong. Globe, 31st Cong., 1 Sess. 1154-1155 (1850) (speech of Henry Clay); James Buchanan, *Inaugural Address*, in *A Compilation of the Messages and Papers of the Presidents, 1789-1897* vol. V, at 430, 431 (James Richardson ed., GPO 1897); James K. Polk, *Fourth Annual Message*, in *A Compilation of the Messages and Papers of the Presidents, 1789-1897* vol. IV, at 629, 642 (James Richardson ed., GPO 1897); Cong. Globe, 31st Cong., 1 Sess. App., 154 (1850) (speech of Jefferson Davis); Cong. Globe, 34th Cong., 1 Sess. App., 797 (1856) (speech of Steven Douglas). *See* Cong. Globe, 33d Cong., 1 Sess. App., 232 (speech of Andrew P. Butler); Cong. Globe, 31st Cong., 1 Sess. App., 95 (1850) (speech of Samuel Phelps). For detailed accounts of legislative efforts to have the judiciary resolve contested issues over slavery, *see* Wallace Mendelson, *Dred Scott's Case—Reconsidered*, 38 Minn. L. Rev. 16 (1953); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. Am. Pol. Dev. 35, 46-50 (1993).

13. Robert G. McCloskey, *The American Supreme Court* 25-27 (3d ed., rev. by Sanford Levinson U. Chi. Press 2000).

14. Akhil Reed Amar, Marbury, *Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443, 462 (1989).

15. *See* Lee Epstein and Jack Knight, *The Strategic John Marshall (and Thomas Jefferson)*, in Marbury v. Madison*: Documents and Commentary* 41 (Mark A. Graber & Michael Perhac eds., CQ Press 2002).

Contemporary political scientists are challenging this common claim that judicial power is created largely by judicial decisions. Elected officials, numerous studies conclude, more often provide crucial foundations for judicial review than oppose particular judicial decisions. The Supreme Court tends to declare laws unconstitutional only after receiving fairly explicit invitations to do so by members of the dominant national coalition.[16] Prominent veto players in Congress support judicial decisions declaring laws unconstitutional by blocking legislative measures or judicial nominees that might reverse such rulings.[17] Howard Gillman details how increases in judicial power after the Civil War were consequences of self-conscious legislative efforts to expand the jurisdiction of the Supreme Court.[18] Keith Whittington describes how presidents during certain moments in political time champion judicial supremacy as a means for preserving decaying political coalitions.[19] Prominent academic lawyers are adding their voice to this revisionist chorus. Professor Levinson's colleague, Scot Powe, documents how the Warren Court worked in tandem with the Kennedy and Johnson administrations to promote a liberal vision.[20] Professor Levinson and Professor Jack Balkin have coined the phrase "partisan entrenchment" to describe the tendency for "[p]arties who control the presidency [to] install jurists of their liking," who "in turn create decisions which are embodied in constitutional doctrine and continue to have influence long after those who nominated and confirmed the jurists have left office."[21] Justices exercise power, these commentators agree, only when other political actors take the positive steps necessary to establish, maintain, and expand judicial power.

The process by which judicial review was partly established during the late eighteenth and early nineteenth centuries was also more driven by decisions made by elected officials than decisions made by Justices. Judicial review was first established by the Judiciary Act of 1789. That measure put in place all the crucial elements of judicial review, including an explicit authorization to declare federal and state laws constitutional. *Marbury* established no additional element of judicial review. The decision is best understood as an effort to preserve in a more hostile political environment some crucial elements of the practice established in 1789. Preservation required sacrifice. Marshall Court decisions sought to

16. Graber, *supra* n. 12; *see* George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (Cambridge U. Press 2003).

17. *Cf.* Mark Silverstein & Benjamin Ginsberg, *The Supreme Court and the New Politics of Judicial Power*, 102 Pol. Sci. Q. 371, 380-81 (1987).

18. Howard Gillman, *How Political Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 Am. Pol. Sci. Rev. 511, 513-15 (2002).

19. Keith E. Whittington, *To Say What the Law Is: Judicial Authority in a Political Context* (Princeton U. Press forthcoming 2005). *See* Keith E. Whittington, *The Political Foundations of Judicial Supremacy*, in *Constitutional Politics: Essays on Constitution Making, Maintenance and Change* (Sotirios A. Barber & Robert P. George eds., Princeton U. Press 2001).

20. Lucas A. Powe, Jr., *The Warren Court and American Politics* 494 (Harv. U. Press 2000) (stating that "the [Warren] Court was a functioning part of the Kennedy-Johnson liberalism of the mid and late 1960s").

21. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1076 (2001).

maintain the judicial power to declare laws unconstitutional when deciding cases by conceding that Congress had the constitutional power to determine for the most part what cases federal courts decided.

*Marbury* and later Marshall Court cases also preserved judicial review by silently transforming what had been understood as an anti-partisan or non-partisan practice into a partisan practice. Judicial review in 1789 was thought to be a means for preventing legislative usurpation and for correcting legislative mistakes. The rise of political parties demolished the political foundations of anti-partisan review and made nonpartisan review politically inconsequential. Judicial review survived in the new partisan political universe brought forth by the Revolution of 1800 because the Marshall Court, while continuing to make anti-partisan noises, used the judicial power only when doing so advanced policies preferred by at least some members of the dominant Jeffersonian coalition. Judicial review in 1803 and afterwards was a means for advancing various political interests, not a device for checking national majorities. The source of judicial power lay in the relationship between life-tenured Justices and elected officials, not in the celebrated independence of the federal judiciary. Various federal judiciary acts and related measures passed by national majorities in Congress present a more accurate picture of the foundations and purposes of judicial review than the countermajoritarian rhetoric found in law reviews and occasional judicial opinions.

This study uses *Marbury* as a vehicle for studying the judicial and political responsibilities for establishing judicial review, and the legal and political foundations of that power. Part I raises some questions about Professor Levinson's initial reasons for excluding *Marbury* from his constitutional canon. Part II discusses the elements of judicial review and the senses in which various elements of that practice might be thought to be established at any point in time. Parts III and IV assess the relative contributions *Marbury* and the Judiciary Act of 1789 made to the legal and political foundations of judicial review. The conclusion details the merits of beginning constitutional law courses with the Judiciary Act of 1789. That measure is a better introduction than *Marbury* to the elements of judicial review, disabuses students of the silly notion that Justices create judicial power, and raises appropriate questions about the reasons why elected officials might vest courts with the power to declare laws unconstitutional.

## I. TEACHING *MARBURY*

Professor Levinson's refusal to teach *Marbury* on craft grounds is more Langdellian than Levinsonian. Casebooks in the "Age of Faith" included only those opinions that editors regarded as models of legal reasoning. The "useful" opinions that belonged in casebooks, Christopher Columbus Langdell and other late nineteenth century legal scholars insisted, "bear an exceedingly small

proportion to all that have been reported."[22] Legal realists denounced this practice. They rejected pedagogical processes that encouraged students to regard distinctive modes of legal reasoning as normative guides for judicial practice and as empirical descriptions of how Justices reached legal decisions.[23] Casebooks edited by legal realists during the 1920s and 1930s presented students with the full range of judicial decisionmaking, warts and all, and refrained from highlighting a few exemplary judicial opinions. This pedagogical practice was designed to teach that law was a form of politics, that policy considerations influenced judicial decisionmaking, and that distinctive modes of legal reasoning rarely yielded clear answers to contested legal questions.[24]

*Marbury* epitomizes the case that belongs in the realist canon. John Marshall's opinion and final ruling illustrate every prominent rival to the legal model of judicial decisionmaking. Judicial review, students might learn from *Marbury*, was result-oriented from birth. The way the decision interprets the Judiciary Act[25] illustrates the malleability of legal language and how such legal maxims as "interpret statutes as constitutional whenever possible" are abandoned whenever doing so suits judicial convenience.[26] The judicial ruling that William Marbury was entitled to a commission as a justice of the peace illustrates how judicial policy preferences better explain most Supreme Court decisions than law.[27] The judicial ruling that the Justices lacked the jurisdiction necessary to issue a writ entitling Marbury to his commission illustrates how Justices strategically manipulate law to avoid making decisions that might damage judicial prestige and power.[28] *Marbury* taught in these legal realist traditions would far better prepare students for *Bush v. Gore*[29] than *McCulloch v. Maryland*,[30] the case *Processes of Constitutional Decisionmaking* uses to introduce judicial reasoning.[31]

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22. C.C. Langdell, *A Selection of Cases on the Law of Contracts* vi (Little, Brown & Co. 1871); *see* Grant Gilmore, *The Ages of American Law* 47 (Yale U. Press 1977).

23. Gilmore, *supra* n. 22, at 77-81.

24. *Id.* at 68-98.

25. *Marbury*, 5 U.S. at 173-76.

26. *See* James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L. Rev. 1515, 1532 (2001); Amar, *supra* n. 14, at 453-54. Professor Pfander points to another possible instance of statutory misinterpretation. "A particularly feisty Court might have chosen to ignore as improperly retrospective the repeal of the 1801 Act," he notes, "at least to the extent it operated to deny Marbury a remedy for rights that would have been otherwise remediable under the law in place at the time of his suit's initiation." Pfander, *supra*, at 1582 n. 279.

27. *See* Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge U. Press 2002); Levinson, *French Revolution*, *supra* n. 7, at 21 ("as a Federalist opponent of the despised Jefferson, Marshall wanted to level salvos questioning the President's integrity without, however, doing anything that might lead to the Jeffersonians successfully defying a judicial decree, not to mention Marshall's understandable fear that a contrary decision in the case could well lead to a Jeffersonian-inspired effort at impeachment").

28. *See* Lee Epstein & Jack Knight, *The Choices Justices Make* 47, 151-52 (CQ Press 1997); Levinson, *French Revolution*, *supra* n. 7, at 21.

29. 531 U.S. 98 (2000). *See* Levinson, *French Revolution*, *supra* n. 7, at 20 ("Marshall's opinion in *Marbury* is no more defensible than is the per curiam opinion (or the concurrence) in *Bush v. Gore*").

30. 17 U.S. 316 (1819).

31. Brest, Levinson, Balkin & Amar, *supra* n. 5, at 17-51.

Demanding that students understand the contexts in which most opinions are handed down would require more massive overhauling of the constitutional law curriculum and legal education than even Professor Levinson countenances. Adequately understanding any major constitutional decision requires more knowledge of history, philosophy, sociology, political science, rhetoric, literature, and economics than students (or their professors) can be expected to possess. Still, if *McCulloch* can be taught to students who have not read *Banks and Politics in America*[32] or a good study on early American political economy,[33] then *Marbury* can be taught to students who have not read *The Jeffersonian Crisis*[34] or a good political history on the Revolution of 1800.[35] Casebook editors routinely highlight the passage in Justice Holmes's *Lochner* dissent proclaiming, "[t]he [Fourteenth] Amendment does not enact Mr. Herbert Spencer's *Social Statics*,"[36] even though students (and professors) are unlikely to have read any Herbert Spencer[37] or Howard Gillman's masterful study claiming that the majority opinion in *Lochner* was rooted more in Jacksonian conceptions of equality than in laissez-faire or Social Darwinist principles.[38]

Concerns with *Marbury*'s originality are generalizable across the constitutional canon. Most famous judicial opinions rely heavily on broader currents of political thought,[39] none of which are detailed at any length in the constitutional law canon. The first part of *McCulloch* is largely a restatement of Alexander Hamilton's *Report on the National Bank*.[40] The *Dred Scott* opinion largely paraphrases an opinion Roger Taney wrote when attorney general denying that former slaves should be treated as American citizens[41] and speeches by John C. Calhoun in the Senate denying that slavery could be banned in American territories.[42] Casebooks that do not include excerpts from John Stuart Mill[43] and John Rawls[44] when discussing twentieth century judicial liberalism need not

32. Bray Hammond, *Banks and Politics in America from the Revolution to the Civil War* (Princeton U. Press 1957).

33. *E.g.* Drew R. McCoy, *The Elusive Republic: Political Economy in Jeffersonian America* (U. N.C. Press 1996).

34. Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (W.W. Norton & Co. 1974).

35. *E.g.* Stanley M. Elkins & Eric McKitrick, *The Age of Federalism* (Oxford U. Press 1993).

36. *Lochner v. N.Y.*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

37. *E.g.* Herbert Spencer, *Social Statics; or, the Conditions Essential to Human Happiness Specified, and the First of Them Developed* (D. Appleton & Co. 1865).

38. Howard Gillman, *The Constitution Besieged: The Rise and Demise of* Lochner *Era Police Powers Jurisprudence* 7-8 (Duke U. Press 1993).

39. *See* Rogers M. Smith, *Liberalism and American Constitutional Law* (Harv. U. Press 1985).

40. Alexander Hamilton, *Opinion on the Constitutionality of the Bank*, in *The Reports of Alexander Hamilton* 83 (Jacob E. Cooke ed., Harper & Row 1964); *McCulloch*, 17 U.S. at 406-25; *see* Brest, Levinson, Balkin & Amar, *supra* n. 5, at 13-16, 17-30.

41. Carl Brent Swisher, *Roger B. Taney* 154 (Archon Books 1961).

42. *See e.g.* John C. Calhoun, *The Essential Calhoun: Selections from Writings, Speeches, and Letters* 382-89 (Clyde N. Wilson ed., Transaction Publishers 1992).

43. John Stuart Mill, *On Liberty* (Elizabeth Rapaport ed., Hackett Publg. Co. 1978).

44. John Rawls, *A Theory of Justice* (rev. ed., Harv. U. Press 1999).

apologize specifically for not excerpting the debates over the federal judiciary in the Seventh Congress[45] when discussing *Marbury v. Madison.*

Many constitutional law casebooks make painstaking efforts to make students aware that the assertion of judicial review in *Marbury* did not necessarily entail the assertion of judicial supremacy in *Cooper v Aaron.*[46] Kathleen M. Sullivan and Gerald Gunther's *Constitutional Law*, generally considered the most traditional constitutional law casebook, highlights numerous legal and political challenges elected officials have issued to the federal judiciary over the past two-hundred years.[47] That discussion cites an article Professor Levinson wrote attacking the common identification of the Constitution with judicial decisions.[48] Given that contemporary claims to judicial supremacy are rooted in an interpretation of *Marbury v. Madison*, raising the constitutional status of judicial supremacy without discussing *Marbury* seems pedagogically mistaken.[49]

Professor Levinson's lifelong concern with judicial supremacy may explain why he overlooks a more fundamental problem with the way *Marbury* is conventionally taught. *Processes of Constitutional Decisionmaking* presents constitutional interpretation by persons outside of courts as an alternative to constitutional interpretation by Justices. The casebook begins by condemning the view that "the Constitution [is] largely what the Supreme Court says it [is]."[50] Non-judicial officials, students learn, have both challenged judicial doctrine and made constitutional decisions on matters that never came before courts.[51] Using the Constitution outside of the court to weaken claims of judicial supremacy or judicial exclusivity, however, obscures how many constitutional decisions made outside of courts promote judicial powers. *McCulloch* was handed down only after the federal government and Maryland agreed that the federal judiciary would determine whether states could constitutionally tax the national bank.[52] Marshall's assertion, "by this tribunal alone can the decision be made,"[53] is a claim about the constitutional powers of the Supreme Court[54] and a description of the constitutional settlement reached outside of the courts that the judiciary would be

45. For excerpts, *see* Marbury v. Madison*: Documents and Commentary*, *supra* n. 15, at 310-38.

46. 358 U.S. 1, 18-20 (1958).

47. Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* 19-29 (14th ed., Found. Press 2001).

48. *Id.* at 26 (citing Sanford Levinson, *Could Meese Be Right This Time?*, 61 Tul. L. Rev. 1071 (1987)).

49. *See* Sanford Levinson, *Why I Don't Teach* Marbury *(Except to Eastern Europeans) and Why You Shouldn't Either*, 38 Wake Forest L. Rev. ___ (forthcoming 2003) (quoting Jack Balkin) (*Marbury* is "a classic" that "can speak in ever new ways to us no matter what our theoretical preoccupations of the moment" it can be reconfigured to serve the ends).

50. Brest, Levinson, Balkin & Amar, *supra* n. 5, at xxix.

51. *Id.* at xxix-xxxiv.

52. Mark A. Graber, *The Passive-Aggressive Virtues:* Cohens v. Virginia *and the Problematic Establishment of Judicial Power*, 12 Constitutional Commentary 67, 84-86 (1995); Dwight Wiley Jessup, *Reaction and Accommodation: The United States Supreme Court and Political Conflict, 1809-1835*, at 191 (Garland Publg., Inc. 1987).

53. *McCulloch*, 17 U.S. at 400.

54. *See id.* at 400 ("[o]n the Supreme Court of the United States has the constitution of our country devolved this important duty").

the institution responsible for ruling upon the constitutional status of the national bank. Repeated incantations that "*Marbury* established judicial review" (or that "*McCulloch* established broad national powers") mask the role constitutional decisions reached outside of courts play in determining the extent of constitutional powers exercised by courts. Both as a matter of jurisprudential logic and historical practice, judicial powers are established only with the proactive cooperation of elected officials.

## II. ESTABLISHING JUDICIAL REVIEW

The common claim that *Marbury* established judicial review is puzzling. Persons have power only to the extent they are able to influence the behavior of others.[55] Mere declarations of power hardly demonstrate the necessary influence. Otherwise, Professor Levinson could establish Levinsonian review by asserting, perhaps in the pages of the Tulsa Law Review, that "it is emphatically the province and duty of the Garwood Centennial Chair in Law at the University of Texas to declare what the law is." How *Marbury* established any politically consequential power is particularly unclear. A judicial decision declaring unconstitutional a federal statute interpreted as adding to the original jurisdiction of the Supreme Court hardly entails or demonstrates the judicial power to declare major legislation unconstitutional. The major lines of influence in *Marbury* run in the wrong direction. The Justices declared they had the power to declare Section 13 of the Judiciary Act unconstitutional only because they recognized they did not have the power to force the Jefferson administration to deliver a judicial commission to William Marbury.[56]

*Marbury* established judicial review only from a remarkably jurocentric perspective on the elements of judicial review and on the criteria for determining whether those elements are established. A functioning system of judicial review, students too often learn, involves only judicial behavior. The only element of judicial review is the judicial authority to declare laws unconstitutional when deciding cases. This judicial power is established by judicial opinions declaring that Justices have the power to declare laws unconstitutional when deciding cases. No element of judicial review involves behavior by other governing officials or is established by other governing officials. Judicial review was established when the Justices in *Marbury* proclaimed their power to declare laws unconstitutional.[57] Judicial supremacy was established when the Justices in *Cooper v. Aaron*

55. Robert A. Dahl, *The Concept of Power in Political Power: A Reader*, in *Theory and Research* 80 (Roderick Bell, David V. Edwards & R. Harrison Wagner eds., Free Press 1969). A vigorous debate exists over the precise nature of power. Scholars point out that persons also exercise power when they control political agendas or control cultural resources so as to get others "to act and believe in a manner in which [they] otherwise might not...." John Gaventa, *Power and Powerlessness: Quiescence and Rebellion in an Appalachian Valley* 15-16 (U. Ill. Press 1980). *See* Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 Am. Pol. Sci. Rev. 947 (1962) (discussing the "pluralist" and "elitist" models of power).

56. Pfander, *supra* n. 26, at 1515 n. 1, 1581-82 ("the writ, as a matter of political reality, was simply unavailable").

57. *Marbury*, 5 U.S. at 176-80.

proclaimed that all governing officials were bound by judicial rulings on constitutional issues.[58]

Judicial practice during the first decades of the nineteenth century belies this simplistic conception of judicial review. Marshall Court Justices, recognizing they had no power to realize those Federalist constitutional visions that lacked sufficient political support, pulled numerous constitutional punches to appease powerful elites.[59] Had the Justices ordered the Jefferson administration to deliver a judicial commission to William Marbury, the writ of mandamus would have been ignored. Had the Justices declared that Congress could not repeal the Judiciary Act of 1801,[60] the Chief Justice and his brethren probably would have been impeached. Section 25 of the Judiciary Act might have been repealed had the Justices ruled against Virginia in *Cohens v. Virginia*.[61] Marshall found a statutory excuse to avoid striking down Virginia's ban on the entry of free blacks because, as he informed Justice Story, he was "not fond of butting against a wall in sport."[62] Reasons exist in each instance for thinking that Marshall Court Justices thought elected officials had acted unconstitutionally.[63] The Justices in each instance found reason not to declare the offending action unconstitutional. These frequent exercises of judicial restraint illustrate various ways the judicial power to declare laws unconstitutional depends on cooperation from other governing officials. Crucial political actors must obey judicial decrees, they must respect judicial independence, and they must not alter the legal foundations of judicial authority.

Justices, acting alone, cannot establish all elements or prerequisites of judicial review. Courts do not create themselves. The Supreme Court lacks both the legal and the political power necessary to prevent a constitutional amendment from repealing Article III. Federal Justices cannot compel private litigants to bring lawsuits challenging the constitutionality of those laws the Justices believe unconstitutional. Judicial review functions and is a politically consequential practice only when political actors outside the courts perform certain tasks and refrain from engaging in certain activities. Elected officials must create and empower national judiciaries. National judiciaries enjoy the power to declare laws unconstitutional only when crucial elected officials pass and maintain laws that authorize and enable Justices to exercise that power.

### *A. Elements*

The practice of judicial review requires judges, jurisdiction, litigants, authority, capacity, independence, and compliance. These categories and their contents are contestable. Professors Charles Geyh and Emily Van Tassel organize

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58. 358 U.S. at 18-20.

59. Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 Stud. Am. Pol. Dev. 229, 250-51, 259 (1998).

60. 2 Stat. 89 (1801); 2 Stat. 156 (1802).

61. Graber, *supra* n. 52, at 86-87.

62. Charles Warren, *The Supreme Court in United States History* vol. 1, at 626 (rev. ed., Little, Brown & Co. 1947) (quoting John Marshall to Joseph Story, Sept. 26, 1823).

63. *See infra* nn. 59, 61.

some elements discussed below differently when they distinguish between "'decisional' and 'branch' (or institutional) independence."[64] The important point is that a system of judicial review has numerous elements, all of which must be in place before courts have the power to declare laws unconstitutional. If a constitution declares, "Courts have the power to declare laws unconstitutional when deciding cases," but also "No one shall bring a case without legislative permission," then judicial review exists only by legislative permission.

(1) Judges/Courts. Judicial review requires judges and courts. Laws are not declared unconstitutional by justices in regimes that lack a judicial system. No case analogous to *Marbury* could have been decided by national courts in the Confederate States of America. Article III of the Confederate Constitution is identical in all relevant respects to Article III of the Constitution of the United States, but the Confederate Congress was unable to agree on legislation establishing a national judiciary.[65] No judges, no judicial review.

(2) Jurisdiction. Judicial review requires that, for any government action that might plausibly be thought unconstitutional, some court has the jurisdiction to decide lawsuits challenging the constitutionality of that government action. This jurisdiction may be vested exclusively in one court, in all courts, or divided between various courts. If more than one court has jurisdiction to hear lawsuits challenging the constitutionality of a specific government action, some court must have the appellate jurisdiction necessary to resolve any differences of judicial opinion. A specific court may be given final appellate jurisdiction over all appeals on constitutional matters or that power may be dispersed. The crucial point is that courts have the power to declare laws unconstitutional only to the extent that courts have the power to resolve lawsuits challenging the constitutionality of those laws. No jurisdiction, no judicial review.

(3) Litigants. Judicial review requires that, for any government action that might plausibly be thought unconstitutional, at least one party have the standing, capacity, and willingness to bring a lawsuit challenging the constitutionality of that action. This element of judicial review is not an element of constitutional review. Constitutional courts in France and in some other countries decide constitutional controversies when asked to do so by members of the national legislature.[66] The practice of judicial review in the United States permits laws to be declared unconstitutional only in the context of a concrete lawsuit. Courts have the power to declare a law unconstitutional only when some party satisfies any standing requirement necessary to bring a lawsuit, has (or is given) the resources necessary

64. Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 Chi.-Kent L. Rev. 31, 31 (1978) ("[d]ecisional independence concerns the impartiality of judges—the capacity of individual judges to decide specific cases on the merits, without 'fear or favor.' Branch or institutional independence, on the other hand, concerns the general, non-case specific separation of the judicial branch—the capacity of the judiciary to remain autonomous, so that it might serve as an effective check against the excesses of the political branches").

65. *See* Marshall L. DeRosa, *The Confederate Constitution of 1861: An Inquiry into American Constitutionalism* 104-05 (U. Mo. Press 1991).

66. *See* Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* 33-34 (Oxford U. Press 2000).

to maintain a lawsuit, and is willing to bring a lawsuit challenging the constitutionality of a government action. Much twentieth century judicial activism is explained by more permissive standing rules, federal laws providing litigants with resources for bringing lawsuits, and greater willingness among Americans to seek legal remedies for perceived wrongs.[67] No litigants, no judicial review.

(4) Authority. Judicial review requires courts with jurisdiction over claims of constitutional wrong to have the power to declare the offending government action unconstitutional. This power to declare laws unconstitutional encompasses the power to decide all legal and factual issues necessary to resolute the constitutional dispute before the court.[68] Justices have little power to declare government acts unconstitutional when they must accept without question claims that a criminal suspect confessed voluntarily or that a national emergency justifies limiting speech rights. Judicial authority may be consistent with some deference to elected officials. Scholars debate whether Justices should sustain all government actions a reasonable person might think constitutional.[69] Still, Congress cannot "tell the court how to interpret the law" or resolve factual disputes relevant to claims of constitutional wrong.[70] Courts cannot identify or remedy constitutional wrongs when Justices must defer to any constitutional judgment made by an elected official or to any official account of the facts relevant to a claim of constitutional wrong. No authority, no judicial review.

(5) Capacity. Judicial review requires that Justices with the jurisdiction and authority to adjudicate claims of constitutional wrong have the capacity to adjudicate those claims in a timely and intelligent fashion. Court sessions must be held with sufficient frequency to enable litigants with claims of constitutional wrong to have those claims adjudicated while the constitutional dispute is live. The Justices must have the time, numbers, and other resources to obtain and process whatever information they believe necessary to resolve those disputes. Authorizing courts to hear every claim of constitutional wrong may actually reduce judicial power. "[A] mandate to hear all appeals," Liebman and Ryan observe, "would overwhelm the [Supreme C]ourt's capacity effectively to maintain national supremacy in those particular cases in which its superintendency

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67. *See* Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* ch. 4 (U. Chi. Press 1998); Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* 149-51 (Princeton U. Press 1990); Mary Ann Glendon, *A Nation under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* 257-69 (Farrar, Straus & Giroux 1994).

68. Professors James Liebman and William Ryan make related points when they discuss the constitutionally mandated quality of judicial review. "An Article III court," they maintain, "must decide (1) the whole federal question (2) independently and (3) finally, based on (4) the whole supreme law, and (5) impose a remedy that, in the process of binding the parties to the court's judgment, effectuates supreme law and neutralizes contrary law." James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696, 696 (1998). *See id.* at 770-71, 884.

69. *Compare id.* at 880-81 *with* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129, 138-42 (1893).

70. Liebman & Ryan, *supra* n. 68, at 822.

was most needed."[71] A court system with only one justice, who holds court only once every ten years for one hour, does not have much power to declare laws unconstitutional. No capacity, no judicial review.

(6) Independence. Judicial review requires that Justices with the jurisdiction, authority, and capacity to declare laws unconstitutional have the tenure in office, salary, and other protections sufficient to prevent undue influence on their constitutional decisions.[72] Some casual connections between judicial decisions and outside influence are legitimate. No one protests when Justices are convinced by effective oral arguments (as long as other parties have equal opportunities to present their constitutional opinions). The legitimacy of other forms of influence is more contestable. Some persons think judicial independence compromised when judicial appointments are based on beliefs about how a Justice is likely to vote. More persons object when courts are packed with political supporters.[73] Judicial independence is clearly absent when judicial decisions are made at gunpoint. Courts have the power to declare laws unconstitutional only to the extent that judicial decisions are not controlled by outsiders. No independence, no judicial review.

(7) Compliance. Judicial review requires that other governing officials obey judicial decisions declaring a government action unconstitutional. Courts have power only when they have an ability to carry their judgments into effect.[74] Proponents of judicial supremacy insist that elected officials must respect the principles laid down by the Supreme Court when resolving claims of constitutional wrong. Others insist that judicial decisions on constitutional issues merely determine the relationships between the parties before the Court. Governing officials, in this view, remain free to make independent constitutional judgments until those judgments are successfully challenged in court. Still, governing officials must at a minimum comply with judicial orders in constitutional cases. No compliance, no judicial review.

These elements of judicial review admit of degree. Judicial review does not exist when any element is completely absent. Justices are powerless when persons must first pay a trillion dollar filing fee before bringing a lawsuit or when courts are not allowed to meet. Judicial power is merely limited when elements of judicial review are partly established. Some limits impair judicial review of particular government actions. Others prevent Justices from declaring some laws unconstitutional, while not affecting judicial capacity to strike down other

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71. *Id.* at 766.

72. *See id.* at 769; Linda Greenhouse, *Chief Justice Calls for Higher Salaries and More Judges*, N.Y. Times A15 (Jan. 2, 2003) (quoting Chief Justice Rehnquist) (judicial salaries that range from $150,000 to $192,000 constitute "inadequate compensation" that "seriously compromises the judicial independence fostered by life tenure").

73. I assume all persons would object to the following practice. Whenever the Supreme Court handed down a decision the dominant national coalition disputes, the president appoints and the Senate confirms, ten additional Justices to the Supreme Court, known to favor overruling that decision. The day after the decision is overruled, the ten new appointees resign, only to be reappointed and confirmed whenever a new occasion arises for their services.

74. Liebman & Ryan, *supra* n. 68, at 790.

measures. Resource problems have historically prevented many constitutional wrongs from being litigated and others from being litigated in ways that provide Justices with the information necessary to resolve claims fairly.[75] Standing rules prohibit even the most well-heeled from litigating certain claims of constitutional wrong.[76] Too many cases combined with too few Justices create backlogs that prevent claims of constitutional wrong from being adjudicated in a timely fashion. These observations suggest that a fully realized system of judicial review may be practically impossible, given the resources necessary to insure that all plausible claims of constitutional wrong are fairly litigated. Courts in practice are likely to have nearly unlimited power to remedy only some constitutional wrongs, more limited power to remedy other constitutional wrongs, and little or no power to remedy the remaining constitutional wrongs.

### *B. Establishment*

Judicial review rests on the weakest element of that practice. If any element is completely or partly impaired, judicial review is impaired to the same degree. Judges, jurisdiction, litigants, authority, capacity, and compliance do not suffice to establish independent judicial power when Justices fear assassination should they declare particular laws unconstitutional. When one element of judicial review has weaker foundations than others, the practice of judicial review as a whole rests on the weaker foundations. If the Constitution mandates judges, litigants, authority, capacity, independence, and compliance, but leaves jurisdiction to the discretion of the national legislature, then judicial review rests on statutory foundations.[77]

The elements of judicial review may be established by law or by political practice. Judicial review is established by law when authoritative legal texts or legal authorities mandate the elements of that practice. Article III, Section 1 provides legal foundations for judicial independence by granting life tenure to federal Justices. The Supreme Court provided legal foundations for the litigant element of judicial review by ruling that states must provide attorneys to indigent persons accused of felonies.[78] Judicial review is established politically to the extent crucial elites or the general population support the elements of that practice. Elected officials support judicial power by acting consistently with the constitutional rules set out in Article III, by not passing contrary constitutional amendments, and by taking whatever steps are necessary to strengthen elements of judicial review not mandated by the Constitution. Judicial review has strong political foundations when elites, inside or outside of government, insure that all persons have the resources necessary to litigate plausible claims of constitutional wrong. Judicial review lacks political foundations, although every element is

75. *See e.g.* Lawrence, *supra* n. 67, at ch. 3.

76. *See e.g. U.S. v. Richardson*, 418 U.S. 166 (1974).

77. The national legislature may not, however, be legally entitled to use its power over jurisdiction to impair any constitutionally mandated element of judicial review. Congress cannot condition jurisdiction, for example, on judicial willingness to rule in favor of the government. *Klein v. U.S.*, 80 U.S. 128 (1871); Liebman & Ryan, *supra* n. 68, at 810-23.

78. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

plainly mandated by the Constitution, when judicial decisions are not obeyed, Justices murdered, constitutional litigation made too costly, and crucial elites are ready to repeal all legal foundations for judicial power should the Justices declare unconstitutional any cherished policy.

The legal foundations for judicial review in the United States are statutory or constitutional.[79] The Supreme Court has constitutional foundations. Article III, Section 1 mandates that Congress establish that tribunal. The Second Circuit has statutory foundations. The Constitution permits Congress to decide whether to create lower federal courts. Congress could have constitutionally guaranteed that no lower federal court ever declared a law unconstitutional by refraining from establishing lower federal courts.[80] Different elements of judicial review may have different legal foundations. One element may be established by statute, another by the Constitution.

The legal foundations for judicial review admit of degree. Some elements of judicial review at a given time may be legally established beyond all reasonable doubt. The Constitution, on any plausible reading, requires Congress to pay a salary to Justices on the Supreme Court. The legal status of other elements is subject to interpretation and debate. Wayne Moore notes in a series of fascinating papers how multiple sources of legal authority exist. Those sources may be ambiguous or conflict.[81] Political actors debate what the Constitution means, whether Supreme Court decisions legally bind all governing officials, and the best interpretation of important Supreme Court decisions. An ongoing dispute exists over whether the persons responsible for the Constitution intended that at least one federal court have the final authority to resolve all cases raising constitutional issues, whether the Supreme Court is authorized to settle that constitutional dispute,[82] and the best interpretation of previous judicial decisions on the constitutional status of federal question jurisdiction.[83] Ambiguous and conflicting constitutional authorities often render the legal foundations for various elements of judicial review unclear or merely probable. The Constitution in 2003 requires that capital defendants be represented by counsel, does not require that capital defendants be represented by highly experienced criminal defense attorneys, but

79. Had *Bonham's Case* provided the foundations for judicial review in the United Kingdom, judicial review in that regime might have had common-law foundations. *See Dr. Bonham's Case*, 77 Eng. Rep. 638 (K.B. 1608).

80. The legislative power to abolish lower federal courts is more contested. The Seventh Congress did abolish the courts established by the Judiciary Act of 1801. Whether that Act was constitutional remains the subject of debate.

81. *See* Wayne D. Moore, Presentation, *Reflections on Constitutional Politics in the Early Judicialization of Reconstruction* (Boston, Mass., Aug. 29, 2002) (copy on file with author of article) (paper presented at the 2002 Annual Meeting of the American Political Science Association); Wayne D. Moore, Presentation, *Toward a Theory of Partial Constitutional Authority* (S.F., Cal., Sept. 2, 2001) (available at <http://pro.harvard.edu/papers/026/026015MooreWayne.pdf>) (paper presented at the 2001 Annual Meeting of the American Political Science Association).

82. *See* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. Rev. 1, 34-36 (1990).

83. *See infra* nn. 137-38.

does not establish the precise degree of competence counsel must display in a capital case.

While constitutional commentary highlights the legal foundations for judicial review, the political foundations are more vital. Judicial review is a politically consequential practice, one worthy of study, only when that practice enjoys substantial political support. A system of judicial review does not function, no matter how strong the legal foundations, when Justices know they will be murdered should they vote to declare any law unconstitutional. By comparison, a system of judicial review can function without legal foundations. When Justices are willing to declare laws unconstitutional and the army enforces all judicial decrees (even those military leaders think mistaken), Justices have power to declare laws unconstitutional. Legal texts to the contrary in such a regime may influence the description, not the reality, of that judicial power.

The political and legal foundations of judicial review are closely related. Legal foundations of judicial review often serve as political foundations. Political elites may support judicial review, at least in part, when they believe the law requires that support. Political foundations, in turn, often determine legal foundations. Whether crucial political elites establish, maintain, strengthen, weaken, or abolish various elements of judicial review depends whether they support judicial review in the abstract or believe that an empowered judiciary will serve their more immediate political interests.

The political foundations of judicial review admit of degree. Crucial political actors tend to support a range of possible judicial decisions rather than judicial power per se. Diffuse support for judicial review among elected officials and the general public provides the political foundations necessary for courts to resolve perceived constitutional technicalities as the Justices see fit, diverge slightly from public and legislative preferences on most politically charged constitutional issues, and perhaps even diverge more sharply from public and legislative preferences on a few hotly contested constitutional questions.[84] The Rehnquist Court need not worry about political backlash (or hope for increased political support) should the Justices reconsider whether Congress may constitutionally add to the original jurisdiction of the Supreme Court. Popular majorities may stomach judicial decisions decriminalizing homosexual sodomy, but not decisions legalizing gay marriage. Alternatively, the political foundations of judicial review may not be weakened if a decision legalizing gay marriage is the only constitutional question on which the Justices issue a sharp challenge to the present constitutional status quo. Much depends on the coalitions that form to strengthen, maintain, and weaken judicial power. The constitutional politics of abortion demonstrate how controversial decisions both inspire attacks on judicial review while bringing forth new champions of judicial power. A coalition of gay rights activists and proponents of state rights may provide sufficient foundations for a court that

84. *See* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 Am. J. Pol. Sci. 635 (1992).

strikes down bans on gay marriages and declares unconstitutional the Violence Against Women Act.

Claims that *Marbury* established judicial review do not have a single meaning, given the numerous elements of judicial review and the numerous senses in which those elements might be established. Assertions that a judicial decision, law, or some other event "established judicial review" invariably require numerous qualifications. The relevant event may establish all elements of judicial review. More likely, a particular event influences only a few elements of judicial review. The other elements of judicial review may have previously been established or remain unestablished. The event may contribute to the judicial power to declare any law unconstitutional or merely influence the judicial power to declare particular laws unconstitutional. The elements of judicial review influenced, after the decision, law, or event, may be fully realized or merely less impaired. Establishment may be legal or political. Legal establishment may be statutory or constitutional, by legal text or by legal authority. Events that help establish some element of judicial review may have little impact on or even weaken other elements of that practice. When teaching or discussing judicial review, therefore, constitutionalists must clarify what they mean by "the establishment of judicial review," and consider in more depth what decisions, laws, and events established that judicial power in the relevant senses.

## III. LEGAL FOUNDATIONS

*Marbury* did not establish judicial review in some universal sense. Some elements of judicial review cannot be established by judicial decree. The Supreme Court could not have created and initially staffed the Supreme Court. The judiciary may not prevent crucial political actors who either disagree with judicial review on principle or with the course of judicial decisions from changing the statutory and constitutional foundations for judicial power. As significantly, *Marbury* did far less than a judicial decision might have done to establish judicial review. The decision largely justified and confirmed a previously established element of judicial review, the judicial power to declare laws unconstitutional when deciding cases. While strengthening the authority element of judicial review, *Marbury* and other cases decided during the first two decades after the Constitution was ratified weakened the jurisdictional element of judicial review by providing precedential foundations for the legislative power to withhold federal jurisdiction over cases raising claims of constitutional wrong. Overall, judicial review was less established legally five years after *Marbury* was decided than five years before.

The Judiciary Act of 1789 did far more than *Marbury* to establish judicial review. That measure provided explicit legal foundations for all seven elements of judicial review. *Marbury* provided explicit legal foundations only for judicial authority. Although the Judiciary Act was a statute, decisions made by the First Congress have historically been given special constitutional significance. The congressional decision in 1789 to vest federal courts with the power to declare

laws unconstitutional is probably a stronger constitutional precedent for judicial authority than judicial affirmation of that power fourteen years later. The course of federal judicial review probably would have run unchanged had Jefferson upon taking office decided to deliver Marbury's judicial commission. Had Congress not passed the Judiciary Act of 1789 or some similar measure, federal judicial review would have existed only in constitutional theory.

### *A. Precedent*

*Marbury* provided solid precedential foundations for one element of judicial review, the judicial power to declare laws unconstitutional when adjudicating cases. Chief Justice Marshall when handed down that decision delivered the first Supreme Court opinion defending that judicial authority at length.[85] Before *Marbury*, one Justice on the Supreme Court had maintained that past precedents did not justify the judicial power to ignore or strike down laws believed unconstitutional. In 1800, Justice Samuel Chase in *Cooper v. Telfair* declared, although "a general opinion" existed "that the Supreme Court can declare an act of congress to be unconstitutional, . . . there is no adjudication of the Supreme Court itself upon the point."[86] *Marbury* removed these doubts. When the *Telfair* opinion was published, Chase or the court reporter attached a note to his initial assertion that judicial review was not yet established, claiming "the point has since been determined affirmatively by the Supreme Court in *Marbury v. Madison*."[87] Future Justices agreed. No judicial opinion written after 1803 by a federal Justice has questioned the precedential status of judicial review.

Whether judicial review was stare decisis only after Marbury is contestable. Several Justices in *Telfair* asserted that judicial review was already settled law. Justice William Cushing wrote, "this Court has the . . . power . . . to declare the law void."[88] Justice Patterson concurred.[89] Justice Chase previously declared federal judicial review the law of the land when riding circuit. "[T]he judicial power of the United States," he stated in *United States v. Callender*, "is the only proper and competent authority to decide whether any statute made by congress (or any of the state legislatures) is contrary to, or in violation of, the federal constitution."[90] During the 1790s, the Supreme Court appears to have declared laws

85. *Marbury*, 5 U.S. at 176-80.

86. 4 U.S. 14, 19 (1800) (opinion of Chase, J.). *See Calder v. Bull*, 3 U.S. 386, 392 (1798) (opinion of Chase, J.) (refraining from "giving an opinion, at this time, whether this Court has jurisdiction to decide that any law made by Congress, contrary to the Constitution of the United States, is void"); *Hylton v. U.S.*, 3 U.S. 171, 175 (1796) (opinion of Chase, J.) ("it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the Constitution").

87. *Telfair*, 4 U.S. at 18 (opinion of Chase, J.).

88. *Id.* at 20 (opinion of Cushing, J.).

89. *Id.* at 19 (opinion of Patterson, J.) ("to authorise this Court to pronounce any law void, it must be a clear and unequivocal breach of the constitution").

90. 25 F. Cas. 239, 256 (C.C. D. Va. 1800).

unconstitutional in two cases, *United States v. Yale Todd*[91] and *Hollingsworth v. Virginia*.[92] Federal justices when riding circuit during the Washington and Adams administrations frequently asserted and occasionally exercised the power to declare federal and state laws unconstitutional.[93] State justices before *Marbury* asserted the power to declare laws unconstitutional and declared various state laws unconstitutional.[94] These relatively frequent exercises of judicial power suggest that *Marbury* is best interpreted as justifying a previously existing judicial practice rather than as announcing a hithertofore judicially unrecognized proposition of constitutional law.

That *Marbury* established judicial review was a well kept secret throughout the nineteenth century. Federal justices for more than eighty years did not acknowledge that *Marbury* provided distinctive precedential support for the judicial power to declare laws unconstitutional when deciding cases. Supreme Court Justices did not cite *Marbury* as a precedent for judicial review until *Mugler v. Kansas* in 1887.[95] Only three lower federal court opinions decided before *Mugler* cited *Marbury* as a precedent for judicial review. None recognized the *Marbury* precedent as particularly important. *Marbury* was twice included in string citations of cases supporting judicial power. Both strings included *Dartmouth College v. Woodward*.[96] One included *Calder v. Bull*,[97] a case decided before *Marbury*.[98] In 1808, Justice John Davis in *United States v. The William* cited *Marbury* in a footnote as merely "affirm[ing] . . . the general doctrine" of judicial review "exhibited in the cases cited in the text."[99] These cases were discussed at far greater length than *Marbury*, and all were decided before 1803.[100] *Marbury* provided even less support for judicial supremacy. The decision was not cited as a precedent for the judicial power to bind all government officials until *Cooper v. Aaron* in 1957.[101] This citation pattern belies claims that *Marbury* played an important role establishing the precedential foundations of judicial

91. *See U.S. v. Ferreira*, 54 U.S. 40, 53 (1851). There was no official reporter at the time the case of *United States v. Yale Todd* was decided on February 17, 1794, and the case was not printed. *Id.* at 53.

92. 3 U.S. 378 (1798).

93. *See VanHorne's Lessee v. Dorrance*, 2 U.S. 304 (1795); *Hayburn's Case*, 2 U.S. 409 (1792).

94. *See Kamper v. Hawkins*, 3 Va. 20 (1793); *Bowman v. Middleton*, 1 Bay 252 (S.C. 1792).

95. 123 U.S. 623 (1887). *See* Marbury v. Madison*: Documents and Commentary*, *supra* n. 15, at 383-402 (listing all cases in which *Marbury* was cited by a Supreme Court Justice); Clinton, *supra* n. 9, at 120.

96. 17 U.S. 518 (1819).

97. 3 U.S. 386.

98. *See New Orleans Waterworks Co. v. St. Tammany Waterworks Co.*, 14 F. 194, 202 n. f (C.C. E.D. La. 1882) (citing *Marbury*, *Dartmouth College*, and *Calder*); *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 827 (C.C. D. N.J. 1830) (citing *Marbury* and *Dartmouth College*). Two other federal cases might be interpreted as including *Marbury* in a string citation of precedents that supported judicial review. *See In re Bogart*, 3 F. Cas. 796, 800 (C.C. D. Cal. 1873); *Magill v. Brown*, 16 F. Cas. 408, 419 (E.D. Pa. 1833).

99. 28 F. Cas. 614, 617 n. 1 (D.C. D. Mass. 1808).

100. The text of *The William* included lengthy analysis of *Hayburn's Case*, *VanHorne's Lessee v. Dorrance*, *Calder v. Bull*, *Hylton v. United States*, and *United States v. Callender*. *The William*, 28 F. Cas. at 616-17. *Cooper v. Telfair* was also discussed in the footnote, at much greater length than *Marbury*. *Id.* at 617 n. 1.

101. *See* 358 U.S. at 18.

power. The better claim is that important late nineteenth and twentieth century cases cited *Marbury* when seeking to establish strong precedential foundations for modern judicial practice. *Mugler* and *Cooper* are the cases that provide precedential foundations for contemporary judicial decisionmaking, not *Marbury v. Madison.*

Many scholars question whether *Marbury* provides precedential support for the authority contemporary courts assert when exercising judicial review. Robert Lowry Clinton and Matthew Franck maintain that Chief Justice Marshall interpreted the judicial power as extending only to cases concerning the structure and operation of the federal judiciary.[102] Others maintain that early American Justices believed they were authorized to declare unconstitutional only those government practices no reasonable person would think constitutional.[103] Another school of thought emphasizes that *Marbury* is a precedent for judicial review, not judicial supremacy.[104] Alternative readings exist, and they may better describe how Marshall and other early federal Justices interpreted the judicial power to declare laws unconstitutional.[105] Still, nothing in the *Marbury* opinion makes clear that the judicial power to declare laws unconstitutional is the power to resolve constitutional issues as the Justices think best, the power to resolve virtually all questions of constitutional right and power, and the power to bind elected officials who are not parties to the case before the Court. These aspects of judicial power would not have clear precedential foundations until after the Civil War.

The *Marbury* precedent may be even weaker than contemporary revisionists suggest. Chief Justice Marshall, when Justice Chase was being impeached, privately floated the suggestion that Congress should be authorized to reverse judicial rulings. "I think the modern doctrine of impeachment shou[l]d yield to an appellate jurisdiction in the legislature," he wrote, permitting "[a] reversal of those legal opinions deem[e]d unsound . . . ."[106] Marshall did not specify how such "yielding" might take place. The quoted passage might be interpreted as indicating that he would sustain federal statutes that either reversed or authorized Congress to reverse Supreme Court decisions. If so, then *Marbury* does not provide precedential support for giving the Supreme Court the last word on constitutional questions. The decision merely authorizes the Supreme Court to

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102. Clinton, *supra* n. 9, at 18 ("the most that may be claimed for judicial review in *Marbury* is that the decision entitles the Court to disregard legislation in resolving particular controversies *only where such legislation bears directly upon the performance of judicial functions*"); Matthew J. Franck, *Against the Imperial Judiciary: The Supreme Court vs. the Sovereignty of the People* (U. Press Kan. 1996).

103. Snowiss, *supra* n. 9; Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* 104-06 (Basic Books 1986).

104. Professor Levinson has sympathy for all three restrictive readings of *Marbury*. *See* Levinson, *French Revolution*, *supra* n. 7, at pt. 3; Levinson, *supra* n. 49.

105. William Michael Treanor, *Judicial Review before* Marbury*: Policing Boundaries*, (unpublished manuscript Feb. 11, 2002) (copy on file with author); Mark A. Graber, *The Law and Politics of Judicial Review*, in *Separation of Powers: Documents and Commentary* 54 (Katy J. Harriger ed., CQ Press 2003).

106. *To Samuel Chase*, in *The Papers of John Marshall* vol. VI, at 347 (Charles F. Hobson et al. eds., U. N.C. Press 1990).

declare laws unconstitutional when deciding cases, leaving the national legislature free to determine whether such judgments are correct. Marshall was clearly willing to acknowledge congressional power to reverse judicial *doctrines* on constitutional matters. His reference to "appellate jurisdiction" suggests he might also have been willing to acknowledge congressional power to reverse judicial *decisions* on constitutional matters. Congress, in this view, could overturn both the judicial holding that the original jurisdiction of the Supreme Court could not be expanded and the specific decision that William Marbury was not entitled to a writ of mandamus.

*Marbury* is susceptible to a still weaker interpretation of constitutional authority, one that entitles the Justices to declare laws unconstitutional only with explicit or implicit legislative permission. Federal statutory law in 1803 authorized judicial review by federal justices. The Judiciary Act of 1789 provides that state court decisions rejecting claims of federal right, declaring federal laws unconstitutional, or declaring state laws constitutional "may be re-examined and *reversed or affirmed* in the Supreme Court of the United States . . . ."[107] *Marbury* did not arise under this provision of the Judiciary Act, but that clause might be interpreted as expressing a broader statutory authorization for federal justices to declare laws unconstitutional in any case over which they had jurisdiction. No way exists for determining whether the Supreme Court would have asserted the power to declare laws unconstitutional in *Marbury* had the Congress that repealed the Judiciary Act of 1801 also repealed the provision in the Judiciary Act of 1789 authorizing judicial review. If Marshall was willing to interpret *Marbury* as consistent with a legislative power to override judicial decisions, perhaps he would have interpreted *Marbury* as consistent with a law forbidding the Supreme Court from declaring federal (or state) laws unconstitutional when deciding cases. His opinion does not expressly rule out this possibility. When the Supreme Court in *United States v. Klein* held that Congress could not dictate results to the Justices on statutory or constitutional issues,[108] the Justices did not cite *Marbury v. Madison* as supporting their holding.

*Marbury*, in short, provides unambiguous precedential support for only the most limited judicial authority to declare laws unconstitutional. After *Marbury*, the scope of congressional power over judicial review remained unclear. Stare decisis after 1803 did not compel courts to declare unconstitutional federal statutes overriding judicial decisions or forbidding Justices from declaring laws unconstitutional. The extent of the judicial power to declare laws unconstitutional was similarly not clarified in 1803. Chief Justice Marshall's opinion has been plausibly interpreted as asserting that the Justices may declare unconstitutional only laws regulating the judiciary or only laws no reasonable person thinks constitutional.[109] *Marbury* provided little precedential support for claims that the Constitution requires Justices to resolve every legal and factual issue relevant to

107. 1 Stat. at 85-86.
108. 80 U.S. at 146-48.
109. *See supra* nn. 69, 103 and accompanying text.

the constitutional dispute before the Court. With a few exceptions decided during the 1990s, the cases that Liebman and Ryan maintain demonstrate the constitutionally mandated quality of judicial review do not cite *Marbury v. Madison*.[110]

*Marbury* provided precedential foundations for only one element of judicial review, the judicial power to declare laws unconstitutional when deciding cases. Chief Justice Marshall's opinion said nothing about the legislative obligation to create a Supreme Court, staff that Court, authorize that Court to meet with reasonable frequency, provide that Court with the jurisdiction necessary to resolve constitutional debates, guarantee the independence of the Justices on that Court, and ensure that potential litigants had the resources necessary to bring their constitutional claims before that Court. One might interpret the assertion, "it is emphatically the province and duty of the judicial department to say what the law is,"[111] as implying that all elements of judicial review have the same constitutional foundations as judicial authority. The next sentence, "[t]hose who apply the rule to particular cases, must of necessity expound and interpret the rule,"[112] however, suggests that *Marbury*'s holding is confined to judicial obligations when deciding cases. The elements of judicial review associated with the process by which cases come before the Supreme Court may have entirely different foundations. Contemporaneous Supreme Court decisions suggest this more narrow understanding of *Marbury* is correct. Jay, Ellsworth, and Marshall Court precedents support claims that the jurisdictional element of judicial review lack the constitutional foundations of the authority element of judicial review. During the first two decades of constitutional life, these tribunals held that Congress has the constitutional power to determine and withhold the Supreme Court's jurisdiction over cases raising claims of constitutional wrong.

*Marbury* was part of a series of decisions holding that the Constitution does not vest the Supreme Court with the power to adjudicate most cases raising federal constitutional issues. The crucial passage of Article III, Section 2 states,

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110. These cases are *Hayburn's Case*, 2 U.S. 409; *Gordon v. United States*, 69 U.S. 561 (1864) (Justice Taney's opinion was published later in 117 U.S. 697 (1864)); *Murdock v. City of Memphis*, 87 U.S. 590 (1874); *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Cohens*, 19 U.S. 264 (*Cohens* does cite *Marbury*, but only to criticize the portion of the opinion suggesting that Congress may not subtract from the original jurisdiction of the Supreme Court, *id.* at 300); *Ableman v. Booth*, 62 U.S. 506 (1858); *Klein*, 80 U.S. 128; *The Mayor v. Cooper*, 73 U.S. 247 (1867);*Crowell v. Benson*, 285 U.S. 22 (1932); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936); *Yakus v. United States*, 321 U.S. 414 (1944); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In addition, Liebman and Ryan cite at least twenty "Mixed Question" cases decided in the twentieth century, none of which cite *Marbury*. Liebman and Ryan do discuss *Marbury* as providing precedential support for their claim that the Supreme Court must resolve all relevant issues relying on all relevant law whenever the Justices have jurisdiction to resolve a case. Liebman & Ryan, *supra* n. 68, at 811-15; *Cohens*, 19 U.S. at 299-302.

The cases that cite *Marbury* are *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995), and *City of Boerne v. Flores*, 521 U.S. 507, 516, 529, 535-36 (1997); *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J., concurring) (but note that the bulk of Liebman and Ryan's analysis is devoted to the majority opinion, which does not cite *Marbury*).

111. *Marbury*, 5 U.S. at 177.

112. *Id.*

"[i]n all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Before *Marbury*, the Justices ruled that the Supreme Court could not resolve any appeal unless Congress by statute had provided for jurisdiction. Chief Justice Ellsworth in 1796 declared, "[i]f Congress has provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction . . . ."[113] Ten years later, in *Durousseau v. United States*, the Marshall Court made clear that the legislative power to make exceptions to the appellate jurisdiction of the Supreme Court included the power to decline to vest the Court with any jurisdiction over an issue.[114] The Supreme Court, Chief Justice Marshall held, could exercise appellate jurisdiction only in those cases where Congress chose to vest the Justices with jurisdiction. If Congress refrained from vesting the courts with federal question jurisdiction, then the Supreme Court had no power to resolve the vast majority of cases raising questions of constitutional wrong. *Marbury* supports these holdings by ruling out the other plausible interpretation of the Exceptions Clause in Article III, Section 2. *Marbury* held that the legislative power to make exceptions to the appellate jurisdiction of the Supreme Court is not the power to give the Supreme Court original jurisdiction when the Constitution initially provides for appellate jurisdiction. If this is so, then the power to make exceptions to appellate jurisdiction must be the power to withhold the appellate jurisdiction set out in Article III.

*Marbury* also weakened judicial power by establishing a strong precedent against any freestanding judicial power to issue writs of mandamus. Professor James Pfander provides much historical evidence that lawyers during the eighteenth century thought high courts had an inherent power to issue certain writs.[115] The constitutional basis for jurisdiction in *Marbury*, he suggests, was Article III, Section 1, which establishes the Supreme Court as the highest tribunal in the land, not Article III, Section 2, which details the original and appellate jurisdiction of the Supreme Court.[116] Marshall in *Marbury* rejected this freestanding judicial power. His opinion provides the precedential foundations for the modern view that Justices may issue writs of mandamus and otherwise exercise judicial power only when their jurisdiction is derived from Article III, Section 2.[117] Antebellum Supreme Court cases, citing *Marbury*, made clear that federal courts could issue various writs only when authorized to do so by Congress.[118] These decisions limited the judicial power to declare laws

113. *Wiscart v. D'Auchy*, 3 U.S. 321, 327 (1796).

114. 10 U.S. 307, 314-15 (1810); *see U.S. v. Goodwin*, 11 U.S. 108, 110 (1812) (stating Supreme Court has no appellate jurisdiction in the absence of legislation). Justice Story insisted that the Constitution required that Congress vest at least one federal court with the power to decide federal questions, but he nevertheless believed that courts could not legally take this jurisdiction in the absence of a statute. *Martin*, 14 U.S. at 334-35, 341-42; *see White v. Fenner*, 29 F. Cas. 1015 (C.C. D. R.I. 1818).

115. Pfander, *supra* n. 26, at 1535-72.

116. *Id.* at 1547-49, 1568, 1602.

117. *Id.* at 1561.

118. *See Kendall v. U.S.*, 37 U.S. 524 (1838). *See* Pfander, *supra* n. 26, at 1595-96.

unconstitutional by foreclosing avenues by which Justices might have been able to identify and remedy constitutional wrongs without statutory permission from Congress.

The rulings on the jurisdictional element of judicial review were part of the Marshall Court's effort to conduct an advance and retreat maneuver on the same field of battle. The Justices did not, as has been suggested,[119] charge in one direction while their political opponents looked elsewhere. The crucial judicial rulings all concerned judicial power. Marshall Court decisions provided precedential support for one element of judicial review while rejecting another element of that practice. *Marbury* and other cases held that Justices have the power to declare laws unconstitutional when resolving cases. Other cases and *Marbury* held that Congress largely determines which cases federal courts will resolve. Even discounting the sacrifice of judicial power Marshall might have countenanced to forestall the Chase impeachment, *Marbury* clearly indicates that Justices cannot by themselves supply important foundations for review. Judicial review, Marshall Court precedent decrees, is established only when elected officials provide courts with the jurisdiction necessary to resolve cases raising claims of constitutional wrong.

### *B. Statutory and Constitutional Foundations*[120]

#### 1. *Marbury*

*Marbury* established the legal foundations for judicial review only if legal materials in 1803 did not already clearly authorize the Justices to declare laws unconstitutional when deciding cases. Judicial elaboration is necessary to settle constitutional meanings when other constitutional sources conflict or are ambiguous. Some constitutional provisions do not require judicial elaboration. That teenagers are not eligible for the presidency is well established, even though no judicial precedent presently exists on this point. Had Article III declared, "the Supreme Court shall have the power to determine whether federal and state laws are constitutional," the judicial power to declare laws unconstitutional would have been established by the persons who framed and ratified the Constitution. *Marbury* would have merely confirmed the legal foundations for judicial review. Judicial decisions that conflict too sharply with other legal authorities may not establish any proposition of law. Social conservatives do not believe that *Roe v.*

119. McCloskey, *supra* n. 13.

120. *Marbury* provided legal foundations for judicial review only to the extent that *Marbury* provided precedential foundations for that power. The problems noted above with claims that *Marbury* provided a strong precedent for judicial review cast doubt on the extent to which *Marbury* established the legal foundations for judicial review. Many precedents for judicial review existed before 1803. Justice Chase aside, no other federal judge thought a more explicit precedent necessary to establish the judicial power to declare laws unconstitutional. No antebellum Justice cited *Marbury* as playing a greater role establishing judicial review or any element of judicial review than other cases in which Justices declared laws unconstitutional.

*Wade*[121] or *Planned Parenthood v. Casey*[122] established that the Constitution forbids government to ban abortion. Social liberals do not believe that *Bowers v. Hardwick*[123] established that the Constitution permits government to ban homosexual sodomy. Had Article III declared, "the Supreme Court shall not have the power to determine whether federal and state laws are constitutional," *Marbury* may have been regarded as judicial usurpation, not the decision that established an element of judicial review.

Little evidence supports claims that *Marbury* established or even significantly augmented the legal foundations for judicial power. American political elites during the last years of the eighteenth century agreed that the constitutional text, history, and practice authorized some form of judicial review.[124] Federalists and anti-Federalists during the ratification debates agreed that federal courts were authorized to declare laws unconstitutional. Publius and Brutus disputed the scope and merits of judicial review, not the constitutionality of that practice.[125] No one protested when the Judiciary Act of 1789 quite clearly authorized the Supreme Court to review state decisions determining the constitutionality of state and federal statutes.[126] When members of the first six Congresses spoke of judicial review, which was not often, they indicated that the practice had solid legal foundations.[127] American constitutionalists before *Marbury* did not agree on how judicial power should be exercised, but *Marbury* did not clearly settle those disputes.

*Marbury* suggests that *Marbury* added little to the law of judicial review. "The question, whether an act, repugnant to the constitution, can become the law of the land," Chief Justice Marshall declared, "is . . ., happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and *well established*, to decide it."[128] Much of the argument that followed reiterated points that Alexander Hamilton made in *Federalist 78*[129] and that Justice Patterson made in *Vanhorne's Lessee v. Dorrance*.[130] *Marbury*, at best, merely stated explicitly legal and constitutional arguments for judicial review previously taken for granted. Unlike *Roe v. Wade* or *Brown v. Board of Education*,[131] the decision simply highlighted a proposition of constitutional law clearly implicit in previous legislative and judicial practice.

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121. 410 U.S. 113 (1973).
122. 505 U.S. 833 (1992).
123. 478 U.S. 186 (1986).
124. *See* Marbury v. Madison*: Documents and Commentary*, *supra* n. 15, at 235-59.
125. Alexander Hamilton, James Madison & John Jay, *The Federalist Papers* 464-72 (Clinton Rossiter ed., New Am. Library 1961); *Essays of Brutus*, in *The Anti-Federalist* 103, 165-85 (Herbert Storing ed., U. Chi. Press 1985.
126. 1 Stat. 73.
127. Marbury v. Madison*: Documents and Commentary, supra* n. 15, at 260-78.
128. *Marbury*, 5 U.S. at 176 (emphasis added).
129. Hamilton, Madison & Jay, *supra* n. 125, at 464-69.
130. 2 U.S. at 309-15. *See* Treanor, *supra* n. 105.
131. 347 U.S. 483 (1954).

Jeffersonians who after 1800 challenged judicial authority did not think *Marbury* established the judicial power to declare laws unconstitutional. Republicans who publicly attacked both judicial review and judicial supremacy during the debates over whether to repeal the Judiciary Act of 1801 did not in 1803 concede that judicial power was now legally established by judicial decree. Jefferson regarded virtually the entire decision as "obiter dictum."[132] His supporters in Congress impeached one Federalist Justice, almost impeached another, and might have moved to impeach Chief Justice Marshall for his conduct of the Burr trial had they not been distracted by a foreign policy crisis.[133] In 1825, the Jeffersonian Chief Justice of the Pennsylvania Supreme Court found the argument in *Marbury* to be "inconclusive."[134] Jeffersonians and Jacksonians would, after 1805, give more support to judicial power. No one claims they did so because they felt legally obligated to respect *Marbury*.

Contemporary scholars do not rely on doctrinal arguments or *Marbury* when justifying judicial review. The *Marbury* precedent plays little role in arguments about judicial review made by such originalists as Robert Bork, Raoul Berger, and Keith Whittington, by such institutionalists as Cass Sunstein, Alexander Bickel, and John Hart Ely, and by such aspirationalists as Laurence Tribe, Michael Perry, and Sotirios Barber. Members of leading schools of constitutional thought cite *Marbury* when making claims about judicial review. Nevertheless, they note only that *Marbury* made (or did not make) a valid constitutional argument, attaching no doctrinal significance to the particular details of Chief Justice Marshall's opinion. Ronald Dworkin comes closest to making a stare decisis argument for judicial review when he claims that "the most straightforward interpretation of American constitutional practice shows that our judges have final interpretive authority . . . ."[135] Still, Dworkin does not restrict these "constitutional practices" to legal precedents. He speaks of "the decisions judges actually make and the public largely accepts . . . ."[136] Even in Dworkin's judge-driven constitutional universe, decisions made outside the courtroom provide as vital legal and precedential foundations for judicial review as decisions made by Justices.

The Marshall Court did as much to weaken as strengthen the legal foundations of judicial review. *Marbury* largely repeated well-known and accepted legal arguments when asserting that the Justices when resolving cases could declare laws unconstitutional. Federalist Justices were on more contested constitutional turf when they claimed that Congress need not vest the Supreme Court or the federal judiciary as a whole with jurisdiction over every case raising a federal question. Substantial disputes presently exist over whether federal question jurisdiction in 1787 was thought to be constitutionally mandated. The

132. Warren, *supra* n. 62 (quoting Thomas Jefferson).
133. Graber, *supra* n. 59, at 252.
134. *Eakin v. Raub*, 12 Serg. & Rawle 330, 346 (1825).
135. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 35 (Harv. U. Press 1996).
136. *Id.*

traditional view maintains that federal question jurisdiction exists entirely at the sufferance of the national legislature, except for a few matters of original jurisdiction.[137] Professors Akhil Amar, Robert Clinton, and others challenge this view, claiming that the persons responsible for the Constitution believed that some federal court had to be vested with the final say over all cases raising federal questions.[138] Significantly, claims that Congress determines the appellate jurisdiction of the Supreme Court are considered "traditional" only because that view was taken by the Ellsworth and Marshall Courts. Precedent in this area of constitutional law has made a legal difference. If Amar and others are right about the views of at least some prominent framers, then *Wiscart* and *Durousseau* did far more to change or settle the constitutional status of the jurisdictional element of judicial review than *Marbury* did to change or settle the constitutional status of the authority element of that practice.

*Marbury* settled several previously contested constitutional questions about judicial power. The decision established that Article III does not grant the Supreme Court any freestanding power to issue writs of mandamus or grant Congress the option to vest that power in the Supreme Court. The constitutional law regarding federal judicial power to issue writs of mandamus dates from 1803, not 1787 or 1789. "*Marbury*," Professor Pfander points out, "*create[d]* a constitutional world in which one tends to regard the Court's power to issue writs of mandamus, prohibition, and habeas corpus as associated with and dependent upon its exercise of appellate jurisdiction to revise the judgments of inferior tribunals."[139] *Marbury* also established that Article III does not permit Congress to add to the original jurisdiction of the Supreme Court. Congress during the 1790s had passed laws expanding the original jurisdiction of the Supreme Court. The Justices before *Marbury* had accepted that jurisdiction.[140] *Marbury* decisively rejected that practice. Nineteenth century Justices repeatedly cited *Marbury* as settling that Congress cannot add to the original jurisdiction of the Supreme Court.[141] *Marbury* continues to provide the main legal support for that claim.[142]

Both settlements limit judicial power to declare laws unconstitutional. *Marbury*'s holding on mandamus prevents the Supreme Court from exercising a

137. *See* Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953); Liebman & Ryan, *supra* n. 68, at 696.

138. Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. Rev. 205 (1985); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. Pa. L. Rev. 741 (1984).

139. Pfander, *supra* n. 26, at 1605 (emphasis added).

140. Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in* Marbury v. Madison, 1986 Wis. L. Rev. 301. *See* Pfander, *supra* n. 26, at 1573-74 (citing three unreported cases, *United States v. Hopkins*, *Ex parte Chandler*, and *Hayburn's Cases*).

141. *See e.g. Ex parte Bollman*, 8 U.S. 75, 103-06 (1807) (Johnson, J., dissenting); *Ex parte Watkins*, 32 U.S. 568, 572-73 (1833); *Harrison v. Nixon*, 34 U.S. 483, 530 (1835) (Baldwin, J., dissenting); *In re Metzger*, 46 U.S. 176, 191 (1847); *U.S. v. Chi.*, 48 U.S. 185, 197 (1849) (Catron, J., dissenting).

142. *See S.C. v. Regan*, 465 U.S. 367, 397 (1984) (O'Connor, Powell & Rehnquist, JJ., concurring in the judgment); *Orr v. Orr*, 440 U.S. 268, 299 (1979) (Rehnquist, J., & Burger, C.J., dissenting); *Ex parte U.S.*, 287 U.S. 241 (1932).

freestanding power to issue various writs that might remedy constitutional wrongs. After *Marbury*, no federal court was authorized when exercising original jurisdiction to issue a writ of mandamus without congressional permission.[143] *Marbury*'s holding on original jurisdiction limits judicial power whenever the Supreme Court cannot engage in de novo review of a state or lower federal court decision. The quality of constitutional decisions may be impaired, for example, when the Supreme Court must rely on a record compiled in a state court whose justices object to the dominant trend of federal jurisprudence. Moreover, by ruling out the other possible meaning of the Exceptions Clause, *Marbury*'s holding that Congress cannot add to the original jurisdiction of the Supreme Court supports claims that the Exceptions Clause entitles Congress to withhold appellate jurisdiction, leaving important questions of federal constitutional law to state courts. Contrary to the popular notion that the Marshall Court established judicial review by judicial decree, that tribunal is better credited with the responsibility for establishing the legal foundations for legislative control over vital elements of judicial power.

2. The Judiciary Act of 1789

The Judiciary Act of 1789 did far more than *Marbury v. Madison* to establish the legal foundations of the judicial power to declare laws unconstitutional. That measure incorporated every element of judicial review. Congress created the federal judiciary, provided for the appointment of federal justices, required federal courts to hold regular sessions for hearing and deciding cases, vested the Supreme Court with appellate jurisdiction over state court decisions that rejected claims of federal right, power, or authority, authorized the Supreme Court to declare federal and state laws unconstitutional when deciding those appeals, provided the court with personnel and processes that facilitated more intelligent judicial decisionmaking, provided the court with personnel and processes that facilitated the implementation of judicial decisions, created federal officers who could litigate constitutional issues before the Supreme Court, and authorized salaries for various judicial officers.[144] The legislative decision to vest state courts with original jurisdiction over most cases raising constitutional issues was intended to make litigation more convenient and less expensive. By eliminating a potential legal barrier to persons with claims of constitutional wrong, the Judiciary Act of 1789 promised to increase judicial ability to declare laws unconstitutional.[145]

The Judiciary Acts of 1789, 1801, and 1802 were the primary sources of law on judicial review immediately before and after *Marbury*. Elected officials determined the extent to which federal jurisdiction could be significantly expanded or contracted,[146] whether federal judicial offices could be abolished, and

143. *See Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524 (1838).

144. 1 Stat. at 73-93.

145. Amar, *supra* n. 14, at 455-56; Pfander, *supra* n. 26, at 1519-20.

146. *See* Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L.J. 1421, 1503-04; Liebman & Ryan, *supra* n. 68, at 778-82.

whether the Supreme Court could be legally prevented from meeting for a full year. The Marshall Court studiously refrained from commenting on these constitutional issues that the Seventh Congress debated at length when considering the structure of federal courts.[147] To the extent any constitutional law was made during the first decade of the nineteenth century on the meaning of "good behavior" and judicial independence, that law was made by Congress during the Chase impeachment,[148] not by any decision handed down by a federal court.

The Judiciary Act of 1789 and other actions taken by the first generation of American elected officials laid constitutional as well as statutory foundations for judicial review. The First Congress has special constitutional standing in American jurisprudence. Members of the House and Senate in 1789 are thought to have uniquely valuable insights into constitutional meanings because the Constitution had just been ratified and many representatives had participated in the framing or state ratifying conventions.[149] Federal courts were a particular subject of expertise. William Ryan observes:

> Because so many Framers were elected to the first Congress, it is widely accepted that that body's enactments provide "'contemporaneous and weighty evidence' of the Constitution's meaning. . . ." This interpretive principle should apply with even greater force to Article III matters, given that Oliver Ellsworth was both the primary architect of the Judiciary and Process Acts of 1789 and a member of the Constitutional Convention's Committee of Detail, which was responsible for adding the phrase "judicial Power" to the Constitution.[150]

If the First Congress mandated that the Supreme Court could declare laws unconstitutional when resolving cases, then that decision supports claims that the Constitution vests courts with that power. To the extent the First Congress did (or did not) vest federal courts with full federal question jurisdiction, that decision is of similar constitutional significance.[151]

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147. These debates are excerpted in Marbury v. Madison: *Documents and Commentary*, *supra* n. 15, at 310-38.

148. Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 Stud. Am. Pol. Dev. 55 (1995).

149. *See Marsh v. Chambers*, 463 U.S. 783, 790 (1983); *Myers v. U.S.*, 272 U.S. 52, 136 (1926); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *Stuart v. Laird*, 5 U.S. 299, 309 (1803); Jay S. Bybee, *Who Executes the Executioner? Impeachment, Indictment, and Other Alternatives to Assassination*, 2 Nexus J. of Op. 53, 61 (1997) ("the First Congress is of the same generation—and included many of the same people—who drafted the Constitution. We should, the argument runs, defer to their understanding of the document they drafted"); James C. Ho, *Misunderstood Precedent: Andrew Jackson and the Real Case against Censure*, 24 Harv. J.L. & Pub. Policy 283, 284 n. 3 (2000); *but see* Bybee, *supra*, at 62 (noting that "[a]s the disgraceful history of the Sedition Act of 1798 demonstrates, the first congresses were not above disingenuous constitutional arguments to justify political expediency").

150. William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. Rev. 761, 770 (1997) (citations omitted).

151. *But see* Holt, *supra* n. 146, at 1485 (noting that the Judiciary Act "was much closer to the wishes of those opponents [of the Constitution] than it was to the wishes of Ellsworth" and other framers), 1510.

Early legislative decisions provided vital constitutional precedents for settling questions of constitutional law and judicial review.[152] The framers recognized that ratification did not settle every possible constitutional question. "All new laws," Madison wrote in *Federalist 37*, "are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[153] Many "discussions and adjudications" took place outside the courtroom. Four years before the Supreme Court handed down *McCulloch v. Maryland*, Madison proclaimed the constitutionality of the national bank settled by legislative and popular action.[154] Americans by 1840 thought the unconstitutionality of the Alien and Sedition Acts settled by legislative and popular action,[155] even though every federal court that considered the matter declared the acts constitutional.[156] Judicial power was presumably subject to the same processes of constitutional settlement outside of courts. The legislative decisions to pass and later maintain Section 25 of the Judiciary Act of 1789 provides strong precedential support for the judicial power to declare laws unconstitutional, far stronger than *Marbury v. Madison.* Antebellum federal justices ignored *Marbury*'s holding on judicial authority, while at the same time Section 25 was being repeatedly reaffirmed by Congress.[157]

History highlights the numerous ways in which elected officials were far more responsible than the Marshall Court for establishing the legal foundations for judicial review. Representatives from state legislatures drafted Article III. Elected delegates in the states ratified Article III. Elected members of Congress elaborated Article III when they passed the Judiciary Act of 1789. The First Congress established federal courts, vested the Supreme Court with jurisdiction to resolve many (not all) cases raising constitutional issues, and authorized that tribunal to declare federal and state laws unconstitutional when adjudicating those cases. These legislative decisions expressed the national consensus during the 1790s that judicial review rested on sound legal foundations. Justices before *Marbury* exercised a power to declare laws unconstitutional because that power was legally established by the persons responsible for the Constitution and their legislative successors.

The Marshall Court accepted the legislative foundations of the judicial power to declare laws unconstitutional. The Justices did not interfere when Congress prevented the Supreme Court from meeting and eliminated federal

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152. For a longer defense of some claims in this paragraph, *see* Mark A. Graber, *Antebellum Perspectives on Free Speech*, 10 Wm. & Mary Bill Rights J. 779, 804-10 (2002).

153. Hamilton, Madison & Jay, *supra* n. 125, at 229.

154. James Madison, *Veto Message*, in *A Compilation of the Messages and Papers of the Presidents, 1789-1897* vol. I, at 555 (James D. Richardson ed., GPO 1896).

155. Michael Kent Curtis, *Free Speech, "The People's Darling Privilege": Struggles for Freedom of Expression in American History* 136-54 (Duke U. Press 2000).

156. *See e.g. Case of Fries*, 9 F. Cas. 826, 836-39 (C.C. D. Pa. 1799); *Callender*, 25 F. Cas. 239. *See* David Yassky, *Eras of the First Amendment*, 91 Colum. L. Rev. 1699, 1711 (1991) (noting that "every Justice on the all-Federalist Court expressed approval of the Act in opinions delivered on circuit").

157. *See* Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1 (1913).

judicial positions. Several judicial rulings specifically held that Congress could prevent the Supreme Court from declaring laws unconstitutional by withholding jurisdiction in all or most cases raising claims of constitutional wrong. The elected officials who largely determined the law of judicial review after 1787 could, thus, cite prominent judicial precedents as supporting claims that federal justices could exercise the power to declare laws unconstitutional only when Congress, exercising its constitutional discretion, vested federal courts with the power to adjudicate cases raising federal constitutional issues.

## IV. POLITICAL FOUNDATIONS

Judicial opinions establish political foundations for judicial review when they induce crucial political elites to support the elements of that practice. What matters from the political perspective is whether political actors support the law as interpreted by the Supreme Court, not whether Supreme Court decisions are legally correct or even whether Supreme Court Justices have a legal right to declare laws unconstitutional when deciding cases. Judicial review has secure political foundations when powerful politicians believe they have a legal obligation to obey judicial decisions, even should their beliefs rest on mistaken legal premises. Judicial review also has secure political foundations when powerful politicians believe most exercises of judicial power serve their interests. Elected officials often have good pragmatic reasons for promoting judicial power. Politicians frequently hope the judiciary will take responsibility for making certain controversial policy decisions or support the policies that Justices are making. A public largely unaware of the content of most judicial decisions may frown on politicians who attack judicial review.[158]

### *A. Preserving Judicial Review*

*Marbury* neither established nor demonstrated the political support federal justices must have to exercise any independent power to declare laws unconstitutional. The decision, James O'Fallon recognizes, "was born out of political defeat."[159] Federalists inside and outside of the judiciary in 1803 lacked the power necessary to obtain Marbury's judicial commission or, more important, to maintain the midnight justices in their offices. The Marshall Court asserted the power to declare unconstitutional a minor provision in the Judiciary Act of 1789 only because the Justices knew they lacked the power to enforce an order requiring the Jefferson administration to give William Marbury his commission. To do otherwise would be "flirting with impeachment."[160] John Marshall thought unconstitutional the legislation repealing the Judiciary Act of 1801, but he lacked the jurisdiction or will to issue a judicial opinion reinstating the midnight

158. *See* Graber, *supra* n. 12, at 46-50; Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 I-Con, Intl. J. Const. L. 3 (2003).

159. James M. O'Fallon, Marbury, 44 Stan. L. Rev. 219, 259 (1992); Pfander, *supra* n. 26, at 1582.

160. Pfander, *supra* n. 26, at 1582; *see id.* at 1578-82.

justices.[161] His Court also failed to strike down several Jeffersonian measures favoring French interests that most pro-British Federalists outside the Court thought illegal.[162] On no disputed question of constitutional law did the Marshall Court during the first decade of the nineteenth century take any step that exhibited the practical power to declare unconstitutional any measure a united Jeffersonian regime thought constitutional.[163] Lacking political support, the Justices exercised no politically consequential judicial power.

The Supreme Court in 1803 had, at most, the following powers. The Justices had the power to suggest that the president had acted illegally, as long as the Justices made no attempt to remedy that legal wrong. The Justices had the power to declare unconstitutional federal statutes when few persons cared about the intrinsic merits of the statute,[164] when those persons in power who cared thought the statute unconstitutional,[165] and when the decision striking down the statute prevented the Justices from interfering with more vital administration policies.[166] Finally, the Justices had the power to issue opinions asserting their right to declare any law unconstitutional when deciding cases, as long as that right was not exercised in a politically consequential manner.[167]

*Marbury* was an effort to maintain the political and legal foundations for judicial review established by the Judiciary Act of 1789.[168] The decision was handed down when important elements of judicial power were under sustained legislative attack. Congress by repealing the Judiciary Act of 1801 had sharply reduced federal question jurisdiction and raised questions about the meaning of life tenure. The Judiciary Act of 1802 limited the capacity of the Supreme Court to resolve constitutional issues in a timely fashion by restricting that tribunal to one annual session and preventing the Justices from declaring any law unconstitutional in 1802. Federalist judicial appointees who could not be removed by repealing the Judiciary Act were threatened with impeachment. The challenge for the Supreme Court in this political environment was to maintain as much of the legal and political foundations for judicial review that had been established from 1787 to 1801, not to further build up that practice. James Pfander properly recognizes that "Marshall set for himself the task of... preserv[ing] as much authority as possible for his branch."[169] "One has the impression," he observes of

161. *See* Ruth Wedgwood, *Cousin Humphrey*, 14 Constitutional Commentary 247, 268 (1997) (reprinting John Marshall to Henry Clay, December 22, 1823).

162. *See U.S. v. Schooner Peggy*, 5 U.S. 103 (1801); *Talbot v. Seeman*, 5 U.S. 1 (1801); *Little v. Barreme*, 6 U.S. 170 (1804); Graber, *supra* n. 59, at 250.

163. *See* Graber, *supra* n. 59, at 250-52.

164. Dean Alfange, Jr., Marbury v. Madison *and Original Understandings of Judicial Review: In Defense of Traditional Wisdom*, 1993 Sup. Ct. Rev. 329.

165. Pfander, *supra* n. 26, at 1520-21, 1583-84.

166. McCloskey, *supra* n. 13.

167. *See* Mark A. Graber, *The Problematic Establishment of Judicial Review*, in *The Supreme Court in American Politics: New Institutionalist Interpretations* 28, 36 (Howard Gillman & Cornell Clayton eds., U. Kan. Press 1999) (noting that "[t]he Marshall Court... vigorously assert[ed] judicial power in theory while declining to exercise it in practice").

168. *See id.* at 34-37.

169. Pfander, *supra* n. 26, at 1521.

Marshall's opinion in *Marbury*, "of a hungry man scrambling to store up as much food as possible for the long Jeffersonian winter that he saw ahead."[170]

The Marshall Court sought to preserve the judicial authority to declare laws unconstitutional when deciding cases partly by avoiding making anti-Jeffersonian rulings and partly by permitting Congress to determine what cases the Justices would resolve. Jurisdiction was partly sacrificed to maintain authority.[171] By promising that the Supreme Court would not implement Federalist understandings of judicial power without active legislative support, Marshall "hoped the *Marbury* opinion would defuse the political crisis and avoid any further attack on the judiciary's powers."[172] Nothing in *Marbury* or in other Marshall Court decisions forbade a revived Federalist coalition from passing the legislation necessary to restore the federal judiciary in full Federalist splendor.[173] *Marbury* and other cases simply recognize that a Federalist Supreme Court cannot realize Federalist understandings of judicial power in the absence of significant support from Federalist elected officials.

### *B. New Foundations*

*Marbury* also preserved judicial review by beginning the process by which the political foundations of judicial review were subtly adjusted in ways that enabled that practice to survive in a partisan universe. Americans in 1803 believed in limited government and that elected officials had no power to pass unconstitutional laws. The problem was that these beliefs provided inadequate support for judicial power. The Jeffersonian majority was likely to think constitutional any major law the Federalist judiciary might be tempted to declare unconstitutional. Thus, the Federalist judiciary was vulnerable to Jeffersonian attack less because Jeffersonians had principled objections to the judicial power to void unconstitutional laws than because Jeffersonians believed that the Marshall Court was voiding laws that were not unconstitutional. Remarkably, the original political foundations of judicial review, established by opponents of political parties, did not contemplate this threat to judicial power.

Americans before *Marbury* advocated either anti-partisan or non-partisan conceptions of judicial review. Alexander Hamilton in *Federalist 78* articulated the anti-partisan conception of judicial review when he declared, "[the] independence of the judges is [necessary] to guard the Constitution and the rights of individuals from" "the cabals of the representative body" and "momentary inclination[s that] happen[s] to lay hold of a majority" which threatens "serious oppressions of the minor party in the community."[174] Judicial review, in this view,

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170. *Id.* at 1606.

171. Marshall in *Marbury* may have attempted to preserve the writ of mandamus as a tool to supervise governing officials. Marshall Court Justices sacrificed the use of that writ when exercising original jurisdiction in order to maintain the authority to use that writ when exercising appellate jurisdiction. *See id.* at 1585-88.

172. *Id.* at 1586.

173. *Id.* at 1521.

174. Hamilton, Madison, & Jay, *supra* n. 125, at 469-70.

is one of many constitutional practices designed to prevent partisan factions from dominating political life. Anti-partisan judicial review had political foundations because the president could be trusted to protect courts from legislative intrigue, the people could be trusted to protect courts from legislative cabals, and the people sober could be trusted to protect courts from their unconstitutional "momentary inclinations."[175] Elias Boudinot during the debates over the national bank articulated the non-partisan conception of judicial review when he "reflected that if, from inattention, want of precision, or any other defect, he should [be] wrong, that there was a power in the Government which could constitutionally prevent the operation[s] of such a wrong measure from [a]ffecting his constituents."[176] Judicial review, in this sense, corrects those constitutional mistakes elected officials occasionally make. Nonpartisan judicial review has political foundations because the people's representatives can be trusted to recognize their errors or defer to the Justices' superior constitutional wisdom.

Constitutional politics during the first decade of the nineteenth century demonstrated that anti-partisan judicial review lacked secure political foundations in a partisan universe. Contrary to *Federalist 78*, Jeffersonians did not think of themselves and were not thought of by most Americans as a "cabal." The election of 1800 was not the result of "momentary inclinations." Indeed, Republicans maintained they had an electoral mandate to save the Constitution from members of the deposed Federalist coalition ensconced in the federal judiciary. Resistance was likely to be futile. President Jefferson would not protect the Court from his supporters in Congress, the Jeffersonian majority in the electorate would not protect the Court from the Jeffersonian majority in the government, and that Jeffersonian majority would prove relatively enduring. The repeal of the Judiciary Act of 1801, the Judiciary Act of 1802, and impeachment proceedings against Federalist judicial appointees gave clear signals to the Supreme Court that anti-partisan judicial review during the first decade of the nineteenth century would destroy any remaining political foundations for judicial review.[177]

Anti-partisan judicial review would not gain the necessary political foundations in the future. The appointments process and judicial timidity explain why Justices rarely oppose a united political majority and never do so for any sustained period of time.[178] On the few occasions where courts have attempted or threatened anti-partisan judicial review, their decisions have often been ignored by elected officials. Crucial political actors have taken both legal and illegal steps to curb hostile judicial power. Presidents from Abraham Lincoln to Franklin Roosevelt have not stood idly by and let the federal judiciary gut their cherished programs. That prominent politicians may have supported anti-partisan review when in a political minority does not guarantee they will support that practice

175. *Id.* at 465-69.

176. 2 Annals of Cong. 1978 (1791).

177. Graber, *supra* n. 167, at 36.

178. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 Emory L.J. 563, 570 (2001).

when they gain power. Abraham Lincoln, whose first inaugural address is often considered the canonical attack on judicial supremacy,[179] was committed to judicial supremacy when he was a Whig legislator.[180]

Nonpartisan judicial review has secure political foundations, antebellam practice demonstrated, when judicial rulings are politically inconsequential. Legislatures do make constitutional mistakes on minor matters. The Ellsworth Court declared unconstitutional a portion of the Judiciary Act of 1789 that Congress forgot to repeal after the Eleventh Amendment was ratified.[181] The Taney Court with the full support of Congress declared unconstitutional a number of private federal laws that accidentally granted to one person land that the national legislature had previously granted to another person.[182] When the issue is relatively minor, elected officials were willing to defer to judicial judgments. While grumbling occurred when the Justices declared in *Hayburn's Case* that they would not evaluate claims to federal pensions, the matter was not deemed important enough to challenge judicial authority.[183]

Nevertheless, constitutional politics during the first decade of the nineteenth century teaches that courts cannot assure themselves the last word merely by trotting out their superior expertise or institutional position. Judicial power was successfully challenged when formerly non-partisan constitutional questions became partisan political questions. Elected officials were willing to have courts resolve questions of federal jurisdiction during the 1790s. They were not as obliging after the election of Jefferson. Jefferson could not have been persuaded that he mistakenly withheld Marbury's judicial commission. Jeffersonians in Congress believed the repeal of the Judiciary Act worth fighting for. Justices who attempted non-partisan judicial review in this partisan political climate were not likely to remain Justices for long. *Marbury* suggests a court limited to correcting non-partisan constitutional mistakes would have as much influence on the course

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179. *The Collected Works of Abraham Lincoln* vol. IV, *supra* n. 11, at 267-68.

180. *The Collected Works of Abraham Lincoln* vol. I, at 62-63, 112, 171, 247-48, 486 (Roy P. Basler ed., Rutgers U. Press 1953).

181. *Hollingsworth*, 3 U.S. 378.

182. *Willot v. Sandford*, 60 U.S. 79, 82 (1857) (1816 confirmation defeats 1836 confirmation because "where there are two confirmations for the same land, the elder must hold it"); *Chouteau v. Eckhart*, 43 U.S. 344 (1844) (claim confirmed in 1812 defeats claim confirmed in 1836); *DeLaurie v. Emison*, 56 U.S. 525, 538 (1854) ("[t]he confirmation of the claim by Congress, in 1836, had relation back to the origin of the title; but it could not impair rights which had accrued, when the land was unprotected by a reservation from sale; and when, in fact, the right of the claimant was barred"); *see Les Bois v. Bramwell*, 45 U.S. 449, 464 (1846); *Landes v. Brant*, 51 U.S. 348, 370 (1851) ("when Congress confirmed and completed an imperfect claim, and then confirmed another and different claim for the same land, the older confirmation defeated the younger one"); *Stoddard v. Chambers*, 43 U.S. 284, 317 (1844) ("the elder legal title must prevail in the action of ejectment"); *Marsh v. Brooks*, 49 U.S. 223, 233-34 (1850) ("where the same land has been twice granted, the elder patent may be set up in defence by a trespasser, when sued by a claimant under the younger grant"); *U.S. v. Covilland*, 66 U.S. 339, 341 (1862) ("a confirmation in the name of the original grantee, divesting the legal title of the United States, is binding on the Government and on the assignees"). These cases are discussed in detail in Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 Vand. L. Rev. 73 (2000).

183. Geyh & Van Tassel, *supra* n. 64, at 72-73; Maeva Marcus & Robert Teir, Hayburn's Case: *A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527, 539.

of American politics as a linguist limited to correcting only non-partisan grammatical mistakes in political speeches.

*Marbury* spouts anti-partisan rhetoric to justify correcting what seems a non-partisan mistake, but the opinion provides a glimpse of how partisan judicial review functions. Robert Dahl articulated one premise underlying the partisan conception of judicial review when he declared, "it would appear . . . somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court Justices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite."[184] Justices who do not endorse the fundamental policy commitments of the dominant national coalition have, more often than not, found discretion the better part of valor.[185] Judicial review, in this view, is a practice that helps at least some powerful political elites in government pursue important policy and electoral goals. These relationships with crucial actors, not judicial independence alone, provide the necessary political foundations for judicial power.

Partisan judicial review is both politically consequential and politically secure. When judicial decisions advance policies favored by most members of the ruling political coalition or even an important faction within the ruling political coalition, Justices do not suffer reprisals for at least as long as their political supporters remain empowered. Sometimes, as was the case during the 1950s, supportive elected officials who have the power necessary to prevent attacks on courts are not powerful enough to enforce judicial decrees.[186] At other times, as was the case during the 1960s, supportive elected officials are able to implement judicial decisions, pass various laws that strengthen the elements of judicial power, while blocking other measures aimed at weakening the federal judiciary.[187] The Civil Rights Act of 1964[188] both punished states for refusing to desegregate and provided resources to litigants seeking to implement *Brown*.

Courts that exercise partisan judicial review are not necessarily pawns in the hands of elected officials. On many issues, lawmaking majorities are sufficiently divided so that a range of decisions exist that will not subject the judiciary to political reprisal. The Rehnquist Court is politically free to choose whether to revisit *Roe v. Wade*. Pro-choice advocates in Congress presently have the power to kill any bill that punishes the Justices for keeping abortion legal. President Bush will not sign a law punishing the Court for overruling *Roe*. Politicians sometimes want courts to take responsibility for making policy, any policy, when taking any clear stand on a hotly contested issue is perceived as politically costly.

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184. Dahl, *supra* n. 178, at 578.

185. *See* Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policy-Maker*, 50 Emory L.J. 583 (2001).

186. *See* Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 42-169 (U. Chi. Press 1991).

187. Powe, *supra* n. 20; Howard Gillman, Presentation, *Judicial Politics as Political Entrenchment: Congressional Democrats and Judicial 'Activism' in the 1960s and 1970s* (Denver, Colo., Mar. 27-29, 2003) (copy on file with author of article) (paper presented at the 2003 Annual Meeting of the Western Political Science Association).

188. Public L. No. 88-352, 78 Stat. 241 (1964).

On issues as diverse as slavery, antitrust, and abortion, elected officials have made self-conscious efforts to foist political "hot potatoes" on to Justices.[189] Most means for punishing courts are too blunt. If a politician believes the general trend of judicial decisions is favorable, then the best strategy may be to live with some "wrong" decisions.[190] Thus, judicial review has sufficient political foundations when most judicial decisions declaring laws unconstitutional appeal to at least some members of the dominant national coalition. In polities such as the United States, where power is dispersed and fractured, Justices concerned with maintaining the political foundations of judicial review are likely to have a fair degree of judicial choice.

*Marbury* was an exercise of partisan judicial review. The dominant national coalition did not wish to give William Marbury his commission. The Supreme Court declared unconstitutional a federal law that might have required the Justices to grant that commission. During the debates over the Repeal Act, Federalists maintained that Section 13 was constitutional,[191] while at least one Jeffersonian insisted that Congress could not add to the original jurisdiction of the Supreme Court.[192] To the extent the original jurisdiction of the Supreme Court was a partisan issue, the Marshall Court took the position of the party in power rather than the party out of power.[193]

*Marbury* and the Marshall Court laid the foundations for the schizophrenic nature of contemporary judicial review. The justification of judicial review in *Marbury*, in other judicial opinions, and in constitutional commentary is anti-partisan. Judicial review prevents legislative tyranny. Without that practice, "the legislature" would have "a practical and real omnipotence."[194] The practice of judicial review in *Marbury*, in other Marshall Court opinions, and in the vast majority of later Supreme Court opinions is partisan. The Marshall Court refused to give *Marbury* his commission, never declared the Repeal Act unconstitutional, and supported the Bank of the United States only after the constitutionality of the bank was affirmed by the President and a strong legislative majority. New Deal legislation aside, when the Supreme Court has declared unconstitutional politically consequential state or federal laws, the judicial rhetoric may have been anti-partisan, but the judicial decision promoted policies favored by at least some influential members of the dominant national coalition.[195] To the extent *Marbury* established judicial review, in short, the decision and subsequent judicial rulings did so by supporting rather than, as Alexander Bickel famously declared,

189. Graber, *supra* n. 12.
190. Whittington, *supra* n. 158.
191. 11 Annals of Cong. 903-905 (1802) (speech of Mr. Dana).
192. 11 Annals of Cong. 556-558 (1802) (speech of Mr. Davis).
193. *See* Pfander, *supra* n. 26, at 1582-83.
194. *Marbury*, 5 U.S. at 178.
195. Dahl, *supra* n. 178; Graber, *supra* n. 12.

"thwart[ing] the will of representatives of the actual people of the here and now."[196]

## V. FROM *MARBURY* TO THE JUDICIARY ACTS

The Judiciary Act of 1789 has historically been buried under the confetti (and occasional rotten tomato) thrown at *Marbury v. Madison*. Discussions about judicial review in the United States begin, and too often end, with commentary on whether *Marbury* was correctly decided and on the best interpretation of that decision. Very few constitutional law casebooks or works on constitutional theory spend much energy considering how the Judiciary Act of 1789 helped establish judicial review or the constitutional issues associated with that measure.[197] The Judiciary Acts of 1801 and 1802 make appearances in most studies of American constitutionalism only as background to *Marbury*. These and other judiciary acts are part of the canon taught and analyzed in courses and scholarship on federal courts, not on constitutional law.

These priorities are unfortunate. The Judiciary Act of 1789 ought to be the first text students consider in a constitutional law course and scholars discuss when setting forth theories of judicial review. That measure offers far more insights about the nature and establishment of judicial review in the United States than any judicial decision handed down by the Jay, Ellsworth, or Marshall Courts. Students and scholars will learn as much about the practice and foundations of the judicial power to declare laws unconstitutional by examining the legislative debates over the structure of the federal judiciary that have taken place throughout American history as by parsing through what judicial opinions have said about judicial power.[198]

The Judiciary Act of 1789 reveals far more than *Marbury* about the elements of judicial review. Provisions of that statute expressly provide for judges, jurisdiction, litigants, authority, capacity, independence, and compliance. This congressional effort to establish a federal court system has generated important jurisprudential debates over the nature and constitutional status of the practices that must be in place for Justices to have the power to declare laws unconstitutional. Commentary on the Judiciary Act explores whether the First Congress established an adequate system of judicial review, whether that measure was consistent with Article III, and whether crucial elements of judicial review were left to legislative discretion.[199] The Judiciary Act might also be a useful vehicle for thinking about the constitutional responsibilities of non-judicial officials and how constitutional changes and settlements often take place outside

196. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 17 (Bobbs-Merrill Co., Inc. 1962).

197. For a rare exception, *see* Lee Epstein & Thomas G. Walker, *Constitutional Law for a Changing America: Institutional Powers and Constraints* 60-62 (3d ed., CQ Press 1998).

198. This project is fortunately well underway. *See* Gillman, *supra* n. 18; Gillman, *supra* n. 187; Edward A. Purcell, *Brandeis and the Progressive Constitution:* Erie, *the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* (Yale U. Press 2000).

199. *See supra* nn. 137-38.

of courts and outside of Article V.[200] *Marbury* fosters none of these conversations. That decision is devoted primarily to the authority element of judicial review and a minor aspect of the jurisdictional element. Commentary on *Marbury* is limited to whether and how Justices should exercise the power to declare laws unconstitutional when deciding cases, and the extent to which such decisions bind elected officials.[201]

The Judiciary Act of 1789 and related measures highlight the legislative responsibility for providing legal and political foundations for judicial review. American law requires elected officials to establish specific elements of judicial review (judges) and arguably leaves to their discretion the extent to which other elements will be established (federal question jurisdiction?). *Marbury* could not have been decided in the absence of a Supreme Court or a judiciary act. Judicial review cannot be maintained unless elected officials or other powerful elites (the military, industrialists, etc.) support that practice. The Supreme Court would have had little power to declare state laws unconstitutional had Congress repealed Section 25 of the Judiciary Act, and no power to declare any law unconstitutional had Jacksonians decided to repeal Article III or treat all judicial rulings as nullities.[202] *Marbury* inspires professors and their students to ask why unelected Justices should be given the power to declare laws unconstitutional. The Judiciary Act of 1789 inspires professors and their students to ask why elected officials give unelected Justices the power to declare laws unconstitutional.

The changing nature of judicial practice in American history cannot be fully realized until the history of legislative debate over judiciary acts is incorporated into the constitutional canon. The original understanding of judicial review relied on political foundations that crumbled within a generation. The Judiciary Act of 1789, framed at a time when political parties did not yet exist, temporarily established anti-partisan and non-partisan judicial review. The Supreme Court, elected officials assumed, would help prevent partisan factions in the states and, less often, in the national government from violating constitutional norms. Elected officials also assumed that the Supreme Court would correct minor constitutional errors in national legislation. The debate over the Judiciary Act of 1801 was about the viability of anti-partisan judicial review at a time when political parties existed. The repeal of that Act destroyed anti-partisan review as a political practice, although not the judicial practice of using anti-partisan rhetoric.

The judicial edifice established in 1789 survived the Jeffersonian attack on federal courts only because the Marshall Court in *Marbury*, subsequent Supreme Court rulings, and subsequent federal legislation placed the judicial power to declare laws unconstitutional on more secure partisan political foundations.

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200. *See supra* n. 82 and accompanying text.

201. *See supra* n. 9. This is not to disparage these fine works, but to note that commentary on *Marbury* tends to be focused on a different set of issues than commentary on the Judiciary Acts of 1789 and 1801.

202. President Jackson may not have said, "John Marshall has made his decision, now let him enforce it." Nevertheless, he showed no inclination to enforce judicial decisions inconsistent with his policies towards Native Americans. *See* Graber, *supra* n. 59, at 260-61.

Legislative attacks on courts were forestalled as judicial review began to be understood as a means by which important regime goals might be advanced. Marshall Court decisions after 1809 advanced policies preferred by members of the dominant National Republican coalition. Satisfied by judicial performance, Congress during the 1820s and 1830s first refused to repeal Section 25 of the Judiciary Act and then, in response to nullification, expanded the jurisdiction of federal courts.[203] Congress after the Civil War further expanded federal jurisdiction in an effort to secure favorable judicial policies.[204] During the 1960s, Congress fostered Warren Court decisionmaking by strengthening numerous elements of judicial review.[205]

These legislative decrees, not *Marbury*, provide the primary legal and political foundations for contemporary judicial practice. "The historian of the Court," Charles Fairman wisely commented, "should keep his watch in the halls of Congress, not linger within the chamber of the Court."[206] The same might be said for the constitutional theorist. As several commentators note, "Congress's power over federal jurisdiction is 'the rock on which rests the legitimacy of the judicial work in a democracy.'"[207]

*Marbury*, properly presented, teaches that judicial review can thrive in a partisan universe only when at least some crucial political elites support the general trend of judicial decisions. Judicial opinions may boldly assert, as *Marbury* does, that judicial review is necessary to prevent legislative omnipotence. History and the legislative record say otherwise. Judicial review exists because legislatures support judicial review. Legislatures support judicial review partly because they believe that practice will help secure their interests. The anti-partisan judicial practice described in *Marbury* died two years before the decision was handed down.

Students of comparative constitutionalism repeatedly recognize that non-judicial actors are usually responsible for establishing judicial review. Alec Sweet explores how post-war European governments promulgated new constitutions or constitutional provisions that explicitly authorized justices to consider the constitutionality of statutes.[208] Ran Hirschl's "hegemonic preservation thesis" details how the rise of judicial review in Israel, South Africa, Canada, New Zealand, and many other countries resulted from actions taken by elected officials and interest groups fearful of losing political power. "When their hegemony is increasingly challenged in majoritarian decisionmaking arenas," Hirschl observes,

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203. Warren, *supra* n. 157; Warren, *supra* n. 62, at 774-76.

204. Gillman, *supra* n. 18.

205. Gillman, *supra* n. 187; Powe, *supra* n. 20.

206. Charles Fairmen, *Reconstruction and Reunion, 1864-88* pt. 1, at 118 (Macmillian Publg. Co. 1987).

207. Liebman & Ryan, *supra* n. 68, at 772 n. 352 (quoting Charles L. Black, Jr., *The Presidency and Congress*, 32 Wash. & Lee L. Rev. 841, 846 (1978)); *see* Michael J. Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* 128-33 (Yale U. Press 1982).

208. Stone Sweet, *supra* n. 66.

> powerful elites and their political representatives may deliberately initiate and support a constitutionalization of rights in order to transfer power to supreme courts, where they assume, based primarily on the courts' record of adjudication and on the Justices' ideological preferences, that their policy preferences will be less contested. In other words, increasing judicial intrusion into the prerogatives of the legislature and the executive following the enactment of constitutional bills of rights may provide an efficient institutional solution for influential sociopolitical groups who seek to preserve their hegemony vis-a-vis marginalized minority groups and who, given an erosion in their popular support, may find strategic drawbacks in adhering to majoritarian decision-making processes.[209]

European bureaucrats made the crucial decisions that expanded the power of the European Court of Justice.[210] Only in the American constitutional canon is the serious suggestion made that the primary foundations for judicial review were laid by self-serving assertions in judicial opinions.

Contemporary constitutional theorizing must take into account the original establishment of judicial review in 1789 and the constitutional changes responsible for the transformation of that practice during the nineteenth century. Constitutional theory, following the canonical analysis in *Marbury*, regards judicial review as a check on elected officials. This conception of judicial power masks how elected officials have historically been responsible for establishing and maintaining the legal and political foundations for judicial authority. Judicial review is an ongoing political choice, not a fait accompli.[211] Whether that practice is justifiable depends on whether elected officials have legitimate reasons for vesting power in the federal judiciary, not on the reasons Justices have given for exercising that power.[212]

Contemporary theories of judicial review must justify the practice established after 1800, not the practice established in 1787 or 1789. The Constitution of 1800 is a Constitution driven by political parties. No institution remains exempt from the partisan imperative.[213] Contemporary Justices are not non-partisan legal experts, and they do not review laws made by elected officials who are expected to rise above party politics. Justices are nominated and appointed by partisan leaders who have partisan purposes for choosing particular Justices and for structuring the federal judicial system in particular ways. Theories of judicial review premised on the non-partisan or anti-partisan federal judiciary promised by *Federalist 78* are no more realistic than constitutional theories that

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209. Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 L. & Soc. Inquiry 91, 103-04 (2000).

210. Gordon Silverstein, Presentation, *Judicial Power, Economic Integration and Democratic Legitimacy: A Madisonian Solution to a European Dilemma* (Boston, Mass., Sept. 3-6, 1998) (copy on file with author of article) (paper presented at the 1998 Annual Meeting of the American Political Science Association).

211. *See* Mark Tushnet, *Taking the Constitution Away from the Courts* 173-76 (Princeton U. Press 1999).

212. Mark A. Graber, *The Law Professor as Populist*, 34 U. Rich L. Rev. 373, 403-10 (2000).

213. *See* Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to George Bush* 69-81 (Belknap Press 1993).

rely on the promise made by *Federalist 10* that a large republic will prevent the rise of mass political parties.[214]

214. Hamilton, Madison & Jay, *supra* n. 125, at 77-84.