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Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*

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Marbury v. Madison, the Supreme Court's leading precedent for judicial review of national laws, has long been viewed by scholars as a kind of "game"—a political struggle between two titans of United States constitutional history: President Thomas Jefferson and Chief Justice John Marshall. Furthermore, *Marbury* has generally been seen as a conflict in which Marshall outfoxed Jefferson by establishing a precedent for court review of legislative acts in a situation to which Jefferson could not respond. The analysis contained in this article suggests that the conventional view of *Marbury* is mistaken. The author employs both traditional legal-historical analysis and game theory to demonstrate that the behavior of both Marshall and Jefferson was consistent with the assumption that they were merely rational actors maximizing their payoffs at each stage of the controversy.

Introduction

The decision of the United States Supreme Court in *Marbury v. Madison* (1803) has been universally hailed as a political masterpiece. Federalists on the high court, led by Chief Justice John Marshall, had found themselves in an awkward position. A fellow Federalist, William Marbury, had asked for vindication of a judicial appointment made by lame-duck Federalist President John Adams, and failure to do so would not please Marshall's partisans. On the other hand, attempting to enforce Marbury's claim would surely provoke the wrath of the newly dominant Republicans, led by President Thomas Jefferson and Secretary of State James Madison, with whom the Court would have to live for some time.

Marshall's resolution of this dilemma, involving the Court's refusal on constitutional grounds to issue a writ of mandamus requested by Marbury, is widely thought to have accomplished several objectives presumably desired by the Court: (1) publicly rebuking Jefferson and Madison and branding their conduct as improper and illegal; (2) advancing the notion that a writ of mandamus was a proper remedy at law in this kind of case, with the corresponding implication that high executive

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officials were subject to the process of federal courts; (3) establishing the authority of the Court to overturn acts of Congress; yet (4) avoiding outright conflict with the executive branch, given that issuance of a writ of mandamus in this case probably would have met with executive noncompliance, ultimately jeopardizing the authority of the federal courts.

The fact that the Court's power to overturn laws was established in circumstances to which the administration could not respond has led to the conventional understanding of *Marbury* as a case in which judicial review was established by virtue of Jefferson having been "outdone" by Marshall. This understanding is reflected in virtually all textbook accounts of the case. Robert G. McCloskey (1960, 40) referred to Marshall's opinion as "a masterwork of indirection, a brilliant example of Marshall's ability to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another." Former Chief Justice Warren E. Burger said that, in *Marbury,* Marshall won "the great war over the supremacy of the Supreme Court in constitutional adjudication" and that Jefferson had been "outmaneuvered by the holding of the court" (Cannon and O'Brien 1985, 14). C. Herman Pritchett (1977, 126) said that, in *Marbury* the Court, "dominated by Marshall, had successfully asserted its authority to invalidate acts of Congress in one of the cleverest coups of American history." And in perhaps the most famous of all rhetorical flourishes on *Marbury,* Marshall's most influential biographer concluded that "by a coup as bold in design and as daring in execution as that by which the Constitution had been framed, John Marshall set up a landmark in American history so high that all the future could take bearings from it, so enduring that all the shocks the Nation was to endure could not overturn it" (Beveridge 1916, 3:142).

Notwithstanding the grain of truth contained in these colorful comments, the analysis that follows militates against their uncritical acceptance. After a brief survey of the historical background, I shall present a simple game-theoretic reconstruction of the *Marbury* situation that strongly suggests that both Marshall and Jefferson behaved rationally under the circumstances and that each obtained the best result available from his own point of view. The formal analysis will then be supplemented and strengthened by consideration of substantive legal history.

Background

Thomas Jefferson defeated incumbent President John Adams in the election of 1800 and was to take office on 4 March 1801. In February the Federalist Congress passed the Circuit Court Act, which doubled the number of federal judges, and the Organic Act, which authorized the

appointment of 42 justices of the peace in the District of Columbia. President Adams's appointments to fill these positions were called the "midnight appointees" and were virtually all Federalists. Their commissions were apparently signed by Adams and sealed by then–Secretary of State John Marshall, but due to time limitations, several of the commissions, including that of William Marbury, could not be delivered by midnight of 3 March, Adams's final day in office. When Jefferson, who, along with most other Republicans, had been infuriated by what he thought was illegitimate tampering with the judiciary by the lame-duck Federalists, assumed office on 4 March, he apparently ordered acting Secretary of State Levi Lincoln (who was attorney general, supervising the State Department during Madison's absence) to withhold delivery of the remaining commissions (Ellis 1974, 53–68; Dewey 1970, 75–134; Clinton 1989, 81–101).

Later in 1801, Marbury and others sought a writ of mandamus (an order issued by a court to a public official instructing the latter to fulfill an obligation imposed by law) in the United States Supreme Court to compel delivery of the commissions (Ellis 1974, 43).[1] The Court, led by Chief Justice John Marshall (who had himself been appointed to the post by Adams in January 1801), ordered the new administration to "show cause why a mandamus should not issue" (1 Cranch 153–54), and the case was placed on the Court's docket for the 1802 term. While the case was pending, the now-Republican Congress decided to eliminate the 1802 Supreme Court term, thus postponing decision in the *Marbury* matter until 24 February 1803 (Haskins and Johnson 1981, 184).

On that day, Marshall delivered the opinion of the Court in *Marbury v. Madison* (1 Cranch 153–80), holding: (1) that Marbury had a legal right to the commission, thus calling into question whether Jefferson had not failed to carry out his responsibility to "take care that the laws be faithfully executed"; (2) that Marbury had a right to resort to the laws of his country for a remedy; but (3) that the proper remedy was *not* a writ of mandamus issuing from the Supreme Court. Marshall argued in support of the third point that the high court had no power to issue a mandamus to the secretary of state because this would have been an exercise of original jurisdiction not warranted by the Constitution, which specifies in

[1]Prior to initiation of the suit, the plaintiffs had applied to the secretary of state and the secretary of the Senate for information regarding the commissions. On 31 January 1803, after a lengthy debate, the Senate voted (15–13) to refuse copies from the Journal reflecting its "advice and consent to the appointments" (*Debates and Proceedings of Congress, 1803,* 34–50). The plaintiffs suffered a similar fate at the State Department.

Article III, Section 2, that the Supreme Court has original jurisdiction in "all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party," and appellate jurisdiction in all other cases.

Marbury had sued under the Judiciary Act of 1789, which stated in Section 13 that the Supreme Court "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." Marshall regarded this clause in the Judiciary Act as an enlargement of the original jurisdiction of the Court, and since the Constitution had spelled out its original jurisdiction in the first place, any enlargement by Congress was unconstitutional. According to Marshall: "The particular phraseology of the Constitution of the United States confirms and strengthens the principle . . . that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument" (1 Cranch 176–80). The primary importance of this case, then, derives from its being the first occasion on which the Supreme Court unequivocally declared an act of Congress unconstitutional.[2]

Marbury in Extensive Form

As the textbook commentary noted earlier suggests, *Marbury v. Madison* has long been viewed by scholars as a kind of "game." Indeed, in the adversarial context of litigation that prevails in judicial systems strongly influenced by English common law, it might be reasonable to view most law suits in this way. It is therefore somewhat surprising that political scientists working in the field of public law have made only sporadic use of formal modeling techniques in the analysis of case law. Schubert (1959, 1962) pioneered the application of game theory to the study of bloc voting on the Supreme Court. Rohde (1972a, 1972b) combined game-theoretic and statistical approaches in his study of coalition formation on the Court, while providing a test of Riker's (1962) size

[2]There had been intimations of this power as early as 1792, where, in *Hayburn's Case* (2 Dallas 409), five Supreme Court justices, sitting on circuit, refused to enforce an act of Congress that authorized the judges to perform administrative duties subject to review by the secretary of war and by Congress (Currie 1981, 822–25; Haines 1932, 173–75). The following year, in the *Correspondence of the Justices* (8 August 1793), the Court refused to render an advisory opinion requested by the president and secretary of state, holding that such an opinion would be "extrajudicial" and thus violative of the "lines of separation drawn by the Constitution between the three departments of the government" (Currie 1981, 829). See generally Dionisopoulos and Peterson (1984).

principle in the context of judicial behavior. Modeling techniques have also been employed, with varying degrees of rigor, in the study of legal institutions and rules: adversarial and inquisitorial litigation procedures (Tullock 1975); peremptory challenges in jury selection (Brams and Davis 1976); the effects of precedent in arbitration cases (Schotter 1978); and evidentiary standards in due process cases (Bell 1987). Interestingly, of the studies mentioned above, only those of Schubert, Rohde, and Bell involve Supreme Court decision making. Moreover, with the exception of the Brams and Muzzio (1977) analysis of the Watergate Tapes Case, which the present study most closely resembles, there has been no attempt to apply traditional game-theoretic approaches in the study of a single case.

It is reasonable to begin the analysis by reconstructing the *Marbury* situation as a two-person, nonzero-sum game with Marshall and Jefferson as players.[3] I shall first construct a decision tree that encapsulates the alternatives available to the players at each stage of the conflict (see Figure 1), with the corresponding possible outcomes (see Table 1).

The initial move is clearly Jefferson's, since he can either order delivery of the commissions—in which case there will be no lawsuit brought by Marbury or the others, hence no conflict, and the game is over; or he can order nondelivery—which gives rise to the suit, and consequently the second move (by Marshall) is necessitated. The original choices available to Jefferson, then, are as follows:

a. Order the secretary of state to deliver the commissions.
b. Order the secretary of state not to deliver the commissions.

The choice of *a* by Jefferson leads to outcome *A*, since no countermoves are available to Marshall in this instance. On the other hand, the choice of *b* by Jefferson makes available the following three options to Marshall on the constitutionality of Section 13 and the related mandamus issue.[4]

[3]It might be thought that law suits, especially, would best be modeled as "zero-sum," but that impression is misleading. Like most other real-world contests, law suits can only rarely be characterized as "all-or-nothing" affairs, due mostly to the ubiquity of such institutions as plea bargaining, negotiated settlements, and the like. The nonzero-sum character of the situation becomes even more apparent in a case like *Marbury*, where the "real" contest might best be described as a shadow play involving participants who are not (technically) parties to the suit.

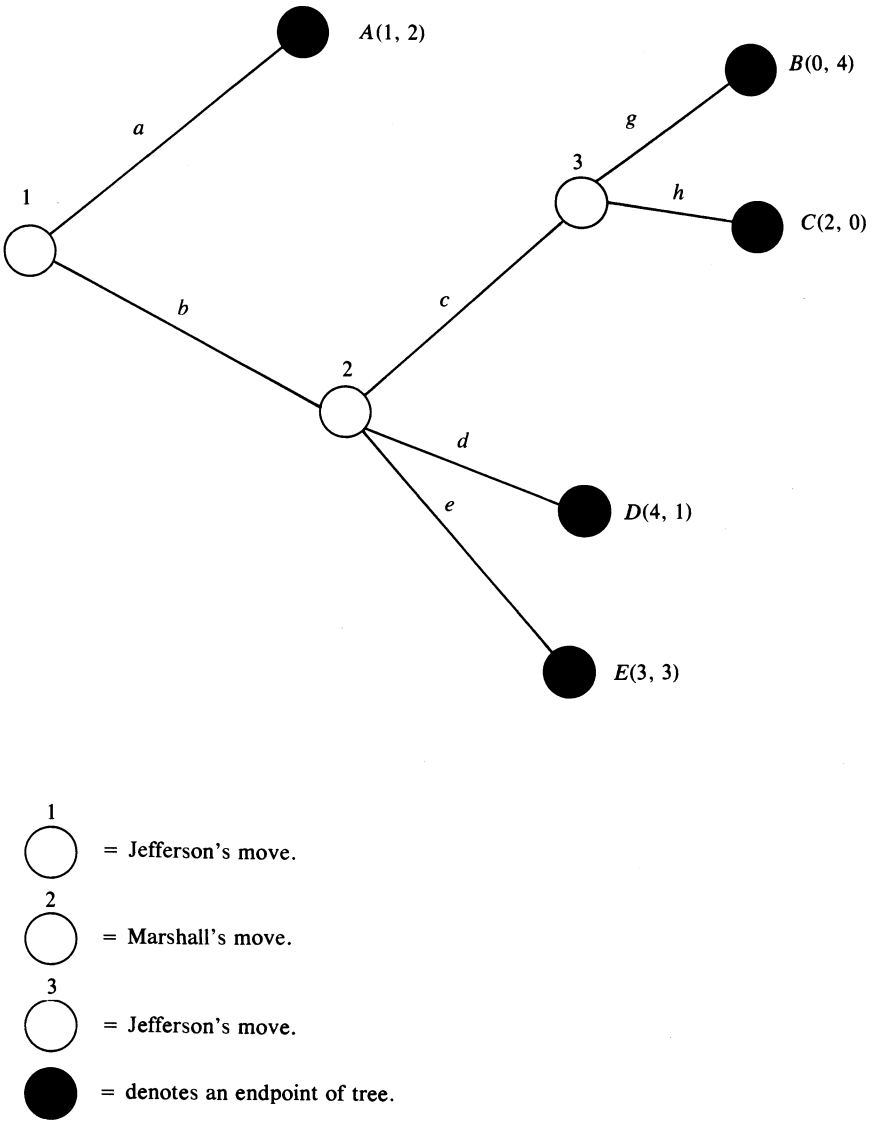
[4]Because Marshall has two alternatives on *each* of the issues (Section 13 and mandamus), there are actually four *logically possible* options. He may invalidate Section 13 and decline the writ (as he in fact did), or he may invalidate Section 13 and *issue* the writ. The only way to do the latter, however, would be to apply the holding of unconstitutionality "prospectively," while holding the law valid for Marbury. While this approach has been

Table 1

Outcome	Sequence of Choices	Description	Jefferson's Value	Marshall's Value
A	*a*	Marbury receives commission; Court has no opportunity to issue writ of mandamus or invalidate act of Congress.	1	2
B	*b–c–g*	Marbury receives commission; writ of mandamus issued; no act of Congress invalidated	0	4
C	*b–c–h*	Marbury does not receive commission; writ of mandamus issued; no act of Congress invalidated.	2	0
D	*b–d*	Marbury does not receive commission; no writ of mandamus issued; no act of Congress invalidated.	4	1
E	*b–e*	Marbury does not receive commission; no writ of mandamus issued; act of Congress invalidated.	3	3

used by the Court recently (see *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50 (1982)), there is no evidence that Marshall considered using it in *Marbury* or in any other case. Given prevailing attitudes about legal reasoning in Marshall's day, it is implausible merely to *assume* that he would have considered it. So this alternative has been excluded from the analysis. On the other hand, Marshall may uphold Section 13 and either issue or deny the writ. The former alternative is obvious, since Section 13, by Marshall's reading, authorizes the writ directly, whereas the latter may be accomplished by a restrictive interpretation of the statute (see n. 6 below). I assume, *arguendo*, the correctness of the "right/remedy" portion of the *Marbury* opinion. Marbury's alleged "right" was statutory (see n. 14 below), and the appropriateness of the remedy was grounded in common law (see n. 15 below). The analysis also does not consider other arguably important aspects of the case, such as Marshall's failure to disqualify himself due to his previous involvement in the appointment process. The latter issue, along with several others, considered only from Marshall's perspective, has been incorporated into Nagel's (1988) analysis of the *Marbury* case, which utilizes a "Policy Goal Percentaging" approach.

Figure 1



Note: Lowercase letters indicate choices (described in text); uppercase letters denote outcomes (described in Table 1).

c. Decide the case in favor of Marbury (issue the writ of mandamus), at the same time upholding the constitutionality of the Judiciary Act of 1789.[5]

d. Decide the case in favor of Madison (refuse to issue the writ), at the same time upholding the constitutionality of the Judiciary Act.[6]

e. Decide the case in favor of Madison (refuse to issue the writ), at the same time declaring the Judiciary Act unconstitutional.[7]

Now, if Marshall chooses *d* or *e* at the second stage, then no options remain for Jefferson, and the game ends with outcome *D* or *E*, respectively. On the other hand, if Marshall chooses *c*, then Jefferson again has the option to deliver or not deliver. However, it should be noted that the choice at this juncture is quite different from that at the first stage, since the decision now is whether to defy an order of the Supreme Court. In response to Marshall's choice of *c*, Jefferson may:

g. Comply with the Court's order—leading to outcome *B*.

h. Refuse to comply with the Court's order—leading to outcome *C*.

Because of the difficulty of arriving at estimates of cardinal utility with respect to the outcomes for the two players, I have only attempted to judge the *relative* merits of the outcomes for each. Since there are five such outcomes, I assign the value four to the most preferred, three to the next most preferred, and so on down to zero for the least preferred. The analysis assumes throughout that institutional factors (judicial power vis-à-vis executive and legislative) are paramount for both players.

The valuations of outcomes for Jefferson are assigned according to the following assumptions. First, Jefferson does not want Marbury's commission delivered (thus *C* is ranked higher than *A*); but if it is to be delivered, he would prefer to deliver on his own initiative, rather than pursuant to a court order (thus *A* is ranked higher than *B*—his worst outcome). Second, Jefferson wants neither judicial review of Congress

[5]Since I assume the correctness of the "right/remedy" portion of the *Marbury* opinion (see n. 4 above), it follows that application of Section 13 necessitates a decision for Marbury, unless the Court relies on a restrictive interpretation of the statute, thereby yielding option *d*.

[6]The Court may do this by construing Section 13 narrowly, saying, perhaps, that Congress did not intend to enlarge the original jurisdiction of the Court beyond the terms of Article III, but merely meant to ensure that the original jurisdiction would be fully exercised by the Court when appropriate. Or the Court may hold that Marbury's case is inappropriate because Section 13 requires that writs be issued according to customs and usages of law, and Marbury's request is not in accord with these (Van Alstyne 1969, 15).

[7]This, of course, is what the Court did, by invalidating Section 13 and renouncing jurisdiction to issue the writ.

nor judicial review of the executive (via mandamus with a supporting judicial opinion) established (thus *D*—his best outcome—is ranked higher than *E*); but if one of these is to be established, he prefers judicial review of Congress rather than judicial review of the executive (thus *E* is ranked higher than *C*).

The valuation of outcomes for Marshall are assigned according to these assumptions. First, Marshall would like to establish judicial review over both Congress and the executive but is in no position to do so because the only questionable congressional act involved is also the sole basis for the Court's authority to discipline the executive via mandamus. Forced to choose, Marshall would prefer to establish judicial authority over the executive rather than Congress (thus *B*—his best outcome—is ranked higher than *E*); but if he cannot obtain this outcome, he would value the opportunity to establish some kind of judicial review (i.e., over Congress) more highly than any outcome that does not allow for this opportunity (thus *E* is ranked higher than *A*, *D*, or *C*).[8] Second, Marshall wants Marbury's commission delivered (thus *A* is ranked higher than *D* or *C*); but if this cannot be done, then he would prefer that the Court not issue a writ of mandamus that the president can defy because executive defiance, if unanswered, may impair the Court's ability to speak with authority in subsequent cases (thus *D* is ranked higher than *C*—Marshall's worst outcome).

Marbury in Normal Form

Now that we have examined the extensive form of the game, it makes sense to convert the tree into a matrix and take a look at its normal form, assuming that each of the players was aware of the options available to

[8]It might be thought that establishing judicial authority over Congress rather than over the executive would have been more important to Marshall, but I think such a view amounts to reading modern perspectives back into Marshall's time. A fair reading of congressional debates and *seriatim* judicial opinions of the 1790s demonstrates that judicial power to disregard *concededly* unconstitutional laws was not really in dispute by the time Marbury's case reached the Court. For at least a decade, Republicans had urged the Court to overturn acts of Congress, and the justices had repeatedly declared their intention to do so whenever confronted with an appropriate case (which turned out to be *Marbury*). Perhaps this is why there was so little contemporary criticism of that portion of the *Marbury* opinion that later came to be regarded as its central feature (Clinton 1989, chap. 6). By contrast, the question concerning judicial authority over illegal or unconstitutional *executive* acts was far from settled at the time of *Marbury,* and this constitutes a strong reason for believing that Marshall's ideal outcome would have been to compel the executive by mandamus to deliver Marbury's commission, if it was within his power. Finally, it is worth remarking, in case one is not persuaded by this argument, that switching Marshall's values on this point does not alter the result of the analysis.

the other. To get the full picture of the situation, the conditional strategies of Jefferson will be examined in combination with Marshall's three options in the case that Jefferson chooses not to deliver from the outset. The procedure followed is that suggested by Hamburger (1979, 26–30), and the resultant matrix is as follows:

Matrix 1. Outcomes and Payoffs Shown

		Marshall		
		c	*d*	*e*
Jefferson	*a*	*A*(1, 2)	*A*(1, 2)	*A*(1, 2)
	b–g	*B*(0, 4)	*D*(4, 1)	*E*(3, 3)
	b–h	*C*(2, 0)	*D*(4, 1)	*E*(3, 3)

In Matrix 1, *A* is the sole outcome in the first row because if Jefferson chooses to deliver from the beginning (i.e., chooses strategy *a*), then the game is over. Similarly, at the second stage (Marshall's turn), if Marshall chooses *d*, then the game ends in outcome *D*; and if he chooses strategy *e*, the game culminates in outcome *E*. The conditional strategies of Jefferson are *b–g* and *b–h*. These two strategies are contingent upon Jefferson's initial choice not to deliver, hence the presence of *b* in each of them. They are also contingent upon Marshall's choice of *c* at the second stage and constitute alternative responses to that choice. For Jefferson, strategy *b–g* says: first choose *b*, then choose *g* if Marshall chooses *c*. Strategy *b–h* says: first choose *b*, then choose *h* if Marshall chooses *c*. There are two conditional strategies for Jefferson because he has two conceivable responses to Marshall's choice of *c*.

First, it should be noted that *b–h*, *e* is in equilibrium, with payoffs of three for both Jefferson and Marshall. Once arrived at, neither player can make himself better off by changing his strategy. Second, *b–h* is a dominant strategy for Jefferson, since no matter what strategy Marshall uses, Jefferson is always at least as well off using *b–h* as he would be using *b–g* or *a*, and is sometimes better off. Finally, when *b–g* and *a* are eliminated for Jefferson, then *c* and *d* become dominated for Marshall, leaving us with equilibrium outcome *E*, the result in fact reached in the case.

Constitutional History

Whereas formal reconstructions of such a situation as that in *Marbury* cannot tell us with certainty what actually happened, they can illuminate structural features of the situation that may lead to better understanding. If, as the previous analysis suggests, it is plausible to view the outcome of the *Marbury* affair as a product of rational choices by both Marshall and Jefferson, then any view of the case that relies on the assumption that one player was essentially "tricked" by the other is put in doubt. The prevailing belief that Jefferson was outfoxed by Marshall rests on the president's alleged ignorance of the Court's available legal options on the jurisdiction and mandamus issues. The former of these issues led ultimately to the Court's exercise of judicial review, and the latter led to its rebuke of the executive by way of *dicta*. In turn, Jefferson's alleged "naivete" turns, at least in part, on Marshall's alleged willingness to "bend the law" in order to establish judicial supremacy over Congress (and perhaps the executive as well) in constitutional matters.

Marshall's alleged willfulness in the case seems to have been based largely on the assumption that the *Marbury* decision had no firm legal basis and was therefore an exercise of "will" rather than "judgment," recalling Hamilton's famous distinction. Relying again on Marshall's influential biographer for the textbook description: "[*Marbury*], for perfectly calculated audacity, has few parallels in judicial history. In order to assert that in the Judiciary rested the exclusive power to declare any statute unconstitutional, and to announce that the Supreme Court was the ultimate arbiter as to what is and what is not law under the Constitution, Marshall determined to annul Section 13 of the Ellsworth Judiciary Act of 1789. Marshall resolved to go still further. He would announce from the Supreme Bench rules of procedure which the Executive branch of the Government must observe" (Beveridge 1916, 3:32).

But Marshall did not, in *Marbury* or on any other occasion, proclaim an exclusive power in the judiciary to invalidate laws, nor that the Court was ultimate arbiter of constitutional questions; nor did he announce "rules of procedure" for the executive branch.[9] Though some of

[9]So far as I know, the Court did not (nor did any sitting Justice for that matter) declare itself the ultimate expositor of the Constitution until 1958, when, in *Cooper v. Aaron*, 358 U.S. 1, 18, it held, erroneously, that *Marbury* had "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." Just how badly mistaken the Court was in its historical reference is indicated by the fact that *Marbury* was not cited by the

Marshall's language might appear to sweep more broadly, *Marbury*'s judicial review holding was in fact quite narrow, justifying at most the Court's power to nullify national laws in cases bearing directly upon the exercise of judicial functions (Clinton 1989, 15–20). Furthermore, it is unlikely that anything more than this would have been even thinkable, given early U.S. attitudes about the nature and scope of judicial authority (Wolfe 1986, 1–11).

This kind of judicial review, in which the Court would be the final judge of its own power in cases involving the performance of its assigned functions, was one to which neither Jefferson nor Madison was opposed. Though Jefferson may not have been enamored of the Federalist judiciary exercising even this much authority over a *Republican* legislature, just as he had not been enamored of judicial review as it had been exercised—or more accurately, not exercised—by the Federalist judiciary over a *Federalist* legislature in the 1790s (Warren 1925, 119–20), he had nonetheless long been a supporter of judicial review over Congress, *in principle* (Mendelson 1962), and he never directly challenged the judicial review aspect of the *Marbury* decision (Dewey 1970, 142).[10] Thus, Chief Justice Burger's suggestion that Marshall had somehow slipped the principle of review past Jefferson like a thief "in the night" (Cannon and O'Brien 1985, 14) should be regarded as highly implausible.

The historical focus upon the *Marbury* affair from the perspective of its long-term effect on judicial power has also obscured understanding of the role of the executive in the case. Aside from the usual speculations about what Jefferson might have done had the case been decided differently (i.e., had the writ of mandamus been issued), the involvement of

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Court in support of any kind of judicial review, however narrowly defined, until 1887, though the Court had by that time invalidated some 20 federal laws on constitutional grounds. See *Mugler v. Kansas*, 123 U.S. 623, 661 (1887). Interestingly, in this first use of *Marbury* to support a doctrine of review, the Court plainly did not know exactly what it was citing, for it used *Marbury* in support of the then-developing doctrine of Fourteenth Amendment substantive due process as a ground for overturning *state* laws. For fuller discussion of this point, see Clinton (1989, chap. 7).

[10]It should be noted that Jefferson was aware of the exercises of judicial review by lower federal courts in the 1790s, in one of which he was directly involved. It had been Jefferson, as secretary of state in Washington's administration, who had petitioned the Supreme Court for the advisory opinion that was rejected in the *Correspondence of the Justices* (see n. 2 above). The issue, which involved the question of what to do with armed foreign vessels docked in U.S. ports, had to be resolved ultimately by executive officers (including Jefferson), who were disappointed by the Court's refusal to provide legal advice and who anticipated "the rebuff of the Court" once the decision was made. It was apparently Jefferson who had been the strongest supporter of the Court's involvement (Malone 1962, 119).

the administration in the *Marbury* struggle has largely been ignored. The historic importance of the judicial review principle, combined with the historic unimportance of the fact that Marbury failed to receive his commission (i.e., that, technically, Madison won the case), has left the impression that the president was somehow a "loser" in the contest, thoroughly outwitted by a clever chief justice.

But Jefferson was not as foolish as he has been made to appear by historians of the *Marbury* affair. It is very likely that he possessed advance knowledge concerning the Court's legal options for resolving the dispute. It is even probable that he was aware of the ultimate ground upon which the Court would invalidate Section 13 (that Congress could not by statute enlarge the Court's original jurisdiction), since Marbury's counsel stressed the provision's *constitutionality,* during oral argument, in the presence of several administration officials, at least two weeks before the final decision. Amid discussion about ministerial duties of the secretary of state and the appropriateness of the mandamus remedy in Marbury's case, Charles Lee remarked, "Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution."[11]

Notwithstanding the Court's exercise of judicial review, it was the famous "right/remedy" portion of the *Marbury* opinion, against which Jefferson would later inveigh on several occasions and which contained the so-called public rebuke of the administration's conduct, that aroused the president's hostility more than any other aspect of the decision. Though most commentators appear to have sided with Jefferson on this point, an attentive reading of the record suggests that the scolding may not have been altogether unjustified. The secretary of state, presumably acting under a presidential directive, had blatantly violated a statutory obligation to safeguard all official federal documents—including judicial commissions—and to produce copies of these upon request. Moreover,

[11] 1 Cranch 137, 148 (1803). It appears that Lee may have blundered here. His accompanying citation was to a 1793 decision of the circuit court for Pennsylvania that involved prosecution of a German consul for extortion. The consul's lawyers had argued against the court's jurisdiction, relying on the provision of Article III that gives the Supreme Court original jurisdiction in cases affecting consuls. The court rejected this argument on the ground that Congress, in Section 13 of the Judiciary Act, had specified the Supreme Court's jurisdiction over consuls to be original, but not exclusive. See *United States v. Ravara,* 2 Dallas 297–98 (1793). If Lee thought that *Ravara* was supportive of the Court's jurisdiction in *Marbury,* he was mistaken, for *Ravara* involved neither mandamus nor statutory enlargement of the Court's original jurisdiction. What is more interesting for present purposes is that Lee stressed the point at all. It is unlikely that he would have done so had the issue not been in dispute prior to the *Marbury* litigation. It is thus also unlikely that the administration would not have known that the Court might void Section 13 in Marbury's case.

the primary purpose of the statute that imposed these duties was to provide evidence *in court* whenever litigation arose over the authenticity of whatever the documents represented.[12] In light of these circumstances, Madison's subsequent failure to appear to explain why he had not produced copies of the commissions for Marbury and the other plaintiffs (i.e., to "show cause why a mandamus should not issue") was probably regarded by Marshall and his fellow justices as a serious, if not ominous, interference with the Court's ability to perform its functions properly.[13] If so, then it is understandable that the Court would have thought it desirable to depart from the usual method of dismissing a case on jurisdictional grounds without expressing an opinion on its merits.

This seems doubly true in light of the equity dimension of the controversy. After all, Marbury had petitioned the Court for essentially equitable relief and had done so in good faith reliance upon a law that he had a right to presume valid. Sitting as a court of original jurisdiction (i.e., a trial court), with power to award both legal and equitable remedies, the Court would have viewed its own discretion more liberally than in the normal case brought on direct appeal. Given the administration's "stonewalling," the Court may have felt that Marbury was at least entitled to

[12]The act was passed by Congress on 15 September 1789 and, among other things, charged the secretary with the duty to "make out," "record," and "affix the seal of the United States to all civil commissions, after they have been signed by the President." Respecting the judicial process, the act stated that all copies of official documents, to which "the law gives a right, on the payment of ten cents," "shall be as good evidence as the originals." See 1 Cranch 137, 140–41, 170 (1803). This statute plainly was not designed to delegate discretionary authority to the executive branch in matters of state, but rather to safeguard the integrity of the courts in the performance of judicial duties, by ensuring the availability of "good evidence." During oral argument, it was rightly pointed out that an entirely different statute (Act of 27 July 1789) required the secretary to "perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President." The scope of this act was explicitly confined to matters "respecting foreign affairs." See 1 Cranch 137, 139–40 (1803).

[13]The *Marbury* situation was not altogether unlike that in which the Court found itself more recently in *United States v. Nixon,* 418 U.S. 683 (1974). In *Nixon* the Court held that documents in the custody of administrative officials, including the president, are subject to judicial process whenever they are essential to adjudication of the rights and duties of parties to a case pending in federal court, absent a clear showing of necessity for exemption. Notwithstanding obvious differences between the two cases (e.g., in *Nixon* the president was an unindicted coconspirator in a criminal prosecution), the fact remains that, in both *Nixon* and *Marbury,* important documents sorely needed by the courts were withheld without even the barest showing of necessity. Moreover, in *Marbury* the executive intransigence had occurred in the face of an act of Congress that *required* that the information be produced and that required production *explicitly* for the purpose of safeguarding the integrity of the judicial process (see n. 12 above).

something like an "advisory opinion" concerning his right to the commission, the appropriate remedy, and his ability to pursue the cause in another court.[14] It should also be noted that Jefferson was one of the foremost equity lawyers of his time (Hoffer 1990) and would not have been insensible to these considerations.

On the mandamus remedy, it is well known that Jefferson was angry about Marshall's "obiter dissertation" on the issue, especially the intimation that writs could be issued by federal judges to subordinate executive officials in certain circumstances. It is also well known that Republicans were generally apprehensive about this possibility long before the actual decision of Marbury's case. It would therefore appear unlikely that Jefferson was unaware of the Blackstonian logic of Marshall's argument on this point, as the matter had received thorough discussion in the press and the government during the months between the filing of Marbury's claim and the final decision. Though Jefferson (and other reasonable persons) disagreed with Marshall, there is little doubt that the latter's arguments on the issue are legally plausible; and Blackstone's views on the subject (which Marshall followed) would have been known generally among lawyers (including Jefferson) in the early republic.[15]

[14]It should be noted that the so-called advisory opinion in *Marbury* has nothing whatever to do with the modern Supreme Court's doctrine proscribing *ex cathedra* pronouncements on constitutional questions. First, Marbury's notorious "right" to a copy of his commission was not a constitutional one but was purely statutory, the result of an obligation imposed by Congress on the secretary of state (see n. 12 above). Second, the purpose of the Court's proscription of advisory opinions is fully satisfied when a court refuses to interpret constitutional provisions in the absence of a bona fide case or controversy. There is no question concerning Marbury's standing to litigate; the only question concerns the appropriate forum in which to do it.

[15]According to Blackstone, a writ of mandamus is "a command issuing in the King's name from the court of King's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposed, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, and has no other specific means of compelling its performance" (Blackstone 1979, 3:110). In oral argument, this passage was quoted in full, in the midst of an argument stressing the equitable nature of the proceeding, the absence of any other civil remedy available to Marbury (criminal prosecution was possible, since the statute made offending officers subject to indictment), and the threat to an independent judiciary posed by the seemingly arbitrary acts of the administration. The argument concluded with reference to a number of English cases designed to show that mandamus is appropriate where there is "no other adequate, specific, legal remedy," thereby rendering its issuance consistent with "the principles and usages of law," as required by Section 13. See 1 Cranch 137, 139–53 (1803).

Conclusion

The legal-historical analysis thus helps to confirm what the formal analysis strongly suggests: that the Court's determinations, at each stage of the *Marbury* controversy, were at least *plausible* applications of existing law and that *both* the Court *and* the administration were hemmed in by legal constraints to a larger extent than usually has been supposed. If this much is granted, then it also must appear less likely that Jefferson and Madison would have been incognizant of the alternatives available to the Court, and so less likely that Jefferson would have allowed himself to be outpointed by the chief justice in the situation, either through ignorance of Marshall's options or because he was "looking in another direction" (McCloskey 1960, 44). Textbook accounts of *Marbury* seem to have overstated both the extralegal dimensions of the case and Marshall's political aggressiveness in "contriving" the decision. Conversely, these accounts appear to have understated the important role of Jefferson's administration in the conflict, as well as information about Marshall's motives and legal alternatives that was likely available to Jefferson himself.

It has often been said that politics makes strange bedfellows. To the extent that *Marbury* was a "political" decision, it seems to have been a tacit political compromise between two figures who have most often been considered mortal enemies in the drama of United States constitutional history, not a "game" with a clear winner and loser. This finding has implications beyond the mere reversal of textbook wisdom. *Marbury* is not just any case; rather, as Chief Justice Rehnquist (1987, 99) recently put it: "One need understand very few of the cases that it has decided in order to understand the Supreme Court's role in our nation's history. But one must assuredly understand the case of *Marbury v. Madison.*"

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