

THE UNBEARABLE RIGHTNESS OF *MARBURY V. MADISON*: ITS REAL LESSONS AND IRREPRESSIBLE MYTHS

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For the last several years, I have taught Federal Jurisdiction at the University of Alabama School of Law, and like many teachers of that subject, I begin by requiring my students to read and discuss *Marbury v. Madison*.<sup>1</sup> There are many important lessons in that famous decision,<sup>2</sup> but a lot of what Americans have been told during the last century about *Marbury* is wrong.

Modern scholarship establishes that *Marbury* is a victim of historical revisionism.<sup>3</sup> *Marbury* is occasionally described as the event where allegedly Americans invented judicial review,<sup>4</sup> but that notion is so untrue as to be laughable. *Marbury* is routinely cited as supporting judicial supremacy,<sup>5</sup> but it does nothing of the sort. *Marbury* is also celebrated as a triumph of judicial activism,<sup>6</sup> but that proposition too is false. In fact, *Marbury v. Madison* is an example of judicial restraint.

I agree with those who describe *Marbury* as “our greatest case”<sup>7</sup> or “the single most important decision in American constitutional law and in defining the role of the federal courts,”<sup>8</sup> but to understand *Marbury*, we must distinguish its real lessons from its irrepressible myths. Lawyers and judges especially should understand what makes *Marbury* great and why.

To explain the real *Marbury* and why it is a great decision, I will address three topics. First, I will provide an overview of the events that led to the decision. Second, I will describe the decision and its enduring lessons. Third, I will address the irrepressible myths about *Marbury* and how those myths were created.

I. THE EVENTS THAT LED TO THE DECISION.

The story of *Marbury* begins in 1800 with the election of President Thomas Jefferson and his supporters in Congress and the defeat of President John Adams and the Federalists.<sup>9</sup> Although the defeat of Adams was clear soon after the election,<sup>10</sup> the victory of Jefferson was settled much later in Congress, on the thirty-sixth ballot, as a result of the tie of votes in the Electoral College between Jefferson and his running mate, Aaron Burr.<sup>11</sup> That mess led to the adoption of the Twelfth Amendment to the Constitution.<sup>12</sup>

While Jefferson and Burr awaited the settling of their election, President Adams received a letter of resignation from Chief Justice Oliver Ellsworth, who was ill in Paris, where he had negotiated a proposed treaty with France.<sup>13</sup> Adams suddenly had the opportunity to nominate a new Chief Justice and have the lame duck Congress confirm the appointment before the Jeffersonians came to power in March 1801. On December 18, 1800, Adams nominated John Jay, who had served as the first Chief Justice and was serving then as Governor of New York, but Governor Jay declined the appointment.<sup>14</sup>

Adams next decided to nominate his Secretary of State, John Marshall, to be Chief Justice.<sup>15</sup> Marshall had served as an

aide to General George Washington during the Revolutionary War,<sup>16</sup> had established a successful law practice in Richmond and a reputation as perhaps the leading lawyer in Virginia,<sup>17</sup> and had played an important role in support of the adoption of the Constitution at the ratification convention in Virginia.<sup>18</sup> George Washington once had offered to appoint Marshall as Attorney General, but Marshall had declined.<sup>19</sup> Later Marshall had served in Congress, where he had been a floor leader for Adams in the House.<sup>20</sup> In the infamous XYZ Affair,<sup>21</sup> Marshall also had served as one of three representatives of the United States to negotiate a treaty with France and had heroically refused to offer a bribe solicited by the French foreign minister, Charles-Maurice Talleyrand.<sup>22</sup>

Marshall also was a second cousin once removed of Thomas Jefferson, and the two men detested each other.<sup>23</sup> In fairness, Marshall could have thought worse of Jefferson. Marshall once joked, “The democrats are divided into speculative theorists and absolute terrorists: with the latter I am not disposed to class Mr. Jefferson.”<sup>24</sup> So John Marshall did not consider his second cousin, the author of the Declaration of Independence, and the third President to be an absolute terrorist.

On January 27, 1801, the Senate unanimously confirmed John Marshall to be the third Chief Justice of the United States.<sup>25</sup> That confirmation came one week after Adams’s nomination of Marshall, who did not have to endure a hearing in the Senate.<sup>26</sup> On February 4, 1801, Justice William Cushing of Massachusetts administered the oath of office to the new Chief Justice, who wore a plain black robe in keeping with the custom of Virginia, which set the standard that we follow today.<sup>27</sup> Other Justices that day wore the so-called party-colored robes that were fashionable in England.<sup>28</sup>

Although now it would be considered “unthinkable,” Marshall briefly served in two branches.<sup>29</sup> He had promised President Adams to continue serving as acting Secretary of State until Adams left office in March.<sup>30</sup> The Supreme Court had only a few days of work in February to burden the new Chief Justice,<sup>31</sup> but the Secretary of State had much work left for President Adams.<sup>32</sup>

Near the end of its lame duck session, the Federalist Congress enacted the Judiciary Act of 1801, which reduced the number of Justices of the Supreme Court from six to five, created a new system of circuit appellate courts and sixteen new judgeships, and eliminated circuit riding responsibilities for Justices of the Supreme Court.<sup>33</sup> Soon afterward, Congress also created several new justices of the peace.<sup>34</sup> Adams busily worked to appoint Federalists to the new judgeships, the so-called “midnight judges.”<sup>35</sup>

As acting Secretary of State, Marshall was responsible for the administration of the judicial appointments of Adams.<sup>36</sup> Marshall received letters from the applicants, prepared the nomination papers, and affixed the great seal to the commissions that he was then responsible for delivering to the

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appointees.<sup>37</sup> For the latter task, Marshall enlisted the assistance of his younger brother, James, whom Adams also had appointed to a new judgeship.<sup>38</sup>

Marshall finished his work in preparing the commissions, but a few of them were not delivered before Adams left office.<sup>39</sup> One undelivered commission was for William Marbury to serve as a justice of the peace.<sup>40</sup> Soon after Marshall administered to Jefferson the oath of office of the presidency,<sup>41</sup> President Jefferson discovered Marbury's commission and others in the office of the Secretary of State.<sup>42</sup> Jefferson, of course, had served as our first Secretary of State.<sup>43</sup>

Jefferson, in his words, "forbade" the delivery of the commissions of Marbury and others.<sup>44</sup> In Jefferson's view, the delivery was necessary to effectuate the appointment, and Jefferson, to say the least, was angry about Adams's appointment of the midnight judges.<sup>45</sup>

On December 17, 1801, former Attorney General Charles Lee presented to the Supreme Court a petition for a writ of mandamus on behalf of William Marbury and three other men whose commissions as justices of the peace had not been delivered.<sup>46</sup> Lee asked the Court to issue a writ of mandamus to the new Secretary of State, James Madison, to deliver the commissions.<sup>47</sup> After Lee presented this petition, the new Attorney General, Levi Lincoln, declined to take any position on behalf of Madison.<sup>48</sup> The Jefferson Administration refused to show respect for the Supreme Court in this matter.<sup>49</sup> The next day, the Supreme Court announced that it would hear Marbury's petition in June 1802.<sup>50</sup>

The Jeffersonians soon moved to thwart the Federalists in the judiciary.<sup>51</sup> On January 6, 1802, Jefferson's ally, Senator John Breckenridge of Kentucky, introduced a bill to repeal the Judiciary Act of 1801.<sup>52</sup> The Jeffersonians argued that the new judgeships created by the recent Act were unnecessary, and the Federalists, led by Senator Gouverneur Morris of New York, responded that the bill to abolish the judgeships was an unconstitutional assault on judicial independence.<sup>53</sup>

In March, Congress enacted the repeal of the Judiciary Act of 1801,<sup>54</sup> and the Jeffersonians then went a step further by passing the Judiciary Act of 1802.<sup>55</sup> Not only did the Jeffersonians return the Justices of the Supreme Court to their earlier circuit riding; the Jeffersonians also cancelled the June and December Terms of the Supreme Court.<sup>56</sup> The Supreme Court would not be able to meet again to hear Marbury's petition until February of 1803.<sup>57</sup> These historical events, among others, explain why I am both amused and bewildered when leaders of the Bench, like retired Associate Justice Sandra Day O'Connor, and leaders of the Bar, like the presidents of the American Bar Association and the American Law Institute, suggest that the modern judiciary recently has been under some kind of "unprecedented" assault.<sup>58</sup> The Marshall Court confronted a far more difficult challenge than anything the federal judiciary has encountered recently.

The new laws enacted by Congress created a dilemma for the Supreme Court. Federalists wanted the Court to declare the acts of Congress unconstitutional and the Justices to refuse to ride circuit.<sup>59</sup> The Justices disliked circuit riding, but they concluded that, if it had been constitutional for Congress to require circuit riding before 1801, then it was constitutional

to return the justices to their circuit riding responsibilities in 1802.<sup>60</sup> Federalist lawyers later objected to the new composition of the circuit courts,<sup>61</sup> and former Attorney General Charles Lee, in the case of *Stuart v. Laird*,<sup>62</sup> objected to Chief Justice Marshall sitting on a circuit court.<sup>63</sup> Marshall overruled Lee's objection, and the final judgment was appealed to the Supreme Court.<sup>64</sup>

When the Supreme Court convened in February 1803, *Marbury v. Madison* and *Stuart v. Laird* were both on the docket, and in both cases, former Attorney General Lee represented the plaintiffs.<sup>65</sup> In *Marbury*, Attorney General Levi Lincoln still refused to present an argument on behalf of the Jefferson Administration.<sup>66</sup>

## II. THE DECISION AND ITS LESSONS

When the Court on February 24 announced its judgment in *Marbury*, Chief Justice Marshall delivered a unanimous opinion. Before Marshall became Chief Justice, the Justices had delivered separate opinions in each case.<sup>67</sup> Marshall had changed that practice, and we still follow the custom he established.<sup>68</sup> This practice infuriated Thomas Jefferson, especially when his appointees and those of his successor, James Madison, joined Marshall's opinions.<sup>69</sup>

Chief Justice Marshall explained that the Court would answer three questions<sup>70</sup> in the order that former Attorney General Lee had presented them.<sup>71</sup> First, "[h]as the applicant a right to the commission he demands?"<sup>72</sup> Second, "[i]f he has a right, and that right has been violated, do the laws of this country afford him a remedy?"<sup>73</sup> Third, "[i]f they do afford him a remedy, is it a *mandamus* issuing from this Court?"<sup>74</sup>

In his answer to the first two questions, in this politically-charged case, Marshall grounded the opinion of the Court in the rule of law. He wrote, "The government of the United States has been emphatically termed a government of laws and not of men."<sup>75</sup> Marshall explained as follows that liberty itself depended on the rule of law: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>76</sup> I do not quarrel with the view of many scholars that the first section of Marshall's opinion, grounded in the rule of law, was intended, at least in part, to upbraid President Jefferson whom Marshall regarded as lawless, but what Marshall wrote was timeless and right as a matter of first principles.

Marshall explained that, if the subject of the controversy was a discretionary act of the President or, in other words, a political decision, then the Court could not interfere. Marshall wrote, "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his conscience."<sup>77</sup> Political decisions, in Marshall's words, "respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."<sup>78</sup> This explanation that political questions are not justiciable—that is, the political decisions of the other branches are not reviewed by the judiciary—is the first important lesson of *Marbury*.<sup>79</sup>

Marshall next turned to the corollary rule: when the executive acts as an "officer of the law," the judiciary can review

his decision.<sup>80</sup> Marshall stated that an executive officer “cannot at his discretion sport away the vested rights of others,”<sup>81</sup> which was surely a barb aimed at Jefferson. This proposition that every official, no matter how high or low, is accountable to the law is the second important lesson.<sup>82</sup> This lesson means as well “that the individual who considers himself injured has the right to resort to the laws of his country for a remedy.”<sup>83</sup> Several years ago, Louise Weinberg argued persuasively that this lesson was Marshall’s main purpose and achievement in *Marbury*: “There can be little doubt that *Marbury* was intended first and foremost to establish judicial control over the government—over executive officials.”<sup>84</sup>

Marshall explained that mandamus was the correct remedy to compel an officer to perform a legal duty.<sup>85</sup> Marshall rejected the notion that “the office alone exempts [the officer] from being sued.”<sup>86</sup> *Marbury*’s petition presented a case of a judicial nature, but the final question remained: Could the Supreme Court issue the writ?

Marshall concluded the opinion with an explanation of the constitutional duty of the judiciary. That duty has two components: one is jurisdictional and the other is interpretive. Marshall addressed both.

Marshall explained that Article III of the Constitution defines and limits the jurisdiction of the Court. The original jurisdiction of the Supreme Court is defined by the Constitution, and the appellate jurisdiction is regulated by Congress. That description is the third important lesson: Article III makes all federal courts—both the Supreme Court and the inferior courts—courts of limited jurisdiction.<sup>87</sup>

Some critics of *Marbury* argue that Marshall misinterpreted Article III to confine the original jurisdiction of the Supreme Court to a narrow class of cases involving interstate disputes and “cases affecting ambassadors, other public ministers and consuls.”<sup>88</sup> They argue that Congress can somehow expand the original jurisdiction of the Supreme Court under the guise of creating an exception to the appellate jurisdiction of the Court.<sup>89</sup> They have speculated that Marshall misinterpreted Article III to create an opportunity to exercise the power of judicial review.<sup>90</sup>

I have never been persuaded by this argument. Marshall’s reading is the natural one of the text.<sup>91</sup> It is also the reading that Alexander Hamilton provided in *The Federalist*<sup>92</sup> and that John Marshall himself expressed as a delegate to the ratifying convention in Virginia.<sup>93</sup> Those who argue that Marshall had an ulterior motive that corrupted his reading offer no evidence that their alternative reading was part of the original understanding.

The problem for the Court was that section 13 of the Judiciary Act of 1789 purported to empower the Court to issue a writ of mandamus in an original action against the Secretary of State or any federal official even though Article III, section 2, of the Constitution did not provide jurisdiction for *Marbury*’s original action in the Supreme Court. Section 13 broadly granted, “The supreme court . . . shall have the 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.”<sup>94</sup> Article III,

section 2, of the Constitution limits the original jurisdiction of the Supreme Court as follows: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . .”<sup>95</sup>

Some scholars have suggested that a better reading of section 13 was that it was intended to allow the Court to issue a writ only in aid of its appellate jurisdiction<sup>96</sup> or where the Court had original jurisdiction under Article III,<sup>97</sup> but without Attorney General Levi Lincoln’s appearance for Secretary Madison, the Court never heard that argument. We do not even know whether Levi Lincoln held that view. The Court instead responded to the argument presented, and that argument by former Attorney General Lee was based on a literal reading of section 13.

Lee argued that the Court itself had read section 13 that way in a few cases before Marshall became Chief Justice when other petitioners invoked the original jurisdiction of the Court in unsuccessful attempts to obtain a writ of mandamus.<sup>98</sup> James Pfander argued in 2001 that the decisions cited by Lee supported his reading of section 13,<sup>99</sup> but Louise Weinberg persuasively responded two years later that those earlier precedents, unlike *Marbury*, involved petitions for writs of mandamus that were within the original jurisdiction of the Supreme Court provided by Article III.<sup>100</sup> Under either view, Marshall did not misinterpret section 13.

In *Marbury*, the Court explained that the conflict between Article III, section 2, of the Constitution and section 13 of the first Judiciary Act, as Lee read the statute, presented an unavoidable issue. Marshall wrote, “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”<sup>101</sup> That portion of Marshall’s opinion offers the fourth key lesson of the decision: that the judiciary is obliged to interpret the law that governs the case before it, and the Constitution is law.<sup>102</sup>

Marshall concluded by explaining why the Court had the authority—indeed, the duty—to obey the Constitution and dismiss the writ for lack of jurisdiction even if section 13 of the first Judiciary Act, as Lee read it, granted the Court jurisdiction to issue the writ. Marshall explained, “The judicial power of the United States is extended to all cases arising under the constitution.”<sup>103</sup> Marshall listed several provisions of the Constitution—the prohibition of bills of attainder and ex post facto laws and the requirement of two witnesses, in the absence of a confession, in a prosecution for treason—as peculiarly addressed to the judiciary.<sup>104</sup> Marshall explained, “[I]t 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.”<sup>105</sup> [Note well that Marshall invoked the Framers’ intent in interpreting the Constitution.] He concluded by explaining that the judicial oath to support the Constitution meant that the Court like other branches had to follow the Constitution and, in this instance, not exercise the jurisdiction that former Attorney General Lee had argued had been granted



by section 13 of the first Judiciary Act.<sup>106</sup> Marshall's conclusion offers the final lesson of the decision: that the Constitution is the law for all branches of the government.<sup>107</sup>

A week after the Court decided *Marbury*, the Court announced its decision in *Stuart v. Laird*.<sup>108</sup> Chief Justice Marshall did not participate in the decision because he had ruled on the question in the circuit court,<sup>109</sup> but the Court upheld the authority of Congress to restructure the inferior courts and return the Justices to circuit riding.<sup>110</sup> If any Federalists had hoped that the discussion about judicial review in *Marbury* foreshadowed a decision that the Judiciary Act of 1802 violated the Constitution, their hope was dashed in an opinion that contained all of four paragraphs.<sup>111</sup> It is hard to understand how Federalists could have had too high of hopes about *Stuart v. Laird*. The abolition of judgeships created by Congress was not at issue as none of the appointees of President Adams were before the Court seeking their reinstatement.<sup>112</sup> The only issue was whether Congress could return the Justices to circuit riding, and the Justices had already made the decision to return to that duty.<sup>113</sup> In any event, the Marshall Court avoided a conflict with the Jeffersonians.<sup>114</sup>

### III. THE MYTHS OF *MARBURY*

Now that we have reviewed the real *Marbury* and its lessons, let us consider the three myths of *Marbury*. First, did the Court in *Marbury* invent the practice of judicial review? Second, did the decision in *Marbury* establish the supremacy of the judiciary as the final arbiter of the meaning of the Constitution? Third, is the decision in *Marbury* an example of judicial activism? To each of these questions, the answer is no.

The first myth is easily refuted. The decision in *Marbury* was not a magical moment when the Supreme Court suddenly created judicial review. In recent decades, William Michael Treanor<sup>115</sup> and Sylvia Snowiss<sup>116</sup> have published scholarship that establishes that there was an historical practice of judicial review in American courts before the decision in *Marbury*. Phillip Hamburger has published an authoritative book entitled *Law and Judicial Duty* that explains in great detail how judicial review in early America was the application of the well-established duty at English common law to decide cases in accordance with the "Law of the Land" and to treat inferior law as void when it conflicts with superior law.<sup>117</sup> Alexander Hamilton explained the duty of judicial review at great length in *The Federalist* Number 78, more than a decade before the Supreme Court decided *Marbury*. He wrote that "whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."<sup>118</sup> Hamilton concluded, "No legislative act, therefore, contrary to the Constitution can be valid."<sup>119</sup> "At the Virginia ratification convention . . . , [John Marshall] defended the authority of the judiciary to declare an act of Congress unconstitutional."<sup>120</sup> In 1792, eleven years before *Marbury*, five of the six Justices of the Supreme Court, including the first Chief Justice, John Jay, riding circuit in *Hayburn's Case*,<sup>121</sup> ruled that an act of Congress, the Invalid Pensions Act of 1792, which provided assistance to wounded veterans of the Revolutionary War, violated the Constitution insofar as it required the judiciary

to provide advisory opinions to the Secretary of War about which veterans should be paid assistance. That decision was an exercise of judicial review.

When the Supreme Court rendered its decision in *Marbury*, there was little, if any, reaction of displeasure that the Court had declared section 13 of the Judiciary Act of 1789 unconstitutional.<sup>122</sup> There was not much controversy about the *Marbury* decision at all, which had avoided a conflict between the executive and judiciary.<sup>123</sup> President Jefferson complained privately that Marshall should not have expressed an opinion about compelling an executive officer to perform a legal duty, and Jefferson repeated his view that an undelivered commission did not vest a legal right in the appointee.<sup>124</sup> But Jefferson said nothing negative about the exercise of the power of judicial review.<sup>125</sup> As David Engdahl has explained,

Jefferson himself highly praised Virginia's judges for having disregarded state legislation found to be at odds with the state constitution; and his assumption that courts would perform likewise with respect to the federal Constitution was advanced by him as a principal reason for adding a "bill of rights" by amendment.<sup>126</sup>

The discussion of the fundamental power of judicial review in *Marbury* was so unremarkable that the Marshall Court never cited the decision again for that proposition.<sup>127</sup> When the Taney Court became the next to declare an act of Congress unconstitutional, in the infamous decision, *Dred Scott v. Sandford*,<sup>128</sup> the Court did not cite *Marbury*.<sup>129</sup> Robert Lowry Clinton has determined, "This pattern continued during the period from 1865 through 1894 . . . . During these years, the Court invalidated national laws in no fewer than twenty cases, yet *Marbury* is mentioned in none of them."<sup>130</sup>

The second myth—that *Marbury* established the judiciary as the supreme and final authority in determining the meaning of the Constitution—is contrary to the language of the decision itself. When Marshall wrote that the "particular phraesology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void,"<sup>131</sup> he tied that statement to the conclusion "that courts, as well as other departments, are bound by that instrument."<sup>132</sup> Marshall described the Constitution as establishing "a rule for the government of courts, as well as of the legislature."<sup>133</sup>

Marshall's argument was for the supremacy of the Constitution, not the supremacy of the Court. Marshall explained that the Constitution controls all the departments of the government. He wrote, "This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description."<sup>134</sup>

Marshall did not say, in any way, that the judiciary was the ultimate arbiter of the meaning of the Constitution.<sup>135</sup> Marshall interpreted a statute that governed the Supreme Court and decided that the statute was unconstitutional as applied to *Marbury's* petition, which was outside the original jurisdiction provided by Article III. Marshall did not say anything negative

about the duty of other branches to interpret the Constitution within their own spheres of responsibility.<sup>136</sup>

As Engdahl has explained, Marshall had long shared James Madison's view that "judicial authority is specific to 'cases.'"<sup>137</sup> Consider the language of the *Marbury* opinion following this famous quotation: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to *particular cases* must of necessity expound and interpret that rule."<sup>138</sup> The emphasis on cases continues in the opinion:

So if a law be in opposition to the constitution; if both the law and the constitution apply to a *particular case*, so that the court must either decide *that case* conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs *the case*. That is the very essence of judicial duty.<sup>139</sup>

Marshall's view "was that the judiciary's determination of constitutional question is limited both in opportunity and in authoritative impact to a particular 'case'"<sup>140</sup>

The third myth—that *Marbury* is an example of judicial activism—is perhaps the strangest of all when you consider the actual result of the decision. The Supreme Court dismissed *Marbury's* petition for lack of jurisdiction and refused to exercise its power to create a conflict with the executive branch. When the judiciary engages in judicial activism, it usurps the constitutional power of a political branch and fails to adhere to the constitutional text. Judicial activism is about wielding judicial power for political ends. In *Marbury*, the Court obeyed the Constitution and exercised restraint by refusing to compel a political officer to act or refrain from acting. The *Marbury* Court in no way frustrated popular will. The *Marbury* Court grounded its decision in the text of Article III, section 2, of the Constitution and narrowly construed its own power. "[T]he underlying intent of the [*Marbury*] opinion was to set forth a principled statement of the judiciary's place in the American constitutional system that disavowed any political role for courts and judges."<sup>141</sup> "John Marshall and the other Federalist justices achieved their narrow goals in *Marbury* and *Stuart* by distinguishing between the domain of law and the domain of politics."<sup>142</sup>

The myth that the *Marbury* Court engaged in judicial activism is dependent on the premise that the Court deliberately misread either section 13 of the Judiciary Act of 1789 or Article III, or both, so that the Court could exercise the power of judicial review. But the premise is entirely flawed. The Court sensibly interpreted Article III and correctly rejected former Attorney General Lee's reading of section 13. The *Marbury* Court also did not need to create a landmark precedent for judicial review, which was an already widely accepted practice.

The more interesting questions are when, why, and how the *Marbury* myth was perpetrated. Robert Lowry Clinton offered the answers to those questions in 1989 in his book, *Marbury v. Madison and Judicial Review*. Clinton explained that "in 1894, the Supreme Court for the first time cited *Marbury* in support of an actual exercise of its power to invalidate acts of Congress in *Pollock [v. Farmers' Loan & Trust Co.]*,"<sup>143</sup> the famous

Income Tax Case."<sup>144</sup> He attributed the "creation of the *Marbury* straw man [to] the leaders of [what was then] the conservative wing of the American Bar Association."<sup>145</sup> "[T]he laissez-faire wing of the Bar championed a more expansive idea of judicial power than that which characterized earlier periods."<sup>146</sup> Clinton explained, "In the early twentieth century, conservatives defended court supervision of legislation as essential for protection of institutional property rights. On the liberal side, before 1937, 'historians and politicians were "proving" that judicial review was a usurpation of power defeating the original intent."<sup>147</sup> Judicial review was the bane of progressives who supported legislative supremacy and economic regulation, and judicial review was the favored and effective tool of laissez-faire conservatives at the turn of the twentieth century:

Between 1897 and 1937, almost as many state laws were invalidated on Fourteenth Amendment grounds alone as had been struck down *in toto* during the previous 110 years. Once the rights of blacks had been 'read out' of the Fourteenth Amendment in *Plessy v. Ferguson*, the Court's primary target became statutes regulating various forms of business activity. During that forty-year period, the Court struck down some 209 state laws on Fourteenth Amendment grounds. . . . As to federal laws, the Court overturned some fifty-five acts of Congress between 1896 and 1936, nearly tripling the previous number.<sup>148</sup>

But then came the New Deal. President Franklin Roosevelt's legislative program not only changed the size and scope of the federal government; the New Deal also reversed political perspectives about the judicial role: "After 1937, the positions began to shift, and by the 1960s liberals had begun to argue that review was necessary either for protecting or countering the democratic process. Conservatives, on the other hand, argued that judicial review was just plain 'undemocratic.'"<sup>149</sup>

During the first half of the twentieth century, a few historians created a scholarly foundation for the *Marbury* myth.<sup>150</sup> Edward Corwin, a progressive who taught at Princeton, published a series of writings about judicial review between 1910 and 1920 that laid the foundation for the "conventional narrative."<sup>151</sup> Albert Beveridge, a biographer of Marshall, contributed to the narrative during the same period.<sup>152</sup> William Winslow Crosskey, a constitutional historian and professor of law at the University of Chicago, later endorsed Corwin's "progressivist critique . . . [as] part of his attack on the early New Deal Court."<sup>153</sup> These scholars, although great in many respects, perpetrated the *Marbury* myth to support a critique of the modern exercise of judicial review.<sup>154</sup>

The completion of the *Marbury* myth occurred during the tenure of Chief Justice Earl Warren and continued during the tenure of Chief Justice Warren Burger. As Clinton's study establishes, "The Court adopted the theory of its own supremacy in constitutional interpretation in 1958, . . . and grounded that adoption in *Marbury v. Madison*."<sup>155</sup> Clinton's statistics about citations of *Marbury* by the Supreme Court after 1958 tell the story about the acceptance of the myth:

There are eighty-nine separate citations of *Marbury* [from 1958 to 1983], which almost equals the total of

the previous 154 years. Of these eighty-nine, fifty utilize *Marbury* in support of some kind of judicial review. Of these fifty, at least eighteen read *Marbury* as having justified sweeping assertions of judicial authority. Of these eighteen, nine apply *Marbury* to support the idea that the Court is the ‘final’ or ‘ultimate’ interpreter of the Constitution, with power to issue ‘binding’ proclamations to any other agency or department of government respecting any constitutional issue.<sup>156</sup>

After the Warren Court adopted *Marbury* as a precedent for judicial supremacy, the fans of the Court in the law schools put a positive spin on the *Marbury* myth. Professor Alexander Bickel of Yale wrote in 1962, “[I]f any social process can be said to have been ‘done’ at a given time and by a given act, it is Marshall’s achievement. The time was 1803; the act was the decision in the cast of *Marbury v. Madison*.”<sup>157</sup> In 1969, Professor William Van Alstyne of Duke wrote, “Of all [Marshall’s] significant contributions to our constitutional history, none has been more acclaimed or seems more secure as enduring precedent than his decision in *Marbury v. Madison*.”<sup>158</sup> The *Marbury* myth had come full circle: from the tool of the critics of the Supreme Court to the event celebrated by proponents of judicial supremacy.

Chief Justice Marshall deserves neither credit nor blame for the modern view of judicial supremacy. “Popular mythology dishonors this straightforward man by depicting him as a master of subtle statecraft. . . . He was not a ‘result-oriented’ judge.”<sup>159</sup> The argument he stated in favor of a modest exercise of judicial review in *Marbury* was neither novel nor controversial. *Marbury* is not a precedent for judicial activism. *Marbury* is a victim of historical revisionism by both proponents and critics of decisions of the Supreme Court in the second century of this country.

The moral of the history of *Marbury* is clear. For those who want to distort the principles of our constitutionalism, it is often helpful to revise the history of its practice. For those who want to restore the principles of our constitutionalism, it is always necessary to know the truth of the history of its practice. We should still teach and celebrate *Marbury*, but we should do so for the right reason: for its exposition of the limited and essential role of the federal judiciary under the Constitution.

## Endnotes

1 5 U.S. (1 Cranch) 137 (1803). The casebook that I use presents both the opinion and substantial commentary about the case. See RICHARD H. FALLON JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 58–80 (6th ed. 2009). Many other casebooks provide shorter treatment of *Marbury*. See, e.g., MICHAEL P. ALLEN, FEDERAL COURTS: CONTEXT, CASES, AND PROBLEMS 19–28 (2009); HOWARD P. FINK, LINDA S. MULLENIX, THOMAS D. ROWE JR. & MARK V. TUSHNET, FEDERAL COURTS IN THE 21ST CENTURY: CASES AND MATERIALS 35–37 (3d ed. 2007); ARTHUR D. HELLMAN, LAUREN K. ROBEL & DAVID R. STRAS, FEDERAL COURTS: CASES AND MATERIALS ON JUDICIAL FEDERALISM AND THE LAWYERING PROCESS 24–32 (2d ed. 2009); MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS: CASES, COMMENTS, AND QUESTIONS 1–16 (5th ed. 2002). Two popular casebooks notably do not provide substantial commentary about *Marbury*. See PETER W. LOW & JOHN C. JEFFRIES JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS (6th ed. 2008); CHARLES ALAN

WRIGHT, JOHN B. OAKLEY & DEBRA LYN BASSETT, FEDERAL COURTS: CASES AND MATERIALS (12th ed. 2008).

2 There are five conventional lessons about *Marbury* for a course in federal jurisdiction. See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 1.3, at 12–20 (2007). The classic guide for teaching law students about *Marbury* was published more than forty years ago. William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1. For a dissenting view, see Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 WAKE FOREST L. REV. 553 (2003).

3 See, e.g., ROBERT LOWRY CLINTON, *MARBUY V. MADISON AND JUDICIAL REVIEW* (1989); CHARLES E. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 47–71 (1996); WILLIAM E. NELSON, *MARBUY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* (2000); R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 157–75 (2001); JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 296–326 (1996); SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990); Akhil Reed Amar, *Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. CHI. L. REV. 443 (1989); David E. Engdahl, *John Marshall’s “Jeffersonian” Concept of Judicial Review*, 42 DUKE L.J. 279 (1992); James A. O’Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992); James E. Pfander, *Marbury*, Original Jurisdiction, and the Supreme Court’s Supervisory Powers, 101 COLUM. L. REV. 1515 (2001); Louise Weinberg, *Our Marbury*, 89 VA. L. REV. 1235 (2003); Gordon S. Wood, *The Origins of Judicial Review, or How the Marshall Court Made More Out of Less*, 56 WASH. & LEE L. REV. 787 (1999). But see Dean Alfange Jr., *Marbury v. Madison and Original Understanding of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. L. REV. 329. *Marbury* too has been recently the subject of a popularly accessible and acclaimed book. CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT* (2009).

4 ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1 (1962) (“[I]f any social process can be said to have been ‘done’ at a given time and by a given act, it is Marshall’s achievement. The time was 1803; the act was the decision in the cast of *Marbury v. Madison*.”).

5 See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by the Court and the country as a permanent and indispensable feature of our constitutional system.”); ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 45 (1987) (*Marbury* is the “cornerstone of judicial supremacy in applying the Constitution.”).

6 See, e.g., EDWARD S. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION: A CHRONICLE OF THE SUPREME COURT* 66 (1919) (describing *Marbury* as “a political coup of the first magnitude”); 2 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 1040 (1953) (*Marbury* “must have been motivated on a political basis only”); ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 27 (1931) (describing Marshall’s political strategy as “masterly”); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS’ CONSTITUTION* 75 (1988) (“one of the most flagrant specimens of judicial activism and . . . one of the worst opinions ever delivered by the Supreme Court”).

7 Weinberg, *supra* note 3, at 1244.

8 CHEMERINSKY, *supra* note 2, at 12.

9 NELSON, *supra* note 3, at 49; SLOAN & MCKEAN, *supra* note 3, at 9–29.

10 SLOAN & MCKEAN, *supra* note 3, at 28.

11 NELSON, *supra* note 3, at 49; SLOAN & MCKEAN, *supra* note 3, at 49–52.

12 U.S. CONST. amend. XII.

13 NELSON, *supra* note 3, at 50; SLOAN & MCKEAN, *supra* note 3, at 32; SMITH, *supra* note 3, at 2.

14 NELSON, *supra* note 3, at 50; SLOAN & MCKEAN, *supra* note 3, at 33–36; SMITH, *supra* note 3, at 14, 278.

15 NELSON, *supra* note 3, at 51; NEWMYER, *supra* note 3, at 142; SLOAN & MCKEAN, *supra* note 3, at 37; SMITH, *supra* note 3, at 278–79.

16 NELSON, *supra* note 3, at 41–42; NEWMYER, *supra* note 3, at 21–27; SLOAN



- & MCKEAN, *supra* note 3, at 23, 37; SMITH, *supra* note 3, at 4, 37-69.
- 17 NELSON, *supra* note 3, at 43; SLOAN & MCKEAN, *supra* note 3, at 38; SMITH, *supra* note 3, at 5, 144-68; Weinberg, *supra* note 3, at 1254.
- 18 NELSON, *supra* note 3, at 43; NEWMYER, *supra* note 3, at 28, 68, 171; SLOAN & MCKEAN, *supra* note 3, at 38; SMITH, *supra* note 3, at 5, 115-43.
- 19 NEWMYER, *supra* note 3, at 111; SMITH, *supra* note 3, at 6, 163-64; Weinberg, *supra* note 3, at 1254.
- 20 NELSON, *supra* note 3, at 46-48; NEWMYER, *supra* note 3, at 119-28; SLOAN & MCKEAN, *supra* note 3, at 40; SMITH, *supra* note 3, at 6, 234-67.
- 21 See generally WILLIAM STINCHCOMBE, *THE XYZ AFFAIR* (1980); see also SMITH, *supra* note 3, at 192-233.
- 22 NELSON, *supra* note 3, at 45; NEWMYER, *supra* note 3, at 112-19; SLOAN & MCKEAN, *supra* note 3, at 23-24; SMITH, *supra* note 3, at 6, 192-233.
- 23 NELSON, *supra* note 3, at 49; NEWMYER, *supra* note 3, at 148-49; SLOAN & MCKEAN, *supra* note 3, at 42; SMITH, *supra* note 3, at 4, 11-14.
- 24 Letter from John Marshall to Charles Cotesworth Pinckney (Mar. 4, 1801), in 6 *THE PAPERS OF JOHN MARSHALL* 89 (Charles F. Hobson, ed. 1990); NEWMYER, *supra* note 3, at 148; SMITH, *supra* note 3, at 18; Weinberg, *supra* note 3, at 1276 n.56.
- 25 NELSON, *supra* note 3, at 51; NEWMYER, *supra* note 3, at 142; SLOAN & MCKEAN, *supra* note 3, at 45.
- 26 NELSON, *supra* note 3, at 51; NEWMYER, *supra* note 3, at 142; SLOAN & MCKEAN, *supra* note 3, at 45.
- 27 SLOAN & MCKEAN, *supra* note 3, at 47; SMITH, *supra* note 3, at 285-86.
- 28 SLOAN & MCKEAN, *supra* note 3, at 47; SMITH, *supra* note 3, at 285-86.
- 29 SLOAN & MCKEAN, *supra* note 3, at 47.
- 30 NELSON, *supra* note 3, at 52; SLOAN & MCKEAN, *supra* note 3, at 47, SMITH, *supra* note 3, at 280.
- 31 NELSON, *supra* note 3, at 52; SLOAN & MCKEAN, *supra* note 3, at 48.
- 32 SLOAN & MCKEAN, *supra* note 3, at 54-63.
- 33 Act of Feb. 13, 1801, ch. 4, 2 Stat. 89; NELSON, *supra* note 3, at 57; NEWMYER, *supra* note 3, at 152; SLOAN & MCKEAN, *supra* note 3, at 54; SMITH, *supra* note 3, at 302; Van Alstyne, *supra* note 2, at 4.
- 34 Act of Feb. 27, 1801, ch. 15, §11, 2 Stat. 89; SLOAN & MCKEAN, *supra* note 3, at 60-63; SMITH, *supra* note 3, at 300; Van Alstyne, *supra* note 2, at 4.
- 35 NELSON, *supra* note 3, at 57; SLOAN & MCKEAN, *supra* note 3, at 53-63; SMITH, *supra* note 3, at 303.
- 36 SLOAN & MCKEAN, *supra* note 3, at 54.
- 37 *Id.*; SMITH, *supra* note 3, at 300.
- 38 SLOAN & MCKEAN, *supra* note 3, at 63.
- 39 NELSON, *supra* note 3, at 57; SLOAN & MCKEAN, *supra* note 3, at 63; SMITH, *supra* note 3, at 300; Van Alstyne, *supra* note 2, at 4.
- 40 NELSON, *supra* note 3, at 57; SLOAN & MCKEAN, *supra* note 3, at 63; SMITH, *supra* note 3, at 300.
- 41 NELSON, *supra* note 3, at 51; NEWMYER, *supra* note 3, at 148; SLOAN & MCKEAN, *supra* note 3, at 66-70; SMITH, *supra* note 3, at 19, 286.
- 42 SLOAN & MCKEAN, *supra* note 3, at 76; SMITH, *supra* note 3, at 300.
- 43 SLOAN & MCKEAN, *supra* note 3, at 76.
- 44 *Id.*; SMITH, *supra* note 3, at 300.
- 45 SLOAN & MCKEAN, *supra* note 3, at 76; SMITH, *supra* note 3, at 300.
- 46 NELSON, *supra* note 3, at 57; SLOAN & MCKEAN, *supra* note 3, at 94-98; SMITH, *supra* note 3, at 299-300.
- 47 SLOAN & MCKEAN, *supra* note 3, at 94-98; SMITH, *supra* note 3, at 301.
- 48 SLOAN & MCKEAN, *supra* note 3, at 98; SMITH, *supra* note 3, at 300.
- 49 NEWMYER, *supra* note 3, at 153.
- 50 SLOAN & MCKEAN, *supra* note 3, at 99; SMITH, *supra* note 3, at 300-01.
- 51 NELSON, *supra* note 3, at 58; SLOAN & MCKEAN, *supra* note 3, at 99-100; SMITH, *supra* note 3, at 304.
- 52 SLOAN & MCKEAN, *supra* note 3, at 105; SMITH, *supra* note 3, at 304.
- 53 SLOAN & MCKEAN, *supra* note 3, at 106-08; SMITH, *supra* note 3, at 304.
- 54 SLOAN & MCKEAN, *supra* note 3, at 112.
- 55 Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132; SLOAN & MCKEAN, *supra* note 3, at 113-14.
- 56 *Id.*; SMITH, *supra* note 3, at 305.
- 57 SLOAN & MCKEAN, *supra* note 3, at 113-14.
- 58 William H. Pryor Jr., *Not-So-Serious Threats to Judicial Independence*, 93 *VA. L. REV.* 1759, 1759-61 (2007).
- 59 SLOAN & MCKEAN, *supra* note 3, at 116; SMITH, *supra* note 3, at 305-11.
- 60 SLOAN & MCKEAN, *supra* note 3, at 116-20; SMITH, *supra* note 3, at 306-09.
- 61 SMITH, *supra* note 3, at 310-11.
- 62 5 U.S. (1 Cranch) 299 (1803).
- 63 SLOAN & MCKEAN, *supra* note 3, at 120; SMITH, *supra* note 3, at 311.
- 64 SLOAN & MCKEAN, *supra* note 3, at 120; SMITH, *supra* note 3, at 311.
- 65 SLOAN & MCKEAN, *supra* note 3, at 126; SMITH, *supra* note 3, at 313.
- 66 SLOAN & MCKEAN, *supra* note 3, at 132; SMITH, *supra* note 3, at 315-16.
- 67 NEWMYER, *supra* note 3, at 405; Antonin Scalia, *The Dissenting Opinion*, 1994 *J. SUP. CT. HIST.* 33, 34; SMITH, *supra* note 3, at 1.
- 68 Scalia, *supra* note 67, at 34.
- 69 NEWMYER, *supra* note 3, at 405; Scalia, *supra* note 67, at 34.
- 70 *Marbury*, 5 U.S. (1 Cranch) at 154.
- 71 *Id.* at 146.
- 72 *Id.* at 154.
- 73 *Id.*
- 74 *Id.*
- 75 *Id.* at 163.
- 76 *Id.*
- 77 *Id.* at 165-66.
- 78 *Id.* at 166.
- 79 CHEMERINSKY, *supra* note 2, at 14-15 (“[T]he Court in *Marbury* announced that there was a category of issues, termed *political questions*, that were not reviewable by the federal courts.”). Dean Chemerisky identifies this lesson as the second and my second as the first.
- 80 *Marbury*, 5 U.S. (1 Cranch) at 166.
- 81 *Id.*
- 82 CHEMERINSKY, *supra* note 2, at 13 (“*Marbury* established the power of the federal courts to review the actions of the executive branch of government. . . . The Court concluded that no person, not even the president or executive officials, can ignore the law.”).
- 83 *Marbury*, 5 U.S. (1 Cranch) at 166.
- 84 Weinberg, *supra* note 3, at 1404.
- 85 *Marbury*, 5 U.S. (1 Cranch) at 173.
- 86 *Id.* at 170.
- 87 CHEMERINSKY, *supra* note 2, at 15-16 (“Third, *Marbury* establishes that Article III creates the ceiling on the Supreme Court’s jurisdiction. . . . More generally, . . . *Marbury* helped establish the principle that federal courts are courts of limited jurisdiction.”).
- 88 U.S. CONST. art. III § 2.
- 89 See, e.g., Van Alstyne, *supra* note 2, at 30-33.

90 Levinson, *supra* note 2, at 565-66.

91 Amar, *supra* note 3, at 463-67.

92 THE FEDERALIST NO. 81, at 487-91 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

93 Weinberg, *supra* note 3, at 1368.

94 Judiciary Act of 1789, § 13, 1 Stat. 73, 81 (1789).

95 U.S. CONST. art. III, § 2.

96 William N. Eskridge Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1071 (2001).

97 Amar, *supra* note 3, at 456.

98 *Marbury*, 5 U.S. (1 Cranch) at 148-49.

99 Pfander, *supra* note 3, *passim*.

100 Weinberg, *supra* note 3, at 1321-31.

101 *Marbury*, 5 U.S. (1 Cranch) at 177.

102 Cf. CHEMERINSKY, *supra* note 2, at 16-17 ("Fourth, and most important, *Marbury v. Madison* established the power of the federal courts to declare federal statutes unconstitutional.").

103 *Marbury*, 5 U.S. (1 Cranch) at 178.

104 *Id.* at 179.

105 *Id.* at 179-80.

106 *Id.* at 180.

107 Cf. CHEMERINSKY, *supra* note 2, at 18-19 ("*Marbury* appears to establish the Court as the authoritative interpreter of the Constitution. . . . But *Marbury* actually is ambiguous about which branch is the authoritative interpreter of the Constitution.").

108 5 U.S. (1 Cranch) 299 (1803).

109 NEWMYER, *supra* note 3, at 156; SMITH, *supra* note 3, at 311; Weinberg, *supra* note 3, at 1281.

110 NEWMYER, *supra* note 3, at 156; SMITH, *supra* note 3, at 324.

111 SMITH, *supra* note 3, at 324.

112 Weinberg, *supra* note 3, at 1282.

113 HOBSON, *supra* note 3, at 50; SMITH, *supra* note 3, at 311; Weinberg, *supra* note 3, at 1283-87.

114 HOBSON, *supra* note 3, at 156-57; SMITH, *supra* note 3, at 324-25.

115 William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005).

116 SNOWISS, *supra* note 3, at 1-89.

117 PHILLIP HAMBURGER, LAW AND JUDICIAL DUTY (2008); see also Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. POL'Y HIST. 6, 7 (2008) ("Marshall did not invent judicial review. Judicial review developed from a longstanding English practice of reviewing the bylaws of corporations for repugnancy to the laws of England.").

118 THE FEDERALIST NO. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

119 *Id.* at 467.

120 SMITH, *supra* note 3, at 326.

121 2 U.S. 408 (1792).

122 CLINTON, *supra* note 3, at 102-02; HOBSON, *supra* note 3, at 48; SMITH, *supra* note 3, at 325.

123 HOBSON, *supra* note 3, at 49.

124 CLINTON, *supra* note 3, at 105-06; SMITH, *supra* note 3, at 324-25.

125 CLINTON, *supra* note 3, at 105; SMITH, *supra* note 3, at 324.

126 Engdahl, *supra* note 3, at 285.

127 CLINTON, *supra* note 3, at 117, 119.

128 60 U.S. (19 How.) 393 (1856).

129 CLINTON, *supra* note 3, at 108-09.

130 *Id.* at 119.

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

132 *Id.*

133 *Id.*

134 *Id.* at 176.

135 NELSON, *supra* note 3, at 59; SMITH, *supra* note 3, at 323, 326.

136 NELSON, *supra* note 3, at 59.

137 Engdahl, *supra* note 3, at 318.

138 *Id.* at 325 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

139 *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 178).

140 *Id.* at 326.

141 HOBSON, *supra* note 3, at 49.

142 NELSON, *supra* note 3, at 59.

143 157 U.S. 429 (1895).

144 CLINTON, *supra* note 3, at 121.

145 *Id.* at 183.

146 *Id.* at 139-40.

147 *Id.* at 192-93.

148 *Id.* at 207.

149 *Id.* at 192-93.

150 Weinberg, *supra* note 3, at 1236.

151 *Id.*

152 *Id.*

153 *Id.*

154 CLINTON, *supra* note 3, at 95, 138, 185, and 190-91.

155 *Id.* at 220.

156 *Id.* at 123.

157 BICKEL, *supra* note 3, at 1.

158 Van Alstyne, *supra* note 2, at 2.

159 Engdahl, *supra* note 3, at 329-30.

