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Great Ironies of History: The Peculiar Historic Fable of Marbury v. Madison

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I. Introduction

On the first day of virtually every course in American Constitutional Law the case of *Marbury v. Madison*[1] is taught. Students are usually told that this is the case that established what we refer to today as judicial review. They are instructed as to the continuing controversy of how "The Great Chief Justice," John Marshall, created out of thin air the power of the courts to pronounce acts of the other branches of government unconstitutional. A cursory review of the bare facts of the case usually accompanies the legal analysis of the opinion generally followed by extensive commentary and criticism by past and contemporary legal scholars. All in all the student is left with the impression that the ultimate power that the Supreme Court wields today was invented by, and is a direct lineal descendent of, John Marshall and his opinion in the case of *Marbury v. Madison*.

This paper will briefly attempt to dispel this legend. The first part of this piece will trace some of the origins of judicial review to show that it was not the creation of John Marshall in 1803, but rather sprang from circumstances of a century and a half of history that were unique to the American colonies and the new republic. In addition, it will be shown that judicial review had, in fact, been exercised in the courts of America numerous times before the decision in *Marbury*, and that this power must have been within the contemplation of the framers at the time the Constitution was written.

The second part of this paper will examine the whole case and controversy. By examining the events surrounding the case it will be shown that the motives compelling the decision were rooted in a fierce political battle and that the entire issue of judicial review, which

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

need not have been addressed in the decision at all, would never have come up but for this political warfare.

The final part of this paper will show that the case, at the time, did not stand for what it has come to mean today. The continuing controversy that is taught in law schools today is a controversy that did not heat up until long after John Marshall was dead and subsequent Supreme Courts used his eloquence on the matter to expand the power of the Supreme Court to dimensions that John Marshall never had intended nor even imagined possible.

II. American Origins of Judicial Review

The power of American judges is unparalleled among western nations.[2] Nowhere else in the world do judges wield as much power in shaping the contours of society as they do in this country.[3] Traditionally, law students are taught that this power emanates from John Marshall's opinion in the case of *Marbury v. Madison*, but this is not altogether accurate. It is true that this case established a precedent that subsequent Supreme Courts have cited extensively to justify sweeping judicial activism but this turn of events is largely a modern phenomenon.[4] That this opinion conceived judicial review as it is applied by the Supreme Court today is implied, if not actually stated outright, in Constitutional law classes. It is, however, an assumption that is patently false. The philosophical conceptualization of what we call judicial review long predates

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2 Wood, *The Origins of Judicial Review* , 22 SUFF. U.L. REV. 1293 (1988).

3 *Id.*

4 Clinton, *Precedent as Mythology: The Case of Marbury v. Madison,* 1989 YEARBOOK OF THE SUPREME COURT HIST. SOC. 78 (1989).

John Marshall. And, as we shall see, its first implementation hardly occurred in *Marbury*. Marshall was, however, the first to lay out the argument for it in a Supreme Court opinion.

To understand the evolution of judicial review one must first examine the sources that lie in the first century and a half of American colonial history and in American attitudes towards the law.[5] The idea that there existed some supreme law as to which the ordinary laws of the colonial legislatures had to conform with was not the stuff of abstract legal and moral philosophy for the colonists, but rather was an everyday part of their judicial system. The thirteen colonial legislatures were dependent governments and at all times had to conform to the laws of Parliament. The Privy Council in England possessed the power to disallow laws adopted by the thirteen colonial assemblies. This power of review was exercised when the colonial legislatures exceeded their authority in adopting certain laws or when colonial laws conflicted with the superior laws adopted by Parliament.[6] Additionally, the inquiries concerning colonial conformity most often were judicial questions, for the Privy Council sat as a court of law with regard to American colonial enactments.[7] To colonial Americans, therefore, judicial control of this sort would have been entirely familiar. To the American colonial lawyer it would have had to have been second nature.[8] This circumstance alone, however, does not explain how a concept as "radical" as judicial review would become a part of the American legal psyche. For this we need to develop an understanding of the intellectual climate and legal culture of the time.

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5 Wood, *supra* note 2, at 1297

6 E. RUSSEL, THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL 227 (1976), according to Charles Grove Haines, the Privy Council reviewed 8563 acts adopted by the colonial legislatures between 1696 and 1776, and 469 or 5.5% were disallowed by orders of the council. C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 49 (1959); *See also* C. WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 74 (1986).

7 Black, *An Astonishing Political Innovation: The Origins of Judicial Review,* 49 U. PITT. L. REV. 691, 693 (1988)

8 *Id.*

The starting point of such an analysis is the idea that if a sovereign's legislative power has limits, it is limited by principles of some "fundamental law". Fundamental law, in its purest sense, is law beyond human invention. Law which is "out there somewhere," a kind of lurking omnipresence, whether God's law, the law of nature, the law of reason, the law of custom or some other like thing.[9] Such law was discovered as an act of revelation. In the early seventeenth century, in England, Lord Edward Coke was to expound, in dictum, the concept that was to become the ideological underpinnings of modern judicial review. In *Dr. Bonham's Case* [10] Coke stated that "it appears in our books, that in many cases, the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, . . . the Common Law will control it, and adjudge such act to be void."[11]

Unfortunately Coke's early notions of judicial review never caught on in England. By the eighteenth century the views of William Blackstone were dominant in England.[12] Blackstone spoke of positivism, where law is an act of authority and that all law is of human invention.[13] In Blackstone's view there was nothing Parliament was not empowered to do. Blackstone was not completely adverse to the idea of fundamental law, but to him it was merely a moral inhibition or conscience existing in the minds of the legislators. The intrinsic problem with this interpretation of fundamental law was that it was so basic and so primal that it was

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9 *Id,* at 694.

10 8 Coke 107

11 *Id.*

12 Black *supra* note 7, at 694.

13 *See generally* 1 BLACKSTONE, COMMENTARIES.

enforceable only by the people's right of revolution; relief could hardly run in the ordinary court system.[14]

Of these competing legal philosophies it was Coke's that had the greatest impact in the American colonies.[15] It has been asserted that as early as 1688 the men of Massachusetts did much quote Lord Coke.[16] Even earlier than that, in the case of *Giddings v. Brown,* [17] Coke's dictum received practical application, something which never actually happened in England, though the act overturned was merely a town vote. Magistrate Symonds based his judgment for the plaintiff upon the following grounds, "The fundamental law which God and nature has given to the people cannot be infringed. The right of property is such a right. In this case the goods of one man were given to another without the former's consent. This resolve of the town being against fundamental law is therefore void, and the taking was not justifiable."[18] This colonial American embrace of Coke continued on into the eighteenth century.

The colonists found Coke's ideas appealing and relevant, not just because of their immediate self-serving usefulness in the independence debate of the late 1700's, but because such ideas fit their notion of what law ought to be. Their experience predisposed them to find

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14 Wood, *supra* note 2 at 1297.

15 Corwin, *The Establishment of Judicial Review,* 9 MICH. L. REV. 102, 105 (1910).

16 *Id.*

17 *Id, citing* RENSCH, COLONIAL COMMON LAW: SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY, Vol. 1 pg. 376

18 *Id.* Corwin cites many examples of Coke's jurisprudence on the subject in eighteenth century American colonial courts starting with the seminal opening argument of James Otis in the *Writs of Assistance* case in Boston in 1761. His argument being that whether the writs were warranted by an act of Parliament or not, was a matter of indifference, since such an act of Parliament would be against the constitution and against natural equity and therefore void. The executive courts must pass such acts into disuse. Coke's famous dictum was raised again in 1765 when Governor Hutchinson, referring to the opposition to the Stamp Act, wrote that the prevailing reason at this time is that the act of Parliament is against the Magna Charta, and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void. In 1776, at the outbreak of the war, Justice Cushing charged a Massachusetts jury to ignore certain acts of Parliament as void and inoperative.

Coke's ideas meaningful.[19] The colonists believed that the overriding nature of law lay in the "immutable maxims of reason and justice,"[20] in something other than the ordinary will of the legislature. To the Americans, the Common Law fit nicely into this paradigm. The Common Law, as the American colonists saw it, was the fundamental law that was superior to the ordinary legislative acts of men. To them, it embodied the principles, rules, procedures, precedents and truths of the legal system that presumably went back to time immemorial.[21] For many colonists the Common Law had been frozen at the time of the initial migrations to America in the seventeenth century. English precedents were important up to around 1607 or maybe 1650, but any decision after that date might be disregarded for wont of relevance to American conditions.[22]

This predisposition to Coke's ideas, on its own, could not gestate into the adoption of the practice of judicial review. This basic legal philosophy however combined with other conditions that were unique to the colonial legal system and created a synergistic effect, inadvertently giving powers to the colonial judges that their English counterparts could never attain. The reasons for this had to do with the simplicity of the colonial court system as compared with the numerous and specialized courts back in England.[23] This circumstance created an unforeseen but incredible paradox. All of the highly complex and diversely rooted varieties of English law,

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19 Wood *supra* note 2 at 1298

20 *Id.* at 1299.

21 *Id.* Wood points out the stunning contrast that, to the Englishmen of the eighteenth century, the common law was a much more complete and dynamic thing than it was for the colonists. For the English, the common law was something living and growing; it included not only the reports and decisions of Coke and other judges in the past, but all the subsequent judicial determinations and legislative additions of the seventeenth and eighteenth centuries. To the English the common law was the current law.

22 *Id.*

23 "What was most obviously simpler about the American legal system was the undifferentiated nature of the courts. The colonists had none of the hodgepodge of courts that existed in England - no ecclesiastical courts, no

in addition to the widely derived colonial laws,[24] intermingled and had to be applied within simple, often single court, judicial systems.[25] This heretofore unknown administrative contradiction caused substantial uncertainty throughout the colonial courts. The end result of this paradoxical incongruity was that the colonial courts were unintentionally encumbered/empowered with the novel necessity of judicial discretion.

Because of the very perplexities facing them, colonial judges were free, if not forced, to select and innovate in order to adjust to continuously evolving local circumstances.[26] Far removed from the strict procedures and protocols of English jurisprudence, colonial jurisprudence was characterized by flexibility, uncertainty, and an unprecedented degree of judicial discretion. The very complex nature of the colonists' legal situation forced them to revert to a kind of medieval English jurisprudence where the right reason and the morality of the Common Law controlled. Once Common Law lawyers began thinking along these lines, deciding on the basis of reason or common sense whether they would or would not follow a particular form or procedure, then a new legal world opened up. The Common Law was based on just such complicated forms and procedures, but by resting their law on some principle beyond statutory will or the technicalities of the Common Law - rather on principles of morality

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merchant courts, no courts of the manor, no courts of the borough, and so on. In some colonies there were not even separate equity courts or probate courts." Wood *supra* note 2, at 1300.

24 "The colonists' law had several sources, both from England in the common law reports, new judicial interpretations, and parliamentary statutes, and from each colony's own legislative statutes and local judicial customs." *Id.*

25 *Id.*

26 The fact that the colonists approximated without really duplicating England's common law procedures contributed to the legal confusion. Many of the English common law forms were present but often with defects and irregularities. The use of some writs and not others, the corrupting and blending of forms of action, the avoidance of special pleading and insufficiency of pleading in general - pleading lying at the heart of the common law - helped to create an atmosphere of permissiveness and uncertainty that a sharp lawyer with a collection of English precedents no one had ever heard of could turn to advantage. *Id.* at 1301.

or justice or common sense or even just utility - the colonists paved the way for the mechanism that we now call judicial review.[27]

Archaic philosophical underpinnings aside, there existed more concrete notions of judicial review abounding in America at the time of the revolution. Conceptually, judicial review is the implicit *sine qua non* of the very theory of written constitutions as higher law. Even positivists could be included in this line of reason. If all law is of human invention and a mere act of will, as positivists believe, a sovereign people can exercise its will to bind those who legislate with a higher law in the form of a written constitution. Such a constitution would be adopted in a special, solemn manner by the people, and not subject to alteration by any but the most extraordinary procedures therein established, procedures which, once again are rooted in acceptance by the people.[28]

An examination of decisions in the state courts after the revolution lends further credence to the idea that judicial review of legislation was an established feature of American jurisprudence well prior to the *Marbury* decision. The first authenticated case in which a court ventured to refuse enforcement to a legislative enactment on the ground that it conflicted with the provisions of a written constitution is that of *Holmes v. Walton,* [29] which was argued before the Supreme Court of New Jersey in November of 1779.

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27 Wood *supra* note 2, at 1302-03.

28 Black *supra* note 7, at 695.

29 *See* Corwin *supra* note 15, at 110. Professor Corwin cites several scholarly works that refer to this case although no official court citation is given.

The notion of judicial review was broached again in the case of *Commonwealth v. Caton* [30] decided by the Virginia Court of Appeals in November of 1782,[31] and again in 1786 in Rhode Island in the case of *Trevett v. Weeden* .[32] This case is considered a transitional case because the plea to overturn the statute was based on the notion that the statute (which dealt with trial by jury) was contrary to *fundamental law* as opposed to being in conflict with a written constitution. (Evidently Coke's dictum was still very much alive).[33] A genuine case of judicial review of the second type, (*i.e.*, the negating of a legislative enactment as being in conflict with a written constitution), occurred in 1784 in Connecticut in the *Symsbury Case* .[34]

This brings us to the time of the constitutional convention. While the convention was actually in session the Supreme Court of North Carolina, after more than a year's hesitation, pronounced unconstitutional, in the case of *Bayard v. Singleton* ,[35] an Act of Confiscation dating from the Revolution. These cases certainly buttress the position that judicial review of legislation was not only theoretically known in the state courts but was actually implemented on many occasions as well. It is unlikely the conventioneers were unaware of these state court decisions. In fact, a plausible argument can be advanced that the power of coordinate judicial

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30 4 Call (Va.) 5 (1782), cited in Corwin at 112.

31 "The act in question was the so-called Treason Act of 1776. Randolph, attorney general, argued for the commonwealth that whether the act of assembly pursued the spirit of the constitution or not, the court was not authorized to declare it void. The act was upheld but the judges were generally of the opinion that if they found it to be in conflict with the constitution they would have had the power to declare it void." *Id.*

32 *Id.,* at 113. Trevett v. Weeden is considered a focal point in the idea of judicial review although no statute was overturned. Madison makes reference to it in his notes on the constitutional convention. Madison's Notes, July 17, 1787.

33 *Id.,* at 114

34 Kirby (Conn) 444-7 (1784), cited in Corwin at 114. The facts of this case were that a later grant of land by the legislature was set aside in the interest of an earlier similar grant of the same parcel, upon the ground that the act of the general assembly could not legally operate to curtail the land previously granted.

35 1 Martin (N.C.) 42 (1787), cited in Corwin at 119.

review was not specifically enumerated in the Constitution because it was taken for granted as an inevitable feature of governing pursuant to a written constitution.

The concept of judicial review was even discussed at the convention. The topic came up after a proposal to adopt a Council of Revision had been considered.[36] The proposed council would have been comprised of the President and members of the judiciary, exercising the veto power against congressional bills when appropriate. This proposal was rejected primarily because it violated the constitutional principle of the separation of the powers.[37] An argument exists that another reason for rejecting the council was that the delegates assumed the power of judicial review already existed.[38] This assertion can be supported by an exchange between delegates Luther Martin of Maryland and George Mason of Virginia. Martin asserted:

> As to the constitutionality of laws, that point will come before the judges in their official character. In this character they have a negative on the laws. Join them with the Executive in the revision, and they will have a double negative.[39]

Mason agreed with Martin about the existence of judicial review although disagreed about how that double negative would operate. What is significant though is the clear assumption underlying Martin's objection to the Council of Revision: the Court already had a negative power in the form of judicial review.[40]

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36 Dionisopoulos and Peterson, *Rediscovering The American Origins of Judicial Review: A Rebuttal to the Views Stated by Currie and Other Scholars,* 18 J. MARSH. L. REV. 49, 56 (1984) (Hereinafter REBUTTAL).

37 *Id. citing* JOURNAL OF THE CONSTITUTIONAL CONVENTION KEPT BY JAMES MADISON 104-05, 107 (E. Scott ed. 1893) (hereinafter MADISON'S JOURNAL).

38 REBUTTAL at 57

39 MADISON'S JOURNAL at 402.

40 REBUTTAL at 57. The authors maintain that the true political leaders of the convention were all in favor of judicial review. Included among them were James Madison, Alexander Hamilton, James Wilson, Elbridge Gerry, Luther

Just as certain powers were assumed to be part of the presidential power, judicial review was assumed to be part of the judicial power.[41] This is essentially the logic behind Hamilton's argument in Essay No. 78 of *The Federalist*. Hamilton's argument for judicial review occurs in the context of his discussion for the need for tenure during good behavior in order to protect judicial independence. Independence is a particularly necessary feature of a limited constitution, that is a constitution that limits itself in certain specified ways. "Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing."[42]

Hamilton goes on to add that:

> There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. . . It is not otherwise supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority.[43]

The heart of Hamilton's argument lies in assertions he makes about both the nature of judicial power, ("the interpretation of the laws is the proper and peculiar province of the courts"), and the nature of a constitution, ("a constitution is in fact, and must be, regarded by the judges as a fundamental law"). From these assumptions it follows that judges "ought to regulate their

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Martin and George Mason, who were certainly political leaders at the time. Therefore when Gerry, an advocate of judicial review, informed his colleagues at the convention that this power was claimed by several state courts (see above) and that this was done with general approval, there was no opposition to his contention. *Id.* at 56 *citing* MADISON'S JOURNAL at 101.

41 REBUTTAL at 58.

42 *Federalist* No. 78

43 *Id.*

decisions by the fundamental laws, rather than by those which are not fundamental."[44] This implies the superiority not of the judiciary to the legislature, but of the power of the people to both.[45]

Other influential men of the time also had similar views on judicial review. Speaking at the Pennsylvania Ratifying Convention, James Wilson, second only to James Madison in terms of his influence on the drafting of the Constitution,[46] and later to be a Justice of the Supreme Court, evidenced his support for the concept.[47] Even Thomas Jefferson had indicated support for judicial review. In a December, 1787 letter to Madison concerning the new Constitution, Jefferson did not seem to realize that the federal courts would have a negative power, and he complained about this deficiency.[48] Subsequently Jefferson was enlightened as to the fact the Judiciary had such a negative power and had wrote at least one letter to Madison indicating his approval.[49] Madison also echoed such approval.[50]

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44 He adds that "If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

45 Wolfe *supra* note 6, at 75.

46 REBUTTAL at 59

47 Wilson stated "If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers of government being defined, will declare such law to be null and void, for the power of the constitution predominates. Anything therefore, that will be enacted by Congress contrary thereto, will not have the force of law. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788 354 (J. McMaster & F. Stone eds. 1970) *cited in* REBUTTAL at 59, n. 65.

48 He wrote that "I like the negative given to the Executive with a third of either house, though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power. 12 THE PAPERS OF THOMAS JEFFERSON 440 (J. Boyd ed. 1955) *cited in* REBUTTAL at 59.

49 REBUTTAL at 60.

50 In House debates over the Bill of Rights Madison stated that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the [Bill] of Rights." 1 ANNALS OF CONG. 457 (1789).

All this evidence alone might lead one to conclude that judicial review was established prior to *Marbury*, but the argument is even stronger when you consider the fact that the Federal Courts of the United States had already exercised the power in the 1790's, up to a full ten years prior to *Marbury v. Madison*![51] Scholars contend that on a federal level, statutes were declared unconstitutional on three separate occasions; in *Hayburns Case* [52] in 1792, in *Chandler v. Secretary of War*, and in *United States v. Todd*, both in 1794.[53] These are what are known as the *Invalid Pensioners* cases.[54]

A problem arose under the third extension of the original bill in 1792.[55] Under the 1792 law, Congress authorized the Secretary of War to correct mistakes made by the circuit courts. Section four of this act described the duties and responsibilities of the Secretary, who could overturn judgments rendered by the judges.[56] What this meant seemed clear to the circuit court judges: judges were being utilized as executive officials, with their findings subject to being overturned by the Secretary of War. This appeared to be a clear violation of the principle of separation of powers. It was this section of the law that was nullified by the circuit courts.[57] The basis for the objections was the fact that the law did not recognize that the federal courts were

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51 For a general discussion of this theory and an analysis of the actual cases involved *see* REBUTTAL *supra* note 36.

52 2 U.S. (2 Dall.) 409 (1792).

53 The Supreme Court decided these cases on Feb. 14 and Feb. 17, 1794 respectively. Dallas did not report these cases. Nevertheless, they are found in 11 ANNALS OF CONGRESS 903-04 (1802). REBUTTAL *supra* note 36, at n.2.

54 The Invalid Acts were statutes which provided pensions for disabled veterans of the Revolutionary War. The federal government had taken over this responsibility from the states in 1789, and paid the pensions under regulations promulgated by the President. The law of 1789 only appropriated money for one year, so Congress enacted new bills in 1790 and 1791 to extend those payments. *Id.* at 63.

55 Act of March 23, 1792, ch. 11, § 4, 1 Stat. 218 (obsolete) entitled "An Act to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims of Invalid Pensions." *Id.*

56 REBUTTAL at 63. The Secretary of War would place the names of claimants to pensions on the list with this proviso: "Provided always, that in any case, where the said Secretary shall have cause to suspect imposition or mistake, he shall have power to withhold the name of such applicant from the pension list and then report this to Congress. *Id.*

judicial, and neither Congress nor the President could constitutionally assign the judiciary any duties, but such as are properly judicial, and to be performed in a judicial manner.[58]

The Supreme Court refused to proceed on the case and the following day, April 13, 1792, William Hayburn reported this to Congress. A subsequent discussion arose where it was noted:

> This being the first instance in which a court of justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion. At length a committee of five was appointed to inquire into the facts contained in the memorial, and to report thereon.[59]

Representative William Murray even suggested to Congress that it enact a law which would provide some regular mode whereby federal judges shall give official notice of their refusal to act under any law of Congress, on the ground of unconstitutionality.[60]

Congress responded not with outrage over a perceived usurpation of power by the Judiciary, but rather by passing a new statute concerning invalid pensions in February of 1793.[61] This new statute sought to correct the operation of the review for mistakes by taking the power away from the Secretary of War and giving it to Congress, and by providing some review to the Supreme Court. This did not necessarily cure the defect though.

In 1794 the issue came before the Supreme Court in the *Chandler* and *Todd* cases. The cases are unreported and not that much is known about the facts of the particular cases, especially

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57 Whereas all five members of the Supreme Court, in letters to President Washington, expressed serious doubts as to the constitutionality of the law, only the middle circuit voided it. *Id.* at 65

58 *Id.*

59 3 ANNALS OF CONG. 556

60 *Id. cited in* REBUTTAL *supra* note 36, at 66.

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

the *Chandler* case, but their outcome can be reported on with reasonable certainty. The Supreme Court had nullified the 1792 and 1793 statutes for exactly the same reasons that were stated by the middle court two years earlier.[62] Congress once again deferred to the Court by passing yet another revised Invalid Pension statute in February of 1794. The new bill removed the provisions for review of the judges' determinations by the Secretary of War or by Congress. The determinations of the judges were to stand. Congress, by its actions, and lack of objection, implicitly accepted the constitutional adjudication of the Courts.[63]

Faced with all this evidence, one would be hard pressed to maintain that judicial review was invented by John Marshall in 1803 in *Marbury v. Madison*. The question therefore remains why did Marshall do what he did. If judicial review was a fundamental part of the American legal psyche, why did Marshall take such pain to pronounce this policy in the most forceful language? Why did he go to such extraordinary lengths to construe Section 13 of the Judiciary Act of 1789 to be unconstitutional when an alternative construction was available to him that did not reach a constitutional conflict? Why did he construe Article III of the Constitution so narrowly as to find such a conflict when a broader reading of the Constitution would also have vitiated the need for a constitutional determination? Why indeed?

62 *See* REBUTTAL at 70.

63 *Id.*

III. Political Chicanery as Historical Icon

The answers to the above questions lie in the political story behind *Marbury v. Madison*. The political events of the first years of the nineteenth century are what created the compelling need for Marshall to do what he did. The great precedent for judicial review (i.e., *Marbury*) was, in its time, just an exercise in naked partisanship and political damage control. It was an accident of history that created this fable worthy of Aesop. A legend that subsequent Courts have employed to expand the power of the Supreme Court to dimensions unimagined by Marshall or his contemporaries.

The story[64] is actually an amusing one viewed with the dispassion that nearly two hundred years will bring. At the time though it was as intense and emotional as a political issue could get, but not for the reasons one would expect.

The story begins with the elections of 1800. In the Presidential and Congressional election of 1800 something happened in the new republic that had not happened before: the incumbent ruling party had lost the election and been thrown out of power. The Federalist candidate, President John Adams, had lost his bid for reelection. Along with the loss of the Presidency the Federalist party had also lost their majority in both houses of Congress. The victors were the (Democratic-) Republicans led by President-Elect Thomas Jefferson. The decade of the 1790's saw a rift develop between the once united revolutionaries. Simply put, on the one hand there were the Federalists, led for the most part by Alexander Hamilton. The Federalists

64 The foregoing narrative is principally derived from D. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND TO MARBURY V. MADISON, (1970), which is the only scholarly book devoted exclusively to the topic. Additional references come from A. BEVERIDGE, THE LIFE OF JOHN MARSHALL, vol. III (1919), and R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE NEW REPUBLIC, (1971).

were aristocratic in their approach to government. They believed, in varying degrees, in a strong central government controlled by an elite group who would know what was best for the country. On the other hand were the Republicans (also known as the Jeffersonians), who believed strongly in states' rights and in the principles of the French Revolution, (i.e. aristocracy is an evil, and the government's function should not be to protect inherited wealth).

As stated, the election of 1800 ousted the Federalist party from dominance of the federal government and set the stage for the first true transfer of power the new nation was to experience. The Federalists, however, were determined not to go "gently into that good night." The election was held in November of 1800, but the transfer of power was not to occur until March 4, 1801. During the lame duck period of the Adams' administration prior to Jefferson's inauguration the Federalists hatched a plan to retrench to the only bastion of power left to them, the federal judiciary. In January of 1801 Adams named, then Secretary of State, John Marshall to replace John Jay as Chief Justice of the Supreme Court. This move was not only a way of preserving Federalist power, but more than that, it laid down the gauntlet to the Jeffersonians. John Marshall was not only a Federalist but also a lifelong enemy of Thomas Jefferson. Marshall's long standing antagonism for Jefferson would certainly make his advancement to a lifetime position in Washington an enduring unpleasant irritant for the incoming President and his Republican congressional majority.

Interestingly enough, however, is that Marshall was not very popular with his own party for the very reasons that should have made him a palatable choice to the Republicans. Most Federalists thought that Marshall was far too congenial. He positioned himself squarely in the moderate wing of the Federalist majority when he served in Congress, while his Virginia

background made him an easy target for the more hard line New England Federalists. He looked to George Washington for his political ideals rather than Alexander Hamilton. Although this irritated some of his Federalist contemporaries, it turned out to be a brilliant political choice because at the time not even Jefferson himself would openly attack George Washington. This political astuteness served to make him an even more formidable foe to Jefferson.

The feud between the two men for the most part remains unexplained. On the surface it seemed that if there was any Federalist that could have gotten along with Jefferson and the Republicans it would have been John Marshall. Compared to the other leading Federalists like Hamilton or Fisher Ames or Timothy Pickering, he was extraordinarily conciliatory. For some reason the two men despised each other despite coming from very similar backgrounds. Both were from Virginia, in fact they were third cousins. Both went to the same law school (College of William and Mary) and they both studied under the same teacher (George Wythe). From this similar background it is hard to see how they came to feel such enmity towards each other.

It is possible that Marshall, in part, married into his antagonism for Jefferson. Marshall married the daughter of Rebecca Ambler, an early love of Jefferson who was later spurned. Thomas Jefferson thus was quite possibly regarded as a cad by the entire Ambler Family. The two men's differences appear to be more related to personality and style rather than pure political ideology. Both were influenced by the ideas of John Locke and David Hume. Both were believers in limited government and natural rights. Their differences were usually a matter of degrees rather than being polar opposites. Both believed in representative government but each interpreted it differently. Jefferson saw centralization as the principal threat to this form of government whereas Marshall saw fragmentation as the principal threat. (Jefferson believed that

Marshall was an advocate of monarchy or at least aristocracy, while Marshall felt that Jefferson was leading an uneducated rabble to political dominance). Against this backdrop the political theater of *Marbury v. Madison* was to be played.

The outgoing Federalists were determined not only to hold on to their control of the federal courts but to strengthen it. The means by which they chose to accomplish this was through a sweeping overhaul of the entire federal judicial court system. Most everyone agreed that the federal court system was in need of reform. The Federalists, for one reason or another never got around to doing this when it would not have caused political warfare. The organizational structure of the federal judiciary at that time was set up according to the Judiciary Act of 1789, passed by the first Congress pursuant to Article III of the Constitution. This act had made several blunders, chief among them was the fact that the Supreme Court justices were required to "ride the circuit," or in other words to serve as Circuit Court judges in addition to their duties on the high court. In practical terms this meant that, in their capacity as Supreme Court justices, they were required to hear appeals on the very cases which they themselves had decided on the lower Circuit Court level.

Along with this legal anomaly was the fact that "riding the circuit" was not an activity that suited the justices well. Transportation at the time left much to be desired. It was a long, arduous, and dangerous proposition for even the heartiest of men let alone the men of advancing years that typically made up the Supreme Court. Both the Executive and Judicial branches disliked this state of affairs but never got around to doing anything about it in a timely and agreeable way. Never, that is, until the lame duck period of the Adams administration and, as it turned out, timely and agreeable it was not.

The Federalists, in their last scramble for power, completely revised the federal judiciary by means of the Judiciary Act of 1801 (the "Reform Act"), passed by Congress in January and February of 1801 and signed by President Adams on February 13. A mere 19 days before Jefferson was to assume office and the Republicans were to get control of both houses of Congress, the Federalists completely changed the federal judicial structure. Among other things, the Reform Act relieved the Supreme Court justices of their Circuit Court duties while it also reduced the number of justices on the high Court to five (presumably to avoid any chance of a tie but also to deprive Jefferson of a Republican appointee).

The Reform Act, although generally a commendable piece of legislation, suffered from abominable timing. It had, quite justifiably, the stench of dirty politics fueled by its last minute, lame duck passage. It allowed Adams, if he did not delay, to appoint 16 Circuit Court judges, plus a number of marshals and district attorneys. In addition "An Act concerning the District of Columbia" passed even closer to the last day of the Adams administration, providing for the appointment of three judges to the Circuit Court of the District of Columbia and an unlimited number of justices of the peace and other officials. In his last month in office, Adams placed 217 nominations before the Senate, 53 of these were appointed to offices in the District of Columbia including one William Marbury. Not only were virtually all of these new appointees "right thinking" Federalists, but Adams also sought to make sure that any Federalist who occupied a pre-existing judicial position that might be contemplating retirement, do so before March 4 in order for the position to be filled with another Federalist rather than allow Jefferson to fill the post with a Republican.

Needless to say the Republicans were not amused by this bit of political chicanery. Within a week of the Reform Act's passage there were Republican grumblings about the possibility of repeal. The Republicans were about to assume control of both houses of Congress and the Presidency. Although Jefferson could not remove these "midnight judges," the legislative act that created their positions could be repealed. Jefferson would not publicly mention the matter until the new Republican controlled congress was seated in December of 1801. Jefferson could, however, hold up the delivery of any appointments not yet perfected. In the confusion of the last days of the Adams administration not all of the commissions were physically delivered despite being duly signed and sealed. William Marbury's commission as a Justice of the Peace was, of course, one of the commissions that weren't delivered.

Jefferson finally made his intentions clear when he addressed the just seated Congress on December 8, 1801. In his address he stated that "The judiciary system of the United States, *and especially that part of it recently enacted*, will of course present itself to the contemplation of Congress." With this veiled reference Jefferson threw down a gauntlet and touched off a political firestorm that would rage for nearly two years, and created a controversy over judicial review that never would have occurred but for these particular circumstances and the political agendas that were at stake.

The event that served to galvanize the Republican controlled congress into action on the repeal matter was the fact that on December 21, a mere two weeks later, William Marbury, represented by attorney Charles Lee, appeared before the Supreme Court seeking a *Writ of Mandamus* to command Secretary of State Madison to deliver the commission that was owed to him. The next day Marshall issued an *Order to Show Cause* to Madison why the writ should not

be issued (Madison ignored the order). Argument was set for the next term, which should have been August 1802 but turned out to be February 1803 for reasons that were political in nature. This lawsuit outraged the Republicans in Congress (not to mention Jefferson himself). They saw this as a deliberate attempt to usurp power and insult the President perpetrated by his political enemy, John Marshall. John Breckinridge, a leading Republican in Congress, remarked that it was "a bold stroke against the executive authority of the government and a high-handed exertion of judicial power." The Republicans felt provoked into action and the debate over the repeal of the Reform Act began in earnest.

This debate ran from January to March of 1802. In contrast to the days of the Republicans being the opposition minority in Congress, the Federalists were loudly outspoken. They raised two issues in the debate. First, could Congress abolish previously created courts and judicial positions and; Second, if it could, what would become of the judges whose lifetime term was established by the Constitution and was to be held "during good behavior?" It was obvious that the second point was the stronger of the two and it was the one that received the most attention. The debate that followed set the stage for Marshall's decision in *Marbury*.

The Constitutional question was that if the judges held their office during good behavior, without proof of less than good behavior, their positions were constitutionally protected. The Federalists felt sure the Federal Judiciary could invalidate the repeal law because it removed from office Article III judges whose behavior had been good. This argument put the Republicans in a corner because the Federalists had a valid point. The Republicans' response was that no court had the power to invalidate the repeal law because judicial review of legislation was not a power enumerated in Article III of the Constitution and therefore it did not exist.

This was a politically expedient argument. If the Republicans could win this argument it would not matter that the Federalists controlled the judiciary, for the judiciary would be powerless to affect the Republican legislative agenda. Both parties had a political stake in the outcome of this debate. The argument that raged between the Republicans and the Federalists really didn't concern the greater concept of the structure and operation of our government for all time to come, but appeared to be narrowly framed as a partisan struggle for political power at that time. What occurred though was that both parties hardened their respective positions and a controversy over judicial review that really shouldn't have arisen in the first place wound up degenerating into a months long political battle waged on the floor of the Congress a whole year prior to the decision in *Marbury*.

Whether the Republicans truly believed their rhetoric about judges not being empowered to invalidate laws that were unconstitutional is subject to varying interpretations. A valid argument can be made that they did not actually believe this. The Republicans passed the Repeal Act on March 3, 1802. If they truly did not believe that the Supreme Court was empowered to rule on its constitutionality, they had a peculiar way of showing it. The next month, after almost no debate, Congress amended the then restored Judiciary Act of 1789. The amendment called for the abolition of the August and December terms of the Supreme Court. The Court was now to meet annually just once, in February. The consequence of this action was that it effectively put the Supreme Court out of business for fourteen months (and delayed the case of *Marbury v. Madison* until February, 1803). By virtue of this amendment, Congress prevented a timely judicial response to the Repeal Act. The fact that the Republicans took such preemptive action is

fairly indicative that they believed the Supreme Court could review the constitutionality of the Repeal Act.[65]

The battle over judicial review, however, was not won or even fought for that matter over the Repeal Act. The Supreme Court never did rule on the matter choosing instead to accept the defeat of the Federalist judicial retrenchment plan. Considering the political frailty of the Federalists at that time, had they tried to rule it unconstitutional history might have a much different tale to tell with respect to the role of the Judiciary in the checks and balances of our government. While the best laid plans of the Republicans seemed to have cornered John Marshall, the battle was actually fought and won over the case of the "midnight Justices of the Peace" who did not get their commissions, or "the mandamus case" as it was called at the time. Strangely, although the battle was won on this front, almost nobody at the time truly realized it or recognized that it was even fought. For the most part, this great and significant historical event emanated from a matter of such insignificant minutia that its final disposition meant virtually nothing to the principals involved (but was extraordinarily significant with respect to the principles involved).

Jefferson's action in withholding the Justice of the Peace commissions was really just a side show to the bigger fights of the day. The much larger and impassioned controversy was the aforementioned judicial overhaul and Federalist stacking of the Article III Courts. The Justice of the Peace commissions were such a minor matter that both the Republicans and the Federalists acted with restraint (with the notable exceptions of William Marbury, Robert Towneshend Hooe,

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65 The constitutionality of the Repeal Act did in fact come before the federal courts in the case of *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). Marshall, sitting on the circuit court, dismissed the case on a writ of error. When it was appealed to the Supreme Court Marshall recused himself (one of the only times he did so) because it was his case below.

Dennis Ramsay, and William Harper who filed the suit). Of the 42 commissions that were undelivered when Jefferson took office, 25 were actually delivered by the Jefferson administration. In fact, only 17 were held back. Three of the Federalist appointees actually refused the commissions either because the stature of the office was beneath their dignity, or the fact that they had to accept them from Jefferson was deemed insulting. Of the 17 commissions that were denied only the aforementioned four men pressed the issue. Marbury himself was certainly not in need of the meager salary the commission paid, for he was well enough off on his own. It is likely that he pressed the case merely because he felt it was his duty to do so as a loyal Federalist.

The significance of the case at the time had little to do with whether the Justices of Peace got their commissions or not, nor did it even remotely concern judicial review, rather it was the mandamus question that enraged the Republican's and encouraged the Federalists. The issue concerned the power of the Supreme Court in the early years of the new republic. In those early days the Supreme Court was very weak compared to the other branches of the Federal government. It controlled "neither the purse nor the sword" as Hamilton put it in Federalist #78. This was not much of an issue in the very early days of the new republic because there was no political division among the coordinate branches (all were controlled by the Federalists). But after the election of 1800 the inevitable question as to the limits of power in the coordinate branches finally came to a head. At issue was whether the Supreme Court could issue an order of mandamus to the Executive branch. If it could this would mean that the Judicial branch would possess a superior power to that of the Executive branch. This concept infuriated the Republicans

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The rest of the Supreme Court also avoided the constitutional issue in the disposition of the case. The decision in this case followed the decision in *Marbury v. Madison* by about a week.

because the Supreme Court was stacked with Federalists, led by a renowned enemy of Thomas Jefferson. In retrospect the Republicans were probably less concerned that such a power existed as opposed to the fact that John Marshall and his Federalist cronies would possess it.

Up until this time no one thought very highly of the Supreme Court because it hadn't really done much. It had no official residence of its own; in fact the Court was held in a small office in what had once been the Senate Clerk's office. So, as with the rest of this story, the reasons why the events occurred as they did resulted from actions and motivations that were far removed from the philosophical arguments of limited government and fundamental law.

The facts surrounding the case involve a fair degree of humor. The trial itself has been referred to as a comic opera. The man whose negligence had actually caused the commissions not to be delivered was the man who was presiding at trial, Chief Justice John Marshall himself.[66] Marshall had been Adams' Secretary of State at the "midnight hour" back in February and March of 1801. It was his responsibility to see that all of the commissions were received. The commissions were complete (signed and sealed) except for delivery. In the hectic last days of the Adam's administration these commissions were somehow lost or misplaced.

As noted above, the case started on December 21, 1801 when Charles Lee, attorney for the plaintiffs, sought the *Writ of Mandamus* to compel the Secretary of State, James Madison, to produce the commissions. The Jefferson administration sent Attorney General Levi Lincoln to the Court merely to say that he had nothing to say. Madison ignored the entire matter from the start. Marshall issued the *Order to Show Cause* to Madison the next day and scheduled argument

66 There is evidence that suggests that as many as three associate justices did not take part. Marshall wrote the opinion for the whole Court as he did in virtually all the cases the Court decided when it possessed Federalist unanimity.

for the next term (which turned out to be February, 1803). In the intervening time Marbury had asked the now Republican Senate for evidence concerning the previous Senate's confirmation of his nomination. This once again angered the Republicans in Congress who felt that Marshall was attempting to issue orders to Congress too, and they refused to comply.

At trial, Marbury's case was virtually uncontested. Madison did not bother to show up. Attorney-General Lincoln was there only as an observer and part-time witness. There was no official account of the trial, only the unofficial report of volunteer court reporter William Cranch. Cranch, in yet another irony of history, was himself one of the midnight judges who found himself unemployed when the Republicans passed the Repeal Act and eliminated his court. It is likely that Madison never even saw the commissions he was being sued for. Some have said that it was likely that the commissions were thrown out with wastepaper when the office was cleaned prior to the arrival of the Jefferson administration. Whatever it was that happened to them, they were never found.

Lee called several witnesses in order to prove that the commissions did in fact exist. Of course the best witness would have been John Marshall, who had been the last person in possession of them. but of course Lee could not call him. Lee summoned two State Department clerks, Chief Clerk Jacob Wagner and Daniel Brent, to testify but it turned out that they had pretty bad memories. They remembered seeing some commissions but they were not sure whose name was on them or what had become of them. Their memory lapse probably has something to do with the fact that they were holdovers from the prior Federalist administrations and they did not want to jeopardize their jobs at the now Republican State Department.

Lee then called Lincoln, who was the acting Secretary of State when Jefferson took over, to answer his questions. Lincoln, of course, did not want to participate at all and made this intention plain. He requested that the court respect his right not to incriminate himself or to divulge matters pertaining to his official duties. He asked that the questions be submitted in writing and that he be given a day to answer them. This request was honored, but when he came back the next day with his answers, they did not reveal anything. A Federalist newspaper of the time, *The Washington Federalist,* chided him, printing that "this great man who, when sworn in the usual manner, was asked a simple question, but could not answer it until they gave it to him in writing, and he went off and spent a whole day and night . . . behind closed doors, and then only made out to remember that he had forgotten everything about it."

Nevertheless Lee did prove, to the satisfaction of the Court, that the commissions existed. Now it was up to John Marshall to do something about it. By this time, February 1803, it appeared that Marshall was caught in a seemingly no-win situation. Jefferson and the Republicans now had more to gain from this case than did Marshall and the Federalists. Either Marshall's decision would bring direct conflict between the Executive and the Judiciary at a time when Thomas Jefferson held all the high cards, or the Court would be forced to expose its weakness by validating the removal policies of Jefferson.

To decide this case against Jefferson would have been a very dangerous move. In the first instance if the *Writ of Mandamus* was issued, Jefferson most probably would have ignored it. The Supreme Court had no way of enforcing its decisions. Andrew Jackson, in 1832, once put it succinctly when the Marshall Court did something he did not agree with. He stated that "John Marshall has made his decision now let him go and enforce it." Such a move on Jefferson's part

during the infancy of the country would have exposed the inability of the Supreme Court to enforce its mandate against an Executive who ignored it. 1803 was a much more dangerous time for the Court to demonstrate weakness than was 1832. Judicial prestige would have been shattered before it ever had a chance to take root. To further complicate matters for Marshall, the Republicans in Congress were whipping themselves into a froth at the prospect of having a pretext for instituting impeachment proceedings against the Federalist Court on the grounds of partisanship. If Marshall had ordered the mandamus he stood a good chance of losing his job.

On the other hand, to decide this case against Marbury would vividly demonstrate that judicial power was a mirage from which no preservation of Federalist principles could be expected. Although this probably was a truism, a highly public humiliation, as it would have been viewed at the time, would also have exposed the underlying weakness of the Court and similarly shatter judicial prestige. It appeared that Marshall had no way out, but Marshall turned out to be the master of snatching victory from the jaws of certain defeat.

Marshall's resolution of the issue, for courage, statesmanlike foresight, and, indeed, for perfectly calculated audacity, has few parallels in judicial history. In two weeks time (although he did have the 14 month hiatus to think about it), he issued the opinion that all at once gave Jefferson the decision he wanted, the tongue lashing that the Federalists wanted for him, and, in no uncertain language, to the Supreme Court he gave the precedent for judicial review which he so desperately wanted.

The decision was a lengthy one. It comprised some 11,000 words and 154 paragraphs divided into three sections. In the first section Marshall asks if the applicant has a right to the commission he demands. Marshall devotes 48 paragraphs to this question and concludes the

answer to this is yes, he does have a right to it. "That by signing the commission to Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the appointment, and that the appointment conferred on him a legal right to the office for the space of five years."

In the second part of the opinion he asked "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?" He answered this question in 28 paragraphs concluding that "having this legal title to office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy." It was in this section that Marshall shredded Jefferson, lecturing the President at length about disobeying the laws of the country. To give added bite to this scolding, Marshall made his point using language laden with Jeffersonian rhetoric. (Rights of the people, limited government, etc.).

The third part of the opinion asked the question "if the laws of the country afford him a remedy, is it a *mandamus* issuing from this court?" Marshall answered this question in 32 paragraphs. He stated that Marbury was indeed entitled to a *Writ of Mandamus* but then added 46 paragraphs to explain why he could not have it. It is in this final part of the opinion where Marshall established his precedent for judicial review. It is this pronouncement that today we are taught created and established judicial review in the courts of the United States of America.

Marshall devised this precedent without relying on any cases that had reviewed statutes in the past, (i.e. *The Invalid Pensioners* cases) even though he was certainly aware of them. His arguments of why judicial review existed were nothing new. Most of it came directly out of

Federalist No. 78. Additionally, all of the arguments for and against judicial review had already played on the floor of the Congress a full year prior to the decision during the debate over the Repeal Act. Marshall just treated judicial review as an accomplished fact, which for the most part it was. It was irrelevant that the merits of the case did not necessitate this constitutional finding but rather it was the political implications that dictated it.

Marshall had to twist Section13 of the Judiciary Act of 1789 in order to reach the point he wanted to make. He could have easily construed the statute as not granting the Supreme Court original jurisdiction to hear a *mandamus* case. In fact, the clause discussing *mandamus* occurs within a sentence laying out the appellate jurisdiction of the Court. He could have dismissed the case on the grounds that the Court could only hear the case on appeal. He also did not have to construe Article III of the Constitution so narrowly as to insure a constitutional clash. In fact Marshall was known for giving very broad constructions to the Constitution in all opinions subsequent to *Marbury*.

The point was that he did not want to avoid the constitutional clash. *Marbury v. Madison* turned into his opportunity to pronounce, once and for all, in a decision of the Supreme Court, the power of judicial review, and to do it in such a way that he was untouchable as far as political backlash was concerned. If the pronouncement of judicial review had occurred in *Stuart v. Laird*, (the case concerning the Repeal Act of 1802), Marshall might have been impeached by the Republicans in Congress along with the rest of the Federalists on the Court. But by establishing the precedent for judicial review in the context of a decision favorable to Jefferson, his accomplishment was impenetrable. Most observers at the time did not realize the significance of

the event. Invalidating Section13 of the Judiciary Act of 1789 was the only new wrinkle Marshall added to the debate of judicial review.

The newspapers of the time clearly misunderstood the significance of what had happened. Most of the papers, both Republican and Federalist just printed the decision verbatim. Most Republican newspapers either printed the decision without editorial comment, or gloated over the victory of the President on the *mandamus* question because, after all was said, the *Writ of Mandamus* was not issued.

The Federalist newspapers seemed to be more impressed with the length of the decision rather than its content. They were as clueless to its import as the general public was. The *Alexandria Gazette* interpreted the decision to mean that the Court could not grant mandamus in Washington D.C., but if the question arose in one of the states there would have been no problem. Other Federalist newspapers were mostly excited by the tongue lashing that Marshall gave Jefferson.

With the hindsight of history it is difficult to imagine how little understood the decision was. This probably occurred because judicial review was not at the core of this case. Judicial review was at the center of the debate over the Repeal Act, and that had played out over a year earlier. The Republicans won that fight, and the passions over the issue had substantially cooled. Those passions were not reignited by what Marshall did. The statute that he invalidated was an arcane bit of judicature that no one, Federalist or Republican, cared much about. The Republicans perceived this event as having no relation to, or affect upon, their political agenda and, at the time, they were right.

Even the concept of judicial review that was established was rather limited. The only notion of finality which legitimately may be drawn from the opinion appears to be that which results from the fact that the statutory provision invalidated in the case is one which pertains to the Court's performance of its own functions.[67] The judicial review holding solely concerned jurisdiction of the Supreme Court, and did not affect any popular bit of legislation.

The limited exercise of judicial review that Marshall pronounced only concerned judicial independence, which was something the Jeffersonians begrudgingly accepted. Had they realized that it established a precedent that has justified the type of judicial review the Court exercises today, (*i.e*, judicial superiority over the other two branches of government), they might not have been so complacent. Jefferson, in later years would write that the part of the opinion that most riled him was not the assertion of judicial review but rather the lecture he received from Marshall, and the fact that the opinion stated that the Court could have, and would have, issued the *mandamus* to the Executive if it had had jurisdiction.

Several events happened subsequent to *Marbury* that knocked the issue right out of the spotlight. Within months Jefferson was entangled with the Louisiana Purchase, problems on the frontier, problems with Spain, and the Aaron Burr affair, to name just a few. *Marbury* rapidly faded from view. This was no accident because Marshall intentionally left the decision alone. He never would cite it for the preposition that the Supreme Court has the final say over what is the law of the land.

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67 Clinton, *The Strange History of Marbury v. Madison in the Supreme Court of the United States,* 8 ST. L. UNIV. PUB. L. REV. 13, 24 (1989).

IV. *Marbury v. Madison* as cited by the Supreme Court

The proposition that what *Marbury* stood for was very limited must have been shared by the Supreme Court during the 19th century. During Marshall's tenure on the court there were only ten references to *Marbury.*[68] Nine are jurisdictional in nature, reinforcing holdings as to the distribution of jurisdiction contained in Article III.[69] The remaining reference is made in support of the ruling that *Writs of Mandamus* may issue to executive officials only when engaged in the performance of purely ministerial duties.[70]

Further support for the idea that the Court's decision in *Marbury* was viewed by Marshall's contemporaries as but a step in the continuous clarification of the restrictive theory of judicial function, rather than an explosive decision establishing the power of judicial review is provided by examining the character of other constitutional decisions rendered by the Marshall Court in the early years.[71] An examination of constitutional cases throughout the remainder of the Marshall period tends to confirm the pattern set forth by the Court in the early years.[72] In substantive areas, the Court allowed wide latitude to the discretion of the people's representatives

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68 *Id.* at 28.

69 *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 100 (1807); *Id,* at 102-05 (Johnson, J., dissenting); McClung v. Silliman I, 15 U.S. (2 Wheat.) 369, 370-71 (1817); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 394, 399-402 (1821); McClung v. Silliman II, 19 U.S. (6 Wheat.) 598, 604 (1821); United States v. Ortega, 24 U.S. (11 Wheat.) 468, 471 (1826); *Ex Parte* Crane, 30 U.S. 190, 200, 202-04, 206, 208-210, 217, 219 (1831) (Baldwin, J., dissenting); *Ex Parte* Watkins, 32 U.S. 568, 572-73 (1833); Harrison v. Nixon, 34 U.S. 483, 510 (1835) (Baldwin, J., dissenting). *Cited* in Clinton at n. 86.

70 United States v. Arredondo, 31 U.S. 691, 729-30 (1832).

71 Clinton *supra* note 67, at 28, Clinton maintains that the entire constitutional output of the Court between 1801 and 1810, with the exception of two cases, dealt with purely jurisdictional issues. Four involved the federal diversity jurisdiction, three (including *Marbury*) decided questions pertaining to Article III's original/appellate distribution, three involved the general jurisdiction of the federal courts. Eight of these decisions (again including *Marbury*) may be plausibly construed as having narrowed the scope of federal judicial power, lending support to the proposition that self-restraint and extreme caution in asserting jurisdiction characterized the Supreme Court from 1801-1815. *Id.*

72 *Id,* at 29.

in Congress,[73] and in the states as well,[74] unless explicit violations of relatively unambiguous constitutional limitations were evident.[75] The preponderance of these decisions hardly reveals a Court desirous of expanding its authority at the expense of Congress, the Executive branch, or the states themselves. Rather they demonstrate a Court somewhat deferential to democracy, yet prepared to defend individual's rights against clear-cut excesses of government.[76]

In the years following Marshall's tenure on the Court until the end of the Civil War, *Marbury* is cited in fifteen separate opinions in the United States Reports. Once again the largest number of citations is found in the jurisdictional area.[77] Six concern nuances in the *mandamus* remedy,[78] but none of them even mention judicial review.[79] The Taney Court for the most part continued Marshall's policy of a limited judicial role with but one notable exception.

One of history's greatest paradoxes is the fact that the case that truly set the precedent for the Supreme Court having the power to nullify popular legislative acts (i.e., ones that do not concern judicial function), is the case of *Dred Scott v. Sandford* .[80] This is the infamous decision by the Supreme Court that outlawed the Missouri Compromise of 1820. The Court ruled that the

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73 *See, e.g.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); United States v. Fisher, 6 U.S. (2 Cranch) 358 (1805); The Flying Fish, 6 U.S. (2 Cranch) 170 (1804). *See* Clinton *supra* note 67 at n.97.

74 *See, e.g.,* Willson v. Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833); Providence Bank v. Billings, 27 U.S. (4 Pet.) 514 (1830).

75 *See, e.g.* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819). *See* Clinton *supra* note 67, at 29.

76 Clinton, *supra* note 67, at 30.

77 *Ex Parte* Whitney, 38 U.S. 404, 407 (1839); *In re* Metzger, 46 U.S. 176, 191 (1847); United States v. Chicago, 48 U.S. 185, 197 (1849) (Catron, J., dissenting); *In re* Kaine, 55 U.S. 103, 119 (1852); Florida v. Georgia, 58 U.S. 496, 505 (1854) (Curtis, J., dissenting); *Ex parte*, Wells, 59 U.S. 316, 317 (1855) (McClean, J., dissenting); *Ex parte* Vallandigham, 68 U.S. 243, 252 (1863); Daniels v. Railroad Co., 70 U.S. 250, 254 (1865).

78 Kendall v. United States, 37 U.S. (12 Pet.) 527, 617-18 (1838); *Id.* at 651 (Barbour, J., dissenting); *Id.* at 38 U.S. 609-12 (Catron, J., dissenting); Decatur v. Paulding, 39 U.S. 497, 513 (1840); *Id.* at 602 (Baldwin, J., dissenting); Reeside v. Walker, 52 U.S. 272, 291-92 (1850)

79 Clinton *supra* note 67, at 30.

Compromise was null and void because Congress did not possess the constitutional power to outlaw slavery in the new territories, and that such an act was an unconstitutional invasion of property rights. It is important to note for purposes of this discussion that the Supreme Court did NOT cite *Marbury v. Madison* as the precedent for its exercise of judicial review in the *Dred Scott* decision. It is not hard to see why *Dred Scott* never became the modern precedent for judicial review. The activist Courts of the latter part of the twentieth century found it much easier looking to the oratory of the "Great Chief Justice" to support the sweeping judicial activism in which it engaged rather than cite the most infamous decision in the Court's history, the decision that held that slaves were merely property and not people within the contemplation of the Constitution.

Between the years 1803 and 1865 the Court had, without exception, read *Marbury v. Madison* as having settled either a narrow jurisdictional question, or a technical issue relating to the *mandamus* remedy. *Marbury's* importance as a precedent for judicial review of legislation was never mentioned by the Court, not even in the only other case of the period wherein the Court invalidated an act of Congress. This pattern continued during the period extending from 1865 through 1894. During these years the Court invalidated national laws in no fewer than twenty cases,[81] yet *Marbury* is not cited in any of them.[82]

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80 60 U.S. (19 How.) 1.

81 Gordon v. United States 69 U.S. (2 Wall.) 561 (1865); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866); Reichart v. Phelps, 73 U.S. (6 Wall.) 160 (1868); The Alicia, 74 U.S. (7 Wall.) 571 (1869); Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870); United States v. DeWitt, 76 U.S. (9 Wall.) 41 (1870); The Justices v. Murray, 76 U.S. (9 Wall.) 274 (1870); Collector v. Day, 78 U.S. (11 Wall.) 113 (1871); United States v. Klein, 80 U.S. (13 Wall.) 128 (1872); United States v. Railroad Co., 84 U.S. (17 Wall.) 322 (1873); United States v. Reese, 92 U.S. 214 (1876); United States v. Fox, 95 U.S. 670 (1878); The Trade Mark Cases, 100 U.S. 82 (1879); United States v. Harris, 106 U.S. 629 (1883); The Civil Rights Cases, 109 U.S. 3 (1883); Boyd v. United States, 116 U.S. 616 (1886); Baldwin v. Franks, 120 U.S. 678 (1887); Callan v. Wilson, 127 U.S. 540 (1888); Counselman v. Hitchcock, 142 U.S. 547 (1892); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893).

82 Clinton *supra* note 67, at 32.

During that time period the instances where *Marbury* is cited relate primarily to the jurisdictional area, or to the *mandamus* remedy. A few of the citations refer to *Marbury's* distinction between political and ministerial acts of administrative officials. Two refer to the technical finality of acts within the Executive discretion. One refers to the equitable right/remedy maxim announced in the first section of the opinion.[83] Finally, it was not until 1887 in *Mugler v. Kanas*[84] that the Supreme Court, for the first time, cited *Marbury v. Madison* as precedent for the idea that courts may enforce constitutional limitations on legislative bodies.

Professor Clinton asserts that the Court's use of *Marbury* in this instance was inappropriate. He first claims that the Court used a passage of Marshall's opinion that originally stood for the premise that legislative acts contrary to the Constitution are void, to support the proposition that the courts have the power to refuse application of them. Second, adding insult to injury, the Court in *Mugler* then proceeds to employ *Marbury* in the service of the developing the doctrine of substantive due process by stating that "the courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty - indeed, are under a solemn duty - look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."[85] The foreshadowing to the *Lochner* era of substantive due process is a clear indication of the direction in which the Court was heading, and its use (or rather misuse) of *Marbury* in this context was the first link in a long chain of opinions that created the legend (or myth, as Professor Clinton prefers to call it) of *Marbury v. Madison*.[86]

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83 *See id.* at 33 and notes 119-23.

84 123 U.S. 623, 661 (1887).

85 *Id.,* at 661, *cited in* Clinton, *supra* note 67, at 34.

86 All this occurs in a passage that was essentially *obiter dicta*, since the actual decision in *Mugler* was merely the upholding of a state prohibition on manufacture and sale of intoxicating beverages. Clinton *supra* note 67, at 34

The first time the Court officially cites *Marbury v. Madison* as precedent for an actual exercise of its power to invalidate acts of Congress occurs in the *Income Tax Case* [87] in 1897. In that case, the Court cites *Marbury* to support the idea that "it is within judicial competency by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void accordingly."[88]

In sum, for the first hundred years or thereabout, at least as far as the Supreme Court was concerned, *Marbury v. Madison* did not mean what it has come to mean today. It was only in the twentieth century, and especially the latter part thereof that *Marbury* became the standard bearer for an activist Court. Between 1895 and 1957, *Marbury* is cited only 38 times, hardly more often than during the thirty year period immediately preceding 1895.[89] Of these 38 references only eight pertain to the judicial power to invalidate laws.[90]

It is fair to say then that although the Court began to notice *Marbury's* judicial review holding during the first half of the twentieth century, it continued to recognize the restrictive nature of that holding. Nowhere is there anything even approaching a declaration that the Court is the "final arbiter of constitutional questions."[91] On a broader scale, of the ninety-two citations of *Marbury* by Justices of the Supreme Court between 1803 and 1957, only ten refer to that part of

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87 157 U.S. 429, 554 (1894).

88 *Id., cited in* Clinton, *supra* note 67, at 35.

89 *Id.,* at 36.

90 Fairbank v. United States, 181 U.S. 283, 285 (1900); Dooley v. United States, 183 U.S. 151, 173 (1901) (Fuller, J., dissenting); Muskrat v. United States, 219 U.S. 346, 357 (1910); Myers v. United States, 272 U.S. 52, 139 (1926); Adamson v. California, 332 U.S. 46, 90 (1946) (Black, J., dissenting); United States v. Commodities Corporation, 339 U.S. 121, 124 (1949); Touhy v. Ragen, 340 U.S. 462, 468 (1950); Textile Workers v. Lincoln Mills, 353 U.S. 448, 464 (1956) (Frankfurter, J., dissenting).

91 Clinton *supra* note 67, at 38.

the Marshall opinion which has been said to have established the power of judicial review. *Marbury,* at least throughout most of its history in the Supreme Court of the United States, has been thought primarily to have settled other matters.[92]

What the Supreme Court of the United States has done subsequent to 1957, with respect to *Marbury*, stands as a radical departure from what was done prior to that year. Between 1958 and 1983 there are 89 separate citations of *Marbury*, a total which almost equals that of the previous 154 years.[93] Of these 89, fifty utilize *Marbury* in support of some kind of judicial review. Of these fifty, at least eighteen read *Marbury* as having justified sweeping assertions of judicial authority.[94] In addition, of these eighteen, nine cite *Marbury* in order to support the idea that the Court is the "final" or "ultimate" interpreter of the Constitution, with the power to issue binding proclamations to any other agency or department of government with respect to any constitutional issue.[95] It would thus appear that the legend that is *Marbury v. Madison* was established not by John Marshall or his contemporaries, but rather was established and developed by the Warren and Burger Courts. Modern constitutional scholars for the most part have just accepted the fable the Warren Court told.

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92 *Id.*

93 *Id.*

94 Cooper v. Aaron, 358 U.S. 1, 18 (1958); Clay v. Sun Insurance Office, 363 U.S. 207, 222 (1959) (Black, J., dissenting); Flemming v. Nestor, 363 U.S. 603, 626 (1959) (Black, J., dissenting); Hutcheson v. United States, 369 U.S. 599, 632 (1961) (Warren, C.J., dissenting); Glidden Co. v. Zdanok, 370 U.S. 530, 602 (1961) (Douglas, J., dissenting); Bell v. Maryland 378 U.S. 226, 244 (1963); Powell v. McCormack, 395 U.S. 486, 503 (1968); *Id.* at 549; *Id.* at 552 (Douglas, J.); Goldberg v. Kelly, 397 U.S. 254, 274 (1969) (Black, J., dissenting); Oregon v. Mitchell, 400 U.S. 112, 204 (1970) (Harlan, J., dissenting); McGautha v. California, 402 U.S. 183, 250 (1970) (Brennan, J., dissenting); Doe v. McMillan, 412 U.S. 306, 326 (1972) (Douglas, J., concurring); United States v. Watson, 423 U.S. 411, 443 (1975) (Marshall, J., dissenting); United States v. Santana, 427 U.S. 38, 45 (1976) (Marshall, Brennan, JJ., dissenting); Nixon v. Administrator of General Services, 433 U.S. 425, 503 (1977) (Powell, J., concurring); City of Rome v. United States, 446 U.S. 156, 207 (1979) (Rehnquist, J., dissenting); INS v. Chadha, 462 U.S. 919, 942 (1982). *Cited in* Clinton *supra* note 67, at n. 172.

95 *Cooper v. Aaron; Flemming v. Nestor; Glidden Co. v. Zdanok; Powell v. McCormack; Goldberg v. Kelly; Doe v. McMillan; Nixon v. Administrator of General Services; City of Rome v. United States; INS v. Chadha; supra* note 94.

V. Conclusion

As previously stated, it is easy to understand why *Marbury* was used in this manner by the activist Warren and Burger Courts. The true precedent for the type of judicial review that was invoked by these Courts was the *Dred Scott* case. Were it not for *Marbury* and Marshall's eloquence and stature as the "Great Chief Justice," the "Expounder of the Constitution" the precedent quite possibly would have had to have been *Dred Scott.* This certainly would have produced one of history's great and perverse ironies. The Warren and Burger Courts, which achieved so much in the area of civil rights and school desegregation, would have had to rely on the infamous decision that held that the black slaves were not people within the contemplation of the Constitution, in order to empower themselves to do it.[96]

The only irony that approaches that magnitude is the legendary myth that permeates the current state of constitutional law, namely that the power of judicial review, as exercised by the Supreme Court of the United States, was conceived by, and originates from, John Marshall's opinion in the case of *Marbury v. Madison*. And like other historic fables, students of Constitutional Law will likely still be taught this on the first day of class, and scholarly articles to the contrary probably will not change this state of affairs. An examination of the recent Court opinions, especially the nine mentioned above, reveals that each case, save *Cooper*, involved either the internal functioning of Congress, the internal functioning of the Executive, or the relation between the two.[97] In other words, each appears to constitute precisely the sort of case to which the historical *Marbury* bears no relation. This suggests that *Marbury* has indeed become a

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96 In the History of the Supreme Court there is only one citation that mentions *Dred Scott v. Sandford* and *Marbury v. Madison* in the same context and that case is Blyew v. United States, 80 U.S. 581 (1871) where the Court just notes that these were the only two cases, until that time, that had held an act of Congress to be unconstitutional.

myth; one which, like Plato's ignoble lie, imparts a flavor of time-honored truth to what really is a quite modern notion of judicial guardianship.[98]

97 Clinton *supra* note 67, at 43.

98 *Id.*