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THE IRONIES OF MARBURY v. MADISON
AND JOHN MARSHALL'S JUDICIAL STATESMANSHP

SAMUEL R. OLEN

"It is emphatically the province and duty of the judicial department to say what the law is."1

I. INTRODUCTION

Over the course of the last century, Marbury v. Madison2 has played a prominent role in the debate over the legitimacy of judicial review in our constitutional system.3 Hailed by some for its conscious distinction between law and politics4 and graceful expression of the constitutional limits of governmental authority,5 others criticize Marbury for its syllogistic legal reasoning6 and flawed constitutional interpretation.7 Accordingly, Marbury has become a flash point of sorts in constitutional discourse, its observations about the role of the Court,8 an independent federal

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2 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).


7 See LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 75, 81 (1988); Alfange, supra note 6, at 389-405, 424-29, 435-36; Van Alstyne, supra note 6, at 6-33.

8 *It is emphatically the province and duty of the judicial department to
judiciary, the supremacy of the Constitution and the importance of the rule of law fodder for constitutional thinkers of all perspectives. Indeed, regardless of its analytical shortcomings and unanswered questions, *Marbury* is a landmark of American constitutional law that symbolizes both the virtues and vices of judicial review.

In no small way, much of the iconic status of *Marbury* derives from the aura of its author, John Marshall, who as the nation's fourth Chief Justice exerted an extraordinary influence upon the course of constitutional history through the compelling logic and elegant rhetoric of his constitutional opinions and his inspired leadership of the Supreme Court during the initial decades of the nineteenth century. When he became Chief Justice of the United States Supreme Court in February 1801, the Court was a relatively weak branch of the national government. In its first dozen years, several justices left the Court, some of whom departed because they felt the Court lacked prestige and the respect of the coordinate branches of the federal government. Marshall himself only attained the top post because President

say what the law is ... If two laws conflict with each other, the courts must decide on the operation of each." *Marbury*, 5 U.S. (1 Cranch) at 177. Earlier in the opinion, Marshall alluded to a significant limitation upon federal judicial power, the political question doctrine. "The province of the court is, solely, to decide on the rights of individuals ... [q]uestions, in their nature political ... can never be made in this court." *Id.* at 170.

9. See *id.* at 173–80 (discussing the nature of judicial review).

10. See *id.* at 176–80. "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently ... an act of the legislature, repugnant to the constitution, is void." *Id.* at 177.

11. "The government of the United States has been emphatically termed a government of laws, and not of men." *Id.* at 163.

12. The first three chief justices were John Jay (1789-95); John Rutledge (1795); and Oliver Ellsworth (1796-1800). John Marshall became Chief Justice on February 4, 1801.


John Adams's first choice, John Jay, the first Chief Justice, who resigned from the Court several years earlier to enter politics in New York, preferred to build his wealth through the practice of law rather than resume the arduous rigors of what he perceived as a rather inconsequential position that required him and other members of the Court to perform most of their work as circuit court judges far away from the nation's capital. As if to underscore the Court's relative obscurity, when the federal government relocated to Washington, D.C. shortly before the start of Marshall's judicial tenure, urban planners neglected to provide the Court with its own building, instead relegating it to a room in the Capitol.

At his death on July 4, 1835, the Court over which John Marshall presided for thirty-four years may have lacked its own physical structure, but, more importantly, it had fortified the edifice of the Constitution through a remarkable series of opinions, many of which Marshall personally crafted. Prior to Marshall's chief justiceship, the exact parameters of the Supreme Court's authority to review constitutional issues were unclear. Yet during his tenure Marshall effectively treated the fundamental law of the Constitution as a special form of ordinary law in order,

15. See Smith, supra note 5, at 283. For discussion of the circuit court obligations of the early Supreme Court justices see Volumes 2-3 of The Documentary History of the Supreme Court of the United States, 1789-1800 (Maeva Marcus ed., 1985). See also Olken, Chief Justice John Marshall, supra note 13, at 744, 779 n.3 (describing the circuit court assignments of pre-Marshall Court Supreme Court justices).


18. During the 1790s the Court issued major constitutional opinions in: Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (narrowly interpreting the Ex Post Facto Clause); Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236-37 (1796) (upholding a federal tax on carriages); Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) (invoking the Supremacy Clause over a Virginia statute that conflicted with a federal treaty) and Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (upholding a creditor's right to bring suit in federal court against a non-consenting state). Prior to Marbury, however, the Court had never invalidated a law of Congress, nor had it engaged in an extended analysis of the limits of its jurisdiction.
Ironically, to enhance the role of the Court as the expositor of constitutional law. In so doing he facilitated the application of the Constitution to the problems of an emergent democratic republic and transformed the practice of judicial review from an abstract and defensive posture into a powerful check upon the elected branches through his steadfast emphasis upon the distinction between law and politics. Though his opinion in Marbury did not establish Supreme Court judicial review nor the notion of judicial supremacy, at the very least it laid the foundation for subsequent decisions by the Marshall Court and others that limn the contours of judicial review in a constitutional democracy.

Derived from the separation of powers implicit within the structure of our constitutional system, judicial review not only functions as a limitation of governmental power, but also as a means for protecting individual rights and liberties from the excesses of representative democracy and the tyranny of its ephemeral popular majorities. Fundamentally anti-democratic in nature, American judicial review, from its origins, has nevertheless functioned to implement popular sovereignty at the


20. See HOBSON, supra note 4, at 47-149 (discussing John Marshall’s constitutional jurisprudence); NELSON, supra note 4, at 7-9, 67.

21. See NELSON, supra note 4, at 67; Kramer, supra note 19, at 4-5. “Marbury did not stake out new territory in the theory of judicial review.” Id. at 86.

22. Although Article III of the Constitution sets forth the contours of federal court jurisdiction, it does not explicitly establish judicial review of federal or state laws. Nor does the text of the Supremacy Clause of Article VI specifically authorize judicial review of federal or state legislation. However, the constitutional allocation of federal governmental power to a legislative branch under Article I; an executive branch under Article II and a judicial branch under Article III, together with the provision that federal jurisdiction “shall extend to all Cases . . . arising under this Constitution, the Laws of the United States and Treaties” U.S. CONST., art. III, § 2, cl. 1, implies the framers intended this role for federal courts. In addition, federal judicial review may arise by implication if one considers Articles III and VI in conjunction with one another.

same time jurists have used it to impose constitutional limits. In this regard, the practice of judicial review bears a considerable amount of irony, and the case most often invoked in discussions of judicial review, Marbury v. Madison, certainly has more than its share of ironic aspects. In large part, because of its political origins and its peculiar facts, Marbury was the Court’s first extended discussion of judicial review and, in many respects, remains its most controversial. Arising from the crucible of partisan politics that roiled the nation in the aftermath of the Revolution of 1800, the case marked a turning point in the evolution of judicial review. It also strengthened the role of the Supreme Court as the expositor of constitutional law at a time when the external—i.e., the Supreme Court—pressures of a protracted battle between Federalists and Jeffersonian Republicans threatened its very independence.

Not surprisingly, the volume of discussion generated by Marbury, the first major constitutional decision of the Marshall Court, has spawned much confusion about the meaning of Marshall’s opinion and speculation about his judicial motivation. Widely considered by earlier generations of historians and constitutional scholars to be a sterling example of judicial statesmanship, consensus about the greatness of Marshall’s

25. 5 U.S. (1 Cranch) 137.
26. This term refers to the outcome of the presidential and congressional elections of 1800. In a hotly contested presidential election, Thomas Jefferson, a Republican, defeated John Adams, the incumbent Federalist president. Adams finished third among four candidates, including Aaron Burr, who narrowly lost the presidency to Jefferson after a vote in the House of Representatives ended an electoral deadlock between Jefferson and the man who eventually became his vice president. In addition, Republicans wrestled control of Congress away from the Federalists. Jefferson himself supposedly coined this phrase. For an excellent discussion of this turbulent period in American political history see generally RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC (1971).
27. See SNOWISS, supra note 19, at 126-51, 169-75; Kramer, supra note 19, at 98.
28. Perhaps the classic description of John Marshall’s statesmanship in Marbury is that his opinion was a “masterwork of indirection, a brilliant example of Marshall’s capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.” ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 40 (Daniel J. Boorstin ed., 1960). McCloskey also noted that “[t]he Marbury argument [about judicial review] is justly celebrated, but not the least of its virtues is that it is somewhat beside the point.” Id. at 43. Some four decades earlier, a zealous biographer of the Chief Justice commented:

Thus, by a coup as bold in design and as daring in execution as that by which the Constitution had been framed, John Marshall set up a landmark in American history so high that all the future could take bearings from it, so enduring that all the shocks the Nation was to
Marbury opinion has fragmented over the last several decades. Revisionist accounts of the origins of judicial review,29 close examination of the Judiciary Act of 178930 and renewed historical analysis of the political aspects of the case31 have altered conventional perceptions about the meaning of Marbury and the judicial statecraft of John Marshall.

Increasingly, constitutional scholars have criticized Marshall's opinion in Marbury. Some, like William Van Alstyne32 and Dean Alfange33 have focused upon the analytical flaws of Marshall's reasoning. Others have, to one extent or another, mocked the dignity of the opinion34 and openly disputed the

endure could not overturn it. Such a decision was a great event in American history. State courts, as well as National tribunals, thereafter fearlessly applied the principle that Marshall announced, and the supremacy of written constitutions over legislative acts was firmly established. . . . The assertion of it . . . was the deed of a great man.

One of narrower vision and smaller courage never would have done what Marshall did. In his management and decision of this case, at the time and under the circumstances, Marshall's acts and words were those of a statesman of the first rank.


29. See generally SNOWISS, supra note 19, at 1-89; Kramer, supra note 19, at 32-89 (both discussing the patterns of state and federal judicial review before Marbury).

30. See, e.g., Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443 (1989) (arguing that Congress did not attempt to expand the Supreme Court's original jurisdiction and that Marshall misread section 13); James E. Pfander, Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers, 101 COLUM. L. REV. 1515 (2001) (asserting that section 13 conferred general supervisory authority upon the Supreme Court over lower federal courts and federal officials).


32. See Van Alstyne, supra note 6, at 6-33.


34. Leonard Levy thought Marbury was "one of the most flagrant specimens of judicial activism and, from the standpoint of judicial craftsmanship, resulted in one of the worst opinions ever drafted by the Supreme Court" LEVY, supra note 7, at 75. Levy also noted that "[a]s a matter of judicial politics, however, it ranks among the craftiest in our constitutional history, and as a symbol of judicial review it ranks as the most important." Id. Of significance here is the distinction Levy drew between judicial politics and judicial statesmanship.
statesmanlike characteristics previous generations of constitutional historians and recent biographers of the Chief Justice have ascribed to Marshall's handiwork in *Marbury*. A few critics of the opinion even go so far as to downplay the importance of *Marbury*, preferring to characterize Marshall's opinion as judicial politics rather than inspired constitutional analysis.

Invariably, a link exists between the mythology of *Marbury* and perspectives of Marshall's judicial statesmanship. Revisionist scholars have painstakingly stripped away mythical, though incorrect, notions that *Marbury* single-handedly established judicial review and the Court as the ultimate arbiter of constitutional issues. In part, Marshall himself may have helped

35. See, e.g., BEVERIDGE, supra note 28, at 142-43; McCLOSKEY, supra note 28, at 40-43.

36. See, e.g., HASKINS & JOHNSON, supra note 28, at 193, 203; HOBSON, supra note 4, at 47-71 (discussing Marshall's judicial statecraft in *Marbury*); NEWMYER, supra note 5, at 153-75; SMITH, supra note 5, at 309-26. Recent commentators who acknowledge Marshall's judicial statesmanship in *Marbury* include the current Chief Justice of the United States Supreme Court, who described Marshall's opinion in *Marbury* as "a remarkable example of judicial statesmanship." Rehnquist, supra note 16, at 1553. Curiously, the Chief Justice does not define judicial statesmanship.

37. See, e.g., Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 STAN. L. REV. 1031, 1031-41 (1997) (arguing that judicial review of federal laws was of far less historical importance in the early republic than the extent to which issues of federalism influenced the development of judicial review). See also Sanford Levinson, Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either, 38 WAKE FOREST L. REV. 553, 553-72 (2002) (explaining why he no longer teaches Marbury to constitutional law students); Michael J. Klarman, How Great Were the "Great" Marshall Court Decisions, 87 VA. L. REV. 1111, 1113-26 (2001) (questioning Marbury's significance). In contrast, this essay contends that much of the importance of *Marbury* lies in its statements about federal judicial power and constitutional supremacy. That Marshall may have erred in his analysis of federal and constitutional law ironically does not necessarily detract from the resonance of his larger points about the role of the Supreme Court in a constitutional democracy. Indeed, when viewed in the context of subsequent constitutional decisions of the Marshall Court, *Marbury*, despite its analytical shortcomings, emerges as a lynchpin for judicial application of the Constitution during the early part of the nineteenth century. For discussion of Marshall Court analysis of federal judicial power after *Marbury*, see Samuel R. Olken, John Marshall and Spencer Roane: An Historical Analysis of their Conflict Over U.S. Supreme Court Appellate Jurisdiction, 1990 J. SUP. CT. HIST. 125, 125, 129-38 [hereinafter, Olken, John Marshall and Spencer Roane].

38. See, e.g., O'Fallon, supra note 31, at 219-20.

39. See, e.g., Kramer, supra note 19, at 87-91. For an example of the erroneous perception that *Marbury* created judicial review in American constitutional law see BEVERIDGE, supra note 28, at 142-43. For early revisionist analysis of the origins of judicial review see Edward S. Corwin, I The Establishment of Judicial Review, 9 MICH. L. REV. 102, 102-25 (1910) (discussing pre-Marbury state precedent); Edward S. Corwin, II The
create these misconceptions through his sparse reliance on precedent and use of rhetoric that seemingly portrayed Marbury as a case of first impression. Further, his statements of judicial humility aside, the Chief Justice was familiar with the heated debates over the independence of the federal judiciary and thus may have gone to great pains to craft an opinion that enhanced the role of the Court in constitutional interpretation. Indeed, close attention to the political context of Marbury and its errors in statutory and constitutional analysis reveal a far different case than the one of myth. Shorn of its fabled talons, Marshall's opinion appears, to some, intellectually dishonest and his elegant words those of a political opportunist. Perhaps these are some reasons modern scholars view Marshall's statesmanship in pejorative terms. Moreover, given the stature of Marshall—by most standards he is considered the greatest of American chief justices—Marshall's Marbury opinion, upon close scrutiny, is almost certain to fall far short of the greatness expected from one

*Establishment of Judicial Review, 9 Mich. L. Rev. 283-316 (1911) (discussing the theoretical antecedents of federal judicial review).*

40. See Marbury, 5 U.S. (1 Cranch) at 178-80 (noting that judges must regard the Constitution in assessing the validity of legislation and “that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.”) Earlier, Marshall noted “[t]he peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it” Id. at 154.


42. See Levy, supra note 7, at 75; Levinson, supra note 37, at 562-66.

43. See Levinson, supra note 37, at 562-66.

44. See Levy, supra note 7, at 75, 77; Alfange, supra note 6, at 372, 379, 381, 384; O’Fallon, supra note 31, at 219-21. To one extent or another, each of these commentators distinguishes between judicial politics and judicial statesmanship in Marshall’s Marbury opinion, praising as Levy does, the “exceptional[ly] adroit[ness]” of Marshall’s judicial politics. Levy, supra note 7, at 77. While suggesting the analytical flaws of his reasoning, his excessive use of dicta and the fact that he discussed at length the merits of Marbury’s claim in a case in which he concluded the Court ultimately lacked jurisdiction detract from his judicial statescraft. See Alfange, supra note 6, at 368, 371, 381, 389-405, 424-27, 435. In contrast, this essay contends that Marshall’s judicial tactics and political acumen were integral components of his judicial statesmanship. Notwithstanding the errors of his constitutional and statutory analysis, Marshall’s opinion exemplified judicial statesmanship because of the manner in which he avoided a direct conflict with the executive branch while asserting the power to review acts of Congress.

of his constitutional decisions, let alone one that has become an icon in its own right.

Insofar as the levels of irony that enshroud the Marbury decision diminish its grandeur, they may, however, also enhance its allure to scholars. Indeed, much of the recent criticism of Marshall's role in Marbury seems to react to the ironic aspects of this decision. Crafted by a chief justice who consciously downplayed his own role in William Marbury's failure to receive his judicial commission, the opinion discussed at length the legal merits of Marbury's case, even though the Court ultimately ruled it lacked jurisdiction to issue a writ of mandamus. Further irony exists in that the seemingly reluctant chief justice went to great lengths to manufacture a conflict between a statute whose constitutionality few doubted before Marbury and the text of Article III of the Constitution. Another irony is that a case renowned for its constitutional exposition may have contained numerous interpretive flaws which, over time, have produced erroneous perceptions about the origins of judicial review and the role of the Supreme Court. It is also ironic that in a constitutional decision often noted for its distinction between law and politics, the chief justice deftly carved a set of legal issues from the political circumstances of the case in order to assert the importance of the Court in matters of constitutional interpretation.

Yet somewhat lost—or, at the very least, often pushed to one side—in the minutiae of several recent analyses of Marbury is an appreciation of the extent to which Marshall's opinion for the Court nevertheless reflects the extraordinary attributes of his judicial statesmanship. Close examination of both the

46. See Marbury, 5 U.S. (1 Cranch) at 154-173 (finding that William Marbury had a vested legal right to his commission and ruling that mandamus was a proper legal remedy).
47. See id. at 173-80.
48. See Susan Low Bloch & Maeva Marcus, John Marshall's Selective Use of History in Marbury v. Madison, 1986 Wis. L. Rev. 301, 327 (1986). Indeed, no issue arose at oral argument about the constitutionality of Section 13 of the Judiciary Act of 1789. In retrospect, this is not surprising given the fact that the party most likely to have invoked this issue was James Madison, who apparently ignored the preliminary Court proceedings and for whom no counsel appeared before the Court. Charles Lee, who represented William Marbury, most certainly would not have questioned the validity of a statutory provision pursuant to which he brought the original action for mandamus in the Supreme Court. Therefore, the fact that neither side addressed the constitutionality of Section 13 produced another irony: a case most famous for its defense of judicial review did not, as argued, raise a constitutional question. See Levy, supra note 7, at 83.
49. See, e.g., O'Fallon, supra note 31, at 220 (criticizing McCloskey's heroic characterization of Marshall's opinion). O'Fallon regards Marbury as an example of judicial politics and refutes the notion that Marshall's opinion exemplified judicial statesmanship. See id. at 219-20. O'Fallon, however, distinguishes, without adequate explanation, between judicial politics and
jurisprudential and political contexts in which Marshall crafted his Marbury opinion reveals his judicial statecraft. Indeed, the totality of Marshall's Marbury opinion is far greater than its individual parts. For not only did it provide a clever legal resolution to a conflict born of partisan politics, but as well a lucid and compelling statement in support of judicial review even though particular aspects of the analysis were incorrect. Thus, the opinion, despite its syllogistic reasoning, unusual structure and excessive dicta exemplifies a mixture of John Marshall's astute political judgment and constitutional vision.

Perhaps much of the difficulty in assessing Marshall's judicial statesmanship in Marbury emanates from the inherent vagueness of a term which conflates the seemingly disparate concepts of adjudication and statecraft. At the core of the judicial function is the resolution of legal disputes through dispassionate analysis of law and facts. In theory, at least, courts only decide concrete legal controversies, not hypothetical ones nor political disputes.

Constrained by precedent, judges rely upon logic and interpretative canons intended to minimize instances of adjudication that reflect the personal politics or whims of individual jurists. Insofar as practical considerations may influence judicial decisions, the hallmark of adjudication is respect for stare decisis and a general disdain for political expediency.

In judicial statesmanship. Id. Interestingly, Alfange, despite his criticism of Marshall's legal reasoning and emphasis upon the Chief Justice's judicial tactics concludes that his "rhetoric . . . more than compensates for the illogic of its argument." Alfange, supra note 6, at 439. Alfange attributes Marshall's syllogistic reasoning and judicial tactics in Marbury to the Chief Justice's belief that "it was politically essential to establish very quickly a precedent . . ." for the legitimacy of judicial review of federal laws. Id. at 438. In this regard, it would appear that Marshall's Marbury opinion, despite its flaws, exemplified his judicial statesmanship in that it mixed political acumen with adjudication in the service of a distinct vision for the role of the Supreme Court in the constitutional system.

50. See, e.g., Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-76 (1982). Noting the prudential considerations of federal judicial review, the Court remarked:

Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.

Id. at 474. See also Baker v. Carr, 369 U.S. 186, 217 (1962) (discussing the political question doctrine).

51. See, e.g., West Coast Hotel Co. v. Parrish, 300 U.S. 379, 401-04 (1937) (Sutherland, J., dissenting); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 448-53, 465, 482-83 (1934) (Sutherland, J., dissenting). For a more modern statement of judicial disdain of adjudication reflective of political expediency see Planned Parenthood v. Casey, 505 U.S. 833, 996-1001 (1992) (Scalia, J., dissenting) (asserting the Supreme Court should not let political
this regard, Supreme Court justices often differentiate between assessing the constitutional limits of public authority and the wisdom of governmental policies. In contrast, statecraft places more emphasis upon compromise and pragmatism and requires its practitioners to anticipate the long-term institutional consequences of political decisions. The most effective statesmen use their political skills to affect the course of public affairs through wisdom and foresight.

Judicial statesmanship, as used in this essay, reflects the dual notions that the Constitution is both a legal and political document and the Supreme Court "an institution of law and politics"—ideas which might, at first, seem more appropriate in the context of modern judicial review with its emphasis upon judicial balancing of public policy interests. Yet Marshall intuitively recognized that constitutional issues often exist at the matrix of law and politics. Endowed with the instincts of a master politician, he used his logic as a superb common lawyer to implement a constitutional vision dependent upon a powerful, independent federal judiciary. In retrospect, Marshall and the other members of the Supreme Court implicitly perceived that constitutional issues could emerge from political conflicts, and that federal judges through the legal process of adjudication could enforce the constitutional limits of governmental authority in order to protect individual rights while enhancing the prestige of the Court. Indeed, it was in this light that the Marshall Court

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52. See, e.g., Ewing v. California, 538 U.S. 11 (2003) (upholding the application of California's three strikes law to a defendant's conviction for committing the felony of grand theft). Justice O'Connor noted that "selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts." Id. at 1187. Noting further, she explained that "[w]e do not sit as a 'superlegislature' to second-guess these policy choices." Id. at 1189.

53. See generally RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT (1948) (discussing the qualities of outstanding statesmanship throughout American political history).


56. "[T]he Framers' Constitution, which he approached legally, was also
understood the issues in *Marbury* and articulated a cogent defense of judicial power that, in many respects, anticipated the development of modern judicial review. Insofar as previous studies have assessed John Marshall’s judicial statesmanship, they have focused on the strengths of his personality and the logic of his constitutional arguments. However, his political acumen and wisdom were also integral components of his highly effective leadership.

Quite possibly, the assertion that Marshall, in effect, demonstrated a high level of judicial statesmanship belies the rigid dichotomy between law and politics Marshall set forth in his opinion.\(^7\) Though Marshall ostensibly separated law from politics in *Marbury*, the structure of his opinion, the points he made (and did not make), and his interpretation of Section 13 of the Judiciary Act of 1789 and the Constitution suggest the contrary. For in deliberately avoiding a confrontation with a hostile Republican administration while proclaiming the Court’s constitutional prerogative to review the legal actions of Congress and the executive branch, Marshall applied his shrewd political instincts to preserve the prestige of the Court and its role in the federal system at a time when it was under severe political attack.\(^5\)

Accordingly, this essay contends that Marshall’s opinion in *Marbury* is a prime example of his judicial statesmanship in its delicate balance between legal/constitutional principles on one hand and, on the other, the practical, political and institutional concerns of a federal judicial system eager to establish itself as an equal, coordinate branch of the national government.

This essay has five parts. The first provides a brief overview

partly political. It was the supreme law of the land... and a bundle of political compromises." (emphasis added) (describing Marshall’s constitutional methodology). Newmyer, *A Judge*, supra note 54, at 1492. In this regard, consider the astute observation that: "Judicial review... is a political act, but it is a political act carried out through legal devices, including the interpretation of constitutional provisions." Alfange, supra note 31, at 348 (emphasis in original). Therefore, refusal to enforce an unconstitutional law is, in some respects, tantamount to a political act by the Court while application of the Constitution to an unconstitutional act is essentially a legal act by the Court. *Id.* (discussing why judicial review necessitates some interpretation of the Constitution).

57. “Questions, in their nature political... can never be made in this court.” *Marbury*, 5 U.S. (1 Cranch) at 170. *See also id.* at 166-67 (distinguishing between the political discretion of public officials and their legal duties).

of the pattern of judicial review before Marbury. Part two describes the political context of Marbury. The third part analyzes the extent to which Marshall's overt distinction between law and politics reflected a careful judicial strategy to preserve the adjudicatory role of the Court over legal issues at a time when partisan political disputes threatened the independence of the federal judiciary. Part four critiques Marshall's defense of judicial review and suggests that Marshall manufactured a constitutional conflict to bolster the Supreme Court as a legal and political institution. The final part links some of the more ironic aspects of Marbury to the attributes of John Marshall's statesmanship.

II. THE PATTERN OF JUDICIAL REVIEW BEFORE MARBURY

One of the fundamental misconceptions about Marshall's opinion in Marbury is that it established judicial review. In part, this might be because of the dearth of precedent Marshall cited in his opinion, which perhaps has contributed to the erroneous notion that the conflict Marshall perceived in Marbury between a federal law and Article III of the Constitution presented an issue of first impression. Indeed, this may have been a calculated omission by a chief justice eager to proclaim the authority of the Supreme Court in constitutional matters and as such reflected his personal, juridical style. That the Supreme Court unequivocally invalidated a federal law for the first time may also contribute to the Marbury myth. Moreover, a narrow, pejorative understanding of the constitutional judicial function that tends to associate judicial review only with the invalidation of legislation, and forgets that courts also review the constitutionality of statutes they uphold, might account for lingering misconceptions about the importance of Marbury, which in turn distort the influence of John Marshall. Nevertheless, during the two decades that elapsed between the end of the American Revolution and the Supreme Court's decision in Marbury, several state courts and a few federal ones, including the United States Supreme Court itself, had engaged in some form of constitutional assessment of state and federal laws. A brief overview of this pattern of judicial review before Marbury lends perspective to the statesmanship of John Marshall's Marbury opinion.

A. Early Notions of Judicial Review

In the aftermath of the American Revolution, a transformation occurred in the role of the judiciary. Regarded with widespread distrust during the colonial era and often constrained by juries empowered to decide both questions of law and fact, colonial judges enjoyed little prestige and institutional independence, operating under the auspices of local governors in
the shadows of local legislatures. After the war, however, the rise of popular sovereignty and the plethora of redistributive legislation altered perceptions about the responsibility of judges in a constitutional democracy.\(^\text{59}\)

As the presumption of legislative supremacy yielded to the principle of popular sovereignty, the judiciary gradually, if not fitfully, emerged as a bulwark against legislative encroachments of individual rights. Within the context of a revitalized concept of separation of powers that emphasized the virtues of a tripartite allocation of governmental authority, judges began to function as intermediaries between the people and their lawmakers. Accordingly, jurists increasingly regarded themselves as agents of the people, authorized in this limited capacity and as a coordinate branch of the government, to guard against legislative excesses by declaring void statutes that appeared to violate fundamental law restraints to which all departments of the government were subject.\(^\text{60}\)

Indeed, this evolution in the judicial function reflected an important distinction between fundamental and ordinary law. As embodied in the constitutions created during the late eighteenth century, fundamental law existed to limit governmental authority in ways consistent with the popular will.\(^\text{61}\) Accordingly, fundamental law emanated from the consent of the governed and functioned to ensure responsible government.\(^\text{62}\) Conversely, ordinary law signified rules of individual behavior promulgated by government.\(^\text{63}\) The supremacy of fundamental law over ordinary law theoretically bound government, including the judiciary, to respect the will of the people in whom sovereignty rested.\(^\text{64}\) To the extent judicial review existed in this inchoate form, it was not to proclaim a unique relationship between judges and fundamental law but rather as a means for the judiciary to protect the people from a coordinate branch of the government.\(^\text{65}\)


\(^{61}\) See Kramer, supra note 19, at 16, 43-46; Wood, supra note 59, at 793-94.

\(^{62}\) See Kramer, supra note 19, at 9, 16.

\(^{63}\) See Snowiss, supra note 19, at 5; Kramer, supra note 19, at 31.

\(^{64}\) See Wood, supra note 59, at 794.

\(^{65}\) See Kamper, 3 Va. (1 Va. Cas.) at 78-79. See also Kramer, supra note 19, at 81. For an excellent background discussion of judicial review in state cases before Marbury see Edward S. Corwin I, The Establishment of Judicial Review, 9 Mich. L. Rev. 102-25 (1911).
For example, judges from the Virginia Court of Appeals expressed these views publicly in their 1788 Remonstrance to the commonwealth's general assembly in which they decried a proposed reorganization of the court system they believed would diminish judicial salaries in contravention of the state constitution. Six years earlier, in less forthright terms, this same court avoided, on technical grounds, invalidating a treason statute, though, in dicta, a couple of the judges intimated they had a duty to invoke the constitutional limits of governmental authority.

To the extent, judicial review existed throughout the closing decades of the eighteenth century, it was essentially perceived in political terms as an extraordinary act by judges on behalf of the people rather than as part of normal adjudication. In this regard, Sylvia Snowiss has aptly characterized the incidents of judicial refusal to enforce unconstitutional ordinary laws as "a substitute for revolution," which underscores the link between popular sovereignty and judicial review during this turbulent period. Indeed, James Iredell articulated this idea in a newspaper article he published in 1786 in conjunction with a case in which a North Carolina court voided a law that required the dismissal of suits brought by British citizens to recover land within the state confiscated during the revolution. Iredell, a prominent North Carolina attorney (and later Associate Justice of the Supreme Court), who represented the successful British landowner, emphasized both in court and to the public that because judges were agents of the people they had a duty to invalidate unconstitutional laws.

Nevertheless, much uncertainty existed about the meaning of judicial review during the 1780s and into the early 1790s, as there was not much direct state precedent for judicial invalidation of ordinary laws, and considerable doubt persisted about whether

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66. Edmund Pendleton, Chief Judge of the Virginia Court of Appeals, remarked that the judges "see no other alternative for a decision between the legislature and the judiciary than an appeal to the people, whose servants both are, and for whose sakes both were created, and who may exercise their original and supreme power whenever they think proper." Remonstrance of the Court of the Appeals to the General Assembly (May 12, 1788) 8 Va. (4 Call.) 141 reprinted in an appendix to Kamper, 3 Va. (1 Va. Cas.) 20, 99-108 (1788).


68. See Wood, supra note 59, at 796.

69. SNOWISS, supra note 19, at 3, 37, 73, 91, 93.

70. Bayard v. Singleton, 1 N.C. (Mart.) 5, 42, 47 (1787).

71. See SNOWISS, supra note 19, at 45-49 (discussing Notes to the Public, James Iredell's impassioned argument in favor of judicial refusal to enforce unconstitutional legislation, that he published in a North Carolina newspaper in 1786).

72. See Kramer, supra note 19, at 51 n.197.

73. See id. at 58 (discussing the status of judicial review in 1787).
a court could declare laws unconstitutional that did not necessarily involve judicial power or the legal process. Indeed, virtually all of the judicial precedent for voiding ordinary laws involved regulations of judicial power or the legal process. Judicial review, in its incipient stages, was, therefore, often defensive in application in that judges only struck down laws that patently contravened the fundamental law of the people as expressed in written constitutions. Careful not to assert their supremacy over the coordinate political branches in the resolution of constitutional disputes, judges of this era rarely engaged in extensive interpretation of constitutional provisions, instead merely taking notice of the constitution in cases in which, acting on behalf of the people, they refused to enforce blatantly unconstitutional laws.

A few jurists, however, were ready to apply judicial review more expansively. For example, Spencer Roane, a judge on the Virginia General Court, remarked in Kamper v. Hawkins, that: "I now think that the judiciary may and ought not only refuse to execute a law expressly repugnant to the Constitution; but also one which is, by a plain and natural construction, in opposition to the fundamental principles thereof." Similarly, St. George Tucker, another Virginia jurist, explained: "The constitution is not an 'ideal thing, but a real existence: it can be produced in a visible form: its principles can be ascertained from the living letter, not from obscure reasoning or deductions only." Neither Roane nor Tucker advocated judicial supremacy; instead, they recognized that judicial refusal to enforce unconstitutional laws necessitated that judges examine the state constitution as part of their interpretation of ordinary law. Yet it was their emphasis upon a

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74. See id. at 57-59.
75. See, e.g., Bayard, 1 N.C. 5 (invalidating a North Carolina law that confiscated property without trial by jury). In addition, consider the following unpublished state cases: Ten Pound Act Cases (N.H. 1786-87) (the same lower court twice invalidating a state law that facilitated the recovery of small debts); Trevett v. Weeden (R.I. 1786); Rutgers v. Waddington (N.Y. 1784) (ruling New York's Trespass Act did not violate a 1783 treaty between the United States and Great Britain). For discussion of these unpublished cases that were nevertheless reported in newspapers and other sources see LEVY, supra note 7, at 94-99.
76. See SNOWISS, supra note 19, at 6, 25, 43; Kramer, supra note 19, at 73.
77. 1 Va. Cas. at 40 (invalidating a Virginia law that authorized district court judges to issue injunctions).
78. Id. at 35-36 (Roane, J.). Interestingly, nearly two decades later, Roane would clash with the Marshall Court over the authority of the Supreme Court to review state court decisions. See Olken, John Marshall and Spencer Roane, supra note 37.
79. Id. at 78 (Tucker, J.).
80. See id. at 78-79. Tucker expressly linked judicial review to constitutional supremacy when he wrote:
constitution as a written document that expressed the fundamental law of the sovereign that suggested the creative potential for judicial review in a constitutional democracy. Ultimately, John Marshall drew upon their ideas when he crafted his Marbury opinion.

B. Federal Judicial Review

At the Constitutional Convention of 1787, the delegates barely considered the contours of federal judicial review. They provided for a Supreme Court and vested Congress with the discretion to create inferior federal courts. The proposed Constitution set forth the parameters of federal jurisdiction, placing a narrow category of cases within the original jurisdiction of the United States Supreme Court and indicating that in all other cases arising under the Constitution, the laws of the United States and federal treaties, the Supreme Court would have appellate jurisdiction. Interestingly, nowhere in the text of the Constitution did the framers confer explicitly upon the federal judiciary the specific authority to review the constitutionality of federal laws. In part, this may have reflected the framers' overriding concern with issues of federalism. Indeed, to the extent they thought about judicial review during the summer of 1787, they considered it primarily as a means of limiting state laws. However, during the state ratification debates proponents of the Constitution such as John Marshall indicated that federal courts would have the authority to invalidate unconstitutional federal laws.

The government... and all its branches must be governed by the constitution. Hence it becomes the first law of the land, and as such must be resorted to on every occasion, where it becomes necessary to expound what the law is. This exposition it is the duty and office of the judiciary to make... the constitution is a rule to all the departments of the government, to the judiciary as well as to the legislature

Id. Eventually, John Marshall would reiterate Tucker and Roane's points about judicial review in Marbury.

81. U.S. Const., art III, § 2, cl. 2.
82. See Kramer, supra note 19, at 60-63.
83. Addressing the delegates at the Virginia Ratifying Convention of 1788, John Marshall noted the supremacy of the Constitution over state and federal laws that conflicted with its provisions. Linking federal judicial review with constitutional supremacy he raised the following hypothetical questions: "Has the Government of the United States power to make laws on every subject?... Can they go beyond the delegated powers?" John Marshall, Speech at the Virginia Ratifying Convention (June 20, 1788), reprinted in I THE PAPERS OF JOHN MARSHALL 276-77 (Herbert A. Johnson ed., 1975). To these questions the future Chief Justice provided this emphatic answer:

If they were to make a law not warranted by any of the powers enumerated, it would be considered by the Judges as an infringement of the Constitution which they are to guard: - They would not consider
Alexander Hamilton, in Federalist Paper No. 78, presented the most far-reaching analysis of judicial review at the time in the context of connecting popular sovereignty and judicial review. In the course of explaining the virtues and necessity of an independent federal judiciary “designed to be an intermediate body between the people and the legislature, in order, ... to keep the latter within the limits assigned to their authority,” Hamilton refuted the notion that federal judicial review would make the judiciary superior over the other branches of the government. Instead, he expected judges, as agents of the sovereign people, to function “as the bulwarks of a limited Constitution against legislative encroachments...” The guardian of individual rights, the federal judiciary would invoke Constitutional supremacy in the event ordinary laws conflicted with the fundamental law of the people embodied in the Constitution. For Hamilton, this task would be a normal part of adjudication in federal courts rather than an extraordinary political act or substitute for revolution. In a passage that John Marshall would later adopt as his own in Marbury, Hamilton explained that:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.

Hamilton’s suggestion that federal courts could interpret the Constitution, as opposed to merely take notice of it, was one of the more bold assertions of judicial review in the era that preceded Marbury, and together with the observations made a few years later by members of the Virginia General Court in Kamper v. Hawkins, bore considerable influence upon John Marshall when he drafted his opinion in Marbury. Yet, for the most part, between 1787 and 1803, American judges continued to pursue a fairly modest approach towards judicial review, as exemplified by the pattern established by the early federal courts.

85. See id. at 523.
86. Id. at 524.
87. See id. at 523.
88. Id. at 522-23.
89. 1 Va. Cas. 20 (1788).
Federal jurists, like their state counterparts, exercised the power of judicial review cautiously. Though federal courts invalidated some state and federal laws that conflicted directly with the Constitution, circuit court judges and members of the Supreme Court often hesitated to strike down laws that did not violate the Constitution in an obvious manner. Accordingly, they invoked the doubtful case rule to resolve questions of constitutional ambiguity in ways that limited the interpretive discretion of federal judges. As Justice William Paterson explained in *Cooper v. Telfair*, "to authorise [sic] this Court to pronounce any law void, it must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication." Similarly, Justice Chase explained he would "not decide any law to be void, but in a very clear case." Accordingly, the Supreme Court relied in large part upon the doubtful case rule when it upheld a federal tax on carriages in the first case before the justices that involved the constitutionality of a federal law. Not until *Marbury* would the Court declare unconstitutional a federal law, and do so in a manner that suggested a nascent departure from its adherence to the doubtful case rule and its traditional, constrained approach towards constitutional interpretation.

90. VanHorne's Lessee v. Dorrance, 2 U.S. 304, 312 (1795) (Patterson, J.) (holding unconstitutional a Pennsylvania law that settled property claims without trial by jury). See also Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792) (discussing the refusal of federal circuit court judges to assume administrative duties assigned to them pursuant to a federal pension law they considered unconstitutional). In essence, a series of cases before various circuit courts, this controversy marked the first time the federal judiciary raised doubts about the constitutionality of a federal law. Technically, no circuit court issued a formal decision because the circuit court judges merely informed President Washington that the pension law's requirement that federal judges serve as pension commissioners authorized Article III judges to perform extra-judicial functions in contravention of the Constitution. In 1793, Congress changed the pension law's administrative procedure, which rendered moot the constitutional issue before the Supreme Court. See LEVY, supra note 7, at 116-17.

91. 4 U.S. (4 Dall.) 14 (1800).

92. Id. at 19 (Paterson, J.).

93. Calder, 3 U.S. (3 Dall.) at 395 (emphasis added).

94. See Hylton, 3 U.S. (3 Dall.) at 171.

95. Prior to *Marbury v. Madison*, insofar as the Supreme Court interpreted the Constitution, it appeared to limit the scope of its inquiry to the literal meaning of isolated constitutional provisions. See, e.g., Ware, 3 U.S. (3 Dall.) 199 (invalidating a Virginia statute under the Supremacy Clause); Hylton, 3 U.S. (3 Dall.) 171 (invoking a constitutional distinction between direct and indirect taxes); Chisholm, 2 U.S. (2 Dall.) 419 (holding a state amenable to suit without its consent in federal court). In contrast, the Marshall Court arguably engaged in a more sophisticated analysis of both the text and structure of the Constitution in *Marbury*, wherein John Marshall relied upon multiple parts of the Constitution to ascertain the implied principle of federal judicial review of...
III. THE POLITICAL CONTEXT OF MARBURY

A myriad of political and legal events of the late 1790s, including the controversy over the Alien and Sedition Acts, conflicts over neutrality in international relations and increasing tensions over the extent to which federal courts applied common law principles, sharpened divergent views of the role of federal courts in a constitutional democracy. The Revolution of 1800, and, in its aftermath, the spate of federal legislation regulating the federal court system, further shaped the parameters of debate over the nature and practice of judicial review. At the helm of the federal judiciary, the United States Supreme Court and its six justices became involved in the controversy generated by 1801 Judiciary Act and its subsequent repeal.

A. Politics and the Federal Judiciary:
The Federalist Salvos of 1801

In the waning days of the Adams Administration, the Federalists, aware of their imminent loss of congressional control to the Republican party led by incoming president Thomas Jefferson, sought to "reform" the judiciary. On February 13, 1801, nearly two weeks before Jefferson took office, the lame duck Federalist-dominated Congress enacted the Judiciary Act of 1801. Intended, in part, to relieve Supreme Court justices of their onerous circuit court duties, this law expanded the federal judicial system by creating an additional tier of lower federal courts and sixteen new circuit court judgeships. Wary of the possibility that Jefferson would appoint a judge of Republican sympathies to fill the next available vacancy on the Supreme Court, Congress prohibited the President from appointing a new justice, so that henceforth the Court would have five justices rather than its customary six. Two weeks later, Congress further addressed judicial matters from a Federalist perspective when it created a judicial system for the District of Columbia and forty-five new justice of the peace positions, to which outgoing President John Adams did not hesitate to nominate loyal Federalists. One of his nominees was William Marbury, whose commission the

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96. See LEVY, supra note 7, at 120-22.
97. Concerned about conflicts of interest in appeals before the Supreme Court of cases in which justices had ruled below while on circuit as well as with the need for additional lower federal courts, the Federalists proposed the Judiciary Act of 1801, which, in part, was intended to address these problems. See O'FALLON, supra note 31, at 224.
99. See SMITH, supra note 5, at 302.
outgoing Secretary of State, John Marshall, inadvertently failed to deliver in the final hours of Adams's presidency.

B. The Controversy Over Repealing the Judiciary Act of 1801

Disconcerted by such blatant attempts of Federalist patronage, Republicans in Congress were eager to repeal the Judiciary Act of 1801 even though the new President initially entertained doubts about the wisdom of this course of action. While frustrated Republicans mulled over their options, William Marbury, filed suit in the United States Supreme Court for a writ of mandamus to compel Marshall's successor as Secretary of State, James Madison, to deliver his commission. Undaunted by the conflict of interest arising from the circumstances of this case, Marshall presided over Marbury's preliminary motion, and on December 18, 1801, the Supreme Court issued its show cause order to Madison. In response, the Republicans, angry at the Court's intervention into what they considered a matter of executive branch political discretion and deeply suspicious of the Supreme Court's motives, moved to repeal the Judiciary Act of 1801. Outraged by the Supreme Court's action, Thomas Jefferson accused the Federalists of "having retired into the judiciary as a stronghold... and from that battery all the works of Republicanism are to be beaten down and erased."  

Significantly, the Congressional debates over this repeal raised legal and constitutional issues that would form the backdrop of the first two sections of Marshall's opinion in Marbury. In general, views about the constitutionality of the repeal act reflected divisions between the national political parties. Republicans who favored repeal asserted the need for reducing the size of a federal judiciary they perceived as heavily influenced by partisan politics and cited the alacrity with which Federalist judges had applied the common law of seditious libel to Republican newspaper editors during the controversy over the Alien and Sedition Acts. Skeptical about the impartiality of Federalist jurists who were predominant within the federal judiciary, Republicans regarded the elimination of the new level circuit courts and the reassignment of Supreme Court justices to the old regional circuit tribunals as within Congress' constitutional authority to regulate the composition of inferior federal courts. They also questioned the legitimacy of judicial review practiced by partisan judges. Conversely, Federalist...
opponents of the repeal act argued it would divest Article III judges of their lifetime tenure in contravention of the Constitution. Convinced that an independent federal judiciary was the bulwark of a constitutional democracy and the guardian of individual rights from the excesses of political factions, Federalists decried congressional attempts to scale back the federal judicial system as legislative tyranny and proclaimed the legitimacy of federal judicial review.

On March 8, 1802, by a slim margin, Congress repealed the Judiciary Act of 1801. Consequently, this repeal act pared the federal judicial system back to its original limited configuration under the Judiciary Act of 1789 and eliminated the sixteen circuit court judgeships created by the 1801 measure. This meant that the justices of the Supreme Court would have to resume their circuit court duties. Concerned that the Supreme Court might invalidate this repeal act, Congress enacted a law on April 29, 1802, that created a single Court term in February, which resulted in a suspension of the Court’s business until 1803.

C. The Supreme Court’s Initial Reaction to the Repeal of the Judiciary Act of 1801

Faced with the unhappy prospect of resuming their onerous circuit court duties, members of the Supreme Court who were dispersed throughout the nation, deliberated through written correspondence about their collective course of action. Most outspoken about the constitutional infirmities of the repeal act was Justice Samuel Chase, who essentially reiterated the staunch Federalist position that Congress could not divest circuit court judges of their lifetime positions under Article III and strenuously objected to going back on circuit. Marshall and the other justices

judicial review of blatant unconstitutional acts but balked at judicial interpretation of fundamental law. To this extent, they distinguished between a court’s refusal to enforce an unconstitutional law and actually declaring a law unconstitutional. Id. at 227. Others, such as John Breckenridge, a Senator from Kentucky, and one of the more outspoken Republican critics of the federal judiciary, advanced the concurrent theory of judicial review whereby each branch of the government retained the prerogative to decide constitutional issues “within the sphere of their own orbits” independent from the other governmental departments. 11 ANNALS OF CONG. at 179 (Speech of Breckenridge, J.) (1801). Breckenridge was one of the more radical Republican foes of a powerful federal judiciary.

105. See id. at 224.
106. See id. at 225, 232-33.
109. See Letter from Samuel Chase to John Marshall (April 24, 1802), in 6
as well entertained doubts about the constitutionality of the repeal legislation,\textsuperscript{110} but also sensed the importance of institutional prudence during a time when Republicans were threatening to impeach recalcitrant Federalist judges.\textsuperscript{111}

A pragmatist and moderate Federalist, the Chief Justice realized that past judicial practice would undermine refusal by the Court's justices in 1802 to resume circuit court duties originally imposed upon them by the Judiciary Act of 1789.\textsuperscript{112} Previous

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\begin{quote}
I hope I need not say that no man in existence respects more than I do, those who passd [sic] the original law concerning the courts of the United States, & those who first acted under it. So highly do I respect their opinions that I had not examind [sic] them & shoud [sic] have p(roceed)ed [sic] without a doubt on the subject, to perform the duties assignd [sic] to me if the late discussions had not unavoidably producd [sic] an investigation of the subject which from me it woud [sic] not otherwise have receivd [sic]. The result of this investigation has been an opinion which I cannot conquer that the constitution requires distinct appointments & commissions for the Judges of the inferior courts from those of the supreme court. It is however my duty & my inclination in this as in all other cases to be bound by the opinion of the majority of the Judges . . .
\end{quote}


\textsuperscript{111} Indeed, in February 1803 the Republicans began impeachment proceedings against John Pickering, a New Hampshire federal district judge whose erratic judicial performance and ardent Federalist politics ultimately led to his ouster from the federal bench. See \textit{Ellis, supra} note 26, at 69-75 (discussing the circumstances surrounding the Pickering impeachment). In 1804, the Republicans sought to impeach Samuel Chase, Associate Justice of the United States Supreme Court, primarily because of partisan political comments he made while as a circuit court judge to a jury in a case involving a Republican newspaper editor, James Callender, whose trenchant criticism of the Adams administration provoked Federalist prosecutors to bring seditious libel charges against him. See \textit{id. at} 76-82, 91-107; \textit{Haskins & Johnson, supra} note 28, at 215-34, 238-45 (chronicling the impeachment, trial and subsequent conviction of Samuel Chase).

\textsuperscript{112} See Newmyer, \textit{John Marshall as an American Original}, supra note 110, at 1380-82. Concerned about public perceptions of the Court, Marshall commented to Justice William Paterson:

\begin{quote}
The consequences of refusing to carry the law into effect may be very serious. For myself personally I disregard them, & so I am persuadeed 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 resolvd [sic] on. The law having been once executed will detract very much in the public estimation from the merit or opinion of the sincerity of a determination, not now to act under it.
\end{quote}
compliance with the mandate of a Federalist law paired with the obstinate refusal to follow a Republican measure would further involve the Court in partisan politics, an occurrence Marshall outwardly sought to avoid. Under Marshall's leadership, the justices once again took up their circuit court obligations and avoided one direct conflict with the Republicans. In this regard, Marshall's handling of the internal Court debate over whether to resume circuit court duties foreshadowed his management of Marbury and, in retrospect, demonstrates some of the qualities of his judicial statesmanship.

IV. THE MERITS OF MARBURY

With politics in mind, the Marshall Court resolved the issues presented by Marbury's original motion for a writ of mandamus. Cognizant of the political circumstances which gave rise to the case and sensitive to the limits of its own power, the Court, under the astute leadership of its chief justice, devised an ingenious way to assert its authority over the legal actions of both the executive and legislative branches of the government without risking a direct confrontation with either that would diminish the role of the Court. \(^{13}\) Accordingly, Marshall crafted an opinion which managed to enhance the prestige of the Court through a distinction he made between law and politics calculated to maintain the independence of the federal judiciary at a time when external political pressures threatened its institutional autonomy.

A. Unity and Leadership

Marshall shrewdly understood the value of having the Court project a unified image in wake of the controversy that surrounded it. To this extent, he persuaded the justices to refrain from the delivery of seriatim opinions, a practice which contributed to misunderstandings about Court decisions and fed the perception that the Supreme Court lacked any significant constitutional authority. \(^{14}\) Already in decline by 1801, \(^{15}\) seriatim opinions

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Two weeks later, Marshall reiterated the prudential aspects of the justices's dilemma whether to resume their circuit duties. Once again, confiding to Justice Paterson, he wrote:

Mr. Washington also states it as his opinion that the question respecting the constitutional right of the Judges of the supreme court to sit as circuit Judges ought to be considerd [sic] as settled and shoud [sic] not again be movd [sic]. I have no doubt myself but that policy dictates this decision to us all.


14. See Newmyer, John Marshall as an American Original, supra note 110,
rendered by individual justices often yielded a bewildering array of legal opinions that detracted from the prestige of the Court. Eager to bolster the public image of the Court, Marshall used his personal charm and understanding of human nature to convince the members of the Court, all jurists of strong intellect and character in their own rights, to put the institutional interests of the Court first.116 An accomplished statesman before he became Chief Justice, Marshall had been an officer in the Revolutionary War, participated intermittently in several sessions of the Virginia legislature and become a pre-eminent common lawyer, distinguished by his facile and creative mind.117 As a leader of the Virginia Federalists and in Congress, Marshall honed his political instincts and later demonstrated considerable tact as a diplomatic envoy during delicate and ultimately unsuccessful negotiations with the French over issues of American neutrality.118 Modest in bearing and moderate in politics,119 Marshall came to the Court with a remarkable set of skills that he employed to great benefit during his tenure.

In addition, the close proximity of the justices-who lived and worked together in a Washington, D.C., boardinghouse when the Court was in session-afforded them ample opportunity to discuss the case and agree upon the most effective strategy for resolving

at 1379. See also Olken, Marshall in Historical Perspective, supra note 58, at 156. 115. See Seddig, supra note 55, at 794. See, e.g., Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794) (the first U.S. Supreme Court opinion issued for the entire Court). The first decision of the Marshall Court delivered as an opinion for the entire Court was Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) (discussing Congress's war powers).

116. The other members of the Supreme Court in 1803 were: Samuel Chase, William Cushing, Alfred Moore, William Paterson, and Bushrod Washington. For discussion of Marshall's ability to persuade his fellow justices to join in single opinions in important constitutional cases during the early part of Marshall's chief justiceship see SMITH, supra note 5, at 293, 295; Newmyer, John Marshall as an American Original, supra note 110, at 1379-82; R. Kent Newmyer, Chief Justice Marshall in the Context of His Times, 56 WASH. & LEE L. REV. 841, 845 (1999); Seddig, supra note 55, at 796-97, 801. On the influence of Chief Justice John Marshall over the members of his Court see Donald M. Roper, Judicial Unanimity and the Marshall Court, 9 AM. J. LEGAL HIST. 118-19 (1965) (refuting the notion that Marshall dominated the other Supreme Court justices).


118. See SMITH, supra note 5, at 169-267.

Within this setting, Marshall functioned as a first among equals and was able to influence the brethren about both substantive and procedural aspects of the case. Moreover, as in many subsequent important constitutional decisions, the Chief Justice himself wrote and delivered the opinion of the Court, which furthered the perception of institutional unity. Orchestrated in this manner, the *Marbury* opinion underscored the leadership of John Marshall and the eloquence of his judicial statescraft.

Marshall's apparent distinction between law and politics in *Marbury* comprised a significant aspect of his judicial statesmanship. Though he articulated this dichotomy to preserve the legitimacy of the Court, the political circumstances of the case and Marshall's personal involvement in the dispute suggest more than a hint of irony. Perhaps Marshall understood this when he deliberately structured his opinion so that it first addressed the merits of Marbury's claim before it revealed the conclusion that the Court lacked jurisdiction to issue a writ of mandamus. Deeply concerned about judicial independence and vested legal rights, the Marshall Court justices perceived strong parallels between Madison's refusal to deliver Marbury's commission and recent Republican efforts to curb the autonomy of the federal judiciary and divest federal judges of their lawful posts.  

**B. William Marbury's Commission as a Vested Legal Right**

Marshall evoked these themes in his analysis of Marbury's legal right to his missing commission. In great detail, he asserted that a signed commission created an irrevocable right to the office of justice of the peace for a term of five years. To this extent, Marshall noted that upon Senate confirmation of William Marbury's nomination as a justice of the peace for Washington, D.C., Jefferson's predecessor, President John Adams, completed the appointment by signing Marbury's commission. Thereafter, pursuant to federal law, Adams's Secretary of State (John Marshall) validated the commission by affixing the seal of the United States on it, in essence attesting to the authenticitiy of the Federalist president's signature. From Marshall's judicial perspective, a signed and sealed commission was sufficient proof of Marbury's appointment. Marshall reasoned that once the
president signed the commission, his political discretion ceased, and federal law rather than political whim governed the terms of the appointment. 126 Noting that federal law required the Secretary of State to affix the nation's seal upon the commission and to record it, Marshall concluded that Marbury had obtained an irrevocable legal right to the office of justice of the peace for five years. 127 Delivery of the commission, was therefore, not essential for proof of Marbury's appointment, nor did its non-occurrence affect the underlying status of Marbury's vested legal right. 128

In essence, Marshall's emphasis upon the irrevocable characteristics of Marbury's commission reflected his abiding concern with using judicial power to protect vested legal rights. One of the main points advanced by Federalist opponents of Congressional repeal of the Judiciary Act of 1801, this idea Marshall did not hesitate to express in a case he and the other members of the Court perceived as an opportunity to assert judicial authority to protect an individual's rights from incursion by a political faction. Indeed, Marshall probably distinguished between the president's political discretion in making the appointment and the secretary of state's legal duty in sealing and recording the commission in order to remind Madison, his successor, and President Jefferson that non-delivery of Marbury's commission was a legal issue. That the Chief Justice reiterated a Federalist argument in this segment of the opinion does not detract from his judicial statesmanship because Marshall carefully contrasted the political discretion of the president in making the nomination of a justice of the peace from the legal duties arising from completion of the appointment. 129

126. See id. at 157-59, 162.
127. See id. at 158, 162.
128. See id. at 159-60, 162. To this extent, Marshall commented: "It is not necessary that the livery should be made personally to the grantee of the office." Id. at 159. He further explained that "[t]he appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment." Id. at 160.
129. See Marbury, 5 U.S. (1 Cranch) at 157-59, 162. In this regard, Marshall remarked:

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.

Id. at 162.
He also explained:

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it . . . This is not a proceeding which may be varied, if
C. The Remedy of Mandamus

Having established the existence of Marbury's vested legal right, Marshall proceeded to examine the propriety of a writ of mandamus as a legal remedy. Once the Court issued its show cause order to James Madison, President Jefferson accused the Supreme Court of interfering with the executive branch's political discretion to withhold the commission of a Federalist loyal to the previous administration. Moreover, state department officials and those in the Senate avoided supplying Marbury's counsel, Charles Lee, with information pertinent to the circumstances of Marbury's appointment and the location of his missing commission.

Sensitive to Republican fears about unwarranted judicial intervention, Marshall deliberately characterized the dispute as a legal one within the purview of the Court:

The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

Who the president chose to nominate as a justice of the peace and whether he completed the appointment were issues involving political discretion, but once the appointment occurred, as it did when Jefferson's predecessor signed Marbury's commission, a legal right to the office vested in Marbury.

Proof of the appointment occurred when, pursuant to federal law, Adams's Secretary of State (Marshall), affixed the national seal onto the commission.

A legal issue arose, however, when Marbury sought his previously undelivered commission from the new Secretary of State, James Madison, who, as Marshall explained, unlawfully withheld Marbury's commission from him even though no law

the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law.

Id. at 158.

130. Jefferson accused the Federalists of "having retired into the judiciary as a stronghold. There the remains of federalism are to be preserved . . . and from that battery all the works of republicanism are to be beaten down and erased." Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801) in 10 THE WRITINGS OF THOMAS JEFFERSON 302 (Andrew A. Lipscombe ed., 1904), as quoted in Alfange, supra note 6, at 358-59.

131. See Marbury, 5 U.S. (1 Cranch) at 138-39 (Argument of Charles Lee, counsel for Petitioner). Of course, the best witness about these matters was John Marshall himself.

132. Id. at 170.

133. See id. at 157-59, 161, 166-67.

134. See id. at 157-62.

135. See id. at 157-58.
required actual delivery of the commission.\textsuperscript{136} The absence of a legal requirement of delivery did not especially concern the Chief Justice because he believed that delivery was not altogether essential for proof of a valid appointment.\textsuperscript{137} Nevertheless, federal law obligated Madison, despite his political misgivings, to honor Marbury's commission.\textsuperscript{138} Consequently, Madison's refusal to do so, presumably at the direction of a Republican President chagrined by Adams's "midnight" Federalist judicial appointments, violated the law.\textsuperscript{139}

Critical of the political decision to withhold Marbury's commission, the Court ruled that mandamus was an appropriate legal remedy to resolve this dispute. Irked by the impudence of Jefferson and his secretary of state, Marshall commented archly that "[t]he government of the United States has been emphatically termed a government of laws, and not of men."\textsuperscript{140} Having characterized Marbury's interest as a legal one, Marshall reminded Madison that regardless of his political office, he was "amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others."\textsuperscript{141} The remedy of mandamus depended upon "the nature of the thing to be done . . . [and] . . . not . . . [upon] . . . the office of the person to whom the writ is directed . . . ."\textsuperscript{142} As a public official, Madison, therefore, was subject to a writ of mandamus compelling him to recognize Marbury's legal right to become a justice of the peace.\textsuperscript{143}

Ironically, in support of this point, Marshall invoked as precedent a previous suit in which the petitioner allegedly sought to compel the Secretary of War to pay a military pension.\textsuperscript{144} Though the Court refused to issue the requested relief in the "case" Marshall mentioned, it did not question the propriety of issuing a writ of mandamus against a public official to make him perform a legally prescribed duty.\textsuperscript{145} Notwithstanding the Chief Justice's deliberate manipulation of precedent—the uncited "case" he described was actually a composite of three unreported suits before the Supreme Court in the 1790s\textsuperscript{146}—he nevertheless made a

\begin{footnotes}
\item[136.] See id. at 172-73.
\item[137.] See id. at 159.
\item[138.] See \textit{Marbury}, 5 U.S. (1 Cranch) at 155-58, 160, 162, 166, 170.
\item[139.] See id. at 158, 166.
\item[140.] \textit{Id.} at 163.
\item[141.] \textit{Id.} at 166.
\item[142.] \textit{Id.} at 170.
\item[143.] See \textit{id.} at 158, 165, 166.
\item[144.] See \textit{id.} at 171-72.
\item[145.] See \textit{id.} at 172.
\item[146.] The cases, all of which were unreported, were: \textit{Ex Parte Chandler, United States v. Yale Todd} and an August, 1793, action in which Attorney General Edmund Randolph asked the Supreme Court to issue a writ of mandamus to Secretary of War Henry Knox to facilitate a Revolutionary War
\end{footnotes}
convincing argument for judicial review over the conduct of executive branch officials that did not involve political discretion.

**D. The Distinction Between Law and Politics**

By deliberately portraying the case as a legal controversy over Marbury's individual rights, Marshall was able to seemingly remove the Court from the political realm. Yet he also managed to rebuke Thomas Jefferson and James Madison for their willful misconduct. Significantly, the Court eventually avoided a political showdown with the Jefferson administration when it concluded it lacked jurisdiction to issue a writ of mandamus.\(^{147}\) Not only was the veteran's receipt of a pension under the Invalid Pensions Act of 1792. See Bloch & Marcus, *supra* note 48, at 306. A panel of pension commissioners had previously approved a pension for the unnamed veteran pursuant to a provision of the 1792 act that authorized U.S. circuit court judges to determine the eligibility of pension applicants subject to review by the Secretary of War. Putting aside their constitutional doubts about whether they could perform such non-judicial duties, some circuit judges reluctantly agreed to serve as pension commissioners. *Id.* In 1793, Congress enacted additional legislation that permitted the Attorney General and the Secretary of War to adjudicate the validity of pension rights asserted under the original act in the Supreme Court. *Id.* Notwithstanding the abstract merits of Randolph's argument, the Court nevertheless refused to issue a writ of mandamus because the Attorney General did not appear on behalf of any particular applicant. *Id.* at 307.

In *Ex Parte Chandler*, counsel for a Revolutionary War veteran asked the Supreme Court to issue a writ of mandamus to Secretary Knox to place the veteran on a pension list after two circuit court judges serving as pension commissioners declared the veteran eligible to receive benefits under the act. *Id.* With little apparent rationale, the Court declined to issue a writ of mandamus, but not because it believed it lacked the authority to provide this remedy. *Id.* at 307-08.

In *Yale Todd*, which was an original action in the Supreme Court to recover money paid to a pension recipient under the act, the Court ruled Article III judges could not act as claims commissioners. *Id.* Significantly, the Court did not question its authority to exercise original jurisdiction in a case that did not involve either an ambassador, public minister, consul or state as a party. *Id.* at 308-09.

John Marshall knew these foregoing cases were relevant to the issue of whether mandamus was a proper remedy for William Marbury, but also realized that they belied his ultimate conclusion that the Supreme Court lacked jurisdiction to issue a writ of mandamus. Accordingly, he blended the cases into a single precedent for which he provided no cite. *See id.* at 310-12, 314, 317-18 (discussing Marshall's manipulation of precedent). He did this in order to assert the authority of the Court over the legal—as opposed to political-actions of executive branch officials while avoiding a direct skirmish with the Jefferson administration over issuance of a mandamus. *See id.* at 319, 333. In addition, Marshall apparently ignored another case in which the Supreme Court denied a motion for mandamus on the merits without questioning its authority to issue the writ. This case, also unreported, was *United States v. Hopkins* (1794). *See Bloch & Marcus, supra* note 48, at 322-23 (discussing this precedent).

\(^{147}\) *See Nelson, supra* note 4, at 63; Alfange, *supra* note 6, at 372, 375, 384; Bloch & Marcus, *supra* note 48, at 301, 333.
this politically savvy but also a way to further the long-term institutional interests of a federal judiciary under siege from both Republicans who sought to curb its independence and their more rabid Federalist opponents who relied upon the unwavering support of the federal bench in their political battles with the party of Jefferson.¹⁴⁶

Through the guise of separating law from politics, the Marshall Court took advantage of the political animus of the Jefferson administration to assert the primacy of a low-level Federalist judicial appointee’s individual rights over the tyranny of presidential whim. Given the context of Marbury and the severe political pressure that confronted the Court in 1803, Marshall’s conscious decision to limit the scope of judicial inquiry to the legal issues presented by the case appears quite sound.¹⁴⁹ For not only did this approach underscore the essential function of the Court to resolve legal disputes, it also enhanced its legitimacy at a time when critics of the federal judiciary who sought to limit its powers often portrayed federal judges as political actors.

However, Marshall may not have altogether distinguished between law and politics in his Marbury opinion. First, Marbury’s action for mandamus involved the Court in both law and politics¹⁵⁰ because the suit asked the justices to compel a public official to perform a legal duty the official otherwise refused to perform because of political reasons. Notwithstanding Marshall’s line of demarcation between matters of law and political discretion, he nevertheless, in the words of Gordon Wood, “appropriated an enormous amount of authority for the courts . . . [b]y turning all questions of individual rights into exclusively judicial issues . . . ”¹⁵¹ In so doing, Marshall employed the master skills of a politician in carving out a niche for the Court.¹⁵² Interestingly, three years
earlier in a speech before Congress in which he defended the extradition efforts of President John Adams during the Robbins affair, Marshall expressed some doubt about the division between law and politics. Conceivably, as chief justice he believed it essential to erect such a barrier in order to lend credence to the application of judicial authority over executive branch officials in a politically controversial dispute.

In addition, although the Court effectively eschewed a political confrontation with Jefferson and Adams by not issuing a writ of mandamus, in retrospect this part of the case, with its assertion of judicial authority over executive branch officials, seems gratuitous, as does the decision, that on the merits, Marbury had a valid claim. Moreover, Marshall's reprisal of Federalist arguments about vested legal rights suggests he deliberately emphasized the judicial function of protecting individual legal interests with politics in mind as well as the overriding institutional objectives of the federal judiciary. Yet even if Marshall melded law and politics in his Marbury opinion,

Bloch & Marcus, supra note 48, at 336.
154. See Alfange, supra note 6, at 388, 410. In this regard, consider the perspective of Thomas Jefferson, who several years after Marbury complained to William Johnson (an 1804 Jefferson appointee to the Supreme Court) and to William Jarvis that:

[T]he practice of Judge Marshall in travelling out of his case to prescribe what the law would be in a moot case not before the Court... was... very irregular and very censurable... the Court determined at once that, being an original process, they had no cognizance over it; and therefore, the question before them was ended. But the Chief Justice went on to lay down what the law would be, had they jurisdiction of the case, to wit: that they should command the delivery... Besides the impropriety of this gratuitous interference, could anything exceed the perversion of the law?... Yet this case of Marbury v. Madison is continually cited by Bench and Bar as if it were settled law, without any animadversion on its being merely an obiter dissertation of the Chief Justice.

I CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY, 1789-1835, at 244-45 (Little, Brown & Co. 1987) (1926). There were Letters from Thomas Jefferson to George Hay (June 2, 1807), to William Johnson (June 12, 1825), and William Jarvis (Sept. 28, 1820). Id.
155. See Van Alstyne, supra note 6, at 6-7 (suggesting that if Marshall was correct that the Supreme Court lacked jurisdiction in the case, it was improper for the Court to decide the merits of Marbury's claim). But see Alfange, supra note 6, at 369-70, 375-76, 384 (arguing that this part of the decision complemented the judicial review segment and was an integral part of Marshall's strategy to portray the federal judiciary as the guardian of individual rights in a constitutional democracy).
156. See Alfange, supra note 6, at 375-76, 384; O'Fallon, supra note 31, at 247, 249, 256.
his purpose and method nevertheless attest to his judicial statesmanship.

V. CONSTITUTIONAL DIALECTICS AND JUDICIAL STATESMANSHIP

Though it comprised but a relatively small segment of his opinion in Marbury, Marshall’s analysis of judicial review was highly significant. For not only did it pull the Court away from the brink of an ugly confrontation with the executive branch and a political imbroglio from which it would unlikely emerge unscathed, it also underscored the role of the Court in a constitutional democracy. Far from being mere dicta, this section marked the advent of a more activist and instrumental form of judicial review than the traditional defensive approach articulated by previous jurists.

Critics of Marshall’s judicial statesmanship in Marbury often point to the errors in his analysis of judicial review. Others accord little significance to this part of the decision, asserting that Marshall broke little new ground with his points about constitutional supremacy and the role of the federal judiciary. Insofar as such criticism has magnified particular flaws of Marbury and contributed to periodic reassessment of its meaning, it has also distorted aspects of Marshall’s judicial statecraft in this much studied case. Though perhaps tinged with political expediency, Marshall’s observations about constitutional supremacy and judicial duty complemented his earlier points about the rule of law and the authority of the Court over the ministerial, non-politically discretionary actions of public officials that impinge upon individual rights.

In a decision about the fundamental limits of governmental authority, Marshall deliberately manufactured a constitutional conflict in order to limn the contours of Supreme Court jurisdiction. Ironically, his exercise in judicial abnegation solidified the role of the Court in constitutional interpretation. Yet instead of simply restating the arguments for judicial review earlier presented by Hamilton and others, Marshall carefully

157. See, e.g., Alfange, supra note 6, at 368-69, 371, 388-405, 424-29, 435-36; O’Fallon, supra note 31, at 255-57; Van Alstyne, supra note 6, at 6-33.
158. See Kramer, supra note 19, at 87. Prior to Marbury Supreme Court precedent existed to support federal judicial review of federal laws. See, e.g., Hylton, 3 U.S. (3 Dall.) 171 (upholding the constitutionality of a federal tax on carriages). In 1800, Justice Chase, in dicta mentioned that “the Supreme Court can declare an act of Congress to be unconstitutional, and, therefore invalid.” Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800) (Chase, J.). However, neither the Supreme Court nor any federal court had expressly declared a federal law unconstitutional before Marbury. Kramer, supra note 19, at 87.
159. See generally THE FEDERALIST NO. 78, supra note 84; Kamper, 3 Va. (1 Va. Cas.) 20. See also Letter from Samuel Chase to John Marshall (April 24,
and subtly began the process of transforming judicial review from an extraordinary political exercise into a routine part of the judicial function.

A. Judicial Tactics

Having previously ruled that Marbury had a legal right to his commission and determined the propriety of a writ of mandamus as a legal remedy, the Supreme Court found itself in a peculiar quandary. Rather than risk embarrassment if the executive branch refused to comply with a mandamus order (a likely scenario), the Court, under the astute leadership of its Chief Justice, concluded it lacked jurisdiction to compel Secretary of State James Madison to deliver Marbury's commission. Acutely aware of the Court's institutional vulnerability to political attack, John Marshall crafted an eloquent and compelling statement of judicial review designed to position the Court above the fray of partisan politics. Yet the foundation for this part of the opinion rested upon Marshall's questionable premise that a conflict existed between the Constitution and the law that authorized the Court to issue writs of mandamus to federal officials.

Ironically, the provision partially invalidated by the Court was part of a statute enacted by the Federalists in 1789 to empower the federal judiciary. Of further irony is that neither of the parties before the Court raised constitutional doubts about the mandamus provision of Section 13 of the Judiciary Act of 1789.

1802), supra note 109 (asserting that Congress could not alter the Court's original jurisdiction). Chase also argued that pursuant to its constitutional authority to review cases arising under the Constitution, the Supreme Court could declare void federal laws that conflicted with the Constitution. Id. at 112.

160. See HOBSON, THE GREAT CHIEF JUSTICE, supra note 4, at 199-208 (discussing Marshall's common law methods to constitutional interpretation during his tenure on the Supreme Court); Alfange, supra note 6, at 335, 338; Wood, supra note 59, at 799-803. But see SNOWISS, supra note 19, at 121, 126-51, 169-75; Kramer, supra note 19, at 87, 98-99 (both concluding that Marshall did this in cases after Marbury).

161. See Marbury, 5 U.S. (1 Cranch) at 173, 176.

162. See LEVY, supra note 7, at 83. Charles Lee, counsel for William Marbury, argued Section 13 pertained to the Supreme Court's appellate jurisdiction. See Marbury, 5 U.S. (1 Cranch) at 147-49 (argument of Charles Lee). Further, he contended that the action was essentially an appellate one since it involved an appeal from an adverse decision of the Secretary of State not to deliver Marbury's commission. See NELSON, supra note 4, at 62. William Nelson asserts that had the Court adopted Lee's point, Marshall's distinction between law and politics would have collapsed because then the Court would have essentially placed itself in the position of reviewing the political actions of the executive branch. Id. However, this explanation does not take into account Marshall's deliberate characterization of the Secretary of State's duty to deliver the commission as a legal obligation, a choice he made expressly to remove the Court from the realm of politics. Id. at 63. Ironically,
nor was its validity questioned in prior Supreme Court practice. Marshall shrewdly sacrificed a relatively uncontroversial law and avoided incurring the wrath of Republicans intent upon curbing an independent federal judiciary. However, his assertions about federal judicial review bolstered arguments made by proponents of a strong federal judiciary and thus probably assuaged some Federalists otherwise disappointed in the Court’s refusal to issue a mandamus. Accordingly, this facet of Marshall’s opinion illustrates both the attributes of his statesmanship and his calculated effort to protect the Court from the external pressures of partisan politics by casting its decision as one based upon the fundamental law of the Constitution rather than political expediency.

Marshall interpreted Section 13 of the Judiciary Act of 1789 as an attempt by Congress to augment the original jurisdiction of the Supreme Court. Pursuant to a curious and forced reading of statutory text, Marshall found that Section 13 authorized the Court to issue writs of mandamus as part of its original jurisdiction in contravention of the distribution of Supreme Court jurisdiction set forth in Article III of the Constitution. Significantly, Marshall departed from the doubtful case rule in his analysis of the mandamus provision of Section 13. Rather than construe the law’s ambiguous grant of mandamus power to the Court in a way that would avoid conflict with Article III, Marshall adopted a singular interpretation of the statute calculated to afford the Court a prime opportunity for exercising judicial review.

Even if Marshall did not deliberately misread Section 13, he chose to overlook the existence of plausible alternative constructions of this provision that would have not presented fatal constitutional problems. Placed within a compound sentence that referred to the appellate jurisdiction of the Supreme Court, the mandamus provision of Section 13 may have had other meanings than the one ascribed to it by a chief justice eager to exploit textual ambiguity of a statute he sought to sacrifice in the service in differentiating between vested legal rights and political discretion, Marshall may actually have blurred the line between law and politics. See Bloch & Marcus, supra note 48, at 336.

163. See Alfange, supra note 6, at 384.
164. See Marbury, 5 U.S. (1 Cranch) at 175-76.
165. See Levy, supra note 7, at 80-82.
166. In relevant part, Section 13 reads:
   The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts . . . and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.
   Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81.
of proclaiming judicial review. For example, Congress may have intended to confer mandamus authority upon the Court incidental to its appellate jurisdiction,\textsuperscript{167} an approach consistent with the plain meaning of the statute and, notwithstanding the Chief Justice’s adulterated version of the Exceptions Clause,\textsuperscript{168} within the power of Congress to regulate the Court’s appellate jurisdiction. In this regard, Marshall could have avoided a constitutional issue altogether and simply dismissed the case for lack of jurisdiction because Marbury sought mandamus in an original action before the Court as opposed to an appellate one. Yet, intriguingly, Marshall construed the mandamus provision as a modification of the Court’s original jurisdiction and thus perceived a constitutional conflict where none actually existed.

Insofar as Marshall tried to establish a rigid dichotomy between original and appellate jurisdiction, he deliberately ignored previous Supreme Court practice.\textsuperscript{169} In as many as three suits during the 1790s,\textsuperscript{170} the Court, in either its original or

\textsuperscript{167} See, e.g., HASKINS & JOHNSON, supra note 28, at 201, Edwin Corwin, Marbury v. Madison and the Doctrine of Judicial Review, 12 MICH. L. REV. 538, 540 (1914); Van Alstyne, supra note 6, at 31-32 (arguing that Marshall erred in failing to recognize that Congress could regulate the Supreme Court’s appellate jurisdiction by transferring a portion of it to the Court’s original jurisdiction). But see Amar, supra note 30, at 465-67 (criticizing the notion that the Exceptions Clause of Article III permits congressional expansion of the Supreme Court’s original jurisdiction).

\textsuperscript{168} Curiously, Marshall omitted a significant phrase in his quotation of the Exceptions Clause, which suggests the Chief Justice wanted to draw as little attention as possible to the fact that Congress could alter the Court’s appellate jurisdiction. With respect to the Supreme Court’s appellate jurisdiction, the Constitution provides in relevant part that the “supreme court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art III, § 2, cl. 2. In Marbury, Marshall misquoted Article III when he wrote that “the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.” Marbury, 5 U.S. (1 Cranch) at 174. Note that in this passage Marshall omitted the constitutional phrase “both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2. However, there was no need for Marshall to distort the text of the Exceptions Clause since his principal contention was that Section 13 impermissibly altered the Court’s original jurisdiction. Thus, Marshall’s point about the Court’s appellate jurisdiction was both gratuitous and misleading.

\textsuperscript{169} See Bloch & Marcus, supra note 48, at 302–33 (discussing Marshall’s selective use of precedent and history).

\textsuperscript{170} See id. at 306-10 (analyzing unreported mandamus cases involving claims under the 1793 Invalid Pension Act: the first, a 1793 action before the Court brought by Attorney General Edmond Randolph on behalf of an unnamed Revolutionary War veteran; and the second, a 1794 action, Ex Parte Chandler). A third case, also unreported, was United States v. Yale Todd, while not a mandamus action nevertheless exemplified the Supreme Court’s
appellate jurisdiction,\textsuperscript{171} entertained mandamus actions in which the justices acknowledged their authority to issue writs of mandamus to public officials even though they ultimately declined to impose this legal remedy.\textsuperscript{172} Though Marshall referred obliquely to this precedent when he ruled on the propriety of mandamus as a legal remedy—recall his odd composite case about Revolutionary War pensions\textsuperscript{173}—slyly he omitted further mention of this precedent when it contradicted his assertions about Supreme Court jurisdiction.

While Marshall may have correctly interpreted the allocation of Supreme Court jurisdiction within Article III as a constitutional limitation upon congressional authority to modify the Court’s original jurisdiction,\textsuperscript{174} his assertion that Section 13 conferred mandamus authority upon the Court as a grant of jurisdiction contained other flaws. For example, Marshall never appears to have considered the possibility that Congress perceived mandamus as an ancillary legal remedy that would only be available in cases in which the Court already had jurisdiction.\textsuperscript{175}

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\textsuperscript{171} Interestingly, some confusion exists about whether these cases involved matters of original or appellate jurisdiction. Alfange, for example, asserts they all were original jurisdiction cases. See Alfange, supra note 6, at 396. See also O’Fallon, supra note 31, at 256. In contrast, Bloch and Marcus describe them as “original actions” but appear to regard all but Yale Todd, and perhaps Hopkins, as appellate cases. Ostensibly, from their perspective, two of the unreported Revolutionary War pension cases were technically appeals from adverse actions (or non-actions) of the Secretary of War. Bloch & Marcus, supra note 48, at 307, 322-23, 29. Perhaps the most accurate way to view mandamus in these cases is not in terms of jurisdiction or even as an ancillary remedy but as part of the Supreme Court’s freestanding and inherent supervisory authority over lower federal courts and federal officials. See Pfander, supra note 30, at 1532-33, 1568, 1570, 1574. Commenting on section 13 of the Judiciary Act of 1789, Pfander suggests: “Congress may have seen the supervisory powers as an inherent feature of the authority of supreme courts and a source of authority that lay outside the scope of original and appellate jurisdiction.” Id. at 1568. Of Hopkins and Chandler, Pfander writes that they involved “original applications for mandamus to executive branch officials in matters that may appear to fall outside the scope of original jurisdiction in Article III.” Id. at 1574. However, the Supreme Court did not raise jurisdictional doubts in these cases because it assumed it could exercise inherent supervisory powers to issue writs of mandamus independent of questions of jurisdiction. See id. at 1574.

\textsuperscript{172} See Bloch & Marcus, supra note 48, at 306-10, 322.

\textsuperscript{173} See Marbury, 5 U.S. (1 Cranch) at 171-72.

\textsuperscript{174} See Amar, supra note 30, at 464.

\textsuperscript{175} See id. at 456.
Alternatively, Congress may have regarded mandamus as part of the Supreme Court’s inherent supervisory authority over lower courts and federal officials and as such differentiated between mandamus and questions of jurisdiction. This compelling suggestion, provided by James Pfander in his recent insightful study of *Marbury*, perhaps best explains the extent to which John Marshall distorted both the common law understanding of mandamus that existed at the time Congress enacted the Judiciary Act of 1789 and the intended meaning of Section 13. For, in retrospect, it appears highly unlikely that those who drafted this legislation (including two future Supreme Court justices) and were cognizant of the text of Article III, would create a law in patent conflict with its limitations of Supreme Court jurisdiction. Yet that is essentially what Marshall intimated in his creative, though ultimately flawed, analysis of Section 13. Moreover, from this perspective one can understand why Marshall seemingly ignored Supreme Court mandamus practice in the 1790s that he knew undermined his simplistic interpretation of a statute that may have sought to infuse burgeoning federal judicial power with common law procedure.

That Marshall may have misread Section 13 of the Judiciary Act of 1789 and manufactured a conflict between it and Article III

176. See Pfander, supra note 30, at 1547, 1568, 1570-72.
178. See Pfander, supra note 30, at 1522-23 & n.29, 1547, 1549, 1568, 1570-71. Pfander suggests Marshall may have in fact understood Section 13 as conferring general supervisory authority to the Supreme Court to issue writs of mandamus. See id. at 1535, 1549. However, Marshall considered this statutory grant in conflict with Article III of the Constitution. See *Marbury*, 5 U.S. (1 Cranch) at 173-77. In so doing he conveniently and deliberately overlooked the possibility that Congress regarded mandamus as a legal/political remedy independent of the Court’s jurisdiction and thus never intended to enlarge the Court’s original jurisdiction by conferring upon it the power to issue writs of mandamus. See Pfander, supra note 30, at 1535, 1547, 1568, 1570-71.
179. See Pfander, supra note 30, at 1518-19, 1524-25, 1535, 1561 (discussing the common law understanding of mandamus as part of inherent supervisory authority of a supreme court over lower courts and public officials). Indeed, Marshall was probably reluctant to acknowledge that the Supreme Court could issue a writ of mandamus pursuant to its inherent supervisory powers over lower federal courts and officials, given his sensitivity to Republican criticisms of abuse of judicial discretion and his desire to craft an opinion that appeared to keep the Court out of political disputes. See Pfander, supra note 30, at 1581-82.
of the Constitution does not, in hindsight, however, necessarily detract from his judicial statesmanship. A shrewd politician and masterful common lawyer, Marshall realized that Marbury's dispute with the Jefferson administration provided the Court with a prime opportunity to proclaim its role as constitutional arbiter in a case where doing so might irk the President, but not risk his ignoring a mandamus order if the Court, in the course of exercising judicial review of a federal law, ultimately concluded it lacked jurisdiction to issue a mandamus.

Viewed from this perspective, Marbury is best understood as both a legal and political case. Marshall certainly exercised a high degree of judicial statesmanship in Marbury but not so much because of the rigid distinction he posited between law and politics. Indeed, this dichotomy falters a bit upon close scrutiny of the context and structure of Marshall's opinion and of his methodology in creating a constitutional issue that actually may not have existed given the possibility of alternative analyses.

In place of the notion that Marshall's judicial statesmanship emanated in large part from his conscious separation of law from politics should be a more nuanced version that accounts for the nexus between law and politics that underlies many constitutional law cases. In fact, Marbury came about precisely because of politics, and the tactical genius of Marshall's opinion was that it appeared to separate legal questions from political ones when it really created legal and constitutional issues from the political circumstances that confronted the Court in 1803.  

In this regard Marshall's deliberate manipulation of mandamus precedent and distorted reading of Section 13 emanated from his tactical decision to retreat from a political conflict with the Jefferson administration. Having initially characterized the case as one involving individual vested rights and the propriety of mandamus as a legal remedy, Marshall shrewdly realized that the best way to preserve the independence of the federal judiciary and enhance the prestige of the Court was through an abstract analysis of the very law that ostensibly authorized the Court to compel Madison to deliver Marbury's commission. Rather than invoke the wrath of the executive branch, Marshall chose to take the proverbial high road, removing the Court from a political mess likely to result if it issued a writ of mandamus. Creation of a conflict between federal law and the Constitution, therefore, enabled Marshall to provide legal and constitutional reasons for the Court's decision rather than political ones. Despite the flaws in Marshall's constitutional and statutory

180. See Bloch & Marcus, supra note 48, at 336.
181. See Nelson, supra note 4, at 63; Bloch & Marcus, supra note 48, at 333.
182. See Alfange, supra note 6, at 367-68, 375-76, 408, 422-23, 438; O'Fallon, supra note 31, at 244.
analysis, his opinion nevertheless represents a special form of judicial statesmanship because Marshall's larger purpose was to clarify the role of the Court in a constitutional democracy.

**B. The Nature of Judicial Review**

In the absence of explicit constitutional text, Marshall used logic to justify the Supreme Court's partial invalidation of a federal law.\textsuperscript{183} Through syllogistic reasoning the Chief Justice sought to demonstrate the constitutional imperative of judicial review. In all likelihood, Marshall and other members of the Court felt some institutional urgency because of the Republicans' mounting skepticism about the legitimacy of federal judicial power and their continued efforts to curtail the independence of federal judges through the repeal of the Judiciary Act of 1801 and threats of impeachment.

Drawing upon traditional notions of constitutional supremacy and limited government, Marshall relied extensively upon the idea, previously advanced by Alexander Hamilton and others, that judicial refusal to enforce unconstitutional laws emanated from popular sovereignty.\textsuperscript{184} In a constitutional system based upon the consent of the governed, judges were agents of the people entrusted to preserve the boundaries of governmental authority.\textsuperscript{185} Paramount in status as the fundamental law of the land, a written constitution embodied the popular will and placed limitations upon all branches of the government, including the judiciary.\textsuperscript{186} Accordingly, the judicial function, as Marshall described it in *Marbury*, was to uphold the primacy of constitutional law over conflicting provisions of ordinary law.\textsuperscript{187} From this perspective, judges had a duty to declare void laws that exceeded the limits of a constitution whose legitimacy and purpose derived from popular consent.\textsuperscript{188}

To prove the Supreme Court had the authority to review the constitutionality of a federal law—something not explicitly set forth in Article III of the Constitution—Marshall used a syllogism in which he compared constitutional judicial review to the common law function by which judges resolved conflicts between ordinary laws.\textsuperscript{189} From the premise that the latter task comprised an essential component of adjudication, Marshall presumed that the

\textsuperscript{183} See Alfange, *supra* note 6, at 422-23.
\textsuperscript{184} See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 84, at 521-24.
\textsuperscript{185} See, e.g., *Kamper*, 3 Va. (1 Va. Cas.) at 78-79.
\textsuperscript{186} See *Marbury*, 5 U.S. (1 Cranch) at 177-80.
\textsuperscript{187} See *id.* at 177-78 (linking judicial review with popular sovereignty and constitutional supremacy).
\textsuperscript{188} See *id.* at 175-79.
\textsuperscript{189} See Alfange, *supra* note 6, at 422-26.
contrast between his reading of Section 13 of the Judiciary Act of 1789 and Article III of the Constitution presented a special kind of conflict of laws question within the purview of the Supreme Court.\textsuperscript{190} Noting the justices could hardly ignore the Constitution in resolving this issue,\textsuperscript{191} Marshall concluded that, as a matter of necessity, the Constitution authorized the Supreme Court to void laws that contravened constitutional limits.\textsuperscript{192} Though, by its very terms, this syllogism did not necessarily prove the constitutional framers intended to establish federal judicial review,\textsuperscript{193} Marshall insisted a written constitution which expressly limited governmental power implicitly sanctioned the authority of federal judges to declare federal laws invalid.\textsuperscript{194} Pursuant to this deft approach, Marshall sought to explain the Supreme Court’s refusal to issue a writ of mandamus as a matter of constitutional law rather than politics.

C. The Province of the Court

At a critical juncture of his analysis, Marshall remarked that “[i]t is emphatically the province and the 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.”\textsuperscript{195} Similarly, Marshall observed that “courts are to regard the constitution\textsuperscript{196} ... as a rule for the government of courts, as well

\textsuperscript{190} See id. at 423.
\textsuperscript{191} See Marbury, 5 U.S. (1 Cranch) at 178-79. Wryly, Marshall commented: “Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.” Id. at 178.
\textsuperscript{192} See id. at 177-78. Specifically, Marshall said:

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. This is the very essence of judicial duty.

If then the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

\textit{Id.} at 177-78.
\textsuperscript{193} See Alfange, supra note 6, at 424-25; Van Alstyne, supra note 6, at 16-22, 25-29.
\textsuperscript{194} See Marbury, 5 U.S. (1 Cranch) at 178. Yet a written constitution did not \textit{per se} authorize the Supreme Court to exercise judicial review, as Marshall intimated. See Alfange, supra note 6, at 426-27; Van Alstyne, supra note 6, at 17.
\textsuperscript{195} Marbury, 5 U.S. (1 Cranch) at 177.
\textsuperscript{196} Id. at 178.
as of the legislature.\textsuperscript{197} Viewed in isolation from the political context of the case, these statements might suggest the Marshall Court exercised judicial review with some caution in \textit{Marbury}, careful to assert merely as a coordinate branch of the federal government and not pursuant to any inherent institutional supremacy the power to invalidate a law that presumably posed a blatant conflict with the Constitution. From this perspective, advanced recently by several commentators, Marshall's \textit{Marbury} opinion fell squarely within the paradigm of late eighteenth century judicial review as a doctrine of judicial restraint and limited exposition.\textsuperscript{198}

Yet notwithstanding his modest assertions, Marshall did more than simply take notice of the Constitution in \textit{Marbury}. Having, in effect, devised a conflict between the Constitution and a federal statute, Marshall engaged in a much more active and instrumental form of judicial review than previous jurists. Whereas 1790s cases invoked judicial review for blatantly unconstitutional acts, in \textit{Marbury}, Marshall applied it to a statute about which there was little previous doubt of its constitutionality. In so doing, he implicitly stretched pre-existing conceptions of judicial review.

Thus his comment in \textit{Marbury} that "it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as the legislature"\textsuperscript{199} was not merely a restatement of the 1790s notion that the judiciary had an obligation not to enforce unconstitutional laws. Instead, it implied that the Court could not enforce the Constitution without ascertaining its meaning. For Marshall, the inherent ambiguity of constitutional text compelled him to apply common law techniques of analysis and thus treat the Constitution as a special kind of ordinary law subject to seemingly routine judicial interpretation.\textsuperscript{200}

\textsuperscript{197} \textit{Id.} at 180 (emphasis added).

\textsuperscript{198} See, e.g., SNOWISS, supra note 19, at 110-12; Kramer, supra note 19, at 87-99.

\textsuperscript{199} \textit{Marbury}, 5 U.S. (1 Cranch) at 179-80 (emphasis added).

\textsuperscript{200} See HOBSON, THE GREAT CHIEF JUSTICE, supra note 4, at 199-208 (discussing Marshall's constitutional methodology while on the Supreme Court); SNOWISS, supra note 19, at 121, 126-51, 169-75; Kramer, supra note 19, at 98-99 (referring, both Snowiss and Kramer, to Marshall's constitutional interpretation after \textit{Marbury}). This article contends, however, that in \textit{Marbury}, Marshall began the subtle process of treating the Constitution as a special form of ordinary law in order to ascertain the meaning of its provisions. \textit{See also} Wood, supra note 59, at 799-803 (noting the influence of the preeminent English common law jurists, Lord Mansfield and Blackstone, upon John Marshall's constitutional jurisprudence and the willingness of Marshall and his contemporaries to adapt common law techniques to American legal issues). From Wood's standpoint, treating the Constitution as a form of ordinary law enabled judicial interpretation of its provisions. \textit{See id.} at 801-03. This article asserts, therefore, that in \textit{Marbury}, Marshall
Since judges could “say what the law is,” Marshall thought they “must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” In this regard, it would appear Marshall conflated fundamental and ordinary law in his analysis of the constitutionality of Section 13 of the Judiciary Act of 1789. Indeed, his syllogism about the nature of judicial review in this context in part rested on this premise.

Moreover, Marshall’s selective reading of Article III’s Exceptions Clause suggests a conscious decision on his part to depart from rote application of the text of the Constitution. In a peripheral analysis of the Court’s appellate jurisdiction, Marshall misread the Exceptions Clause of Article III so as not to concede that Congress could regulate the Supreme Court’s appellate jurisdiction. Presumably, the Chief Justice deliberately misconstrued this constitutional language in anticipation of an argument that Congress could confer mandamus authority upon the Court as a regulation of appellate jurisdiction, a point, however, he need not have made given his preceding analysis of original jurisdiction and the text of Article III.

In addition, Marshall relied upon the structural components of the Constitution and his perceived intent of the framers to determine the meaning of its text and the scope of its limitations. Balancing the allocation of judicial power in Article III with the Supremacy Clause, he reasoned that, as a practical matter, the framers intended to vest the federal judiciary with the authority to void federal laws in conflict with the Constitution. Through interpolation of the Supremacy and Oath Clauses of Article VI, Marshall essentially construed the provisions of Article III and Article VI of the Constitution from a common law perspective in order to derive constitutional limits of federal judicial and legislative power.

201. Marbury, 5 U.S. (1 Cranch) at 177.
202. Id.
203. Marshall partially (and deliberately) misquoted the Exceptions Clause of Article III, Section Two, Clause Two of the Constitution when he wrote: “In all other cases, the supreme court shall have appellate jurisdiction,” Id. at 174, and omitted the following language from the Exceptions Clause: “both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” U.S. CONST. art. III, § 2, cl. 2. Thus, what Marshall quoted was only a portion of this constitutional clause, and he deliberately omitted a dependent clause from the sentence authorizing Congressional regulation of the Court’s appellate jurisdiction. The Chief Justice may have done this intentionally to assert the independence of the Court from Congress. Alternatively, he may have sought to refute the implicit argument of Marbury’s counsel that Congress could add to the Court’s original jurisdiction through regulating an exception to the Court’s appellate jurisdiction.
204. See Marbury, 5 U.S. (1 Cranch) at 177-80 (linking judicial review with constitutional supremacy).
205. In relevant part, the Supremacy Clause provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance
with the jurisdictional distribution set forth in Article III, Marshall crafted a cogent argument for the exercise of judicial review in the absence of explicit constitutional language giving the Court this power.

In so doing, he melded popular constitutionalism with ordinary law principles, in essence treating the Constitution as a special form of ordinary law susceptible to the techniques of common law interpretation, all the while recognizing its paramount status as the fundamental law of the land. To the extent, Marshall invoked popular sovereignty as the basis of constitutional supremacy and the justification for judicial review, his Marbury opinion initiated the subtle transformation of judicial review from a defensive posture hesitant to void legislation of doubtful unconstitutionality to a more creative form in which the justices ascertained the existence of implied constitutional limitations through creative analysis of both the text and structure of a written document.

Though on the surface Marshall appears to have pursued a cautious approach toward judicial invalidation of federal legislation, his legal maneuvers in the case and constitutional legerdemain suggest the Chief Justice’s ulterior motives were to enhance the prestige of the Court and solidify its institutional role thereof; . . . shall be the supreme Law of the Land.” U.S. CONST., art. VI, § 1, cl. 2. The Oath Clause provides in relevant part that: “all executive and judicial Officers . . . of the United States . . . shall be bound by Oath or Affirmation, to support this Constitution.” Id. at cl. 3. Marshall invoked the Oath Clause as a partial justification for judicial review when he asked: “Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?” Marbury, 5 U.S. (1 Cranch) at 180. However, Supreme Court justices are not the only public officials who take an oath to uphold the Constitution. That they are only one group of public officials to do so does not, therefore, confer upon them the power to declare federal laws unconstitutional, since presumably members of the other branches of the federal government are also aware of their obligation to follow the Constitution. See Alfange, supra note 6, at 435-36 (criticizing Marshall’s assumption that because Supreme Court justices take an oath to uphold the Constitution, they may derive some constitutional authority to review federal laws). But see Van Alstyne, supra note 6, at 25-27 (suggesting Marshall’s argument about the Oath Clause may be one of the more analytically sound points within his opinion).

206. The term popular constitutionalism is Larry Kramer’s. See Kramer, supra note 19, at 11, 14-15, 85. See also Nelson, supra note 4, at 59 (noting Marshall sought “to reconcile popular will and legal principle”).

207. See Horsin, THE GREAT CHIEF JUSTICE, supra note 4, at 199-208 (discussing Marshall’s constitutional methodology while on the Supreme Court); Snowiss, supra note 19, at 121, 126-51, 169-75; Kramer, supra note 19, at 98-99 (referring, both Snowiss and Kramer, to Marshall’s constitutional interpretation after Marbury). See also Wood, supra note 59, at 799-803 (describing the application of common law techniques to constitutional interpretation that began to occur after 1800 in American courts).
in constitutional interpretation. This is not to say, however, that Marshall proclaimed the supremacy of the Court as a constitutional arbiter in Marbury, although this implication would be drawn out over time.  

Marshall infused his analysis of judicial review with a vision of a strong federal judiciary that ultimately came to fruition in subsequent decisions in which the Court, under his leadership, increasingly interpreted the interstices of the Constitution through judicial recognition of the implied and incidental powers of the federal government and judicial application of constitutional limits to preserve contract obligations and protect property rights. Without Marbury and its implicit suggestion of the promise of judicial review, these cases would never have taken hold in the firmament of constitutional jurisprudence. Marbury, therefore, expressed Marshall's inchoate understanding of the role of the Supreme Court in the relatively new constitutional order, and for this reason, among others, is evidence of his judicial statecraft.

Modest in tone, yet forceful in practical impact, the Marbury opinion is more than the product of political intrigue and expediency. Subtle in its transformation of the Constitution from an abstract construct as the fundamental law of the land into a concrete statement of first principles fixed in tangible form and susceptible to common law interpretation, Marshall's Marbury opinion was a masterful decision despite its analytical flaws. Greater than the sum of its individual parts, it bolstered federal judicial power and outlined some of its constraints. In crafting an

208. For example, in 1833, Joseph Story, Associate Justice of the United States Supreme Court and a close colleague of Marshall, observed in his constitutional treatise:

It is the proper function of the judicial department to interpret laws, and by the very terms of the constitution to interpret the supreme law. Its interpretation, then, becomes obligatory and conclusive upon all the departments of the federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by that constitution.

Kramer, supra note 19, at 92, quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 357 (1833). See also Cooper v. Aaron, 358 U.S. 1, 18 (1958) (noting that "the federal judiciary is supreme in the exposition of the law of the Constitution . . ." and citing Marbury for this proposition).


210. See, e.g., Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819) (invalidating retroactive debt relief legislation as an unconstitutional impairment of the obligation of contracts); Fletcher, 10 U.S. (6 Cranch) 87 (applying the Contract Clause to executed land grants).


212. See Van Alstyne, supra note 6, at 29.
opinion which transcended the political circumstances of the case, Marshall, therefore, demonstrated considerable judicial statecraft.

VI. IRONY AND THE ATTRIBUTES OF JOHN MARSHALL'S JUDICIAL STATECRAFT

Viewing *Marbury* as a case with various levels of irony brings into sharper focus the attributes of John Marshall's judicial statesmanship. One basic irony is that Marshall actually presided over a legal proceeding that came about, in large part, because of his failure as Secretary of State and predecessor of James Madison, to deliver William Marbury's commission in the waning hours of the Adams administration. While modern standards of judicial ethics would condemn this conflict of interest, this unusual practice did not prevent the Chief Justice from delivering one of his more fabled opinions about the nature of judicial review and the importance of the rule of law in a constitutional democracy. Had Marbury received his justice of the peace commission from John Marshall, there would have been no dispute, though this does not mean, of course, that the Supreme Court would have lacked an opportunity to exercise judicial review in 1803. After all, also on the docket was *Stuart v. Laird*,\(^2\) decided six days after *Marbury*, in which the Court upheld the authority of Congress to repeal the Federalist Judiciary Act of 1801 and reinstate the requirement that Supreme Court justices perform circuit court duties.\(^3\) Interestingly, Marshall recused himself from this case because of his involvement in the circuit court proceedings below.

Another ironic aspect of Marshall's *Marbury* opinion is that even though the Court ultimately ruled that it lacked the jurisdiction to issue a writ of mandamus, Marshall did not hesitate to find a vested legal right at issue, for which mandamus was an appropriate legal remedy. From this twist of irony, he fashioned the segment of the opinion that asserted the authority of the Court, as an equal, coordinate branch of the government, to review the legal actions of both Congress and the President. This was a cogent reminder to the political branches not only of the Court's constitutional role but also its independence. Marshall delivered this message in a way that announced the province of the Court over legal issues and limited its intervention in matters of political discretion, at a time when the federal judiciary, in general, and the Supreme Court, in particular, found itself at the center of a political maelstrom. Though cast as a distinction between law and politics, this facet of Marshall's opinion reflected his political instincts and overriding concern for preserving judicial independence in a manner calculated to enhance the prestige of an

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213. 5 U.S. (1 Cranch) at 299.
214. Id. at 308.
embattled judiciary.

A more fundamental irony involves the manner in which Marshall deliberately crafted a conflict between Section 13 of the Judiciary Act of 1789 and Article III of the Constitution. In contrast to previous applications of judicial review wherein courts consciously followed the doubtful case rule and merely took notice of constitutional provisions unless situations involved blatant constitutional violations, in *Marbury*, Marshall may have misread the federal statute and conveniently ignored mandamus precedent in order to suggest the existence of a constitutional violation that had never occurred to either his predecessors on the Court or the draftsmen of the Judiciary Act of 1789. Having raised doubts about the validity of the federal law, Marshall proceeded to compare it with what he perceived were the applicable provisions of the Constitution.

To ascertain the meaning and effect of Article III, Marshall considered the structure of the Constitution as well as his perceived intent of the Framers. Analysis of constitutional text in this manner, therefore, went beyond the norms of late eighteenth century judicial review and presaged Marshall's eventual transformation of constitutional adjudication into a sophisticated exercise of common law interpretation intended to facilitate judicial application of the Constitution to the legal problems of an emergent democratic republic. Indeed, behind the sophistry of Marshall's *Marbury* opinion lay his subtle treatment of the Constitution as a special type of law, supreme in a legal system marked by the fundamental limits of governmental authority as interpreted by an independent judiciary careful to interpose constitutional restraints upon the coordinate branch of the government and, itself, in order to protect individual rights.

Though it appears to some revisionist scholars that Marshall did not depart from traditional notions of judicial review in *Marbury*, his opinion, notwithstanding its seemingly straightforward exposition of constitutional text, actually marked the incipient stages of a subtle shift in which judges began to decide for themselves the line of demarcation between legal and political issues. The irony here is that although commentators often regard *Marbury* as an example of defensive judicial review, Marshall's opinion proved pivotal in the evolution of judicial review from its more modest origins as a means for the judiciary to interpose itself as an intermediary between the people and an overreaching legislative branch.

Through his conscious relaxation of the doubtful case rule and his alacrity in construing diverse sections of the Constitution to ascertain the meaning of its text and the scope of its limits upon
governmental authority, Marshall accomplished several objectives which underscore the attributes of his judicial statesmanship. From an institutional perspective, his shrewd strategy in first discussing the merits of Marbury's claim enabled the Court to assert its authority over the legal actions of the political branches of the national government. In this sense, the Marshall Court, though ostensibly distinguishing between law and politics, actually used political tactics to bolster its adjudicatory role.

Having assumed legal control over a conflict that emerged from a bitter dispute between the Federalists and Republicans, the Court appeared to place itself above the political fray. Once again, Marshall's political astuteness suffused his judicial strategy as he affixed to Marbury's claim a constitutional dimension that enabled the Court to withdraw from the brink of direct confrontation with a recalcitrant presidential administration and hostile Congress. Rather than issue a writ of mandamus Marshall expected the Republicans would likely ignore to the embarrassment of the Supreme Court, Marshall moved the case to a more abstract level of constitutional inquiry.

Reasoning that the Court lacked jurisdiction to issue a writ of mandamus because, in Marshall's mind, Section 13 of the Judiciary Act of 1789 unconstitutionally augmented the Court's original jurisdiction as set forth in Article III, the Chief Justice saved the Court from a political imbroglio created in the first place by his failure to deliver Marbury's commission and then his presiding over the claim. Moreover, by characterizing Marbury's right to the commission as a vested legal right subject to court rule, Marshall issued a challenge to the political branches. Though Marshall's analysis of statutory and constitutional law was not without its flaws, one aspect of his constitutional exegesis was that it gave the Court an opportunity to expand the realm of judicial review. Through the guise of distinguishing law from politics, Marshall shaped a case "born out of political defeat" into a vehicle for enhancing the constitutional role and prestige of the Court.

VII. CONCLUSION

Though widely acclaimed as America's greatest jurist, John Marshall is not without his critics, for whom the Chief Justice's opinion in Marbury v. Madison serves as an egregious example of judicial statesmanship gone awry. From this perspective, Marshall's lengthy discussion of the merits of William Marbury's claim, the propriety of mandamus as a legal remedy, his manipulative interpretation of statutory and constitutional law

216. O'Fallon, supra note 31, at 259.
217. 5 U.S. (1 Cranch) 137.
and his syllogistic justification of federal judicial review seemingly contradict the distinction between law and politics Marshall asserted throughout his written analysis. Moreover, to some, the Chief Justice’s personal involvement in the underlying dispute, coupled with the political circumstances of the case, suggest Marbury was more the product of judicial politics than dispassionate adjudication.\footnote{218}

Yet despite the opinion’s analytical flaws and structural anomalies, it nevertheless demonstrates the extent to which John Marshall’s particular form of judicial statecraft reflected his intuitive understanding of the Court as a legal and political institution and the Constitution as a blueprint for the allocation of governmental authority. Insofar as Marshall differentiated between law and politics in Marbury, he sought to insulate the Court from the external pressures of partisan politics that threatened its independence and legitimacy. However, by engaging in a form of judicial brinksmanship with the Jefferson administration, the Chief Justice mixed political savvy with common law reasoning to strengthen the Supreme Court. In so doing, Marshall quietly began the process of transforming the practice of judicial review from an abstract and often defensive exposition of first principles into a dynamic and pragmatic exercise of legal interpretation and constitutional adjudication.

Indeed, throughout Marbury Marshall advanced a vision of judicial power based upon constitutional supremacy and the rule of law. Statesmanlike in its balanced appraisal of the parameters of judicial authority, Marshall’s opinion also evoked the promise of a constitutional system in which the Court would function as the guardian of individual rights. Viewing the components of Marshall’s opinion in Marbury through the prism of irony reveals the spectrum of his juridical skills. For in its entirety the decision transcends the sum of its individual parts and thus underscores the genius of John Marshall’s judicial statecraft.

\footnote{218. \textit{See} O’Fallon, \textit{supra} note 31, at 219-21.}