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The Story of *Marbury v. Madison*: Making Defeat Look Like Victory

One of the closest and most acrimonious elections in American history was followed by one of the most hotly debated constitutional decisions. Disputes over who won the election lasted months beyond Election Day. Although the two leading candidates generally behaved themselves with moderation and civility (and neither was an inspiring public speaker), their partisan supporters inflamed public opinion with charges of political and personal malfeasance. Each party viewed the other not as a legitimate democratic alternative, but as a deep-dyed danger to the Constitution. One party was accused of favoring the rich, of aggrandizing executive power at the expense of Congress, of fighting an illegal war unauthorized by Congress, of exaggerating national security concerns, trampling freedom of speech and press, and invading the rights of aliens in the interest of protecting the incumbent from dissent. The other party was accused of demagoguery, of “anarchy” and “sedition,” of weakening America’s military readiness, of lack of respect for religious and traditional constitutional values, of hostility to commerce and industry, and of dangerous naivete—if not outright enthusiasm—about the worldwide revolution that had already brought terror to one major nation and could spread disorder to our own.

Judicial appointments and philosophy were a major issue in the campaign. The incumbent President and his predecessor had named federal judges who uniformly shared their conservative philosophy. The challenger criticized those judges for favoring creditors and large landowners and supporting the prosecution of newspaper editors and other critics of the administration. Some judges appointed by the incumbent asserted the authority of the federal courts to convict citizens for

“crimes” not set forth in statutes passed by Congress. The challenger’s party denounced the undemocratic implications of a life-tenured federal judiciary, insulated from democratic accountability and armed with the powers to make law and to override the popular will.

Early election returns produced a virtual tie in electoral votes, with the nation sharply split along regional lines. The result hinged on the outcome in one southern state, where it took weeks for authorities to determine who won. On December 12, the result was announced: the Republican candidate had been elected.

But that was not the end of the matter. Under the peculiar voting rules of that era, electors each would cast two votes for President, with the leading candidate elected President and the runner-up Vice President. Because all the Republican electors cast their ballots for both the Republican candidates, Thomas Jefferson was tied with his running mate, Aaron Burr of New York. That threw the election into the lameduck House of Representatives, which was dominated by the Federalist Party of John Adams and Alexander Hamilton. That created a unique opportunity for a deal: Burr would be selected President, in defiance of the popular will, and he would return the favor by supporting the Federalists. (To their credit, neither Adams nor Hamilton supported the scheme.) For three months, the House was deadlocked. Federalist-dominated delegations from six states cast their ballots for Burr; Jefferson commanded eight state delegations; and two were split. It was as close as the nation would ever come to a coup, achieved in strict conformity to the forms of the Constitution. No wonder Jefferson denounced this plan as a usurpation, or that Virginia Governor James Monroe threatened to use the state militia to prevent Burr’s ascension to the Presidency.

In the midst of this regime crisis, President Adams and the defeated Federalists sought to protect the nation from the radical measures of their successors by securing a powerful and independent judicial branch, staffed by life-tenured judges loyal to Federalist principles.¹

Adams’ opportunity to shape the courts received a boost when Oliver Ellsworth, the third Chief Justice of the United States, resigned, and Adams’ first choice for his replacement, John Jay, declined the position. The President now turned to his most trusted cabinet officer, forty-five year old John Marshall of Virginia. More than any other person, Marshall was to shape the character of the federal judiciary. Though he had no prior judicial experience, Marshall had served with

¹ Sources discussing the Election of 1800 include Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (1971); James F. Simon, *What Kind of Nation?: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (2002); Frank Van der Linden, *Turning Point: Jefferson’s Battle for the Presidency* (2002).

distinction as a soldier in the Revolution, as a delegate to the Virginia ratifying convention, as a member of the House of Representatives, where he was leader of the moderate wing of the Federalist Party, as envoy to France during the XYZ Affair, and as Secretary of State, in which position he was chief architect of Adams' successful policy of reconciliation with France. Marshall was an uncommonly able lawyer, with an affable disposition that helped him to build coalitions and disarm his critics. Ominously, however, one of the few people with whom Marshall could not get along was his distant cousin, Thomas Jefferson, who had just defeated Adams for the presidency.²

Adams nominated Marshall as Chief Justice on January 20, 1801. After a one-week delay by High Federalist critics, Marshall was confirmed. In what now seems a bizarre mixture of roles, however, Marshall continued to serve as Acting Secretary of State for the remaining five weeks of Adams' presidency. In that capacity, he was to make a mistake, which precipitated the most famous constitutional decision of his career.

The next big move in President Adams' strategy to shore up the judiciary occurred precisely as the Jefferson–Burr contest reached its climax. On February 13, the Federalist Congress passed and Adams signed the Judiciary Act of 1801. The Act replaced an antiquated and inefficient federal judicial structure with a new system of circuit courts, and extended the scope of federal jurisdiction. No longer would Supreme Court Justices have to endure the discomforts and hazards of riding circuit, with appeals from their circuit court decisions going to their own Court. That system had proven slow, inefficient, and arguably unfair. In its place, there would be six new circuit courts, with sixteen new judges. Because these courts were capable of hearing cases regularly and conveniently throughout the nation, they enhanced the efficiency, fairness, and authority of the federal courts—and by the same token, their ability to compete with the state court system for prestige and authority.

Enactment of the Judiciary Act could be understood as good government reform, but the rushed circumstances of its passage in the lame-duck Congress and the immediate nomination and rapid confirmation of sixteen new life-tenured judges, all of them staunch Federalists, gave the Judiciary Act a partisan odor. With Jeffersonians soon to be in control of both the executive and legislative branches, Federalists believed that preservation of the checks and balances of constitutional government required that the judiciary be in other hands: their own. To add insult to injury, the statute reduced the size of the Supreme Court as of the next vacancy, thus denying the new President (whoever it would be, Jefferson or Burr) his first appointment. Jefferson was quick to perceive the partisan implications: “[the Federalists] have retired into the Judiciary

² See generally Jean Edward Smith, *John Marshall: Definer of a Nation* (1996); R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (2001).

as a stronghold . . . and from that battery all the works of Republicanism are to be beaten down and erased.”³

Four days after passage of the Judiciary Act, the Burr machinations came to an end. On the thirty-sixth presidential ballot, enough Federalist representatives cast blank ballots to enable the selection of Thomas Jefferson as the third President of the United States.

By this time, Adams’ major restructuring of the federal judiciary was complete. But one relatively minor part of the strategy was yet to be put in place. On Friday, February 27, a week before his presidency was to come to an end, Congress passed and Adams signed the Organic Act for the District of Columbia. This Act created the position of justice of the peace in the new District of Columbia. It should not be assumed that these were petty offices. The justices of the peace were the principal arm of local government in the two counties of the District, combining executive, judicial, legislative, and administrative power. Above all, they were responsible for maintaining public order. No one observing recent events in Paris could think that maintenance of public order in the national capital lacked political significance. The justices of the peace were to serve for five-year terms, conveniently extending just beyond the term of the new President.

Over the weekend, Adams collected names of promising appointees. He relied particularly on the recommendations of Benjamin Stoddert, his Secretary of the Navy and a leader of the moderate Federalists of Maryland, for the names of justices of the peace to serve in Washington County, which was carved out of Stoddert’s state, and on Levan Powell, Federalist congressman from Virginia, for Alexandria County nominations. On Monday, he submitted forty-two names to the Senate. Contrary to some historians, the justice of the peace nominees were a bipartisan mix: six of Adams’ twenty-three nominees in Washington County were Republicans. Among the nominees were such distinguished figures as six-term Maryland governor Thomas Sim Lee, former Senator Tristram Dalton, outgoing Secretary of the Navy Benjamin Stoddert himself, former Georgetown Mayor and U.S. Representative Uriah Forest, and Architect of the Capitol William Thornton. Best known to posterity, however, is a 38-year old Georgetown businessman who never ran for office: William Marbury.⁴

Marbury was an experienced public official as well as a self-made, successful banker and investor. He had served as Agent of the State of

³ Letter from Thomas Jefferson to John Dickinson, Dec. 19, 1801, in 10 *The Writings of Thomas Jefferson* 302, 302 (Albert E. Bergh ed., 1907) [hereinafter “Writings of Jefferson”].

⁴ Information in this and the following paragraph comes from David F. Forte, *Marbury’s Travail: Federalist Politics and William Marbury’s Appointment as Justice of the*

Maryland, the state's highest unelected official, responsible for organizing and collecting the debts of the state. During the Whisky Rebellion, he led the Annapolis militia to put down an uprising in western Maryland. Later, he was a principal in the Potomac Company, headed by George Washington, a company founded to build a canal linking the Potomac to the Ohio River. In 1798, Marbury moved from Annapolis to Georgetown, where he had been elected Director of the Bank of Columbia and hired by Stoddert as agent to the Washington Navy Yard, responsible for finance and procurement. Marbury's political loyalties are revealed in the name he chose for his youngest son: Alexander Hamilton Marbury. They are also evident in newspaper reports of his behavior the night Jefferson was proclaimed President-elect. Republican demonstrators marched through Georgetown compelling citizens to illuminate their houses to celebrate the event. Even some prominent Federalists succumbed to the pressure. The *Washington Gazette* reported, however, that Marbury defied the demonstrators, leaving his residence dark, and "the mob left him imprecating vengeance."⁵

By the close of business on Tuesday, March 3, 1801, the day before Jefferson was to take office, Adams' nominees to the position of justice of the peace were confirmed by the Senate—so quickly that some of them had not been informed of their nomination, and declined to serve. Adams remained hard at work until about 9:00 p.m., signing commissions. He went to bed early, and arose at 4:00 a.m. to depart the capital without having to witness the awful event of Jefferson's inauguration. As Adams signed the papers, aides transported them to the Department of State, where the Acting Secretary of State—John Marshall himself—affixed the Great Seal.

Precisely what happened to the commissions is not clear. Some were delivered. Marshall's younger brother James—himself a newly commissioned Circuit Judge for the District of Columbia—delivered a few to appointees in Alexandria, where there were concerns about the possibility of disruptive political celebrations. Other commissions lay undelivered. Later, John Marshall explained that he was short-handed that night because two State Department aides were assisting the President. Besides, he considered delivery legally inconsequential, once they had been signed and sealed.⁶ That was a fateful error.

Peace, 45 *Cath. U. L. Rev.* 349 (1996). See also John A. Garraty, *The Case of the Missing Commissions*, in *Quarrels That Have Shaped the Constitution* (John A. Garraty ed., 1962).

⁵ See Forte, *supra* note 4 at 397 n.253 (quoting *Washington Gazette*, Feb. 25, 1801) (in turn quoting a letter dated Feb. 18, 1801).

⁶ Letter from John Marshall to James Marshall, Mar. 18, 1801, in 6 *The Papers of John Marshall* 90 (Charles F. Hobson & Fredrika J. Teute eds., 1990) [hereinafter "Marshall Papers"].

When Jefferson took office the next day, a sheaf of commissions were discovered in the offices of the Department of State. Among them was William Marbury's. Interestingly, James Madison, whose name graces Marbury's famous constitutional case, was still in Virginia, settling the estate of his father, who had died the week before. He did not take office until May.⁷ Jefferson ordered his Acting Secretary of State, Attorney General Levi Lincoln, to withhold the undelivered commissions. It is likely that Jefferson had them destroyed. He also reduced the number of justices of the peace (as the statute allowed) and nominated Republicans in place of many of Adams' appointees, thus removing almost all the staunch Federalists from the position.

These actions attracted little attention at the time. In his inaugural address, Jefferson emphasized reconciliation between the parties—"We are all Republicans: we are all Federalists"—and the justices of the peace of the District of Columbia were small potatoes. Not until nine months later did Federalist strategists make an issue in court of Jefferson's disposition of the commissions.

Adams' appointees to the federal courts soon served notice that judicial independence would be a thorn in the side of the new administration. In *Wilson v. Mason*,⁸ Marshall's first constitutional decision, the Supreme Court made clear that it would be the ultimate authority in land disputes between local settlers and nonresident land companies. This was one of the flashpoints in the Jeffersonian–Federalist war over the judiciary, because small farmers and settlers (mostly Jeffersonians) preferred the more politically accountable state courts to the distant and more legalistic federal courts. In *The Schooner Betsy*,⁹ the Court staked its claim to authority in matters of foreign affairs. In both cases, Marshall used his characteristic tactic (evident later in *Marbury v. Madison*¹⁰) of avoiding confrontation by coupling the assertion of authority, which the Jeffersonians feared, with a narrow result which the Jeffersonians desired.

Perhaps more threatening was the decision of the new Circuit Court for the District of Columbia, by party-line vote, to order the prosecutor to initiate a libel prosecution against the editor of the Republican *National Intelligencer*, based solely on the common law. The editor had published a letter defending Jefferson and criticizing the courts. The judges voting for the order were James Marshall, the younger brother of the Chief Justice, and Abigail Adams' nephew, William Cranch. The legal

⁷ See Simon, *supra* note 1, at 174.

⁸ 5 U.S. (1 Cranch) 45 (1801).

⁹ *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

¹⁰ 5 U.S. (1 Cranch) 137 (1803).

doctrine on which they based the prosecution—federal common law—implied that the federal courts could exert power even without authorization by Congress.¹¹ Although the Republican District Attorney declined to prosecute the case,¹² the episode made clear that the Federalists were prepared to use the circuit courts to their advantage.

Republican stalwarts—to some extent supported by their new President—were plotting a counter-strategy to undo the edifice of the Federalist judiciary. In June, Jefferson received a letter from his congressional ally, William Branch Giles:

What concerns us most is the situation of the Judiciary as now organized. It is constantly asserted that the Revolution is incomplete, as long as that strong fortress is in possession of the enemy; and it is surely a most singular circumstance that the public sentiment should have forced itself into the Legislative and Executive Department, and that the Judiciary should not only not acknowledge its influence, but should pride itself in resisting its will, under the misapplied idea of “independence.”¹³

Republicans proposed to attack judicial life tenure by removing the new circuit judges from office by statute and by threatening sitting judges with impeachment. They proposed to repeal the Judiciary Act of 1801 and thus to return to the weak and inefficient structure of the pre-1801 judiciary. They denied the authority of federal judges to act on the basis of common law in the absence of statutes, especially in criminal cases. Some of them even denied the power of the judiciary to review the decisions of Congress or the Executive on constitutional or (in the case of the Executive) other legal grounds.

The disagreement over the judiciary went to the heart of American constitutionalism. Was the Constitution, as the Republicans believed, principally an instrument of popular government, in which the will of the people should control even the question of constitutional meaning? Or was the Constitution, as the Federalists believed, principally an instrument of the rule of law, to be enforced by independent judges even in the face of popular opposition?

In his first annual message to Congress, on December 8, 1801, Jefferson laid down the gauntlet: “The Judiciary system of the United States, and especially that portion of it recently erected, will of course,

¹¹ See Simon, *supra* note 1, at 150.

¹² See 1 Charles Warren, *The Supreme Court in United States History 195–97* (Fred B. Rothman ed., 1987) (1926).

¹³ Letter from William Branch Giles to Thomas Jefferson, June 1, 1801, quoted in Ellis, *supra* note 1, at 20–21.

present itself to the contemplation of Congress.”¹⁴ Republicans moved quickly to repeal the Judiciary Act of 1801. Debate in the Senate occupied the entire month of January, 1802. It was one of the most heated constitutional debates in our history, and the one most clearly directed to the constitutional role of the federal courts. Interestingly, it was the first Senate debate to be transcribed and published—and the contract to do so was given to the same editor threatened with libel prosecution by Judges Marshall and Cranch.

Shortly after Jefferson’s message, on December 16, 1801, Charles Lee, a Virginia Federalist who had served as Attorney General under both Washington and Adams, appeared in John Marshall’s Supreme Court to request a writ of mandamus to compel the Secretary of State, Madison, to deliver a copy of his commission to Marbury and three other Adams appointees to justice of the peace, Dennis Ramsay, William Harper, and Robert Townshend Hooe. Jefferson’s Attorney General, Levi Lincoln, who happened to be in court, stated that he had no instructions regarding the case. After consulting with his colleagues, Marshall set the case for argument in the next Term of Court. No one could have expected this minor matter would make constitutional history. At the time, the debate over repeal of the Judiciary Act of 1801 commanded center stage.¹⁵

Federalists in Congress argued that the repeal would be unconstitutional, essentially on two grounds. First, they argued that the requirement of circuit riding by Supreme Court Justices in ordinary cases violated the provision of Article III granting the Supreme Court appellate jurisdiction in most cases and original jurisdiction in only a few, narrowly defined areas. *Hayburn’s Case*¹⁶ had already established that it was unconstitutional for Congress to assign the Court duties other than those prescribed by Article III, and Congress had acquiesced in that judgment. This could be seen as a variant on that principle. Second, Federalists argued that removal of the newly appointed Circuit Judges would violate the constitutional provision of life tenure for Article III judges. This, they stressed, was a direct threat to the principle of an independent judiciary. “What will be the effect of the desired repeal?” asked constitutional framer Gouverneur Morris, now Senator from New York. “Will it not be a declaration to the remaining judges that they hold their offices subject to your will and pleasure? And what will be the result of this? It will be, that the check established by the Constitution,

¹⁴ Thomas Jefferson, Message to Congress, in 9 *Works of Thomas Jefferson* 321, 340 (Paul L. Ford ed., 1904).

¹⁵ Much of the following account of the debate is based on James M. O’Fallon, *Marbury*, 44 *Stan. L. Rev.* 219 (1992).

¹⁶ 2 U.S. (2 Dall) 408 (1792).

wished for by the people, and necessary in every contemplation of common sense, is destroyed.”¹⁷

After a month of debate, the Senate approved the Repeal Act by a vote of 16–15, over the constitutional objections of the Federalists. The House followed suit by a vote of 59–32. Jefferson signed the bill in early March. Almost immediately, eleven of the judges who had lost their jobs petitioned Congress for redress—a reminder of the older view that Congress was the first line of defense for vindication of constitutional principles. They were rebuffed, quickly in the House and by a party line vote in the Senate.

Attention now turned to the judiciary, and particularly to the Supreme Court. In cases in the 1790s the Court had shown itself willing to address the constitutionality of Acts of Congress. Because the Judiciary Act repeal affected the judiciary itself, the matter fell within even the narrowest conception of judicial review, the conception that each branch could protect its own constitutional powers from the assaults of the other branches. The Supreme Court Justices could respond to the Repeal Act either by refusing to ride circuit or by holding that the removal of the new circuit judges had been unconstitutional.

In the resolution of these great issues, the *Marbury* litigation was a sideshow. Few people cared whether Adams’ appointees were seated as justices of the peace. By the time the case was argued, Congress had stripped the office of much of its power and pay, and two of the five years of the term had already passed. It seems unlikely that, by this point, even the four petitioners cared much about the job. The great question of the day was whether the judiciary would defy the popular will and strike down the Judiciary Act repeal. Presumably to forestall such a decision, Congress passed another bill canceling the Supreme Court’s June Term, thus postponing the next meeting of the Court for more than a year, to the second Monday of February, 1803. “Are the gentlemen afraid of the judges?” asked Delaware Federalist James Bayard, a close friend of Marshall. “Are the gentlemen afraid that they will pronounce the repealing law void?”¹⁸

Whether Congress was afraid of the Judges, Republican members of Congress hoped to make the Judges afraid of the Congress. “If the Supreme Court shall arrogate this power to themselves, and declare our law to be unconstitutional,” warned John Nicholas of Virginia, “it will then behoove us to act. Our duty is defined.”¹⁹ By postponing the next Term of the Supreme Court, Congress forced each of the Justices to decide, individually, whether to comply with the new law and return to

¹⁷ 11 Annals of Cong. 38 (1802)(speech of Gov. Morris).

¹⁸ Quoted in Simon, *supra* note 1, at 168.

¹⁹ 12 Annals of Cong. 438 (1802).

circuit duty. This exposed each Justice, individually, to the wrath of Congress if he did not.

To drive home the point, the Jeffersonians opened a second front in their campaign against an independent and powerful judiciary. The week before the Supreme Court resumed its duties in February, 1803, Republican House leaders commenced impeachment proceedings against Judge John Pickering of New Hampshire. Pickering was an inspired choice for the first judicial impeachment proceeding. He had committed no “high crime or misdemeanor.” But he was a drunk and arguably insane, thus an ideal test case for the proposition that Congress could use the impeachment club in cases beyond the seemingly strict language of the Impeachment Clause. After convicting Judge Pickering, the Jeffersonians were expected to go after a bigger and more significant target, probably Supreme Court Justice Samuel Chase, the most uncompromising Federalist on the High Court. Between dismissing the circuit judges and mounting a credible threat of impeachment of the Supreme Court Justices, the Jeffersonians hoped to deflate the judiciary’s arrogant pretensions to independence from the will of the people.

The Justices got the message. Marshall wrote a letter to each of his colleagues soliciting their views on the circuit riding question. In his letter, he stressed that

This is not a subject to be lightly resolved on. The consequences of refusing to carry the law into effect may be very serious. For myself personally I disregard them, and so I am persuaded does every other Gentleman on the bench when put in competition with what he thinks his duty. But the conviction of duty ought to be very strong before the measure is resolved on.²⁰

Even Chase, the Court’s most combative Federalist, commented that “[t]he burthen of deciding so momentous a question, under the present circumstances of our country, would be very great on all the Judges assembled, but an individual Judge, declining to take a Circuit, must sink under it.”²¹ By the time the Court met as a body, each of the Justices had ridden circuit, and four of them, including Marshall, had ruled against the claim that removal of the circuit judges by the Repeal Act had been unconstitutional. Far from reflecting a confident and assertive judiciary, therefore, *Marbury* must be understood as the product of a defeated and demoralized Court.

Marbury has been taught to generations of law students as establishing the authority of the courts to decline to enforce a statute they

²⁰ Letter from John Marshall to William Paterson, Apr. 19, 1802, in 6 *Marshall Papers* 108, 109.

²¹ Letter from Samuel Chase to John Marshall, Apr. 24, 1802, in 6 *Marshall Papers* 109, 116.

deem to be unconstitutional. At the time, however, that proposition was not particularly controversial. After the Anti-federalist “Brutus” issued his prescient warnings about the anti-democratic implications of constitutional judicial review during the fight over ratification,²² the proposition that courts could disregard unconstitutional legislation became more or less conventional wisdom during the 1790s.²³ Although not reflected in the text of Article III—an omission that some historians attribute to uncertainty and disagreement—debate at the Constitutional Convention and again in the First Congress over the Bill of Rights presupposed the authority of the courts to engage in some form of judicial review. Both Madison and Jefferson spoke in favor of judicial review during the early years. Indeed, Jeffersonians were disappointed that the courts were not more inclined, during the 1790s, to invalidate legislation they thought unconstitutional, such as the carriage tax or the Alien and Sedition Acts. When they were out of power, judicial review appeared to be a useful check. Only when the Jeffersonians assumed control over the legislative and executive branches and saw their political rivals in control of the judiciary did they entertain serious reservations about judicial review.

The scope of judicial authority to review the constitutionality of Acts of Congress surfaced repeatedly during the debate over the Repeal Act. Federalists tended to take an expansive view of that authority. According to them, judicial review is an essential part of the structure of the Constitution and the courts’ judgment is final. The judges “are intended to stand between the Legislature and the Constitution, between the Government and the people; they are intended to check the Legislature. Should the Legislature even surmount the barrier of the Constitution, it is the duty of the judges to repel it back within the bounds which limit its power,” according to a North Carolina Federalist.²⁴ Gouverneur Morris stated that “[t]he decision of the Supreme Court is, and, of necessity, must be final. This, Sir, is the principle, and the source of the right for which we contend.”²⁵

During the Repeal Act debates, most Jeffersonians hewed to a moderate middle. Under this view, judicial review was an implication of the principle that each department of government had authority to make independent constitutional judgments in the course of discharging its

²² Brutus, Essay XV, in 2 *The Complete Anti-Federalist* 437–42 (Herbert Storing ed., 1981).

²³ Much of the following is based on David E. Engdahl, *John Marshall’s “Jeffersonian” Concept of Judicial Review*, 42 *Duke L.J.* 279 (1992), and O’Fallon, *supra* note 15.

²⁴ 11 *Annals of Cong.* 859 (1802) (speech by Rep. William Hill).

²⁵ *Id.* at 180 (speech by Sen. Gov. Morris).

own duties. Within the confines of a case or controversy, the courts had authority to determine which of two competing laws applicable to the case—the statute or an inconsistent constitutional provision—controlled the outcome. But this did not imply any special or final, let alone exclusive, power of “judicial” review. The other branches faced similar issues of legal and constitutional interpretation in the course of performing their duties. The Constitution was final and authoritative, but its meaning was to be determined by each branch within its own scope of authority, and ultimately by the people. This has become known as “departmentalism” or “co-ordinate review.” A few years after *Marbury*, Jefferson put it this way:

The Constitution intended that the three great branches of the government should be co-ordinate, and independent of each other. As to acts, therefore, which are to be done by either, it has given no control to another branch. . . . Where different branches have to act in their respective lines, finally and without appeal, under any law, they may give to it different and opposite constructions.²⁶

Madison put it this way:

I suppose an exposition of the Constitution may come with as much propriety from the Legislature, as any other department of the Government. . . . I acknowledge, in the ordinary course of Government, that the exposition of the laws and constitution devolves upon the Judiciary. But, I beg to know, upon what principle it can be contended, that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments? . . . I do not see that any one of these independent departments has more right than another to declare their sentiments on that point.²⁷

According to Jeffersonians, coordinate review gave triple security to individual rights. Any denial of life, liberty, or property required first that the legislative branch consider the limitation constitutional, second that the executive bring charges (which it would not do if the restriction were not constitutional), and third that the court—meaning both judge and jury—deem it constitutional. No one branch had authority to determine constitutionality for all. In 1820, Jefferson declared it “a very dangerous doctrine indeed” that judges would be deemed “the ultimate arbiters of all constitutional questions.”²⁸

²⁶ Letter from Thomas Jefferson to George Hay, June 2, 1807, in 11 *Writings of Jefferson* 213, 213–14.

²⁷ 1 *Annals of Cong.* 479, 520 (Joseph Gales ed., 1789) (speeches by Rep. James Madison).

²⁸ Letter from Thomas Jefferson to William C. Jarvis, Sep. 28, 1820, in 15 *Writings of Jefferson* 276, 277.

For the most part, Republicans in Congress parroted the Jeffersonian line on judicial review. A Maryland Republican, for example, declared that “judges ought to be the guardians of the Constitution, so far as questions were constitutionally submitted to them” but that the Legislative, Executive, and Judiciary, each were “severally the guardians of the Constitution, so far as they were called on in their several departments to act.” He added that he had “not supposed the judges were intended to decide questions not judicially submitted to them, or to lead the public mind in Legislative or Executive questions.”²⁹

Arch-Jeffersonian John Breckinridge of Kentucky was the first member of Congress to deny the power of courts to refuse to enforce an Act of Congress they deemed unconstitutional. The Legislature, he said, “have the exclusive right to interpret the Constitution, in what regards the law-making power, and the judges are bound to execute the laws they make.”³⁰ This was a minority view, even among Republicans. A Massachusetts Republican, for example, responded to Breckinridge:

However I may differ in opinion from some with whom I have the honor generally to agree, I may not deny, but must frankly acknowledge the right of judicial officers of every grade to judge for themselves of the constitutionality of every statute on which they are called to act in their respective spheres. This is not only their right, but it is their indispensable duty thus to do. Nor is this the exclusive right and indispensable duty of the Judiciary department. It is equally the inherent and the indispensable duty of every officer, and I believe I may add, of every citizen of the United States.³¹

Federalists shrewdly responded that without judicial review, state governments would be at the mercy of the national Congress, and there would be no effectual protection against “consolidated [g]overnment.”³² This was a reminder that Jeffersonians, no less than Federalists, sought judicial protection when their cherished principles did not prevail in the political process.

The combination of broad judicial review with federal common law was particularly unsettling to Jeffersonian principles of popular sovereignty. Common law was judicial governance in the absence of legislation; judicial review was judicial governance in defiance of legislation. A life-tenured, unelected judiciary armed with both powers was dangerously close to an aristocracy. One Republican congressman worried:

²⁹ 11 Annals of Cong. 115 (1802) (speech by Sen. Robert Wright).

³⁰ *Id.* at 179 (speech by Sen. John Breckinridge).

³¹ *Id.* at 982 (speech by Rep. John Bacon).

³² *Id.* at 180 (speech by Sen. Gov. Morris).

Give the Judiciary this check upon the Legislature; allow them the power to declare your laws null and void; allow the common law, a system extending to all persons and all things, to be attached to the Constitution, as I understand it is contended; and in vain have the people placed you upon this floor to legislate. . . .³³

From the vantage point of 200 years, it seems obvious that *Marbury* must be connected to this debate. But counsel's argument in *Marbury* had nothing to do with judicial review of legislation, and the holding of *Marbury* regarding judicial review was nothing out of the ordinary. It more or less reflected the consensus of Federalists and moderate Republicans. The real novelty of *Marbury* was its assertion of authority to issue affirmative commands to the executive.³⁴ Marshall's order to show cause implied the power of the courts to direct the President regarding his conduct of the executive office. DeWitt Clinton of New York accurately described the case at the time as "involving a right [of the Supreme Court] to control the Executive."³⁵ The Constitution charges the President—not the courts—with the duty to "take Care that the laws be faithfully executed." Although the courts were a check against unconstitutional executive action, such as an unlawful prosecution or seizure of property, it was not obvious that the courts could order an executive officer to take an action, such as providing William Marbury with a copy of his commission. Under Jefferson's theory that each branch has the duty to decide constitutional and legal questions that fall within its own sphere of authority, the Court was overstepping its bounds if it told the President how to conduct his Article II, Section 3 power of commissioning officers of the United States.

Jefferson and Madison expressed their view of the illegitimacy of the proceeding in the most eloquent possible way. They did not bother to show up. Madison, the nominal defendant, went unrepresented: a dramatic way of showing that the Administration did not recognize the Court's jurisdiction over a cabinet officer in the exercise of his executive responsibilities.

Marbury was scheduled for trial on February 9, 1803. Also on the Court's docket was the far more important case, *Stuart v. Laird*,³⁶ a direct challenge to the constitutionality of the Repeal Act. *Marbury* did not seem of much consequence.

³³ *Id.* at 552–53 (speech by Rep. Thompson).

³⁴ See Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 Va. L. Rev. 1111, 1114–17 (2001).

³⁵ 12 Annals of Cong. 48 (1802) (speech by Sen. DeWitt Clinton).

³⁶ 5 U.S. (1 Cranch) 299 (1803).

There ensued one of the oddest proceedings in the history of American litigation.³⁷ Only four of the six Justices attended the entire proceeding. The Court met in a cramped, sparsely furnished committee room in the Capitol, and later adjourned to Stelle's Hotel for the convenience of the ailing Justice Chase. The first order of business in the case was to establish that Marbury, Ramsay, Harper, and Hooe had been appointed and commissioned, but that the commissions had not been delivered. This was surprisingly difficult to prove. The Republican-dominated Senate had refused to provide them with an official record of their nomination and confirmation, and the State Department declined to provide the relevant documents. But what made the proceeding exceptionally odd was that the person most intimately acquainted with the facts—the person who would have been the best witness, the person responsible for the fiasco—was sitting in the presiding chair as Chief Justice. The nominal defendant, Madison, had nothing to do with the affair. Jefferson's Acting Secretary of State on the morning in question, Levi Lincoln, was now Attorney General. Everyone in court knew exactly what had happened, but no one could, or would, provide the formal evidence.

Charles Lee first called the two State Department clerks who had assisted with the commissions. After initially refusing to testify, the clerks coyly claimed not to know what had happened to the petitioners' commissions. Lee then called Levi Lincoln to the stand. Lincoln was reluctant to testify. He invoked the privilege against self-incrimination. (Did he fear that destruction of the commissions was a criminal offense?) More to the point, he warned that certain persons he "highly respected"—presumably Jefferson and Madison—thought it improper for a cabinet secretary to be haled into court to testify "to facts which came to his knowledge officially." If either side had pressed the point, *Marbury* might have become a showdown over the unsettled question of executive privilege, anticipating Aaron Burr's treason trial³⁸ and the Nixon tapes case.³⁹ But Lee and Lincoln came to an accommodation. Lincoln agreed to consider written questions.

The next day, Lincoln answered three of the four questions Lee propounded. He stated that he had seen "a considerable number" of completed commissions in the State Department office the morning of March 4, but could not identify whether the petitioners' commissions were among them. He stated that he had not given the commissions to Madison, his successor. Chief Justice Marshall discreetly permitted Lin-

³⁷ The following description of the proceedings is primarily derived from Smith, *supra* note 2; Simon, *supra* note 1, and William Cranch's U.S. Reports.

³⁸ *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692-D).

³⁹ *United States v. Nixon*, 418 U.S. 683 (1974).

coln to decline to tell what actually happened to them. Based on affidavits from James Marshall and another clerk, however, Lee declared that he had “proved the existence of the commissions.”

Lee then argued his legal points. Deliberately tailoring his argument to the Repeal Act controversy, Lee emphasized the theme of judicial independence. From the Federalists’ perspective, Jefferson’s refusal to allow Marbury to serve his five year term as justice of the peace presented the same issue, in miniature, as the Repeal Act’s displacement of life-tenured circuit judges. In both cases, the Administration was willing to defy the law in order to wrest control over the institutions of justice. Moreover, although Lee did not argue the point, the constitutional issue on which *Marbury* ultimately was decided was essentially the same as that posed by the return to circuit riding: whether it was constitutional for Congress to give Supreme Court Justices original jurisdiction beyond that authorized by Article III.

The Court then retired to consider its decision. The options did not appear propitious. If the Court decided in favor of Marbury, it was almost certain that Jefferson would refuse to comply. That would establish a precedent that the courts have no authority over the President. Moreover, it seemed likely that Congress would take this act of judicial impudence as an occasion for impeachment proceedings. The independent judiciary would be proven feckless, and then destroyed. On the other hand, if the Court decided against Marbury, it would reveal itself a paper tiger. Either way, Jefferson would emerge victorious.

Marshall’s solution to this dilemma was strategically brilliant, even if not quite sound from a strictly legal point of view. He held, first, that Marbury was entitled to his commission. This was probably not correct. Justices of the peace were not Article III officers and did not have life tenure. The statute gave the President the right to determine the number of justices of the peace, and Jefferson had exercised that power by reducing the number from forty-three to thirty. Moreover, the Supreme Court was to hold more than 100 years later, all officers of the federal government exercising executive authority serve at the will of the President.⁴⁰ The statutory five year term of office for the justices of the peace was inconsistent with this, since it had the effect of requiring the President to submit new nominees (or reappoint old ones) every five years.

Marshall held, second, that Marbury was entitled to the writ of mandamus as a remedy for deprivation of his office. In modern constitutional pedagogy, this is generally passed over as an inconsequential feature of the opinion, but it may have been the most momentous and most questionable part. The writ of mandamus was available only for the

⁴⁰ See *Myers v. United States*, 272 U.S. 52, 163–64 (1926).

compulsion of “ministerial” duties. Was it merely “ministerial” for the Secretary of State to defy a direct order of the President, with regard to a matter (commissioning officers of the United States) committed to the President by Article II? Was it “ministerial” to commission a person to a job that was either eliminated or already filled? Moreover, even aside from these details, it was a significant step to hold that the courts have authority to issue affirmative orders to the Executive. One might think the relations between the courts and the two other branches are symmetrical. While the courts have authority to refuse to give effect to Acts of Congress deemed unconstitutional, they have never been thought to have power to require the Legislative Branch to act—“ministerially” or otherwise. Why is the Executive different? Jefferson believed that each branch of government was responsible for interpreting the law relevant to its own operations, and specifically that the President was charged with enforcement of the law within the Executive branch. A few years after *Marbury*, Jefferson’s Attorney General Caesar Rodney issued an opinion declaring that federal courts do not have authority to issue writs of mandamus to executive officers:

Writs of this kind, if made applicable to officers indiscriminately, and acts purely ministerial, and executive in their nature, would necessarily have the effect of transferring the powers vested in one department to another department. If, in a case like the present, where the law vests a duty and a discretion in an executive officer, a court can not only administer redress against the misuse of the authority, but can previously direct the use to be made of it, it would seem that under the name of a judicial power, an executive function is necessarily assumed, and that part of the constitution perhaps defeated, which makes it the duty of the president to take care, that the laws be faithfully executed.⁴¹

Thus, the Jefferson Administration formally declared its intention not to comply with this holding of the Court. It was not until the 1840s that the Court would again assert the power to direct an executive officer to do his duty, and not until passage of the Administrative Procedure Act that this became routine.

Third, Marshall declared that it was unconstitutional for Congress to assign the mandamus power, a species of original jurisdiction, to the Supreme Court. This, too, was problematic. Textually, the holding was based on a strained reading of the Exceptions Clause of Article III, which appears to permit Congress to “make exceptions” to the original allocation of jurisdiction between original and appellate jurisdiction. Moreover, the power of the Court to issue writs of mandamus as a matter of

⁴¹ Report of the Attorney General of the United States, July 15, 1808, in *Aurora General Advertiser*, No. 5464, at 2-3 (Aug. 9, 1808) (William J. Duane & Co., pub.).

original jurisdiction was imparted by the First Congress, and had been exercised on several occasions during the 1790s. It is hard to square the holding that this was unconstitutional with the Court's unanimous holding, a week later, that establishment by the First Congress and subsequent acquiescence by the Court had legitimized the practice of circuit riding. Perhaps this was the Court's subtle way of suggesting that its latter holding was a bow to pressure rather than a decision of principle.

Marshall ended the opinion with the ringing defense of judicial review for which it is famous:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.⁴²

None of this went beyond the well-accepted middle ground. Marshall did not assert the exclusive power of courts to interpret the Constitution, or even the finality of their decisions, outside of the "particular case." He was careful to limit the practice of judicial review to cases of a judicial nature. (The greater scope of judicial review authority today is not attributable to any change in constitutional theory, but to an expansion in the forms of action, such as the writ of injunction.) He suggested that, in the exercise of this power, courts should not act in doubtful cases, and should accord deference to the judgments of the politically accountable branches.

Marshall's discourse on judicial review seemed less momentous to his contemporaries than it appears to us today. Jefferson, for example, criticized the decision not for its exercise of judicial review, but for the Court's decision to reach questions on the merits despite the Court's admitted lack of jurisdiction, and its criticism of his own decision to withhold the commissions. In the decades after *Marbury*, Jeffersonian critics attacked the Court not for striking down Acts of Congress, but for upholding them. (The most notable instance was *McCulloch v. Maryland*.⁴³) Nor did *Marbury* lead to other overrulings. Not until 1857, in

⁴² *Marbury*, 5 U.S. at 177-78.

⁴³ 17 U.S. (4 Wheat) 316 (1819).

Dred Scot v. Sandford,⁴⁴ would the Court again hold an Act of Congress unconstitutional, and when that happened, the issue of judicial power returned to the center stage of national politics.

Marbury can best be understood as Marshall's oblique commentary on the Judiciary Act repeal, which he was powerless to confront directly. If it was illegal for Jefferson to dismiss a justice of the peace, who was to serve a five year term, it must have been a far more serious breach for Congress to dismiss sixteen life-tenured Article III judges. If Congress could not assign mandamus jurisdiction to the Supreme Court, it must have been unconstitutional, as well, to assign circuit riding duty. But by holding that the Supreme Court had no jurisdiction in the case (and blaming it on Congress), Marshall was spared the necessity of acting and the indignity of having his orders ignored. Jefferson and the Republican Congress might be annoyed, but there was no way for them to respond to a decision that, in the final analysis, did nothing.

Marbury was brilliant, then, not for its effective assertion of judicial power, but for its effective avoidance of judicial humiliation. Its bold, but empty, assertion of judicial power masked a quiet capitulation on all the issues that really mattered. A week after *Marbury*, the Supreme Court handed down its decision in *Stuart v. Laird*, a terse, unanimous opinion (Marshall not participating) upholding the Judiciary Act repeal and the return of the Justices to circuit riding duty. Ten years later, the Court handed down another unanimous opinion, *United States v. Hudson & Godwin*,⁴⁵ renouncing the power of federal courts to prosecute under the common law. The Jeffersonian counter-revolution had succeeded.

⁴⁴ 60 U.S. (19 How.) 393 (1857).

⁴⁵ 11 U.S. (7 Cranch) 32 (1812).