

Marbury v. Madison: A Bicentennial Symposium

OUR *MARBURY**

89 Virginia LR 1235 (2003)

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INTRODUCTION	1236
I. CHIEF JUSTICE MARSHALL'S FIRST DECISION (AND HOW TO READ IT) . . .	1245
II. PROBING THE CONVENTIONAL NARRATIVE	1260
A. <i>Of Effrontery and Retreat</i>	1260
B. <i>Burr</i>	1265
C. <i>Of Guts and Federalism</i>	1267
D. <i>Righteous Anger</i>	1272
E. <i>Why Do We Think Jefferson Would Not Have Complied?</i>	1275
F. <i>The Courage to Tangle with the Chief Justice</i>	1277
G. <i>Stuart v. Laird</i>	1281
H. <i>The Impeachment of Justice Chase</i>	1287
I. <i>Noncompliance</i>	1294
J. <i>Why Marbury Lost</i>	1296
III. <i>MARBURY'S MISSING ARGUMENT: THREE FUNCTIONS OF THE HOLDING</i> ON JURISDICTION	1297
IV. <i>MARBURY'S STRAINED AND IMPLAUSIBLE STATUTORY</i> CONSTRUCTION	1303
A. <i>Charles Lee's Jurisdictional Problem</i>	1303
B. <i>What Statutory Construction?</i>	1310
C. <i>The Question for Decision</i>	1316
D. <i>How Jurisdiction Cases Are Decided</i>	1317
E. <i>Disembodied Mandamus: The Alleged Precedents</i>	1321

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I would like to acknowledge the splendid resources now accessible to scholars. We have Maeva Marcus's collection of documents on the history of the Supreme Court, including early unpublished opinions. With Charles Hobson's publication in 2002 of Volume 11 of the collection of the papers of John Marshall long under his editorship, we now have this magisterial work in near completion, with Hobson's particularly valuable notes. In addition, we have internet access to the Library of Congress, including such searchable collections as the 65,000 papers of George Washington. There are biographical and other materials available at the various websites of the United States Government. There are also the resources of the great university libraries. I have relied particularly on the University of Virginia's open, easily accessed, searchable, and printable collection of the letters of Thomas Jefferson, displayed both in his original hand and in transcription, and on the electronic text collections of the Avalon Project at Yale. In citing to sources found on the internet I have tried to provide traditional hard copy sources in preference to URLs.

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F. Charles Lee’s Alternative Jurisdictional Hypotheses.	1331
G. Reaching for a Constitutional Question	1335
H. “He Wrote It Backwards”	1341
V. <i>MARBURY’S</i> STRAINED AND IMPLAUSIBLE CONSTITUTIONAL INTERPRETATION.	1349
A. A Curious Device	1349
B. An Originalist Excursus: What the Exceptions and Regulations Clause Was About	1356
C. Of Additions and Epicycles.	1370
D. The Power to Add is the Power to Destroy: Of Hazard and Accountability	1374
E. Bullying the Court	1379
F. Of Floors and Ceilings.	1382
G. Ah, The Recantation!	1384
H. Vanishing in a Puff of Smoke.	1388
VI. SECURING THE APPELLATE POWER.	1389
VII. <i>MARBURY’S</i> UNCONVINCING SUPPORT OF JUDICIAL REVIEW	1395
VIII. MARSHALL’S <i>MARBURY</i>	1403
CONCLUSION	1407

(2003) 89 Virginia LR 1236

INTRODUCTION

THERE is a conventional narrative of *Marbury v. Madison*,¹ a story we have been telling ourselves about the case. The story can be found in Beveridge’s great *Life of John Marshall*,² and a few years earlier in Corwin’s writings.³ Parts of the narrative may trace back to more obscure **(2003) 89 Virginia LR 1237** earlier sources.⁴ The background is the election of 1800. The Republicans have swept the political branches, but the Federalists are hunkered down in the judiciary. A partisan war on the judiciary ensues.⁵ The new Republican President, Thomas Jefferson, refuses to recognize some of

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

2. 3 Albert J. Beveridge, *The Life of John Marshall* 50-156 (1919) [hereinafter 3 Beveridge, *The Life of John Marshall*].

3. Edward S. Corwin, *Marbury v. Madison* and the Doctrine of Judicial Review, 12 Mich. L. Rev. 538 (1914) [hereinafter Corwin, *Marbury* and Judicial Review], reprinted in Edward S. Corwin, *The Doctrine of Judicial Review* (1962) (1914) [hereinafter Corwin, *The Doctrine of Judicial Review*]; Edward S. Corwin, *The Establishment of Judicial Review* (II), 9 Mich. L. Rev. 283 (1911) [hereinafter Corwin, *Judicial Review* (II)]; Edward S. Corwin, *The Establishment of Judicial Review* (I), 9 Mich. L. Rev. 102 (1910) [hereinafter Corwin, *Judicial Review* (I)].

4. The narrative does not appear in works as late as Henry Flanders, *The Life of John Marshall* (1905) [hereinafter Flanders, *John Marshall*]; Allan B. Magruder, *John Marshall* (1885).

5. See, e.g., 2 George Lee Haskins & Herbert A. Johnson, *History of the Supreme Court of the United States* 136-81 (1981) (Chapter on “Jefferson’s Attack on the Federal Judiciary”); Edward S. Corwin, *John Marshall and the Constitution: A Chronicle of the Supreme Court* 53-85 (1919) [hereinafter Corwin, *Marshall and the Constitution*] (Chapter on “Jefferson’s War on the Judiciary”). For useful background, see James F. Simon, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States* (2002); Richard E. Ellis, *The Jeffersonian Crisis: Courts and Politics in the Young Republic* (1971) [hereinafter Ellis, *The Jeffersonian Crisis*]; Donald O. Dewey, *Marshall Versus Jefferson: The*

President John Adams's last-minute judicial appointments—the so-called “midnight judges.”⁶ The Republican Congress embarks on a purge of the Federalist judiciary with a series of arbitrary impeachments. Meanwhile, Congress fires all the federal circuit judges by repealing⁷ the 1801 statute that created the federal circuit bench.⁸ To avoid an immediate challenge to this enormity, Congress shuts down the Supreme Court of the United States for the entire year of 1802. It is a constitutional crisis.

(2003) 89 Virginia LR 1238 In the traditional account, the new Chief Justice, John Marshall, presides over a low-prestige Supreme Court.⁹ He wants to build it up, just as the political branches want to tear it down. Then along comes William Marbury. Although Marbury is not one of the new circuit judges, he is one of the midnight judges.¹⁰ Jefferson does not acknowledge Marbury's appointment because Marbury's commission was found in a batch of midnight judges' commissions that were never delivered.

As the story has it, John Marshall, under threat of impeachment himself, is badly frightened. Marbury's case presents him with a dilemma. If he orders Secretary of State James Madison to deliver Marbury's commission, Madison will not obey, and the Supreme Court will be a laughingstock. But if Marshall declines to order Madison to deliver, it will look as though the Supreme Court is backing down. The Court will still be a laughingstock. Either way, the Court will suffer a blow to whatever small authority it possesses, rendering it even more politically vulnerable.

In *Marbury v. Madison*, so the story goes, Chief Justice Marshall dodges both horns of this dilemma and achieves a “strategic coup.”¹¹ Marshall holds that the Supreme Court has no jurisdiction.

Political Background of *Marbury v. Madison* (1970) [hereinafter Dewey, Marshall versus Jefferson].

6. Cf. Letter from Thomas Jefferson to Mrs. John [Abigail] Adams (June 13, 1804), in 10 *The Works of Thomas Jefferson* 84, 85 (Paul Leicester Ford ed., 1905) (“I can say with truth, that one act of Mr. Adams' life, and one only, ever gave me a moment's personal displeasure. I did consider his last appointments to office as personally unkind.”). [Note, some editions of the Ford collection of Jefferson's works bear the alternative title of “The Writings of Thomas Jefferson.” Since other collections of Jefferson's papers tend to bear this last title, and since the edition of Ford to which I have access uses the word, “Works,” throughout these notes the cited series is referred to as “The Works of Thomas Jefferson.”]

7. Judiciary Act of 1802 [“Repeal Act”], ch. 8, § § 1-2, 2 Stat. 132 (Mar. 8, 1802) (repealing the provisions of the Circuit Court Act of 1801, ch. 4, 2 Stat. 89).

8. Judiciary Act of 1801 [“Circuit Court Act”], ch. 4, 2 Stat. 89 (Feb. 13, 1801), repealed by Judiciary Act of 1802, ch. 8, § § 1-2, 2 Stat. 132.

9. See, e.g., William R. Casto, *The Supreme Court in the Early Republic* 249 (1995) (“[T]oday the early Supreme Court is usually dismissed as a mediocre collection of reasonably competent lawyers.”); 2 Haskins & Johnson, *supra* note 5, at 7 (arguing that the Court was a “relatively feeble institution during the 1790s”); see also Seriatim: *The Supreme Court before John Marshall* 1 (Scott Douglas Gerber ed., 1998) (arguing that it has been a mistake to neglect the early Court, in part because studying the early Court can tell us what the Supreme Court might have been like if Marshall had not put his stamp upon it).

10. Marbury had been named a justice of the peace for the District of Columbia, but his appointment had not been perfected by the delivery of an official commission. This presented the new Jefferson administration with the opportunity of treating it as null. The openings for justices of the peace had been created in that part of the organic law of the District of Columbia that organized its first system of courts. An Act Concerning the District of Columbia, ch. 15, § 11, 2 Stat. 107 (Feb. 27, 1801).

11. 4 Dumas Malone, *Jefferson the President: First Term, 1801-1805*, at 148 (1970) [hereinafter 4 Malone, *Jefferson the President I*] (deeming *Marbury* a “tour de force”); Robert H. Jackson, *The Struggle for Judicial Supremacy* 27 (1941) (finding Chief Justice Marshall's strategy “masterly”); Robert G. McCloskey, *The American Supreme Court* 25 (Sanford Levinson ed., 2000) (1941) (describing *Marbury* as “a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it”); 3 Beveridge, *The Life of John Marshall*, *supra* note 2, at 142 (“[B]y 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.”); Corwin, *Marshall and the Constitution*, *supra* note 5, at 66 (seeing in *Marbury* “a political

(2003) 89 Virginia LR 1239 But this holding, in itself, is not the “strategic coup.” In *Marbury*, the Court establishes judicial review of acts of Congress¹² and the hierarchical superiority of the Constitution, among other things. Along the way, the Court disclaims power to decide political questions and chastises the administration. Marshall does all this in heroic defiance of Jefferson’s war on the courts. In so doing, he comes to the rescue of the judiciary, and begins to build up the Supreme Court’s prestige. And, in a nice twist at the end of the story, Madison has no chance to refuse to obey, because Marshall has not ordered him to do anything. The traditional moral of the story is couched as an amusing paradox. By denying his Court this little bit of jurisdiction, Marshall has carved out much larger powers for it.

So the standard narrative has a happy ending, and *Marbury* can begin its life on the first page of all the casebooks.

A more complete account of the things happening in *Marbury* would also include the following. The Justices chose to disregard the more established custom of delivering their several opinions “seriatim,”¹³ and spoke in an individually authored opinion that was both unanimous and the opinion of the “Court,” focusing the Court’s authority with force in the voice of the Chief.¹⁴ In this clearer voice of power, *Marbury* established the foundations of public law. It laid down that our government was under the rule of law in our courts. It disclaimed any power over unadjudicable political action, but, by the same token, insisted on judicial protection **(2003) 89 Virginia LR 1240** of everything that is adjudicable—that is, the rights of individuals. By implication, this American constitutionalism was to extend to state as well as federal acts and laws, and would be as characteristic of state as of federal courts. This dispensation does seem to describe, more or less, the real world of American constitutionalism as it has been experienced over two centuries, developed, and handed on to us today. Even if one does not approve of all this, one has to be a little awed by it.

Yet, alluring as it is, much of the narrative frame for these achievements is simply *made up*. There was a war on the judiciary, all right, but until the early twentieth century there was no reference to the “dilemma,” the “strategic coup,” and so forth. Nevertheless, fresh elaborations upon the old story are still appearing and gaining acceptance. In later accounts, the strategic coup is no longer a coup, but an effort by Marshall to calm partisan passions and to conciliate the new administration.¹⁵ This kindly twist in the old story, alas, has undergone a rapid metamorphosis. In the most recent version, Chief Justice Marshall no longer heroically mans the constitutional barricades, and *Marbury* is not an act of defiance or courage after all. Rather, Chief Justice Marshall is now recast as a coward, and *Marbury* as an inglorious retreat. Worse, *Marbury* is now seen in a diminishing light, as unimportant then and overemphasized now.

coup of the first magnitude”). But see, e.g., Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 Am. J. Pol. Sci. 285 (1994) (arguing that the strategic coup theory is too clever, and that Marshall and Jefferson are better understood as rational actors maximizing their gains at each stage of the *Marbury* controversy).

12. By this, writers do not mean that by 1803 judicial review was not fully understood and substantially accepted, at least among Federalists. Rather, they mean only that in *Marbury* the Supreme Court first placed its authoritative explicit imprimatur on judicial review in a case in which an act of Congress would have been unconstitutional if applied as counsel was urging, and attempted to explain the justifications for it.

13. For background see *Seriatim*, supra note 9. The device of having the Chief Justice deliver an opinion for the “Court,” with or without dissent, was apparently employed but not well established before Marshall’s Chief Justiceship. See, e.g., *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 9 (1799) (Ellsworth, C.J.) (delivering the opinion of “the Court”).

14. For comment on this feature of *Marbury*, see James Bradley Thayer, *John Marshall* 54-55 (1901).

15. For a good example of writing in this mode, see George L. Haskins, *Law Versus Politics in the Early Years of the Marshall Court*, 130 U. Pa. L. Rev. 1 (1981).

There is also a conventional technical critique of Chief Justice Marshall’s reasoning, and a much older and more vocal substantive critique of *Marbury*’s real-world legacy. Of the two, the technical critique has become the more vitriolic. The opinion in *Marbury* is called disingenuous, its reasoning insupportable. This late-blooming critique has become almost as conventional as the standard narrative, and through unthinking repetition has nearly submerged the greatness of the case, while a sour disrespect for Chief Justice Marshall now infects the debate.

The technical critique has to do with the Court’s holding of “no jurisdiction.” Jurisdiction was an issue because *Marbury* initiated his case in the Supreme Court, as if it were a trial court. *Marbury* relied on a statutory grant of power to the Supreme Court to issue **(2003) 89 Virginia LR 1241** the writ of mandamus against a government official—precisely the relief he wanted. Congress had granted this mandamus power to the Court in Section 13 of the First Judiciary Act.¹⁶ The Supreme Court ultimately held in *Marbury* that, if this grant of mandamus power were read as a grant of jurisdiction, as *Marbury* was urging, the statute would be¹⁷ unconstitutional. Under Article III, a party within the Supreme Court’s original jurisdiction must be a state or an ambassador,¹⁸ and neither *Marbury* nor Madison was a state or an ambassador.¹⁹ Moreover, Article III plainly prohibits Congress from extending the Court’s original jurisdiction to other kinds of parties. After affording ambassadors and states the courtesy of trial in the highest Court, Article III says unequivocally that “in all other cases the supreme Court shall have appellate Jurisdiction.”²⁰

The conventional technical critique of *Marbury*’s jurisdictional holding involves two separate sets of objections to this apparently seamless reasoning. These objections are accompanied by curiously heated allegations of activism,²¹ twisted reasoning,²² and even dishonesty²³ **(2003) 89 Virginia LR 1242** on the part of Chief Justice Marshall. Most of the elements of the critique were first set out by Corwin.²⁴ Professor Corwin’s progressivist critique was picked up by Professor Crosskey, who made it part of his attack on the early New Deal Court.²⁵ The same critique was warmed over in the 1950s.²⁶

16. Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80-81 [“Judiciary Act of 1789”] (“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, when proceeding as courts of admiralty and maritime jurisdiction, 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.”).

17. I state the holding in the subjunctive, as a ruling on a hypothesis. For an explanation of this formulation, see *infra* Sections IV.C-D, F.

18. Throughout this Article I use the term “ambassadors” generically to encompass the class of foreign dignitaries for whom Article III offers the Supreme Court as a court of first instance.

19. The proposition that the Constitution should provide a forum for trial of cases concerning foreign dignitaries first appears in the New Jersey plan offered to the Constitutional Convention of 1787 by William Paterson, and is limited to “ambassadors.” 1 Records of the Federal Convention 244 (Max Farrand ed., 1937).

20. U.S. Const. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

21. See, e.g., Leonard W. Levy, *Original Intent and the Framers’ Constitution* 75 (1988) (declaring *Marbury* to be “one of the most flagrant specimens of judicial activism and . . . one of the worst opinions ever delivered by the Supreme Court”).

22. See, e.g., Letter from Thomas Jefferson to James Madison (May 25, 1810), in 3 *The Republic of Letters: The Correspondence between Jefferson and Madison 1631, 1632* (James Morton Smith ed., 1995) (“His [Marshall’s] twistifications in the case of *Marbury* . . . shew how dexterously he can reconcile law to his personal biases.”).

23. See *infra* note 293.

24. See works cited *supra* note 3.

25. 2 William Winslow Crosskey, *Politics and the Constitution in the History of the United States* 1041-42 (1953)

Years later, the old critique was recycled and argued more fully by Professor Van Alstyne, to whom it is now customary to attribute it.²⁷ Professor Van Alstyne's main contribution may have been to turn Corwin's progressivist critique to conservative use in reaction to the Warren Court.

It is complained, preliminarily, that Marshall wrote *Marbury* backwards, with jurisdiction at the end instead of the beginning, just so that Marshall could reach the merits of the dispute and reproach Thomas Jefferson. This was "manipulative" and "dishonest," but fortunately it rendered Marshall's censure of Jefferson mere dictum.²⁸ Second, Marshall's statutory construction was strained and implausible. He should have read the mandamus clause of the statute not as a grant of adjudicatory power, but simply as a grant of remedial power²⁹—as it obviously was. Third, Marshall's constitutional interpretation, too, was strained and implausible. He should not have stripped Congress of its power to add to the original jurisdiction of the Supreme Court. In aid of this conclusion, it is alleged that Congress obviously has redistributive power under the Exceptions and Regulations Clause of Article (2003) 89 Virginia LR 1243 III.³⁰ Some critics also find unconvincing and simplistic Marshall's reasoning in support of judicial review of legislation.³¹ This, in sum, is the technical critique. In my view, *Marbury* is nowhere near as strained and implausible as this critique is.

The substantive critique involves the controversy over judicial review. That critique calls for a fully argued separate treatment; and because that subject is overworked anyway, in this Article I will limit my remarks to what I have here called, respectively, the "narrative" and the "technical critique." I will have quite a bit to say about the judicial review passages in *Marbury*, but not about judicial review itself.

This Article challenges the traditional narrative, as well as the conventional technical critique. Oddly, although the technical critique has occasionally been called into question, the traditional narrative has not. Yet if one looks closely at both the critique and the narrative, they begin to seem unconvincing. Fresh lines of inquiry open up. Part I lays a basis for these challenges through an inquiry into John Marshall's purposes. Part II probes the conventional account of *Marbury* with some skepticism. It argues that in *Marbury* Marshall was not, in fact, confronted with the alleged "dilemma," did not care about the strategic "coup," and should not be understood as engaged in some sort of retreat or accommodation. Part III argues that the judicial review aspect of *Marbury*, whatever its other purposes, was strategically important to the longer part of the case that precedes it, the part dealing with judicial control of the government. This was the aspect of *Marbury* that mattered most to Marshall and the Court. Part IV substantially demolishes the prevailing technical critique of John Marshall's statutory construction, in a detailed and extended set of arguments. Part V similarly demolishes the prevailing technical critique of John Marshall's constitutional interpretation. Part VI identifies—in addition to judicial power over the executive, the legislature, and the judiciary itself—a further power secured by Chief Justice Marshall in *Marbury*. Part VII acknowledges certain much-criticized features of the judicial-review segment of *Marbury*, but argues that Marshall's method was essential to his success in

[hereinafter Crosskey, *Politics and the Constitution*].

26. See, e.g., Thomas Reed Powell, *Vagaries and Varieties in Constitutional Interpretation* 7-23 (1956).

27. William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1 (1969) [hereinafter Van Alstyne, *A Critical Guide*].

28. These perceptions of the reasoning in *Marbury* as manipulated, and of the opinion as largely dictum, surfaced early in newspaper accounts of the case. For a survey of these sources, see 1 Charles Warren, *The Supreme Court in United States History* 248-55 (1926) [hereinafter 1 Warren, *Supreme Court*].

29. See, e.g., Corwin, *Marshall and the Constitution*, supra note 5, at 541-42.

30. See Corwin, *The Doctrine of Judicial Review*, supra note 3, at 4-9.

31. See infra Part VII.

establishing judicial (2003) 89 Virginia LR 1244 review. Part VIII argues, briefly, that the main accomplishment of the case as Marshall and his contemporaries saw it should more completely enrich our understanding of *Marbury*'s legacy.

In the course of these interconnected analyses, I cast some doubt upon the standard account of *Marbury*. I highlight a major weakness in that part of the Court's opinion dealing with judicial control of government. I explain why Marshall selected *Marbury*, rather than a later case preferred by *Marbury*'s critics, for full-dress treatment. I show that the conventional critique of Marshall's statutory construction cannot be reconciled with the conventional critique of Marshall's constitutional interpretation. I identify what Marshall's critics have taken for "statutory construction" as a very different feature of judicial process. I show that the statutory critique is based on theorists' impatience with, if not forgetfulness of, the fundamentals of the judicial process in cases raising jurisdictional issues. I show that the widespread conviction that there were precedents for a contrary result in *Marbury* is quite unfounded. I clarify the workings of the reallocative mechanism that *Marbury*'s critics read into Article III, and show that this proposed reading of the Constitution is not only pointless, but wrong, and not only wrong, but subversive. Although I do not discuss the perennial issue of the propriety and legitimacy of judicial review of legislation, I try to explain the peculiar virtues of Chief Justice Marshall's reasoning in support of judicial review. In short, my effort is to enter the *Marbury* debates on the side of those who would preserve the case from its critics, and in the process to shed some new light. But I am confident that, even if the critics were right about *Marbury*, it would still be our greatest case.³² (2003) 89 Virginia LR 1245

I. CHIEF JUSTICE MARSHALL'S FIRST DECISION (AND HOW TO READ IT)

Much of what I am about to say builds on the familiar assumption that Chief Justice John Marshall's opinion in *Marbury v. Madison* was fully intended to be read as a constitutive document—that in *Marbury*, Marshall was at his most ambitious. Marshall's admirers and his critics alike make the same assumption, with only this difference: His admirers think that in *Marbury* he was statesmanly, while his critics think he was disingenuous. We cannot know Marshall's mind, but what I call here "his first decision" may bear interestingly on his purposes in *Marbury*.

Although John Adams had lost the presidential election of November 1800, it was unclear who had won it. There was an intractable electoral tie between Thomas Jefferson and Aaron Burr.³³ The election went to the House, where for complex reasons perhaps best explained by game theory, balloting went on and on without result. The Republicans had swept the field, but an orderly transfer of power was a rare experience in human history, and the Republicans guarded their victory with a jealous eye toward the old Federalists. It was widely feared that the Constitution might not hold. Convinced, in their anxiety, that Burr would find a way to cheat Jefferson of the presidency, or that the holdover Federalist Congress

32. There is remarkable consensus about this, shared by *Marbury*'s critics and proponents alike. See, for example, Jean Edward Smith, *John Marshall: Definer of a Nation* 325 (1996) [hereinafter Smith, *John Marshall, Definer*] ("The decision itself is one of the great constitutional documents of American history."). Smith is an admirer of Marshall; but see even the occasionally critical Thayer, *supra* note 14, at 94-95 ("Coming now to the . . . class of cases . . . which deals with the fundamental conceptions and theory of our American doctrine of constitutional law, *Marbury v. Madison* is the chief case.").

33. Jefferson and Burr had run on the same Republican ticket. But under the provisions of Article II as it then stood, after Adams's defeat they had to face a runoff in the House of Representatives. Jefferson did not win the presidency until the 36th ballot. Bernard A. Weisberger, *America Afire: Jefferson, Adams, and the Revolutionary Election of 1800*, at 227-77 (2000).

might halt the fruitless balloting and name a Federalist president pro tem—perhaps John Marshall³⁴—or even that General Alexander Hamilton might order the Army to seize control of the **(2003) 89 Virginia LR 1246** government, the governors of Pennsylvania and Virginia laid plans to call out their state militias if need be.³⁵ “In Maryland and elsewhere,” Beveridge tells us, “armed men, wrought up to the point of bloodshed, made ready to march on the . . . Capital.”³⁶

In the midst of the electoral crisis, John Adams (back in Washington³⁷ to serve out his last lame-duck months in the presidency) learned that the Chief Justiceship of the Supreme Court had fallen vacant. Oliver Ellsworth, in failing health, had resigned. Ellsworth’s timing preserved the nomination of his successor for the Federalists,³⁸ but left very little time for them to achieve it. Adams, of course, had no intention of permitting the new Republican President, be he Jefferson or Burr, to name the next Chief Justice. But in the little time left to him he could not find a Federalist to his liking who would accept the job. Initially he had tried to nominate Jay. John Jay had been the first Chief Justice of the United States, but had valued the job so little that in 1795 he had resigned to run for governor in New York. Adams knew that Jay did not want to run again. It seemed plausible that Jay might now welcome a chance to return to the Court. But a precious month passed before Jay finally declined. Jay’s delay made it urgent—if the Federalists were to retain the Chief Justiceship—that Adams fill the post quickly.

Adams was under a further pressure. The Federalists’ new judiciary bill was being rushed through Congress. The proposed bill, among other things, would cut the number of Supreme Court Justices from six to five. The point of this provision was to force the new Republican president to wait until two of the old Federalist **(2003) 89 Virginia LR 1247** Justices retired or died before he could name a Republican Justice of his own. But now, at the eleventh hour, an unintended consequence of the proposed bill was presenting a serious risk to the Federalists themselves. They might very well lose that sixth seat on the Court simply because Adams could find no one to take it.³⁹

As Marshall later told the story of his appointment, it was he, Marshall, then serving as Adams’s

34. A letter appeared in the press proposing legislation to make the Chief Justice President pro tem in such a crisis. It was rumored that the writer was Marshall himself. 2 Albert J. Beveridge, *The Life of John Marshall* 541-44 (1916) [hereinafter 2 Beveridge, *The Life of John Marshall*]. The style of the letter was thought to be very like Marshall’s. Marshall did not deign to deny such rumors, and his silence was taken as an admission. Jefferson wrote Madison declaring that any Federalist “usurpation” would be resisted “by arms” or, almost as disturbingly, by recourse to a new constitutional convention. Letter from Thomas Jefferson to James Madison (Feb. 18, 1801), *in* 9 *The Works of Thomas Jefferson* 182 (Paul Leicester Ford ed., 1905). For the view that John Marshall might well have been involved in a conspiracy to steal the presidency, see Dewey, *Marshall Versus Jefferson*, *supra* note 5, at 42-44.

35. 3 Dumas Malone, *Jefferson and the Ordeal of Liberty* 503-04 (1962) [hereinafter 3 Malone, *The Ordeal of Liberty*]; 4 Malone, *Jefferson the President I*, *supra* note 11, at 7-11; Joanne B. Freeman, *The Election of 1800: A Study in the Logic of Political Change*, 108 *Yale L.J.* 1959, 1963-87 (1999).

36. 2 Beveridge, *The Life of John Marshall*, *supra* note 34, at 544.

37. In the spring of 1800, the President received news that Abigail Adams was ill and rushed off to Boston, leaving his young Secretary of State, John Marshall, to govern the country. *Id.* at 493-515.

38. I had presumed Ellsworth timed his resignation to ensure that the Chief Justiceship would remain in Federalist hands, but Ellsworth apparently had fallen ill in October, 1800, while in France, and would remain in Europe for some time. See 2 Haskins & Johnson, *supra* note 5, at 103; Kathryn Turner, *The Appointment of Chief Justice Marshall*, 17 *Wm. & Mary Q.* 143, 143 (1960) [hereinafter Turner, *Chief Justice Marshall*].

39. The statute fashioning a judicial system for the District of Columbia posed a similar danger to the Federalists, one which, in the event, Adams could not forestall. The statute created a special circuit court for the District, but Adams simply could not name its new chief judge in time. The plum appointment fell into Jefferson’s hands. Susan Low Bloch & Ruth Bader Ginsburg, *Celebrating the 200th Anniversary of the Federal Courts of the District of Columbia*, 90 *Geo. L.J.* 549, 551-52 (2002).

Secretary of State, who carried in to the President the letter from Jay declining the Chief Justiceship.⁴⁰ We might pause to ask the question, how, at forty-five, John Marshall had become Secretary of State. Although he had risen to become leader of the Federalist party in Republican Virginia, that would not have been enough to put him on the national stage. But back in 1797, Marshall, then a young congressman, had been dispatched by Adams, with Elbridge Gerry, to assist Charles Cotesworth Pinckney in the diplomatic mission that became the XYZ Affair.⁴¹ Marshall's role in spurning the corrupt and demeaning (2003) 89 Virginia LR 1248 proposals of the French brought him to national prominence, and incidentally gave him a good grounding in international law and foreign affairs. It would also have mattered to Adams that, in Congress, Marshall had turned out to be Adams's unfailing defender against attacks by both the "high Federalist" Hamiltonians⁴² and the "Republican" Jeffersonians.⁴³ Marshall's famous speech in the House defending the administration's conduct in the Jonathan Robbins affair⁴⁴ was typical of Marshall's loyalty. Adams, who was surrounded by intrigue⁴⁵

40. John Marshall, *An Autobiographical Sketch* 30 (John Stokes Adams ed., 1937) [hereinafter Marshall, *Autobiographical Sketch*]. The *Autobiographical Sketch*, all of thirty-five pages, was written at the request of Joseph Story.

41. Engaged as it was toward the close of the eighteenth century in a naval war with England, France resented America's trade relations with England, and privateers authorized by France began to disrupt American shipping. Despite growing American sentiment for war with France, and the opposition of the "high Federalists," President Adams saw the national interest in peace with the French, and sent like-minded Marshall and Gerry to help Pinckney negotiate an agreement. Their French counterparts—the "X, Y, and Z" of Marshall's dispatches back to Adams—shamelessly demanded, as a precondition, a "douceur" of \$250,000 for foreign minister Charles-Maurice Talleyrand, as well as a public loan of \$12 million to France—and, to the Americans' mounting fury, an apology for American pro-British policies. Adams believed that a French treaty would be the capstone of his presidency, and despite the opposition of Hamilton's faction, in retrospect there can be little doubt that his French policy was sound. Yet the Americans let the coveted French treaty slip through their fingers. They chose, rather, to assert the honor, dignity, and sovereignty of their young country. Adams, under attack on all sides, both for his French policy and its failure, was reluctant to make Marshall's dispatches public. He did so only when the opposition's clamor for their release became too noisy to disregard. To Adams's surprise, the dispatches redounded greatly to both Adams's and Marshall's credit. When Marshall returned to America he was received everywhere as a national hero. For a detailed exposition of the whole Affair, see William Stinchcombe, *The XYZ Affair* (1980). Were it not for the Federalists' Sedition Act, Marshall's conduct in the Affair would have secured the reelection of Adams and the future of the Federalist party. As Secretary of State, Marshall would eventually secure the French treaty as well, with the success of Ellsworth's negotiations.

42. For background, see Samuel J. Konefsky, *John Marshall and Alexander Hamilton: Architects of the American Constitution* (1964).

43. The names of factions in that period were many and confusing, but I will use "Republican" and "Jeffersonian" interchangeably when referring to the faction that developed in opposition to the policies of George Washington and Alexander Hamilton. This may also conveniently, if anachronistically, convey something of Jefferson's politics to a modern reader. It seems likely that if, based on his domestic program alone, you would have voted for Thomas Jefferson in 1804, you would vote, based on his domestic program alone, for George W. Bush in 2004. For further speculation about your vote for Jefferson, see Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 Const. Comment. 67, 88 (1995) [hereinafter Graber, *The Passive-Aggressive Virtues*].

44. This *cause célèbre* involved an alleged mutineer and murderer, Thomas Nash. Adams had handed him over to the British upon demand, and the British promptly hung him. But the popular belief in America was that Nash was really Jonathan Robbins, an American, and that, since he had been forceably pressed into service aboard the British vessel in question, his deeds were justified. Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229 (1990). Robbins's version of the story may well have been true, but John Marshall assumed the contrary. His celebrated speech in defense of Adams was so straightforwardly convincing that Albert Gallatin, who had planned to speak in rebuttal, abandoned the attempt. See Smith, *John Marshall, Definer*, supra note 32, at 258-62. For the speech itself, see *Speech of the Hon. John Marshall Delivered in the House of Representatives (Mar. 7, 1800)*, in 4 *The Papers of John Marshall* 82-109 (Charles T. Cullen ed., 1987).

45. There was no Twelfth Amendment at the time, and thus Adams's opponent in the election of 1796, Republican Thomas Jefferson, became Adams's Vice President. Adams had thought it prudent to retain Washington's cabinet; however,

and felt himself isolated in his administration, was deeply grateful to Marshall. Adams had only belatedly begun to purge the Cabinet of those of George Washington's appointees **(2003) 89 Virginia LR 1249** he correctly believed to be in league with Hamilton and bent on undermining the aims of his administration.⁴⁶ Marshall's staunch support must have commended him to Adams for one of these newly opened Cabinet positions. It is true that, the previous spring, Marshall had declined Adams's offer to join the Cabinet as Secretary of War. But a week later, for complex reasons of his own,⁴⁷ he did agree to become Adams's Secretary of State.

Now, January 14, 1801,⁴⁸ John Marshall, the young Secretary of State, stands at the President's elbow. As Marshall tells the story,⁴⁹ Adams, with Jay's refusal in his hand, asks Marshall to suggest a nominee for the Chief Justiceship. Marshall had previously suggested Justice Paterson and mentions his name again. "I shall not nominate him," Adams says, not liking to pass over Justice Cushing, and asks for another name.⁵⁰ There is a silence. Then, perhaps aware that the new Judiciary Act of 1801 would soon deprive the Federalists of a slot on the Court, and that there is a risk that if he names a sitting Justice to the Chief Justiceship, he will have trouble filling the remaining slot before the Act kicks in,⁵¹ Adams decides that he must pass over all the sitting Justices after all. He turns to Marshall and, as if by default, utters the offhand words that will echo down two centuries: "I believe I must nominate you."⁵²

(2003) 89 Virginia LR 1250 Marshall writes that he had never heard himself mentioned for the Chief Justiceship and "had not even thought of it."⁵³ Why, then, did Adams offer it? If at forty-five Marshall was a very young Secretary of State, he would certainly be a very young Chief Justice. Yet the offer to John Marshall had much to recommend it.⁵⁴ Marshall was already a noted expounder of the Constitution and an expert on its judicial article, Article III. He had defended the Constitution in the Virginia ratifying convention against such men as Patrick Henry and George Mason, rising to his feet most particularly to defend Article III.⁵⁵ In Congress, Marshall had become a principal architect⁵⁶ of

three of these men were in the councils of Hamilton and the High Federalists, who abhorred Adams's moderate policies and were doing everything they could to undermine them. Joseph J. Ellis, *Founding Brothers 185-201* (2000).

46. See Forrest McDonald, *Alexander Hamilton 332-33* (1979) (detailing Hamilton's influence on three members of Adams's cabinet); Ralph Adams Brown, *The Presidency of John Adams 31-32* (1975) (noting the disloyalty of Adams's cabinet and the influence of Hamilton and the High Federalists).

47. See *infra* text following note 80.

48. See Turner, *Chief Justice Marshall*, *supra* note 38, at 152 & n.40 (choosing January 14, 1801, as the most likely date of Adams's offer to Marshall); 2 Beveridge, *The Life of John Marshall*, *supra* note 34, at 553 (giving the date as January 20, and remarking that Marshall was nominated to the Chief Justiceship "with no herald announcing the event, no trumpet sounding").

49. Except as noted, the following account is taken from Marshall, *Autobiographical Sketch*, *supra* note 40, at 29-30.

50. *Id.* Adams also considered Jared Ingersoll, who was not interested. See Turner, *Chief Justice Marshall*, *supra* note 38, at 148.

51. The bill was enacted into law on February 13, 1801. Judiciary Act of 1801 ["Circuit Court Act"], 2 Stat. 89 (1801), repealed by Judiciary Act of 1802, ch. 8, § § 1-2, 2 Stat. 132.

52. Marshall, *Autobiographical Sketch*, *supra* note 40, at 30.

53. *Id.* A few weeks earlier, Marshall had written privately, "If my present wish can succeed so far as respects myself I shall never again fill any political station whatever." Letter from John Marshall to Charles Cotesworth Pinckney (Dec. 18, 1800), in 6 *The Papers of John Marshall* 41 (Charles F. Hobson ed., 1990).

54. See Magruder, *supra* note 4, at 163 ("Doubtless he [Adams] was led to the selection of Mr. Marshall . . . by an instinctive perception of a peculiar fitness in him for the place."). Magruder was given access by John Marshall's grandson to a private letter, now famous, from Marshall's youngest son to Brooks Adams, recounting the young man's visit to ex-President John Adams in 1825. During that visit, John Adams, now grown old, "grasping my hands told me that his gift of John Marshall to the people of the United States was the proudest act of his life." *Id.* at 162.

55. See 1 Albert J. Beveridge, *The Life of John Marshall* 409-20 (1916) [hereinafter 1 Beveridge, *The Life of John Marshall*].

the bill that, in the month following Adams's offer of the Chief Justiceship, would become the Circuit Court Act of 1801. Indeed, as the author of John Adams's final annual address to Congress in December 1800, Marshall was the source of Adams's renewed recommendation to Congress that the First Judiciary Act be reformed.⁵⁷

It is still sometimes said that the 1801 Act was a purely partisan attempt, in the face of the Republicans' sweep of the political branches, to pack the federal bench with Federalists. But that was not so, or not wholly so. Adams had suggested the need for legislation to reform the federal judiciary long before the election of 1800, in an address to Congress back in 1797.⁵⁸ Although in the end **(2003) 89 Virginia LR 1251** the Act did contain partisan features, and although it was rushed into law in 1801 for partisan reasons, the congressional committee on which Marshall was serving at the time well understood the need for reform, and the Act, on the whole, was a progressive, and indeed impressive, measure.⁵⁹

Then too, Marshall was eminently confirmable.⁶⁰ He was a man liked and trusted by men in all factions. His unpretentiousness, comradeliness, and humor made it easy for him to make and keep friends across the political spectrum, despite the political turbulence of that period. Notwithstanding his relative youth, his carelessness in dress, his "lax, lounging"⁶¹ ways, and his awkwardness in public speaking, the sheer force of his intellect had brought him to the attention of some of the greatest figures of the age, as his straightforwardness and loyalty had won him their confidence and friendship.⁶²

The even more interesting question is why Marshall, with all his future before him, accepted the Chief Justiceship in its then sorry condition. In later life, in his *Autobiographical Sketch*, Marshall tells us that he was surprised but pleased by Adams's offer, and "bowed in silence."⁶³ That is all. Marshall acceded on the spot. There was no delay.⁶⁴ He did **(2003) 89 Virginia LR 1252** not ask for time to think it over. He made no modest protestations. He offered no argument against it. He said nothing about the pros and cons of the proposition. He did not consider his other commitments. In an instant he laid aside all his future plans. He was pleased and bowed in silence. Yet it would not have been at all obvious to him that he should accept the Chief Justiceship. He had already turned down Adams's offer, upon the death of Justice James Wilson, of a seat on the Supreme Court.⁶⁵

56. See Robert J. Lukens, Jared Ingersoll's Rejection of Appointment as One of the "Midnight Judges" of 1801: Foolhardy or Farsighted?, 70 Temp. L. Rev. 189, 219 & n.166 (1997).

57. See William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* 48 (2000).

58. See John Adams, Speech to Both Houses of Congress (Dec. 3, 1799), in 9 *The Works of John Adams* 136, 137 (Charles Adams ed., 1854) ("To give due effect to the civil administration of government, and to insure a just execution of the laws, a revision and amendment of the judiciary system is indispensably necessary."). However, nothing of the sort had been enacted when Adams repeated the recommendation after the election of 1800. *Id.* at 144 (speech of Nov. 22, 1800).

59. Among other much-needed improvements, the 1801 Act gave general federal-question jurisdiction to the circuit courts and created genuine circuit courts with their own judicial personnel, thus relieving the Justices from the ordeal of circuit riding. Judiciary Act of 1801, ch. 4, § 6-7, 2 Stat. 89 (repealed 1802). For brief discussion of these features of the Act, see Erwin C. Surrency, *History of Federal Courts* 20, 22 (1987).

60. But see *infra* note 124 and accompanying text (discussing the Senate's delay in confirming Marshall). Marshall's appointment was confirmed January 27, 1801, and he took his seat February 4, 1801. See Marshall Chronology, in 6 *The Papers of John Marshall*, *supra* note 53, at xliii.

61. Letter from Thomas Jefferson to James Madison (Nov. 26, 1795), in 2 *The Republic of Letters*, *supra* note 22, at 900.

62. See *infra* notes 164-67 and accompanying text.

63. Marshall, *Autobiographical Sketch*, *supra* note 40, at 30.

64. Marshall did wait a week before sending Adams a formal letter accepting the Chief Justiceship. 2 Beveridge, *The Life of John Marshall*, *supra* note 34, at 448.

65. For a good, circumstantial account of Adams's offer to Marshall of an Associate Justiceship, see Smith, John

Of course Marshall would have seen at once that by occupying the Chief Justiceship he could be useful to his party, if only by keeping the post in good Federalist hands. He might also have been encouraged⁶⁶ by the dignity and prestige of the men who had served as Chief Justice before him.⁶⁷ Yet he might have been expected **(2003) 89 Virginia LR 1253** to decline for the same reasons that had previously led him to decline Adams's offer of a seat on the Supreme Court. The fact is that Marshall wanted to make money. It was not a matter of social pretension. Although Marshall was related to the Randolphs and the Jeffersons, he had no social ambitions. Washington had Mount Vernon, Jefferson his Monticello,⁶⁸ and Madison Montpelier. Adams jokingly liked to call his house "Montezillo."⁶⁹ For his part, Marshall was so unassuming⁷⁰ that he seems never to have thought about such things. He remained

Marshall, *Definer*, supra note 32, at 245.

66. See Joseph Story, *An Address on Chief Justice Marshall* 38 (1900) (1852) [hereinafter *Story, An Address*] ("No man ever had a loftier desire of excellence.").

67. Marshall's immediate predecessor, Oliver Ellsworth, had a long and distinguished career. He served on the Committee of Detail responsible for drafting the text of the Constitution. See 2 *Records of the Federal Convention of 1787*, at 97, 106 (Max Farrand ed., 1966) (1911). He was also the principal author of the First Judiciary Act, the main outlines of which still survive in Title 28 of the U.S. Code. See Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49, 50, 73 (1923). Among other things, the statute established the lower federal courts, omitting, however (in deference to antifederalist sentiment), to vest in the lower federal courts a general jurisdiction over cases arising under federal law. For Ellsworth's energetic promotion of this brilliant statute, see Casto, supra note 9, at 46-53. As a diplomat, Ellsworth also, notably, negotiated the peace with France that, as Adams's administration drew to its close, was Adams's—and Marshall's—chief object. 2 *Haskins & Johnson*, supra note 5, at 103 & n.158; 1 *Warren, Supreme Court*, supra note 28, at 119.

John Jay's career was at least equally distinguished. He was a delegate to the First and Second Continental Congresses. In the New York legislature, he drafted much of that state's first constitution, later also becoming New York's chief justice. He became President of the Continental Congress. He served as minister plenipotentiary to Spain, and carried out diplomatic missions in Great Britain and France. During the Articles of Confederation period, Congress appointed him Secretary of Foreign Affairs. He became Chief Justice of the United States, and while serving in that capacity concluded the much-disliked but essential treaty with Great Britain that bears his name. A forceful proponent of the Constitution, he authored five papers in *The Federalist*. We would regard his appointment by Washington as the first Chief Justice of the United States as the capstone of his career, but Jay left the Supreme Court to become governor of New York. See Richard B. Morris, *John Jay, the Nation and the Court* (1967).

John Rutledge also had a career of distinguished service. He was the provincial governor of South Carolina when it was taken over by the invading British. He escaped to North Carolina, rallied forces, and reconquered South Carolina. He was a delegate to the Continental Congress. His greatest achievement was as a delegate to the Constitutional Convention, where he became a chief draftsman of the Constitution, chairing the Committee of Detail. He also was a member of South Carolina's ratifying convention. George Washington named Rutledge an Associate Justice of the Supreme Court in 1789, and he served on the Jay Court for two years, leaving the Court to serve as chief justice of South Carolina. In 1795, Washington named Rutledge to the Chief Justiceship of the Supreme Court, but he presided only very briefly as an interim Chief Justice for the August Term; his nomination was rejected by the Senate (in part for his opposition to the Jay Treaty). See James Haw, *John and Edward Rutledge of South Carolina* (1997); Richard Barry, *Mr. Rutledge of South Carolina* (1942); Henry Flanders, 1 *The Lives and Times of the Chief Justices of the Supreme Court of the United States, John Jay and John Rutledge* (1881). On the cause of Rutledge's rejection by the Senate, see Matthew D. Marcotte, *Advice and Consent: A Historical Argument for Substantive Senatorial Involvement in Judicial Nominations*, 5 *N.Y.U. J. Legis. & Pub. Pol'y* 519, 539-41 (2001-02).

68. Responding to these montane pretensions, Marshall once called Jefferson "the great lama of the mountain." See *Letter from John Marshall to Joseph Story* (Sept. 18, 1821), in 9 *The Papers of John Marshall* 183 (Charles F. Hobson ed., 1998).

69. Joseph Ellis, *Passionate Sage* 58 (1994).

70. See John Stokes Adams, *Introduction to Marshall, Autobiographical Sketch*, supra note 40, at xiii ("It is difficult to think of Marshall as the author of an autobiography. His character was marked by simplicity and modesty, and he had none of that egotism which causes a man to imagine that he benefits mankind by talking about himself."); see also, e.g., 2 *Beveridge, The Life of John Marshall*, supra note 34, at 168 (regarding Marshall's lack of self-concern).

content with the substantial but plain house⁷¹ he had built in Richmond, close to the street, near his brothers' houses. But he had become involved in, and was heavily in debt over, one major land speculation—his part of a purchase of the Fairfax estate manor lands.⁷² This was the venture that ruined the great financier, Robert Morris.⁷³ As Charles Lee had reported **(2003) 89 Virginia LR 1254** to George Washington, Marshall was “at the head of his profession in Virginia.”⁷⁴ In his private practice he had been making the then-huge sum of five thousand pounds a year.⁷⁵ He had been using it to pay off the Fairfax loan.⁷⁶ It was because he had to make that kind of money that he had turned down George Washington's offer of a Cabinet post as Attorney General.⁷⁷ A year later, despairing of the fortunes of the Federalists, Washington had pulled out all the stops to prevail on Marshall to run for Congress.⁷⁸ Only George Washington, Marshall's hero, could have deflected Marshall from his pressing need to leave public life. President John Adams then sent the young congressman on that mission to Talleyrand that became the XYZ Affair. Like Adams, Marshall saw the need for peace with the French. But the compensation package also attracted him to the mission.⁷⁹ True, he had a different reason for turning Adams down when Adams offered him an Associate Justiceship on the Supreme Court, and then when Adams wanted him for Secretary of War—George Washington had wanted him in Congress.⁸⁰ Adams's offer of State a week later, in May 1800, was harder to resist. Unlike the War portfolio, the State position was interesting to Marshall, and he might have been as helpful to his party there as in Congress. He would have felt adrift as Secretary **(2003) 89 Virginia LR 1255** of War, but very much at the helm as Secretary of State. Besides, he thought he could be useful in promoting peace with France and finalizing a French treaty. Still, an expeditious return to his practice remained Marshall's object. His Cabinet position was enabling him to make his interest payments on the Fairfax loan, but he was anxious to pay off the debt altogether.

There were other reasons Marshall might have been expected to turn down the Chief Justiceship, reasons that must have moved both Jay and Ellsworth in leaving it. Secretary of State Marshall, after Adams the most powerful Federalist in the country, would be accepting a position that, however

71. Photographs in 2 Beveridge, *The Life of John Marshall*, supra note 34, opposite page 172, show Marshall's simple house close to the street, and a handsome large room used for entertaining.

72. Marshall had joined a syndicate that had agreed to purchase 160,000 acres of the Fairfax estate for \$20,000. Francis N. Stites, *John Marshall, Defender of the Constitution* 54-55 (1981). This was the involvement that would lead him to recuse himself, much to his regret, in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

73. *Id.*; see 2 Beveridge, *The Life of John Marshall*, supra note 34, at 201.

74. Letter from Charles Lee to George Washington (Mar. 20, 1796), *excerpted in* 2 Beveridge, *The Life of John Marshall*, supra note 34, at 201.

75. 2 Beveridge, *The Life of John Marshall*, supra note 34, at 201.

76. *Id.* at 210-11 (reporting that Marshall and his brother James together owed £14,000. When Robert Morris, James's father-in-law, went bankrupt, John and James Marshall assumed responsibility for his Fairfax debt as well).

77. In 1789 Washington proposed to name Marshall U.S. Attorney in Richmond. Then, in 1795, Washington wanted Marshall to join the Cabinet as Attorney General. The following year, Washington tried to name him Minister to France. Beveridge is convincing that Washington would have made Marshall Secretary of State but for the fact that Marshall had turned down every other offer of an appointment. 2 Beveridge, *The Life of John Marshall*, supra note 34, at 147-48.

78. In 1798, George Washington, foreseeing the decline of the Federalists, “set in motion a great political career” by “bullying” Marshall into running for Congress. James Thomas Flexner, *Washington: The Indispensable Man* 382 (1974). That took a good deal of bullying, since during Washington's presidency Marshall had rejected all of Washington's offers of high political office. See supra note 77.

79. Marshall came away from the XYZ affair \$15,000 to the good. His remuneration came to some \$20,000, and he seems to have cleared about \$15,000. However, this would have amounted only to £5000 in English money. See Stites, supra note 72, at 55; 2 Beveridge, *The Life of John Marshall*, supra note 34, at 372.

80. See supra note 78 and accompanying text.

dignified, was one of almost risible weakness. The office of Chief Justice, unlike that of Secretary of State, was not then one of particular prestige or power—although it was keenly felt that only a dignified worthy could be named to it. Nor did the Supreme Court then occupy anything like its position today in law or politics or public regard. In declining Adams’s invitation to return to the Chief Justiceship, Jay had famously written of the Court: “I left the bench perfectly convinced that under a system so defective, [the Court] would not . . . acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess.”⁸¹ It is telling that, although the capital was moved that same year from Philadelphia to Washington,⁸² and considerable work had been done on the White House and the Capitol, no one had thought to provide a courtroom, much less a building, for the Supreme Court. The Court had to meet in a half-finished little committee room in the first floor of the Capitol.⁸³ The Court had very little business, and such cases as did come before it were of scant importance. It could hardly have been otherwise, since there was very little federal law, and no very clear idea of constitutional litigation. I have already mentioned that the Justices at the time, following the English custom, managed both to confuse and dilute the effect of whatever they did do **(2003) 89 Virginia LR 1256** by delivering their several opinions seriatim, so that there was no single, clear, authoritative “opinion of the Court.”⁸⁴ Few of the fifty cases the Justices decided in the Court’s first decade are remembered now.⁸⁵ One thinks of *Chisholm v. Georgia*⁸⁶ and *Ware v. Hylton*,⁸⁷ and two “cases” not actually in the Supreme Court but in which the Justices wrote opinions, *Hayburn’s Case*⁸⁸ and *The Correspondence of the Justices*.⁸⁹ To make matters worse, the Federalist Justices’ heavy-handed enforcement, when sitting on circuit, of the hated Sedition Act, and of “criminal libel,” a federal common-law crime, had stirred well-deserved popular outrage.

Service on the Court, moreover, was peculiarly onerous then. Under Section 4 of the First Judiciary Act, there were no permanent judges of the circuit courts.⁹⁰ Instead, the Act required the Justices of the Supreme Court to leave their families for long periods and to ride circuit in all weathers— under the hazards of premodern conditions of travel⁹¹—two at a time, in order to compose, with **(2003) 89**

81. Letter from John Jay to John Adams (Jan. 2, 1801), in 4 *The Correspondence and Public Papers of John Jay* 284, 285 (Henry P. Johnston ed., 1893).

82. Marshall supervised the move to Washington D.C. himself. See Nelson, *supra* note 57, at 48.

83. For a good later photograph of this depressing room, no more than twenty-four by thirty feet in area, see 1 Warren, *Supreme Court*, *supra* note 28, at 170. At the time of the photograph it was serving as the office of the marshal of the Supreme Court.

84. See *supra* note 9 and accompanying text.

85. See Casto, *supra* note 9.

86. 2 U.S. (2 Dall.) 419 (1793) (holding a state amenable to suit in a diversity case), superseded by U.S. Const. amend. XI.

87. 3 U.S. (3 Dall.) 199, 235-39 (1796) (holding that the treaty with Britain at the close of the Revolutionary War preempted a Virginia statute that provided for the discharge of debts owed British creditors).

88. 2 U.S. (2 Dall.) 409, 409 & n.2 (1792) (reporting views of the Justices sitting variously on circuit; taken together they can be said to “hold” that decisions of federal judges cannot constitutionally be made subject to executive review).

89. This 1793 correspondence, popularized in Henry M. Hart, Jr. & Herbert Wechsler, *The Federal Courts and the Federal System* 75 (1953), appears at 3 *Correspondence and Public Papers of John Jay* 486-89 (Henry P. Johnson ed., 1890). The list of questions appended to the first letter can be found in 10 *The Writings of George Washington* 542-45 (Jared Sparks ed., 1836). The story behind the correspondence is told in 3 Malone, *The Ordeal of Liberty*, *supra* note 35, at 118-19. The Justices’ ultimate reply to Washington, signed by each of them, can be said to “hold” that the Supreme Court cannot constitutionally serve as an advisory appendage to the administration, since Article III permits the judicial branch only to adjudicate “cases” and “controversies.”

90. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74.

91. Although much of Marshall’s renewed circuit duty would be conveniently in Richmond, he still would have his

Virginia LR 1257 a single district judge, a circuit court. The bill that would become the Circuit Court Act of 1801, in the drafting of which Congressman John Marshall had been so instrumental, would create sixteen new judgeships to staff genuine circuit courts, and thus eliminate the Justices' burden of circuit riding. But the bill had not yet been enacted into law when Adams made his offer of the Chief Justiceship to Marshall.⁹² All this considered, it was understandable that Adams was having trouble filling the Chief Justiceship.

With so much in the scales against it, why then did Marshall accept? How could Marshall embrace so quickly a future for himself that had never figured in his ambitions, and one that, though a brilliant choice for Adams, would not necessarily have been considered a brilliant choice for him? It is a mystery, but since in two hundred years it has not seemed worthy of notice, we may be allowed to speculate about its solution. We know enough about Marshall, I think, to make an educated guess about the nature of what I have called here his "first decision."

During the Revolutionary War, Marshall, at first a lieutenant, then a captain, was little more than a boy. He was a convivial companion, whose jokes and pranks kept up the spirits of the men at Valley Forge.⁹³ Yet the men also came to hold the young officer in some regard. In their close and inadequate quarters, often embroiled in disputes among themselves or with other officers, men would go to see what young Marshall might have to say. They turned to him to hear and settle disputes. The boy, for all his frontier manners, came to General Washington's attention, and Washington appointed him Deputy Judge Advocate in the Army of the United States. Army lawyers deferred to Marshall, and he came to **(2003) 89 Virginia LR 1258** preside at formal courts-martial.⁹⁴ A conviction arose among army men that Marshall could see deeper and further and faster into a problem than anybody else. Later in his life, those who observed Marshall came away with remarkably similar impressions. Toward the end of Marshall's life, an English traveller noted particularly that Marshall's "quickness in apprehending either the fallacy or truth of an argument is surprising."⁹⁵ William Wirt was Attorney General from 1817 until 1829, and argued numerous cases to the Marshall Court, giving him ample opportunity to observe the Chief Justice. Wirt had also formed earlier impressions of Marshall when they were both young lawyers in Virginia. What Wirt particularly noted in Marshall was the one trait that seems to have distinguished Marshall in every setting, notwithstanding a certain want of presence. This was the gift of an understanding so penetrating, and above all so quick, as to seem uncanny. "This extraordinary man, without . . . advantages of person . . . possesses one original and almost supernatural faculty; the faculty of developing a subject by a single glance of his mind, and detecting at once, the very point on which

share of the Justices' frequent road accidents. See, for example, Cranch's brief report in *Hudson & Smith v. Guestier*, 11 U.S. (7 Cranch) 1, 1 & n. (1812) (explaining in an asterisk note that the Chief Justice could not be present at the opening of Court that term because he "received an injury by the over-setting of the stage coach on his journey from Richmond"). Beveridge describes the travel of the period as involving shipwreck, overturned carriages, improvised stages by wagon, and broken bones. 3 Beveridge, *The Life of John Marshall*, supra note 2, at 55 & n.5. Although Marshall's rapid decline and death were caused by a liver ailment, the precipitating event of the final downward spiral for the eighty-year-old giant seems to have been the overturning of a coach in which he was travelling; he sustained spinal injuries in the accident. See 4 Albert J. Beveridge, *The Life of John Marshall* 587 (1919) [hereinafter 4 Beveridge, *The Life of John Marshall*]. This may have been the occasion of the "severe contusions" reported in Flanders, *John Marshall*, supra note 4, at 265.

92. Charles Hobson believes that Marshall accepted the Chief Justiceship confident that at least he would not have to ride circuit. See 6 *The Papers of John Marshall*, supra note 53, at 126.

93. 1 Beveridge, *The Life of John Marshall*, supra note 55, at 132; Thayer, supra note 14, at 12.

94. According to Joseph Story, Marshall took these disputes very seriously. He wrote out his decisions and gave his reasons. At that time his only legal education consisted of a start at reading his father's *Blackstone*, a pursuit he had relinquished, at eighteen, when he answered Washington's call to the colors. Story, *An Address*, supra note 66, at 12-13.

95. See Flanders, *John Marshall*, supra note 4, at 264-65.

every controversy depends”⁹⁶

Perhaps it is here that we have an answer to our question. We have just seen that John Marshall had previously turned down a nomination to the Court, and two nominations to the Cabinet. With the single exception of his present post, he had consistently declined every offer of high position in government in order to work at paying off the debt he had acquired with his investment in the Fairfax estate. Yet Marshall accepted—in an instant—John Adams’s laconic offer of the Chief Justiceship, with its disruption of all his plans, and all its immediate disadvantages. Nor did Adams’s evident want of conviction in making the offer cause Marshall a moment’s hesitation. Whatever other men had been able to do with the job, and although, as he said, he had never thought of it for himself, he must have understood at once, seeing deeper, further, **(2003) 89 Virginia LR 1259** and faster than other men could, what the job might mean in his own hands. To us, the potential power of the Chief Justiceship seems as obvious as that Marshall should occupy it. Yet, although few men in public life have been less self-assuming than John Marshall, he might well have seen the matter as we do, as it pertained to himself. He knew that both his august predecessors had been defeated by the littleness of the job as it then was. Even so, he must have grasped, on the instant, that here was his chance. The opportunity would have seemed to him, as it pertained to himself, much bigger than it was as it pertained to his predecessors.⁹⁷ Against the background of the upheaval of the election of 1800, in Marshall’s likely state of anxiety for the safety of his country and the future of the Framers’ design, there was no one in whom he could have had greater confidence. Although Marshall was truly unaffected and unassuming, he was well aware, in the words of his still-greatest biographer, that “he carried heavier guns than other men.”⁹⁸ Joseph Story, his intimate and colleague, said of Marshall that “no one ever possessed a more entire sense of his own extraordinary talents.”⁹⁹ The prefiguring sense Marshall may have had that, like Washington, he would die despairing for his country, could not obscure the bigness of the chance. He could turn the Court to high uses. He could shape the Constitution to the vision of the Founders. He could stand guard over the Union. He could fortify the nation against centrifugal forces. Released from any necessity of practical political struggle, he would have a whole lifetime in which to try. Nothing else could compare to this. John Marshall had found his occupation.¹⁰⁰

(2003) 89 Virginia LR 1260 Looking back, then, at Marshall’s unhesitating decision to throw away all his plans and take the Chief Justiceship, it seems more likely than not that he did so with ambition to achieve what, in fact, the Marshall Court for the most part did achieve. He would bide his time and choose his occasions. But the achievement is there. If we are right about his idea, as he stood at Adams’s elbow early in 1801, then we may also be right in supposing that, in late 1801, beholding William Marbury’s case, Marshall would have seen not a dilemma, but—what others at the time would not have seen—a way to move the Court to a height on which authority as well as safety lay, and to

96. William Wirt, Esq., *The Letters of the British Spy* 178-79 (1832).

97. Cf. Joseph Ellis, *Maximum Justice*, N.Y. Times Book Review, Dec. 1, 1996, at 14 (pointing out that although John Marshall was the fourth Chief Justice, he was the first to locate and define the real powers of the office).

98. 2 Beveridge, *The Life of John Marshall*, supra note 34, at 168.

99. Story, *An Address*, supra note 66, at 40.

100. After Marshall’s death, Joseph Story wrote of him, “His proudest epitaph may be written in a line—’Here lies the expounder of the Constitution.’” Joseph Story, *A Discourse upon the Life, Character, and Services of The Honorable John Marshall, LL.D., Chief Justice of the United States of America, at the Request of the Suffolk Bar* 56 (1835) [hereinafter *Story, A Discourse*]; see also Earl Warren, *Forward to Chief Justice John Marshall: A Reappraisal* xvi (W. Melville Jones ed., 1956) (“But the great felicity of his life, and his claim to the reverence, not of his countrymen only but of mankind, are the services which he rendered . . . , in explaining and establishing the true principles of constitutional government.”). Thayer wrote of Marshall, “It is hardly possible . . . to say too much of the service he rendered to his country.” Thayer, supra note 14, at 46.

expound the rule of law as the Founders understood it. It was all in his hands now.

II. PROBING THE CONVENTIONAL NARRATIVE

A. *Of Effrontery and Retreat*

According to the standard account, *Marbury v. Madison* is located somewhere along a scale running from statesmanly “strategem” to headlong “retreat.”¹⁰¹ Both these extremes are (2003) 89 Virginia LR 1261 based on the same conviction—that Marshall stepped back from confrontation. Yet, why, in the standoff between the Chief Justice and the President, have we been assuming that the Chief Justice would blink? The Supreme Court was indeed very weak politically, but what we know about John Marshall suggests that he was not a man to shrink from a confrontation, politically weak or not.

First, consider Marshall’s conduct in *Marbury* and other early cases. Those who see prudence or strategic retreat in *Marbury* have to overlook a good deal of effrontery. When *Marbury* first came

101. See, e.g., Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* 49 (1996) (“Far from being a bold assertion of judicial power, *Marbury* actually marked a strategic retreat by the judiciary. . . .”); Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 Cal. L. Rev. 1, 18 (2003) [hereinafter Fallon, *Marbury and the Constitutional Mind*] (describing *Marbury* as a “prudent retreat”); John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. Rev. 962, 995-96 (2002) (“*Marbury* was a relatively inconsequential rear-guard action by a Court in full flight after a ruthless political offensive.”); Jed Handelsman Shugerman, *Marbury and Judicial Deference: The Shadow of Whittington v. Polk and the Maryland Judiciary Battle*, 5 U. Pa. J. Const. L. 58, 107 (2002) (characterizing “Marshall’s clever retreat in 1803” as “a wise survival strategy”); see also Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 Va. L. Rev. 1111, 1163-64 (2001) (arguing that the Marshall Court was in broad strategic retreat throughout, particularly in its final years). Also extending the “retreat” idea to a general theory of the Marshall Court, Professor Mark Graber writes, “[T]he Marshall Court frequently manipulated various federal statutes and jurisdictional grants in order to avoid handing down blunt judicial challenges to hostile political forces.” Graber, *The Passive-Aggressive Virtues*, supra note 43, at 68. These charges of “retreat” apparently originate with Professor Crosskey. See Crosskey, *Politics and the Constitution*, supra note 25, at 1035-46.

Professor Graber has gone so far as to claim that John Marshall deliberately misconstrued the language of the French treaty in *United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), in order to trim his sails to Jefferson’s French policy. See Mark Graber, *Establishing Judicial Review? Schooner Peggy and the Early Marshall Court*, 51 Pol. Res. Q. 221, 228-31 (1998). But John Marshall was the father of the French Treaty. President Adams had sent Marshall to Paris, with Charles Cotesworth Pinckney and Elbridge Gerry, to negotiate peace with the French. Marshall spent a year in the struggle against French arrogance and venality, in what became the XYZ Affair. Marshall was at the helm as Secretary of State when Ellsworth’s negotiations culminated in the treaty. See infra note 123 and accompanying text. Although the High Federalists disagreed with Adams and Marshall about our need for peace with the French, Marshall was a rock of firmness on the French treaty, and for this reason he and Jefferson were aligned on this issue. Only Ellsworth could have been as conversant with the treaty’s meaning, line for line. Nor is Professor Graber’s reading of the case one that should be accepted. A federal circuit court, reversing the district court, ordered that a French vessel should be condemned as prize. This judgment was then subject to appeal to the Supreme Court. At this juncture, the French treaty was signed. It provided that unless “definitively condemned” at the time of the treaty, any property in litigation would be restored to the owner. The Marshall Court enforced the treaty, since there was no definitive condemnation while the judgment of condemnation was subject to appeal. Chief Justice Marshall expressed regret that the property must be restored, but correctly explained that the obligations of the treaty superseded the claim. The case would come out the same way today. Since the French party was allowed to keep its property, at a stretch one might read this as evidencing Marshall’s desire to reassure the French that American courts would enforce the treaty. If so, this would be his own desire, not the President’s. But to the extent the case can tell us anything about Marshall’s predilections, surely it evinces at least as strongly Marshall’s well known conviction that our credit depended upon the confidence of foreign claimants that they would find the rule of law in our courts, notwithstanding local prejudices and interests.

before the Court in 1801, the result was not a dismissal, but a show-cause order. It is doubtful that Marshall would have been unaware of the boldness of his show-cause order—that, as some writers argue,¹⁰² he would have thought it routine or *pro forma*. The order went against James Madison, the “father of the Constitution,” now (2003) 89 Virginia LR 1262 Secretary of State. As against such a defendant, Marshall certainly did not toss off the order lightly. We know he issued it quite deliberately, after thinking it over for two days.¹⁰³

There was every advantage in so doing, as Marshall of all men was likely to have understood. Politically, of course, the case was a distinct plus for the Court from the moment the *Marbury* plaintiffs walked in. It is basic political wisdom that a player’s prestige is enhanced by challenging a bigger player. It was simply not in the cards that the Court would throw such an opportunity away. More importantly, the show-cause order, whatever else it might do, put the administration in the Court’s power. To some unpredictable extent, practical and political power materialized in the Court from that moment forward. Even more importantly, the Court’s taking hold of the case by issuing the show-cause order clearly put into Marshall’s hands, to some unpredictable extent, the future of the Constitution, because it put into his hands the political crisis that was rapidly becoming a constitutional crisis—the Republicans’ effort to purge the judiciary, federal and state, of Federalists, and to pack the judiciary with their own party men. And Marshall, ordinarily the most amiable of men, was angry now.¹⁰⁴

True, there was an obvious problem of jurisdiction. That would have to be dealt with. The *Marbury* plaintiffs would have to establish the jurisdiction of the Court, but that could await the scheduled hearing in a few months.¹⁰⁵

(2003) 89 Virginia LR 1263 With or without jurisdiction, the case put the Court in a better position to combat the administration. Indeed, with the benefit of history we can see that the Court would have seen this and that the Chief Justice was right to issue his show-cause order. We now know that the Chief Justice was able to turn the base metal of the occasion into something of incalculable value, even without jurisdiction. Marshall, then, would fully have intended his show-cause order to be confrontational. However, writers who think that Marshall’s 1801 show-cause order precipitated Jefferson’s war on the judiciary overstate the force of the confrontation. Since William Marbury was already a casualty of that war, at worst Marshall and his brethren can be faulted only for adding fuel to the fire.¹⁰⁶

I like to think that, at the time of his December 1801 order to show cause, Marshall was enjoying

102. See, e.g., Smith, John Marshall, Definer, *supra* note 32, at 301.

103. *Id.* at 300-01. Smith reports that only Chase was prepared to issue a show-cause order immediately. *Id.* at 300. Hobson thinks the Court took only one day, dating Lee’s motion on December 17, 1801, and the show-cause order December 18. 6 *The Papers of John Marshall*, *supra* note 53, at 160.

104. Dumas Malone speculates that Marshall “must have become very anxious to put himself on record or he would not have gone so far out of his way to do so.” 4 Malone, *Jefferson the President I*, *supra* note 11, at 147.

105. The hearing was scheduled for the fourth day of the following Term; that Term was supposed to begin in June 1802. 6 *The Papers of John Marshall*, *supra* note 53, at 160. However, the Court could not hear the case until 1803 because the Republican Congress in effect prorogued the Supreme Court for 1802. Act of Apr. 29, 1802, ch. 31, § 1, 1 Stat. 156 (repealing the 1801 Act’s December/June schedule for the Supreme Court, reinstating the Court’s old February Term, and explicitly repealing the First Judiciary Act’s provision for an August Term). The effect of this measure was to put the Supreme Court out of business for the whole of 1802. In the debate in the House over this last measure, Rep. James Bayard of Delaware, a leading Federalist, asked, “Are the gentlemen afraid of the judges? Are the gentlemen afraid that they will pronounce the repealing law void?” See Simon, *supra* note 5, at 168.

106. It is true that Marshall’s show-cause order of December 18, 1801, came in for frequent mention during the debate in the Senate preceding enactment of the Repeal Act of March 8, 1802. However, the references to Marshall’s show-cause order exhibit at least as much anxiety that the Marshall Court would declare the Repeal Act unconstitutional as anger at Marshall for issuing the show-cause order. See 3 Beveridge, *The Life of John Marshall*, *supra* note 2, at 91.

the sport. This may not be wholly fanciful. It is interesting that, in describing Marshall, Attorney General Willard Wirt would point not only to Marshall's uncanny penetration, but also to one other less expected quality. Notwithstanding the quiet, patient dignity on the bench that all other reports ascribe to Marshall, Wirt tells us in his brilliant "The British Spy" letters that he looked into the eyes of the Chief Justice and saw "hilarity."¹⁰⁷ To our astonishment, Wirt is saying that Marshall's eyes had that glint of hilarity *on the bench*. No doubt this was Marshall's characteristic sense of the absurd, the same comedic spirit that cheered the men at Valley Forge, and regaled the brethren at the new Chief Justice's hospitable boarding-house table in Washington. Who can say whether Marshall's show-cause order was a conservation of his options until he could see how to make something of the case, a taking of angry aim against a lawless President, a delighted partisan assumption of the panoply of judicial powers, a guarding step between the Constitution and its enemies, or a hilarious tilt at his personal dragons? Or something of all these and more—a glimpse of the possibilities?

(2003) 89 Virginia LR 1264 We do know that, in 1803, when Marshall would soon be off to Washington for the opening of the February Term—with *Marbury* looming on the docket¹⁰⁸—Marshall was hardly in a mood of anxiety, gloom, dread, or despair, as the standard narrative might lead us to expect. Actually, he was in his customary state of hilarity. Writing to his "Dearest Polly" from Raleigh, where he was sitting on circuit, what he had to tell her was that he had arrived at Raleigh not having noticed that his luggage was missing the homely but necessary item of "breeches." In all of Raleigh there was no tailor who could make him a pair in time to be of any use. Polly should be assured that he had taken his place on the circuit bench in a very dignified manner, but "sans culotte."¹⁰⁹ No doubt Marshall liked to shield his Polly from his worries, but if he was the frightened man conjured up by *Marbury*'s critics, he was remarkably good at having his fun at the same time.

Of course by 1803 Marshall must have been anxious, not for himself, but for his country. Much was at stake. During the year intervening between the show-cause order in *Marbury* and the anticipated hearing, the Jeffersonians, in a spasm of partisan spite, had succeeded in tearing real fissures in the constitutional fabric. President Jefferson, with the lightest of touches, had asked Congress¹¹⁰ for what would become the Repeal Act of 1802. By repealing the Circuit Court Act of 1801, the Republican Congress did what it could to encourage the resignation of the Justices, Federalists all, of the United States Supreme Court. The Repeal Act revived Section 4 of the First Judiciary Act of 1789, forcing the Justices to resume the burden of performing circuit duties—riding circuit—with the attendant burdens of difficult travel. Men were saying that this was to punish the Justices for their enforcement, when sitting on circuit, of the Sedition Act. Men were saying that such punishment was inconsistent with an independent judiciary. Worse, after eliminating the new circuit courts, the Repeal Act revived **(2003) 89 Virginia LR 1265** the old patched-together circuit courts. In other words, Congress fired the entire federal circuit bench at a blow. Men were saying that it was unconstitutional to turn the judges out of office when Article III judges were supposed to have life tenure.¹¹¹ Then, in separate legislation,

107. Wirt, *supra* note 96, at 171 (Letter V); see also 3 Beveridge, *The Life of John Marshall*, *supra* note 2, at 102 (referring to Marshall's "unfailing lightheartedness").

108. *Marbury* was handed down on February 24, 1803.

109. Letter from John Marshall to Mary W. Marshall (Jan. 2, 1803), in 6 *The Papers of John Marshall*, *supra* note 53, at 145, 145-46.

110. See Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801), in 9 *The Works of Thomas Jefferson*, *supra* note 34, at 321, 340 ("The judiciary system of the United States, and especially that portion of it recently erected, will of course present itself to the contemplation of Congress. . .").

111. Gouverneur Morris argued in the Senate that in firing life-tenured Article III judges, the Repeal Act damaged the independence of the federal judiciary, the separation of powers, the system of checks and balances, and indeed the entire

Congress went a step further, and prorogued the Supreme Court for a year.¹¹² Men were saying that this was in disregard of the Constitution's mandate that there shall be one Supreme Court. Now the Republicans had embarked on a program of unconstitutional impeachments. When *Marbury's* case came on for its delayed hearing and decision in February 1803, enormous damage to the Constitution had already been done.¹¹³

A reading of *Marbury* that cannot see its heroism is an obtuse reading. It was in the teeth of this massive assault on the judiciary that in *Marbury*, after all, Marshall took all the power for the courts that there was to take—power over the executive, the legislature, the works. And Marshall was not afraid to let Jefferson know what he thought of him. In the Sections that follow, I think I can show that Marshall's likely concern and anger, given what we know of him, far from suggesting any sort of craven accommodation or retreat, would only toughen his stance.

B. Burr

It is hard to imagine Marshall as afraid to issue an order to anyone in the Jefferson administration, when one remembers that, only a few years after *Marbury*, Marshall would subpoena Jefferson *directly*, in the *Burr* treason case, while sitting on circuit in Richmond.¹¹⁴ And he would rebuke the administration *again*.¹¹⁵

(2003) 89 Virginia LR 1266 We know that in *United States v. Burr* Marshall again insisted that the administration act within the constraints of the Constitution. But we do not always remember that in an infamous message to Congress, President Jefferson had declared of Aaron Burr, while the prosecution was pending, that “his guilt is placed beyond question.”¹¹⁶ We forget the angry lynch mobs that in consequence poured into Richmond. The jurors were so fearful for their own safety that John Marshall worried about their ability to maintain impartiality. Behind the scenes, the President himself, as his letters show, was neurotically preoccupied with the prosecution, managing it personally.¹¹⁷ The weight of Jefferson's administration was brought to bear on the prosecution of a political enemy.¹¹⁸ Marshall

constitutional structure. 11 *Annals of Cong.* 38, 40-41 (1801).

112. Act of April 29, 1802, “An Act to Amend the Judicial System of the United States,” ch. 31, § 1, 2 Stat. 156.

113. An editorial in the *Washington Federalist*, entitled, “Farewell, A Long Farewell, To All Our Greatness,” grieved, “The fatal bill has passed: our Constitution is no more.” 3 Beveridge, *The Life of John Marshall*, supra note 2, at 92. For a succinct statement of the situation, see Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 *L. & Soc. Rev.* 87 (1996).

114. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. June 13, 1807) (No. 14692d).

115. *United States v. Burr*, 25 F. Cas. 2, 15 (C.C.D. Va. 1807) (No. 14692a) (Marshall, C.J.) (“More than five weeks have elapsed since the opinion of the supreme court has declared the necessity of proving the fact, if it exists. Why is it not proved? To the executive government is intrusted the important power of prosecuting those whose crimes may disturb the public repose or endanger its safety. It would be easy, in much less time than has intervened since Colonel Burr has been alleged to have assembled his troops, to procure affidavits establishing the fact.”). On Marshall's conduct of the *Burr* trials, see Albert J. Beveridge, *Maryland, Marshall, and the Constitution*, in *The Marshall Reader* 66-71 (Erwin C. Surrency ed., 1955); Harold H. Burton, “Justice, the Guardian of Liberty”: John Marshall at the Trial of Aaron Burr, 37 *A.B.A. J.* 735 (1951).

116. See Special Message [to Congress] on Burr (Jan. 22, 1807), in 10 *The Works of Thomas Jefferson*, supra note 6, at 346, 348. William Cranch reports Jefferson's message in his narrative account in *United States v. Burr*, 25 F. Cas. 30, 32 (C.C.D. Va. 1807) (No. 14692d).

117. See John C. Yoo, *The First Claim: The Burr Trial, United States v. Nixon, and Presidential Power*, 83 *Minn. L. Rev.* 1435, 1443 & n.31 (1999).

118. 3 Beveridge, *The Life of John Marshall*, supra note 2, at 390 (“Thus the President of the United States became the leading counsel in the prosecution of Aaron Burr, as well as the director-general of a propaganda planned to confirm public

himself was under obvious pressure to convict. Through three trials he withstood it all with mild forbearance. In the end, Marshall taught the reckless President, as he had in *Marbury*, what an independent judiciary is. Once again, Marshall had to contend with the administration's lawlessness and to require that the administration conform its conduct to the Constitution. Is it credible that this same man could be "frightened"¹¹⁹ by Jefferson, or would ever "retreat" **(2003) 89 Virginia LR 1267** from the Framers' Constitution as he saw it, whatever the partisan wrath of Congress?

C. *Of Guts and Federalism*

What we know of Marshall before he accepted the Chief Justiceship does not convey the impression of a man who would not have the courage of his convictions. Marshall was a war hero who had fought long and bravely in the Revolutionary War. Historians place him at a number of significant battles and skirmishes. Marshall stuck it out with Washington all through the ordeal of Valley Forge. A good part of the public affection he enjoyed had to do with his being a true veteran of the Revolution.

In the Virginia Assembly, Marshall rose naturally to the leadership of his party. When, after the Jay Treaty, Republican Virginia was full of incomprehensible antagonism to George Washington, Marshall stood up consistently to defend the President against scurrilous attacks. We have already seen that, when in Congress, Marshall got to his feet to defend another President, John Adams, for an unpopular action.¹²⁰ And, alone among Federalists, Marshall had the fortitude to vote against his party and with the Republicans for repeal of the Sedition Act, the Federalists' do-or-die issue, a step of such courage that leaders in both parties assumed it had ended his career in politics.¹²¹ Beveridge concludes that Marshall's six-month stint in Congress revealed an "extraordinary independence of thought and action" and an "utter fearlessness," as well as Marshall's "commanding mental power."¹²²

We have also recalled that in the XYZ Affair, Marshall was not afraid to reject Talleyrand's debasing conditions, although he was **(2003) 89 Virginia LR 1268** wholly in accord with Adams on the urgency of our need for peace with the French. As Adams's Secretary of State, Marshall continued to pursue the French treaty, notwithstanding the anger of the High Federalists. Oliver Ellsworth would complete those controversial negotiations under Secretary of State Marshall's own direction.¹²³

All of these evidences of an independence that could not be intimidated would stall Marshall's confirmation as Chief Justice for a week, although the Senate was still in Federalist hands.¹²⁴

opinion of Burr's treason."). Beveridge remarks that Jefferson also planned "to discredit Marshall should his decisions from the bench result in the prisoner's escape from the gallows." *Id.*

119. This characterization of Marshall as "frightened" apparently originates with Beveridge, the source of much of the rest of the conventional narrative. 3 Beveridge, *The Life of John Marshall*, supra note 2, at 176. Opposite the cited page there is a reproduction of a letter in Marshall's hand, discovered by Beveridge, which seems to lend credibility to the characterization of Marshall as "frightened." This document is reprinted, Letter from John Marshall to Samuel Chase (Jan. 23, 1805) [mis-dated 1804 by Marshall], in 6 *The Papers of John Marshall*, supra note 53, at 347. For the language in question, see *id.* at 347-48; infra note 204 and accompanying text.

120. See supra note 44 and accompanying text (discussing the Jonathan Robbins affair).

121. 2 Beveridge, *The Life of John Marshall*, supra note 34, at 164 ("[H]is vote appeared to spell his destruction, for it . . . killed Marshall's future as a Federalist in the opinion of all the politicians of the time, both Federal and Republican."). Ironically, it was largely to ensure another vote for the sedition law that George Washington had strong-armed Marshall into running for Congress. Stites, supra note 72, at 67.

122. 2 Beveridge, *The Life of John Marshall*, supra note 34, at 484.

123. Convention of Môtrefontaine (Sept. 30, 1800). See Smith, *John Marshall, Definer*, supra note 32, at 275. On Marshall's efforts to persuade the Federalist Senate to reverse its rejection of the French treaty, see *id.* at 278.

124. Professor Turner believes that the delay was more probably attributable to Adams's failure to name Justice Paterson to the Chief Justiceship. Turner, *Chief Justice Marshall*, supra note 38, at 158-60. That the Federalist Party expected

It is sometimes said that, way back in his days in the Virginia legislature, Marshall had stood clear of controversy,¹²⁵ allowing Lighthorse Harry Lee, his good friend, to fight the Virginia Resolutions.¹²⁶ A Minority Report did appear, but it is commonly attributed to Lee rather than to Marshall.¹²⁷ *Marbury*'s critics, however, are quite willing to attribute it to Marshall. The Minority Report is in support of the notorious Sedition Act. As such, the critics believe it shows the hypocrisy and dishonesty they have come to attribute to John Marshall.

The Virginia Resolutions were the product of a secret collaboration by Thomas Jefferson and James Madison. The two had become so incensed by the Sedition Act and the federal judiciary's (2003) 89 Virginia LR 1269 partisan enforcement of the Act that in 1798 they penned seminal political papers opposing it. These papers, cast in a noble light by their emphasis on liberty, were in fact profoundly subversive. Building on Jefferson's theory that the Constitution, like the Articles of Confederation, was only a compact among sovereign states, the Resolutions of 1798 argued for the states' rights of "interposition" between federal law and the people, "nullification" of federal law, and, if need be, "secession" from the Union. Jefferson and Madison then arranged to have their Resolutions moved for adoption in the legislatures of Virginia and Kentucky. The Virginia and Kentucky Resolutions would become the basic charters of disunion. They furnished the South an intellectual foundation for civil war. They *needed* to be opposed. Yet the Minority Report does not challenge the dangerous theories of federalism and sovereignty advanced in the Virginia Resolutions. Rather, the Report is in support of the Sedition Act. It points out that the Act unnecessarily replicated existing remedies against calumny. It argues that the Constitution contemplates power in Congress to enact laws against sedition,¹²⁸ and confronts, after a fashion, the counterargument from the First Amendment. It is true that Marshall was running for Congress at the time, an uphill struggle for him in Republican Virginia, and doubtless he was under all sorts of political pressure. But these arguments in the Minority Report do not appear in any other speech or writing attributable to Marshall.¹²⁹ Indeed, Marshall was so far from hypocrisy that at that time he was spelling out his views in opposition to the Sedition Act publicly, in a letter to the press.¹³⁰ (2003) 89 Virginia LR 1270 When we recall the courage of Marshall's later vote in Congress

Paterson to be named is also suggested by Marshall's having twice himself suggested Paterson to Adams.

125. See, e.g., R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* 125-26 (2001) [hereinafter Newmyer, *Marshall and the Heroic Age*]; Smith, *John Marshall, Definer*, supra note 32, at 267.

126. The story of the Virginia and Kentucky Resolutions is well told in H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 Va. L. Rev. 689 (1994). See James Madison, *Virginia Resolutions* (Dec. 21, 1798), in 5 *The Founders' Constitution*, 135-36 (Philip B. Kurland & Ralph Lerner eds., 1987); Thomas Jefferson, *Kentucky Resolutions* (Nov. 10, 1798), in 5 *The Founders' Constitution*, supra, at 131. Several state legislatures passed resolutions in opposition to the Virginia and Kentucky Resolutions. See Walter F. Murphy et al., *American Constitutional Interpretation* 264-65 (1986) (describing the resolutions of Massachusetts, Rhode Island, and Vermont opposing the Virginia and Kentucky Resolutions).

127. See Editorial Note, 3 *The Papers of John Marshall* 498-99 (William C. Stinchcombe ed., 1979).

128. On the strength of this feature of the Minority Report, Professor Anderson argues that although Marshall opposed the sedition law, he believed Congress had power to enact it. See the excellent discussion in David Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. Rev. 455 (1983); id. at 517 & n.352. For excellent background on free speech in the eighteenth century, see David M. Rabban, *Review, The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 Stan. L. Rev. 795 (1985).

129. See 3 *The Papers of John Marshall*, supra note 127, at 499 & n.1.

130. See Letter from John Marshall to a Freeholder (*Virginia Herald*, Oct. 2, 1798), in 3 *The Papers of John Marshall*, supra note 127, at 503, 505-06 (stating that he, Marshall, was "not an advocate" of the alien and sedition laws, but expressing a hope that they would be allowed to expire and would not require repeal). Of this letter, Secretary of State Thomas Pickering wrote that there was not "one good federalist" who did not regret Marshall's letter to the Freeholder, but, Pickering added, it should not be imagined that the letter to the Freeholder was an "electioneering trick," since "General Marshall is incapable of doing a dishonourable act." See Letter from Timothy Pickering to Theodore Sedgwick (Nov. 6, 1798),

for repeal of the Sedition Act, that he was the only Federalist to vote against the party on his issue, it becomes difficult to attribute the Minority Report to him, and certainly to attribute any cowardice on the issue to him.¹³¹ We remember, too, Chief Justice Marshall's ruling in *Burr*, burying forever the analogously dangerous doctrine of constructive treason.¹³²

Nevertheless, it is possible that Marshall did have a hand in the Minority Report, certainly not in support of the Sedition Act, as his critics would have him, for he was always opposed to it,¹³³ but in the Report's conclusion. Reading these final paragraphs, one is struck by their tone of good will and common sense. Here, the writer's effort is only to cool the partisan anger and passion that fueled the Virginia Resolutions. Particularly striking, given the unending furor over *Marbury*'s establishment of judicial review, is the Report's argument four years earlier, using some of the same language, that since the Sedition Act could be challenged in courts or repealed in the legislature, these peaceable paths should be taken, and Americans should put factional hatred and hatred of their government behind them:

The legislature of Virginia has itself passed more than one unconstitutional law, but they have not been passed with an intention to violate the constitution. On being decided to be unconstitutional by the legitimate authority, they have been permitted to fall The same check, nor is it a less efficient one, exists in the government of the union. The judges of the United States are as independent as the judges of the state of Virginia, nor is there any reason to believe them less wise and less virtuous. It is their province, and their duty to construe the constitution and the laws, and it cannot be doubted, but that they will perform this duty . . . unwarmed by political debate, uninfluenced by party zeal. Let us in the mean time seek a repeal of any acts we may **(2003) 89 Virginia LR 1271** disapprove, by means authorized by our happy constitution, but let us not endeavor to disseminate among our fellow citizens the most deadly hate against the government of their own creation, . . . on the preservation of which . . . the peace and liberty of America . . . depend, because in some respects its judgment has differed from our own.¹³⁴

These are such kind, wise, patient, and teaching paragraphs that Marshall might well be supposed to have written them, but for the mistake, unlikely coming from Marshall's pen, that the *federal* courts have the special province and duty of interpreting the Constitution. Certainly he makes no such mistake in *Marbury*. In *Marbury*, Marshall avoids referring either to the Supreme Court or to the lower federal courts, and instead uses the vaguer term, "the judicial department."¹³⁵ In 1788, at the Virginia ratifying convention, Marshall also avoided the mistake of imputing the power of review under the Constitution to federal courts only, carefully referring, rather, to *the judiciary*. "To what quarter will you look for protection from an infringement o[f] the Constitution," he asks the assembled delegates, "if you will not give the power to the judiciary?"¹³⁶

excerpted in 2 Beveridge, *The Life of John Marshall*, *supra* note 34, at 394.

131. See *supra* note 121 and accompanying text (regarding Marshall's vote for repeal).

132. *United States v. Burr*, 25 F. Cas. 55, 177 (C.C.D. Va. 1807) (No. 14693).

133. John Costa, Note, John Marshall, the Sedition Act, and Free Speech in the Early Republic, 77 *Tex. L. Rev.* 1011 (1999). This is a fine student contribution.

134. 5 *The Founders' Constitution*, *supra* note 126, at 138-39.

135. *Marbury*, 5 U.S. (1 Cranch) at 177. It needs to be remembered that neither in 1799 nor in 1803 was there any general federal-question jurisdiction in the federal courts; Congress would not renew this reform until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. Today the grant of federal-question jurisdiction is to the district courts rather than the circuit courts. 28 U.S.C. § 1331.

136. 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (1861) [hereinafter 3 Elliot's Debates].

Marshall's answer to the pernicious theories of the Virginia and Kentucky Resolutions of 1798 would ultimately appear in *McCulloch v. Maryland*.¹³⁷ If we fast-forward to the great later cases like *McCulloch*, or *Cohens v. Virginia*, we have some of the most powerful evidences of the courage of the man. Nobody supposes that in his great federalism cases the Chief Justice was preaching to the converted. The country was rushing from the rowdy democracy and wrecked economy of Jefferson's presidency toward the rowdier democracy and wrecked economy of Jackson's. The states' rights movement was stronger in Andrew Jackson's America than **(2003) 89 Virginia LR 1272** in Jefferson's. Through adroit coalitions the South was able for much of that time to hold on to the presidency and the Congress. With Marshall's death, the South would have the Court as well. Marshall's magisterial opinions on federalism were received with rage by states' rights ideologues throughout the United States.¹³⁸ At the time of *McCulloch* the country was in the midst of a severe depression, which was blamed on the Bank. In the year following *McCulloch*, Henry Clay would struggle to stave off civil war by brokering the Missouri Compromise. Why has it not occurred to us that it took *courage* to hand down *McCulloch*? What kind of man would take it upon himself, when, presumably, he is engaged in his life's work of building popular support for his Court, to take Hamilton's theories, and Daniel Webster's theories—ideas that would become Abraham Lincoln's theories—and go out of his way to lecture the South-dominated country that the true sovereign was *not* the states, but We, the people? That the Constitution was *not* a compact of states, but an establishment by Us, the people, of a more perfect Union, indissoluble and perpetual? That the national powers must be interpreted broadly, and the state powers not? What kind of man would mount the barricades in all that angry clamor, shrug off compromise, and defend the *nation*?

None of this suggests that Chief Justice Marshall would shrink from performing a judicial duty as he saw it, certainly not with a unanimous Court behind him.¹³⁹

D. Righteous Anger

Nor should we underestimate John Marshall's depth of disgust in 1803 at the administration's war on the judiciary. It was necessarily a war on the Constitution. In Congress, the Republicans had deleted the Supreme Court for the whole of the past year. If they could do that for one year, why not for ten years? A century? It **(2003) 89 Virginia LR 1273** appalled Marshall, too, that the Republicans had punished the Court, a clear encroachment upon the judicial power, by repealing the 1801 Act and forcing the Justices to ride circuit again.¹⁴⁰ And Congress had thrust the new circuit judges out of office. The principle of an independent judiciary was not sacred to them, as it was to him, and to the Federalist fathers. Indeed, the Republicans were attacking the state judiciaries as well. In Pennsylvania, the Republican legislature was beginning its successful impeachment of Judge Alexander Addison, a staunch Federalist.¹⁴¹ In Maryland, the Republican legislature had enacted a little "repeal act" of its

137. 17 U.S. (4 Wheat.) 316 (1819).

138. For a recent discussion of Marshall's struggle in defense of nation and union, see F. Thornton Miller, John Marshall in Spencer Roane's Virginia: The Southern Constitutional Opposition to the Marshall Court, 33 John Marshall L. Rev. 1131 (2000).

139. As one who is perched rather far out on a hitherto unoccupied limb, it is with some satisfaction that I find that Charles Hobson, who is as familiar with Marshall's life and thought as any scholar living, also speculates that Marshall might well have been "prepared to risk the consequences of ordering the secretary of state to deliver Marbury's commission." 6 The Papers of John Marshall, supra note 53, at 164.

140. See infra notes 195-96 and accompanying text.

141. 3 Beveridge, The Life of John Marshall, supra note 2, at 112.

own, and had fired the state's lower court judges, Federalists all—although they had life tenure—cowering Maryland's high court into obedience.¹⁴²

When Marshall undertook to write his opinion in *Marbury*, he knew that the Republicans expected him to rule for the plaintiffs. He had heard rumors that he, John Marshall, would be impeached if he did.¹⁴³ What a wreck Jefferson was making of it all, throwing away with both hands the rule of law and the legacy of the Framers! Marshall would do what he could to hold the tattered fabric together.

Late in his life, in 1829, after scanning “with deep felt disgust” Jefferson's posthumously published correspondence, with its insinuations against his dear old friend, Lighthouse Harry Lee, Marshall wrote sympathetically to young Henry Lee.¹⁴⁴ He downplayed Jefferson's “repeated unwarrantable aspersions” against himself, confessing to the young man that he was too old and tired to bother publishing a defense.¹⁴⁵ The public could judge of the matter for itself. His, Marshall's, public life had been lived openly. “Nothing is unknown or can be misunderstood by intelligent men,” he wrote, adding enigmatically, “unless it be the motives which compelled **(2003) 89 Virginia LR 1274** the court to give its opinion at large on the case of *Marbury vs Madison*.”¹⁴⁶

This expression, “give its opinion at large,” seems somewhat opaque. We can only guess what Marshall meant by it. One might take “at large” to mean *free ranging*. Or one might, perhaps, read it to mean *openly, in public*. Marshall might have meant that the Court had decided to give its decision openly, without restriction, to the press and the public. Not only had Marshall read the entire opinion from the bench, but a pre-publication copy of Cranch's report had been sent to the press.¹⁴⁷ The newspapers in those days customarily published reports of cases of particular interest. If that is what “at large” means here, the implication would seem to be that although Marshall might have preferred to keep within the pages of the reports a rebuke of the administration, such was the lawlessness of Jefferson's partisan purge of the judiciary, and of his disregard of the lawful appointments of his predecessor in office, that the whole Court felt it right that the opinion be given “at large”—that is, to the public.¹⁴⁸ Or Marshall might have been using the term in its other sense, *free ranging*, to describe a full-dress opinion, or perhaps an opinion at length, *in extenso*. Certainly the Court had discussed features of the case that Jefferson would have preferred not to have spelled out. Jefferson had “sport[ed] away the vested rights of others.”¹⁴⁹ The Supreme Court had no jurisdiction, **(2003) 89 Virginia LR**

142. See *infra* notes 272-76 and accompanying text (discussing the war on the Federalist judiciary in Maryland).

143. 2 Haskins & Johnson, *supra* note 5, at 185.

144. Letter from John Marshall to Henry Lee (Oct. 25, 1830), in 11 *The Papers of John Marshall* 386 (Charles F. Hobson ed., 2002).

145. *Id.* at 387.

146. *Id.* For the possible relevance of these remarks to the supposition that *Marbury* was a made case, see *infra* notes 282-90 and accompanying text.

147. Neil Kumar Katyal, *Judges as Advicegivers*, 50 *Stan. L. Rev.* 1709, 1737 (1998) (“Marshall's words drew popular attention to Jefferson's potentially unconstitutional course of activity.”). William Cranch evidently sent prepublication reports of *Marbury* to the press within two weeks of the decision. The Washington Federalist was the first paper to publish *Marbury* in full—the earliest surviving text. The most complete report appeared in three issues of the *National Intelligencer*. See 6 *The Papers of John Marshall*, *supra* note 53, at 164.

148. Apparently the sting of this publicity rankled in Jefferson. See the extraordinary Letter from Thomas Jefferson to George Hay [prosecutor in the Burr case], (June 2, 1807), in 5 *The Writings of Thomas Jefferson* 84, 85 (H.A. Washington ed., 1853) (“I have long wished for a proper occasion to have the gratuitous opinion in *Marbury v. Madison* brought before the public, & denounced as not law; & I think the present a fortunate one, because it occupies such a place in the public attention. I should be glad, therefore, if, in noticing that case, you could take occasion to express the determination of the executive, that the doctrines of that case were given extrajudicially & against law, and that their reverse will be the rule of action with the executive.”).

149. *Marbury*, 5 U.S. (1 Cranch) at 166.

1275 but Marbury's claim against the administration, Marshall insisted, was a valid one, good in any court that *did* have jurisdiction.¹⁵⁰ There is a related shade of meaning of "at large," suggesting *unrestrictedness*. Whatever Marshall meant, these related ideas convey that what the Court did do, publicly, fully, freely, without restriction, cannot be made to fit the description of retreat, or any sort of backing down. That is not the way Marshall saw it.

The Court was fighting back, not retreating.¹⁵¹ The Republicans certainly *saw* no retreat in *Marbury*, although some failed to see the effrontery as well. Jefferson was enraged by *Marbury*, and was still inveighing against it late in his life.¹⁵² His friends took *Marbury* for arrogance. James Monroe had complained all along that the First Judiciary Act ought to have been repealed along with the 1801 Act, thus wiping out the federal judiciary in its entirety, Supreme Court and all. It was only after *Marbury* that Monroe's sullen extremist view became a majority position within the Republican party.¹⁵³

E. Why Do We Think Jefferson Would Not Have Complied?

The conventional narrative has it that in 1803, had mandamus issued from the Marshall Court, the Jefferson administration would have defied it. According to the standard account, Marshall anticipated this, and resorted to his jurisdictional ruling instead. To my mind, this scenario is implausible. Marshall would have *expected* compliance. He says as much in *Marbury*. "In Great Britain," he writes, "the king himself is sued in the respectful form of a petition," and, Marshall adds pointedly, "[the king] never fails to comply with the judgment of his court."¹⁵⁴

Why do we think the administration would *not* have complied? That has been the universal assumption, but why do we accept that (2003) 89 Virginia LR 1276 assumption out of hand? In *Marbury*, the administration filed no appearance, but Attorney General Levi Lincoln somehow managed to be present in the courtroom both in 1801 and in 1803. In 1801 he declined an invitation to argue, insisting he had no instructions. But in 1803 he even testified, when required to do so. Jefferson, intemperate in his correspondence,¹⁵⁵ nevertheless was obviously working hard to tame his public persona. He had given a conciliatory inaugural speech, and, having felt it exigent not to be snubbed by the Chief Justice for the ceremony, had himself attended to the necessity of Marshall's officiating, with surface cordiality inviting Marshall to swear him in—an honor Marshall bestowed upon Jefferson with equal surface cordiality.¹⁵⁶

When Marshall issued his first subpoena in the *Burr* case, Jefferson privately bristled with

150. Id. at 167. But, notwithstanding the exigencies of litigation, writers commonly make the slip of speaking of judicial review as confined to the Supreme Court. See, e.g., Van Alstyne, A Critical Guide, *supra* note 27, at 36.

151. See R. Kent Newmyer, *The Supreme Court under Marshall and Taney* 29-31 (1968) (commenting on Marshall's "boldness" and "daring" in *Marbury*).

152. For Jefferson's lifelong resentment of Marshall's "*obiter* dissertation," see *infra* note 399.

153. See Forrest McDonald, *The Presidency of Thomas Jefferson* 51 (1976) [hereinafter McDonald, Thomas Jefferson].

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

155. See, for example, Jefferson's notorious "Mazzei" letter, *infra* note 163; his self-revelatory letter to Washington before their final break over his "Mazzei" letter, *infra* note 606; and his extraordinary letter to the prosecutor in the *Burr* case, requesting he disparage *Marbury* to the *Burr* jurors, Letter from Thomas Jefferson to George Hay (May 20, 1807), in 10 *The Works of Thomas Jefferson*, *supra* note 6, at 394, 395.

156. On his way to Jefferson's inauguration, where he would swear him in, Marshall joked that he did not deem Jefferson an "absolute terrorist." Letter from John Marshall to Charles Cotesworth Pinckney (Mar. 4, 1801), in 6 *The Papers of John Marshall*, *supra* note 53, at 89.

arguments against complying.¹⁵⁷ He was also apprehensive. He appreciated Marshall's power to hold him in contempt and envisioned federal marshalls coming to arrest him.¹⁵⁸ In his actual response to the subpoena, however, he was almost forthcoming in his apparent willingness to comply¹⁵⁹—and Marshall reciprocated by offering Jefferson a plausible excuse, if he chose to use it. There would be a political price to pay by a president who defied a court order sustained by the Supreme Court.¹⁶⁰ In *Burr*, (2003) **89 Virginia LR 1277** Jefferson evidently calculated the political price of an open quarrel with Marshall, and decided not to pay it.¹⁶¹ Why should we assume that he would not have made a similar calculation in *Marbury*? If we are going to take the position that Jefferson would have behaved differently in *Marbury*, we have to be counting Jefferson's political courage as outweighing Marshall's political strength just at that particular time. What we know of the two men, however, does not support such a position.

F. The Courage to Tangle with the Chief Justice

Perhaps the conventional narrative takes insufficient account of the weight of Marshall's personal influence and prestige at the outset of his Chief Justiceship. After the XYZ Affair, when Marshall returned home and found himself received everywhere as a national hero,¹⁶² even Jefferson, who reciprocated his cousin Marshall's loathing,¹⁶³ thought it politically expedient to call on him.¹⁶⁴ (2003)

157. See Letters from Thomas Jefferson to George Hay (June 20, Aug. 7, Sept. 7, 1807), in 10 *The Works of Thomas Jefferson*, supra note 6, at 403, 406 [draft], 409.

158. See Thayer, supra note 14, at 79-80. According to Thayer, Jefferson received the *Burr* subpoena with the "utmost discontent," and, entertaining "a serious apprehension of a purpose to arrest him [Jefferson] by force, . . . was prepar[ing] to protect himself." Thayer cites the draft letter from Thomas Jefferson to "District Attorney Hay" (Aug. 7, 1807), in 9 *The Writings of Thomas Jefferson* 62 (Paul Leicester Ford ed., 1894).

159. *Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14694) ("Mr. Hay presented a certificate from the president, annexed to a copy of Gen. Wilkinson's letter, excepting such parts as he deemed he ought not to permit to be made public.").

160. Richard Nixon famously complied with Judge Sirica's subpoena, once the Supreme Court sustained it, although it cost him his presidency. *United States v. Nixon*, 418 U.S. 683 (1974). True, Nixon was under threat of impeachment when he did comply, but had he not been under threat of impeachment, a failure to comply would have put him there.

161. In the struggle between Jefferson and Marshall, the verdict of history is that Marshall was the victor. Even the Taney Court did not disturb the lineaments of judicial power traced out by the Marshall Court. Henry Adams, no friend to judicial review, concluded that Jefferson was inadequate to the struggle against his most dangerous opponent, John Marshall. See 1 Henry Adams, *The History of the United States of America during the Administrations of Thomas Jefferson 175-77* (1986) (1891) [hereinafter Adams, *History of the United States*]. Adams points out that Jefferson could have asked Congress to repeal § 25 of the First Judiciary Act, short-circuiting the long struggle between the Virginia Court of Appeals and the Marshall Court. Adams, *History of the United States*, supra, at 177. This is the struggle exhibited most acutely in *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) and *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

Marshall was the victor in the struggle. For an interestingly reluctant New-Deal era conclusion to this effect, see Max Lerner, *John Marshall and the Campaign of History*, 39 *Colum. L. Rev.* 396, 405 (1939) (blaming Jefferson for a lack of sufficient "daring," and pointing out that Jefferson might have asked Congress for a constitutional amendment fixing the tenure of the Justices to a term of years renewable by the President and Senate). Lerner adds, "In fact, this was the suggestion that Jefferson finally made, desperate and defeated, four years before he died, when he understood more fully the extent of Marshall's victory."

162. See supra note 41 and accompanying text.

163. See Newmyer, *Marshall and the Heroic Age*, supra note 125, at 148 (section on the "Grand Creative Hatred" between Marshall and Jefferson). The cousins' differences were largely political. See infra note 608 for Marshall's view of Jefferson as no friend of the Constitution. For an extended exploration of these political differences see Simon, supra note 5. Jefferson could not forgive either Adams or Marshall for cheating him of the chance to appoint his own Chief Justice. See Letter from Thomas Jefferson to Mrs. John [Abigail] Adams (June 13, 1804), supra note 6. Jefferson had hand-picked Spencer Roane for the job. Roane, the celebrity of the Virginia Court of Appeals, was an inveterate champion of states'

89 Virginia LR 1278 Marshall had been the leader of his party in Virginia and became active among the leaders of his party in Congress.¹⁶⁵ He had already become George Washington's personal lawyer and friend. When the news of Washington's death reached the capital, it was Marshall whom his colleagues sought out to announce the news in Congress, and who delivered Washington's eulogy.¹⁶⁶ Marshall also became President Adams's only intimate in the Cabinet, and indeed, in the capital. Marshall effectively ran the country as a solid caretaker president¹⁶⁷ when, for much of that last year, Adams was in Boston tending his ailing Abigail. All the while, Marshall was **(2003) 89 Virginia LR 1279** doing an admirable job as Adams's Secretary of State. These things were very much in the public eye. In addition, Marshall's agreeing, at the behest of Alexander Hamilton, to withhold his support from Aaron Burr is believed almost certainly to have played a significant part in swinging the election of 1801 to Jefferson, although Marshall could not bring himself to support Jefferson.¹⁶⁸ In short, Marshall had become one of the most powerful and respected public figures in the country.¹⁶⁹ Now, with Adams gone from the scene, and Hamilton's reputation unravelling,¹⁷⁰ John Marshall was simply the greatest Federalist left standing.

We must add to this the weight of Marshall's new office as Chief Justice. The Supreme Court itself, perhaps, could confer upon him little more prestige than he had brought to the Court. But Marshall's contemporaries clearly believed that only a man of stature should occupy the Chief

rights. (It is sometimes joked that John Marshall accepted the Chief Justiceship for fear that Spencer Roane might otherwise occupy it.) For his part, Marshall could not forgive Jefferson for his failures to fight in the Revolutionary War or work to alleviate the sufferings of the Army. Nor could Marshall forgive Jefferson for his intrigues and calumnies against George Washington, about whom Marshall was to write a reverent five-volume biography. See Letter from John Marshall to Alexander Hamilton (Jan. 1, 1801), in 6 *The Papers of John Marshall*, supra note 53, at 46, 47 (refusing to support Jefferson for the presidency, and remarking, "[t]he Morals of the Author of the letter to Mazzei cannot be pure"). This was a reference to a letter Jefferson incautiously had written to Philip Mazzei, an Italian acquaintance, who published it. In the Mazzei letter, Jefferson was caught inveighing against George Washington. "It would give you a fever," he fulminated, "were I to name to you the apostates who have gone over to these heresies, men who were Samsons in the field & Solomons in the council, but who have had their heads shorn by the harlot England." See Letter from Thomas Jefferson to Philip Mazzei (Jan. 1, 1797), in 8 *The Works of Thomas Jefferson* 237 & n.1, 238. (Paul Leicester Ford ed., 1904). For the ensuing break between Jefferson and Washington see infra note 606.

164. The best account of Marshall's tumultuous reception is probably in Smith, John Marshall, *Definer*, supra note 32, at 234-37.

165. 2 Beveridge, *The Life of John Marshall*, supra note 34, at 446-84.

166. Speech (Dec. 19, 1799), in 2 Beveridge, *The Life of John Marshall*, supra note 34, at 440, 440-43. The eulogy was graced by Henry Lee's tribute, "First in war, first in peace, first in the hearts of his countrymen." *Id.* at 443. For Marshall's account, see *id.* at 444-45. It was also Marshall who, after Washington's funeral, introduced the resolution in Congress calling for the erection in marble of what we now know as the Washington Monument. Smith, John Marshall, *Definer*, supra note 32, at 256.

167. Even Jefferson's worshipful biographer, Henry Randall, concluded of Marshall's few months at the head of the administration that "under the firm and steady lead of [Marshall] . . . the government soon acquired an order, system, and character, which it never had before possessed." 2 Henry S. Randall, *Life of Thomas Jefferson* 547 (1858).

168. Letter from John Marshall to Alexander Hamilton (Jan. 1, 1801), in 6 *The Papers of John Marshall*, supra note 53, at 46, 47.

169. See Magruder, supra note 4, at 168 ("Perhaps no American citizen except Washington ever conciliated so large a measure of popularity and public esteem.").

170. After the retirement of President Washington, Alexander Hamilton proceeded to self-destruct. See Weisberger, supra note 33, at 250 ("Once more a curious, self-destructive streak had surfaced in a man whose calculating mind was one of the country's all-time best."). Despite Hamilton's brilliant marriage to Elizabeth Schuyler, and the adoration of her prominent New York family, in midlife he was seduced by an adventuress and blackmailed for it. To disentangle himself, Hamilton penned an embarrassingly full public confession. His beloved son was killed in a duel over this scandal. Hamilton's own needless and tragic duel with Burr at least put an end to this painful downward spiral.

Justiceship; Marshall's predecessors, John Jay and Oliver Ellsworth, were very great statesmen indeed.¹⁷¹ Nor should we discount the general affection as well as esteem felt for Marshall by men in both parties. Recall Patrick Henry's famous letter backing Marshall in his run for Congress. Henry, although still a Republican at the time, said that Marshall was an American and a patriot, and he loved him.¹⁷² Ever since the XYZ Affair, Marshall had been a national figure and a popular one. All this suggests that a member of the administration who disobeyed a court order issuing from a unanimous Supreme Court under the hand of Chief Justice Marshall might be in at least as much trouble as the Chief Justice.

(2003) 89 Virginia LR 1280 Jefferson's character, on the other hand, was one of rather consistent "retreat." He did not join the fight in 1776, busying himself in the Virginia legislature with reforms that, however nobly enshrined in memory, reportedly were not needed, and which too often he failed in any event to achieve.¹⁷³ As wartime governor of Virginia from 1779 to 1781, he did little to protect the state, hobbled by an ideologically driven Constitution he himself had authored. The defense Jefferson finally mounted when the British invaded Virginia was too little, too late. With the fall of Richmond, Jefferson simply ran away.¹⁷⁴

Nor did Jefferson rise to the occasion of the Constitutional Convention of 1787, preferring to prolong his idyll in France to seeking a place in the Virginia delegation.¹⁷⁵ Indeed, Jefferson lived his life as though afraid to face the public. He did not run openly for the presidency, letting it be understood that he was above all that. This was the admired tradition set by Washington, but Jefferson preferred manipulating events from the privacy of his writing desk. Jefferson's way characteristically was behind the scenes, behind-hand, indirect, covert. In the presidency he all but disappeared, working his grand schemes and his petty plots alike through his lieutenants in Congress, in his private correspondence, or in bachelor dinner parties.¹⁷⁶ He could not even bring himself to read his own first message to Congress, but sent it by his secretary and suffered it to be read by a clerk of the House.¹⁷⁷

(2003) 89 Virginia LR 1281 During the election of 1800, the following broadside appeared in a Federalist newspaper, the *Gazette of the United States*, in the form of a message addressed to Thomas Jefferson: "You have been, Sir, a Governor, an Ambassador, and a Secretary of State, and had to desert each of these posts, from that weakness of nerves, want of fortitude and total imbecility of character, which have marked your whole political career."¹⁷⁸ For all its funny irreverence, beneath this caricature

171. See supra note 67 (discussing Marshall's three predecessors on the Court).

172. 2 Beveridge, *The Life of John Marshall*, supra note 34, at 407.

173. McDonald, *Thomas Jefferson*, supra note 153, at 32.

174. See Simon, supra note 5, at 158; 1 Beveridge, *The Life of John Marshall*, supra note 55, at 129. This left "a faint smear on his [Jefferson's] reputation." Marshall Smelser, *The Democratic Republic, 1801-1815*, at 4 (1992) (1968). For a charitable account, see Weisberger, supra note 33, at 286.

175. Reportedly Jefferson wasted four years in France trying to undo a tobacco-marketing arrangement he mistakenly thought Virginia planters did not like. See McDonald, *Thomas Jefferson*, supra note 153, at 32.

176. See Smelser, supra note 174, at 3 (describing Jefferson as using his dinner parties as his "political tool," often conspicuously omitting invitations to women, banishing "eavesdropping servants," and, as he personally dished out luxuries prepared in the French taste from a dumbwaiter of his own invention, planting "the seeds of his political philosophy" not by "shop talk," which was not permitted, but "by indirection").

177. See Simon, supra note 5, at 158. Curiously, this foible set a tradition for subsequent presidents, not broken until the presidency of Woodrow Wilson. Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 *Wm. & Mary L. Rev.* 1, 19 (2002).

178. See *The Election of 1800 and the Administration of Thomas Jefferson* 25 (Arthur M. Schlesinger, Jr. ed., 2003). Schlesinger gives no date or page for the *Gazette*. Jefferson's own self-estimate was that he "was a failure as a public man." McDonald, *Thomas Jefferson*, supra note 153, at 32. This conclusion may be somewhat reflected, as my editor, David Sarratt suggests, in the sorts of accomplishments Jefferson chose to have recorded on his memorial stone. See Joseph Ellis,

we can recognize the man.¹⁷⁹ This is the man we have been assuming would dare to defy an order of John Marshall's Supreme Court.

G. *Stuart v. Laird*

Of late, Marshall has been much derided for his role in the case of *Stuart v. Laird*,¹⁸⁰ handed down a week after *Marbury*. If *Marbury* itself is not the "retreat," *Laird*—it is thought—is. *Laird*, unlike *Marbury*, was a challenge to the Repeal Act of 1802. Marshall recused himself, and the Court sustained the Act. These facts have led some commentators to conclude that Marshall was in headlong retreat in *Laird*, and thus probably in headlong retreat in *Marbury* as well. The picture is one of total capitulation, if not collapse.

Marshall, of course, recused himself of necessity in *Laird*, because he had decided the case below while sitting on circuit. It is (2003) 89 Virginia LR 1282 true that his decision below was to sustain the Repeal Act, but *Laird* had nothing to do with the Act's firing of the Article III judges. Although firing Article III judges is pretty much what Congress did when it enacted the 1802 statute, in *Laird* the Supreme Court did not have before it a challenge to the firing of the circuit judges. No Article III judge was a plaintiff in the case. There was not even a *Marbury* sort of magistrate in the case. Neither party was a judge of any kind. Since the plaintiff in *Laird* was not a fired circuit judge, he could complain only indirectly, if at all, about what Congress had done to circuit judges in 1802. The midnight circuit judges were even less a feature of *Laird* than of *Marbury*.¹⁸¹ Moreover, *Laird* was not an action against the administration. There was no government official in the case, and therefore no opportunity to found American administrative law. The defendant did challenge the jurisdiction of the circuit court, but the

American Sphinx: The Character of Thomas Jefferson xi (1997) ("The best and the worst of American history are inextricably tangled together in Jefferson, and anyone who confines his search to one side of the moral equation is destined to miss a significant portion of the story.").

179. For a survey of expressions of regret and disenchantment by some historians of Jefferson, see Dewey, *Marshall Versus Jefferson*, supra note 5, at 46-47 (quoting Beveridge as "disillusioned" and as doubting whether history could show another example of "so shifty a politician and so reckless a demagogue," and quoting Henry Cabot Lodge on the "feline hostility of Jefferson," whom Lodge saw as "given to creeping methods").

180. 5 U.S. (1 Cranch) 299, 309 (1803) (Paterson, J.) (holding that Congress may require Supreme Court Justices to perform the duties of circuit judges, without providing for separate commissions).

181. As for Marshall's own opinion of the legislative firing of Article III judges, that is not the constitutional issue he raises in his surviving correspondence. In commenting on the Repeal Act, Marshall expresses "constitutional scruples" that new circuit duties can be imposed upon the Justices, and regrets that the Justices resumed those duties without convening first, presumably to talk it over and hear his viewpoint. Letter from John Marshall to William Paterson (Apr. 6, 1802), in 6 *The Papers of John Marshall*, supra note 53, at 105, 106. On April 19 he repeats the same doubt in a letter to William Cushing, Letter from John Marshall to William Cushing (Apr. 19, 1802), in 6 *The Papers of John Marshall*, supra note 53, at 108. Again writing to Paterson on April 19, Marshall says he has become convinced that Congress cannot impose additional circuit duties upon the Justices, notwithstanding that they performed them under the First Judiciary Act. Letter from John Marshall to William Paterson (Apr. 19, 1802), in 6 *The Papers of John Marshall*, supra note 53, at 108-09. He says that he is endeavoring to collect the opinions of the Justices. By May 3, Marshall has received Bushrod Washington's view that it is too late to raise the circuit riding issue, and in a letter of May 3 to Paterson, Marshall concurs with Washington, and thinks Washington's opinion "dictates this decision to us all," Letter from John Marshall to William Paterson (May 3, 1802), in 6 *The Papers of John Marshall*, supra note 53, at 117, but points out that Chase thinks otherwise, and wants them all to convene in August. *Id.* at 118. Cushing independently has decided it is too late to raise the circuit riding issue, as we learn in further correspondence with Paterson. 6 *The Papers of John Marshall*, supra note 53, at 120-21. We cannot say from the surviving papers that Marshall saw a constitutional defect in the firing of the Circuit Judges, although Chase's earlier letter to him raising that issue does survive. 6 *The Papers of John Marshall*, supra note 53, at 109-10. But see infra notes 195-97 and accompanying text.

case did not offer any of the other opportunities that *Marbury* did. The original plaintiff in *Laird* was only a creditor, and the action was only to collect a debt. The debtor's challenge to the jurisdiction of the circuit court was based on the fact that Chief Justice John Marshall was sitting as a **(2003) 89 Virginia LR 1283** circuit judge, without a separate commission.¹⁸² However, the Justices had been required to ride circuit without separate commissions even under Ellsworth's First Judiciary Act, which they revered.¹⁸³ Possibly for this reason, the Associate Justices had resumed their circuit court duties without consulting Marshall, in 1802, shortly after the Repeal Act went into effect.¹⁸⁴ *Laird*, affirming Marshall's unreported decision below, held only that, in view of the long tradition of the Justices' circuit riding, it was too late to rule that Congress could not require circuit riding again without separate commissions; the old practice now constituted an authoritative interpretation.¹⁸⁵

Would it have been better for the Court to have had a case by one of the midnight circuit judges, instead of *Marbury*? If so, as we have just seen, *Stuart v. Laird* was not that case. But I am not so sure that a *Marbury*-like case by one of the disappointed circuit judges would have been very helpful to Marshall, if brought at first in the ordinary way, as *Laird* was, in a court below. It is true that, in that situation, the complaint would not be about a Justice's lack of a separate commission to sit on circuit. It would be about much bigger game, the statutory destruction of the circuit judges' life tenure—indeed, the annihilation of the entire federal circuit bench. In such a case, no challenge to the jurisdiction a la *Marbury* would have been needed. It appears, however, that Marshall did not believe **(2003) 89 Virginia LR 1284** that this aspect of the Repeal Act was unconstitutional, not under Article III, not in the way that Justice Samuel Chase did,¹⁸⁶ or I do, or the reader may. No surviving paper of his from that period gives as Marshall's reason for thinking the Repeal Act might be unconstitutional that Congress had violated the life tenure provision of Article III. Today the weight of authority is on the side of the view that Congress has plenary power to shut down the circuit courts completely,¹⁸⁷ and I doubt that Marshall would have disagreed.¹⁸⁸ The argument was that Congress could not take the judges from the

182. Cf. Remonstrance by the Judges of Court of Appeals, 1788 Va. Lexis 3, at *7-*8 (1788) (protesting a Virginia law imposing duties on Virginia appellate judges to serve in other courts without additional compensation and arguing that the legislature is encroaching upon the independence of the judiciary).

183. Letter from John Marshall to William Paterson (Apr. 19, 1802), in 6 The Papers of John Marshall, supra note 53, at 108 (“I hope I need not say that no man in existence respects more than I do, those who passd 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 them & shoud have p(roceed)ed without a doubt on the subject, to perform the duties assignd to me. . .”).

184. Letter from John Marshall to William Paterson (Apr. 6, 1802), supra note 181, at 105, 106 (“I coud have wishd the Judges had convend before they proceeded to execute the new system.”).

185. *Laird*, 5 U.S. (1 Cranch) at 309 (“[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is, at rest, and ought not now to be disturbed.”).

186. Letter from Samuel Chase to John Marshall (Apr. 24, 1802) in 6 The Papers of John Marshall, supra note 53, at 109, 110.

187. For proponents of the classic view that Congress's power to limit Article III jurisdiction is almost plenary, the exceptions being the mandatory cases in the Supreme Court's original jurisdiction, see infra note 459. A more moderate position, and one that has been highly influential, is that Congress may not destroy the Supreme Court's “essential role in the constitutional plan.” Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1365 (1953).

188. Assuming Marshall entertained a similarly expansive view of the power of Congress, he would obviously have disagreed with the High Federalists, such as Gouveneur Morris and Justice Samuel Chase, who were ridiculing the argument that Congress could “take the office from the judge but not the judge from the office.” Cf. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), supra note 186, at 110. On Morris's position, see James M. O'Fallon, *Marbury*, 44 Stan. L. Rev. 219 (1992) [hereinafter O'Fallon, *Marbury*].

courts, but could take the courts from the judges.¹⁸⁹ In that sense the tenure of a lower court judge was rather like academic tenure today. Marshall believed the ousted judges retained some rights, but they themselves seemed to have no stomach for the battle, and actions were not being brought. Marshall did think Supreme Court Justices could not constitutionally be required to **(2003) 89 Virginia LR 1285** sit as circuit judges without new commissions,¹⁹⁰ but he also thought it too late in history to raise that issue¹⁹¹—and so he held, sitting on circuit, and so the Court held, affirming, in *Laird*.¹⁹² Marshall seemed to feel that the Justices had already validated the statute, more or less, or at least foreclosed challenge to it, by too precipitously conforming to it.¹⁹³ For their part, the Justices might have felt it unseemly, furthermore, to strike down an act of Congress when to do so would have been perceived as attending to their own creature comforts. It was an additional embarrassment to them that the Federalists had also abolished courts—two district courts were closed by the Circuit Court Act of 1801.¹⁹⁴ The greatest difficulty for them, however, remained the fact that they had always ridden circuit previously, under the venerated First Judiciary Act.

A distinction might have been drawn between the duty of circuit riding under the Repeal Act of 1802 and the duty of circuit riding under the First Judiciary Act. With his characteristic penetration, Marshall had early seen the argument, and he raised it in a letter to Justice Paterson.¹⁹⁵ I do not believe that Marshall would have been concerned about a distinction based on the mere expectations of the Justices. Rather, the two situations were distinguishable on the important ground that the Repeal Act, unlike the First Judiciary Act, was a politically motivated attack on the independence of the Justices. In re-imposing the burden of circuit riding upon the Justices—for political reasons—Congress had offended the principles of judicial independence and separation of powers. Justice Chase **(2003) 89 Virginia LR 1286** was thinking along the same lines.¹⁹⁶ Congress could hardly have undone such a violation simply by providing for separate commissions.

We cannot know, of course, why neither Marshall nor the Court took this line in *Stuart v. Laird*, but one weakness in the position is apparent. It would have been impossible for Marshall to distinguish the

189. See Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *supra* note 186. Scot Powe alerts me to the fact that Marshall, late in his life, was also prepared to disparage the distinction between shutting down the courts and terminating the judges (one familiar no doubt to us from the analogy to academic tenure). See Letter from John Marshall to Henry Clay (Dec. 22, 1823), *in* 9 *The Papers of John Marshall*, *supra* note 68, at 365. This letter was discovered by Professor Wedgwood in 1990. See Ruth Wedgwood, *Cousin Humphrey*, 14 *Const. Comment.* 247, 258-60 (1997). Yet this letter would seem at most to show that in 1823 Marshall could downplay that argument when writing to Clay. It tells us little about his thinking in 1802 and 1803. I would have liked to find more of Marshall's correspondence touching upon the controversy in the period between the Repeal Act and the decision in *Marbury*. There is surprisingly little. See *infra* note 288 and accompanying text.

190. See Letter from John Marshall to William Cushing (Apr. 19, 1802), *in* 6 *The Papers of John Marshall*, *supra* note 53, at 108 (“For myself I more than doubt the constitutionality of this measure & of performing circuit duty without a commission as a circuit Judge. But I shall hold myself bound by the opinions of my brothers. . . . I am endeavoring to collect the opinion of the judges.”).

191. Letter from John Marshall to William Paterson (Apr. 19, 1802), *supra* note 183.

192. 5 U.S. (1 Cranch) 299, 309 (1803).

193. Letter from John Marshall to William Paterson (Apr. 19, 1802), *supra* note 183, at 108, 109 (“I should therefore have proceeded to execute the law so far as that task may be assigned to me; had I not supposed it possible that the Judges might be inclined to distinguish between the original case of being appointed to duties marked out before their appointments & having the duties of administering justice in new courts imposed after their appointments.”). Marshall went on to say that he was not convinced the distinction ought to have weight, and to protest that he would be guided by the Justices' views.

194. See 3 Beveridge, *The Life of John Marshall*, *supra* note 2, at 64.

195. See *supra* note 193.

196. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *supra* note 186, at 111 (arguing that Congress could not impose duties on the judges for the manifest purpose of compelling them to resign their offices).

Repeal Act from the First Judiciary Act without casting aspersions on Congress that he could not substantiate without entangling himself in questions he could not answer. Consider that, only seven years later, in the great Yazoo swindle case, *Fletcher v. Peck*, Marshall, writing for the Court, would refuse to consider the corrupt motives of the Georgia legislature for very similar reasons—reasons that, adopting the arguments of counsel, he made quite explicit.¹⁹⁷ With regard to the Repeal Act, moreover, for the Court to impugn the intentions of Congress would be to enter the political conflict overtly, the last thing John Marshall would have wanted the Court to do after his struggle to distance the Court from the political conflict one week earlier in *Marbury*. His effort, rather, was to place the judiciary on a lofty eminence above the political fray. All this considered, it is a bit harder than one would have supposed to describe *Laird* as a “retreat” from anything the Court could have *done*. *Laird* was useless to the Marshall Court from just about any angle.

(2003) 89 Virginia LR 1287 Nevertheless, the stubborn fact is that the Court did sustain the Repeal Act. In the public mind and in the perception of the bench and bar, the details were not likely to matter. One might even be tempted to agree with *Marbury*’s critics that *Laird* was indeed something of a “retreat,” except for three facts. First, as we have seen, the Justices had already decided *Laird* as a practical matter when they recommenced circuit riding. Second, the Justices’ self-interest was too much entangled with the circuit-riding issue to insist upon new commissions. Third, and most importantly, after *Marbury*, *Laird* simply did not *matter*. Having already aggrandized to the judiciary, in *Marbury*, virtually all the power the Court could aggrandize to the judiciary, there was little, beyond the Justices’ own comfort, to be gained by asserting some of that power in *Laird*. It is only on the unconvincing view, then, that *Marbury* was unimportant, unfrontational, and did nothing to secure the independence and power of the judiciary, that either *Marbury* or *Laird* can plausibly be read as some sort of “retreat.”

H. *The Impeachment of Justice Chase*

It is sometimes argued, in support of the view that Marshall was in “retreat,” that he was fearful and weak when he testified in the 1805 impeachment trial of his colleague, Associate Justice Samuel Chase. Jefferson, the erstwhile foe of the Sedition Act, himself had vengefully suggested that Chase be “punished” for “seditious” remarks.¹⁹⁸ Chase was the Republicans’ old arch-enemy, a fiery courtroom tyrant, the Jeffries of the Sedition Act. Sitting on circuit, Chase’s charges to grand juries were indeed

197. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) (Marshall, C.J.) (“That impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its Framers, and how far the particular inducements, operating on members of the supreme sovereign power of a state, to the formation of a contract by that power, are examinable in a court of justice. . . . Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority . . . the principle by which judicial interference would be regulated, is not clearly discerned.”).

198. 3 Beveridge, *The Life of John Marshall*, supra note 2, at 170. Jefferson had complained to Joseph Nicholson, an ally in the House, that Justice Chase had made seditious remarks in a charge to a federal grand jury. Letter from Thomas Jefferson to Joseph Nicholson (May 13, 1803), in 10 *The Writings of Thomas Jefferson* 390 (Andrew A. Lipscomb ed., 1903). The House voted to impeach Chase for this and other offenses. For discussion see Ellis, *The Jeffersonian Crisis*, supra note 5, at 36-68; McCloskey, supra note 11, at 45-47.

political harangues, but it was common in those days for judges to deliver political harangues to grand juries.¹⁹⁹ The articles of impeachment charged Chase, among other things, with uttering anti-administration seditious to a grand jury when sitting in Baltimore. This alleged “sedition”**(2003) 89 Virginia LR 1288** consisted mainly in a side remark about the impropriety of the 1802 Repeal Act. The event occurred two weeks after *Marbury* was handed down.

It was at Jefferson’s prodding that the Republican Congress had begun to threaten arbitrary impeachments.²⁰⁰ In 1803 Congress actually removed the alcoholic and doddering John Pickering, a federal district judge from New Hampshire.²⁰¹ In that proceeding, the House rejected language in the motion to impeach that would have required a finding by the Senate of “high crimes and misdemeanors.”²⁰² There was a prevailing belief that the impeachment of Chase was intended as a threat, that the whole Court was to be impeached, and that the Chief Justice was next.²⁰³ After all, Chase would soon retire anyway, and in any event the Chief Justice was much bigger game.

Marshall is commonly supposed to have been anxious and fearful over this. Indeed, in the previous year Marshall had penned a letter to Chase, in which he seemed, disconcertingly, to be saying that he would favor an appellate power in Congress, if only the Justices could be free of the constant threat of impeachment.²⁰⁴ This **(2003) 89 Virginia LR 1289** bizarre remark, which of course is utterly at odds with Marshall’s views, is read quite literally as an example of Marshall’s supposed anxiety. It seems at least equally likely that it was extravagance. Or perhaps it was intended to comfort Marshall’s beleaguered colleague. The sentiment seems too much out of character and too isolated to be taken seriously. Marshall of course regarded these arbitrary impeachments as the lawless actions they were. He would have felt his own possible impeachment as a threat, more to his plans for the Court, more to the Court and indeed to the country, than to himself. Waiting in the wings was Spencer Roane, Jefferson’s first choice to replace Marshall as Chief Justice.²⁰⁵ Yet not even this last could be as

199. Haskins, *supra* note 15, at 4.

200. For well-known examples of the President’s complaints to his friends in Congress about the entrenchment of the Federalist judiciary, see Letters from Thomas Jefferson to Joel Barlow (Mar. 14, 1801) and to John Dickinson (Dec. 19, 1801), *in* 3 *Memoir, Correspondence, and Miscellanies from the Papers of Thomas Jefferson* 457, 487 (Thomas Randolph ed., 1830); see 2 Haskins & Johnson, *supra* note 5, at 205 (discussing the Republicans’ impeachment drive in Jefferson’s first term).

201. John Pickering’s offense, apparently, was senility. For good accounts of his impeachment, see 2 Haskins & Johnson, *supra* note 5, at 211-14; Lynn W. Turner, *The Impeachment of John Pickering*, 54 *Am. Hist. Rev.* 485 (1949).

202. David P. Currie, *The Constitution in Congress: The Most Endangered Branch: 1801-1805*, 33 *Wake Forest L. Rev.* 219, 244-46 (1998) [hereinafter Currie, *the Constitution in Congress*] (describing Judge Pickering’s impeachment trial).

203. 3 Beveridge, *The Life of John Marshall*, *supra* note 2, at 160.

204. See Letter from John Marshall to Samuel Chase (Jan. 23, 1804), *in* 6 *The Papers of John Marshall*, *supra* note 53, at 347. (“I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the Judge who has rendered them unknowing of his fault.”). The letter is generally taken quite literally. See 3 Beveridge, *The Life of John Marshall*, *supra* note 2, at 176-78. (Opposite page 176 Beveridge exhibits a photograph of the original in Marshall’s handwriting). It is difficult to see what Marshall meant by this suggestion, since it cannot be reconciled with what we know of Marshall’s constitutional views. It is possible it was a hyperbolic expression of sympathy for his embattled colleague. See, e.g., David E. Engdahl, *John Marshall’s “Jeffersonian” Concept of Judicial Review*, 42 *Duke L.J.* 279, 332 & n.181 (1992) (reading Marshall’s remark as the “passing comment of a warm and compassionate man in a sympathetic letter of support to a distressed friend”).

205. See Note, *Judge Spencer Roane of Virginia: Champion of States’ Rights—Foe of John Marshall*, 66 *Harv. L. Rev.* 1242, 1242 (1953) (hailing Roane as “Chief Justice of the United States but for Oliver Ellsworth’s inopportune resignation”). Roane, like Calhoun, was a chief intellectual heir to the delusions of the Virginia and Kentucky Resolutions of 1798, a proponent of the states’ rights/compact theory of sovereignty. A hero of the ongoing battle between the Virginia Court of Appeals and the Marshall Court, Roane was the pseudonymous author of newspaper attacks on *McCulloch v. Maryland* that

injurious as an appellate power over the Court, lodged in the most political branch. Of course such a power would take a constitutional amendment.

It is conventional to describe Marshall's testimony on behalf of his colleague as altogether too cringing and anxious—and even as revealing a dislike of Chase.²⁰⁶ It turns out that there is only one source for such characterizations: the diary of Senator Plumer.²⁰⁷ Shortly after the impeachment trial, Plumer, who had been corresponding with Republican colleagues, became a Republican himself.²⁰⁸ Perhaps his 1805 evidence, sometimes described as “friendly,” may not be as friendly as scholars generally assume. Plumer's memoir says that Marshall, when testifying, showed “too much caution, too much fear,” and also a disposition to “accommodate” the managers of the impeachment. “That dignified frankness (2003) 89 Virginia LR 1290 which his high office required did not appear.” Plumer's report conveys a picture of an uncharacteristic Marshall, frightened and servile, a Chief Justice, you might say, in headlong retreat. But Plumer and his friends had been presuming fright on the part of the Justices, particularly Chief Justice Marshall, at least since January 1803.²⁰⁹

It rings true that Marshall's manner would have been unimpressive. Especially in beginning to speak, Marshall would have been hesitant and unsure, and his gestures awkward.²¹⁰ From the portraits of Marshall on so many frontispieces, forming for future generations their very idea of how a Chief Justice should look, it is hard to believe that that handsome, commanding figure lacked presence, but we have it from too many sources to doubt it.²¹¹ Besides all this, Marshall would have been bending over backwards, trying to avoid any appearance of personal engagement. His way with colleagues of strongly pronounced but divergent views, moreover, (2003) 89 Virginia LR 1291 had always been notably temporizing;²¹² he had a Southerner's preference for easygoing relations.

elicited Marshall's “Friend of the Constitution” letters. See *infra* note 419 and accompanying text. It is an intriguing question whether it would have made a difference had Roane and not Marshall come down to us as “Expounder of the Constitution.”

206. See, e.g., Ellis, *The Jeffersonian Crisis*, *supra* note 5, at 69.

207. William Plumer, *Diary* (entries of Feb. 1805), Plumer Manuscripts, Library of Congress; 3 Beveridge, *The Life of John Marshall*, *supra* note 2.

208. 3 Beveridge, *The Life of John Marshall*, *supra* note 2, at 222 & n.1.

209. See *id.* at 160-62.

210. Joseph Story, who loved Marshall, mentioned Marshall's hesitancy in speech. “[H]is language . . . does not flow rapidly. . . . In conversation he is quite familiar, but is occasionally embarrassed by a hesitancy and drawling.” 1 *The Life and Letters of Joseph Story* 166 (William W. Story ed., 1851). Wirt, *supra* note 96, at 178-79, also mentions Marshall's hesitancy and awkwardness. See also Anonymous, *Sketches of American Orators* 13-14 (1816) (“So great a mind . . . is with difficulty set in motion. . . . [H]e [Marshall] begins with reluctance, hesitation, and vacancy of eye; presently his articulation becomes less broken, his eye more fixed, until finally, his voice is full, clear, and rapid, . . . and his whole face lighted up with . . . genius.”).

In his diary entries describing Chase's impeachment, Senator Plumer concludes that Marshall was a “trimmer,” and there he may have him. Marshall liked to write letters to his Polly describing his delightful evenings at balls and dinner parties, and stoutly insisting that he did not enjoy them, no, not one bit. He “greatly prefer[red] remaining, at home.” Letter from John Marshall to Mary Marshall (Feb. 14, 1830), *in* 11 *The Papers of John Marshall*, *supra* note 144, at 348.

211. Story writes, “The consciousness of power was not there; the air of office was not there; there was no play of the lights or shades of rank; no study of effect in tone or bearing.” An Address by Mr. Justice Story on Chief Justice Marshall, Delivered in 1852, at the request of the Suffolk (Mass.) Bar (1900), at 41. The one description of Marshall I have seen that confirms my frontispiece-formed vision, is that of a European visitor, who observed Marshall on the occasion of his return to this country after the XYZ affair, and saw him as “quite handsome,” adding, “[O]ne could recognize in his bearing that he had breathed the air of Paris.” Smith, *John Marshall, Definer*, *supra* note 32, at 236.

212. Marshall's hesitant manner sometimes led to misjudgments about him. Theodore Sedgwick, the Speaker of the House during Marshall's months in Congress, acknowledged Marshall's excellence and command of the House, but recorded that some of the members “thought him temporizing,” prone to expressions of doubt, and indeed so indecisive as to seem even “foolish.” Sedgwick complained that doubts expressed by Marshall unfortunately led to “irremovable” doubts in others.

If Plumer is to be believed,²¹³ Marshall made some admissions that on a casual reading might seem disloyal to Chase. But, if so, his admissions were substantially only of facts, and of facts that could not constitute an impeachable offense. That, indeed, was the strategy of Chase's defense—that the articles of impeachment did not allege, nor did the evidence show, an impeachable offense.²¹⁴ But even if Plumer is accurate, I do not read Marshall as disloyal. Marshall's sense of the ridiculous was very strong, and it is quite possible that the Chief Justice was playing a little with the impeachment managers. Recall Willard Wirt's striking remark that even when Marshall was presiding on the Court, Wirt saw "hilarity" in Marshall's eyes.²¹⁵ Probably Marshall's most "disloyal" remark was offered in answer to a question from Vice President Aaron Burr,²¹⁶ who asked whether he had ever observed Chase on the bench to be tyrannous, oppressive, and overbearing. Marshall appeared to think this over, and then in a helpful tone offered that he had once heard Chase stop an attorney repeatedly on a point, but then tell the attorney to proceed, assuring him he would not be interrupted again. If that was not tyrannous, oppressive, and overbearing, Marshall added (I imagine him nodding encouragingly), he did not know what was.²¹⁷ But if that is not Marshall's bit of fun, (2003) 89 Virginia LR 1292 I do not know what is. Chase undoubtedly was overbearing on the bench, but even if that were an impeachable offense, Marshall had offered a counterexample.²¹⁸

If anybody was unnerved during Marshall's testimony it was not Marshall, but his examiner-in-chief, John Randolph of Roanoke, the young, fiery, whip-snapping, booted, volatile, and arrogant Speaker of the House, who had proposed, and was now managing, Chase's impeachment. Randolph seemed ill. He looked "[w]eary and harried."²¹⁹ The fact is that Randolph had just broken with the administration over its compromise resolution of the Yazoo land swindle.²²⁰ Jefferson, at the time, was in headlong retreat from positions that would offend northern Republicans, among whom there was a growing secessionist movement.²²¹ But the Yazoo compromise outraged Randolph. More Jeffersonian than Jefferson, with his extreme states' rights and agrarian views, Randolph, full of moralistic fervor,

See Letters of Theodore Sedgwick to Rufus King, (Dec. 29, 1799, Feb. 6, 1800, May 11, 1800), in 3 *The Life and Correspondence of Rufus King, 1799-1801*, at 163, 189-90, 237 (Charles R. King ed., 1896).

213. Cf. Currie, *The Constitution in Congress*, supra note 202, at 244 (wondering, in another connection, whether Plumer was to be believed).

214. See Ellis, *The Jeffersonian Crisis*, supra note 5, at 97.

215. See supra note 107 and accompanying text.

216. Surreally, Burr, then under indictment in two states for the murder of Alexander Hamilton, was presiding over the impeachment proceedings in the Senate. We can assume that the Vice President had not forgiven Marshall for withholding his support in the struggle following the election of 1800, notwithstanding that Jefferson had the identical grievance. See supra note 168 and accompanying text.

217. 3 Beveridge, *The Life of John Marshall*, supra note 2.

218. The event described by Marshall is probably the incident reported in 3 Beveridge, *The Life of John Marshall*, supra note 2, at 40. The attorney in question was George Hay. Although eventually Chase did calm down and beg Hay to proceed, Hay "indignantly stalked from the room." Id.

219. Id. at 187.

220. A presidential commission had recommended that five million acres of land be set aside for the Yazoo purchasers by way of compromise. This case, of course, was to come before the Court in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Marshall held for the bona fide purchasers, id. at 132-33, but as long as John Randolph of Roanoke remained in Congress, Marshall's judgment, like the settlement recommended by Jefferson's commission, could come to nothing. See 4 Malone, *Jefferson the President I*, supra note 11, at 456.

Randolph's break with the administration was probably inevitable in any event. Jefferson had little confidence in him. It will be recalled that Jefferson's intemperate suggestion that Chase be impeached was sent not to Speaker Randolph, but to Congressman Nicholson. See supra note 198 and accompanying text.

221. 3 Beveridge, *The Life of John Marshall*, supra note 2, at 170.

insisting on Georgia's right to repeal its corrupt statute, had proceeded to split the Republican party and to lead the renegade faction in the House—and in consequence to bring down on his head Jefferson's bitter vengeance.²²² Randolph may well have been looking to the trial to repair his fortunes,²²³ but in order to topple Randolph, the devious Jefferson, behind the scenes, now began pulling the strings of his puppets in the House to **(2003) 89 Virginia LR 1293** persuade the Burrites, who alone were uncommitted, to vote for Chase's *acquittal*.²²⁴

In Senator Plumer's account, Randolph, questioning Marshall, is in obvious difficulties. Sick, and in deep political trouble, he seems reluctant to question Marshall at all. Arrogant and swaggering as Randolph usually was, he now faced a man who was widely loved and respected, who understood very well the mess Randolph was in, and who, apparently, was trying to be helpful to him. Besides all this, there may have been—who knows?—that flicker of hilarity in the Chief Justice's eye. Randolph seems unable to tackle the Chief Justice effectively. At one point, an objection having been raised, Randolph complains to Vice President Burr that he ought to have a right to ask a man a question, however august a personage that man may be. Burr agrees. But when Marshall is brought back for further questioning, Randolph falls silent. The reader has the overwhelming impression that Randolph, who, from the floor of the House has just had the audacity to accuse President Jefferson of corruption, knows that he cannot afford a public perception that he is bullying Chief Justice John Marshall.²²⁵

In his closing argument, Randolph, even more sick than on the day he questioned Marshall and having lost his notes besides, somehow rose to the occasion, became at last effective, and used Marshall's testimony adroitly to criticize Chase by praising Marshall. Perhaps to annoy Jefferson, Randolph was almost fawning in his encomiums to the mild Chief Justice, whom he contrasted at **(2003) 89 Virginia LR 1294** every point with the overbearing Chase.²²⁶ Beveridge concludes that, even though Randolph failed to bring Chase down, he very probably succeeded in making it impossible to impeach Marshall.²²⁷

I. Noncompliance

We now have a refreshed recollection of the man John Marshall was. Even if we assume the Jefferson administration would have had the hardihood to put itself in contempt of the Supreme Court, and to put itself in the wrong vis-à-vis John Marshall, why have we been assuming that that would

222. See 2 Beveridge, *The Life of John Marshall*, supra note 34, at 562 (noting in another context Jefferson's "curiously vindictive nature").

223. Ellis, *The Jeffersonian Crisis*, supra note 5, at 90.

224. *Id.* at 104-05. But see, e.g., Dewey, *Marshall Versus Jefferson*, supra note 5, at 150 (declaring that Jefferson was outraged by the *acquittal*). Randolph's radicals, perceiving Jefferson's strategy, began to woo the Burrites too, at this juncture, Chase, a very smart man with very smart advice, requested a month's delay and was granted it. During that month the Yazoo matter came up again. Randolph became uncontrollable and from the floor more or less accused Jefferson of corruption. He was denounced in the House, and party discipline became even less reliable. Even so, Chase was acquitted very narrowly. Ellis, *The Jeffersonian Crisis*, supra note 5, at 84-95. Randolph somehow weathered the storm and lived a long and busy political life. The classic telling of the story is in Henry Adams, *John Randolph* 89-106 (1996).

225. Although the drive to impeach Federalist judges ended with the failure of Chase's impeachment, reportedly John Randolph, "in a rage," submitted as an amendment to the Constitution that "[t]he judges of the Supreme Court, and all other courts of the United States, shall be removed by the President on the joint address of both Houses of Congress." Hampton L. Carson, *Address*, in *II John Marshall: Life, Character and Judicial Services* 239, 407 (John F. Dillon ed., 1903). Judge Carson provides no source.

226. 3 Beveridge, *The Life of John Marshall*, supra note 2, at 214-15.

227. *Id.*

matter to Marshall? The executive branch can always drag its feet in every case. Government nonacquiescence in judicial decisions²²⁸ and government noncompliance with judicial decrees are perennial problems. Courts cannot worry very much about all that. Of course, sometimes a court will make mistakes. But courts cannot worry very much about that either. A court must decide the case before it by its best lights.

*Worcester v. Georgia*²²⁹ handily illustrates both the problem of recalcitrance and the risk of mistake. In that case, near the end of his life, Marshall must have understood that, notwithstanding all the Court's accumulated prestige, Georgia would not submit to the jurisdiction of the Court and would pay no attention to its ruling, and that Andrew Jackson was of all presidents the least likely to call out the troops to enforce it.²³⁰ Marshall's sympathies in this case clearly lay with the Cherokees.²³¹ Marshall evidently intended to **(2003) 89 Virginia LR 1295** prevent the states from taking advantage of the Indian tribes by placing them under clarified national protection.²³² But the unintended consequence of *Worcester v. Georgia* was to empower the federal authorities to march the Cherokee Nation west of the Mississippi. The Cherokees' trail of tears is a remembered shame and sorrow. Yet all of that is history, and all the actors in the tragedy are long gone. As to national power, tribal sovereignty, and tribal rights, *Worcester v. Georgia* is still good law.

President Jefferson bitterly criticized Marshall for his allegedly partisan conduct of the trials of Aaron Burr, and considered defying Marshall's subpoena demanding the production of evidence sought by Burr.²³³ But nearly two centuries later the Supreme Court relied on Marshall when, in the constitutional crisis of the Watergate scandal, it threw its weight behind Judge Sirica's subpoena to President Nixon, and forced the only resignation of a President of the United States.²³⁴

No likely recalcitrance of the administration would matter to Chief Justice Marshall. On this point we should not disregard the internal evidence of *Marbury* itself. In *Marbury*, Marshall is doing more than placing his hand above the fist of Thomas Jefferson—he is quietly shaping to great, uniquely American uses, both Court and Constitution. *Marbury* lays foundation stones. It insists on great powers. Far from being some kind of accommodation or retreat, it is evident from the opinion itself, on its face, that it is intended to be an assertion of broad judicial powers over government, enduring long after recalcitrant actors in the drama have left the stage.

228. See Louise Weinberg, *Federal Courts: Cases and Comments on Judicial Federalism and Judicial Power* 358-69 (1994) (regarding intracircuit nonacquiescence); Samuel Estreicher & Richard L. Revesz, *The Uneasy Case Against Intracircuit Nonacquiescence*, 99 *Yale L.J.* 831 (1990) (same).

229. 31 U.S. (6 Pet.) 515 (1832) (holding that the Cherokee Nation is an independent sovereign under the protective umbrella of supreme federal laws and treaties).

230. Kent Newmyer points out that the system was never tested in these ways. There was no formal remand in the case, and, as a technical matter, there was nothing for Georgia to defy or for Jackson to enforce. Newmyer, *Marshall and the Heroic Age*, *supra* note 125, at 454-55.

231. Marshall may have hurried the litigation, Professor Newmyer speculates, to make Jackson's Indian policy an issue in the presidential election of 1832. *Id.* at 456. Apparently to spare Jackson embarrassment over his Indian policy in the election of 1832, supporters of the administration persuaded the Governor of Georgia to pardon the defendants in *Worcester v. Georgia*. See G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, at 737-38 (1988). For an excellent study of the subsequent development of the issues traced out in *Worcester*, see Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 *Tex. L. Rev.* 1 (2002).

232. For a well-written indictment of Marshall's Indian policy in another, less well-known case, see George Bryan, *The Imperialism of John Marshall* (1924).

233. See *supra* Section II.B.

234. *United States v. Nixon*, 457 U.S. 731, 750 n.31 (1982) ("Chief Justice Marshall held . . . that a subpoena *duces tecum* can be issued to a President.") (citing *United States v. Burr*, 25 F. Cas. 30 (No. 14692d) (C.C.D. Va. 1807)).

(2003) 89 Virginia LR 1296 J. *Why Marbury Lost*

If Marshall might have issued a mandamus in *Marbury*, why didn't he? It took him two weeks to write *Marbury*, hammering it out with the Justices until he had a unanimous Court. He was four hours reading the opinion from the bench. The case reads like one long struggle. Is it possible this was a struggle, not to find a way out, but to find *jurisdiction*? *Marbury* reads that way—like one long struggle to establish jurisdiction.

Viewed in this light, the earlier parts of the case are hardly “dictum.”²³⁵ It is true that Marshall works hard to ground William Marbury's cause of action—to establish that Marbury had a “vested” right, and that the administration had “sported away” that right.²³⁶ But he could hardly do otherwise. There was a statutory requirement that the writ of mandamus issue only in accordance with the “principles and usages of law.”²³⁷ Indeed, this would have been a requirement at common law even if the statute had not codified it.²³⁸ Contrast *Marbury*, for example, with *Hodgson v. Bowerbank*, decided six years later.²³⁹ In *Hodgson*, Marshall insists that there is no jurisdiction in the absence of a pleading of jurisdiction that meets constitutional requirements. But his *Hodgson* opinion is a matter of a few sentences. There is no struggle, no attempt to show ways in which the case might arguably fit statutory and constitutional requirements. It might plausibly be concluded that in *Marbury*, (2003) 89 Virginia LR 1297 on the other hand, Marshall was trying to justify, to sustain, rather than to strike down, the taking of jurisdiction. But if so, why did Marshall wind up striking it down?

Is the answer, perhaps, that he could not sustain jurisdiction because it was not there? Was Marshall right, whatever his critics think? Is it possible that the Court had no jurisdiction?

Well, of course he was *right*. Nobody today would disagree. Of course Congress cannot exceed the limits of Article III. Certainly Congress cannot expand the Court's original jurisdiction. True, we blame this position on *Marbury* itself, although much of it was well established before *Marbury*.²⁴⁰ But this position—this limit on the power of Congress—has been so sturdy that it has withstood the test of time for two hundred years. And if Marshall's *reasoning* was as bad as his critics think, then *a fortiori*, it is the *position* itself—the conclusion that Congress has no power to add to the Court's original jurisdiction—that must be unassailable. That conclusion also seems intuitively right. After all, the Supreme Court is not a trial court.

235. Accord 6 The Papers of John Marshall, *supra* note 53, at 163 (“In a broader sense, however, the entire opinion centered on the single issue of jurisdiction.”).

236. Cf. Karen Orren, *The Work of Government: Recovering the Discourse of Office in Marbury v. Madison*, 8 Stud. Am. Pol. Dev. 60 (1994) (describing understandings of that period concerning the nature of office, and *Marbury*'s grounding in those understandings).

237. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (“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 . . . *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.”).

238. See, e.g., *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) (deciding the propriety of mandamus according to the usages of law). Professor Van Alstyne acknowledges that Marshall's discussion of the validity of William Marbury's claim is really about jurisdiction. See Van Alstyne, *A Critical Guide*, *supra* note 27, at 68. But see Fallon, *Marbury and the Constitutional Mind*, *supra* note 101, at 16 & n.61 (commenting on this concession: “But this is a bridge too far; it wholly obliterates the distinction between jurisdictional and merits issues”).

239. 9 U.S. (5 Cranch) 303 (1809).

240. Cf. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13-14 (1800) (holding that a case brought under an act of Congress purporting to authorize federal jurisdiction in cases in which “an alien is a party” must nevertheless fall within the provisions of Article III).

III. *MARBURY*'S MISSING ARGUMENT: THREE FUNCTIONS OF THE HOLDING ON JURISDICTION

Here I do have to come to a halt and acknowledge that, while Marshall clearly went out of his way to try to grant Marbury relief, and must have been disappointed that he could not, he must nevertheless have been very glad of the opportunity to strike down the mandamus clause of Section 13.

I say this because there was a marked absence of relevant legislation on the merits of Marbury's case. Assuming, as I do, that in *Marbury* the Court pretty clearly set out to claim all the judicial power it could, Marshall would have been hard pressed to find an opportunity in *Marbury* to assert the claimed power of judicial review of legislation, unless it was the allegedly jurisdictional statute that the Court could "strike down." Marshall might have hoped to find a way to strike down some statutory feature of Marbury's **(2003) 89 Virginia LR 1298** claim on the merits. He seems to be trying to bring into play, after a fashion, the legislation organizing the judicial system of the District of Columbia, when he says that Marbury has a claim under "the laws of his country."²⁴¹ But the organic laws of the District of Columbia, in their want of actual connection to Marbury's allegations of right and injury, do not seem to have presented an opportunity for judicial review under the Constitution. Marshall concedes as much, when he says, "It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute."²⁴² In this light, the long struggle of the opinion is not so much a struggle to find jurisdiction, as to find *law*.

Second, there was the difficulty that, in Marshall's view, Marbury's claim did not arise under the *Constitution*. To the extent Marshall was convinced of this, *Marbury* would not have been a constitutional case without its jurisdictional wing. Yet it would have been of paramount importance to Marshall to pull the Constitution into the case. Unless there was a constitutional issue somewhere in the case, *Marbury* would have been a case like any other, subject to the legislature's ordinary power of revision. A declaration of judicial supremacy would have been beyond the Court's reach. The force of the Constitution in courts would not have emerged. Yet John Marshall's argument for the hierarchical superiority of the Constitution is essential to his other probable ambitions for the case. *Marbury* would not be the case that it is unless Marshall *did* strike down the alleged jurisdiction. If he was to find his way to the Constitution, his only apparent path lay in the jurisdictional defense.²⁴³

Third—and for him this may have been the greatest difficulty of all because of the want of law for the case—Marshall was unable to **(2003) 89 Virginia LR 1299** find a constitutional link in the case between judicial control and *the administration*. The only limit on executive misconduct on which Marshall seemed able to rely, apparently, was the common law, in this case federal common law²⁴⁴—or, even less satisfactorily, some implication from Article II²⁴⁵ and the organic laws of the District of Columbia.²⁴⁶ Yet it is clear, if only from its bulk and seriousness, that his discussion of judicial control

241. *Marbury*, 5 U.S. (1 Cranch) at 162. For further discussion of this feature of the case, see *infra* Part VI.

242. *Marbury*, 5 U.S. (1 Cranch) at 172.

243. Partly for these reasons, it is a mistake to read the judicial review aspect of *Marbury*, as some do, as having principled application only as confined to jurisdictional legislation, or at most matters concerning courts. See, e.g., Robert Lowry Clinton, *Marbury v. Madison* and Judicial Review 207-11, 223-33 (1989); William W. Van Alstyne, Notes on a Bicentennial Constitution: Part II, Antinomial Choices and the Role of the Supreme Court, 72 Iowa L. Rev. 1281, 1288 (1987) [hereinafter Van Alstyne, Notes on a Bicentennial Constitution II]. But see, for Professor Van Alstyne's later position, William W. Van Alstyne, The Constitution in Exile: Is It Time to Bring It In from the Cold?, 51 Duke L.J. 1, 7 & n.16 (2001).

244. See *infra* Part VI.

245. *Marbury*, 5 U.S. (1 Cranch) at 155 (describing the President's appointment power under Article II).

246. See *id.* at 154 ("His right originates in an act of congress passed in February 1801, concerning the district of

over the executive was the part of the case that mattered most to him. This was a deficiency he could not cure. He had to give it up.

If Marshall did have broader ambitions for *Marbury* than the case afforded—if he would have liked to establish constitutional control over the executive branch—ironically he seems to have succeeded. Many of us tend in our thinking to gloss over the complex history and interplay of administrative law, constitutional amendment, the doctrine of *Ex parte Young*,²⁴⁷ and modern legislation, and simplistically to count *Brown v. Board of Education*²⁴⁸ as part of *Marbury*'s legacy. In doing so we willingly suspend disbelief, and elide (complaisantly as well as complacently) *Marbury*'s missing argument against the administration—the *constitutional argument*. We willingly read *Marbury*'s claim against Madison as somehow augmented or undergirded by Marshall's constitutional ruling on the jurisdiction issue.²⁴⁹ Not all wrongs by government officials are of constitutional dignity,²⁵⁰ but we are quite clear that the Constitution does control government actors. In *Marbury*, Marshall could not forge that link between the Constitution and the **(2003) 89 Virginia LR 1300** executive. Nevertheless, since then we have not doubted its existence.

These reflections raise the further interesting question whether Charles Lee, *Marbury*'s famous lawyer, might have framed *Marbury*'s *claim* as a constitutional one, or whether Chief Justice Marshall might have reconceived it as a constitutional claim. What about the Due Process Clause? The “sporting away” of a vested property right in a term of office for years might have been enough, even then, to have produced a leap into the future of substantive due process. Both the midnight Washington judges and the midnight circuit judges might have brought such claims, in theory, against Madison. Charles Lee did not argue *Marbury*'s case under the Fifth Amendment, but the Court did not wait to strike the due process spark²⁵¹ until Chief Justice Roger Taney decided *Dred Scott* in 1857.²⁵² Had Marshall first

Columbia.”).

247. 209 U.S. 123 (1908) (holding that the Fourteenth Amendment may be enforced through injunctions against state officials).

248. 347 U.S. 483 (1954).

249. See Thayer, *supra* note 14, at 78-79 (“In this way two birds were neatly reached with the same stone.”).

250. See, e.g., in actions for damages, *Daniels v. Williams*, 474 U.S. 327 (1986) (holding that claims of government misfeasance are not actionable under the bare Due Process Clause when a state tort remedy is available); see also, e.g., in actions for injunctive relief, *Dalton v. Specter*, 511 U.S. 462, 472-74 (1994) (holding that a President's violation of federal law is not necessarily also a violation of the Constitution).

251. Chief Justice Marshall obliquely raised due process, as a matter of English rather than American law, in the *Dartmouth College Case*, *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 689 (1819) (“The crown, then, upon the face of the charter, pledged its faith that the donations of private benefactors should be perpetually devoted to their original purposes, without any interference on its own part, and should be for ever administered by the trustees of the corporation, unless its corporate franchises should be taken away by due process of law.”). But this did not deflect Marshall from his focus on the Contracts Clause, which he reached via an implied contract. Joseph Story, the author of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), tended to rely on general understandings. See, e.g., *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 625-26 (1812) (Story, J.) (holding Virginia's escheat of the Fairfax estate invalid for want of a hearing). Of course there was no Fourteenth Amendment; in the absence of a Due Process Clause applicable to the states, Story's ruling on the validity of the escheat was either based on general understandings or Virginia law. On remand, Spencer Roane, in the Virginia high court, complained that the Supreme Court had invalidated Virginia's escheat without any basis for doing so under federal law. *Hunter v. Martin*, 18 Va. (4 Munf.) 1, 54 (1813) (Roane, J., concurring) (“I can perceive no arguments justifying the authority of the decisions of the Supreme Court of the United States, in relation to this case, which would not equally sustain its judgments, rendered upon the construction of our acts of descents, for example, should that court ever so far forget its own limited powers, as to intrench on that province, also.”). As for “taking” claims, as early as *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), the Court, by Justice Story, decided that a state legislature could not confiscate church lands without compensation. But, again, Story seems to have relied on the sort of general understandings that were so embarrassing to him in *Fairfax's Devisee*. Marshall would not have made these mistakes.

done that in *Marbury*, the Court's triumph **(2003) 89 Virginia LR 1301** would have been much more complete. Marshall would then have given the Court far more scope for action than its then-cramped field of play under the Contracts Clause and the Commerce Clause.

One also sees this want of law when one looks at the history of judicial review of legislation after *Marbury*. Critics trying to downplay the importance of *Marbury* like to say that it was not until *Dred Scott* that the Court would again assert the power of judicial review.²⁵³ Others do note that the Court during that period did “strike down” state legislation, and will declare, on that basis, that *Marbury* was about federalism more than separation of powers.²⁵⁴ But of course judicial review of acts of Congress takes place even if the legislation is sustained. Chief Justice Marshall's opinion in *McCulloch v. Maryland* was not an unimportant exercise of that power. Even so, the commentators have a point. In the early nineteenth century there simply was very little constitutional litigation. This was not because *Marbury*'s establishment of judicial review was exaggerated or unimportant. Rather, it was a direct consequence of the sparseness of enforceable rights afforded by the Constitution and the unincorporated Bill of Rights in the nineteenth century, particularly before the ratification of the Fourteenth Amendment. We often forget how little constitutional law there was before the emergence in the middle of the twentieth century of rights-based constitutionalism.²⁵⁵

(2003) 89 Virginia LR 1302 We do not know much about Marshall's sense of the possibilities of the Due Process Clause. From the internal evidence of *Marbury*, all we can say with certainty is that Marshall stuck to the arguments of counsel—a feature of *Marbury* that makes it seem much less inventive and activist than it was—and Charles Lee did not raise a deprivation-of-property-without-due-process point. The likely explanation for his omission of a “taking” argument as well,²⁵⁶ on both Lee's part and Marshall's is that, if there was a “taking” question, there was also a short answer to it. *Marbury* did not want to claim “just compensation”; he wanted to claim the job. It is also possible that neither Chief Justice Marshall nor any of the other Federalist figures in the case was interested in judgment. They wanted the “force” and “will”²⁵⁷ of a court order.

In this Part, I have tried to show some of the ways in which the judicial review passage in *Marbury* may be functioning to solve certain problems the case presented. I should add that Marshall himself is explicit, in his peroration in *Marbury*, that not only are the legislature and executive bound by the Constitution, but also that “courts, as well as other departments, are bound by that Instrument.”²⁵⁸ That the courts are under the Constitution was a moral worth pointing. It also put the courts in the same

252. *Scott v. Sandford*, 60 U.S. (19 How.) 393 at 450-52 (1856) (Taney, C.J.) (holding that Congress could not abolish slavery in the Territories because to do so would be a deprivation of property without due process of law, within the meaning of the Fifth Amendment, and thus the Missouri Compromise, since repealed, had been unconstitutional).

253. See, e.g., William F. Swindler, *The Constitution and Chief Justice Marshall* 33 (1978) (“[H]alf a century was to elapse before the Court again would assert its right to hold an act of Congress unconstitutional—in the *Dred Scott* case in 1857.”). I assume the mistake is linguistic—it is surprisingly commonplace.

254. See, e.g., Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *Stan. L. Rev.* 1031, 1037 (1997).

255. Chief Justice Marshall, who believed that the Constitution was “intended to endure for ages to come,” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819), would have understood that the foundations laid in *Marbury* might have a fuller use in ages to come. For an extended argument that the lack of enforceable constitutional rights before the Warren Court explains the paucity of constitutional litigation until the Warren Court, see Louise Weinberg, *The Monroe Mystery Solved: Beyond the “Unhappy History” Theory of Civil Rights Litigation*, 1991 *BYU L. Rev.* 737, 737-65 (1991).

256. U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

257. See *The Federalist* No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The judiciary . . . may truly be said to have neither FORCE nor WILL, but merely judgment.”).

258. *Marbury*, 5 U.S. (1 Cranch) at 180.

position as those most likely to complain about the opinion, an adroit touch. Particularly interesting here is the curious vagueness of Marshall's reference to "other departments" that are also bound by the Constitution. This vagueness perhaps functions to obscure the want of a constitutional basis for *Marbury's* assertion of judicial control over the executive. It is one of the touches that helps us to paper over *Marbury's* missing argument.

(2003) 89 Virginia LR 1303 IV. *MARBURY'S* STRAINED AND IMPLAUSIBLE STATUTORY CONSTRUCTION²⁵⁹

A. *Charles Lee's Jurisdictional Problem*

Nobody has ever explained why Charles Lee thought he could bring *Marbury v. Madison* in the first instance in the Supreme Court of the United States. Lee was a distinguished lawyer who had served as Attorney General in John Adams's Cabinet. Whether he framed the case as a "motion" or an "action," he had no reason to believe that the Supreme Court, like some trial court, could remedy his client's grievance in the first instance. There was an obvious constitutional difficulty. In order to get a case into the original jurisdiction of the Supreme Court, according to Article III of the Constitution,²⁶⁰ one of the parties has to be an ambassador²⁶¹ or a state. And, as Article III states, "in all other cases," the Supreme Court's jurisdiction has to be "appellate." Notwithstanding that the new Chief Justice, John Marshall, was a good friend and a staunch Federalist, *Marbury's* case was hardly likely to survive a constitutional challenge. It was only because an Act of Congress seemed to open up the possibility that Lee had any hope of persuading the Court of its jurisdiction. Indeed, as Marshall acknowledged, the defendant fell precisely "within the letter of the description"²⁶² in the statute. The statute in question—the mandamus clause at the end of Section 13 of the First Judiciary Act²⁶³—was an (2003) 89 Virginia LR 1304 explicit grant of power to the Supreme Court to issue the writ of mandamus in cases against government officials. The defendant, James Madison, Secretary of State, certainly was a government official. A mandamus against him was the very remedy *Marbury* wanted—a court order requiring Madison to give him the job to which the former president had appointed him.

Did Charles Lee have other options? Recently Professor Bloch has addressed at some length the question why *Marbury* was brought in the Supreme Court.²⁶⁴ She points out the availability of the

259. See Graber, *The Passive-Aggressive Virtues*, supra note 43, at 70 (complaining that Chief Justice Marshall "strained" legal texts in *Marbury*); Dean Alfange, Jr., *Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom, 1993 Sup. Ct. Rev. 329, 384 (decrying Marshall's reading of the statute as "strained"); Andrew C. McLaughlin, *Marbury vs. Madison* Again, 14 A.B.A. J. 155, 157 (1928) (asserting that Marshall "manufactured" his reading of the statute).

260. U.S. Const. art. III, § 2, para. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

261. Again, I use the word "ambassador" generically to refer to the foreign dignitaries listed in Article III.

262. *Marbury*, 5 U.S. (1 Cranch) at 173.

263. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 ("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 *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.").

264. Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 Const. Comment. 607 (2001).

circuit court for the District of Columbia, a court established by the legislation organizing the judicial system for the District. This was the same legislation that had created the *Marbury* plaintiffs' jobs as justices of the peace.²⁶⁵ Why should *Marbury* not have made his motion there? It is an interesting question.

Presumably the salient feature of the circuit court for the District of Columbia was that it, too, had explicit statutory mandamus power in cases against federal officials.²⁶⁶ Under the First Judiciary Act, only the Supreme Court had been given that power in terms.²⁶⁷ **(2003) 89 Virginia LR 1305** No express mandamus power had been authorized for the Article III circuit courts. Unfortunately, the new chief judge of the circuit court for the District of Columbia, William Kilty, was a Jefferson appointee, Adams having failed to appoint a Federalist in time.²⁶⁸ Charles Lee might have felt it important, in the politically corrosive atmosphere of that time, to find a more reliably friendly forum for *Marbury*'s case.

Then, too, although that circuit court had jurisdiction over cases arising under federal law, it might not have agreed with Lee that *Marbury*'s claim of a property right in his appointment for a term of years arose under the laws of his country. A property dispute in the District of Columbia would have been governed by the common law and statutes of Maryland or Virginia, incorporated by reference in the District's organic law.²⁶⁹ On Maryland statutes, in particular, Chief Judge Kilty was particularly expert.²⁷⁰ If Maryland law was held to govern *Marbury*'s case, Kilty's court might dismiss a claim for which federal-question jurisdiction was pleaded. There would then be no federal-question jurisdiction in aid of which federal mandamus could issue.²⁷¹

265. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103, 105 (1801).

266. Cf. *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524, 625-26 (1838) (opining that, after *Marbury*, the Supreme Court could not issue a mandamus to a federal official, at all; finding that the only court that could was the circuit court for the District of Columbia).

267. Ten years after *Marbury*, in *McIntire v. Wood*, 11 U.S. (7 Cranch) 504 (1813), the Supreme Court, in an opaque opinion by Justice Johnson, would let pass an argument of counsel that after *Marbury* the Supreme Court had no mandamus power. Apparently our familiar distinction between law struck down "on its face" or "as applied" was not then understood. Counsel in *McIntire* argued that since the Supreme Court did not have mandamus power, the circuit courts must. *Id.* at 505. Justice Johnson acknowledged that under § 14 of the First Judiciary Act (the "All Writs Act"), the circuit courts did have mandamus power in theory, but then explained that there was, at the time, no federal-question jurisdiction in the circuit courts, and thus no jurisdiction in aid of which mandamus against a federal official could issue. *Id.* at 506. To make matters worse, it was held, a decade later, in *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821), that state courts, too, were without power to issue mandamus against a federal official. Then, in *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524, 625-26 (1838), the Taney Court woodenly found that the only court in the United States that *could* mandamus a federal official was the circuit court for the District of Columbia. That this harsh and foolish result should have survived the 1875 establishment of general federal-question jurisdiction in the district courts is astonishing, given the reasoning, such as it was, of *McIntire*. This was the insupportable situation corrected by the Mandamus and Venue Act of 1962, allowing federal district courts to try suits "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Act of Oct. 5, 1962, Pub. L. No. 87-748, § 1(a), 76 Stat. 744 (codified at 28 U.S.C. § 1361).

268. See *supra* note 39. Marshall expressed regret for this in the same famous letter in which he expressed regret for the failure to deliver the justice of the peace commissions. See Letter from John Marshall to James M. Marshall (Mar. 18, 1801), in 6 *The Papers of John Marshall*, *supra* note 53, at 90. Marshall felt that the administration had been too confident that the Federalist nominee for the post would accept. Apparently Adams had sent the name to the Senate, as he often did, without checking with his nominee. From Marshall's contrition, it is fair to assume that Marshall fell in with this expedient, given the pressure of time. The Senate confirmed the appointment only a day before the end of Adams's administration, and the nominee then declined. See Bloch, *supra* note 264, at 612.

269. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103.

270. See, e.g., William Kilty, *Laws of Maryland* (1800) (multivolume compendium).

271. That mandamus be "in aid of jurisdiction" was a literal requirement of the All Writs Act, § 14 of the First Judiciary Act. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73. ("And be it further enacted, That all the before-mentioned courts of the United States, shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially

(2003) 89 Virginia LR 1306 What about the state courts? Lee might well have doubted whether a state court could issue an order against a member of the Cabinet. The Court was soon to answer that question in the negative.²⁷² In any event, the midnight judges' faith in state justice had been badly shaken by a recent, closely watched Maryland case.²⁷³ The Republicans' purge of the judiciary extended to the state courts as well, and in the Maryland case, *Whittington v. Polk*,²⁷⁴ the Maryland high court had cravenly refused to protect the life tenure of judges of the lower Maryland courts. The plaintiffs in *Whittington* had been ousted from office under a new Maryland law, grimly dubbed "the ripper bill," an enactment even more blatantly partisan than the federal Repeal Act. Under the ripper bill, the Maryland legislature closed down Maryland's lower courts, thus ridding them at a single blow of Federalist judges. The legislature then reconstituted those same courts, quickly re-staffing them with Republican judges.²⁷⁵ The Maryland high court judges who turned away their ousted colleagues under the command of this "law" might truly be said to have been in headlong retreat. They voted against conscience and reason, the two Federalists along with the Republican, apparently afraid for their own jobs.²⁷⁶ The Republican, Gabriel Duvall, would be repeatedly rewarded by Jefferson for this corrupt decision, and eventually would be elevated to the Supreme Court by James Madison, where he would distinguish himself as American history's "least significant Justice."²⁷⁷

(2003) 89 Virginia LR 1307 Yet Charles Lee should have had a multiplicity of friendly federal forums from which to choose. The new Circuit Court Act had been in place since February 13, 1801, and by December 1801, when Lee moved the Supreme Court for a show-cause order, *all* the federal circuit courts were sitting, complete with new, life-tenured, friendly Federalist judiciaries. Moreover, these courts were sitting with more original federal-question jurisdiction²⁷⁸ than the lower federal courts

provided for by a statute, which may be necessary for the exercise of their respective jurisdictions." See *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813) (Johnson, J.) (acknowledging that the All Writs Act would enable a federal court to issue a mandamus in aid of [federal] jurisdiction, but pointing out that Congress had not seen fit to grant jurisdiction over cases arising under federal law to the courts below).

272. *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821); see also *Tarble's Case*, 80 U.S. (13 Wall.) 397, 411 (1871) (holding that a state court may not release a person in federal custody).

273. Shugerman, *supra* note 101, at 58.

274. 1 H. & J. 236, 249-50 (Md. 1802) (holding that an action of novel disseisin would not lie to restore a judgeship with life tenure).

275. Shugerman, *supra* note 101, at 71.

276. *Whittington* held that although the "ripper bill" was unconstitutional, 1 H. & J. at 246, the assize of novel disseisin would not lie. *Id.* at 249. Duvall dissented only on the holding of unconstitutionality. *Id.* at 251 (Duvall, J., dissenting). In order to hold that a writ of novel disseisin could not issue, the Maryland court had to hold that a justiceship during good behavior was not a freehold interest. Prior Maryland law, however, appears to have been to the contrary. See Shugerman, *supra* note 101, at 67 & n.30.

277. Cf. David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 U. Chi. L. Rev. 466 (1983) (offering an elaborate, mostly statistical, and very funny demonstration of Duvall's insignificance on the Supreme Court); Shugerman, *supra* note 101, at 68 & nn.46-69 (noting the consensus that Duvall's tenure on the Court was "mediocre" and "insignificant"). Even more revealing, perhaps, to our eyes than his participation in *Whittington*, was Duvall's participation in the Constitutional Convention of 1787. Duvall was among the indignant antifederalists who, sent to the Convention, either did not attend or walked out. See 1 Hampton L. Carson, *The Supreme Court of the United States, with Biographies of All the Chief and Associate Justices* 233 (1902) (1891) (stating that, by ignoring the Convention, Duvall "stripped himself by inaction of a claim . . . to share in the glory which belongs to the Framers"). On the other hand, Duvall's degree of ideological commitment is impressive enough to redeem him from the charge of venality in *Whittington*. His decision in that case was more likely partisan than venal. The Federalist judges in *Whittington* had no such excuse.

278. William Marbury, a Marylander, presumably could have sued James Madison, a Virginian, in diversity. However, the All Writs Act, § 14 of the First Judiciary Act, required that mandamus be in aid of jurisdiction. This would have been read to mean that federal mandamus could be exercised only within some head of a federal court's federal-question

would enjoy again—after the 1802 Repeal Act kicked in—until 1875.²⁷⁹ The All Writs Act,²⁸⁰ arguably, could **(2003) 89 Virginia LR 1308** have provided mandamus power to the circuit courts in Marbury’s case,²⁸¹ assuming the identification of a federal question, at least until their new federal-question jurisdiction—in aid of which mandamus might have been invoked—was repealed. Would an attempt to obtain mandamus in a federal circuit court under the All Writs Act seem to Lee a more formidable obstacle than the constraints of Article III would present in the Supreme Court? That seems unlikely, especially since in the February Term of 1800 the Jay Court had already held that an Act of Congress could not exceed the limits of Article III.²⁸² It is unlikely that Lee saw the possible federal question in *Marbury*. Although in his *Marbury* argument in 1803 Lee asserted that Marbury’s case arose under the laws of his country, the assertion was conclusory and unexplained.²⁸³

It is occasionally suggested that *Marbury* was a made case—a Federalist artifact.²⁸⁴ Of course, even if a feigned case, it was not a collusive suit. The administration obviously wanted no part of it. But the charge might plausibly be laid that the suit was a planned strategy by plaintiffs who did not care about the merits. Such a phenomenon may be quite commonplace. To my mind it would suggest bad faith only in a suit without merit. In *Marbury*, however, the merits were fine—the problem with the suit lay elsewhere. The charge that *Marbury* was a feigned case becomes more serious to the extent that the Chief Justice is implicated. Professor Bloch points out that Marbury and his Federalist friends, including **(2003) 89 Virginia LR 1309** Chief Justice Marshall, did not want the case to go to a court with jurisdiction; they wanted to establish judicial review of legislation.²⁸⁵ On that view, neither the Circuit Court for the District of Columbia nor the Article III circuit courts could have been of much use.

jurisdiction. In other words, to be entitled to mandamus, it would be insufficient to plead Marbury’s claim as a federal one in a state court or a diversity court. The forum would have to be a federal court, under some head of federal-question jurisdiction within the meaning of Article III’s “arising under” clause. See *supra* note 271. At the time Marbury’s suit was filed, the Circuit Court Act of 1801 was still in effect. The federal circuit courts had general federal-question jurisdiction. Under the Act, however, as today, to gain access to that jurisdiction, it would be necessary that one’s claim arise under federal law. 28 U.S.C. § 1331. It is unclear whether Charles Lee was convinced he could identify a federal question in Marbury’s property claim. Courts recognized a property right of sorts, although not a freehold right, in an appointment for a term of years. See Shugerman, *supra* note 101, at 80. But such rights, however created, were thought to be protected by state law. The want of a federal question not only would have been an obstacle to mandamus, it would also have been an obstacle to review in the Supreme Court. For Chief Justice Marshall’s anticipation of this difficulty in his opinion in *Marbury*, see *infra* Part VI.

279. The general federal-question jurisdiction found today at 28 U.S.C. § 1331 was not given to federal courts until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470.

280. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82; see *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807) (Marshall, C.J.) (concluding that the All Writs Act was sufficient authority upon which the Supreme Court could issue the writ of habeas corpus on behalf of a prisoner, and distinguishing *Marbury* on the ground that habeas is appellate in nature).

281. This was the assumption in *McIntire v. Wood*, 11 U.S. (7 Cranch) 504, 506 (1813) (Johnson, J.).

282. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13-14 (1800) (holding that a case brought under an act of Congress purporting to authorize federal jurisdiction in cases in which “an alien is a party” must nevertheless meet the requirements of Article III).

283. See *Marbury*, 5 U.S. (1 Cranch) at 152 (argument of Charles Lee, asserting that Marbury had a right to seek relief “under the laws of his country”). For Chief Justice Marshall’s choice of law and the use he made of it, see *infra* Part VI.

284. See, e.g., David Loth, *Chief Justice: John Marshall and the Growth of the Republic 177* (1949) (suggesting that *Marbury* was a feigned case, “a bit of Federalist animosity designed to embarrass the administration”); 1 Warren, *Supreme Court*, *supra* note 28, at 205 (stating that the Republicans correctly assumed that *Marbury* was “a purely political move on the part of the Federalist Party . . . to scare off their opponents from attempting to repeal the Judiciary Law”); Corwin, *The Doctrine of Judicial Review*, *supra* note 3, at 9 (asserting, influentially, that *Marbury* “bears all the earmarks of a deliberate partisan coup”).

285. See Bloch, *supra* note 264, at 625-26.

The problem would be too much jurisdiction, not too little. The federal-question jurisdiction of those courts, from February 13, 1801, until the March 8, 1802 enactment of the Repeal Act, was indisputable. In further support of the proposition that *Marbury* was a made case, Professor Bloch points out that, notwithstanding the roadmap furnished by Marshall to the *Marbury* plaintiffs, not one of them went on to press his claim in some other forum.²⁸⁶ From this she concludes that they may well have gotten all they wanted from the case. To this we might add that Marshall's serene, even jovial correspondence as *Marbury* came on for decision,²⁸⁷ and the apparent sparseness of his other correspondence surviving from that period,²⁸⁸ suggest, perhaps, that some of his correspondence might have been destroyed. If so, this possibility would lend some support to the hypothesis of a made case. One sometimes has a fleeting sense that much else would be explained if *Marbury* were a made case.

It seems unlikely, though, that an endeavor of such scope, in which so many would have had to participate, would have remained unrevealed, the subject of mere speculation, for two hundred years. We would not have to speculate—we would know. We do have Marshall's rather persuasive general denial, when, privately summing up his public life as wholly open to scrutiny, he wrote, "Nothing is unknown or can be misunderstood by intelligent men."²⁸⁹ The only fact concerning *Marbury* that he thought might be unknown or misunderstood were the motives that led the Court (2003) 89 Virginia LR 1310 to give its opinion in *Marbury* "at large."²⁹⁰ We also have the internal evidence of *Marbury* itself—the inescapable facts that Chief Justice Marshall could find neither the jurisdiction nor the law to assert the kinds of power we believe he wanted to assert over the administration. If *Marbury* were a made case, it is surprising, and disappointing, that it could not have been better made to serve Marshall's purposes.

We simply cannot say, without more, that we understand Lee's choice of the Supreme Court as the right forum for *Marbury*. In the end that must remain something of a mystery.

B. What Statutory Construction?

I hasten to assure the reader that the Sections immediately following this introduction will deal very thoroughly with the alleged statutory construction in *Marbury*. I simply express some mystification. I am unable to locate the "statutory construction" of which *Marbury*'s critics complain. Neither, apparently, could any commentator during the first hundred years of *Marbury*'s existence. Not until Professor Corwin's clever assertions to the contrary, at the turn of the last century,²⁹¹ did anyone find anything amiss with the statutory reasoning in *Marbury*—or indeed, find *any* statutory reasoning in *Marbury*. Could *Marbury*'s critics have been working themselves up for the past hundred years over a chimera?

An emphatic criticism of Chief Justice Marshall's reasoning in *Marbury* is that *Marbury* struck down Section 13's mandamus clause *as a grant of jurisdiction*. From this fact, *Marbury*'s critics see Marshall as *misconstruing* the statute. Instead of reading it as the grant of remedial power it obviously

286. Id. at 626.

287. See Letter from Marshall to Mary Marshall (Jan. 2, 1803), *supra* note 109 and accompanying text.

288. It appears that some months of correspondence are lost. With the exception of Marshall's letter of January 2, 1803 to his wife, and a courteous note to a friend on January 4, Hobson apparently found no correspondence between June 11, 1801, and the decision in *Marbury*, February 24, 1803. See 6 The Papers of John Marshall, *supra* note 53.

289. Letter from John Marshall to Henry Lee (Oct. 25, 1830), *supra* note 144. For Marshall's further enigmatic remark specifically about *Marbury*, see *supra* text accompanying note 146.

290. Letter from John Marshall to Henry Lee (Oct. 25, 1830), *supra* note 144.

291. See *supra* notes 21-27 and accompanying text.

was, he read it—disingenuously, they believe—as a grant of jurisdiction.²⁹² *Marbury*'s critics denounce this alleged misconstruction of the statute with surprising vehemence, as dishonest, contrived, and manipulative.²⁹³

(2003) 89 Virginia LR 1311 Let me venture to suggest that this perception is simply a mistake. I pass over the unseemly vituperativeness of the accusation, with its stunning want of respect, and its disregard of John Marshall's actual character.²⁹⁴ But the critics are simply mistaken about what Marshall said and did. While Marshall undoubtedly held that the mandamus clause of Section 13 would be unconstitutional if read as a jurisdictional grant instead of a grant of remedial power, he did not so read it himself. He *could* not so read it himself, because, as he held, it would be unconstitutional if so read. There is a deep illogicality in the critique.

Marshall read the mandamus power precisely as his critics do, and as we do—as remedial.²⁹⁵ Indeed, Marshall expended an inordinate amount of space in *Marbury* on the question whether the remedy of mandamus was the appropriate remedy.²⁹⁶ In Marshall's view, the statutory grant clearly was a grant of remedial power to be exercised in aid of one of the two constitutional heads of Supreme Court jurisdiction,²⁹⁷ either the Court's original or its appellate **(2003) 89 Virginia LR 1312** jurisdiction. We know this because he analyzed the case both ways,²⁹⁸ and *held* that the remedy applied for, in the posture of the case, fit neither. That much is not in doubt. In effect, Marshall is being criticized for failing to read the statute in the way he held it *must* be read.

Here is the part of the opinion that is involved in this controversy:

292. See, e.g., Corwin, *Marbury* and Judicial Review, *supra* note 3, at 542 (criticizing Marshall for construing the mandamus clause of § 13 as jurisdictional instead of remedial).

293. See, e.g., Sanford Levinson, *Why I Do Not Teach Marbury (Except To Eastern Europeans) and Why You Shouldn't Either*, 38 *Wake Forest L. Rev.* 553, 558 (2003) [hereinafter Levinson, *Why I Do Not Teach Marbury*] (classing *Marbury* with *Dred Scott*, *Lochner*, *Korematsu*, and *Bush v. Gore*); *id.* at 562 (characterizing Chief Justice Marshall's interpretation of the Constitution as "an out-and-out attempt to deceive the reader," and his interpretation of the statute as "shoddy in its reasoning"); L.A. Powe, Jr., *The Politics of American Judicial Review: Reflections on the Marshall, Warren and Rehnquist Courts*, 38 *Wake Forest L. Rev.* 697, 698 (2003) (stating that Chief Justice Marshall "butchers" § 13 of the First Judiciary Act); William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 *Colum. L. Rev.* 990, 995 (2001) (complaining that "Marshall's first great opinion, *Marbury v. Madison*, utterly rewrote the statute the Court was interpreting"); Sanford Levinson, *Law as Literature*, 60 *Tex. L. Rev.* 373, 389 & n.60 (1982) (decrying Marshall's construction of § 13 as "intellectually dishonest").

294. See generally Jean Edward Smith, *Marshall Misconstrued: Activist? Partisan? Reactionary?*, 33 *John Marshall L. Rev.* 1109 (2000) (describing Marshall's character). For a fine reminder to Marshall's noisier critics of the essential straightforwardness and decency of Marshall's character, see David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 *Duke L.J.* 279, 324 & n.146, 328-29 & nn.162-64 (1992). Professor Engdahl justly remarks that Marshall's character is unrecognizable in the writings of his noisier critics. *Id.*

295. See Corwin, *Marbury* and Judicial Review, *supra* note 3, at 541 (explaining that the writ of mandamus, like habeas and injunction, is a remedy, not a head of jurisdiction); Van Alstyne, *A Critical Guide*, *supra* note 27, at 15 (same).

296. *Marbury*, 5 U.S. (1 Cranch) at 162, 168-73.

297. Apparently *Marbury*'s critics have read their Corwin or Van Alstyne more carefully than they have read *Marbury*. But see James E. Pfander, *Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers, 101 *Colum. L. Rev.* 1515, 1524 (2001) (arguing that in Marshall's day lawyers would have thought "quite mysterious" a reading of the mandamus clause of § 13 as "remedial").

298. *Marbury*, 5 U.S. (1 Cranch) at 174 (explaining that a case may be brought in the original jurisdiction only if one of the parties is an ambassador or a state); *id.* at 175-76 (explaining that, since *Marbury*'s case is not within the Court's original jurisdiction, it must be appellate); *id.* at 175-76 (explaining that, to be appellate, a mandamus case must be in review of adjudication below, and since *Marbury*'s case is an original action against an officer, there is no appellate jurisdiction either).

The act to establish the judicial courts of the United States authorizes the supreme court to “issue writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”

The Secretary of State, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.²⁹⁹

This is the alleged “statutory construction” in the case. That Marshall immediately turns to the Constitution in this passage certainly shows, as the critics charge, that Marshall is about to strike down the mandamus clause if it is read as a jurisdictional grant. But we cannot conclude from this that Marshall himself read it as a jurisdictional grant, honestly or dishonestly. As I will explain at greater length,³⁰⁰ Marshall was taking the jurisdictional argument of counsel as a working hypothesis. Allegations of jurisdiction, of **(2003) 89 Virginia LR 1313** course, as allegations, can only be hypotheses.³⁰¹ That the statute was a grant of jurisdiction was simply what Marbury’s lawyer, Charles Lee, was asking Marshall to consider. But if one reads the statute the way Lee wanted Marshall to read the statute, as a jurisdictional grant, it clearly *would* be unconstitutional.³⁰² That is all Marshall said, in the same sentence in which he stated Lee’s hypothesis, and so he went on to hold.

There is not much statutory construction going on in the quoted bit of text; Marshall’s brief recapitulation of the text is without exegesis.³⁰³ But the critics also complain that, exegesis or no, Marshall was dishonest because his statement of the statute lifted the word “mandamus” out of its “appellate context” by quoting only the mandamus clause itself, the last words of Section 13.³⁰⁴ Marshall, they think, should have quoted from the statute at greater length, so as to include its mention of the word “appellate.”

Actually, the logic of *Marbury* does not require an “appellate context.” After *Marbury*, as before, any state, any ambassador, could file suit against a federal official in the Supreme Court, as an original matter, and seek the remedy of mandamus.³⁰⁵ The Court clarified its original mandamus power against officials in 1860, explaining that nothing in *Marbury* stood in the way. In that well-known case, *Kentucky v. Dennison*, Kentucky sought a mandamus in an original action in the Supreme Court, and was denied it only on special substantive grounds not relevant here.³⁰⁶ The Court explained that

299. Id. at 173.

300. See *infra* this Part, Sections C, D, & F.

301. Here I do not mean to tangle with the technical concept of “hypothetical jurisdiction.” I am using the word “hypothesis” in its plain English sense. Cf. Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 Vand. L. Rev. 235, 312 (1999) (referring to the practice in some courts of avoiding difficult jurisdictional questions by deciding the merits).

302. The Court’s constitutional argument is considered *infra* Part V.

303. But see Eskridge, *supra* note 293, at 1071 (stating that it was not “reasonable,” but nevertheless “brilliant,” to construe the words, “The Secretary of State, being an officer, falls within the letter of the description,” as a grant of jurisdiction).

304. E.g., Van Alstyne, *A Critical Guide*, *supra* note 27, at 15.

305. In *United States v. Hopkins*, for example, a case argued by Lee, Virginia had already done so. See 6 *The Documentary History of the Supreme Court of the United States, 1789-1800*, at 356-69 (Maeva Marcus ed., 1998).

306. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 109-10 (1860) (holding that the governor of Ohio could not be compelled to deliver up a fugitive from justice, and, upon that ground only, denying Kentucky’s motion for a mandamus).

Dennison was the first case since *Marbury* in which an **(2003) 89 Virginia LR 1314** original mandamus was sought against an official. The Court, relying on earlier decisions, went so far as to state that its remedial powers, when used in its original jurisdiction, were beyond the reach of Congress.³⁰⁷

In *Marbury* itself, Marshall was clear that, on the one hand, since jurisdiction could not be “appellate,” it must be “*original*”:

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction.³⁰⁸

On the other hand, since *Marbury*’s case could not constitutionally be “original,” it must be “*appellate*”:

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.³⁰⁹

The “appellate” jurisdiction, then, had no more bearing on *Marbury* than the “original” jurisdiction had, since in *Marbury*’s case the Court had neither. However, the critics can hardly be faulted for their view that mandamus in the Supreme Court must be appellate, since the position has occasionally been misread by the Court itself.³¹⁰

We are seeing that Chief Justice Marshall’s critics are faulting him for not placing mandamus in an appellate context in *Marbury* when in fact he does so. *Marbury* holds that the appellate context is **(2003) 89 Virginia LR 1315** the only constitutional context for *Marbury*’s particular claim—that when mandamus *against an officer* is sought in the Supreme Court by a merely *private* party, the Supreme Court’s jurisdiction “must be appellate,”³¹¹ since it cannot, constitutionally, be “original.” *Marbury*’s case could not be “original” because neither *Marbury* nor *Madison* was a state, or an ambassador. Of course, *Marbury* also holds that the jurisdiction in *Marbury*’s case could not be appellate, either, since *Marbury* did not seek appellate review of a case below. There was no case below. The upshot was that there was *no* jurisdiction, and no amount of “appellate context” could have saved the mandamus clause, as applied to *Marbury*’s motion, or made the Chief Justice’s brief allusion to the statute any more straightforward.

Marshall’s recapitulation of the statute, or rather of the situation, is simply factual. Marshall does

307. *Id.*

308. *Marbury*, 5 U.S. (1 Cranch) at 175-76.

309. *Id.*

310. See *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 97 (1868) (“But, in the case of *Marbury v. Madison*, it was determined, upon full consideration, that the power to issue writs of mandamus, given to this court by the 13th section of the Judiciary Act, is, under the Constitution, an appellate jurisdiction, to be exercised only in the revision of judicial decisions. And this judgment has ever since been accepted as fixing the construction of this part of the Constitution.”).

311. See *Marbury*, 5 U.S. (1 Cranch) at 175. In theory, this did not mean that the Court would lack mandamus power in a proper case within its original jurisdiction. In the wake of *Marbury*, Congress underscored this fact by amending § 13 to clarify that mandamus could be exercised by the Court within its original jurisdiction. Rev. Stat. tit. XIII, ch. 11, § 688, 18 Stat. 127, 128.

not say that the “case” fits the description. He is careful to say only that the “defendant” does. He does not say that the defendant falls within the letter of the “statute.” He is careful to say only that the defendant falls within the letter of the “description.” He does not say the statute confers anything; he says its words “purport” to do so. If we respect the limits of this very circumspect language, we must concede that the “defendant” *did* fall “within the letter of the description.” Madison was an officer against whom a mandamus was sought. This is a literal application of the text to the situation. Nothing could be less contrived.

Of course it is Marshall’s reaching the constitutional question that infuriates his critics. Their outrage, all along, has been not for Marshall’s treatment of the statute in itself. Rather, they believe that Marshall “construed” the statute as he did in order to create an occasion for striking it down, and lecturing us on the necessity of judicial review of acts of Congress. This is the critics’ true ground of anger—that Marshall set up the statute for the precise **(2003) 89 Virginia LR 1316** purpose of striking it down.³¹² I will confront this concern in a later Section.³¹³ But here I think I can help *Marbury*’s critics by identifying the offending piece of text for them a little more accurately than as a piece of statutory “construction,” which it most plainly is not.

C. *The Question for Decision*

Marbury’s technical critics, I believe, are characterizing as a “statutory construction” what is only a statement of the question for decision. It is barely even that; it takes up only half a sentence. It is a statement of Charles Lee’s jurisdictional hypothesis. When stating a party’s position for the purpose of ruling upon it, judges are not usually faulted for disingenuously setting up law for the sole purpose of knocking it down. Yet, of course, they do that in every case in which a law is held unconstitutional. It would be equally plausible, in cases in which legislation is sustained, to fault the judges for setting up law for the sole purpose of validating it.³¹⁴ It is difficult, if not impossible, to decide a question without stating it. The decision of constitutional questions involves conceptions, but not *immaculate* conceptions.

Did Chief Justice Marshall state the question for decision in *Marbury* in some dishonest way? We have seen that the reproach about the missing “appellate context” is without merit.³¹⁵ Is there any other ground for supposing the question for decision was wrongly framed? Perhaps Marshall’s mistake was to frame the question in a biased way, giving it the spin *Marbury*’s counsel put upon it. Perhaps this aspect of the case is the willful manipulation the critics ascribe to John Marshall. But I should have thought it **(2003) 89 Virginia LR 1317** good judicial process to state a question for decision in the manner most favorable to the party about to lose on that issue.

It will be useful to pause at this point to venture a little more deeply into the question how *Marbury*’s technical critics could have gone so far off the rails.

D. *How Jurisdiction Cases Are Decided*

312. See, e.g., the relatively mild Alexander Bickel, *The Supreme Court, 1960 Term—Foreward: The Passive Virtues*, 75 *Harv. L. Rev.* 40, 57 (1961) (“There was room for choice, as is well known, in *Marbury v. Madison*; the Judiciary Act could have been construed so as to avoid the issue of constitutionality.”).

313. See *infra* Section IV.G.

314. I am indebted to my editor, Benjamin Block, for sharpening this point.

315. See *supra* notes 305-12 and accompanying text; see also Akhil Reed Amar, *Marbury*, section 13, and the Original Jurisdiction of the Supreme Court, 56 *U. Chi. L. Rev.* 443, 455 (1989) [hereinafter Amar, *Marbury*] (noting, in effect, that any “appellate” jurisdictional requirement for mandamus is not properly attributable to *Marbury*).

Marbury's technical critics seem to have overlooked some very basic features of jurisdictional analysis, features as fundamental today as they were in 1803. Because federal courts are courts of limited jurisdiction,³¹⁶ limited both by the Constitution and by the terms of their statutory jurisdictional grants, it is hornbook law that a federal plaintiff must plead jurisdiction. Although the burden of persuasion on a motion to dismiss lies with the defendant, the plaintiff must not only plead jurisdiction, but be prepared to argue it, and, if necessary, prove it. All these things being so, as a practical matter the presumption is against federal jurisdiction.

Thus, a filed complaint in an original action in the Supreme Court would have to contain an allegation that, in accordance with Article III, Section 2,³¹⁷ one of the parties to the case is a state or an ambassador. A failure to make that allegation would be an obvious constitutional defect on the face of the complaint. Although in the ordinary case jurisdiction is clear, the constitutional inquiry cannot be avoided when a statute can be read literally to authorize jurisdiction. The fact that the statute "fits the letter of the description" of the case, in and of itself, will not overcome the presumption against jurisdiction. Thus, even without a defendant's challenge to jurisdiction, a federal court will scrutinize its own jurisdiction *sua sponte*. When testing its jurisdiction, the court will look at the statute alleged to give jurisdiction, to see if it does literally "fit the letter of the description" of the case. If so, the court will then consider whether, as a grant of jurisdiction, the statute would be constitutional as applied on the facts of the particular case. This is the familiar **(2003) 89 Virginia LR 1318** two-step process of jurisdictional analysis. It is no more a piece of skulduggery in the quotidian case than it was in *Marbury*.

Yet this very ordinary piece of judicial process has escaped the understanding of some of our finest writers. Consider, for example, the typical treatment of this phenomenon even in the hands of a writer who thinks it "brilliant,"³¹⁸ Professor Eskridge:

Marshall treated the mandamus clause as vesting original jurisdiction in the Court to consider the claim against Madison, who was "precisely within the letter of the [statutory] description." That was not the case at all. Sentences one and two gave the Court no basis for original jurisdiction, and sentence four's mandamus clause was part and in aid of the Court's appellate jurisdiction. By no reasonable reading of the statute's words was the Court given original jurisdiction just because the petitioner was suing in mandamus.³¹⁹

This is an unusually clear statement of the critics' view, but it is a misapprehension of the situation. It was by no reasonable reading of the motion, there being no proceedings below to appeal from, that the Court's jurisdiction was anything *other* than original. Eskridge, of course, recognizes the problem, and sees that Marshall was merely restating Charles Lee's argument. But by failing to read Marshall's sentence as a statement of the issue, Professor Eskridge inadvertently performs the manipulation he attributes to a deliberate manipulation by the Chief Justice—misconstruing the statute. If, instead, Eskridge had held constant in his mind the merely remedial statute, and considered Charles Lee's argument that the statute nevertheless authorized jurisdiction *in the posture of Marbury's motion*, he

316. See, for example, the early case of *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13-14 (1800), stated in its entirety *infra* note 394 and accompanying text.

317. U.S. Const. art. III, § 2 ("The judicial Power shall extend to . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

318. See *supra* note 303.

319. Eskridge, *supra* note 293, at 1071.

would have seen the Court's statement for what it was, a statement of constitutional doubt: Could the statute be read *as so applied*? Even without recalling Marshall's long discussion of the nature of the "remedy," had Eskridge read the second half of Marshall's sentence—which, like Marshall's critics he omits—with the same care with which he read the remedial mandamus clause, he would not have made this mistake. For Marshall's sentence continues, "and if this court is not authorized to issue a **(2003) 89 Virginia LR 1319** writ of *mandamus* to such an officer, it must be because the law is unconstitutional." This, then, for Marshall, was the *issue*.

It becomes an irony of the critics' position that inevitably they must blame Marshall for *not* doing what he *does* do. Recall that Marshall's critics believe that Marshall "struck down" the mandamus provision, instead of construing it properly, and sustaining it as remedial. They want Marshall to have sustained mandamus as a perfectly good remedy, quite apart from any jurisdictional question. But is not that, in effect, what he did? He held, precisely, that William Marbury could maintain an action for the remedy of mandamus against James Madison in any court of competent jurisdiction.³²⁰ Marshall's critics are imagining that, when "struck down," the mandamus clause was somehow obliterated. They think it silly or dishonest of Marshall to have obliterated Congress's provision of a perfectly good remedy. But Marshall had already sustained mandamus, if read as a perfectly good remedy, when he held mandamus the appropriate remedy, available in any court with jurisdiction to issue it.

I suspect that *Marbury*'s critics simply have forgotten what happens when an assertion of jurisdiction is declared unconstitutional. It is a feature of jurisdictional analysis that a court almost always tests an assertion of jurisdiction *in the particular case*. Typically a court does not strike down a jurisdictional grant "on its face." Only very rarely does a court obliterate or delete or declare null and void a statute granting jurisdiction. We all overstate what happens to the mandamus clause in *Marbury*. *Marbury* declares nothing null or void. *Marbury* does not really "strike down" the First Judiciary Act or Section 13. It does not strike down the mandamus clause. As I have already shown, the Supreme Court had as much mandamus power after *Marbury* as before.³²¹ Indeed, we would all agree that the Court retained all its appellate mandamus power. After *Marbury*, and within Chief Justice Marshall's lifetime, the Supreme Court was to take appellate jurisdiction in some forty-three mandamus cases, for the most part seeking mandamus to a **(2003) 89 Virginia LR 1320** court below.³²² My point here is that the mandamus clause in *Marbury* was not struck down "on its face," but only, as we would say today, "*as applied*."³²³ That is, the clause was struck down only insofar as it was alleged to bestow jurisdiction upon the Supreme Court in a case like *Marbury*'s. Such jurisdiction, as Article III says and *Marbury* holds, would not be constitutional. There is nothing disingenuous or manipulative about seeing a constitutional infirmity in legislation "as applied." There is nothing contrived or implausible about striking down law "as applied," "as contended for," or "as so read." It is the common way of testing constitutionality in any context, since standing requirements are disturbed when law is tested "on its

320. *Marbury*, 5 U.S. (1 Cranch) at 173 ("This, then, is a plain case of a mandamus"); id. at 167-68 ("[H]aving this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.").

321. See *supra* notes 305-07 and accompanying text.

322. This was the result of a search in Westlaw's SCT-OLD database for "MANDAMUS & DA(BEF 1835)." A few of these Supreme Court cases were reviewing mandamus in courts below, but most of them sought mandamus from the Court itself, as an appellate remedy, to be directed to a court below. See, however, the statutory grant of original mandamus power, *supra* note 311 and accompanying text.

323. For this mistake, see, for example, Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 850 (1970) ("*Marbury v. Madison* itself held a statutory provision void in toto").

face.”³²⁴ It is almost invariably the way an allegation of jurisdiction is tested.

Notice how much depends on the arguments of counsel—and, in *Marbury*, on the fact that no arguments were made for the defense. A court’s working hypothesis, for purposes of testing the constitutionality of its jurisdiction, is the hypothesis offered by the plaintiff. But a defendant’s challenge to the jurisdiction, and the arguments the defendant raises, are of obvious assistance to a court in recognizing a jurisdictional doubt and in analyzing the problem. Recall that James Madison filed no appearance in *Marbury*, and thus no objections or counterarguments were offered. So Marshall naturally and necessarily referred to Lee’s hypothesis of statutory authorization, without more, for the few seconds required for him to point out that any such reading would be unconstitutional. (If this was a statutory “construction,” it was a virtual one.)

Chief Justice Marshall believed that the arguments of counsel are an important index of what a court actually holds. Once, in a (2003) 89 Virginia LR 1321 letter to the court reporter, Richard Peters, who had proposed to omit the arguments of counsel from the Supreme Court Reports for want of space (as eventually was done), Marshall wrote, “I believe we all think that the arguments at the bar ought, at least in substance to appear in the report. They certainly contribute very much to explain the points really decided by the court.”³²⁵ In *Marbury*, in default of any argument to the contrary, Marshall simply accepted, for purposes of stating the problem, the best hypothesis as to jurisdiction that Charles Lee offered.

E. Disembodied Mandamus: The Alleged Precedents

I have said that, as an allegation, jurisdiction is always only a hypothesis. In fact, Charles Lee presented the Court with three alternative hypotheses.

He began with a theory we would characterize as one of inherent, or nonstatutory, power. In essence, Lee argued that his freestanding motion for a writ of mandamus was within a general power of “superintendance” belonging to the Supreme Court.³²⁶ Lee’s hypothesis of a “supervisory” power in the Supreme Court could not rely on Article III. A supervisory power is not to be found there. Rather, Lee thought the supervisory power inherent. If today some of us believe that the Court has inherent supervisory power, however, it is not a power to rule on some disembodied motion for relief.³²⁷ Marshall, for his part, consistently taught that federal jurisdiction must be written.³²⁸ In view of Article III’s “cases” (2003) 89 Virginia LR 1322 and “controversies” language, it is clear that Article III

324. See *Younger v. Harris*, 401 U.S. 37, 52 (1971) (Black, J.) (explaining as a function of the Article III duty of federal courts to decide only concrete cases and controversies the general understanding that statutes are reviewed under the Constitution “as applied”).

325. Letter from John Marshall to Richard Peters (Mar. 22, 1830), in 11 *The Papers of John Marshall*, supra note 144, at 366.

326. See Pfander, supra note 297, at 1518-19 (arguing that since the court of King’s Bench had mandamus power within its inherent supervisory jurisdiction, the Supreme Court of the United States would have been understood to have it as well). This was also one of Charles Lee’s arguments in *Marbury*, 5 U.S. (1 Cranch) at 146-47.

327. But see Wilfred J. Ritz, *Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence 178-79* (Wythe Holt & L.H. LaRue eds., 1990) (arguing that the mandamus clause of § 13 clearly authorized the Court to take original jurisdiction over freestanding motions for mandamus, and that Marshall was wrong to hold Article III inconsistent with this reading of the statute).

328. See, e.g., *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.) (“[B]ut courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction . . . [F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.”).

authorizes lawsuits, not freestanding motions. As Marshall said in *Marbury*, “to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper.”³²⁹ The Court, of course, can no more be permitted to violate the Constitution than can Congress.³³⁰ Whatever inherent jurisdiction the Court has, as for example its power to determine its jurisdiction in a case in which it will decide it does not have it, that jurisdiction is constitutionally exercised, as its remedial powers are, only in proper cases coming to it in authorized original or appellate form. We can assume that Marshall was unpersuaded by Lee’s “inherent power” argument since he did not even make a show of considering it.

Somehow, a sincere conviction has arisen among virtually all commentators that the Supreme Court in its early days did entertain freestanding motions for mandamus.³³¹ They believe they have precedents on this point. They cite the same handful of supposed precedents again and again, and deal rather harshly with Chief Justice Marshall for his “selective” version of history in *Marbury*.³³² **(2003) 89 Virginia LR 1323** They charge him with overlooking some of these cases and amalgamating others. They charge him with conveniently disregarding the existence of precedents when talking about jurisdiction, and then conveniently referring to the same precedents when talking about remedy. And supporting their charges is the fact that, in the fourteen intervening months between the show-cause order of December 1801, and the hearing and decision in February 1803, nobody seems to have thought William Marbury’s petition in the Supreme Court inappropriate or out of place.

The surprising fact is that there are no such precedents. The alleged precedents are worthless. Notwithstanding the universal belief that there were plenty of precedents—cases in which the Court, without some other basis of jurisdiction, *did* take casual jurisdiction over freestanding motions for mandamus—not a single one of the alleged precedents supports the critics’ position, not even ambiguously.

It is true that when mandamus is sought against proceedings in another court, it is treated as a collateral remedy, independent of the proceedings in the other court. It is like habeas corpus in this way, or injunction against suit. But it does not follow from the independence of any of these kinds of cases from the proceedings they seek to overturn or restrain that they are not subject to the same constitutional and jurisdictional constraints as other cases.

Most of the supposed precedents contrary to *Marbury* were argued by Charles Lee in *Marbury*, and it may be that writers have read Lee too uncritically. For example, Lee cited a 1795 case, *United States*

329. *Marbury*, 5 U.S. (1 Cranch) at 175.

330. See, e.g., *Erie v. Tompkins*, 304 U.S. 64, 78-79 (1938) (holding that the Court had pursued an unconstitutional course). For another case in which it has been argued that the Court pursued an unconstitutional course, see Louise Weinberg, *When Courts Decide Elections: The Constitutionality of Bush v. Gore*, 82 B.U. L. Rev. 609 (2000) [hereinafter Weinberg, *When Courts Decide Elections*].

331. See Professor Pfander’s interesting recent consideration of freestanding motions in the early Supreme Court. Pfander, *supra* note 297, at 1573-74 (arguing that, before *Marbury*, freestanding motions for mandamus were assumed to fall within the Supreme Court’s inherent or supervisory power: “In, at least three well known, but unreported proceedings, *United States v. Hopkins*, *Ex parte Chandler*, and *Hayburn’s Case*, the Court entertained original applications for mandamus to executive branch officials in matters that may appear to fall outside the scope of original jurisdiction in Article III”); see also *id.* at 1532 (“[S]cholars may have been too quick to dismiss Marshall’s interpretation of section 13. Carefully sifted, the evidence supports Marshall’s conclusion that the drafters of section 13 gave the Court freestanding mandamus authority.”). For a view similar to Professor Pfander’s, see Ritz, *supra* note 327, at 178-79. These authors are persuasive that, in those prepositivist times, lawyers may very well have considered freestanding motions as available to them. However, as I argue in this Section, the cases offered as precedents for this position do not support it.

332. E.g., Susan Low Bloch & Maeva Marcus, *John Marshall’s Selective Use of History in Marbury v. Madison*, 1986 Wis. L. Rev. 301 (1986); Corwin, *The Doctrine of Judicial Review*, *supra* note 3, at 4 (“[A]nterior to *Marbury v. Madison* the court itself had repeatedly taken jurisdiction of cases brought under that provision.”).

v. Peters,³³³ in which the Court granted a writ of prohibition on a motion. But that case, reviewing the work of a court below, rather obviously fit Marshall's description in *Marbury* of cases that may be deemed appellate,³³⁴ in that the writ of prohibition in *Peters* went to a district court below. It was on just such reasoning **(2003) 89 Virginia LR 1324** that in 1807 the Court, by Marshall, would sustain its power to issue the writ of habeas corpus.³³⁵

Lee relied first on *United States v. Lawrence*.³³⁶ Although mandamus in the end did not issue in that case, original jurisdiction was claimed and the Court heard the case. But as Lee acknowledged, the party in interest in that case was the French consul,³³⁷ a proper party within the Court's original jurisdiction. The party of record in that case, the United States, by the Attorney General, was acting for the French consul in the consul's attempt to procure an arrest warrant.³³⁸ *Lawrence* was discussed by Chief Justice Taney in *Kentucky v. Dennison*.³³⁹ Taney rightly did not question that the Court had original jurisdiction in that case. He explained that the mandamus did not issue only because of the scope of Judge Lawrence's discretion in the matter.³⁴⁰

Interestingly, in *Lawrence*, the Court might have had jurisdiction even if the real party in interest had not been a foreign consul. There is a plausible argument in the alternative, that the Court's jurisdiction was appellate in nature. The mandamus in the case was sought to compel a district judge, Judge Lawrence, to issue a warrant. Since the mandamus would go to a court below, the case was technically appellate within *Marbury*'s meaning.³⁴¹ The jurisdiction in the district court below was not in diversity; only the circuit courts at that time had diversity jurisdiction. Presumably the judicial power extended to the case in the district court as a case in admiralty. The warrant sought was for the arrest of a ship's captain who had deserted. To be sure, mandamus is an original, independent, collateral action, very much as habeas corpus is. In that sense, the consul being a party, *Lawrence* was an original case in the Supreme Court within the meaning of Article III. But with Judge **(2003) 89 Virginia LR 1325** Lawrence in the district court refusing to issue the warrant, *Lawrence* was also appellate in nature, as habeas is.³⁴² Admiralty jurisdiction vel non would have been a big issue in the district court, but that issue is well within the Supreme Court's appellate power. *Lawrence* arguably having been within *both* heads of Supreme Court jurisdiction under Article III, to treat it as a precedent for Supreme Court jurisdiction outside Article III is absurd.

Lee also relied on an unreported case, a motion in the Supreme Court by one Chandler, seeking a writ of mandamus commanding the secretary of war to place Chandler on the invalid veterans' pension

333. 3 U.S. (3 Dall.) 121, 129 (1795).

334. Cf. *Marbury*, 5 U.S. (1 Cranch) at 175-76 ("It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause.").

335. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 100-01 (1807) (Marshall, C.J.) (distinguishing *Marbury*).

336. 3 U.S. (3 Dall.) 42 (1795). Beveridge follows Charles Lee in citing Lawrence, 3 Beveridge, *The Life of John Marshall*, supra note 2, at 129, as do Bloch & Marcus, supra note 332, at 327 & n.102.

337. *Marbury*, 5 U.S. (1 Cranch) at 148 (argument of Charles Lee).

338. *Lawrence*, 3 U.S. (3 Dall.) at 44-45.

339. 65 U.S. (24 How.) 66, 73 (1860) (Taney, C.J.).

340. Id.

341. See supra note 308 and accompanying text; infra notes 368-71 and accompanying text.

342. See Ex parte Bollman, 8 U.S. (4 Cranch) 75, 100-01 (1807) (Marshall, C.J.) (concluding that the All Writs Act authorized the Supreme Court to issue the writ of habeas corpus on behalf of a prisoner). In *Bollman*, Chief Justice Marshall distinguished *Marbury*, pointing out that, unlike the mandamus sought in *Marbury*, a proceeding in habeas corpus, in the case of a prisoner, reviews questions concerning the authority of another court, in a criminal proceeding, and is thus appellate in nature, in a way that *Marbury*'s case was not.

list, based on the findings of a federal circuit judge serving as a commissioner.³⁴³ The Supreme Court in *Chandler* refused to issue the mandamus. In his *Marbury* argument, Lee explained that mandamus was refused “because the two acts of congress respecting invalids, did not support the case on which the applicant grounded his motion.”³⁴⁴ *Chandler*, having come to the Court as a motion for mandamus against a federal cabinet minister, is probably the best case for the argument that *Marbury* disregarded a precedent.³⁴⁵ However, it would be consistent with Lee’s statement of the case that the Court sat in *Chandler* with appellate jurisdiction. True, the prayed-for mandamus would have gone to an officer, not to a judge below, but that is also true in cases of habeas corpus, when a person has been committed into custody based on some adjudicatory proceeding. As in habeas cases, the Court was asked to review the findings of a judge below, in circumstances familiar to us from **(2003) 89 Virginia LR 1326 *Hayburn’s Case***.³⁴⁶ I mention *Hayburn’s Case* to situate the reader familiar with it within the facts of the veterans’ pension cases generally. Supreme Court appellate jurisdiction in virtually all of those cases can be justified on the argument that the Supreme Court would be reviewing the decisions of judges below, notwithstanding that the writs of mandamus sought in those cases typically ran against an officer—not the judge below—to require the officer to put the plaintiff’s name on the pension list. Whether the judges below had jurisdiction would be an issue within the Supreme Court’s appellate powers. It is worth noting that, in *Marbury*, Chief Justice Marshall refers specifically, when discussing the suitability of the remedy sought by *Marbury*, to *Hayburn’s Case*.³⁴⁷ Marshall explains that mandamus was denied by the Supreme Court in *Hayburn’s Case*, not because of any disapproval of the remedy, but only because the judicial determinations below were without jurisdiction and could therefore not be sustained by the Court.³⁴⁸ This, of course, is an acknowledgment that in *Hayburn’s Case* the Court sat with appellate jurisdiction over the proceedings below.

The case of *United States v. Todd* [“*Yale Todd*”],³⁴⁹ an unreported case not raised by Lee but pertinent here, is sometimes adduced by writers to illustrate that the Supreme Court was hospitable to freestanding motions for mandamus.³⁵⁰ *Yale Todd* was **(2003) 89 Virginia LR 1327** another chapter in

343. The outlines of *Chandler’s* case, with such sketchy minutes of it as exist, appear in 6 Documentary History, supra note 305, at 41-42, 292-93. After the Circuit Judges (Justice Iredell and Judge Law), acting as commissioners, decided that *Chandler’s* name should be added to the pension list, the Secretary of War did not in fact include him. In *Ex parte Chandler*, the Supreme Court held, without giving its reasons, that it would not issue a mandamus against the Secretary. *Id.*

344. *Marbury*, 5 U.S. (1 Cranch) at 149 (argument of Charles Lee).

345. Professor Crosskey relies almost entirely on *Chandler* for the proposition that *Marbury* was without foundation. 2 Crosskey, *Politics and the Constitution*, supra note 25, at 1042.

346. 2 U.S. (2 Dall.) 409 (1792). *Hayburn’s Case* proper exists in a footnote appended by the reporter, Dallas, to a cursory Supreme Court report. Dallas explains, “As the reasons assigned by the judges, for declining to execute the first act of Congress, involve a great constitutional question, it will not be thought improper to subjoin them, in illustration of *Hayburn’s* case.” The footnote contains the several opinions of circuit courts below, the panels of which, at the time, included individual Justices of the Supreme Court, and take various formal and informal forms. These opinions concern the propriety or constitutionality of an act of Congress requiring Article III courts to serve in administrative capacity over veterans’ pension claims, subject to further executive processing. The judges say in various ways that if they agree to perform this duty—as some of them are willing to do—they cannot constitutionally do so as Article III judges, because the decisions of Article III judges cannot be made subject to executive review; the act is unconstitutional.

347. See *Marbury*, 5 U.S. (1 Cranch) at 171-72.

348. *Id.* at 172.

349. *United States v. Todd* [“*Yale Todd*”] [“*Yale Todd’s Case*”], an unreported case in the Jay Court, exists in a discussion by Chief Justice Taney in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52-53 (1851).

350. Bloch & Marcus, supra note 332, at 307-10, emphasizes *Yale Todd* as supporting Supreme Court jurisdiction over motions for mandamus against a federal officer. But *Yale Todd*, yet another pensioner’s case, was in review of a decision of the circuit court, and thus irrelevant to *Marbury*. The other cases cited by Bloch and Marcus are also in the familiar pattern of

the story of the pensioners' problems, similar to *Hayburn's Case*. But *Yale Todd* did not involve mandamus. The Attorney General's petition before the Court in *Yale Todd* arguably sounded in the Supreme Court's original jurisdiction, since the petition was in the form of a motion for judgment, not mandamus. It was pleaded by the United States, against a pensioner, as an action in assumpsit for money had and received. In *Marbury*, Charles Lee did not argue *Yale Todd* to the Court, possibly because it was not a mandamus case. Nevertheless, *Yale Todd* was clearly within the appellate jurisdiction of the Supreme Court, just as the other pensioners' cases were. The dispositive issue in *Yale Todd* was whether the judges below could constitutionally sit as commissioners to award a pension,³⁵¹ and the Supreme Court held that they could not.³⁵² *Yale Todd* was within the Supreme Court's appellate jurisdiction since the Court passed on the jurisdiction of judges below. Chief Justice Taney, in 1851, so read the case.³⁵³ Indeed, *Yale Todd* is precedent for the proposition that Congress lacks power to expand the Article III jurisdiction of the federal courts. An act of Congress purporting to give administrative jurisdiction to the circuit court was unanimously struck down in *Yale Todd*. The case supports, rather than contradicts, *Marbury*.

Recently Professor Pfander has given us an extended argument that a motion for mandamus at the time of *Marbury* was indeed a freestanding procedure, requiring no independent jurisdiction.³⁵⁴ I (2003) **89 Virginia LR 1328** should clarify that Professor Pfander is hardly a critic of *Marbury*. His intriguing essay is intended to buttress, not attack *Marbury*. I mention it here because it does share the view of *Marbury's* critics that there were numerous precedents against the result in *Marbury*. Apart from the cases in the shadow of the pensioners' controversy, Professor Pfander relies on *United States v. Hopkins*,³⁵⁵ also cited by Charles Lee in *Marbury*.³⁵⁶ However, in *Hopkins*, a state—the Commonwealth of Virginia, by its governor—was the real party in interest. The governor was merely the party of record. *Hopkins* was an attempt by Attorney General William Bradford and the Governor of Virginia to ascertain the validity of the national assumption of state indebtedness under Hamilton's financial plan. The two sought a writ of mandamus in the Supreme Court to compel the federal loan officer for the District of Virginia, *Hopkins*, to accept, as security, paper issued by the United States after its assumption of state indebtedness.³⁵⁷ Lee cited *Hopkins* because it was a case against an officer for a

Hayburn's Case—they are part of the group of veterans' pension cases. With *Yale Todd*, they are thought to be “precedents” for a result to the contrary of *Marbury*, because in those cases, mandamus was sought not against the judges below, but against the executive officer who was refusing to put the particular veteran on the pension list. Yet as Professor Marcus has previously acknowledged, “The decision in *Yale Todd*, however, could also be explained as holding that the circuit judges had no power to act as commissioners.” Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 Wis. L. Rev. 527, 531 n.25. In other words, these cases were appellate in nature, within *Marbury's* meaning, since they reviewed the jurisdiction of judges below.

351. Marcus & Teir, *supra* note 350, at 531.

352. *Yale Todd's Case* (U.S. 1794), *stated in United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851).

353. *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52 (1851) (describing and considering *Yale Todd's Case* (U.S. 1794)).

354. Pfander, *supra* note 297, at 1573-74. I believe it would have been more accurate to say that mandamus had been a prerogative writ, rather than a freestanding motion. By 1803, however, it had already become a remedy in an ordinary action at law. Chief Justice Taney refers to this development in *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 97 (1860) (“It is equally well settled, that a mandamus in modern practice is nothing more than an action, at law between the parties, and is not now regarded as a prerogative writ.”) (citing *Kendall v. Stokes*, 44 U.S. (3 How.) 87 (1845), and *Kendall v. Stokes*, 37 U.S. (12 Pet.) 524 (1838)).

355. 6 Documentary History, *supra* note 305, at 356-69.

356. *Marbury*, 5 U.S. (1 Cranch) at 149.

357. The Court held laconically that a mandamus could not issue on these facts. 6 Documentary History, *supra* note 305, at 360-61. This might mean that other legal remedies were adequate, or that the loan officer's decisions were too

writ of mandamus. It was, however, one of the rare instances in which mandamus against an officer was simply a remedy, one the Court could constitutionally furnish while duly sitting in its original jurisdiction as authorized by Article III. It should be obvious that *Hopkins* was within the Court's original jurisdiction, the state being a party.³⁵⁸

(2003) 89 Virginia LR 1329 In *Marbury*, Marshall dispensed with Lee's cases summarily, as conforming in all respects to his own view: "In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted."³⁵⁹ Given the plausible jurisdiction in all of them, this summary is quite sound.

The reader may well be as perplexed as I am that any attacks on *Marbury* should have as their basis that Chief Justice Marshall took inadequate account of these alleged "precedents." These old instances, obscure as they are, seem rather to support *Marbury* than otherwise. But even if they did not, it would be hard to fathom the continuing struggle to discredit with such fragmentary antique scraps a full-dress, reflective, unanimous opinion of the Marshall Court. The asperity of the attacks on Chief Justice Marshall for taking inadequate account of these "precedents" seems wholly gratuitous. Indeed, the continuing strenuous effort to read these early cases as binding precedent on a point they do not touch, a point as to which Chief Justice Marshall's opinion to the contrary has held firm without a single exception for over two centuries, is unaccountable.

The solution to the mystery, of course, is that *Marbury* is not a technical case about jurisdiction, but a great case about the nature of our polity. Of course *Marbury*'s critics are taking aim at the politics of the case—and *Marbury* presents a target of irresistible grandeur.

It is worth noting that, although a few complaints about Marshall's "statutory construction" emerged at the turn of the last century,³⁶⁰ there were not many such complaints until more recent times. Such criticisms could not have gathered much steam in any event before *Erie v. Tompkins*³⁶¹ in 1938. Before *Erie*, not only were the sources of law vague in lawyers' minds, but also the distinctions between "jurisdiction" and "cause of action" and "remedy." Lawyers went into court confidently seeking such things as (2003) 89 Virginia LR 1330 "equitable remedial rights."³⁶² *Marbury*'s case itself came into court as a "motion," unattached to any case. The second Justice Harlan attributed to post-*Erie* American

discretionary for mandamus.

358. Cf. *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 406 (1792) (treating a suit brought on behalf of Georgia by its governor as a suit by the state within the Court's original jurisdiction). Alas, the answer to a question will vary depending on the purpose for which it is asked. In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 857 (1824), the Court, by Chief Justice Marshall, held that a defendant state official could not claim Eleventh Amendment immunity, notwithstanding that the state was the real party in interest in the case. As later modified, this is the fiction that survives today for purposes of the Eleventh Amendment. Cf. *Ex parte Young*, 209 U.S. 123 (1908) (holding that in an injunction suit, a defendant state official is not a "state" for purposes of Eleventh Amendment immunity, notwithstanding that the official is sued for a violation of the Fourteenth Amendment, the obligations of which run only against a "state").

359. *Marbury*, 5 U.S. (1 Cranch) at 169.

360. See, e.g., Corwin, *Marbury* and Judicial Review, *supra* note 3, at 540-43.

361. 304 U.S. 64 (1938).

362. Under this doctrine lawyers believed they could "go into equity" in a federal court to obtain an injunction against some threatened interference with federal law or policy. See, e.g., *In re Debs*, 158 U.S. 564, 582 (1894) (sustaining an injunction against striking railway workers to prevent obstruction of the mails); Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. Pa. L. Rev. 287 (1927). Today courts reconceptualize injunction suits as they would damages suits, as causes of action, without reference to the nature of the relief sought. For post-*Erie* discussion, see David Crump, *The Twilight Zone of the Erie Doctrine: Is There Really A Different Choice of Equitable Remedies in the "Court a Block Away?"*, 1991 Wis. L. Rev. 1233; Note, *The Equitable Remedial Rights Doctrine: Past and Present*, 67 Harv. L. Rev. 836 (1954).

legal positivism the modern understandings that access to a federal court in a nondiversity case depended on a right having its source in federal law, and that this was so no matter what relief was requested.³⁶³ Only after *Erie* could the Supreme Court remand a case that had been dismissed for want of jurisdiction with corrective instructions to dismiss for failure to state a claim.³⁶⁴ Before 1938, lawyers would go to court seeking court orders and pleading “equity jurisdiction” for a motion for a restraining order or other injunction, or pleading a separate cause of action “for damages.” Many lawyers still think in such muddled ways. Nor has this sort of fog been entirely dispelled from today’s law reports. It should hardly be a basis for outrage, then, that two hundred years ago, the authorization of writs of mandamus in the First Judiciary Act was argued by *Marbury*’s illustrious lawyer as giving the Supreme Court original jurisdiction (this was a last resort of Lee’s, as we shall see in the next Section), and accordingly tested in that light by the Court.

(2003) 89 Virginia LR 1331 Certainly after the early Supreme Court cases on jurisdiction,³⁶⁵ including *Marbury*, it would not be possible for the Supreme Court to sit as a kind of all-purpose provider of handy writs on disembodied motions. That is among the lesser-known achievements of the Marshall Court. To the extent that there may have existed ambiguous cases in the past (neither Charles Lee nor *Marbury*’s critics have found any), Marshall rightly paid very little attention to them in *Marbury* as in other cases. Marshall is sometimes criticized for his general disregard of precedents—even his own decisions. Professor Faulkner’s explanation may be helpful here. He points out that Marshall typically insulated his opinions from future criticism by refraining from relying on older cases, the justice and appropriateness of which might be challenged. Marshall chose instead to rely instead on “safe and fundamental principles.”³⁶⁶ Professor Eisgruber also senses Marshall’s method in this seeming inattentiveness to precedent.³⁶⁷ It was probably Marshall’s view that it would be better for the country if casual or ambiguous cases of the past were not taken for more than they were worth; that insofar as possible a fresh beginning be made; and that “in the beginning” there should be his own solid opinions, built on understandings reliably consonant with the structures put in place in 1789.

F. Charles Lee’s Alternative Jurisdictional Hypotheses

Let us rejoin Charles Lee in the committee room in the Capitol, where we left him arguing to the Marshall Court in 1803, in the case of *Marbury v. Madison*. Gaining no traction with his argument for

363. See Justice Harlan’s post-*Erie* flash of insight about federal equitable remedial rights in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring) (“However broad a federal court’s discretion concerning equitable remedies, it is absolutely clear—at least after *Erie v. Tompkins*, 304 U.S. 64 (1938)—that in a nondiversity suit a federal court’s power to grant even equitable relief depends on the presence of a substantive right derived from federal law.”).

364. *Bell v. Hood*, 327 U.S. 678, 776-77 (1946) (“The issue of law is whether federal courts can grant . . . damages said to have been suffered as a result of federal officers violating the Fourth and Fifth Amendments. That question has never been specifically decided by this Court. . . . [T]he issue thus raised has sufficient merit to warrant exercise of federal jurisdiction.”).

365. E.g., *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12 (1800) (per curiam).

366. Robert Kenneth Faulkner, *The Jurisprudence of John Marshall* 220 (1968).

367. Christopher L. Eisgruber, *John Marshall’s Judicial Rhetoric*, 1996 S. Ct. Rev. 439, 440. Eisgruber offers the example of *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824), in which Marshall repeated two arguments previously made by him in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821). *Id.* at 457-58. For Professor Eisgruber, Marshall’s handling of precedent, like his other strategies, was an instrument carefully tempered to Marshall’s wider project of constitutional legitimation. Of course I agree. But even in his days as a successful member of the Virginia bar, Marshall had rarely argued from precedent. 2 Beveridge, *The Life of John Marshall*, supra note 34, at 179-80.

inherent jurisdiction, Lee turned, in the alternative, not to original jurisdiction, but to *appellate* jurisdiction. Interestingly, (2003) 89 Virginia LR 1332 Lee's confidence in the existence of original jurisdiction was (rightly) so weak that he preferred to argue, counterintuitively, that jurisdiction in Marbury's case was somehow "appellate." The Court did not believe a word of this either.

In essence, the argument was that the mandamus power in Section 13, which Congress obviously had granted the Supreme Court for use in the exercise of its regular heads of jurisdiction, somehow extended the Court's appellate jurisdiction to William Marbury's case. "[T]here is no difference," Lee argued, "between a judicial and a ministerial officer."³⁶⁸ It was just a question of which kind of defendant official a mandamus would go against. He was trying to assimilate judicial review of administrative action with judicial review of judicial action, so that the former could be considered "appellate in nature,"³⁶⁹ along with the latter.

This second line of argument, that *Marbury's* case was somehow really "appellate in nature," may seem an extraordinary one to support a motion brought to the Court as an original matter. It was a clever argument, but there is a difference, after all, between trial practice and appellate practice. Recently it has been argued that the word "appellate" in Article III would have gone far to cover Marbury's case in the minds of the Framers.³⁷⁰ It clearly did not go anywhere near that far in the minds of Chief Justice Marshall and his brethren. Lee's hypothesis of appellate power, like his first hypothesis (2003) 89 Virginia LR 1333 of inherent power, simply fell on deaf ears. Marshall's response to it in *Marbury*, as we have already seen, was to make the obvious point that mandamus against an official rather than a court was in its nature original, not appellate.³⁷¹

We should interrupt this account for a moment to remind ourselves, and *Marbury's* critics, that the illustrious Charles Lee was arguing in the presence of a master, and knew it. Recall that Marshall was already presiding over formal courts-martial as a stripling in Washington's army.³⁷² In Virginia the young Marshall had lawyered his way to the forefront of the Virginia bar.³⁷³ It was he whom his party had called upon to defend Article III in the Virginia ratification debates.³⁷⁴ Marshall was the designated expert on Article III in Congress, the architect of the Circuit Court Act of 1801.³⁷⁵ Marshall was now Chief Justice of the United States. His brethren already felt and deferred to the intellectual power of this

368. *Marbury*, 5 U.S. (1 Cranch) at 146 ("This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial.") (argument of Charles Lee). This argument was a loser. Marshall's conviction was that federal jurisdiction was given by written law. To permit any other rule would be to destroy the limits of Article III. See, e.g., *Durousseau v. United States*, 10 U.S. (6 Cranch) 307, 314 (1810) (Marshall, C.J.) (explaining that when Congress vests a jurisdiction more limited than the Constitution would allow, the statute is an exercise of the Exceptions power, and the statutory limits must govern); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809) (Marshall, C.J.) (holding, in effect, that Congress cannot give federal courts jurisdiction over all cases in which an alien is a party, because under the Constitution federal judicial power does not extend to all such cases); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.) (disclaiming any jurisdiction not given by written law, and explaining that "for the meaning of the term habeas corpus resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law").

369. *Marbury*, 5 U.S. (1 Cranch) at 147 (argument of Charles Lee).

370. This is one of the novel arguments in Ritz, *supra* note 327, at 88. See, for a somewhat similar argument, Pfander, *supra* note 297, at 1591-92.

371. *Marbury*, 5 U.S. (1 Cranch) at 175-76.

372. See *supra* note 94 and accompanying text.

373. See *supra* notes 74-75 and accompanying text. Indeed, at the age of seventy-four Marshall would also write the Report of the Judiciary Committee of Virginia's constitutional convention of 1829. 4 Beveridge, *The Life of John Marshall*, *supra* note 91, at 483-85.

374. See *infra* Section V.B.

375. See *supra* note 51 and accompanying text.

awkward frontiersman, a force so strong we can feel its influence through two hundred years of constitutional history.

We can imagine, then, with how sinking a heart Lee finally did advance his third alternative hypothesis, that the Supreme Court had original jurisdiction over Marbury's case. Lee pointed out that the case was literally authorized by Section 13.³⁷⁶ To this Marshall's response in *Marbury* was that, if so, the jurisdiction "must be appellate."³⁷⁷ That much had seemed obvious at the outset, since Marbury was not one of the parties listed in Article III as having access to the Court's original jurisdiction, and neither was Madison.

The constitutional defect, indeed, becomes so immediately apparent, and evidently was so immediately apparent to Lee, that in arguing for original jurisdiction, Lee conspicuously avoided focusing on the text of Article III itself, with its short list of parties entitled **(2003) 89 Virginia LR 1334** to such august access. The opinion in *Marbury* offers no statutory construction or analysis largely because Charles Lee's argument on original jurisdiction offered no statutory construction or analysis. Rather, Lee went at once to the constitutional question, and Marshall's opinion in *Marbury* simply tracks Lee in this. Lee argued, as he had to, that Congress had power to *expand* the original jurisdiction of the Supreme Court, power to add to the few kinds of parties—ambassadors and states—to whom Article III gave admission.³⁷⁸ Lee argued, further, that Congress had done precisely that when it provided the Court with jurisdiction to issue writs of mandamus.³⁷⁹ As we have seen, Marshall acknowledged that the case fell within the letter" of the "description," but pointed out that therefore if there was no jurisdiction it must be because the statute was unconstitutional.³⁸⁰ He went on to hold that, if so read, the statute was indeed unconstitutional.³⁸¹

I have tried to convey in this account of Lee's argument, and the Court's responses to it in *Marbury*, a true sense of Marshall's jurisdictional holding as a ruling upon a theory advanced to support one of three alternative hypotheses. This degree of tenuousness in the inquiry may seem questionable to some readers. But, as we have already reminded ourselves, Marshall was dealing with what we would call, in an ordinary lawsuit, an allegation of federal jurisdiction, a hypothesis intended to set the stage for the introduction of facts and arguments that will overcome a presumption to the contrary. The facts are particularly important. An allegation of jurisdiction is almost always tested "as applied," as I have explained, to the particular facts of the case. In ruling upon the constitutionality of a statute allegedly granting jurisdiction, a court is saying, in effect, "*If* you read the statute as authorizing jurisdiction in this case, *then* the statute would be unconstitutional." That is, very precisely, the logic of John Marshall's holding on the constitutionality of the mandamus clause of Section 13. Far from being manipulative, **(2003) 89 Virginia LR 1335** contrived, strained, or implausible, such reasoning is garden variety jurisdictional analysis.

Marshall's critics, in short, have failed to apply their experience of basic jurisdictional analysis to the greatest case in which it occurs. Instead, they have painted the very ordinary jurisdictional analysis in *Marbury* in the increasingly lurid colors of an intellectual scandal. But the only intellectual scandal here is that so many admired writers have followed each other over the edge of this precipice.

376. *Marbury*, 5 U.S. (1 Cranch) at 148 (argument of Charles Lee).

377. *Id.* at 175-76.

378. *Id.* at 148 (argument of Charles Lee) ("Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution.").

379. *Id.*

380. *Id.* at 173.

381. *Id.* at 176 ("The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution.").

G. Reaching for a Constitutional Question

The chief complaint about the statutory “construction” in *Marbury* is probably that Marshall stated the statute as he did to make it *seem* unconstitutional—to reach a constitutional question. Not that his critics care whether there was jurisdiction in *Marbury*’s case, but they are offended by Marshall’s manipulating the situation, as they see it, in order to create an occasion for judicial review.³⁸² Since the statute was not a jurisdictional grant, but in fact only a remedial one, the critics protest that Marshall should have dismissed the case at once *on that ground*.³⁸³ Critics support this point partly with prudential arguments, partly with logic, partly with broader arguments about judicial process, and partly with substantive arguments as well.

The critics’ prudential point is that a proper construction of the statute would have avoided needlessly striking it down.³⁸⁴ They refer to the traditionally acknowledged value of avoiding constitutional questions. It is a hallowed canon of construction that it is better to construe legislation so as to avoid raising a constitutional (2003) 89 Virginia LR 1336 doubt.³⁸⁵ I assume for the sake of argument that there must be some prudential value in judicial abstention from or postponement of constitutional adjudication. But what is the *purpose* of prudential rules? Presumably judges have developed prudential rules in order to husband and preserve the prestige and legitimacy of the courts, to avoid offense to the political branches, or to demonstrate the importance of democratic values. Federal judges share an additional concern—they want to avoid offense to state governments and courts, and to local sentiments. By abstaining from sensitive constitutional adjudication, then, courts hope to protect and augment their most precious resource—the willing consent of the public to the rule of law.

But if judges, fearing to squander it, never expend a moiety of that priceless resource, their prudence becomes pointless. What are they husbanding it *for*? Presumably a time will come when a court must lay its prestige on the line. In *Marbury*, that moment had come very early in the history of the Marshall Court, but it had come. It was at that moment, and not at some future time, that attacks on the federal judiciary were at crisis pitch. As *Marbury*’s first technical critic observed 120 years later, “[b]eyond any doubt the moment was now at hand when the Court must prove to its supporters that it was still worth defending and to all that the Constitution had an authorized final interpreter.”³⁸⁶ The better options for shoring up the prestige and legitimacy of the Court therefore were those chosen by Chief Justice Marshall. Had he dismissed *Marbury* under a clarified reading of the statute, and declined

382. See, e.g., Corwin, *Judicial Review (II)*, supra note 3, at 292 (asserting that Marshall deliberately contrived a statutory interpretation to give himself an opportunity to establish judicial review).

383. See, e.g., Thayer, supra note 14, at 78 (“[T]he opinion began by passing upon all the points which the denial of its own jurisdiction took from it the right to treat.”).

384. See, e.g., Alfange, supra note 259, at 396-97 (arguing that the Court should have applied the canon of avoidance, as more respectful to the legislature). Such an argument is pointless, of course, to the extent judicial review would sustain the legislation. Critics who favor the canon of avoidance in a case like *Marbury* are laying themselves open to the charge they make against Marshall—that of stating a remedial statute as if it were jurisdictional. The only difference is that they would do so for the purpose of avoiding, rather than asserting, judicial review.

385. Adrian Vermeule, *Saving Constructions*, 85 *Geo. L.J.* 1945 (1997) (discussing canons of avoidance of judicial review); Frederick Schauer, *Ashwander Revisited*, 1995 *Sup. Ct. Rev.* 71, 92 (1995) (same); see also Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 *Tex. L. Rev.* 1549 (2000) (discussing the propriety of displacement by judicial “resistance” norms of the canons of avoidance, in cases in which Congress has attempted to limit judicial review).

386. Corwin, *Marshall and the Constitution*, supra note 5, at 63. Notwithstanding this insight, Corwin criticized Marshall in the same work, as elsewhere, for failing to dismiss on statutory grounds. See *id.* at 66.

to assert the power of judicial review, little if anything would have been gained, and much lost.

To some of *Marbury*'s critics, Marshall's failure immediately to dismiss on obvious statutory grounds may be inexcusable in itself, (2003) 89 Virginia LR 1337 without regard to the wisdom or unwisdom of avoiding constitutional questions. There would be no need, once the alleged jurisdiction flunked the statutory test, for the Court to put it through a constitutional test as well. I have the same initial reaction to this logical criticism as to the prudential one. Why *should* Marshall have stripped the occasion of its opportunity, especially since now, in 2003, we can appreciate how much he achieved by grasping it? And why should he have run from the case when the situation positively demanded something better than headlong retreat? The critics here exhibit a marked unwillingness to take into account what was at stake.

Even apart from its almost wilful blindness, this class of argument seems too abstract, too out of touch with the actual case. Is it realistic to suppose that Marshall could have decided the jurisdictional question on the purely statutory ground? I think it would have been very hard to do. The constitutional question must have been almost palpable from the moment Charles Lee walked into the courtroom with his disembodied motion. (It is no accident that I am having trouble keeping the constitutional question out of this "statutory" discussion.) The Court would consciously have had to ignore the eight-hundred pound gorilla in the courtroom—the obvious constitutional difficulty.

Take, for example, the 1809 Supreme Court case, *Hodgson v. Bowerbank*.³⁸⁷ There, on writ of error, Chief Justice Marshall refused to read as sufficient an allegation of jurisdiction in the court below. Then as now, the Alien Tort Statute³⁸⁸ provided jurisdiction in cases in which an alien is a party. The statutory grant seems well within the contemplation of the diversity clauses of Article III.³⁸⁹ But Chief Justice Marshall could not help immediately perceiving the constitutional defect in the jurisdiction of the circuit court below. It was obvious on the face of the complaint. True, the plaintiff had pleaded that he was an alien, and that the defendant was not. But the complaint said nothing about the citizenship of the defendant, (2003) 89 Virginia LR 1338 alleging vaguely that the defendant was "late of the district of Maryland, merchant." Marshall simply said, "Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution."³⁹⁰

This was the opinion of the *Hodgson* Court in its entirety. There was even less attention to statutory construction in *Hodgson* than there was in *Marbury*. Marshall did later remark that the objection to the pleading was "fatal," but Cranch reassuringly reports that Marshall, no stickler for mere technicalities, permitted the record to be amended with the consent of the parties, presumably to show the citizenship of the resident party.³⁹¹

It would be a strain in cases configured like *Marbury* and *Hodgson* to avoid the glaring constitutional defect. It would be a strain, rather, to ignore it. One sees this reality in the one sentence in *Marbury* in which any "construction" of the mandamus clause can be said to occur. In a carefully worded and tentative tone Marshall repeats Lee's argument that the secretary of state, being an officer, does fall "within the letter of the description." But this pivotal sentence does not end there. In the very same sentence, the constitutional infirmity interposes itself immediately, irresistibly, and naturally. Here it is again, *Marbury*'s much-denounced statutory "construction." I set it down to recall to you the way in

387. 9 U.S. (5 Cranch) 302, 304 (1809) (Marshall, C.J.) (holding the Alien Tort Statute unconstitutional as applied in a case between two aliens).

388. Judiciary Act of 1789, ch. 20, § 11 (codified at 28 U.S.C. § 1350).

389. U.S. Const. art III, § 2 ("The judicial Power shall extend . . . to Controversies between . . . Citizens of different States; . . . and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

390. *Hodgson*, 9 U.S. (5 Cranch) at 304.

391. *Id.*

which the Constitution irrepressibly bobs up in the same sentence like a cork in water: “The Secretary of State, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional”³⁹²

In jurisdiction cases, this immediacy of the constitutional question is such a familiar feature that it cannot support a criticism of *Marbury* in particular. We have just seen this effect in Marshall’s own decision in *Hodgson v. Bowerbank*. Another well-known and even clearer example occurs in the early case of *Mossman v. Higginson*,³⁹³ a Jay Court case decided per curiam. *Mossman*, like *Hodgson*, was a case under the Alien Tort Statute. And, as in **(2003) 89 Virginia LR 1339** *Hodgson*, *Mossman* had been brought in the diversity jurisdiction of the circuit court below. But in *Mossman*, both parties were foreign, a fatal defect under Article III. True, the Alien Tort statute literally authorized the suit. It was indeed a case in which an alien was a party. As Chief Justice Marshall might have said, the case fell within the letter of the description. The Alien Tort statute itself, like the mandamus clause in *Marbury*, was obviously constitutional on its face, but *as applied* in *Mossman*, there was no way the Court could avoid striking it down. (The reader will recognize the two steps of classic jurisdictional analysis.) That the *Mossman* Court “struck down” the Alien Tort Statute does not mean that the statute was thereby rendered null and void. It exists to this day. It means only that, if read literally, as the plaintiff urged, to apply in a case in which both parties were aliens, the statute was unconstitutional. This is the familiar rhetoric of constitutional rulings “as applied,” and, as I have pointed out, is the rhetoric of *Marbury* vis-à-vis its technical jurisdictional holding. It is a particularly common feature of constitutional challenges to jurisdiction.

Mossman is also a rather amusing example of the difficulty of avoiding constitutional questions, even with the best of prudential intentions. The *Mossman* Court tried hard to deliver a prudential opinion. The Court began by immediately deploying the canon of construction that a statute should be interpreted so as to avoid raising a constitutional difficulty. Yet the canon, far from furnishing a means of avoidance of the constitutional issue in *Mossman*, seemed almost to render the statute and the Constitution two sides of the same coin. This may happen more often than we would like. A court would not bother with the canon, after all, in a case in which it had not already perceived a constitutional defect. In *Mossman*, in the very teeth of the avoidance canon, the Court threw the case out on constitutional grounds, half clinging to the pretense that the grounds were statutory, and finally characterizing the defect as one of pleading, as if an amended complaint could naturalize a foreigner. Here is this droll instance in its entirety:

By the Court:

The decisions, on this subject, govern the present case; and the 11th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general **(2003) 89 Virginia LR 1340** terms, that the Circuit Court shall have cognizance of suits “where an alien is a party;” but as the legislative power of conferring jurisdiction on the federal Courts, is, in this respect, confined to suits between citizens and foreigners, we must so expound the terms of the law, as to meet the case, “where, indeed, an alien is one party,” but a citizen is the other. Neither the constitution, nor the act of congress, regard, on this point, the subject of the suit, but the parties. A description of the parties is, therefore, indispensable to the exercise of jurisdiction. There is here no

392. *Marbury*, 5 U.S. (1 Cranch) at 173.

393. 4 U.S (4 Dall.) 12, 13-14 (1800) (per curiam).

such description; and, of course,

The writ of error must be quashed.³⁹⁴

Putting *Hodgson* and *Mossman* together, then, it appears that, in well-known jurisdiction cases before and after *Marbury*, in the presence of an obvious constitutional defect, the Justices in that period customarily went directly to the Constitution to reject literalistic assertions of jurisdiction.³⁹⁵ Courts did not, and could not very well, wall off the Constitution by pretending that they were engaged solely in statutory construction. The critics' insistence on a walled-off Article III in *Marbury* seems to call for a much less *natural* opinion—however tidy—than Marshall wrote or than judges typically do write.

Chief Justice Marshall, of course, must have seen at once, back in 1801, that a “motion” made in the Supreme Court as an original matter, by a party neither an ambassador nor a state, could not constitutionally be heard in his Court. He did not mind setting a convenient hearing date in which Charles Lee could perhaps come up with a jurisdictional argument, especially since Attorney General Levi Lincoln, present in the courtroom, declined an invitation to argue, stating that he had no instructions. Certainly Charles Lee knew he had a jurisdictional problem. Like Marshall, he must have been aware of it from the first. It is not impossible that Marshall suggested to Lee at some time that he needed to argue jurisdiction,³⁹⁶ although I doubt that Lee would have needed that help. In **(2003) 89 Virginia LR 1341** 1803 he devoted much of his argument to it, and presumably he would have done the same in June 1802, had the scheduled hearing been allowed to take place. We should now understand why his lengthy tripartite argument was almost entirely a constitutional argument, not a statutory one.

H. “He Wrote It Backwards”

We must still deal with the critics' point of judicial process, that the order of the case is unnatural and contrived, placing, as it does, the substantive cart before the jurisdictional horse.³⁹⁷ The accusation is that this was done to score political points.³⁹⁸ The case moves directly to the merits, and finds the

394. *Mossman*, 4 U.S. (4 Dall.) at 14.

395. *Hodgson*, 9 U.S. (5 Cranch) at 304.

396. In *Ex parte Bollman*, William Cranch reports that Marshall requested the parties to argue the “whole ground” of the question (on the availability of habeas). *Bollman*, 8 U.S. (4 Cranch) at 75. Similarly, in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 816 (1824), Marshall acknowledged, at the outset of the opinion that he specifically asked the parties to argue the capacity issue. Marshall must have seen, although the parties would have been quite unaware of it, that the capacity issue would be dispositive of the jurisdictional question. What is even more extraordinary is that this seeming technicality, a side issue, would in Marshall's hands become the ground of Marshall's extraordinary reach for maximum judicial power over federal questions, perhaps his most brilliant expounding of Article III. Marshall seems to have grasped, before the parties understood what the case was about, that *Osborn* was a chance for him to lay deep foundations. He also saw that the judicial power of the Supreme Court was, at its greatest when raised by the smallest issue in courts below. See *Osborn*, 22 U.S. (9 Wheat.) at 823 (announcing Marshall's “ingredient” theory of the Article III power over cases “arising under” federal law). Cf. *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 492-93 (1983) (returning after some 150 years to *Osborn*'s “ingredient” theory of federal jurisdiction).

397. See, e.g., Corwin, *Marshall and the Constitution*, supra note 5, at 65 (asserting that Marshall left the question of jurisdiction for last, “and so created for himself an opportunity to lecture the President on his duty to obey the law and to deliver the commission”); Corwin, *The Doctrine of Judicial Review*, supra note 3, at 3-4 (pointing out that the Court reversed the usual order of procedure and so went first to the merits).

398. Corwin, *Marshall and the Constitution*, supra note 5, at 65 (“Marshall, reversing the usual order of procedure, left the question of jurisdiction till the very last, and so created for himself an opportunity to lecture the President on his duty to obey the law.”).

administration at fault. Jefferson complained of this,³⁹⁹ and James Bradley Thayer made the **(2003) 89 Virginia LR 1342** point in his little book, *John Marshall*.⁴⁰⁰ Both *Marbury*'s critics and supporters have tended to share this view.⁴⁰¹

There is a related charge that the Court, having no jurisdiction, had no power to reach the questions it did reach. Once the Court saw that it had no jurisdiction, the Court was stripped *instanter* of all power to do anything other than to hold it had no jurisdiction, give its reasons, and dismiss. Thus, beyond its narrow jurisdictional holding, the opinion cannot be authoritative, and ought never to have been taken as authoritative. It is, as *Marbury*'s critics insist, sheer *obiter dictum*. And the failure to dismiss and keep silent on all but jurisdiction, independent of the Court's errors of statutory and constitutional interpretation, reveals, in the critics' view, that *Marbury* is just a manipulative venting of political spleen. This feature of the case, or at least the aspersions Marshall managed to cast on the administration's conduct in the course of this discussion, was its most annoying, as far as Jefferson was concerned. He famously complained that it was all "an obiter dissertation."⁴⁰²

The more acute criticism is that the opinion goes to the merits in order to aggrandize to courts the power to command government officials. This part of *Marbury* holds that, although the Supreme **(2003) 89 Virginia LR 1343** Court is not a trial court with general jurisdiction, a person aggrieved by government misconduct has a good cause of action in any court in this country that does have jurisdiction. And this seems to comprise the bulk and main subject of the opinion. Was it, as Jefferson charged, mere *obiter dictum*?

The short answer to this is that Section 13 itself required an examination into the "usages of law" that would warrant issuing a mandamus in the particular case.⁴⁰³ Once that is recognized, the criticism of the long first part of *Marbury* as "dictum" seems strained. *Marbury* is more naturally viewed as a four-square decision of the jurisdictional question from beginning to end.⁴⁰⁴ The ordering of the discussion is

399. Jefferson chafed all his life under Marshall's rebuke of his administration in *Marbury*. See Letter from Thomas Jefferson to George Hay (June 2, 1807), in 10 *The Works of Thomas Jefferson*, supra note 6, at 396 (complaining of *Marbury* that "the judges in the outset disclaimed all cognisance of the case; altho' they then went on to say what would have been their opinion, had they had cognisance of it"); id. at 397 (grumbling that *Marbury* was too much cited, and suggesting, oddly, that Hay denigrate *Marbury* when addressing the jury in the trial of Aaron Burr); Letter from Thomas Jefferson to James Madison, (May 25, 1810), in 3 *The Republic of Letters*, supra note 22, at 1631, 1632 (protesting that Marshall's "twistifications in the case of *Marbury* . . . shew how dexterously he can reconcile law to his personal biasses"). On the following day, Jefferson wrote, "We have long enough suffered under the base prostitution of law to party passions in one judge. . . ." Letter from Thomas Jefferson to John Tyler (May 26, 1810), in 5 *The Works of Thomas Jefferson* 524 (Paul Leicester Ford ed., 1904). As late as 1823, Jefferson was still insisting that Marshall's ruling on the justice of *Marbury*'s claim was "merely an obiter dissertation of the Chief Justice. . . . This practice of Judge Marshall, of traveling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and very censurable. . . . [T]he Chief Justice went on to lay down what the law would be, had they jurisdiction of the case. . . . [C]ould anything exceed [this] perversion of law?" Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), in 3 *The Republic of Letters*, supra note 22, at 1862, 1864-65.

400. Thayer, supra note 14, at 78-79 ("And thus, as the court, by its decision in this case, was sharply reminding the legislature of its limitations, so by its dicta, and in this irregular method, it intimated to the President, also, that his department was not exempt from judicial control. In this way two birds were neatly reached with the same stone.").

401. See, e.g., Alfange, supra note 259, at 393 ("[C]ommentators have generally concluded that Marshall adopted strained constructions . . . in order to be able to invalidate the act.").

402. Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), supra note 399.

403. For the text of the statute see supra note 237.

404. No doubt that was why Charles Lee also argued the propriety of the remedy first. *Marbury*, 5 U.S. (1 Cranch) at 138-42. When Chief Justice Marshall declares in *Marbury* that he will not follow the precise order of Lee's argument, evidently he is not referring to the initial resort to the merits, but probably to Lee's alternative jurisdictional hypotheses. Hobson also concludes that "the entire opinion centered on the single issue of jurisdiction," although he does not link this

natural to mandamus. We find mandamus cases in later courts proceeding in the same fashion, one which seems to have been comfortable to lawyers deep into the nineteenth century.⁴⁰⁵

In the Sections just preceding, we have seen that *Marbury*'s critics object to the Chief Justice's having reached a constitutional question. But the same critics disregard the fact that Marshall might have avoided the constitutional question by first considering whether *Marbury* even had a case. Once they fault Marshall for writing the case backwards in order to reach a constitutional question, they cannot then fault him for writing the case backwards to *avoid* reaching a constitutional question.⁴⁰⁶ The paradox vanishes if (2003) 89 Virginia LR 1344 we do not see the case as "backwards" at all, but understand that an inquiry into the merits of a claim in a case seeking mandamus is required by "the principles and usages of law." The purpose of the inquiry is to determine whether mandamus is warranted.

Apart from the requirements of mandamus, there is the further reflection that *Marbury* might have been even more offensive to critics without an initial finding that there was a claim of right. Jefferson had a plausible theory that *Marbury*'s appointment had not been perfected, since his commission had never been delivered, and was therefore ineffective.⁴⁰⁷ To leave this plausible theory unaddressed would have been tantamount to yielding to the administration on an issue as to which Chief Justice Marshall was perfectly convinced of the administration's lawlessness. To have yielded on that point would have invited the opprobrium of generations to come for having knuckled under to the administration while under threat of impeachment.

Marshall therefore did address Jefferson's theory, and made very short work of it, with an elegant, two-pronged attack.⁴⁰⁸ Marshall began by pointing out that, on the one hand, Jefferson's thinking was too metaphysical. A commission is not a deed. A commission is evidence of an appointment, not the appointment itself. On the other hand, an appointment for a term of years in those days was generally considered a property, and Marshall had himself so referred to it.⁴⁰⁹ Moreover, Charles Lee had framed *Marbury*'s motion as one for delivery, in effect conceding the point. Marshall therefore proceeded on the assumption that Jefferson was correct. Even so, he pointed out, delivery of the president's deeds of appointment and letters patent is not to the appointee, but to the secretary of state, since the secretary has to affix the seal. The last act required of the president, then, is transmission of the commission to the secretary.⁴¹⁰ Analyzing the commission as evidence, he came out the same way: Evidence of an appointment (2003) 89 Virginia LR 1345 becomes conclusive when the president transmits a signed and sealed commission to the secretary.⁴¹¹ At this point, the reader abandons Jefferson and his theory. It would be an odd presidential power of appointment that would be subject to the whim, design, or

with the statutory "usages of law" requirement. Editorial Note, *in* 6 The Papers of John Marshall, *supra* note 53, at 163.

405. The same ordering of decision is seen, for example, in *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 609 (1838) (stating the questions for decision as: "1. Does the record present a proper case for a mandamus; and if so, then, 2. Had the circuit court of this district jurisdiction of the case, and authority to issue the writ[?]"). For a similar analysis in a case involving habeas rather than mandamus, see *In the Matter of Metzger*, 46 U.S. (5 How.) 176, 182-83 (1847). Cf. *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 200 (1831) (Baldwin, J., dissenting) (arguing that the Court should have considered jurisdiction first).

406. Professor Van Alstyne also mentions this difficulty. See Van Alstyne, *A Critical Guide*, *supra* note 27, at 7.

407. See Letter from Thomas Jefferson to George Hay (June 2, 1807), *supra* note 148, at 396, 397 ("The executive & Senate act on the construction, that until delivery from the executive department, a commission is in their possession, & within their rightful power.").

408. *Marbury*, 5 U.S. (1 Cranch) at 159-60.

409. *Id.* at 155.

410. *Id.* at 157-58.

411. *Id.* at 156.

neglect of the secretary of state. As Marshall puts this, “[i]f [delivery] was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office.”⁴¹²

It is true that, in an ordinary case, courts must dismiss without reaching the merits of a case in which an assertion of jurisdiction is not warranted by the Constitution.⁴¹³ This seems the only principled way of handling a jurisdictional issue. But in *Marbury*, the Court was in a unique position. It was not simply deciding a jurisdictional issue. It was speaking authoritatively, for the first time, to the issue of judicial review.⁴¹⁴ Had the Court, having struck down an act of Congress as unconstitutional, simply dismissed for want of jurisdiction, without more, it would have been putting itself in the position of delivering a foundational constitutional opinion not only without jurisdiction—that could hardly be avoided—but without any legal foundation at all. Although the Court’s need to reach the merits technically was a function of Section 13, as a practical matter the Court needed all the footing it could get.

The objections that the case is written “backwards,” and should have been dismissed, have, with the prudential objection that constitutional questions should be avoided, one common aim: to strip the case of its importance. We might try an instructive thought experiment. Imagine a *Marbury* cleansed of dictum and strategy and all the flaws its angriest critics have found in it. Chief Justice Marshall, after all, could easily have delivered the sort of unexceptionable opinion the unanimous Jay Court delivered per curiam in 1800 **(2003) 89 Virginia LR 1346** in *Mossman v. Higginson*.⁴¹⁵ Marshall could have given us something along the following lines (I paraphrase *Mossman*, transposing it to the *Marbury* situation. Except for a certain emphasis in *Mossman* on the pleadings, the reader will recognize, since we have already seen the real *Mossman*,⁴¹⁶ that the following is a faithful paraphrase of that opinion in its entirety).

By the Court:

The decisions, on this subject, govern the present case; and the 13th section of the judiciary act can, and must, receive a construction, consistent with the constitution. It says, it is true, in general terms, that the Supreme Court shall have cognizance of suits for a “mandamus” but as the legislative power of conferring jurisdiction on the Supreme Court, is, in cases not given to its original jurisdiction, confined to suits in its appellate jurisdiction, we must so expound the terms of the law, as to meet the case, where, indeed, a mandamus is the remedy. Neither the constitution, nor the act of congress, regard, on this point, such a suit, but as appellate. A case in its nature appellate is, therefore, indispensable to the exercise of jurisdiction. There is here no such case; and, of course,

The rule must be discharged.

Except for its failure to touch upon original as well as appellate jurisdiction, this is a fairly accurate

412. Id. at 160.

413. But see Joan Steinman, After Steel Co.: “Hypothetical Jurisdiction” in the Federal Appellate Courts, 58 Wash. & Lee L. Rev. 855 (2001) (discussing cases in which courts find it simpler to dismiss on the merits than to deal with a complex jurisdictional issue).

414. I do not mean to suggest that the Court was inventing judicial review, which by the time of *Marbury* was anticipated and understood, but rather that the Court was for the first time speaking authoritatively to the issue.

415. 4 U.S. (4 Dall.) 12 (1800) (per curiam).

416. See supra notes 393-94 and accompanying text.

reflection of the technical holding of *Marbury*, translated into a *Mossman* opinion. It is not possible to say this case is manipulative, politicized, or intellectually dishonest. But one would not put it on page one of a casebook on constitutional law (or, for that matter, a casebook on administrative law, or a casebook on federal courts). One could, I suppose, begin a constitutional law casebook with *McCulloch v. Maryland*.⁴¹⁷ I admire few cases as I do *McCulloch*. Among other things, (2003) 89 Virginia LR 1347 *McCulloch* gives us a theory of sovereignty, a theory of federalism, a theory of national power, and a theory of constitutional interpretation.⁴¹⁸ Besides, it is beyond question Chief Justice Marshall's most beautiful opinion. It is also, almost certainly, the opinion about which he himself cared most deeply.⁴¹⁹ But it tells us nothing about our constitutional rights, or how to assert them. It does not set up what courts do, and what the Supreme Court does. It does not establish that the government must conform its conduct to the rule of law in American courts. It is not part of what differentiates America from failed or oppressive countries. It is just not *Marbury*. Indeed, since *McCulloch* also strikes down a state tax (“[T]he power to tax involves the power to destroy,”)⁴²⁰ and sustains the Bank of the United States,⁴²¹ if *Marbury* had not existed, *McCulloch* would have had to invent it.⁴²²

With their disparagements of Chief Justice Marshall's craft, and even honor, in *Marbury*, his critics show a curious disregard for everything at stake in the case. Marshall's critics lay themselves open to the just charge that to them it would have been far more acceptable had the Chief Justice in February 1803 handed down a *Mossman v. Higginson* instead of an imperishable monument. The technical statutory critique of *Marbury* winds up faulting Chief Justice Marshall, in essence, for having written a great opinion.

(2003) 89 Virginia LR 1348 Sometimes the very authors who make this charge fault Marshall at the same time for writing an *unimportant* opinion.⁴²³ The critics are entitled to both these viewpoints,

417. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). One casebook does begin with *McCulloch*. See Paul Brest & Sanford Levinson, *Processes of Constitutional Decisionmaking: Cases and Materials* 19 (3d ed. 1992). *McCulloch* is preceded in the book by an excerpt from Madison.

418. I recently discussed constitutional theory in *McCulloch* in Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 *Notre Dame L. Rev.* 1113, 1146-58 (2001).

419. In 1819, in response to two series of anonymous letters in the press criticizing *McCulloch* (one of which was authored by Spencer Roane), there appeared two series of letters signed “A Friend to the Union” and “A Friend of the Constitution.” For over a century the authorship of these “Friend” letters was unknown. In 1969, Professor Gerald Gunther disclosed his discovery that the author of both the “Friend to the Union” and the “Friend of the Constitution” letters was none other than John Marshall. As far as I am aware, *McCulloch* was the only case for which Marshall mounted a sustained extrajudicial defense. See John Marshall, *A Friend to the Union* Nos. 1-2 (1819), in *John Marshall's Defense of McCulloch v. Maryland* 78-105 (Gerald Gunther ed., 1969); John Marshall, *A Friend of the Constitution* Nos. 1-9 (1819), in *John Marshall's Defense of McCulloch v. Maryland*, supra, at 155-214.

420. *McCulloch*, 17 U.S. (4 Wheat.) at 431.

421. *Id.* at 425.

422. See supra text accompanying notes 253-55 (regarding judicial review in *McCulloch*). I am indebted to Doug Laycock for the quip.

423. See, e.g., Klarman, supra note 101, at 1112 (arguing the unimportance of *Marbury*); O'Fallon, *Marbury*, supra note 188, at 260 (deeming *Marbury* (i.e., judicial review) irrelevant because created for a world in which “the political energy of the masses could be held in check through . . . suffrage limitations and remote representations” (i.e., a world not warranting deference to legislatures)). The reader will recognize here Professor Bickel's “counter-majoritarian difficulty.” Cf. Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16-22 (1962) [hereinafter Bickel, *The Least Dangerous Branch*]. In Levinson, *Why I Do Not Teach Marbury*, supra note 293, the author jokes that, if the political drama in the election of 1800 were *Hamlet*, Marshall and *Marbury* would play Rosencrantz and Guildenstern. But neither the rage of the Jeffersonians nor the rout of the Federalists in 1800 could have anything like the significance for us today that *Marbury* has. Another example of this sort of dismissiveness occurs in Ferejohn & Kramer, supra note 101, at 995-96 (asserting that “*Marbury* was a relatively inconsequential rear-guard action. . . . Much more important at the time

whatever the internal contradictions. Academics make their reputations by showing that other people are wrong— great people especially. But for some, at least, it might be more “honest,” to borrow from their own vocabulary, to come out from behind the smokescreen of a technical critique and candidly acknowledge that they just do not like judicial review, or perhaps that they do not like constitutional litigation. It seems hardly possible that they oppose the Constitution.⁴²⁴ Perhaps they just do not like the Supreme Court. This last is not a wholly illiberal stance, in view of the Court’s conservative character through most of its history, a tradition now cheerfully resumed by the Rehnquist Court.⁴²⁵

(2003) 89 Virginia LR 1349 V. *MARBURY’S* STRAINED AND IMPLAUSIBLE CONSTITUTIONAL INTERPRETATION

A. *A Curious Device*

The critics of *Marbury v. Madison* think that Chief Justice Marshall, for partisan reasons, deliberately misconstrued Article III and ignored its obvious meaning to the contrary when he denied that Congress could constitutionally expand the Supreme Court’s original jurisdiction.⁴²⁶ The critics believe that if it were not for *Marbury*, Congress could do so easily today.

The critics cannot support their view by recourse to the original understandings, because their view literally has no existence before 1868. As we shall see, it is *Marbury* that accords with the original understandings.⁴²⁷ Nor can the critics rely on precedent: The general rule that Congress may not exceed the limits of Article III was already assumed settled in the time of the Jay Court.⁴²⁸ Nor can the (2003)

[was] the Judiciary Act of 1802, in which Congress . . . abolish[ed] a number of newly created judgeships and fir[ed] the judges. . . . The actual resolution of the crisis was reflected not in *Marbury*, which passed by with little fanfare, but rather in the Court’s meek submission to this congressional mugging in *Stuart v. Laird*). In other words, if this political drama were *Hamlet*, the prince would be played by the Act of 1802, or perhaps by *Stuart v. Laird*, reserving the role of Guildenkrantz (or Rosenstern?) for *Marbury v. Madison*. But however important at the time, both that statute and *Stuart v. Laird* have vanished without a trace. *Stuart v. Laird* was no *Marbury*; it is the foundation of nothing.

424. For some such Jeffersonian distaste, see, e.g., William W. Van Alstyne, Notes on a Bicentennial Constitution: Part I, Processes of Change, 1984 U. Ill. L. Rev. 933 (1984) (arguing that the Constitution should be easier to amend).

425. For an emerging liberal counter-*Marbury* reaction to the Rehnquist Court, see, e.g., Mark Tushnet, Taking the Constitution Away from the Courts (1999); for a more conservative author, Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (1999).

426. See, e.g., Klarman, *supra* note 101, at 1123-24 & n.56 (“Virtually all contemporary commentators agree that Marshall in *Marbury* twisted legal doctrine when declaring unconstitutional Section 13 of the Judiciary Act of 1789.” (quoting Mark A. Graber, Federalist or Friends of Adams: The Marshall Court and Party Politics, 12 Stud. Am. Pol. Dev. 229, 250 (1998)); see also Powe, *supra* note 293 (stating, without explanation, that the Chief Justice’s interpretation of Article III was “silly”); Graber, The Passive-Aggressive Virtues, *supra* note 43, at 88 (“[S]cholars who would have voted for Jefferson [in 1800], . . . insist that the Marshall Court distorted constitutional doctrine to suit the political preferences of the Justices.”); Corwin, Marshall and the Constitution, *supra* note 5, at 65 (“Marshall’s position was equally questionable when he contended that the thirteenth section violated that clause of Article III of the Constitution which gives the Supreme Court original jurisdiction ‘in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party.’”).

427. For a thorough exploration, see Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741, 778 (1984) [hereinafter Clinton, A Mandatory View] (concluding that “the congressional power to make ‘exceptions’ to the appellate jurisdiction of the Supreme Court, granted by the exceptions and regulations clause, was at most an authority to delete a class of cases from the jurisdiction of the Supreme Court in favor of exercise of power by an inferior federal court”). For a brief survey of the original understandings, see *infra* Section V.B.

428. Cf. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13-14 (1800) (holding, in a case brought below under an act of

89 Virginia LR 1350 critics rely on the text. Article III, Section 2, after affording states and ambassadors access to the Court's original jurisdiction, unequivocally bars access to everybody else. "In all other cases," says Article III, the Court's jurisdiction "shall be appellate." How can the critics justify their extraordinary disregard of history, precedent, and text? On what basis would anyone label as a deliberate misconstruction a reading that accorded with history, precedent, and text?

It turns out that the constitutional critique of *Marbury* rests almost exclusively on a single seductive suggestion made long ago. Writers have been unable to resist appropriating it. In a snowballing of credulousness, critics now uncritically assume the idea to be sound and in fact dispositive, rather in the way that the emperor's subjects assumed—since everybody else seemed to believe it—that the emperor had clothes. Perhaps we can attribute some of this surprisingly uncritical acceptance to a natural reluctance to focus on the idea long enough to get the hang of it. Writers seem to take each other's word for its soundness, speaking of it in confident but hazy terms. They will say something like this: "In my opinion, good and sufficient reasons exist for regarding Marshall's interpretation of Article III as strained and implausible."⁴²⁹ Yet on examination, this imagined critique, so apparently alluring, turns out to be not only ahistorical, but unworkable; not only unworkable, but dangerous. The critics' proposed reading of Article III is so subversive that neither the Court nor the Constitution could easily survive its implementation.

The critics' constitutional critique relies entirely upon the Exceptions Clause of Article III. Their basic idea is that Congress's power to make "Exceptions" to the Supreme Court's *appellate* jurisdiction⁴³⁰ authorizes Congress to make *additions* to the Supreme Court's *original* jurisdiction. They cannot be shaken in this sincere conviction, although Article III has always been read as authorizing **(2003) 89 Virginia LR 1351** Congress only to diminish, not add to, the Court's original jurisdiction, as this Part will abundantly show.⁴³¹

Congress purporting to authorize federal jurisdiction in cases in which "an alien is a party," that the jurisdiction of the court below must nevertheless meet the requirements of Article III). *Mossman* cannot be distinguished from *Marbury* in their shared understanding that Congress cannot expand the jurisdiction of federal courts beyond the limits of Article III.

429. E.g., Henry P. Monaghan, *Marbury* and the Administrative State, 83 Colum. L. Rev. 1, 8 (1983) ("Powerful, and to my mind convincing, arguments can be made that the named categories [i.e., ambassadors and states] stated only the irreducible minimum, not the maximum, of original jurisdiction."). The "convincing arguments" Monaghan cites are Van Alstyne's. *Id.* at 8 & n.44.

430. U.S. Const. art. III, § 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

431. The Exceptions Clause has long been read as extending to the Court's original as well as its appellate jurisdiction, obviously to protect the Court from a mandatory trial jurisdiction. E.g., *Ames v Kansas*, 111 U.S. 449, 463-69 (1884). It is true that John Marshall read the text of the Exceptions Clause literally at the Virginia ratifying convention, as giving Congress only power to subtract from the Court's appellate jurisdiction, see *infra* note 493 and accompanying text. However, Marshall soon abandoned this position from the necessities of the case, since state courts obviously must have jurisdiction over the state's criminal prosecutions, in which the state is always a party. For the best statement of the position, see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (Marshall, C.J.). For a suggestion that Marshall might have located Congress's power to make exceptions to the Court's original jurisdiction outside the Exceptions Clause, see *infra* note 492. Men in the founding generation were impatient of the Clause's apparent textual confinement to the Court's appellate jurisdiction, understanding the importance of protecting the Court's vital appellate jurisdiction not only from an inundation of appellate cases but also from an inundation of *original* cases. For original understandings, see *infra* Section V.B. The first Congress also saw the need to permit the states to sue in their own courts, and to protect the Court from an inundation of original cases. The First Judiciary Act of 1789, § 13, exercised power, apparently under the Exceptions Clause, over the Supreme Court's original jurisdiction, to make large parts of it concurrent with the jurisdiction of courts below. Today the Court's discretion to deny access both to appellate and original cases, is complete except for its mandatory jurisdiction over controversies between two states and cases against a foreign ambassador.

However counterintuitive this reading of Article III may seem,⁴³² the critics think it obvious that the Exceptions Clause of Article III gives Congress power to “reallocate,” or “redistribute,” or “reshuffle,” or “shift” cases from the Court’s appellate to its original jurisdiction, apparently unaware that this, in effect, “reshuffles” the Constitution’s arrangements for the Supreme Court. As one keen-eyed parodist put this, in a mock dissent to *Marbury*, “The exceptions clause must mean nothing less than that Congress has power to reshuffle the distribution of cases as just listed!”⁴³³ They think it indefensible of Chief Justice Marshall to have held that Congress has no power at all to add to the short list of dignified parties explicitly afforded the courtesy of trial in the nation’s highest Court.⁴³⁴ To them it is obvious that the Constitution at least contemplates **(2003) 89 Virginia LR 1352** trials in the Supreme Court for all government administrative officers. Postmasters. The head of an Internal Revenue office. One’s local United States Attorney.

When artfully framed, the proposal can indeed suggest an almost unforced reading of the Exceptions Clause. Consider, for example, this natural-sounding reading: “The Supreme Court shall have appellate jurisdiction in a given class of cases, unless Congress decides to give it original jurisdiction in those cases.”⁴³⁵ This sort of thing can sound so reasonable that even some of those who reject such a reading will give it serious consideration.⁴³⁶

In the rest of this introductory Section, I will confine myself to setting out the critics’ technical argument and explaining its mechanism, for readers who have grasped it only vaguely. In the Sections that follow I hope to show just how bad the critics’ *idée fixe* turns out to be.

I can trace the critics’ position no further back than the 1868 case of *Ex parte Yerger*.⁴³⁷ *Yerger* was a petition for habeas corpus. Chief Justice Salmon P. Chase there raised a previously unheard-of question neither briefed nor argued.⁴³⁸ Chase suggested that the Exceptions Clause of Article III might be read as empowering Congress to expand the original jurisdiction of the Supreme Court.⁴³⁹ Chase rightly rejected this novel proposition. He did so on the strength of *Marbury* (although he did not get *Marbury* quite right).⁴⁴⁰ Since, as **(2003) 89 Virginia LR 1353** Chase himself pointed out, the Supreme Court’s habeas jurisdiction had already been held to be “appellate” in *Ex parte Bollman*,⁴⁴¹ no purpose

432. For recent interesting attempts to rebut the critics’ reading of Article III, see Pfander, *supra* note 297; Amar, *Marbury*, *supra* note 315.

433. Michael Zuckert, Epistemology and Hermeneutics in the Constitutional Jurisprudence of John Marshall, in John Marshall’s Achievement: Law, Politics and Constitutional Interpretations 196 (Thomas C. Shevory ed., 1989).

434. Eskridge, *supra* note 293, at 1071.

435. Forrest McDonald, Book Review, 16 L. & Hist. Rev. 617, 619 (1998) [hereinafter McDonald, Book Review] (reviewing Haskins & Johnson, *supra* note 5).

436. See, e.g., Amar, *Marbury*, *supra* note 315, at 452 (“Prior to *Marbury*, an argument could possibly have been made that Congress could exercise this ‘exception’ power only by shifting a case from the Court’s appellate to its original docket. . . . Yet *Marbury* emphatically forecloses such an argument. . . .”).

437. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

438. Photocopies of the briefs in *Yerger* on file with the author.

439. *Yerger*, 75 U.S. (8 Wall.) at 97 (Chase, C.J.) (“If the question were [a] new one, it would, perhaps, deserve inquiry whether Congress might not, under the power to make exceptions from this appellate jurisdiction, extend the original jurisdiction to other cases than those expressly enumerated in the Constitution.”).

440. *Id.* (“But, in the case of *Marbury v. Madison*, it was determined, upon full consideration, that the power to issue writs of mandamus, given to this court by the 13th section of the Judiciary Act, is, under the Constitution, an appellate jurisdiction, to be exercised only in the revision of judicial decisions. And this judgment has ever since been accepted as fixing the construction of this part of the Constitution.”). However, as we have already seen, the Court did not in *Marbury* or, at any other time deny its original jurisdiction to issue writs of mandamus to an officer, at the suit of a state or an ambassador. See *supra* notes 308-11 and accompanying text.

441. *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (Marshall, C.J.).

at all was served by raising this question. Nevertheless this rejected suggestion would go on to have a life of its own. It resurfaced decades later as one of Professor Corwin's more dubious arguments in derogation of *Marbury*,⁴⁴² and was repeated, decades again after Corwin, by the ever controversial⁴⁴³ Professor Crosskey⁴⁴⁴ (who may have introduced into these critiques the disrespectful tone that too often seems now to characterize them). Another generation would come and go before the better-mannered Professor Van Alstyne picked up this old suggestion in the 1960s,⁴⁴⁵ and by now it is approaching the status of received wisdom.⁴⁴⁶ None of **(2003) 89 Virginia LR 1354** these critics, by the way, provided much relevant attribution to their predecessors, although it is hard to imagine independent derivation of anything so contrived.

Since no previous writer, to my knowledge, has unpacked and explained the critics' curious suggestion about the reallocative power of Congress, let me try to provide a clearer understanding. It will be helpful to begin by referring to Chief Justice Marshall's own view of the power of Congress. Recall the ends/means device deployed by Marshall in *McCulloch v. Maryland*.⁴⁴⁷ This mechanism appears as an assumption of Alexander Hamilton's in *The Federalist No. 19*. Hamilton elaborated on it

442. Corwin, *The Doctrine of Judicial Review*, supra note 3, at 5-6 ("Why, then, should not the exceptions thus allowed to the appellate jurisdiction of the Supreme Court have been intended to take the form, if Congress so willed, of giving the court original jurisdiction of the cases covered by them?"). Marshall, of course, does quote the Exceptions Clause. See *Marbury*, 5 U.S. (1 Cranch) at 175 ("That [the Supreme Court] should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.").

443. For Professor Crosskey's charge that James Madison deliberately faked his notes of the Constitutional Convention, see 1 Crosskey, *Politics and the Constitution*, supra note 25, at 12-13; 2 Crosskey, *Politics and the Constitution*, supra note 25, at 976-1046; see also William Winslow Crosskey, *The Ex-Post-Facto and the Contracts Clauses in the Federal Convention: A Note on the Editorial Ingenuity of James Madison*, 35 U. Chi. L. Rev. 248 (1968) (same). For a refutation of Crosskey's charges, see Max Farrand, *Supplement, Records of the Federal Convention xx-xxvi* (1987). For discussion see Donald O. Dewey, *Crosskey Versus Madison: James Madison and the United States Constitution*, 19 U. Rich. L. Rev. 435 (1985). For particularly strong criticism of Crosskey, see Irving Brant, *Book Review, Mr. Crosskey and Mr. Madison*, 54 Colum. L. Rev. 443 (1954).

444. See 2 Crosskey, *Politics and the Constitution*, supra note 25, at 1041.

445. See Van Alstyne, *A Critical Guide*, supra note 27. For Professor Van Alstyne's more recent position, see Van Alstyne, *Notes on a Bicentennial Constitution II*, supra note 243.

446. Current adherents to the Corwin/Crosskey/Van Alstyne view include even the popular historian Forrest McDonald. See McDonald, *Book Review*, supra note 435, at 619 (opining that the critics' redistributive reading of the Exceptions Clause is "a reasonable reading," id., assuming that this was "surely the way the Congress read the clause when enacting section 13"). For the views of some in the legal academy, see, for example, David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years* 68 (1985) [hereinafter Currie, *The Constitution in the Supreme Court*] ("[T]he exceptions clause itself arguably authorized the grant of original mandamus jurisdiction: Congress had made an 'exception' to the appellate jurisdiction by providing original jurisdiction instead."); Martin H. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 11 (1980) (arguing that Marshall's exposition of Article III in *Marbury* is "surely wrong"); Alfange, supra note 259, at 397 ("Why could that language [the Exceptions Clause] not, with perfect reason, be interpreted to mean that Congress may except matters from the Court's appellate jurisdiction by assigning them to its original jurisdiction?"); O'Fallon, *Marbury*, supra note 188, at 255 ("Marshall ignored the 'exceptions and regulations' language of Article III."); Bloch & Marcus, supra note 332, at 320 ("It would have been easy to . . . read article III to permit Congress to move cases from the Supreme Court's appellate jurisdiction to its original jurisdiction. . . . The Framers could have intended that the two specified categories were to be minimum definitions of the Court's original jurisdiction. . . . Alternatively, the Framers might have intended their designation to be the presumed initial distribution with Congress authorized to modify it, if and when it chose."); see also Monaghan, supra note 429, at 8 (similar). How all these smart people could have led themselves up the garden path I leave to the reader; my point is that there are a lot of them.

447. 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

in *The Federalist No. 33*, and with more particularity, in his great state paper, the *Report on the Bank*.⁴⁴⁸ In *McCulloch*, of course, the Marshall Court held that Congress's power to charter a bank could be implied, as a "necessary (2003) 89 Virginia LR 1355 and proper" "means" to achieve a "legitimate" "end."⁴⁴⁹ As if following this model, Professor Corwin plucked from *Ex parte Yerger* the suggestion that Congress might have implicit power to add to the original jurisdiction of the Supreme Court—as a *means* of achieving the explicit *end* of making "Exceptions" to the Court's appellate jurisdiction.⁴⁵⁰

This proposed maneuver, of making additions to one jurisdiction to achieve exceptions to another, hinges on the structural consideration that the Court cannot exercise appellate power over a case it has tried in its original jurisdiction. Once a case is in the Court's original jurisdiction, the Court's appellate power over that case, of necessity, is extinguished.⁴⁵¹ So if Congress has the "legitimate end" in view of removing mandamus suits against officers from the Court's appellate jurisdiction, Congress can readily accomplish the exception—so the argument briskly concludes—by adding those cases to the Court's *original* jurisdiction.

The critics further point out that, at the time of *Marbury*, Congress, by ordinary legislation—Section 13 of the First Judiciary Act—had made just such an "Exception" to the Court's appellate jurisdiction, by adding cases like *Marbury's* to the Supreme Court's original jurisdiction. Thus, when Charles Lee brought *Marbury's* motion before the Supreme Court, the statutory list of parties within the Court's original jurisdiction—as Lee later argued—included not only those specified in Article III—"Ambassadors" and "States"—but also any federal officers against whom mandamus was sought.

I cannot resist reminding the reader that the same critics invariably also accuse Chief Justice Marshall of dishonestly contriving an indefensible construction of Section 13 *to the same effect*. They blame Marshall for "construing" the statute in the precise manner they insist is authorized by their reading of the Constitution—as validly adding to the Supreme Court's original jurisdiction over "Ambassadors" and "States" the class of officers against (2003) 89 Virginia LR 1356 whom mandamus is sought. Thus, amusingly, the conventional critique of *Marbury's* "statutory construction" is contradicted by the conventional critique of *Marbury's* "constitutional interpretation."⁴⁵² The two critiques, constantly coupled,⁴⁵³ are in fact inconsistent. They cannot be reconciled.

448. Alexander Hamilton, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), in 8 *The Papers of Alexander Hamilton* 97, 104 (Harold C. Syrett ed., 1965) ("Now it appears to the secretary of the treasury that this *general principle* is *inherent* in the very definition of government and *essential* to every step of the progress to be made by that of the United States, namely: that every power vested in a government is in its nature SOVEREIGN and includes, by *force* of the *term*, a right to employ all the means requisite and fairly applicable to the attainment of the *ends* of such power, and which are not precluded by restrictions and exceptions specified in the constitution, or not immoral, or contrary to the essential ends of political society. . . .").

449. *McCulloch*, 17 U.S. (4 Wheat.) at 421.

450. Corwin, *Marbury* and Judicial Review, *supra* note 3, at 5-6.

451. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 820 (1824) (Marshall, C.J.) ("In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form.").

452. Professor Amar has also noticed this peculiarity of the critics' position. See Amar, *Marbury*, *supra* note 315, at 460.

453. Every one of the critics discussed in this Article has fallen into the trap of criticizing Marshall for a statutory construction which they insist is (a) dishonest and silly, and (b) the only proper construction for purposes of their constitutional critique. The two criticisms are almost always stated together. See, e.g., Corwin, *The Doctrine of Judicial Review*, *supra* note 3, at 5-7 (arguing that Marshall failed to consider the Exceptions Clause: as authorizing additions to the Court's original jurisdiction of the cases "excepted," and then going on to complain that *Marbury* "rests upon the assumption that it was the . . . necessary operation of section 13 . . . to *enlarge* the original jurisdiction of the Supreme Court, and this cannot be allowed").

B. An Originalist Excursus: What the Exceptions and Regulations Clause Was About

It is a further problem for the critics' position that it turns out to be—quite strikingly—without historical support.⁴⁵⁴ Except for the mysterious appearance and rejection of their idea in *Ex parte Yerger*,⁴⁵⁵ it has never been entertained, as far as I can discover, in any court. Indeed, even *Marbury*'s lawyer did not conceive of it and did not offer any such argument in support of the jurisdiction for which he contended. Although Charles Lee asserted that Congress had power to add to the Court's original jurisdiction, he did not argue that that power had anything to do with the Exceptions Clause.⁴⁵⁶ For the proposition that Congress could add to the Court's original jurisdiction, Lee cited a 1793 case, *United States v. Ravara*.⁴⁵⁷ Numerous authorities have mindlessly followed Lee's over- (2003) 89 Virginia LR 1357 enthusiastic advocacy and confidently asserted that *Ravara* recognized a power in Congress to add to the Supreme Court's original jurisdiction. It is hard to believe that I am the only commentator who has actually read *Ravara*, but that case held only that Congress could make an exception from the Supreme Court's original jurisdiction, in order to permit criminal prosecutions of foreign consuls in courts *below*.

Ravara's unexceptionable ruling is a reflection of the early understanding that Congress's exceptions power had to be broad enough to protect the Court's original as well as its appellate jurisdiction, whatever Article III said.⁴⁵⁸ I find no record of some agreement or oversight that could explain the textual confinement of the Exceptions Clause to the Court's appellate jurisdiction. Fortunately, the Court has paid no attention to the omission. Since it is necessary that Congress have power to protect the Court from too onerous an original jurisdiction, that power has been implied; it is read into the Exceptions Clause. But nothing in *Ravara* or any other case holds that Congress can *add* to the Court's original jurisdiction. The vague but rejected suggestion in *Ex parte Yerger* to one side, for two hundred years not a single court has acted upon, had a good word to say for, or even had anything to say *about*, the position the critics think so self-evident.

We can dismiss this history by blaming it on *Marbury*, but we would have to be equally cavalier about the illustrious tradition of scholarly writing on Congress's Exceptions Clause power, a tradition until recently almost entirely undisturbed by the reading of the Exceptions Clause that *Marbury*'s critics think so obvious. Among the luminary scholars who have written in the field of federal jurisdiction, the debate concerning the Exceptions Clause has overwhelmingly involved the classic question of the extent of the power of Congress to curtail the appellate jurisdiction of the Supreme Court.⁴⁵⁹ The Exceptions

454. For a more thorough exploration see Clinton, *A Mandatory View*, *supra* note 427.

455. For the view that, whatever the *Yerger* Court said, it actually held that Congress constitutionally added habeas corpus to the Court's original jurisdiction, see Christopher Bryant & Carl Tobias, *Youngstown Revisited*, 29 *Hastings Const. L.Q.* 373, 380 & n.20 (2002). However, the *Yerger* Court explicitly rejected that approach, following *Marbury* in categorizing habeas as "appellate." *Yerger*, 75 U.S. (8 Wall.) at 96-97.

456. *Marbury*, 5 U.S. (1 Cranch) at 148 (argument of Charles Lee) ("Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution.").

457. 2 U.S. (2 Dall.) 297 (1793).

458. See *supra* note 431; *infra* note 493; *infra* Section V.B.

459. See, e.g., Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 *Stan. L. Rev.* 895 (1984); Lawrence Gene Sager, *The Supreme Court, 1980 Term, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *Harv. L. Rev.* 17 (1981); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 *U. Pa. L. Rev.* 45 (1975); Theodore Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 *Yale L.J.* 498 (1974); Hart, *supra* note 187. For fine recent work in this

Clause is authoritatively regarded in their (2003) 89 *Virginia LR* 1358 classic works as permitting Congress to delegate final authority over selected cases otherwise within the Supreme Court's appellate jurisdiction to courts below only, and to do so by withdrawing those cases from the Supreme Court entirely. Related work in this tradition touches upon the power of Congress to withdraw federal authority over selected cases otherwise within the jurisdiction of the courts below, confining those cases to the state courts.⁴⁶⁰ For obvious reasons of plain meaning, and given *Marbury*, it is not contemplated in this literature that Congress, by any contrivance, could add to the original jurisdiction of the Supreme Court. In the critics' view, presumably all of this distinguished, classic literature is as indefensible, dishonest, and silly as *Marbury*.

This is not to overlook those eminent writers who have accepted the critics' Exceptions Clause argument. What is fascinating in such cases is that a kind of schizophrenia tends to set in. In their work on the power of Congress to limit the appellate jurisdiction of the Supreme Court, these writers rarely deal with the alleged Exceptions Clause power, or any other power in Congress, to add to the Court's original jurisdiction—certainly not as a predicate for making exceptions to the Court's appellate jurisdiction. But when it comes to criticizing *Marbury*, the same writers, out of the blue, will (2003) 89 *Virginia LR* 1359 adopt the idea uncritically.⁴⁶¹ Undeniably, in so doing, they contribute to the general snowballing of credulity.

The omission of any such Exceptions Clause device from Charles Lee's argument in *Marbury* is particularly instructive, and not simply because Lee was a great lawyer. It means that the critics are casting aspersions upon the character of Chief Justice Marshall for not inventing an argument that counsel did not make. Indeed, Marshall is faulted for not inventing an argument that, however obvious they imagine it to be, had no existence at that time or at any previous time. Marshall is blamed for dishonestly omitting an obvious interpretation of Article III, which he also omitted at the Virginia ratifying convention, when under none of the stresses peculiar to the crisis of the first Jefferson administration.

I do not want to be terribly originalist about all this, but one wonders: Did delegates to the Constitutional Convention contemplate that Congress would have power to broaden the original jurisdiction of the Supreme Court? Did they see the Exceptions Clause as authorizing Congress to broaden the original jurisdiction of the Supreme Court? What about the ratification debates? What about the understandings reflected in the First Judiciary Act? Tellingly, the little evidence we have of early understandings consistently contradicts the critics' reading of the Exceptions Clause, their view of the

illustrious tradition, see, e.g., David E. Engdahl, *Intrinsic Limits of Congress's Power Regarding the Judicial Branch*, 1999 *BYU L. Rev.* 75; Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 *Geo. L.J.* 2445 (1998); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 *U. Chi. L. Rev.* 203 (1997); Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 *U. Pa. L. Rev.* 1499 (1990); Akhil Reed Amar, *Reports of My Death Are Greatly Exaggerated: A Reply*, 138 *U. Pa. L. Rev.* 1651 (1990); Daniel J. Meltzer, *The History and Structure of Article III*, 138 *U. Pa. L. Rev.* 1569 (1990); Clinton, *A Mandatory View*, *supra* note 427. For my view, finding the effective limits of Congress's jurisdiction-stripping power in the Due Process Clause rather than Article III, see Louise Weinberg, *The Article III Box: The Power of "Congress" to Attack the "Jurisdiction" of "Federal Courts,"* 78 *Tex. L. Rev.* 1405 (2000).

460. Louise Weinberg, *The Power of Congress over Courts in Nonfederal Cases*, 1995 *BYU L. Rev.* 731, 743 (1995) [hereinafter Weinberg, *The Power of Congress*] (giving the examples, among others, of Congress's leaving with state courts the exclusive jurisdiction over diversity cases that fall below the federal monetary threshold, and Congress's permitting concurrent state jurisdiction over diversity cases above the federal monetary threshold).

461. Compare, e.g., Currie, *The Constitution in the Supreme Court*, *supra* note 446, at 68 (finding plausible a reading of the Exceptions Clause as authorizing additions to the original jurisdiction of the Supreme Court), with David P. Currie, *Federal Courts* 320-26 (4th ed. 1990) (discussing the Court's original jurisdiction without reference to such a reading).

malleability of the original jurisdiction, and their view of Article III.

An interesting circumstance has some bearing on these questions. Attending the Constitutional Convention of 1787, there was, as we know, a substantial delegation of great Virginia lawyers and statesmen.⁴⁶² These men had themselves endured the consequences of a defective court system in which a single supreme court had been given a large measure of exclusive broad *original* jurisdiction. Professor Pfander recently called our attention to this Virginia arrangement.⁴⁶³ **(2003) 89 Virginia LR 1360** Intended as an economy, Virginia's concentration of judicial power turned out to be a disaster. Why such a system *would* be disastrous will appear more fully as we delve further into the critics' reading of the Exceptions Clause. For the present, we can say that, since the Virginia delegation would not have tolerated another such arrangement in the proposed Constitution, it is unlikely that the Convention would have put any such arrangement within the power of Congress. As John Marshall later argued in the Virginia ratification debate, the power of Congress to establish lower federal courts was a great *advantage* of Article III. What could be less convenient to a litigant, Marshall asked, than being dragged before a single tribunal hundreds of miles away?⁴⁶⁴ The question is highly relevant to our inquiry. As we shall see shortly, the critics' redistributive Exceptions Clause will not work unless the original jurisdiction redistributed thereunder to the Supreme Court is *exclusive*.

One can conceive of an argument to the contrary, that in 1787 it might have seemed expedient, notwithstanding the Virginia experience, to leave it to Congress whether to endow the Supreme Court with a more general original jurisdiction. After all, what if, for political reasons, Congress should be stymied in its efforts to establish lower federal courts? The short answer to this is that, even so, there would have been no need for such an expedient. The state courts were sitting with general jurisdiction, adequate then, as now, to try virtually every case. Indeed, the first Congress, in effect, left the state courts with exclusive jurisdiction over general federal litigation, an arrangement that lasted until 1875.⁴⁶⁵

(2003) 89 Virginia LR 1361 It might also be argued that the history of the Exceptions Clause itself supports the critics' reading. In the Constitutional Convention, the Committee of Detail prepared a draft version of Article III in which the Supreme Court was to have only appellate jurisdiction, except in "those instances in which the legislature shall make it original."⁴⁶⁶ That draft could be read as intending to provide Congress with the sort of redistributive power that *Marbury's* critics see in the Exceptions Clause today. But this, apparently, was either a false start or an inadvertence. The later notes of the Committee of Detail are very different. By July 23, 1787, the only redistributive power of Congress concerning the Court's original jurisdiction was a power to *relieve* the Court by assigning original jurisdiction cases to some lower court: "The legislature may assign any part of the jurisdiction

462. The Virginia delegates were John Blair, James Madison, Jr., George Washington, George Mason, James McClurg, Edmund J. Randolph, and George Wythe.

463. See Pfander, *supra* note 297, at 1551-52. Professor Pfander explains that a strict limit on the original jurisdiction would have been of great importance in the Virginia ratifying convention. See *id.* at 1551 & n.153. Apparently, Virginia had supplemented its rather primitive system of inadequate local courts with a broad original jurisdiction in its distinguished supreme court, the Court of Appeals. As we might have predicted, the result of this economy was an impossibly backlogged original docket in the the Virginia supreme court. Virginia eventually had to assign all of that jurisdiction to the expensive multiple judicial system with a qualified judiciary that she had needed in the first place. *Id.* at 1552 & n.3.

464. See Speech (June 20, 1788), in 1 *The Papers of John Marshall* 276 (Herbert A. Johnson ed., 1974).

465. Original jurisdiction over cases arising under federal law finally was vested in the circuit courts, at the time still serving as the main federal trial courts, by the Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470. Today, of course, that jurisdiction is in the district courts. 28 U.S.C. § 1331 (2000).

466. 2 *Records of the Federal Convention*, *supra* note 67, at 147.

abovementioned . . . to such Inferior Courts, as it shall constitute from time to time.”⁴⁶⁷ Any earlier mistake to the contrary had been rejected and expunged. Two weeks later, in the August 6 Report of the Committee of Detail, the Exceptions Clause had been placed where it is today, in the context of the Court’s appellate jurisdiction. In this draft of August 6, an added clause does separately recognize a redistributive power of Congress over the Supreme Court’s jurisdiction, but this power is again explicitly limited to a power of reassignment to the *lower* federal courts (“such Inferior Courts, as [Congress] shall constitute from time to time”).⁴⁶⁸ Thus, as the provision is reported out of the Committee of Detail, Congress has *no* power to shift cases from one head of the Court’s jurisdiction to the other, and Congress also has no power to add to the Court’s original jurisdiction under any circumstances. The Exceptions Clause attained its current form in the Committee of Style, with no changes to these fundamentals.

(2003) 89 Virginia LR 1362 Some support for the critics’ view arguably might be found in the fact that the First Judiciary Act significantly extended the reach of the text of the Exceptions Clause in a way not challenged in *Marbury*. Almost from the beginning it seems to have been understood, for reasons that will become plain in this Section, that Congress had to have power, whatever the Exceptions Clause said, either to give the Court significant discretion over its own trial docket, to legislate significant exceptions to it, or both. This implied power was exercised immediately, when the authors of the First Judiciary Act, Section 13, made only a small part of the Supreme Court’s original jurisdiction mandatory.⁴⁶⁹ Eventually the constitutionality of this understanding was confirmed.⁴⁷⁰ This implied expansion in Congress’s authority, however, is very different from the expansion the critics would read into the Clause. This implied power is only to authorize *exceptions*, not additions. It is true that a case thus made triable in courts below is “reshuffled” into the Court’s appellate jurisdiction. But Congress can relieve, and has relieved, the burden of the appellate docket upon the Court by giving the Court complete discretion over the cases it will accept for review.⁴⁷¹

The distinction between the described expansion of Congress’s authority under the Exceptions Clause, and the expansion proposed by the critics, can be understood by considering it in light of the original purposes of the Exceptions Clause. Let us turn, then, to the views of the founding generation—their writings and debates—to determine, if we can, what those purposes were.

When we do turn to whatever evidences we have of the views of the founding generation, we find those views the same in all important respects as Chief Justice Marshall’s in *Marbury*. Although far more moderate in his politics than Hamilton, Marshall characteristically accepted Alexander Hamilton’s positions on structural features of the Constitution.⁴⁷² It is to be expected that Hamilton would be found to reinforce Marshall. Indeed, Hamilton was clear **(2003) 89 Virginia LR 1363** in *The Federalist No. 81*, written during the ratification controversy in New York, that the Supreme Court would be almost exclusively an appellate Court. True, a narrow access to this most dignified forum would be afforded certain parties for trial, but Hamilton stressed that the Court’s original jurisdiction was sharply limited to

467. See James Madison, Notes of Debates in the Federal Convention of 1787, at 393 (Adrienne Koch ed., 1984).

468. 2 Records of the Federal Convention, *supra* note 67, at 186. The explicit redistribution clause was amended out of Article III on August 27. *Id.* at 425. For a logical slip leading to the erroneous conclusion that the redistributive clause of this draft supports the critics’ position, see the otherwise excellent Sager, *supra* note 459, at 35 & n.51. Professor Sager’s mistake is explained in Clinton, *A Mandatory View*, *supra* note 427, at 855.

469. The Judiciary Act of 1789, § 13, provided that the Court’s original jurisdiction over certain cases was concurrent with the jurisdiction of courts below. Ch. 20, § 13, 1 Stat. 73, 80-81.

470. *Ames v. Kansas*, 111 U.S. 449, 463-69 (1884).

471. 28 U.S.C. § § 1254, 1257.

472. *Konefsky*, *supra* note 42.

the two named classes of parties. These were parties whose dignity was sufficient to justify trial in the Supreme Court:

The Supreme Court is to be invested with original jurisdiction, only “in cases affecting ambassadors, other public ministers, and consuls, and those in which *a state* shall be a party.” Public ministers of every class are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal.⁴⁷³

But considerations of “dignity” alone could not fully account for the extraordinary narrowness of this jurisdiction. If “dignity” were the only concern, similar access should have been accorded members of the Cabinet, governors, and senators. Hamilton’s reference to “the public peace” suggests a further implication of these omissions. The Framers were also concerned about protecting the named parties from local passions and prejudices. A state could hardly have confidence in the courts of an opponent state. As for foreign dignitaries, they might well meet local hostility in courts below.

Above all, the stringent limits on the Court’s original jurisdiction were intended to protect the Court’s far more important work—its appellate jurisdiction. To admit other persons to the sacred precincts, if the Court were not given discretion to decline jurisdiction, **(2003) 89 Virginia LR 1364** would be to undermine the Court’s vital function in the constitutional plan. Trials are time-consuming and arduous in a way that appeals are not. The concern in the founding generation that the original jurisdiction might overwhelm the *raison d’être* of the Court, its appellate jurisdiction, is evidenced by the provisions of the First Judiciary Act of 1789, which, as we have seen, in Section 13, implied a power to make exceptions to the original jurisdiction of the Court, and endowed the Court with discretion to decline original jurisdiction in five classes of cases.⁴⁷⁴

In the Virginia ratifying convention, Edmund Pendleton, a distinguished statesman, President of the Court of Chancery of the Commonwealth of Virginia, spoke at length in defense of the proposed Constitution, and touched particularly upon the original jurisdiction of the Supreme Court. For Pendleton, the Court’s original jurisdiction was quite as strictly limited as Marshall would hold it to be in *Marbury*. On the question whether the Supreme Court’s original jurisdiction could constitute a threat to state courts of first instance, Pendleton pointed out that the original jurisdiction is limited to foreign ministers and states. He insisted that the Constitution “excludes [the Supreme Court’s] original jurisdiction in all other cases.”⁴⁷⁵ Pendleton did not read the Court’s original jurisdiction as mandatory. Indeed, he confidently contemplated, from the necessities of the case, that Congress would have power to protect the Court from too burdensome an original jurisdiction. “Notwithstanding this [original] jurisdiction is given to the Supreme Court,” he argued, “yet Congress may go farther by their laws, so as

473. The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

474. The Judiciary Act of 1789, § 13, authorized the Court to decline jurisdiction in cases between a state and its own citizens, between a state and citizens of another state, between a state and an alien, in cases brought by an ambassador as party plaintiff, and in cases in which a consul or vice-consul was a party. Ch. 20, § 13, 1 Stat. 73, 80-81.

475. 3 Elliot’s Debates, *supra* note 136, at 518.

to exclude its original jurisdiction, by limiting the cases wherein it shall be exercised.” Correctly, as it turned out, Pendleton argued that Congress could “permit foreign ambassadors to sue in the inferior courts, or even to compel them to do so, where their causes may be trivial.”⁴⁷⁶ As we have seen, the drafters of the First Judiciary Act fully agreed with Pendleton in this expanded reading of the Exceptions **(2003) 89 Virginia LR 1365** Clause authority, making large parts of the Court’s original jurisdiction discretionary from the beginning.⁴⁷⁷

Pendleton was at pains to explain that any power of Congress over the Court’s original jurisdiction was a power to limit, not to extend. It was ratcheted one way: “Yet the legislature cannot extend [the Court’s] original jurisdiction, which is limited to these cases only.”⁴⁷⁸ As Pendleton saw it, Congress had no power, on any theory, to *add* to the Supreme Court’s original jurisdiction. This, of course, was Chief Justice Marshall’s position in *Marbury*, later to be elaborated in *Cohens v. Virginia*.⁴⁷⁹ The redistributive power of Congress under Article III was a power to put concurrent original jurisdiction in courts *below*, or to remove cases from the Court’s appellate jurisdiction, delegating final authority over such cases, again, to courts *below*.

In the Pennsylvania ratifying convention, the chief defender of Article III was the future Supreme Court Justice, James Wilson. Wilson was particularly qualified to speak to Article III. He had played a leading role in the Committee of Detail at the Constitutional Convention of 1787, and is thought to have been a chief architect of the Committee’s draft, a draft in all important respects in agreement with the final draft of Article III. We have Wilson’s protective, specific reading of the Exceptions Clause. Wilson thought the Exceptions Clause gave Congress power to protect the Supreme Court’s vital appellate docket from a flood of cases. If the Supreme Court’s appellate obligations should be “attended with inconvenience, the Congress can alter them as soon as discovered.”⁴⁸⁰ The key word in this remark of Wilson’s is “inconvenience,” because it reinforces our perception of the Court-protective purposes underlying the Exceptions Clause. Wilson’s understanding is equally protective if we read it as addressed to the “convenience” of the parties. Heavy Supreme Court dockets, particularly **(2003) 89 Virginia LR 1366** any expansion in the necessarily cumbersome trial jurisdiction of the Court, would at a minimum delay appellate justice. We get similar help from Pendleton’s speech to the Virginia ratifiers. Turning to the explicit provisions of the Exceptions Clause, Pendleton felt it important to point out the limits of the authority it gave to Congress. Pendleton insisted that Congress could regulate the Court only “to accommodate the convenience of the people.”⁴⁸¹ Given this shared conviction of the purpose of the Exceptions Clause, neither Wilson nor Pendleton could have contemplated an interpretation of the Exceptions Clause that would have given Congress the redistributive power contended for by *Marbury*’s critics. Especially Pendleton, with his insight into the need for Supreme Court discretion over its original jurisdiction,⁴⁸² would never have contemplated the power so obvious to *Marbury*’s critics—a power to shift cases from the Court’s overburdened appellate docket to the Court’s original docket. A

476. *Id.*

477. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (providing that jurisdiction be non-exclusive with respect to selected parties within the Supreme Court’s original jurisdiction); *United States v. Ravara*, 2 U.S. (2 Dall.) 297 (1793) (holding that Congress has power to authorize prosecution in courts below of certain parties otherwise within the Court’s original jurisdiction).

478. 3 Elliot’s Debates, *supra* note 136, at 518.

479. 19 U.S. (6 Wheat.) 264 (1821).

480. 2 Jonathan Elliot, Debates of the Several State Conventions on the Adoption of the Federal Constitution 494-95 (1861).

481. *Id.* at 518.

482. See *supra* notes 474-75 and accompanying text.

burden cannot be lifted by being shifted; and a case too burdensome to hear on appeal cannot become less burdensome to *try*.

The power to limit jurisdiction was certainly the only Exceptions Clause power that was before the ratifiers in Virginia. The fear evidently was that cases coming up from thirteen separate judicial systems would inundate the Court's appellate docket.⁴⁸³ In the Virginia ratifying convention, James Madison addressed the problem of "vexatious appeals," and explained that if this problem did materialize it could be "remedied by Congress."⁴⁸⁴ Indeed, under the Exceptions Clause, the first Congress, for example, limited the Court's jurisdiction over state judgments to that fraction of federal-question cases in which the party relying on federal law was the loser.⁴⁸⁵

(2003) 89 Virginia LR 1367 To some extent, Congress's authority to make "Exceptions" may also have been justified by a felt need to put at Congress's disposal a means of shielding state jury findings⁴⁸⁶—and state law as well⁴⁸⁷—from Supreme Court appellate interference. After all, Article III gives the Supreme Court power both as to "law and fact."⁴⁸⁸ In retrospect, the fear that the Supreme Court would attempt to revise state laws seems well justified by the historical record.⁴⁸⁹ However, in *The Federalist No. 81*, addressing himself to ratifiers in New York, we find Alexander Hamilton noting the prevailing lack of concern about state law, but remarking upon the more manifest concern of the antifederalists about jury findings. To these doubts, Hamilton responded with an argument based on the Exceptions Clause: "The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries. This would certainly be an authorized **(2003) 89 Virginia LR 1368** exception."⁴⁹⁰ Here, too, the purposes underlying the Exceptions Clause help us to understand its intended scope. Since the ratifiers were given to understand that those purposes included protecting state

483. Early in the debates, James Madison expressed his fear that unless Congress had power to ensure that the inferior tribunals would have final jurisdiction in many cases, the Supreme Court would be deluged with appeals "to a most oppressive degree." 1 Records of the Federal Convention, *supra* note 19, at 124; James S. Liebman & William F. Ryan, "Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts, 98 Colum. L. Rev. 696, 716 (1998).

484. 3 Elliot's Debates, *supra* note 136, at 538.

485. Judiciary Act of 1789, § 25, 1 Stat. 73.

486. Some commentators take the view that preservation of jury findings was a chief concern underlying the Exceptions Clause. See, e.g., Raoul Berger, *Congress v. The Supreme Court* 286-87 (1969); Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 Am. U. L. Rev. 497, 512-13 (1983) (stating that "the exceptions clause was designed to allow Congress to protect state court findings of fact and jury verdicts"); Irving Brant, *Appellate Jurisdiction: Congressional Abuse of the Exceptions Clause*, 53 Or. L. Rev. 3, 5 (1973); Henry J. Merry, *Scope of the Supreme Court's Appellate Jurisdiction: Historical Basis*, 47 Minn. L. Rev. 53, 61-62 (1962).

487. The power over "fact" and "law," of course, is located in the text describing the Supreme Court's appellate jurisdiction, rather than in the Exceptions Clause. U.S. Const. art. III, § 2, para. 2, cl. 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."). However, John Marshall succeeded in combining the two in defending Article III in the Virginia ratifying convention. See 3 Elliot's Debates, *supra* note 136, at 560 ("Congress is empowered to make exceptions to the appellate jurisdiction, as to law and fact, of the Supreme Court.").

488. See Gunther, *supra* note 459, at 901 (arguing that the concern for jury findings of fact could not be the sole policy underlying the Exceptions Clause in view of the Clause's reference to "law").

489. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842) (holding that on general questions not governed by federal law, by fixed local usages, or by state statutes, federal courts were free to apply principles of "general" common law). For the argument that "general" common law only gradually came to require displacement of the case law applied in state courts, see Louise Weinberg, *Federal Common Law*, 83 Nw. U. L. Rev. 805, 822-30 (1989).

490. *The Federalist No. 81*, at 495-98 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

findings of fact and interpretations of state law from Supreme Court revision, it could not conceivably accord with the expectations of the ratifiers to permit Congress to create an alternative original forum in the high Court for some undefined classes of cases, a forum that would completely *displace* state judges and juries.

But let us return to the Virginia ratifying convention, where a speaker of particular interest to us, of course, was John Marshall. On both the original jurisdiction and the Exceptions Clause, we have already seen that the Framers and ratifiers shared the views Marshall expressed in *Marbury*. If Marshall's views were contrived, dishonest, or silly, so also were the views of the founding fathers. It is also significant that, in the Virginia ratifying debates, the young John Marshall offered exactly the same understanding of these rudiments of Article III as he would expound in *Marbury v. Madison*—when under no such political pressures as attended him in *Marbury*, and engaged in no such “retreat” as wise heads have discovered in *Marbury*. To Marshall, the Exceptions Clause was a power of Congress to limit and control the Court's appellate jurisdiction, certainly not to augment its original jurisdiction. Marshall's concern in the Virginia ratifying convention was mainly to allay antifederalist fears that the Supreme Court's appellate jurisdiction would somehow interfere with justice as it then was. Marshall posed one of his rhetorical questions. What, he asked, is an exception, other than a diminution?⁴⁹¹ He read the Exceptions Clause literally, as wholly limited to the Court's appellate jurisdiction, stating, “Congress is empowered to make exceptions to the [Supreme Court's] appellate jurisdiction, as to law and fact These exceptions certainly go as far as the legislature may think proper for the interest and liberty of the people.”⁴⁹²

(2003) 89 Virginia LR 1369 I pause to call attention again to the policy directives variously suggested by the Constitution's proponents in these debates. John Marshall points us in the direction of the “interest and liberty of the people.” Marshall's sense of the interpretive constraints on the Exceptions Clause seems subtly broader and more pointed than either Pendleton's or Wilson's. Although Wilson looked to the convenience of the Court itself, and Pendleton addressed the convenience of both the Court and “the people,” Marshall, characteristically, was thinking about the interests and freedoms of individuals. He saw that crowded dockets are not merely matters of judicial convenience, but are barriers to the rule of law. Marshall's formulation conveys an understanding that when private litigants are balked of justice, there is also serious injury to the interests of “the people”—by which he seems to have meant the public interest.

These various expressions of concern among Framers and ratifiers point us in one interpretive direction, showing us the effective constraints on the Exceptions power. With this background we ought to be able to distinguish between valid and invalid interpretations of the Exceptions Clause. John Marshall's understanding of the policy direction of the Clause will become particularly useful shortly, when we consider the risk of injuries to “the people's interest and liberty” posed by the critics' reading of the Exceptions Clause—if it were ever to be taken seriously. The concurrence of early proponents of the Constitution on the purpose of the Exceptions Clause and of the rigidity of the limits on the original jurisdiction is quite marked. We may safely conclude that, at a minimum, the convenience of both the

491. 3 Elliot's Debates, *supra* note 136, at 560 (remarks of John Marshall) (“What is the meaning of the term *exception*? Does it not mean an alteration and diminution?”).

492. *Id.* I assume that Marshall would have understood the needs of the Framers' design, notwithstanding his fidelity to the textual limitations of the Exceptions Clause power. Presumably, unlike Pendleton, Marshall would have found the power of Congress to protect the *appellate* jurisdiction from an inundation of *original* cases in some other part of the Constitution, perhaps as a necessary and proper implication from Congress's Article I power to establish tribunals, or Article III power to establish the inferior courts. In his great cases on the subject, *Marbury*, *Cohens*, and *Osborn*, Marshall's understanding of Article III was perfect.

Court and the public should determine the limits of the Exceptions Clause power. It is odd, then, that *Marbury's* latter-day critics should understand the Exceptions Clause to empower Congress to impose the ruinous “inconvenience” upon both Court and litigants of a heavy Supreme Court trial docket.

(2003) 89 Virginia LR 1370 C. Of Additions and Epicycles

Unfortunately for the critics’ reading of the Exceptions Clause, its lack of historical foundation is the least of its defects. Under this proposal, of course, Congress could swamp the Court with trials of workaday cases, overwhelming the Court’s important work. That is by far the greatest difficulty, and I will consider it more fully in two later Sections. Here, I simply point out some of the more awkward aspects of the position. Like all strained and implausible ideas, the critics’ Exceptions Clause generates a host of complexities.

It might be argued at the outset that if Congress should be so imprudent as to attempt to exercise this power in a given class of cases, the Justices could easily avoid substitution of a trial for an appellate docket by assigning the new original cases to a magistrate, or trying those cases to a single Justice or panel of Justices, thus preserving the Court’s appellate role in that class of cases by preserving the remaining Justices’ ability to hear any resultant appeals. But resort to such expedients would cause the whole mechanism to collapse amid its internal contradictions. Since Congress’s presumed purpose is to effectuate an “Exception” to the appellate jurisdiction, Congress cannot add to the original jurisdiction if to do so will not, in fact, achieve an “Exception.” It would be wholly outside the terms of the critics’ proposal to impute the “means” to Congress to effectuate a nonexistent “end.”

Thus, Congress would not only be unable to enact such loopholes, but in order to secure the new legislation Congress would have to forbid the Court from creating any such loopholes for itself. Congress would have to provide that cases it has excepted from the Court’s appellate jurisdiction by putting them into the Court’s original jurisdiction must remain excepted from the Court’s appellate jurisdiction. That is, the new original cases must be *nondelegable*, and must be tried to the full “Supreme Court”—that is, en banc—with a quorum satisfiable only by the full Court, every Justice, ill or well, in attendance. For the same reason, the Court could not counter this unwanted jurisdiction by holding that it has discretion to remand unwanted original-jurisdiction cases to any lower court with concurrent jurisdiction over them,⁴⁹³ or by developing **(2003) 89 Virginia LR 1371** prudential threshold doctrines giving itself discretion to stay some of the new cases or dismiss them outright.⁴⁹⁴ Congress’s alleged redistributive power would not be reliably effectual unless it was a power to confer jurisdiction that is also *mandatory, nondelegable, exclusive*, and solely triable to the court en banc. Otherwise it would fail to achieve the “Exception” to the appellate jurisdiction that is the “end” it is supposed to be the “means” to accomplish, and Congress’s power would be inadequate to support the legislation. Nor is it necessary literally to apply *McCulloch* to test the power of Congress under the Constitution. The critics’ reading of the Exceptions Clause depends on the same analysis.

There are also two structural complications that must be taken into account. Appeals and trials, like

493. See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (making the Court’s original jurisdiction, in certain cases, concurrent with the jurisdiction of courts below). A similar situation obtains today. See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-101 (1972) (explaining that only cases between two states are within the Supreme Court’s mandatory trial jurisdiction; the Court has discretion to decline jurisdiction in single-state cases and remand them to a federal district court); *Ames v Kansas*, 111 U.S. 449, 463-69 (1884) (same).

494. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717-19 (1996) (treating the various theories of federal abstention in a unified way, and explaining that federal courts always have discretion to dismiss suits in equity or for declaratory judgments, and always have discretion to stay, but not dismiss, actions at law for damages).

apples and oranges, are very different things. One cannot “redistribute” an appeal into a trial. A trial is a much more burdensome proceeding. And such a “redistribution” in the Supreme Court cannot take place without also changing the jurisdiction of courts below. Exclusive original jurisdiction in the Supreme Court over any case must strip the lower courts of their original jurisdiction over that case. Thus, the alleged power of Congress to redistribute cases from the Court’s appellate to its original docket, is also a power, since the cases redistributed to the Court for trial would be mandatory, exclusive, and nondelegable, to strip the state courts and lower federal courts of any jurisdiction over the “redistributed” cases.

In light of all these sobering facts, it would be helpful, especially given the Court-protective concerns of the Exceptions Clause, if we could find the effective limits of the critics’ proposal. It might be argued that the proposal is confined to the facts of *Marbury*. But the logic of the critics’ position seems to go well beyond the facts of *Marbury*. The critics are arguing, after all, for a power in Congress under the Exceptions Clause, something logically independent (2003) 89 Virginia LR 1372 from the facts of any particular case. Thus, it might be argued that the proposed power is a power to shift into the Court’s original jurisdiction any and all cases to which the Article III “judicial power” extends.⁴⁹⁵ The Exceptions Clause, in this view, could be a power to vest a near-plenary original jurisdiction in the Supreme Court, not only over general claims of federal right, but also over controversies between enumerated kinds of diverse parties, and over claims in admiralty.

At the same time, there is the obvious difficulty that the original jurisdiction, after all, is a party-based jurisdiction. Thus, *Marbury*’s critics may have to concede that Congress has no power to add federal-question or admiralty cases to the Court’s original jurisdiction, in the absence of some party or parties to whom the federal judicial power extends under Article III. On this view, the power for which the critics contend would have to be limited to classes of Article III parties, unless they mean to say not only that Congress can add to the original jurisdiction, but that Congress can transform its very nature. We are left, then, with cases in the pattern of *Marbury*, and to the various heads of diversity jurisdiction in Article III. But when we begin to consider the party-based cases for this purpose, further difficulties arise.

It is doubtful that Congress could constitutionally add any party-based cases to the Court’s original jurisdiction if it attempted to do so on a theory of having intended to withdraw those cases from the Court’s appellate docket. Those cases, without more, have no existence in the Court’s appellate jurisdiction. The Court’s appellate jurisdiction in party-based cases is limited by *Erie v. Tompkins* and *Murdock v. Memphis*.⁴⁹⁶ Diversity and other party-based cases cannot (2003) 89 Virginia LR 1373 be reviewed by the Court unless they raise some issue of federal law, substantive or procedural, in courts below. Thus, it would seem that Congress’s alleged power to make additions to the original jurisdiction, if based on its authority to make exceptions from its appellate jurisdiction, must be limited to party-based cases over which the Court could have exercised appellate jurisdiction—that is, cases raising

495. Such jurisdiction, when not exclusively federal, would be concurrent with the state courts as well; thus, both state and federal courts below would be vulnerable to this jurisdiction-stripping feature of the critics’ proposal. See generally Weinberg, *The Power of Congress*, supra note 460 (arguing that Congress has power to allot jurisdiction to state as well as federal courts over even borderline federal questions, and over some state questions as well).

496. In *Murdock v. Memphis*, 87 U.S. (20 Wall.) 590, 636 (1875), the Court held, as a matter of construction of the Court’s own jurisdictional statutes, that in cases coming up to the Supreme Court from the state court systems, the Supreme Court would not apply the general federal common law then available in federal courts under the doctrine of *Swift v. Tyson*. With the positivistic recognition that a state’s case law as well as its statutes are the law of the state, such displacements of otherwise applicable state law were ultimately held unconstitutional in *Erie v. Tompkins*, 304 U.S. 64 (1938).

federal questions.⁴⁹⁷

Under this necessarily adjusted reading of the Exceptions Clause, however, we would be faced with two anomalies. First, it would be anomalous to burden the Supreme Court with mandatory trials of quotidian state-based claims, given the importance of the federal questions on the Court's appellate docket, simply because some federal side-issue appears in those cases. This anomaly seems underscored by the reflection that it should be relatively easy for counsel to allege some federal issue in every case. Second, it would be anomalous for Congress to force the Supreme Court to adjudicate a case likely to be based on a state claim, when Congress would not be free to authorize Supreme Court trial of a federal claim, absent diversity or other party-based jurisdiction.

It is a possible limit on the Exceptions power, even assuming that Article III's list of parties within the original jurisdiction was not intended to be exclusive, but merely illustrative, that only very dignified parties, representatives of sovereign nations and states, are "illustrated" in Article III as having possible access to the high Court for their trials. Ordinary parties are not on that list. Arguably, then, only parties of similar dignity could be given access to trial in the high Court. This feature, it might be supposed, would furnish important protection to the Court, preventing Congress (2003) 89 Virginia LR 1374 from swamping the Court and drowning out its essential work. But how would it be determined, in the general run of party-based cases, whether a party is sufficiently dignified to warrant giving it access to, or bringing it before, the Supreme Court? Is a large corporation dignified? Is its chief executive officer? Is a professor of law?

Strangely, none of the critics see their interpretation of the Exceptions and Regulations Clause, however ungrounded in history, however complicated and unworkable, as strained and implausible in the way they feel *Marbury* to be. It is not a strain, to them, to read a Court-protective clause as an authorization to burden the Court. It is not a strain to them that their approved "additions" to Supreme Court jurisdiction must, by necessary implication, be within the Court's exclusive jurisdiction, and be mandatory upon the Court and nondelegable to a court below, state or federal, or to a magistrate, single Justice, or panel of the Court, but must be tried to the full Supreme Court, sitting en banc. It is not a strain to them to transform a very short invitation list of dignified parties into an invitation to every plaintiff in a diversity case with a federal question and a reasonably impressive résumé or opponent to litigate in the Supreme Court. It is not a strain to them to destroy the jurisdiction of courts nationwide over innumerable cases raising inconsiderable federal issues, in order to achieve an unneeded removal of those cases from the Supreme Court's appellate docket, which today is already completely discretionary. It is not a strain to them to have to back and fill, stopping up loopholes and adding qualifications, like pre-Copernican astronomers, adding epicycles upon epicycles to geocentric orbits to explain what could only be explained by heliocentric ones.

D. The Power to Add is the Power to Destroy: Of Hazard and Accountability

497. See *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) (holding that a single "ingredient" of federal law in a state-law case "arises under" federal law within the meaning of Article III; explaining that the Article III power over federal questions is a much broader power than the *statutory* power of the district courts over federal questions). The *Osborn* Court reasoned that the Supreme Court must have power to review federal questions coming up from the state courts, or arising by way of defense or counterclaim, or in any other fashion. Therefore, Congress has power, whether it uses all of that power or not, to give the lower federal courts jurisdiction as broad as the Supreme Court's appellate jurisdiction. Under this theory a federal district court may constitutionally exercise original jurisdiction in a nondiversity case over a claimed infraction of a rule of state tort law that merely incorporates a federal standard. *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804 (1986).

Marbury's critics would say, at this juncture, that we have been making unnecessary difficulties for their position. All that they have in mind is a critique of *Marbury*. The only reading of the Exceptions Clause that they have offered, they would insist, limits the Exceptions Clause power by the facts of *Marbury*. Thus, the only cases to be considered would be suits for mandamus against government officials for omissions of nondiscretionary acts. This (2003) 89 Virginia LR 1375 would be the entire extent of the new party-based jurisdiction Congress could allocate to the Supreme Court. As for the problem of "dignity," presumably James Madison would have passed muster. To them it is obvious that Congress gave the Court jurisdiction in that particular case (although they do not forgive Chief Justice Marshall for taking the same position as a working hypothesis). It is also obvious to the critics that the jurisdiction in *Marbury* was constitutional, in light of their interpretation of the Exceptions Clause.

I have been suggesting that the class of cases to which the proposed reading of the Exceptions Clause could rationally apply is limited in all sorts of odd and unworkable ways. But even if Congress's proposed power would be limited to the facts of *Marbury*, it turns out that the critics' Exceptions Clause would still be a power to substitute a trial court for the great appellate Court that is a co-equal branch of American government. The effect would still be to crowd out the Court's appellate jurisdiction with the enormously time-intensive business of conducting mandatory trials, with or without juries. It thus would be a power to impede the Court in the exercise of its essential functions.⁴⁹⁸

Adoption of the critics' reading would be a calamity. Every new "original" case would be a body blow to the Court's appellate supervision of the supremacy, uniformity, and meaning of federal law, of constitutional rights, and of the validity of exercises of governmental power. If a large enough class of defendant officials and agencies is included in the new jurisdiction, the Court could be left with little or no time for this important work—its appellate role in the constitutional plan. The power to add is the power to destroy. Even Professor Van Alstyne halted discussion of the supposed reallocative function of the Exceptions Clause, when he noted that Congress could "sink the Court beneath an unbearable workload of cases assigned to its original jurisdiction."⁴⁹⁹ This jurisdiction-(2003) 89 Virginia LR 1376 packing could make Franklin Delano Roosevelt's court-packing plan look benign in comparison.

To test this gloomy prediction, let us accept our more modest description of the Exceptions Clause power, and assume that Congress has power to give the Supreme Court original jurisdiction over mandamus suits against relatively high officials of the federal government. Now, let us ask ourselves: What sort of original claim is almost invariably one against a government official? There will be statutory claims, of course.⁵⁰⁰ There will be federal and state common-law claims. But the hypothetical legislation clearly is addressed at a minimum to *constitutional* claims. That being so, the jurisdictional grant under consideration, in the guise of an "Exception," would probably have to contemplate suits against state as well as federal defendant officials, because *Marbury* does. It would probably have to contemplate injunction and even damages, as well as mandamus, because the facts in *Marbury* would apply to any remedy Congress was willing to authorize—although, arguably, the remedies available in the Court's original jurisdiction may not be within the complete control of Congress, since the original

498. The Court has pointed out the relation between a heavy original docket and an impaired appellate power. See, e.g., *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972) (Douglas, J.) ("We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.") (citing *Washington v. General Motors Corp.*, 406 U.S. 109 (1972)).

499. Van Alstyne, *A Critical Guide*, supra note 27, at 33. This was a fortunate abandonment of an untenable hypothesis that John Marshall had weakened the Supreme Court by permitting no additions to its original jurisdiction. *Id.* at 32-33.

500. But see, e.g., *Dalton v. Specter*, 511 U.S. 462, 472-74 (1994) (holding that the President's alleged violation of the Base Closing Act was not a final agency action for purposes of relief under the Administrative Procedure Act; holding also that not every statutory wrong by a government official amounts to a constitutional violation).

jurisdiction is established directly by Article III itself. Then, too, since we are hypothesizing suits against “high” government officials, presumably their discretion is so great that the jurisdiction would be largely illusory if limited to mandamus.

This new jurisdiction, we have already determined, must be nondelegable, mandatory, and exclusive, or else it cannot be justified as an “exception” to the Court’s appellate docket. Thus, the new jurisdiction would have the effect we have already anticipated, not mentioned by *Marbury*’s critics, of clearing all constitutional litigation against high government officials, however defined, out of state and federal courts nationwide, and channeling it into the Supreme Court.⁵⁰¹ The Court’s new trial jurisdiction, far from being severely limited, as we have been imagining, would be as large as **(2003) 89 Virginia LR 1377** the vague category, “high official,” would make it. The pressure of like cases having to be decided alike would inevitably put severe limits on the Court’s power, and on Congress’s power as well, to define this category narrowly.

This single Court, the Supreme Court, would be a very inconvenient venue for the country’s major constitutional litigation, as both Professors Amar and Pfander have already observed.⁵⁰² The Court’s trial docket could become so crowded that, as a practical matter, litigants seeking to enforce the Constitution, who cannot settle their claims, might wait out their lifetimes for a trial. Such an arrangement, as we have also seen, would have been quite unacceptable to the Virginia delegation at the Constitutional Convention. And it would be a betrayal of a key promise of American constitutionalism after *Marbury*—that a litigant with a good claim against a government official would be able to assert it in some court.

There is also the problem of political accountability. Constitutional litigants might not notice that, in gaining theoretical trial access to the Supreme Court, they have lost practical access to our enforceable Constitution. It is even less likely that they would notice, given this other, more serious, loss, that they had lost the opportunity, statistically small as it now is, to appeal, in a proper case, to a deliberative Supreme Court. Meanwhile, courts around the country, state and federal, in a large class of constitutional cases, would lose their historic powers of debate, discussion, and creative contribution. Yet Congress could make these drastic changes without commensurate political accountability for attacking the Court, **(2003) 89 Virginia LR 1378** and indeed for attacking the dual-court system. The public might well perceive, instead of a jurisdiction-stripping Congress, a Congress *adding* to the powers of the Supreme Court, and even enhancing its role. Congress might be seen not as destroying access to state courts and the lower federal courts for these largely constitutional cases, but rather as trying to furnish a better court for them. The lines of political accountability are obviously confused when a part of the public can take for an enhancement of American constitutional litigation a measure that is in fact an assault on the courts. Finally, even that part of the public that understands the new dispensation as an assault on the courts may fail to see it for what it also is, an assault on the

501. For George Mason’s fears of such a situation, see 2 Records of the Federal Convention, *supra* note 67, at 638. For the similar situation obtaining for many years in mandamus actions against federal officers, see *supra* note 267.

502. See Amar, *Marbury*, *supra* note 315, at 474-76 (using the inconvenient venue problem as a general theory of the distribution of the Supreme Court’s jurisdiction); Pfander, *supra* note 297, at 1519 (agreeing with Amar about the venue problem). Professor Amar makes the further point, as did Marshall’s colleague, Justice Chase, that the Constitution would not have been ratified had it permitted concentration of a significant amount of federal litigation in the capital. See Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *supra* note 186, at 110-11. Amar points out that one of the reasons for the Madisonian compromise, by which the Constitution does not itself establish the lower federal courts, was a rational fear of inconvenient litigation even in those courts. Typically there would be only one federal court in a state, and traversing a state in those times might require an arduous journey of several days. Here I am making a different argument, that concentration of litigation in a single forum is destructive of the rights of individuals. See also *supra* notes 462-63 and accompanying text (regarding the Virginia experience with such an arrangement).

Constitution. That laymen should fail to grasp what is at stake should not be surprising, since many learned experts have failed to grasp this.

Meanwhile, under the critics' reading of the Exceptions Clause, America could become a rather dangerous place. Again, assuming the power is applied only to officer suits like *Marbury*, the ensuing damage to an enforceable Constitution would mean a seismic shift in power to the executive. There would be no practical remedy for government wrongs by "high" officials, except the doubtful expedient of impeachment, and for elected officials, elections.⁵⁰³ But by adding state electoral officials to the list of parties within the nondelegable, mandatory, exclusive, original jurisdiction of the Supreme Court, Congress could ensure that there would be scant effectual check on government fraud in the electoral process. For appointed officials, meanwhile, not even the check of elections would be available. Executive decree and arbitrary action could increasingly become the norm of American government at all levels.

In such ways, for want of a sensible reading of the seemingly innocuous Exceptions Clause, in theory our democracy and our constitutional rights and protections could be eroded and even taken from us. It is startling that *Marbury*'s critics could imagine the Framers' straightforward reading of the Exceptions Clause to be **(2003) 89 Virginia LR 1379** silly or insupportable, yet fail to see that their confident alternative reading, if it is not so limited as to be meaningless, would have ruinous consequences.

Of course, in *Marbury*, Chief Justice Marshall was not thinking of any of these threats. *Marbury* is not a deliberate rejection of any such proposal, since no such reading of the Exceptions Clause had ever been imagined.

E. Bullying the Court

Preposterous and alarming as the critics' reading of the Exceptions Clause may be, there is some reason to suppose that the Court today might accede to legislation putting new cases into its original jurisdiction on such a reading. We have already seen that a Congress acting on this reading must necessarily strip the Court of discretion to dismiss or stay unwanted cases. Nor would the Court be likely, notwithstanding *Marbury*, to strike down the offending new legislation. Scores of brilliant writers would file briefs explaining that *Marbury*'s interpretation of Article III was strained and implausible. The Exceptions Clause would be argued in support of the view that *Marbury*'s core constitutional holding should be overruled. This would not be perceived as disturbing the power of judicial review. The Court, recognizing that Congress in any event could strip the Court's appellate jurisdiction directly, might well decide to defer, perhaps citing *Ex parte McCordle* [*McCordle's Case*].⁵⁰⁴

The Court has yielded previously to a Congress punitively burdening it with additional trial-court duties. Recall that, to attack and punish the Court in 1802, Congress restored the mistake of the First Judiciary Act, and forced trial-court duties upon the Justices, requiring them to sit on circuit (and incidentally compelling them to undergo the rigors of circuit riding). Even without significantly damaging the Court's then appellate docket, the imposition of these additional trial-court duties upon the Justices was resented, and perceived by Chief Justice Marshall—as his private correspondence **(2003)**

503. See Loth, *supra* note 284, at 178 (commenting on a passage Jefferson crossed out at the last moment from his first address to Congress, in which the supposed champion of liberty had asserted a power in the executive to determine the lawfulness not only of its own acts, but of the acts of the judicial and legislative branches, and concluding: "[The President] would become a dictator curbed only by the doubtful and difficult process of impeachment").

504. *Ex parte McCordle*, 74 U.S. (7 Wall.) 506, 512-15 (1868) (sustaining the power of Congress to strip the Supreme Court of appellate jurisdiction in a case then pending before it).

89 Virginia LR 1380 makes clear—as probably unconstitutional.⁵⁰⁵ But he and the other Justices believed it was too late to raise this issue. For whatever reason, the duties of circuit riding, emanating from an unconstitutional, retrogressive, partisan, and punitive law, were nevertheless fastened on the Court for a large part of the nineteenth century. The Justices could not find a way of relieving themselves of this burden,⁵⁰⁶ and Congress would not relieve them of it until 1891.⁵⁰⁷ So we cannot always count on the Court's ability or even its will to protect itself from jurisdiction-packing attacks.

It does not say much for the critics' proposal that their best argument is the unlikelihood that Congress would ever act upon it. But Congress need not actually enact legislation to avail itself of the new Exceptions Clause power. A Congress eager to bend the Supreme Court to the popular will might simply threaten to do so. In a time of great public outcry against an unpopular decision by the Court, it would be open to Congress to engage in any of the various processes by which Congress communicates to the wider world (hearings, committee reports, resolutions), demonstrating clearly enough to the Court that the political branches are entertaining an idea of adding to the Court's original jurisdiction. For reasons we cannot predict, the Court might deem itself unable to strike down the threatened legislation, should it be enacted. Under this pressure, the Justices might find themselves voting more accommodatingly in the relevant class of cases. The Justices might be tempted to come to Congress in advance to conciliate the managers of a proposed bill and to give assurances that would satisfy Congress's concerns. Whether or not they did so, the independence of the Supreme Court would have been compromised.

To lead Congress to suppose that it could constitutionally force upon the Supreme Court an open-ended original jurisdiction of quotidian cases would be to arm the political branches with a real weapon in any future all-out war on the judiciary—and a weapon, like a nuclear warhead, used not necessarily to attack, but to deter **(2003) 89 Virginia LR 1381** and threaten. The power for which *Marbury's* critics contend, then, is not only a power to inundate, but to intimidate—to threaten, harass, and bully the Court. Yet any power to bend the Justices to Congress's will would be inconsistent with the separation of powers, and, more specifically, with Article III's establishment of an independent judiciary. Nothing in the Exceptions Clause or anything else could have required the *Marbury* Court, in the interest of "intellectual honesty," to consider self-destructing in this way.⁵⁰⁸

In 1803, the Court had so little work to do that, if Marshall had enabled Congress to flood the Court's docket with such original trials as were then in the circuit and district courts, the threat would not have been as alarming as it would be today. But the author of *Gibbons v. Ogden*⁵⁰⁹ and *McCulloch v. Maryland* would have understood the danger. As the country and the Constitution grew, would not a power to threaten and punish the Supreme Court through additions to its trial jurisdiction become a power to cripple if not destroy it as the final arbiter of federal law?

Analogously, Chief Justice Marshall elsewhere took the view that territorial judges could not be

505. Letter from John Marshall to William Paterson (Apr. 19, 1802), *supra* note 183, at 108-09.

506. Cf. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (holding that the power of Congress to require the Justices of the Supreme Court to sit on circuit without separate commissions was too well established to challenge as unconstitutional).

507. See Act of Mar. 3, 1891, ch. 517, § 2, 26 Stat. 826.

508. For the argument that the Justices' renewed acquiescence in circuit riding was, in effect, a holding that Congress could expand the Supreme Court's original jurisdiction, see Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 *Sup. Ct. Rev.* 123, 148. The argument seems unconvincing. Assigning circuit duties to Supreme Court Justices does not convert their circuit cases into Supreme Court cases.

509. 22 U.S. (9 Wheat.) 1 (1824).

Article III judges.⁵¹⁰ He ruled as he did as a matter of practical necessity. Otherwise, every time a territory became a state, the federal judiciary would be swamped with large numbers of merely municipal but life-tenured judges.⁵¹¹ Similarly, any reading of Article III that would bestow upon Congress the ability to threaten the Court with a packed trial docket could not be a legitimate reading of the Constitution of the United States. That would be true even if such a power could be identified without a strained reading.

(2003) 89 Virginia LR 1382 *F. Of Floors and Ceilings*

It is a bedrock principle of the law of federal courts that Congress has no power to give a federal court jurisdiction beyond that enumerated in Article III.⁵¹² *Marbury*'s critics, blind to the naturalness of Chief Justice Marshall's reading of the Constitution, suppose that that bedrock position is bedrock only because Marshall adopted it in *Marbury*. And in so doing, *Marbury*'s critics would have us believe that Chief Justice Marshall was ignoring a hallowed canon of constitutional interpretation: that the Constitution is a floor, not a ceiling.⁵¹³ As for the list of distinguished parties to be found in the Court's original jurisdiction under Article III, that should be read as a floor, not a ceiling, too.

I hope you find this "floor, not ceiling" argument as astonishing as I do.⁵¹⁴ Suspicion of and hostility to national courts was so obvious at the time of the founding as to engender the Madisonian compromise, by which the Constitution created no lower federal courts at all. It is unthinkable that the Framers and ratifiers would have intended that the limits of Article III be exceeded. Suspicion of the trial jurisdiction of the Supreme Court was also substantial, (2003) 89 Virginia LR 1383 as we have seen. The proponents of Article III had to defend the original jurisdiction by insisting on its limits.⁵¹⁵

Although constitutional rights generally may rest on a constitutional "floor," so that one doubts that Congress has power to diminish them,⁵¹⁶ few have taken the view that the Constitution anywhere

510. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.) (holding that territorial courts are Article I courts rather than Article III courts, serving substantially as local courts analogous to state courts).

511. *Id.* at 546 ("We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares, that 'the Judges both of the Supreme and inferior Courts, shall hold their offices during good behaviour.'").

512. See, e.g., *Mesa v. California*, 489 U.S. 121, 129 (1989) (striking down jurisdiction under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), as applied in a case in which no federal defense or other national interest was engaged). For modern cases sustaining improbable jurisdiction not as added to, but within Article III, see, for example, *American National Red Cross v. S.G.*, 505 U.S. 247, 248 (1992) (sustaining federal jurisdiction over cases in which the Red Cross is a party); *Verlinden v. Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (sustaining federal jurisdiction over foreign sovereigns when the only federal "ingredient" of a case is the question of sovereign immunity *vel non*). For theoretical exploration of these cases, see Weinberg, *The Power of Congress*, supra note 460 (generalizing the question of Congress's power over both sets of courts and applying that analysis to such federal cases as *Verlinden*, *Mesa*, and *American Red Cross* to conclude that the effective limit on the power of Congress is not Article III, but the Due Process Clause).

513. See, e.g., Bloch & Marcus, supra note 332, at 320-21 & n.73 ("The Framers could have intended that the two specified categories [ambassadors and states] were to be minimum definitions of the Court's original jurisdiction. . . . Alternatively, the Framers might have intended their designation to be the presumed initial distribution with Congress authorized to modify it, if and when it chose."); see also Van Alstyne, *A Critical Guide*, supra note 27, at 31 (suggesting that the cases enumerated in the original jurisdiction might merely be an "*irreducible minimum*").

514. But see, e.g., Monaghan, supra note 429, at 8 ("Powerful, and to my mind convincing, arguments can be made that the named categories stated only the irreducible minimum, not the maximum, of original jurisdiction.").

515. See supra notes 474-77, 485-90 and accompanying text (regarding the early understandings that the requirements of the Supreme Court's jurisdiction under Article III serve as a ceiling, not a floor).

516. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 & n.10 (1966) (Brennan, J.) (stating that Congress may expand, but not diminish, a constitutional right, and adding, "Contrary to the suggestion of the dissent, . . . section 5 [of the

furnishes a floor vis-à-vis the domestic *powers* of the national government. On the contrary, we cling steadfastly to the view that ours is a government of limited powers. The limits on government are, more or less, our freedoms. True, *McCulloch v. Maryland* helps us to imply Article I powers in Congress, but only as a necessary and proper means to some legitimate end. Article III, on the other hand, has no parallel mechanism, no Necessary and Proper Clause. The Supreme Court has never held that Congress could give the federal judiciary jurisdiction it does not have under Article III. We have known this since the days of Chief Justice Jay.⁵¹⁷ We do not need *Marbury*'s later holding on the point to ground the unbroken succession of cases reiterating it whenever (2003) 89 Virginia LR 1384 the question was addressed.⁵¹⁸ It is baffling that Chief Justice Marshall's critics can shrug off this essential requisite of the independence of the judiciary and the separation of powers, a constant, unwavering feature of American law.

G. Ah, The Recantation!

"But," I can hear the *Marbury* critics insisting, "Marshall retracted his erroneous interpretation of Article III in *Cohens v. Virginia*."⁵¹⁹ This supposed recantation is among the more persistent myths about *Marbury*. Some critics are careful to describe the supposed recantation with sufficient imprecision

Fourteenth Amendment] does not grant Congress power to exercise discretion in the other direction and to enact statutes so as in effect to dilute equal protection and due process decisions of this Court"). But see John C. Jeffries, Jr. & Daryl J. Levinson, The Non-Retrogression Principle in Constitutional Law, 86 Cal. L. Rev. 1211, 1212-13 (1998) (taking issue with this position). After *City of Boerne v. Flores*, 521 U.S. 507, 535-36 (1997), and its progeny, § 5 of the Fourteenth Amendment will no longer permit Congress to expand the litigational advantages of civil rights plaintiffs without close scrutiny. In the Court's thinking, such legislation must be "proportional" to and "congruent" with the extent of known constitutional violations, to avoid becoming substantive redefinitions of the rights in question, since § 5 gives Congress only remedial power. *Id.* at 533.

517. See Letter from Secretary of State Thomas Jefferson to Chief Justice Jay and Associate Justices (July 18, 1793), in 3 Correspondence and Public Papers of John Jay, *supra* note 89, at 486; Letters from Chief Justice Jay and Associate Justices to President Washington (July 20, 1793; Aug. 8, 1793), *id.* at 488, 488-89. A list of twenty-nine questions appended by the administration to the first of these letters can be found in 10 The Writings of George Washington 542-45 (Jared Sparks ed., 1836). In their letter of August 8, 1793, *supra*, the Justices responded to the administration's request for advice on these questions by holding, in effect, that federal judges have no power to declare law extrajudicially, without a proper Article III case or controversy before them.

518. Only three Justices have ever thought that Congress had power under Article I to give federal courts jurisdiction over any cases beyond those enumerated in Article III. *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 589 (1949) (Jackson, J., for a plurality of three); see also Letter from Samuel Chase to John Marshall (Apr. 24, 1802), *supra* note 186, at 110 ("I much doubt, whether the Supreme Court can be vested, by Law, with *original* Jurisdiction, in any *other* Cases, than the very few enumerated in the Constitution. In *all other* Cases, to which the Judicial power of the United States extends, the Supreme Court is vested with an *appellate* Jurisdiction.").

519. This charge is very old. See Corwin, *Marbury* and Judicial Review, *supra* note 3, at 540-41 ("[T]he time was to come when Marshall himself was to abandon the reasoning underlying the rule laid down in *Marbury v. Madison* . . . in *Cohens v. Virginia*."). Professor Corwin asserts that *Marbury* amends Article III by eliminating the word "all" from the opening clause of Article III, § 2, paragraph 2, and qualifying the word "those" in the same clause. The assertion is skew. Of course Congress can "redistribute" the nonexclusive cases from the Court's original jurisdiction to its appellate jurisdiction—by remitting those cases to trial courts *below*. *Marbury* does not say that the Court's original jurisdiction is wholly exclusive. Nor does *Marbury* deny that in cases brought in courts below, which might have been brought in the Supreme Court's original jurisdiction, the Court will have appellate jurisdiction. As Marshall explains very clearly in *Cohens*, 19 U.S. (6 Wheat.) at 392-94, the Court's original jurisdiction is defined, not exclusive. States or ambassadors can litigate in courts below, and the states may be party to their own criminal prosecutions in their own trial courts, as *Cohens* holds. Nothing in *Marbury* is to the contrary. On the concurrent jurisdiction of courts below over cases in which only one party is a state, see *supra* note 493. Here, as elsewhere, Corwin overshoots his mark.

to cover what Marshall actually said in *Cohens*,⁵²⁰ but you will not find the alleged recantation **(2003) 89 Virginia LR 1385** in it. *Cohens* merely holds, quite sensibly, that a state may prosecute a criminal defendant without having to do so in the original jurisdiction of the Supreme Court, and that the Supreme Court can review such a case if it raises a federal question.⁵²¹ *Cohens* furnishes no occasion for Chief Justice Marshall to recant *Marbury*'s quite different holding that Congress cannot *add* to the Court's *original* jurisdiction as described in Article III. Undoubtedly Chief Justice Marshall did hold in *Cohens* that Congress could grant appellate jurisdiction to the Supreme Court in cases in which the Constitution provided for original,⁵²² a seeming contradiction of an assertion to the contrary in *Marbury*.⁵²³ But Marshall's critics accuse him of changing his mind in *Cohens* about *Marbury*'s core holding, and admitting that Congress could grant original jurisdiction to the Supreme Court in cases in which the Constitution provided for appellate. Not only did the Court hold to the contrary in *Marbury*, but, so far from recanting the point, Chief Justice Marshall went out of his way in *Cohens* explicitly to reaffirm it: "The original jurisdiction of this Court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable under the third article of the constitution."⁵²⁴

The Supreme Court's appellate jurisdiction is necessarily elastic in a way that the original jurisdiction is not. The Supreme Court always has Article III appellate power over federal questions triable in courts below, and, as federal law expands, all the lower courts' jurisdiction over federal questions "expands" too. And so, of course, the Court's appellate jurisdiction "expands" to cover these new cases. It is equally true that questions within the Court's discretionary original jurisdiction may be triable and reviewed by courts of competent jurisdiction below, and the Court has repeatedly **(2003) 89 Virginia LR 1386** so held, in *Cohens* and other cases.⁵²⁵ Courts below are trial courts and intermediate appellate courts, and it is appropriate for them to take on such business. But it is simply not possible to conclude from these facts that Congress could grant the Supreme Court concurrent original power over cases not enumerated as within the Court's original jurisdiction. Nothing in *Cohens* changes *Marbury*.⁵²⁶

Moreover, although general language in *Marbury* about the Court's appellate jurisdiction was distinguished and explained by Marshall in *Cohens*, *it was not retracted*. The distinction certainly was

520. See, e.g., Bloch & Marcus, *supra* note 332, at 320 & n.73 ("Indeed, Marshall retreated from some of his broader statements soon after *Marbury*."); Currie, *The Constitution in the Supreme Court*, *supra* note 446, at 69 ("Marshall himself was to reject the implications of the *Marbury* reasoning in *Cohens v. Virginia*."). The myth seems to have been created in 1914 in another bit of specious reasoning in Corwin, *Marbury and Judicial Review*, *supra* note 3, at 540-41. Beveridge simply cites Corwin and omits any reference to *Cohens*. 3 Beveridge, *The Life of John Marshall*, *supra* note 2, at 129 & n.1.

521. 19 U.S. (6 Wheat.) 264, 392-94 (1821); see also *Bors v. Preston*, 111 U.S. 252, 260 (1884) (holding that Congress has power to vest in lower federal courts a jurisdiction, concurrent with that of the Supreme Court, over cases affecting consuls).

522. *Cohens*, 19 U.S. (6 Wheat.) at 393-94.

523. *Marbury*, 5 U.S. (1 Cranch) at 174 (stating, correctly, that "[i]f congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction made in the constitution, is form without substance"). Although both propositions remain correct, only the latter proposition was an issue in *Marbury*.

524. *Cohens*, 19 U.S. (6 Wheat.) at 399.

525. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-101 (1972) (holding that the Court's original jurisdiction is discretionary in a case in which only one state is a party, and that such a case may be brought in any court of competent jurisdiction).

526. *Cohens*, 19 U.S. (6 Wheat.) at 400 (Marshall, C.J.) ("In the case of *Marbury v. Madison*, the single question before the Court, so far as that case can be applied to this, was, whether the legislature could give this Court original jurisdiction in a case in which the constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The Court decided, and we think very properly, that the legislature could not give original jurisdiction in such a case.").

no retraction of the constitutional limits on original jurisdiction insisted upon in *Marbury*. Marshall's point in *Cohens* was that the two cases, *Marbury* and *Cohens*, involved very different questions and therefore could be reconciled with each other upon clarification. His point emphatically was *not* that *Cohens* was a repudiation of *Marbury*.⁵²⁷

Here is the language from *Marbury* that the Chief Justice is supposed to have recanted in *Cohens*: "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."⁵²⁸

Here, Marshall points out, first, that Congress cannot give the Supreme Court appellate jurisdiction where the Constitution has **(2003) 89 Virginia LR 1387** declared the Court's jurisdiction to be original. This proposition is necessarily true. Once the Court tries a case, there is no way to appeal the judgment to a higher court. Congress does have implicit power to create a concurrent jurisdiction in a court below, over a case that is not within the Court's *exclusive* original jurisdiction.⁵²⁹ When that happens, of course the Court may exercise appellate jurisdiction, and this is the situation seen in *Cohens*.

Second, Marshall asserts that Congress cannot give the Supreme Court original jurisdiction where the Constitution has declared the Court's jurisdiction to be appellate. This also is necessarily true, and is, of course, the technical holding of *Marbury*. It is fixed law today. As we have seen, it is so for good and sufficient reasons. In other words, nothing in *Cohens* recants anything in *Marbury*.

In any event, the critics' arguments come much too late to matter now. "The decision of the court, . . . both on the question of jurisdiction and on its power and duty to declare an act of Congress to be unconstitutional and void has always commanded universal assent."⁵³⁰ Fortunately, we do have our constitutionalism, we do have the rule of law in courts, we know that, given a proper case, the Supreme Court will have the last word, and we believe that the Constitution should protect persons from government lawlessness. We live in the world that *Marbury* made. American constitutionalism is a distinguishing feature and a legitimate source of national pride.

(2003) 89 Virginia LR 1388 *H. Vanishing in a Puff of Smoke*

For all the dangerousness and complexity of the critics' position, it turns out to be pointless. The maneuver, so satisfying to so many worthies, has no constructive function. Far from a "necessary and proper" means to the "end" of making "Exceptions," the proposal is so much waste motion. Congress does not *need* to add to the Court's original jurisdiction to make exceptions to the appellate jurisdiction.

527. *Id.* at 399, 401-02 ("The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the Court, in the case of *Marbury v. Madison*. . . . The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, *or the tenor of its reasoning.*") (emphasis added).

528. *Marbury*, 5 U.S. (1 Cranch) at 174.

529. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80-81 ("*And be it further enacted*, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party.")

530. Magruder, *supra* note 4, at 182; cf. Fallon, *Marbury* and the Constitutional Mind, *supra* note 101, at 11 ("*Marbury* is too foundational, too ensconced, and too pervasive in influence to be rejected as mistaken.")

Under the Exceptions Clause, Congress already has all the power it could ever want or use to attack the Court's appellate jurisdiction—dandy, explicit power. The Exceptions power is complete in itself, and entirely satisfactory. Unlike the Mickey-Mouse power the critics think so obvious, the literal Exceptions Clause power is unconditional, and requires no backing and filling, no qualifications, no insertions. It has even been upheld and acceded to, famously, in *McCardle's Case*, a pending case the Court could easily have held beyond the Exceptions power.⁵³¹

Recall that for generations Congress made large "Exceptions" in the Court's appellate jurisdiction. The statutes permitted review in state cases only when the loser, not the winner, had relied upon federal law,⁵³² an arrangement that was not revised until 1914.⁵³³ Yet it did not occur to Congress to undo this vast "Exception" by forcing trials upon the Supreme Court in the large number of cases excluded under that arrangement. It certainly did not occur to Congress that forcing trials of those cases on the Supreme Court was a *predicate* for withdrawing them from the Supreme Court's appellate docket. The exception made was quite effectual without any such further action.

Moreover, there has never been any need to consolidate in a single trial court all officer suits,⁵³⁴ and certainly not all party-based Article III cases. After all, federal and state trial courts together have always sat with plenary jurisdiction over all Article III cases. So the critics' reading is hardly a "necessary and proper" "means" **(2003) 89 Virginia LR 1389** to any "legitimate end." But since that is so, Congress has no power to employ it. In short, the asserted power does not exist.

The conclusion is the same under alternative analyses. Since, for example, the critics' reading, carried to its logical extreme, points, among other things, to massive breaches of the separation of powers without accountability, through threats to the independence of the judiciary and shifts of unchecked power to the executive, that reading is obviously unconstitutional, and the power contended for under that reading cannot exist.

It might be argued that as much might be said of the unvarnished Exceptions Clause, read straightforwardly, without a redistributive twist. After all, under the straightforward reading of the Exceptions Clause, legal scholars generally believe that Congress could cripple, if not destroy, the important appellate work of the Court.⁵³⁵ That being so, it might be argued that the foregoing exposure of the dangers of the critics' reading of the Clause is out of proportion and unduly alarmist. But the difference between the two readings is of the utmost importance. When Congress acts straightforwardly under the Exceptions Clause, *it leaves intact* the country's forums for original trial of the affected federal questions. No massive denials of justice or rights occurs. There is no substantial shift in power to the executive. The two mechanisms simply cannot be compared when it comes to their respective degrees of injuriousness.

VI. Securing the Appellate Power

There is a further somewhat mysterious feature of *Marbury v. Madison* that does not seem to have been addressed elsewhere. John Marshall not only held that Marbury's claim was good in law, but he

531. Ex parte McCardle, 74 U.S. (7 Wall.) at 512-13.

532. Judiciary Act of 1789, § 25, 1 Stat 73.

533. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (codified as amended at 28 U.S.C. § 1257).

534. But vis-à-vis federal officer suits, see supra note 267 (discussing the history leading to the Mandamus and Venue Act).

535. For the standard view that the powers of Congress over federal jurisdiction, including the Exceptions Clause power, are virtually plenary, see Gunther, supra note 459. For the influential view that Congress nevertheless may not destroy the Supreme Court's "essential role in the constitutional plan," see Hart, supra note 187, at 1365.

went so far as to identify the source of law governing it. He said that Marbury had a claim of right “under the laws of his country,”⁵³⁶ and, again, “under the laws of the United States.”⁵³⁷ At one point, apparently, he toyed with the idea of an implied private right to sue under the act of Congress authorizing the District of Columbia (2003) 89 Virginia LR 1390 judgeships,⁵³⁸ although in the end, of course, he had to acknowledge that the statute could not be said to have been “violated.”⁵³⁹ Quoting Blackstone, he spoke of “the common law courts of justice” as protecting Marbury,⁵⁴⁰ but he also said that “the . . . judicial power of the United States . . . is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.”⁵⁴¹ Why should he have said all this? Marbury having brought his motion originally in the Supreme Court, as if it were a trial court, we recall that, neither party being a state or an ambassador, the judicial power could not extend to the case even if it *did* present a federal question.

Undoubtedly there were significant federal issues in the case, which, whatever the source of law for the claim, would have grounded the Court’s appellate power, had *Marbury* been a case coming up from courts below. There was, for example, a question of the power of a president to remove an officer after an appointment was complete. But Marshall’s identification of a federal question was made in description of Marbury’s underlying *claim*, and Marshall went out of his way to say that the claim arose “under the laws of” Marbury’s “country.” Marshall’s language is generally consistent with the view that he was recognizing a federal common-law cause of action for the restoration of a property wrongly withheld by federal officials.⁵⁴² This was an even easier case for a federalized property right than the much-admired late nineteenth-century case, *United States v. Lee*.⁵⁴³ Marbury’s property right, as Marshall took pains to explain, was created by federal law, whereas we would suppose the Lees’ property right to Arlington, however wrongful the confiscation by federal authorities, to have been (2003) 89 Virginia LR 1391 state-created. True enough, but why should Marshall have troubled with any of this? What was he trying to accomplish?

It might be supposed that Marshall’s emphatic federalization of law had something to do with the remedy—that Marshall was trying to lay a basis for the issuance of a writ of mandamus. Recall that federal courts thought mandamus could issue only “in aid of jurisdiction,” by which they meant federal-question jurisdiction. This requirement was substantially explicit in the All Writs Act, Section 14, and arguably implicit in Section 13’s reference to “the principles and usages of law.”⁵⁴⁴ If Marshall were indeed struggling to lay a basis for mandamus, we would have been right to be skeptical of the traditional narrative, according to which Marshall was struggling to avoid issuing the writ. However, it must have been obvious to Marshall from the outset that in *Marbury* the Court had no jurisdiction at all. There was no jurisdiction in aid of which mandamus could issue. Marshall’s efforts to identify federal

536. *Marbury*, 5 U.S. (1 Cranch) at 154, 162.

537. *Id.* at 173.

538. See *id.* at 154 (“His right originates in an act of congress passed in February 1801, concerning the district of Columbia.”).

539. *Id.* at 172 (“It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.”).

540. *Id.* at 163.

541. *Id.* at 173-74.

542. See *id.* at 166. Marshall’s concern for the protection of property rights distinguishes Marbury’s situation importantly from prosecutions for violations of the federal common law crime of seditious libel, to which Marshall was strongly opposed. See *supra* notes 121, 130 and accompanying text.

543. 106 U.S. 196 (1882).

544. See *supra* Section IV.A.

law for the case must therefore have had a different aim in view.

It is also possible that Marshall might have been trying to assure Marbury of a forum in the federal-question jurisdiction of the circuit court for the District of Columbia. Although the other circuit courts had lost their abortive federal-question jurisdiction under the Repeal Act of 1802, the Act repealed only the Judiciary Act of 1801. We have already seen that the Repeal Act did not touch the organic laws of the District of Columbia.⁵⁴⁵ Moreover, the circuit court in the District of Columbia was the only federal court, other than the Supreme Court, explicitly empowered by Congress to issue the writ of mandamus against a federal officer.⁵⁴⁶ If Marbury could plead federal-question jurisdiction in the circuit court below, he would lay a necessary basis for mandamus in aid of jurisdiction.⁵⁴⁷ But Marshall's repeated emphasis on the federal nature of the case suggests that he was interested in something of broader and more permanent importance than William Marbury's particular claim.

(2003) 89 Virginia LR 1392 It might more convincingly be supposed that Marshall's federalization of law had something to do with the Court's own jurisdiction. The jurisdiction of the Supreme Court in *Marbury*, however, as *original* jurisdiction, did not hinge upon identification of a federal question. When jurisdiction in any federal *trial* court is based on the nature of the parties, it does not also require the existence of a federal question.⁵⁴⁸ Article III extends the judicial power of the United States to party-based original cases, including those in the Supreme Court's original jurisdiction, without regard to the law applied.⁵⁴⁹ Concerning the Supreme Court, however, a distinction must be drawn between original and appellate cases. Under the rule of *Murdock v. Memphis*,⁵⁵⁰ review of cases originating in the state courts requires a federal question. Under the influence of *Erie v. Tompkins*, review of party-based cases originating in federal courts, like review of federal-question cases, also requires a federal question. The true principle, then, is that the Supreme Court will review only cases raising a federal question.

In view of this principle, it seems more likely that, with his characteristic penetration, Chief Justice Marshall had understood that there was a further power it was necessary for the Court to secure—its own appellate power. By clearly federalizing the substantive question in Marbury's case, Marshall could ensure that, whether or not federal-question jurisdiction were ever restored to federal courts generally, the Supreme Court would have appellate jurisdiction over the suits his opinion authorized. Since courts **(2003) 89 Virginia LR 1393** might continue to treat a claim like Marbury's as a state-law claim of property, it was especially important to Marshall to clarify that the Supreme Court would have ultimate control, primarily *over the issue of federal government misconduct* in cases like Marbury's. This would be so even in cases brought in state court, or brought in a federal diversity court. As

545. See supra note 266 and accompanying text.

546. *Id.*

547. See supra note 267. The requirement would seem to have been one of general law at the time, quite apart from its codification in the All Writs Act.

548. *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 14 (1800) (stating, with reference to the diversity jurisdiction of the circuit courts, "Neither the constitution, nor the act of congress, regard, on this point, the subject of the suit, but the parties"). Note, however, that although the nature of the parties raises jurisdiction in these cases, the law applied in the Supreme Court's original jurisdiction is likely to be federal common law, particularly in actions between states, depending upon the issues presented. See, e.g., *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 111 (1938) (Brandeis, J.) (holding that federal common law applies in interstate boundary disputes, explaining, "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive").

549. U.S. Const. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . ; to all Cases affecting Ambassadors, other public Ministers and Consuls; . . . to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States. . . .").

550. 87 U.S. (20 Wall.) 590, 636 (1875); see supra note 496.

Marshall would explain in *Osborn v. Bank of the United States*,⁵⁵¹ the Supreme Court must have jurisdiction to decide any federal issue in a case, no matter what law grounded the original claim.⁵⁵²

It is merely an interesting by-product of this effort that *Marbury* also recognizes that acts of the federal government as well as federal legislation can create an equity in property or a vested property right. Federalized equity interests or property rights of various sorts arguably are seen not only in such later cases as *United States v. Lee*,⁵⁵³ to which I have already referred, but also, if you will indulge the idea, *Klein's Case*,⁵⁵⁴ and *Osborn*.⁵⁵⁵ But this is not where the primary significance of the choice of law lies.

I am arguing that, among its other foundational achievements, *Marbury* secured the appellate power of the Supreme Court over **(2003) 89 Virginia LR 1394** the inchoate federal questions that arise from federal government misconduct. With this Marshall managed to some extent to overcome the unfortunate lack of a constitutional or even statutory basis for his opinion establishing judicial control over the government.⁵⁵⁶

Marbury itself furnishes an example of the need of litigants for this clarification. In an earlier Part, we considered the problem of forum selection in *Marbury's* case.⁵⁵⁷ It is possible that none of the practical and political disadvantages of alternative forums would have troubled Charles Lee, could he have been assured of a final forum in the Supreme Court. We know, from the evidence of *Stuart v. Laird*, that at least some of the Federalists were serious about pressing these litigations and carrying them to the Supreme Court. In *Laird*, their pertinacity seems extraordinary, since Marshall, sitting on circuit, had already ruled against them, and since the Justices felt they had foreclosed a decision in the Federalists' favor by resuming their circuit riding. But to carry *Marbury's* case to the Supreme Court, if it had been brought in a circuit court in the first instance, Charles Lee would have had to have a federal question. Since *Marbury* was claiming only a property right, Lee might have anticipated an even greater difficulty arguing jurisdiction on writ of error than he was to experience with his freestanding original motion. In 1801 Lee might have brought his mandamus case in any of the federal circuit courts. But in 1801, Lee did not know that William *Marbury* had a claim arising under federal law. He might have

551. 22 U.S. (9 Wheat.) 738 (1824).

552. *Id.* at 823 (Marshall, C.J.) (“We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.”).

553. 106 U.S. 196, 219-20 (1882) (holding that the United States was not immune from an action in ejectment by Robert E. Lee's descendants to challenge the wrongful appropriation of the Lees' home, Arlington).

554. 80 U.S. (13 Wall.) 128, 146-47 (1871) (holding that the United States could not retain the plaintiff's property under an arbitrary new statutory presumption reversing the legal effect of a presidential pardon). Reacting to the consequent taking of property, the Court, per Chief Justice Salmon P. Chase, stated, “The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war. . . . To refuse it would be a breach of faith not less ‘cruel and astounding’ than to abandon the freed people whom the Executive had promised to maintain in their freedom.” *Id.* at 142. Rather than impute this intention to Congress, the Court declared it could best reflect true legislative will by affirming the judgment in *Klein's* favor. *Id.* at 148.

555. 22 U.S. (9 Wheat.) at 868 (holding available an injunction against collection of a state tax on the Bank of the United States, in a challenge to the tax under *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), where state officials had physically seized moneys in the vault of a local branch of the Bank in satisfaction of the tax and federal authorities had in turn physically retrieved the disputed moneys from the state's possession).

556. *Marbury*, 5 U.S. (1 Cranch) at 173-74 (“The constitution vests the whole judicial power of the United States in one supreme court. . . . This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.”).

557. *Supra* Section IV.A.

brought *Marbury*'s motion in a federal diversity court. But, again, mandamus would not be available unless "in aid of" federal-question jurisdiction. Perhaps even more important to Lee, without a clear federal question he could not have counted on access to the Supreme Court.

In the Supreme Court, Lee offered some arguments with a certain federal resonance. He spoke, for example, of the independence (2003) 89 Virginia LR 1395 of the judiciary,⁵⁵⁸ and baldly asserted that *Marbury* had a right to relief under the laws of his country.⁵⁵⁹ But Lee would not really know that *Marbury*'s claim, as an original matter, arose under federal law, until the Chief Justice said so in his opinion in *Marbury*.

Marshall's foresight has structured the rule of law in our courts for two centuries. We can say that, in *Marbury*, among his other, more celebrated achievements, Chief Justice Marshall did what he could to secure the appellate power of the Supreme Court over cases challenging government misconduct.⁵⁶⁰ Marshall ensured that the final forum he was establishing for judicial review of official lawlessness would not be compromised by any failure on his part to have identified the federal question in that part of *Marbury* in which he ruled upon *Marbury*'s right and Jefferson's wrong.

VII. *MARBURY*'S UNCONVINCING SUPPORT OF JUDICIAL REVIEW

One other feature of the reasoning in *Marbury v. Madison* has come under fire. Although some commentators think the reasoning on judicial review magisterial,⁵⁶¹ others increasingly seem to find it unpersuasive.⁵⁶²

(2003) 89 Virginia LR 1396 We can isolate Marshall's reasoning in support of judicial review from the phenomenon of judicial review itself, but it seems harder to isolate criticisms of supporting arguments from criticisms of the phenomenon. Professor Klarman, for example, has criticized Chief Justice Marshall's argument that without judicial review a written constitution would be pointless. It is obvious, Professor Klarman believes, that the Constitution would continue to constrain Congress whether or not the Constitution were enforced in courts.⁵⁶³ The trouble with this argument is that, in downplaying the importance of judicial enforcement, it is an attack *au fond* upon judicial review itself—

558. *Marbury*, 5 U.S. (1 Cranch) at 151 (argument of Charles Lee).

559. *Id.* at 152.

560. This position was somewhat modified in the Rehnquist Court when it was held that a violation of federal law was a prerequisite of federal actions for injunctions against state, and presumably federal, officials. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-05 (1984).

561. Although the originator of the standard technical critique of *Marbury*, Professor Corwin occasionally acknowledged admiration for its reasoning in the context of judicial review. See, e.g., Corwin, *The Doctrine of Judicial Review*, supra note 3, at 70 ("There is not a false step in Marshall's argument"); Corwin, *Marshall and the Constitution*, supra note 5, at 67 (describing Marshall's argument as marching to its conclusion with "all the precision of a demonstration from Euclid"); see also Van Alstyne, *Notes on a Bicentennial Constitution II*, supra note 243, at 1288 ("The principal role of the Court is rightly identified with *Marbury v. Madison*, its most famous case, and with . . . John Marshall, its most famous Chief Justice, who correctly identified that role with a judicial responsibility to apply no act inconsistent with the Constitution.").

562. For a typical current view, see, e.g., Klarman, supra note 101, at 1117 ("*Marbury*'s arguments in defense of judicial review are . . . thoroughly unpersuasive."); Bickel, *The Least Dangerous Branch*, supra note 423, at 2 ("[T]o rest the edifice on the foundation Marshall supplied is ultimately to weaken it. . . . *Marbury v. Madison* in essence begs the question. What is more, it begs the wrong question."). Bickel's latter complaint seems influenced by the well-known dissent in *Eakin v. Raub*, 12 Serg. & Rawle 330, 1825 WL 1913, at *19 (Pa. 1825) (Gibson, J., dissenting) ("It is worthy of remark here that the foundation of every argument [in *Marbury*] in favor of the right of the judiciary, is found, at last to be an assumption of the whole ground in dispute.").

563. Klarman, supra note 101, at 1117.

indeed, upon all litigation. This makes Professor Klarman's argument all the more fundamental and important, but it is not so much a criticism of Marshall's reasoning as a political disagreement with its premises.

It is often complained that Marshall's formulations fail in any event to allow for the important role of the political branches in interpreting the Constitution—the contributions their interpretations make over time, sometimes without the assistance of case law. This common complaint does seem a criticism of *Marbury* rather than of judicial review, but it is plainly wrong. Marshall's opinion is clear and quite explicit about the coordinate powers and duties of the political branches. After offering examples of constitutional proscriptions which should trump legislation to the contrary, he writes, "From these and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, *as well as of the legislature*."⁵⁶⁴ Far from positing an exclusive interpretive power in the judiciary, Marshall repeatedly refers to the coordinate interpretive powers and obligations of the political branches. Consider, for example, Marshall's recognition of a coordinate interpretive power in his discussion of the judicial oath of office. Marshall writes, "The oath of office, too, *imposed by the legislature*, is completely demonstrative of the *legislative opinion* on this subject."⁵⁶⁵ Marshall is not (2003) 89 Virginia LR 1397 mentioning the oath in order to derive authority for judicial review from Congress, as his critics seem to imagine. Congress cannot authorize what the Constitution does not, and Marshall in any event derives authority for judicial review from such constitutional sources as the Supremacy Clause. Rather, he is saying that Congress's *interpretation* of the Constitution—as seen in the requirement of the statutory oath that judges support the Constitution—is in agreement with his interpretation. He is also pointing out that, since this is an interpretation by the first Congress, it is of utmost persuasive value. Marshall's insistence that a judicial interpretation, in a proper case, will trump a contrary interpretation by Congress, that "it is emphatically the province and duty of the judicial department to say what the law is,"⁵⁶⁶ is not at all to the contrary, but is fully in accord with Congress's own interpretation. It is ironic, then, that Marshall's reliance on the oath is perhaps the most frequently criticized aspect of Marshall's support of judicial review. His argument from the oath, more attentively read, is one of the strengths of this part of the opinion. In his hands, the oath becomes a *precedent*, an authoritative interpretation of the Constitution in agreement with his own. This interpretation not only favors judicial review of legislation, but requires it. And, to cap all, the source of the interpretation is the *legislature itself*. In all these ways, Marshall's argument from the oath functions quite differently from the way his less careful critics have imagined.

It might be complained of Marshall's reasoning that he does not rely on original meanings, or tradition, or precedent. Such views are perfectly accurate, but at the same time, meaningless. We have seen that there was an easy assumption among the Framers and ratifiers that judicial review would exist, but, as Professor Alfange has pointed out, many of these originalist materials were not available at the time.⁵⁶⁷ As for precedents and tradition, *Marbury* was the Supreme Court's own first full-dress treatment of judicial review. It is hard to believe that any of the scattered early examples of its existence could have contributed much to Marshall's arguments. Moreover, the fact is that *Marbury* was argued *ex parte*. On (2003) 89 Virginia LR 1398 the issue of judicial review, Marshall had not a single argument of counsel.

Some writers feel Marshall should have responded to the obvious difficulty, almost a conflict of

564. *Marbury*, 5 U.S. (1 Cranch) at 180-81 (emphasis added).

565. *Id.* at 180 (emphasis added).

566. *Id.* at 177.

567. Alfange, *supra* note 259, at 419.

interest, inherent in permitting the judiciary to be final judge of the constitutionality of its own actions. Chief Justice Rehnquist made this point not too long ago in another context, in disapproving judicial review of impeachments of judges.⁵⁶⁸ Here, too, one has to be careful to disentangle evaluations of rationales from evaluations of judicial review. Whether the Court has been successful in avoiding unconstitutional actions of its own,⁵⁶⁹ whether it has been able to overrule its more glaring mistakes,⁵⁷⁰ whether it has been aggrandizing increasing interpretive power to itself⁵⁷¹—these are all questions intended to highlight past failures of judicial review. As a criticism of the reasoning in *Marbury*, however, the argument will always seem weak because Marshall appears to have anticipated it, with a counterargument that seems incontrovertible. Marshall pointed out that for judges to fail to enforce the Constitution, when they have adjudged legislation to be in violation of it, would be for them to *violate the Constitution themselves*.⁵⁷² Although the term, “violate,” may express his point a shade too emphatically for our taste, there is no escape from his point. This is part of what Marshall means when he goes out of his (2003) 89 Virginia LR 1399 way, as we have already seen,⁵⁷³ to underscore that all branches, including the judicial, are under the duty of giving effect to the Constitution. “[C]ourts,” he writes, “as well as other departments, are bound by that Instrument.”⁵⁷⁴ If the foxes must guard themselves, as well as the chickens, at least it can be said for them that they have no choice.

Marshall’s critics are right, however, when they point out that he says very little. The segment seems almost an afterthought, something tacked on to an opinion about something else—as, in a sense, it is. Charles Hobson feels that the judicial review passage is a “perfunctory”⁵⁷⁵ restatement of what was, after all, a widely accepted position.⁵⁷⁶ Moreover, as many commentators have pointed out, there is something simplistic, almost superficial about the segment. It does not *satisfy*. There is none of the rhetorical power anywhere in *Marbury* that Marshall would summon up in *McCulloch*. There are none of *McCulloch*’s “broad purposes,” no implications from the legitimate ends of government, no sweeping reminder that it is a Constitution we are expounding. Is it possible that Marshall deemed it advantageous to avoid those sorts of arguments in *Marbury*? Of course we can only speculate about Chief Justice Marshall’s intentions, but it may be possible to gain some further insight into his method by focusing less subjectively on our own expectations and *Marbury*’s failure to live up to them, and more

568. *Nixon v. United States*, 506 U.S. 224, 235 (1993) (Rehnquist, C.J.) (“Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would . . . place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is meant to regulate.”).

569. On perhaps the most disturbing example, see Weinberg, *When Courts Decide Elections*, supra note 330, at 609-66.

570. *Erie v. Thompkins* must be counted as something of a success in overcoming the unconstitutionality of the course pursued under *Swift v. Tyson*, but it took a Civil War and a coercive constitutional amendment to overturn *Dred Scott*.

571. This appears to have been the case, for example, in *City of Boerne v. Flores*, 521 U.S. 507 (1997) in which the Court treated § 5 of the the Fourteenth Amendment substantially as a ceiling (rather than a floor) on the powers of Congress to enhance American liberties as against state government.

572. This point emerges explicitly in Marshall’s often underestimated arguments about the judges’ oath of office. *Marbury*, 5 U.S. (1 Cranch) at 180 (“This oath certainly applies, in an especial manner, to their [judges’] conduct in their official character. How immoral to impose it on them, if they were to be used as the . . . knowing instruments, for violating what they swear to support!”) (emphasis added).

573. See supra note 254 and accompanying text; supra note 548, and accompanying text.

574. *Marbury*, 5 U.S. (1 Cranch) at 180.

575. Editorial Note, in 6 *The Papers of John Marshall*, supra note 53, at 164 (remarking on the “perfunctory, almost matter-of-fact exposition”).

576. Marshall had earlier explained judicial review in the Virginia ratifying convention, 3 Elliot’s Debates, supra note 136, at 553, 554 and the author of the Minority Report to the Virginia Resolution of 1798, arguably Marshall, relied on judicial review at the close of that Report. See supra note 128 and accompanying text.

objectively on whatever work the reasoning on judicial review, such as it is, does appear to be doing. We can make a beginning by trying to understand the nature of the problem that this part of the opinion presented to Marshall. The case did not require him to invent judicial review, explain its deeper implications, or develop novel arguments. The phenomenon was already well understood and considered natural and necessary by men of serious understanding. We have already glimpsed the almost casual assumption **(2003) 89 Virginia LR 1400** of judicial review by the Framers and ratifiers,⁵⁷⁷ and its occurrence in the early Court.⁵⁷⁸ Nevertheless, judicial review was, and is, a matter of some delicacy. Legislation, was, and is, considered the legitimate expression of the people's will.⁵⁷⁹ Given our democratic and republican values, our respect for majorities, and the traditional supremacy of legislation at common law, it is not surprising that judicial review was a matter about which courts continued to express doubts and trepidation well into the nineteenth century, and about which commentators are still expressing doubts and trepidation today. Perhaps it was for such reasons that until *Marbury* the Supreme Court had never set a formal imprimatur upon judicial review. If we are right in our assumption that Marshall very much chose *Marbury* as the occasion to do so, he would have to confront these doubts and trepidations.

Curiously, after stating that the difficulty of the question did not match its interest and importance—oh, no, it was really very easy—Marshall situated the judiciary in a realm of passivity. He posited a helpless judge, who through no action of his own, is confronted with a simple textual conflict—as if this sort of thing were all that was at stake. The rhetoric, quite noticeably, is one of judicial powerlessness in the presence of inescapable strictures.

On the stage of this simplified setting, from the “writtenness” of constitutional commands, from the judicial quandary when confronted with written commands in conflict with positive law, from the judicial oath, from the Supremacy Clause, from the lexical superiority of the Constitution, Chief Justice Marshall *let us see*, as a mere incident of the case-deciding process, the duty of judicial review.⁵⁸⁰ **(2003) 89 Virginia LR 1401** This is an elegant apotheosis of the position, from a formal point of view. It is an argument that is more persuasive on its face, as a purely textual matter, than its critics seem willing to give it credit for. The Constitution, under the Supremacy Clause, binds the judges. What can this mean, other than judicial review?⁵⁸¹ The primacy of the Constitution flows, even if all did not

577. See *supra* Section V.B.

578. E.g., *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13-14 (1800), discussed *supra* note 394 and accompanying text; *United States v. Todd* [“Yale Todd’s Case”], in *United States v. Ferreira*, 54 U.S. (13 How.) 40, 52-53 (1851), discussed *supra* notes 349-53 and accompanying text; see also *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 409 & n.2 (1792) (reporting views of the several circuit courts that the first act of Congress, requiring Article III courts to perform administrative duties subject to executive review, was unconstitutional), discussed *supra* notes 346-48 and accompanying text.

579. But see Christopher L. Eisgruber, *Constitutional Self-Government* 81-87 (2001); Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. Rev. 115, 117 (2002) (arguing that “the people” cannot rationally be identified with the legislature, electorate, the voter, the majority, or the taxpayer).

580. Even Professor Corwin, *Marbury’s* febrile and indefatigable first critic, acknowledged that the structural features of the Constitution on which Marshall relied for the implication of the power of judicial review, do, in fact, show that this aspect of *Marbury* was in line with the intentions of the Framers. Corwin, *Marbury and Judicial Review*, *supra* note 3, at 543, 547.

581. For the view that the Supremacy Clause, without more, establishes judicial review, see, e.g., William M. Meigs, *The Relation of the Judiciary to the Constitution* 131-57 (1919). Arguably this view does not importantly beg the question of the hierarchical supremacy of the Constitution. Once it is appreciated that an unconstitutional state law cannot stand in state court, a result that can be derived from the Supremacy Clause without more, it becomes difficult to argue that a similar unconstitutional federal law can stand in the same court. Those cases having been affirmed or let stand in turn, it becomes difficult for a federal court to apply that federal law. The position also may depend to some extent upon Article III’s establishment of “one supreme Court.”

acknowledge it, from the hierarchical ordering of the Supremacy Clause, and Marshall's simple examples remind us that we do acknowledge it. The chief feature of this demonstration is its homeliness. Marshall's arguments in support of judicial review depend not only on the parts of the constitutional text that he can bring to bear, not simply on the logic of the situation, but on reassuringly homely examples and common sense.⁵⁸² They echo Hamilton's clever but somewhat disingenuous⁵⁸³ assertion in *The Federalist No. 78*, that courts are "the least dangerous branch" because they have neither force nor will, but only judgment. It is fair, then, as far as such things go, to say that Marshall's argument on judicial review is unanswerable; but it is subdued as well as passive. If it had been a painting we would say that the artist was working with a limited and rather colorless palette.

Were these methods helpful to the solution of some problem? His subdued and passive rhetoric, perhaps, might have seemed **(2003) 89 Virginia LR 1402** helpful to Marshall in overcoming a certain paradox of his position. The written constitutional law of *Marbury*, so different from the grand unwritten Constitution he would open to our gaze in *McCulloch*, was, paradoxically, to be expounded by a Court with no written authorization to do that.⁵⁸⁴ He was quite right that the Constitution was instinct with the power of judicial review, but this understanding was not spelled out in so many words. Nor was this the only paradox of the position. A democracy within a republic was, paradoxically, to leave it to an unelected and ungovernable judiciary to determine the ultimate validity and meaning of its laws. The tack that Marshall took, arguably, was brilliant. In an activist opinion authorizing greater judicial activism, Marshall's method was to insist on judicial helplessness, passivity, and obedience. While all the while aggrandizing and insisting upon every power he could assert as belonging to the judiciary, while hurling his most defiant responses to the administration in its war on the judiciary, Marshall spoke quietly of the nature of the judicial process. It is fair to say also that he did succeed in forestalling any excitement of the fears of the public at the time.

Adroit as this performance may be, I think we can begin to see why Marshall's critics might well remain unpersuaded by it. Marshall's is an argument that is persuasive enough on its face, but it is too easy. It does not begin to convey why judicial review is a good thing, if it is. If the judicial review passages in *Marbury* deserve criticism it is not because they fail to explain, or even to justify, but rather because they fail to inspire. Marshall's too-easy solution to the problem at hand had the effect of releasing him from the necessary task of revealing to the public at large the virtue rather than the inevitability of judicial control of legislation under the Constitution. Although *Marbury* does not invent judicial review, surely the American people did. It was our innovation. Marshall is right that judicial review is within the obvious contemplation of the Constitution. What is missing in *Marbury* is a deeper engagement with the importance to us of this invention of ours. The closest Marshall comes to this, perhaps, is in his argument that if courts could not review legislation for its constitutionality, it "would be **(2003) 89 Virginia LR 1403** giving to the legislature a practical and real omnipotence."⁵⁸⁵ Earlier in the opinion he had come even closer to what needed to be said, when, quoting Blackstone, he spoke of the possibility that this country might, without a remedy for constitutional wrong, become a government not of law, but of men.⁵⁸⁶ He had done a better job in the main part of his opinion, when he insisted on judicial control of government, perhaps because there he was angrier.

582. As Professor Snowiss recently emphasized, "In form, substance, and wording [*Marbury*] repeated what had already received widespread support." Sylvia Snowiss, *Judicial Review and the Law of the Constitution* 109 (1990).

583. "Disingenuous" because the want of "force and will" may fairly be said of pre-execution judgments at law, but is hardly a fair description of equitable remedies, or even of such legal remedies as habeas and mandamus.

584. This is a chief complaint of Corwin, *Marbury and Judicial Review*, supra note 3, at 543.

585. *Marbury*, 5 U.S. (1 Cranch) at 178.

586. *Id.* at 163.

If his critics' real quarrel with Marshall's reasoning was that he did not, or did not vividly enough, connect judicial review with our highest constitutional ideals, I would have to agree with them. But that is not their difficulty. Their real quarrel is with judicial review itself. Their underlying concern may be a political concern for majority rule simply, or perhaps an instrumentalist concern for the social values of the majority, or a dislike of the importunings of minority groups. A few, perhaps, resent that unelected judges, wrapping themselves in the Constitution, can license unappealing individuals to do unappealing things, in arrogant disregard of what most people think and want. The critics of judicial review will always urge us to place our confidence in "the people," and will always downplay the risks of government power unchecked by courts.⁵⁸⁷

VIII. MARSHALL'S *MARBURY*

This brings us to the main feature of *Marbury v. Madison*, its confrontation with the administration, in which American courts are declared the guardians of the rule of law.

It will have become evident to the reader who has read his *Marbury*, or, I should say, Marshall's *Marbury*, that the critical furor *Marbury* excites seems oddly lopsided. Although the debate tends to focus on Marshall's establishment of judicial review of legislation, we know that Marshall's *Marbury* was not chiefly *about* judicial (2003) 89 Virginia LR 1404 review of legislation. We do not doubt that Marshall consciously established judicial review of legislation, but it was not first on his mind. What takes up most of *Marbury*, rather, is the establishment of "judicial review" of government misconduct. It is this feature of the case that infuriated Jefferson⁵⁸⁸ and to which Marshall seems to have bent more attentively the resources of his mind.⁵⁸⁹ There can be little doubt that *Marbury* was intended first and foremost to establish judicial control over the *government*—over executive officials.

Marshall's discussion of judicial power over the executive branch is the beginning of American public law. It is the beginning, more particularly, of that kind of litigation in which the remedy sought is an affirmative court order against a government official. In that sense, the case might just as well have been about injunction as mandamus. Before *Marbury* one can find affirmative injunctions in common use, but typically in private cases. Administrative law in the context of an "officer suit" for an injunction is not easy to discover,⁵⁹⁰ perhaps because mandamus provided a specific remedy against government officials, and one, moreover, reassuringly limited by doctrine so that only "ministerial," that is, non-discretionary, action could be decreed. Mandamus, Marshall pointed out, had been sought in the veterans' pension affair, seen in *Hayburn's Case*.⁵⁹¹

At the same time, we can see Marshall accepting without comment an injunction against a government official in *Osborn v. Bank of the United States*,⁵⁹² perhaps because the underlying

587. Id. at 178 (Marshall, C.J.) (arguing that to refuse to review statutes for their constitutionality "would be giving to the legislature a practical and real omnipotence"); cf. Joseph Story, Commentaries on the Constitution of the United States § 818, at 581 (1833) ("Where there is no judicial department . . . to enforce rights, . . . [t]he will of those, who govern, will . . . become absolute and despotic; and it is wholly immaterial, whether power is vested in a single tyrant, or in an assembly of tyrants.").

588. See supra note 399.

589. See Editorial Note, in 6 The Papers of John Marshall, supra note 53, at 160 ("In his [Marshall's] mind, . . . the discussion of . . . what critics then and later dismissed as 'dicta'—constituted the real heart of the opinion.").

590. See Peter W. Hogg & Patrick J. Monahan, Liability of the Crown 36 (2000) (stating that today the Crown has no immunity from injunctions against the unconstitutional acts of its officers); id. at 32-34 (pointing out that officers of the Crown also may be enjoined, although mandatory injunctions are less common than prohibitory injunctions).

591. 2 U.S. (2 Dall.) 409 (1792). See supra note 346.

592. 22 U.S. (9 Wheat.) 738, 870-71 (1824).

controversy was for the restitution of money, and in those days the bill for the restitution of money, as against a private party, as I have said, was commonplace. What was interesting in *Osborn* was the Court's **(2003) 89 Virginia LR 1405** casual recognition of this remedy when turned to the uses of public law. The fact that the defendant was a state official was taken by the parties, and so by Marshall, not to raise any concerns about federal equitable power, but rather about sovereign immunity, an easy issue for Marshall. He was able to shrug it off on the ground that the party of record was not the state, but only the officer. One sees this sort of equity power most prominently contended for in that century⁵⁹³ in *Georgia v. Stanton*⁵⁹⁴ and *Mississippi v. Johnson*.⁵⁹⁵ Those cases had the interesting features of challenging a radical act of Congress, the Military Reconstruction Act, and seeking an injunction to prevent its enforcement. In the Georgia case, the injunction would have issued against a member of the Cabinet. In the Mississippi case, the injunction would have issued against the President himself. This last, an injunction against a president, was a power the *Johnson* Court disclaimed,⁵⁹⁶ as the Chief Justice had in *Marbury*.⁵⁹⁷ However, Marshall seemed less concerned about the **(2003) 89 Virginia LR 1406** encroachments the power might entail when asserted over a subordinate official. It was in *Marbury* that Marshall first saw and shaped judicial power of this kind for large uses, even in what was, after all, only a motion analogized to an action at law. He did this while disclaiming any power to "intrude into the Cabinet, and to intermeddle with the prerogatives of the executive."⁵⁹⁸ He purported to insulate questions "in their nature political" from judicial questions.

This power of a court sitting in equity to make a government official conform official conduct to law is inevitably a power, as the first Justice Harlan would one day point out, to govern by decree.⁵⁹⁹ In *Marbury*, the Chief Justice attempts to reassure readers having qualms about government by judiciary. Notwithstanding his disclaimers, he carves out constitutional space for vast judicial powers over the

593. The injunctive power assumed by Marshall in *Osborn* and asserted by the state attorneys general in the Reconstruction cases is rarely reflected in nineteenth century treatises, suggesting that academics in that period had a somewhat crabbed understanding of the actual remedial power of courts. See, e.g., for a typically constricted understanding of the position, James L. High, *A Treatise on the Law of Injunctions, As Administered in the Courts of the United States and England* 472-78 (1873).

594. 73 U.S. (6 Wall.) 50, 76 (1867).

595. 71 U.S. (4 Wall.) 475, 501 (1866) (Chase, C.J.) (concluding that "this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and . . . no such bill ought to be received by us"); see, more recently, *Dalton v. Specter*, 511 U.S. 462, 472-74 (1994) (relying in part on the antique case of *Johnson*, 71 U.S. at 501, to refuse to approve an injunction against the President on either statutory or constitutional grounds); see also *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992) (O'Connor, J.) (remarking that a prayer for an injunction against the President should have "raised judicial eyebrows"); *id.* at 827 (Scalia, J., concurring) (referring to the emphatic disclaimer of injunctive power against the President in *Johnson*, 71 U.S. at 501).

596. After the Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (sustaining an injunction restraining the Secretary of War from executing a presidential order), and especially after *United States v. Nixon*, 418 U.S. 683 (1974) (sustaining a subpoena against the President to obtain evidence in a pending criminal proceeding against a third party), it was widely believed that an injunction could go against the President. The present Justices, however, take a more restrictive view. See *supra* notes 250, 595.

597. *Marbury*, 5 U.S. (1 Cranch) at 166 ("The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable.").

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

599. *Ex parte Young*, 209 U.S. 123, 175 (1908) (Harlan, J., dissenting) ("This principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the national and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the states as if they were 'dependencies' or provinces.").

organs of government. Although, as we have seen, Marshall carefully recognized that the remedy of mandamus was limited to ministerial acts, according to the usages of law, it would be a mistake to read that reasoning as broadly applicable in an injunction suit. In the injunctive officer suit, the “usages” are principles of equity; judicial discretion is much greater; and judicial power can pass upon official acts that are, indeed, discretionary. As for political questions, it is possible to read Marshall as intending that no claim of individual right, if presenting a legal question capable of adjudication, *can* be a “political question.”⁶⁰⁰ The decision to fight a war is a political decision, but the claims of individuals that in that fight they have been treated unconstitutionally are justiciable. This is all *Marbury* can be found to say on this issue, and this was the reading the Warren Court gave *Marbury* in the great case **(2003) 89 Virginia LR 1407** of *Powell v. McCormack*.⁶⁰¹ More recent cases taking adjudicable issues from the courts on more restrictive assumptions⁶⁰² are not within the contemplation of either *Marbury* or *Powell*.

The American officer suit comes down to us, as Marshall says in *Marbury*, through Blackstone,⁶⁰³ and of course *Marbury*, and not through memories both vague and wrong that the Supreme Court accepted jurisdiction when it did not have it over disembodied motions for mandamus. The officer suit is justified in *Marbury* not simply when the propriety of mandamus is considered, but when *Marbury*’s claim, the laws of his country, and by inference from the judicial-review segment of the opinion, the Constitution itself, are all held justiciable and enforceable. *Marbury* says to those who abuse the authority of the government in whose name they act, “You may act only under the Constitution. You may not deny or violate an individual’s rights without becoming amenable to suit for it.” With all its early limitations still upon it, this was the proclamation of a charter of liberties.

CONCLUSION

It is remarkable and indeed disturbing that specious criticisms of *Marbury v. Madison* should have engaged the intellect of so many for so long. In these criticisms nothing is plainer than a vulgar hostility to the Court.

We have been looking very thoroughly into supposed criticisms of the reasoning in *Marbury*. These criticisms increasingly are taken on faith, yet have obviously depended for their currency on **(2003) 89 Virginia LR 1408** remaining unexamined. Every alleged precedent upon which the critics rely vanishes when read. Their alleged constitutional interpretation, it turns out, had no existence at the time of the Founding, no existence at the time of *Marbury*, and if installed today would destroy the Constitution. Their preferred statutory construction, we discover, is identical to Chief Justice Marshall’s, and irreconcilable with their constitutional interpretation.

Suppose that instead of our *Marbury* we had the critics’ revised, presumably acceptable *Marbury*.

600. For the argument that a case otherwise justiciable should not present a political question, see Louise Weinberg, *Political Questions and the Guarantee Clause*, 65 U. Colo. L. Rev. 887 (1994).

601. 395 U.S. 486, 549 (1969) (Warren, C.J.) (holding, in his last great decision, that the Court could adjudicate the constitutionality of an expulsion of a member of the House of Representatives by a mere vote to exclude, notwithstanding the argument that the case presented a “political question”: “It is the responsibility of this Court to act as the ultimate interpreter of the Constitution. [citing *Marbury*]. Thus, we conclude that petitioner’s claim is not barred by the political question doctrine”). Indeed, the case is virtually on all fours with *Marbury*.

602. E.g., *Nixon v. United States*, 506 U.S. 224, 238 (1993) (holding nonjusticiable the constitutionality of impeachment procedures).

603. *Marbury*, 5 U.S. (1 Cranch) at 165 (Marshall, C.J.) (“Blackstone, vol. III. p. 255, says, ‘but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers: for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents by whom the king has been deceived and induced to do a temporary injustice.’”).

Would the critics be satisfied with it? Marshall, of course, would have recused himself.⁶⁰⁴ Would they be reproaching Marshall today for having backed down in the face of an unparalleled assault on the independence of the federal judiciary? *Marbury* would have become a justly obscure paragraph, dismissing for want of jurisdiction, based on an obvious statutory interpretation. In agitating noisily for this, *Marbury*'s critics are saying that American constitutionalism is not a good thing.

To be fair to them, *Marbury*'s critics are aligned with forces they may not understand. They imagine they are in good company with **(2003) 89 Virginia LR 1409** Thomas Jefferson, the author of the Declaration of Independence. Jefferson's admirers down through two hundred years have almost succeeded in projecting upon Marshall's memory⁶⁰⁵ the deficiencies of Jefferson's own devious and manipulative character.⁶⁰⁶ Marshall's critics have blinded themselves to the threat to the Constitution

604. Everybody knows that it was Secretary of State John Marshall who had failed to deliver *Marbury*'s commission, and thus to perfect *Marbury*'s judicial appointment. It is less widely known that it was also Marshall who, by his own account, see Marshall, Autobiographical Sketch, *supra* note 40, at 29-30, was himself suggesting to Adams names for the Chief Justiceship, and can be presumed to have assembled the list of names for Adams's appointments of the "Midnight Judges," including William *Marbury*'s name. See Stites, *supra* note 72, at 81 (pointing out some of the ways in which Marshall was an active figure in Adams's eleventh hour appointments); 2 Beveridge, *The Life of John Marshall*, *supra* note 34, at 559. Moreover, the Judiciary Act of 1801, undone by the Repeal Act in the Jeffersonians' war on the judiciary, must have been largely Marshall's own handiwork. He was the House's expert on the judiciary and served on the committee drafting the bill that eventually became the Circuit Court Act of 1801. This was the statute that authorized the new judgeships that went to the "Midnight Judges." Marshall also was a business associate of Charles Lee, *Marbury*'s lawyer, involved with Lee in the purchase of the Fairfax estate manor lands, and had once offered to buy Lee out. See Letter from John Marshall to Charles Lee (Apr. 20, 1797), in 3 *The Papers of John Marshall*, *supra* note 127, at 70, 72.

Senator Hatch has opined that the failure to deliver the commissions alone put Marshall in such conflict of interest that, had *Marbury* arisen today, Marshall would have been impeached. Cf. Orrin G. Hatch, *Modern Marbury Myths*, 57 U. Cin. L. Rev. 891, 893 (1989) ("If *Marbury* had been able to sue the officer who failed to deliver his commission rather than the successor, the name of this suit would have been *Marbury v. Marshall*. In this day and age, a conflict of interest of that magnitude may have cost Marshall his Supreme Court seat."). Of course, if Marshall rather than Madison could have been named as a defendant, of necessity he would have been in a position to complete delivery of the commissions.

605. Jefferson was virtually alone among Marshall's contemporaries in failing to describe the Marshall they knew as straightforward, direct, unpresuming, and sincere. See *supra* note 294. On Marshall's character in professional life, see, e.g., R. Kent Newmyer, *John Marshall as an American Original: Some Thoughts on Personality and Judicial Statesmanship*, 71 U. Colo. L. Rev. 1365 (2000); Horace Binney, *An Eulogy on the Life and Character of John Marshall, Chief Justice of the Supreme Court of the United States* 27 (1835) (noting Marshall's "candour and integrity" and the "esteem" in which he was held from the earliest unfolding of his career). Joseph Story, who had worked with Marshall intimately for twenty-four years, wrote of him, "He would not do, what his conscience told him was wrong. . . . He would not avoid to do, what he thought was right. . . ." Story, *A Discourse*, *supra* note 100, at 44; see also Michael J. Gerhardt, *The Lives of John Marshall*, 43 Wm. & Mary L. Rev. 1399, 1402-03 & n.13 (2002) (regarding the outpouring of praise across party lines when Marshall died in 1835); 1 Warren, *Supreme Court*, *supra* note 28, at 807-12 (surveying the press reports). But see Gerhardt, *supra*, at 1403 & n.18 (referring to critical commentary); G. Edward White, *The Marshall Court and Cultural Change, 1815-1835*, at 774 (1991).

606. For a revealing attempt by Jefferson to project his own character onto others, see the distressing Letter from Thomas Jefferson to George Washington (June 19, 1796), in 29 *The Papers of Thomas Jefferson* 127 (Oberg ed., 2002) (attempting to seem not to be casting blame on Henry Lee and Alexander Hamilton for a leak of Cabinet business to the press). This was among the posthumously published letters that Marshall read, as he wrote to young Henry Lee, "with a deep felt disgust." See *supra* note 144. Washington had long withheld his confidence from Jefferson in any event, but once Jefferson had sent this missive, it must have dawned on him that if he had not already injured himself irretrievably with Washington, he had done so now. That anxiety would have sharpened over the long weeks that passed without reply. Washington's eventual reply, while firm and clear, is a model of kindness, and an illuminating glimpse of the extraordinary resources of intellect as well as character at the command of this superb man. See Letter from George Washington to Thomas Jefferson (July 6, 1796), in *George Washington: Writings* (John Rhodehamel ed., 1997). As for Jefferson's more notorious Mazzei letter, Letter from Thomas Jefferson to Philip Mazzei (Jan. 1, 1797), *supra* note 163, that would not appear in the

and the rule of law presented by the unstable and bitterly partisan **(2003) 89 Virginia LR 1410** Jefferson in his 1801-1805 term.⁶⁰⁷ The critics either have not understood or do not appreciate that in *Marbury* Chief Justice Marshall, doing what he could with what he had, managed to rescue not simply the courts but the Constitution from a President who did not much value it.⁶⁰⁸

John Marshall believed that we could not be prosperous and free unless the government was under the rule of law. With his characteristic penetration, Marshall saw the great chance to ground that position, and, although the judiciary was under assault and himself under threat of impeachment, with his characteristic courage he **(2003) 89 Virginia LR 1411** seized that chance. In his mild, logical, patient style, the Chief Justice made it clear in *Marbury* that whether or not demagogues hold the political branches, and whether or not public opinion is mob opinion, the courts are open; that a tough, independent judiciary will guard its independence; that American courts will say what the Constitution requires of the legislature, of our officers, and of the judges as well. Our courts will say what the lawful course of government is and require the government to conform its conduct to that course. When the long public reading of *Marbury* was over, an ideal implicit in the Constitution was engraved upon it as if in stone: We will have the rule of law in courts.

For all this, its critics have been treating *Marbury v. Madison* as if it were about Marbury's commission, and about jurisdiction, and about heaven knows what technicalities. They bring a narrow vision to greatness. *Marbury* is not about technicalities. Nor is it simply "a case." It is a vital part of the Founding. *Marbury's* critics might acknowledge that in *McCulloch v. Maryland* John Marshall was a

American press until April 1797, several months after the election of 1796. Once the letter to Mazzei was published, Washington broke off all communication with Jefferson and never saw him again. See Andrew Burstein, *The Inner Jefferson, Portrait of a Grieving Optimist* 223 (1995). For his part, Jefferson, in a conspicuous display of his own character, did not attend the funeral of George Washington. See Smith, *John Marshall, Definer*, supra note 32, at 256 ("Jefferson, in a curious display of petulance, refused to attend the services, a partisan move that scarcely elevated him in Marshall's estimation.").

607. The reader familiar with the reasonably dignified exterior Jefferson presented to the world during the decade of his covert campaign for the presidency and his first term will be stunned by the Jefferson of the private correspondence. This is a Jefferson at once ranting, paranoid, sly, and vindictive. In the preface to his *Holmes Devise* volume on the Marshall Court, George Haskins writes, "A conscious effort has been made not to overemphasize some of the standard charges against Jefferson for his alleged 'deviousness,' 'duplicity,' and 'prejudice' but rather to permit letters, documents, and events to speak for themselves. . . ." 1 Haskins & Johnson, supra note 5, at 8-9. For Jefferson on John Marshall, see, e.g., Letter from Thomas Jefferson to James Madison (Nov. 26, 1795), supra note 61. In a letter to Henry Lee, Marshall, commenting on Jefferson's posthumously published letters, noted, inter alia, the "repeated unwarrantable aspersions on myself." Letter from John Marshall to Henry Lee (Oct. 25, 1830), supra note 144, at 387. For depressing examples of Jefferson's paranoia and vindictiveness, see Yoo, supra note 117, at 1443 & n.31.

608. See, e.g., Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 1 *The Republic of Letters*, supra note 22, at 631 (complaining of the Constitution and proposing a sunset period for it); Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), in 7 *The Works of Thomas Jefferson* 9 (Paul Leicester Ford ed., 1904) (proposing a constitutional convention every nineteen years). Marshall summed up Jefferson's constitutional theories in a moment of uncharacteristic exasperation. Letter from John Marshall to Henry Lee (Oct. 25, 1830), supra note 144, at 387-88 (recalling Jefferson's views that revolution every ten or twelve years is salubrious; suffrage should be universal but white only (this latter stipulation, according to Hobson, was after-inserted by Marshall, id. at 387 & n.7); the Senate should be elected by proportional representation; the President should be elected directly; the federal judiciary should be elected or removable; and the Constitution should be amended periodically). This is probably Marshall's frankest denunciation of Jefferson. But Marshall had very early understood the danger Jefferson posed to the Constitution. See Letter from John Marshall to Edward Carrington (Dec. 28, 1800), in 6 *The Papers of John Marshall*, supra note 53, at 45 (comparing Jefferson to Burr, and tentatively concluding that Burr was the lesser of the two evils) ("It is not believed that he [Burr] would weaken the vital parts of the constitution."). In his last letter, ten days before his death, Jefferson revealingly sought to promote the Declaration of Independence rather than the Constitution, in which he had had no direct hand. Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826), in *Jefferson's Letters* 373 (Willson Whitman ed., n.d.).

founder and guardian of America's future. They have not understood that this is at least as true of *Marbury* as of *McCulloch*—that the expounder of the Constitution as surely secured the advance of our liberties in *Marbury* as the advance of our national power in *McCulloch*.

Marbury's detractors do not forget to take into account that Chief Justice Marshall had a constitutional crisis on his hands, and was under great political pressure—that he had problems to solve that had little to do with the dreary facts of that dispute. But from these circumstances they conclude that Marshall was only political, not visionary; in retreat, not in advance. They do not see that for us *Marbury* is great not because of a *crafty refusal* to adjudicate, but because of a *principled insistence* on adjudication. In *Marbury* a unanimous Supreme Court confronted an ideologically driven government which had misdirected its energies toward subversion of its own courts. Chief Justice Marshall met our history's most clamorous assault on the independence of the judiciary, and in so doing laid the foundation of American constitutionalism.

This turning of danger to great uses, this largeness of view, this grasp of the future, this claiming and staking out of so much power—we can barely take it all in at a distance of two centuries. **(2003) 89 Virginia LR 1412** In *Marbury*, a great father of our country⁶⁰⁹ bequeathed to us his greatest legacy and our most precious inheritance—the inestimable treasure of an enforceable Constitution.

Perhaps it is time to reopen the book of American constitutional law at this, its first page. Perhaps it is time to forgive ourselves for saying, once again, quite deliberately, in the great tradition, in full confidence and natural pride, and with the old remembered reverence, “This is our greatest case.”

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609. O'Fallon, *Marbury*, supra note 188, at 220 (decrying “Marshall's apotheosis” as a “statesman, fit to stand alongside Washington and Lincoln”).