

JUDICIAL FAITHFULNESS OR WANDERING INDULGENCE?
ORIGINAL INTENTIONS AND THE HISTORY OF
MARBURY V. MADISON

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Chief Justice John Marshall's opinion in *Marbury v. Madison* has long been considered one of the "essential" documents of American history. References to *Marbury* abound in the five hundred-plus volumes of the Supreme Court Reports. It has become the principal "legitimizing" case in constitutional law. Significantly, early uses of *Marbury* typically were connected with the clarification of technical issues of law. The employment of *Marbury* to establish the legitimacy of regular and searching judicial oversight of legislative and executive action, whether federal or state, is a rather late development in American constitutional history. By the end of the twentieth century, *Marbury* was almost universally associated with judicial assertiveness, whether in the service of individual freedoms, federalism, or the system of checks and balances. Marshall likely would find reasons to be both cheered and troubled by contemporary uses of his opinion. His assessment of *Marbury* at its bicentennial no doubt would contain instructions regarding the careful use of the "loaded weapon" that he is credited with bequeathing to the Justices who have followed him on the United States Supreme Court.

Legal scholars and jurists have long regarded *Marbury v. Madison*¹ as the premiere case in American constitutional law. There can be little doubt that *Marbury* is the premiere legitimating case when it comes to judicial independence and power in the United States.² The American judiciary

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

2. See KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 2 (14th ed. 2001) ("Understanding the core reasoning of *Marbury* . . . is essential to thinking about Court power today."). The significance of Marshall's defense of a general power of judicial review can be appreciated when compared with the following observation by Justice Chase in a case involving the enactment of a bill of attainder by the Georgia legislature prior to the adoption of the United States Constitution:

came of age with Marshall's opinion, especially with his declaration that "[i]t is . . . the province and duty of the judicial department, to say what the law is."³ Recitation of these classic words is virtually expected in major cases such as *Bush v. Gore*⁴ or *United States v. Nixon* (the Watergate Tapes case).⁵ Disagreements over both the status of judicial review prior to *Marbury* and the conformity of Marshall's arguments to the intentions of the leading delegates at the Federal Convention of 1787 have not diminished the stature of the case or the significance of its reasoning.⁶ Precisely due to its "legitimizing" qualities, judicial disputes over the proper interpretation and use of *Marbury* have been more important to the direction of the country than most other controversies in American constitutional law.

Even a cursory review of the five hundred-plus volumes of the Supreme Court Reports will reveal that several Marshall Court cases, such as *McCulloch v. Maryland*⁷ and *Gibbons v. Ogden*,⁸ have enormous precedential value. No other case, however, rivals *Marbury* when it comes to legitimating judicial independence and power.⁹ This is not to say, however, that the reasoning and precedential stature of *Marbury* have escaped all criticism. Scholarly treatments of *Marbury* typically include both references to pre-Marshall Court arguments for judicial review and warnings that we not "exaggerate" the significance of Marshall's ruling.¹⁰ The principal intention of this Article is not to revisit or recast the debate over either judicial review or Marshall's proper legacy. This Article, however, does seek to make a contribution to these debates by exploring the way in which *Marbury* has been used by Supreme Court Justices in the two hundred years since Marshall declared that "[i]t is . . . the province and duty of the judicial department, to say what the law is."¹¹ The Article concludes with some reflections

[A]lthough it is alleged, that all acts of the legislature, in direct opposition to the prohibitions of the constitution, would be void; yet, it still remains a question, where the power resides to declare it void? It is, indeed, a general opinion, it is expressly admitted by all this bar, and some of the judges have, individually, in the circuits, decided, that the supreme court can declare an act of congress to be unconstitutional, and therefore, invalid; but there is no adjudication of the supreme court itself upon the point.

Cooper v. Telfair, 4 U.S. (4 Dall.) 14, 19 (1800).

3. *Marbury*, 5 U.S. (1 Cranch) at 176.

4. 531 U.S. 98, 128 n.7 (2000) (Stevens, J., dissenting).

5. 418 U.S. 683, 703 (1974).

6. C. HERMAN PRITCHETT, *THE AMERICAN CONSTITUTION* 31 (3d ed. 1977) (drawing attention to the continuing "disput[e]" as to whether Marshall's conclusions about the intent of the framers . . . were supported by the evidence").

7. 17 U.S. (4 Wheat.) 316 (1819).

8. 22 U.S. (9 Wheat.) 1 (1824).

9. See, e.g., 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-1815*, at 182 (1981) (noting *Marbury*'s status as a "landmark" decision due to the belief that it "established the doctrine of judicial review of acts of Congress"). Justice McReynolds spoke directly to the status of *Marbury* in 1926: "For a hundred and twenty years that case has been regarded as among the most important ever decided. It lies at the very foundation of our jurisprudence." *Myers v. United States*, 272 U.S. 52, 218 (1926) (McReynolds, J., dissenting).

10. See HASKINS & JOHNSON, *supra* note 9, at 182-91; ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 32-33 (Sanford Levinson ed., 2d ed. 1994).

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803).

on Marshall's likely reaction to the contemporary status and use of *Marbury*.

I. *MARBURY'S* EARLY YEARS: FROM 1803 TO THE CENTENNIAL

Pre-Civil War citations of *Marbury* are relatively scarce by modern standards and focus mainly on "technical" rather than "substantive" or "theoretical" issues pertaining to judicial power or checks and balances. Although *Marbury* has long been viewed as the quintessential judicial review case in American law, the regular practice of using Marshall's opinion to conclusively establish the legitimacy of judicial oversight of legislative and executive action, whether federal or state, only appears in the late nineteenth century. There is a two-fold explanation for the modest use of *Marbury* as a legitimizing precedent prior to the turn of the twentieth century. For one thing, nineteenth century jurists understood that good arguments for limits on legislative power pre-dated *Marbury*. Recourse, for example, could be made to Justice Chase's declaration in *Calder v. Bull*¹² that "[a]n act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority."¹³ This observation was made five years before *Marbury* and represented only one of a number of opinions that contained references either to the existence of limits on legislative power or specifically to judicial review. Especially after the publication in 1840 of Madison's notes on the Federal Convention of 1787, jurists who wished to defend either a general or limited power of judicial review could cite approving statements by important "Founding Fathers" in addition to referencing Hamilton's defense of judicial review in *Federalist Paper No. 78*.¹⁴

In addition to their familiarity with pre-*Marbury* defenses of limited government and judicial review, few jurists prior to the 1900s were interested in justifying the kind of assertive judicial action that has come to be associated with contemporary invocations of Marshall's declaration that "[i]t is . . . the province and duty of the judicial department, to say what the law is."¹⁵ While the American people have become accustomed to seeing the Supreme Court overturn legislative or executive action—examples from

12. 3 U.S. (3 Dall.) 386 (1798).

13. *Id.* at 388 (emphasis omitted).

14. See, for example, the remarks by Eldridge Gerry and Luther Martin at the Constitutional Convention. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., rev. ed. 1937). Hamilton's argument for giving the judiciary a general power of constitutional review appears in a much cited passage on limited government in FEDERALIST NO. 78. Referring in particular to the legislature, Hamilton noted that limitations "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961). An additional reference to a general power of judicial review appears in FEDERALIST NO. 81, at 481 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

15. *Marbury*, 5 U.S. (1 Cranch) at 176.

the Rehnquist Court alone are quite numerous—the Supreme Court of the nineteenth century used its power of judicial review to check the coordinate branches of the federal government sparingly.¹⁶ After *Marbury* in 1803, the Court did not strike down part or all of another federal law until *Dred Scott v. Sandford* in 1857 declared the Missouri Compromise of 1820 unconstitutional.¹⁷ Interestingly, Chief Justice Taney did not cite *Marbury* in his opinion in *Dred Scott*. In fact, the Court during the nineteenth century was not yet looking for heavy armament that could be used in battles with legislative or executive officials over protection of individual freedoms or institutional arrangements such as separation of powers.

All of this is not to say that *Marbury v. Madison* went unnoticed until the twentieth century. Where *Marbury* was cited, however, it tended to be used to make a technical point about the Court's jurisdiction or the degree of exposure of public officials to writs of mandamus.¹⁸ That is to say, *Marbury's* value as a precedent during most of its first hundred years was tied to Marshall's comments on questions such as the specific character or nature of appellate and original jurisdiction. This was not insignificant, since the clarification of these issues was of obvious importance to the Court during these early years when it was still struggling to define its role in the larger governmental system.

Beginning even before Marshall's appointment to the Supreme Court, Justices wrestled with the issue of the judiciary's place in the new constitutional order. *Marbury's* importance has to do with the fact that it was in this case that the Justices took the bull by the horns and not only declared that the judiciary is charged with a special responsibility to enforce the limits of the Constitution, even against the more democratic legislative branch of the government, but also acted on this argument. Here was *Marbury's* significance on the macro-level. On the micro-level, *Marbury* addressed the scope of the Court's appellate jurisdiction and the extent of its authority to issue writs of mandamus.¹⁹ Marshall's opinion, however, did not put an end to judicial consideration of such matters. While *Marbury* hardly figured in all

16. Cases from the Rehnquist Court that involve rejections of all or part of federal statutes include *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); and *United States v. Morrison*, 529 U.S. 598 (2000). The executive branch was not shielded from unwelcome rulings by the Rehnquist Court. In *Clinton v. Jones*, the Court found that the doctrine of separation of powers does not provide the president with protection against all private actions while in office. 520 U.S. 681, 705-06 (1997). The Federal Drug Administration also found itself overruled by the Rehnquist Court in its attempt to impose significant new regulations on the tobacco industry. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

17. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Chief Justice Taney argued in *Dred Scott* that the Constitution's protection of property rights applied to slavery in all parts of the Union. *Id.* The Missouri Compromise brought Maine into the Union as a "free" state while Missouri had the status of a "slave" state. *Id.* at 488. In arguments before the Court in 1871, Attorney General A.T. Akerman and Solicitor General B.H. Bristow made reference in *Blyew v. United States* to the uniqueness of *Marbury* and *Dred Scott*: "till the beginning of the rebellion, this court rarely decided [a law of Congress] unconstitutional. The cases of *Marbury v. Madison* and perhaps *Scott v. Sandford*, are the only ones we recall." *Blyew v. United States*, 80 U.S. (13 Wall.) 581, 588 (1871) (internal citations omitted).

18. See, e.g., *Reese v. Walker*, 52 U.S. (11 How.) 277, 291 (1851).

19. *Marbury*, 5 U.S. (1 Cranch) at 150-52.

the cases that addressed these issues, its early use was generally as a precedent that spoke to narrow technical issues.

Cases involving the issuance of writs of mandamus came up with some regularity during the first decades of the nineteenth century. *Marbury* both opened the door to such cases with its broad interpretation of the principle of legal redress and constituted the dominant precedent that could be cited by contesting parties and Justices. Although Marshall declared that the Court could not issue the writ requested by William Marbury and his fellow petitioners,²⁰ his opinion nevertheless included the observation that to withhold a commission can be “violative of a vested legal right.”²¹ He did not quibble about the judiciary’s power to issue writs of mandamus, when appropriate, to compel officials such as Madison to perform designated actions. These arguments, especially coming from the Chief Justice, certainly did not discourage persons from seeking court orders to gain redress against unfavorable governmental action. Thus, for example, counsel for the plaintiff in *McIntire v. Wood*,²² an 1813 mandamus case, cited *Marbury* to support his argument for a broad reading of the judiciary’s remedial powers.²³ His plea, however, was unsuccessful. Justice Johnson, without reference to *Marbury*, replied with the declaration that circuit courts have only a limited power to issue writs of mandamus.²⁴ Returning to *Marbury* four years later, and citing Marshall’s finding that such writs can not be issued under original jurisdiction, the Court again refused to issue the desired order.²⁵ In 1821, Justice Johnson appealed to *Marbury* when denying the power of the Supreme Court of Ohio to issue a writ of mandamus to the register of a land office.²⁶ One of the more curious Marshall Court opinions that made reference to *Marbury*’s passages on the issuance of writs of mandamus was a dissent in 1831 by Justice Baldwin.²⁷ Writing in *Ex parte Crane*, Baldwin drew directly from *Marbury* to support his objection to what he believed was an indiscreet expansion of judicial power by Marshall, the author of the Court’s opinion in *Crane*.²⁸ Where Marshall was prepared to authorize mandamus in this case, Baldwin believed that the reasoning of *Marbury* was on the side of denying the writ.²⁹ Importantly, not only did the early uses of

20. *Id.* at 149.

21. *Id.* at 162.

22. 11 U.S. (7 Cranch) 504 (1813).

23. *Id.* at 505.

24. *Id.*

25. See *McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 605 (1821).

26. Writing for the Court in *McClung v. Silliman*, Justice Johnson made direct reference to *Marbury*:

But when, in the cases of *Marbury v. Madison*, and that of *McIntire v. Wood*, this court decided against the exercise of that power, the idea never presented itself to any one, that it was not within the scope of the judicial powers of the United States, although not vested by law in the courts of the general government.

Id. at 604.

27. See *Ex parte Crane*, 30 U.S. (5 Pet.) 190, 200 (1831) (Baldwin, J., dissenting).

28. *Id.* at 200-04, 223.

29. *Id.* at 223.

Marbury tend to focus on procedural or technical issues of law, but Marshall's opinion was not typically employed to defend an expansionist or assertive use of judicial power.

References to *Marbury* in cases involving the issuance of writs of mandamus continued to appear through the nineteenth century. *Marbury* figured prominently in *Kendall v. United States*,³⁰ a Taney Court case having to do with the susceptibility of the President to mandamus. Counsel for both sides quarreled over Marshall's teaching; with one side asserting that mandamus is improper if there are alternative remedies,³¹ and the other side insisting that *Marbury* did not bar writs of mandamus where "warranted by the principles and usages of law."³² It was not uncommon in mandamus cases that came before the Supreme Court in the mid-nineteenth century to find references to *Marbury* in the arguments of opposing counsel. A divided Court in *Kendall* reaffirmed the judiciary's power to issue writs to officers of the government without directly citing *Marbury* on this point.³³ Justice Barbour, however, did mention the 1803 precedent in his dissent, specifically noting Marshall's declaration that Congress went too far in extending to the Court a power to issue writs of mandamus under original jurisdiction.³⁴

Opposing counsel and Justice Woodbury for the Court all cited *Marbury* in an 1850 case arising out of a dispute over the conditions that must be satisfied before federal courts may issue mandamus.³⁵ Rejecting pleas for a broad reading of the judiciary's remedial powers, Woodbury made direct use of *Marbury* to support his argument that resort to mandamus "lies only when no other adequate remedy exists."³⁶ Attorney General Gilpin cited *Marbury* in both an 1839 and an 1840 case,³⁷ arguing in the former that a petitioner "must be without any legal remedy" to secure mandamus.³⁸ Counsel for the state of Ohio turned to *Marbury* in an 1860 case to support his contention that the judiciary enjoyed only a limited power to issue writs of mandamus.³⁹ Here is further evidence that during this period Marshall's 1803 opinion was not uniformly associated with expansive views of judicial power. In terms of constitutional value, however, the most interesting citations of *Marbury* are the ones found in the written opinions of U.S. Supreme Court Justices, and especially in opinions written by leading figures on the

30. 37 U.S. (12 Pet.) 524 (1838).

31. *Id.* at 563.

32. *Id.* at 606.

33. *Id.* at 621-26.

34. *Id.* at 651 (Barbour, J., dissenting).

35. *Reeside v. Walker*, 52 U.S. (11 How.) 272, 285, 287, 291-92 (1851).

36. *Id.* at 291.

37. *See Ex parte Hennen*, 38 U.S. (13 Pet.) 225 (1839); *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497 (1840).

38. *Ex parte Hennen*, 38 U.S. (13 Pet.) at 250. While Gilpin was defending the government as the defendant in *Decatur*, the counsel for the plaintiff also relied on *Marbury*. *See Decatur*, 39 U.S. (14 Pet.) at 505. *Marbury* also appears in the arguments before the Court in *Ex parte Whitney*, 38 U.S. (13 Pet.) 404, 407 (1839).

39. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 90, 94-95 (1860) (Taney, C.J.) (denying mandamus).

Court. In this connection, the 1860s saw Chief Justice Waite, in *Ex parte Yerger*,⁴⁰ identifying *Marbury* as the authoritative precedent when it comes to the Supreme Court's power to issue mandamus:

But, in the case of *Marbury v. Madison*, it was determined, upon full consideration, that the power to issue writs of mandamus, given to this court by the 13th section of the Judiciary Act, is, under the Constitution, an appellate jurisdiction, to be exercised only in the revision of judicial decisions. And this judgment has ever since been accepted as fixing the construction of this part of the Constitution.⁴¹

Again, however, Waite emphasized what he considered to be the narrowness of Marshall's ruling.⁴²

More than a handful of cases decided between the 1870s and the end of the nineteenth century dealt with the circumstances that must be satisfied for the courts to be able to issue writs of mandamus. Opinions authored in several of these cases make reference to Marshall's argument in *Marbury* that mandamus is not a vehicle for relief when an official's actions are "political" and not merely "ministerial" in nature.⁴³ Justice Miller pointed to this distinction in his opinion for the Court in *United States v. Schurz*⁴⁴ in 1880 as did Justices Bradley, Lamar, Brown, and White in a series of cases from 1888 to 1894.⁴⁵ Additional references to this distinction, and to *Marbury*'s teaching on the issuance of writs of mandamus, continued to appear into the first decades of the twentieth century.⁴⁶ By contrast, references to *Marbury* in connection with questions having to do with the power to issue writs of mandamus became increasingly scarce during the period after World War I.⁴⁷ As we shall see, this development coincided with the quiet emergence of a matter-of-fact reliance on *Marbury* to legitimate significant assertions of judicial power.

Another "technical" use of *Marbury* between 1803 and the late nineteenth century dealt with the special nature and scope of the Court's original and appellate jurisdiction. As in the case of the power to issue mandamus,

40. 75 U.S. (8 Wall.) 85 (1869).

41. *Id.* at 97 (internal citation omitted).

42. *Id.*

43. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 150-52 (1803).

44. 102 U.S. 378, 394-95 (1880).

45. *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 44 (1888); *United States ex rel. Redfield v. Windom*, 137 U.S. 636, 643 (1891); *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 171 (1893); *United States ex rel. Int'l Contracting Co. v. Lamont*, 155 U.S. 303, 308 (1894). References to *Marbury* in connection with the judiciary's power to issue writs of assistance appear in several 1870s cases. *See, e.g., Ex parte Newman*, 81 U.S. (14 Wall.) 152, 165-66 (1871); *see also Ex parte Virginia*, 100 U.S. 339, 341 (1879).

46. *See United States ex rel. Garfield v. Goldsby*, 211 U.S. 249, 261 (1908); *Louisiana v. McAdoo*, 234 U.S. 627, 633-34 (1914).

47. Among the few examples from this period are *Ex parte Peru*, 318 U.S. 578, 582 (1943), and *United States v. U.S. District Court for Southern District of New York*, 334 U.S. 258, 263 (1948).

references to *Marbury* in connection with jurisdictional matters began to appear during Marshall's tenure on the Court. Counsel for the appellants in *Osborn v. United States*,⁴⁸ an 1824 case, reminded the Court that *Marbury* stood for the principle that Congress may not expand original jurisdiction,⁴⁹ and Justice Washington cited *Marbury* when discussing the nature and limits of the Court's jurisdiction in an 1826 case.⁵⁰ Justice Story made liberal use of *Marbury* in *Ex parte Watkins*⁵¹ in 1833 to discuss the limited nature of original jurisdiction and also to support the proposition that appellate jurisdiction "revises and corrects the proceedings in a cause already instituted."⁵² Two years earlier, in *Ex parte Crane*,⁵³ Justice Baldwin cited *Marbury* in conjunction with the argument that Congress may not fiddle with original jurisdiction.⁵⁴ In these early cases, *Marbury* principally was employed to clarify the place of the judiciary in the constitutional order and often was associated with arguments that emphasized the limits of judicial power.

During the period of the Taney Court, citations to *Marbury* appear with some regularity in briefs and opinions that addressed jurisdictional issues. As in cases involving writs, it was common to see *Marbury* cited in connection with arguments having to do with the scope of the Court's authority to act and, especially, the limits that apply to such action. Speaking for the government in 1839, Attorney General Gilpin referred to the 1803 precedent when asserting that appellate jurisdiction "revise[s] and correct[s]" the proceedings of lower courts,⁵⁵ while Justices Catron and Curtis went back to *Marbury* in 1849 and 1854 to clarify the scope of the Court's appellate and original jurisdiction in cases in which the United States is a party.⁵⁶ In a concurring opinion authored in 1852, Justice Curtis used *Marbury* on two separate occasions to support a denial of jurisdiction.⁵⁷ From *Marbury*, he drew the argument that the Court may only revise the proceedings of tribunals over which it has appellate jurisdiction, a situation that he believed did not exist in this case that involved an arrest warrant emanating from "a department of the executive."⁵⁸

48. 22 U.S. (9 Wheat.) 738 (1824).

49. *Id.* at 757.

50. *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 472 (1826).

51. 32 U.S. (7 Pet.) 568 (1833).

52. *Id.* at 572-73.

53. 30 U.S. (5 Pet.) 190 (1831).

54. *Id.* at 202 (Baldwin, J., dissenting). Dissenting from Justice Marshall's majority opinion, Justice Baldwin cited *Marbury* to support his claim that the Court may issue a mandamus only under appellate jurisdiction. *Id.* at 203-04.

55. *Ex parte Hennen*, 38 U.S. (Pet.) 225, 252 (1839).

56. *United States v. Chicago*, 48 U.S. (7 How.) 185, 196-97 (1849) (Catron, J., dissenting); *Florida v. Georgia*, 58 U.S. (17 How.) 478, 509 (1854) (Curtis, J., dissenting).

57. *See In re Kaine*, 55 U.S. (14 How.) 103, 119, 128 (1852) (Curtis, J., dissenting).

58. *Id.* at 128. For his part, Justice McLean used *Marbury* in a case in which he found that the Court did not have "appellate power . . . over the proceedings of a district judge at his chambers." *In re Metzger*, 46 U.S. (5 How.) 175, 191 (1847).

Marbury appears in several 1860s cases that directly or indirectly involved the scope and nature of either original or appellate jurisdiction. In an opinion for the Court in *Ex parte Vallandigham*,⁵⁹ a case arising out of President Lincoln's aggressive prosecution of the war and southern sympathizers, Justice Wayne called attention to Marshall's narrow interpretation of original jurisdiction in *Marbury*: "The rule of construction of the Constitution being, that affirmative words in the Constitution, declaring in what cases the Supreme Court shall have original jurisdiction, must be construed negatively as to all other cases."⁶⁰ Two years after *Vallandigham*, Justice Swayne used *Marbury* to clarify the specific conditions needed to bring a case within the appellate jurisdiction of the Court: "In order to create such [appellate] jurisdiction in any case, two things must concur: the Constitution must give the capacity to take it, and an act of Congress must supply the requisite authority."⁶¹ Significantly, both Wayne and Swayne employed *Marbury* in conjunction with "strict" rather than "loose" readings of the Court's jurisdiction.

Again in the 1870s and 1880s we find Justices invoking *Marbury* in cases having to do with the nature and limits of the Court's jurisdiction as well as with separation of power issues. Justice Field, writing in dissent in *Ex parte Clarke*,⁶² cited *Marbury* when reminding his colleagues that Congress's power to enlarge "judicial power" is limited.⁶³ Justices Harlan and Waite recurred to *Marbury* when discussing jurisdiction issues in two 1884 cases,⁶⁴ with Chief Justice Waite specifically using the 1803 precedent to add weight to the argument that Congress may not enlarge original jurisdiction.⁶⁵ Chief Justice Fuller followed Waite's lead in his opinion for the Court in *California v. Southern Pacific Co.*⁶⁶ In these instances, Justices invoked *Marbury* in an attempt to preserve the limited scope of judicial power, rather than using Marshall's 1803 opinion to expand the boundaries of their domain.

Although early uses of *Marbury* primarily involved the clarification of technical issues, there was at least one significant use of the case whose jurisprudential importance transcended narrow questions such as the proper conditions for the issuance of writs of mandamus. Interestingly, Marshall himself is responsible for this additional use of *Marbury* during the nineteenth century.

59. 68 U.S. (1 Wall.) 243 (1863).

60. *Id.* at 252. Also, Justice Clifford references *Marbury* in *The William Bagaley*, 72 U.S. (5 Wall.) 377 (1866), arguing that the Court could have no original jurisdiction in prize cases. *Id.* at 412.

61. *Daniels v. R.R. Co.*, 70 U.S. (3 Wall.) 250, 254 (1865).

62. 100 U.S. 399, 408 (1879).

63. *Id.* at 408. Justice Field also cited *Marbury* when discussing the nature of appellate jurisdiction in an 1879 case. *See Virginia v. Rives*, 100 U.S. 313, 327-28 (1879) (Field, J., concurring).

64. *Bors v. Preston*, 111 U.S. 252, 258 (1884); *Ames v. Kansas ex rel. Johnston*, 111 U.S. 449, 466-67 (1884).

65. *Ames*, 111 U.S. at 466-67.

66. 157 U.S. 229, 261-62 (1895).

Writing in *Cohens v. Virginia*,⁶⁷ Marshall inserted a pointed observation about the weight that should be given to reasoning found in prior opinions of the Court, with specific reference to his own arguments in *Marbury*.⁶⁸ After hearing counsel for the defendants cite *Marbury* on Congress's power to manipulate the Court's jurisdiction, Marshall reflected on how properly to read and apply reasoning found in prior opinions:

It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of the maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.⁶⁹

In this passage, Marshall cautioned his brethren and students of the law not to take the Court's reasoning and rulings out of context. Arguably, contained in this passage on the proper use of precedents is a plea for judicial officials to use their powers fully, but prudently, and to be attentive to the distinctive elements of each case. Marshall's counsel is clear: the careful review of specific questions of fact or law in a particular case carries more weight than generalizations that might have been announced in prior cases, even in cases of the stature of *Marbury v. Madison*. Hence his declaration in *Cohens* that "[t]he general expressions in the case of *Marbury v. Madison* must be understood, with the limitations which are given to them in this opinion."⁷⁰ So important were Marshall's comments in *Cohens*, that no less a figure than Justice Bushrod Washington would soon after declare that *Marbury* was "revised and explained" in the 1821 Virginia case.⁷¹

Marshall's reflections in *Cohens* armed Justices who wished to preserve adequate space for independent judicial deliberation in a common law nation that embraces the principle of stare decisis. It was in this connection that Justice Curtis inserted a long passage from *Cohens* in an opinion for the Court in 1853.⁷² Curtis saw Marshall's observations in *Cohens* as coming in response to the Court being "much pressed with some portion of its opinion in the case of *Marbury v. Madison*."⁷³ Writing a dissent in 1890, Justice Gray cited Marshall's statement in *Cohens* as "explain[ing] away some

67. 19 U.S. (6 Wheat.) 264 (1821).

68. *Id.* at 394-402.

69. *Id.* at 399.

70. *Id.* at 401-02.

71. See *United States v. Ortega*, 24 U.S. (11 Wheat.) 467, 472 (1826).

72. See *Carroll v. Lessee of Carroll*, 57 U.S. (16 How.) 275 (1853).

73. *Id.* at 287.

dicta of his own in delivering judgment in *Marbury v. Madison*.”⁷⁴ For Curtis and Gray, Marshall’s remarks in *Cohens* were intended to remind his colleagues, and all Americans, that judicial decisionmaking should always be attuned to contextual considerations, a point that parallels his comments on strict and loose construction in *Gibbons v. Ogden*.⁷⁵

Significantly, even citations to Marshall’s comments in *Cohens* on *Marbury v. Madison* have something of a “technical” quality to them. There is little evidence that the Justices were interested in using *Marbury* during the period between 1803 and the late nineteenth century to supply theoretical legitimacy for the work of the Court or to justify expansive judicial decisionmaking. Citations to *Marbury*, for example, do not appear in Taney’s opinion in *Dred Scott v. Sandford*⁷⁶ or Miller’s opinion in the *Slaughter-House Cases*,⁷⁷ two of the most critical cases of the middle nineteenth century. *Marbury*’s main precedential value during this period was connected with the clarification of specific legal questions dealing with such matters as the distinctive nature of appellate jurisdiction or when the judiciary might issue mandamus. The contrast to late twentieth century uses of *Marbury* could hardly be more dramatic. The Justices closest to Marshall and most responsible for the Court during its formative period neither read *Marbury* as mandating an activist approach to the exercise of judicial power, nor embraced it as a precedent that could be construed to legitimate judicial activism. What now seems to be a narrow reading and application of *Marbury* might be explained away as a manifestation of the general laissez-faire philosophy so often associated with classical liberalism. It is not unreasonable to conclude, however, that many Justices honestly believed that John Marshall specifically set out to defend what he conceived to be the proper, but also clearly restrained, use of judicial power in *Marbury*. Certainly such an interpretation fits with Marshall’s own concession in cases like *Marbury v. Madison* (the discretionary actions of political officials),⁷⁸ *McCulloch v. Maryland* (the degree of necessity of legislative actions),⁷⁹ and *Gibbons v. Ogden* (the power of Congress over commerce with foreign states)⁸⁰ that there are important outer boundaries to the exercise of the judiciary’s review powers. His pointed comment in *Cohens* certainly reinforced a constrained rather than expansionist reading of *Marbury*.

74. *Leisy v. Hardin*, 135 U.S. 100, 135 (1890) (Gray, J., dissenting). Forty-five years later, Justice Sutherland would use *Cohens* to make the point that when the Court goes further than it needs to go, even in a monumental case like *Marbury*, its remarks are not controlling in subsequent suits. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 627 (1935).

75. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 187-88 (1824).

76. 60 U.S. (19 How.) 393 (1856).

77. 83 U.S. (16 Wall.) 36 (1873).

78. 5 U.S. (1 Cranch) 137 (1803).

79. 17 U.S. (4 Wheat.) 316 (1819).

80. 22 U.S. (9 Wheat.) 1.

II. TRANSITIONAL PERIOD: THE LATE NINETEENTH CENTURY TO THE 1950S

Despite the continued attention to “technical” issues in references to *Marbury* in the last decades of the nineteenth century and the first years of the twentieth century, judicial use of this precedent was clearly changing by the late nineteenth century. It is not uncommon just before and after the turn of the twentieth century to encounter appeals to *Marbury* that are closely connected with the power of judicial review, protection of rights, and questions of legitimacy. As *Marbury* grew in importance as a precedent supplying foundational legitimacy for the Court, Marshall’s stature as one of the great figures in constitutional history also received growing attention. This occurred at a time when the federal government and the states were engaged in an increasing array of regulatory actions, and the Fourteenth Amendment moved out of the shadows of American law. The stigma of *Dred Scott*,⁸¹ the most notorious judicial review case of the nineteenth century, was also receding into history.

In the course of discussing when a writ may be issued, Justice Field looked to Marshall, “the great Chief Justice,” for support in an 1882 dissent in *Louisiana v. Jumel*.⁸² Field drew support for his position in *Jumel* from *Marbury*’s teaching that “[t]he very essence of civil liberty” consists in government protection of rights.⁸³ Field specifically used both Marshall’s reputation and *Marbury*’s stature as a constitutional precedent to legitimize the position he staked out in his dissent. Two years later, Justice Matthews again employed references to Marshall and *Marbury* to affirm the principle that the government must be committed to protecting rights. Characterizing Marshall as an “illustrious” man, Matthews incorporated language from *Marbury* to lend credibility and force to his position: “The Government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.”⁸⁴ Nor are these the only instances of such rhetoric being used in the 1880s. Justice Harlan, writing for the Court in 1887 in *Mugler v. Kansas*, a case having to do with state regulation of the liquor business, made direct reference to *Marbury* when discussing the duty of the courts to enforce limits on legislative action: “‘To what purpose,’ it was said in *Marbury v. Madison* ‘are powers limited . . . if these limits may, at any time, be passed by The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine’”⁸⁵ A year later, Justice Bradley joined these celebrations of *Marbury*, citing this case as Marshall’s “great opin-

81. 60 U.S. (19 How.) 393.

82. 107 U.S. 711, 743 (1882).

83. *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 137).

84. *Virginia Coupon Cases*, 114 U.S. 269, 298 (1885) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

85. *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (quoting *Marbury*, 5 U.S. (1 Cranch) at 176).

ion,” in the course of distinguishing between the Court’s power to issue writs in cases involving political acts on the one hand, and ministerial functions on the other.⁸⁶

A good example of the growing practice of using *Marbury* to legitimize judicial assertiveness appears in Chief Justice Fuller’s opinion in *Pollock v. Farmers’ Loan & Trust Co.*⁸⁷ It is to *Marbury* that Fuller recurred to support the proposition that the Court has the power to determine whether a law is constitutional:

Since the opinion in *Marbury* . . . was delivered, it has not been doubted that it is within judicial competency, by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void accordingly.⁸⁸

Two years later, Justice Peckham returned to the theme of Marshall’s stature in constitutional law in a case having to do with the President’s power to remove U.S. Attorneys: “Whatever has been said by that great magistrate in regard to the meaning and proper construction of the Constitution is entitled to be received with the most profound respect.”⁸⁹

What is especially notable about this period is the emphasis given both to Marshall’s reflections in *Marbury* on legal protection of rights and on the judiciary’s duty to uphold and enforce the terms of the Constitution. These themes appear prominently in two turn-of-the-century cases. In a dissenting opinion in *Taylor v. Beckham*, Justice Harlan reminded his colleagues of Marshall’s declaration that “[t]he very essence of civil liberty . . . is the right of every individual to claim the protection of the laws, whenever he receives an injury.”⁹⁰ A year later, Justice Brewer quoted extensively in *Fairbank v. United States*⁹¹ from *Marbury*’s passages on the supremacy of the Constitution and judicial review. In rather blunt language, Brewer noted that the “judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this nation.”⁹² Brewer directly quoted the lines from *Marbury* that are most closely identified with that case by contempo-

86. *United States ex rel. Dunlap v. Black*, 128 U.S. 40, 44 (1888); *see also Noble v. Union River Logging R.R. Co.*, 147 U.S. 165, 171 (1893) (stating Justice Brown’s characterization of *Marbury* as “the great case”).

87. 157 U.S. 429 (1895).

88. *Id.* at 554.

89. *Parsons v. United States*, 167 U.S. 324, 335 (1897).

90. 178 U.S. 548, 586 (1900) (quoting *Marbury*, 5 U.S. (1 Cranch) at 137).

91. 181 U.S. 283 (1901).

92. *Id.* at 286. Brewer referred to Marshall at one point in his opinion as “the chief justice.” *Id.* at 287.

rary students of American constitutional law: "It is emphatically the province and duty of the judicial department to say what the law is."⁹³

While *Marbury* was employed repeatedly at the turn of the century to confirm the legitimacy of judicial protection of rights and judicial review of governmental action, in keeping with the transitional character of this period several Justices drew on the one-hundred-year-old precedent to emphasize not only the limited powers of the national government but the limits of the review powers of the judiciary. In a 1901 dissent that included a long quotation from *Marbury* regarding the limits placed on the government by the original and supreme will, Chief Justice Fuller went on to note that "[f]rom *Marbury v. Madison* to the present day, no utterance of this court has intimated a doubt that in its operation on the people, by whom and for whom it was established, the national government is a government of enumerated powers."⁹⁴ Fuller made use of *Marbury* on several other occasions early in the century to reinforce dissenting arguments having to do with constitutional limits on the government or the judiciary's duty to enforce limits found in the Constitution.⁹⁵ In an unusual use of *Marbury* in connection with the argument that government powers are limited by the Constitution, Justice Day appealed in 1911 to this precedent and Marshall's general jurisprudence to lend credibility to the argument that the judiciary enjoyed only a limited power to review the actions of Congress. According to Day, Marshall taught Americans "that there was no general veto power in the court upon the legislation of Congress."⁹⁶ Day added that Marshall fully understood that there would be occasions when the court might not be able to act despite evidence that the Constitution had been violated.⁹⁷ Having Marshall on your side clearly was seen to be an advantage in a judicial fight by the turn of the century.

By the end of the nineteenth century, appeals to *Marbury* and Marshall were increasingly employed to legitimate expansive views of judicial power and interpretations of the Constitution. In contrast to the prevailing practice through much of the nineteenth century, invocations of *Marbury* and Marshall after 1880 not infrequently had a legitimizing purpose. It is a measure of the significance attached to the 1803 precedent and Marshall by the first part of the twentieth century that Justices competed to attach one or both to

93. *Id.* at 286 (quoting *Marbury*, 5 U.S. (1 Cranch) at 176). For another reference to *Marbury* from this period in connection with the question of judicial review, see the concurrence by Justice White in *Downes v. Bidwell*, 182 U.S. 244 (1901).

94. *Id.* at 359 (Fuller, C.J., dissenting) (italics added). Harlan also wrote a dissent in *Downes v. Bidwell* that referenced Marshall's argument about the limited nature of the powers of the national government. *See id.* at 381.

95. *See Dooley v. United States*, 183 U.S. 151, 173 (1901); *see also Champion v. Ames*, 188 U.S. 321, 372 (1903) (lottery case). Marshall figured prominently in the debate over national powers that took place between Fuller (in dissent) and Harlan (writing for the Court) in *Champion*. *See id.*

96. *Muskrat v. United States*, 219 U.S. 346, 357 (1911).

97. *Id.* at 358. It is interesting to note that Day wrote the opinion for the Court in *Hammer v. Dagenhart*, the highly controversial 1918 case that overturned a federal child labor law. 247 U.S. 251 (1918).

their opinions. After calling Marshall a “great constitutional authority”⁹⁸ and “the great Chief Justice,”⁹⁹ Taft cited *Marbury* as supporting his reading of the Constitution in *Myers v. United States*, a controversial case having to do with the removal powers of the President.¹⁰⁰ In dissent, Justice McReynolds referred to Marshall as “the great Chief Justice” and insisted that *Marbury* supported his more restrictive interpretation of the President’s removal powers.¹⁰¹

Not surprisingly, it was the “rights” theme from *Marbury* that grew in significance during the early decades of the twentieth century. Justices made considerable use of *Marbury* during the period of World War II to buttress arguments having to do with protection of rights. Justice Reed invoked *Marbury* in 1943 and 1944 in connection with the argument that laws should provide remedies for violations of rights.¹⁰² Writing for the Court in 1946, Black again used *Marbury* to lend support to the position that the judicial department has a special responsibility to supply relief when rights have been violated: “[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.”¹⁰³ This use of *Marbury* to legitimate judicial protection of rights anticipated what was to become the typical use of the 1803 case during the last half of the twentieth century. *Marbury* had evolved from a precedent that principally provided guidance on “technical” legal issues into something of a “political” tool or weapon for Justices seeking to establish the bona fides of controversial or provocative interpretations of the Constitution or judicial responsibilities. By the mid-twentieth century, the days of using *Marbury* principally to clarify technical issues of law were basically over.

III. THE POLITICIZATION OF *MARBURY*: FROM THE WARREN TO THE BURGER COURTS

Nothing more scholarly than a cursory review of the index of the “cases cited” section of the United States Reports for the twenty-year period before and after the beginning of the Warren Court (1953) is needed to confirm that *Marbury*’s stature in American jurisprudence underwent a significant mid-century growth spurt. Whereas *Marbury* appears in the indexes about a dozen times in the twenty years before Warren’s appointment in 1953, the number grows to approximately fifty for the twenty-year period following

98. *Myers v. United States*, 272 U.S. 52, 139 (1926).

99. *Id.* at 142.

100. *Id.*

101. *Id.* at 218 (McReynolds, J., dissenting).

102. *Switchmen’s Union v. Nat’l Mediation Bd.*, 320 U.S. 297, 318 n.16 (1943) (Reed, J., dissenting); *Stark v. Wickard*, 321 U.S. 288, 304 n.19 (1944).

103. *Bell v. Hood*, 327 U.S. 678, 684 (1946). Black cited *Marbury* again in 1947 when discussing the judiciary’s power to strike down laws that violate the Constitution. See *Adamson v. California*, 332 U.S. 46, 90 (1947) (Black, J., dissenting). Black argued in *Adamson* that *Marbury* legitimates a power to review legislation on the basis of standards “enumerated” in the Constitution. *Id.* at 91.

his appointment.¹⁰⁴ By the end of the Warren Court, there is little doubt that *Marbury* had emerged as the principal “legitimizing” case in American law.

While *Marbury* was not cited by Chief Justice Warren in *Brown v. Board of Education*,¹⁰⁵ it does appear rather regularly in opinions during the late 1950s and 1960s, that is, during the period when the Warren Court was under careful scrutiny for its handling of controversial cases involving school segregation, subversive activity, civil rights, and various types of expressive freedom. After Frankfurter and Black incorporated references to *Marbury* when discussing judicial review of legislative action and constitutional limits on governmental powers in a pair of 1957 cases,¹⁰⁶ the Court quoted directly from that precedent when affirming its authority as the “supreme” interpreter of the Constitution in *Cooper v. Aaron*, a major school desegregation case.¹⁰⁷ The opinion signed by all the members of the Court pointedly emphasized Marshall’s declaration that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”¹⁰⁸ The Justices associated *Marbury* with “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 this Court and the Country as a permanent and indispensable feature of our constitutional system.”¹⁰⁹ The Court’s reliance on *Marbury* clearly was designed to lend legitimacy, and hence forcefulness, to the message intended for states such as Arkansas regarding school desegregation. Indeed, the invocation of *Marbury* in *Cooper* was tantamount to bringing the gavel down to signal the end of a public debate.

References to Marshall’s defense of the power of judicial review and of the judiciary’s special responsibility to check on the constitutionality of governmental action abound in early 1960s cases. As the 1960s were a period of cultural change, so the decade witnessed the emergence of the Warren Court as an aggressive defender of rights. By the end of the decade, the Court had placed the government on notice that the legitimacy of traditional practices that impacted the exercise of individual freedoms would no longer be taken for granted.¹¹⁰

104. Compare, for example, volumes 285 to 345 (spanning 1932 to 1953) of the United States Reports to volumes 346 to 414 (spanning 1953 to 1973).

105. 349 U.S. 294 (1955).

106. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 464 (1957); *Reid v. Covert*, 354 U.S. 1 (1957).

107. 358 U.S. 1 (1958). *Cooper v. Aaron* is notable for its strong assertion that the Court serves as the ultimate interpreter of the Constitution. *Id.* The case was precipitated by the refusal of Arkansas officials to implement a school desegregation program in Little Rock. *Id.*

108. *Cooper*, 358 U.S. at 18 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

109. *Id.*

110. For an excellent example of the Court’s willingness to confront and discard longstanding government restrictions on civil “liberties,” see *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). In *Brandenburg*, which involved Ku Klux Klan activities, the Court announced that it would be difficult for states to secure convictions under decades-old criminal syndicalism laws. *Id.* at 447. In the process, the Court overturned *Whitney v. California*, 274 U.S. 357 (1927), a case upholding a conviction under that state’s Criminal Syndicalism Act. *Id.* at 372.

While the versatility of *Marbury* in the 1960s was evident in its association with arguments having to do with everything from the judiciary's power to issue writs to its power to overturn legislation, the most common and important use of the 1803 precedent had to do with judicial enforcement of constitutional protections of rights. In a series of decisions beginning in 1960 and continuing unabated through the entire decade, Justices repeatedly invoked *Marbury* in defense of the proposition that all rights deserve legal protection when asserting the Court's power to compel agents of the legislative and executive branches to respect constitutional guarantees. Brennan and Black both drew on *Marbury* in early 1960s opinions that included affirmations of the legitimacy of the judiciary's power of constitutional review, including review of legislative action.¹¹¹ To refuse to engage in such review, according to Black in *Flemming v. Nestor*, would be tantamount to "abdicat[ing] the power that this Court has been held to have ever since *Marbury v. Madison*."¹¹² He connected his defense of judicial review in another 1960 case with Marshall's declaration that "[t]he 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."¹¹³ Brennan incorporated this same passage from *Marbury* into his important opinion for the Court in *Baker v. Carr*, the controversial malapportionment case of 1962 that expanded the range of "political" cases that the judiciary could address.¹¹⁴ By implication, Brennan claimed *Marbury* for the side that not only favored expanded judicial review of state electoral practices, but also endorsed the more global proposition that the courts have a special responsibility for protecting rights when no other governmental entity is doing this effectively.¹¹⁵ The reasoning employed by Brennan in *Baker* reappeared in a number of civil rights and voting rights cases that were decided in the mid-1960s. Black and Douglas, for example, followed Brennan's lead in citing *Marbury* when arguing in two 1964 cases that the judiciary not only has a special responsibility "to protect the constitutional rights of individuals from legislative destruction," but must be prepared to act when others fail to protect rights.¹¹⁶ The practice of attaching *Marbury* to the judicial defense of

111. For Brennan's use of *Marbury*, see *United States v. Raines*, 362 U.S. 17, 20 (1960). Black cited *Marbury* in *Clay v. Sun Insurance Office*, 363 U.S. 207, 223 (1960), and *Flemming v. Nestor*, 363 U.S. 603, 626 (1960) (Black, J., dissenting).

112. 363 U.S. 603, 626 (1960) (italics added).

113. *Baker v. Carr*, 369 U.S. 186, 208 (1962) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

114. *Id.* at 208.

115. Harlan, writing in dissent in *Baker*, faulted Brennan for suggesting that the Constitution supplies protection of all rights and redress for all grievances. *Id.* at 339-40. Justice Frankfurter wrote a separate dissent in which he also argued that the Court was gravely mistaken in believing that it could take malapportionment cases without having to subscribe to some subjective definition of "democratic" principles of representation. *Id.* at 270. In 1962, Chief Justice Warren reverted to *Marbury* to support his argument in dissent that the judiciary has an obligation "to insure that no branch of the Government transgresses constitutional limitations." *Hutcheson v. United States*, 369 U.S. 599, 362 (1962).

116. See *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964) (Black, J.); see also *Bell v. Maryland*, 378 U.S. 226, 244-45 (1964) (Douglas, J., concurring). In 1962, Douglas cited *Marbury* in his dissent, reminding his colleagues that the Court is "the expositor of the meaning of the Constitution." *Glidden Co. v. Zda-*

rights can be traced through the entire decade of the 1960s. Writing a concurrence in 1968 that expanded taxpayer standing, Douglas paired *Marbury* with the argument that “where . . . wrongs are done by violation of specific guarantees, it is abdication for courts to close their doors.”¹¹⁷ Significantly, *Marbury* figured in Chief Justice Warren’s last major opinion for the Court. Citing *Marbury* several times in *Powell v. McCormack*, Warren insisted that the Supreme Court could check Congress’s power to exclude its own members, even if this might create an embarrassing confrontation between coordinate branches of the national government.¹¹⁸ According to Warren, Chief Justice Marshall had established conclusively in *Marbury* that “it is the responsibility of this Court to act as the ultimate interpreter of the Constitution.”¹¹⁹ The effect of Warren’s ruling in *Powell* was to narrow the range of cases that were nonjusticiable under the “political questions” doctrine—an effect that was consistent with the position that the judiciary should be prepared to supply redress for all grievances and protection of all rights, especially in the absence of effective action by “political” agencies of the federal or state governments.¹²⁰

Interestingly, *Marbury* played an important part in attacks on judicial activism made by Justices Black and Harlan during the 1960s. Dissenting in a significant civil rights sit-in case in 1964, Justice Black reminded his colleagues that Marshall had “stressed the duty of judges to act with the greatest caution before frustrating legislation by striking it down as unconstitutional.”¹²¹ Black, who had confidently used *Marbury* in the defense of a broad power of judicial review, was becoming increasingly concerned about how the Warren Court was using its review powers by the mid-1960s. Thus, for example, he returned to the 1803 precedent in his forceful dissent in

nok, 370 U.S. 530, 602 (1962). Interestingly, Black rebuked Douglas and the Court for pushing its judicial review power too far in *Griswold v. Connecticut*, an important privacy case from the mid-1960s:

While I completely subscribe to the holding of *Marbury v. Madison*, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of “civilized standards of conduct.”

381 U.S. 479, 513 (1965) (Black, J., dissenting) (italics added) (citation omitted).

117. *Flast v. Cohen*, 392 U.S. 83, 111 (1968).

118. 395 U.S. 486, 549 (1969).

119. *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962)).

120. Previously, Brennan had narrowed the political questions doctrine. *See Baker*, 369 U.S. 186. The narrowing process continued after *Powell* with Chief Justice Burger’s opinion in the *United States v. Nixon*, 418 U.S. 683 (1974) (Watergate Tapes case). The argument that the judicial department is not equipped to review matters of a “political” nature can be traced to *Marbury*, specifically to Marshall’s declaration that “[q]uestions in their nature political . . . can never be made in this court.” 5 U.S. (1 Cranch) 137, 170 (1803). For Marshall, “political questions” constitute an important outer boundary to the exercise of judicial review. *Id.*

121. *Bell v. Maryland*, 378 U.S. 226, 323 (1964). In the same year as *Bell*, in his concurrence in *Katzenbach v. McClung*, 379 U.S. 294 (1964), one of a pair of major cases challenging the constitutionality of the 1964 Civil Rights Act, Black inserted a strong defense of judicial oversight of congressional regulations.

Griswold v. Connecticut, the landmark privacy case of 1965.¹²² While conceding that the Court has the power to strike down statutes, he tersely emphasized that *Marbury* only affirmed a power in the judiciary to invalidate laws that violate the Constitution and not just the “belief[s]” of the Justices.¹²³ Writing again in dissent in 1969, Black invoked *Marbury* while scolding his colleagues for assuming an unwarranted power to monitor state action:

While *Marbury v. Madison* held that courts can pass on the constitutionality of state laws already enacted, it certainly did not decide to permit federal courts or federal executive officers to hold up the passage of state laws until federal courts or federal agencies in Washington could pass on them.¹²⁴

In line with Black’s construction of *Marbury*, and looking back to the nineteenth century, Justice Harlan insisted in a 1967 dissent that the Court historically had restrained its employment of the review powers defended by Marshall.¹²⁵ In a pointed remark about the limits of the Court’s powers, Harlan bluntly announced at the very end of the decade in *Desist v. United States* that “[t]his Court is entitled to decide constitutional issues only when the facts of a particular case *require* their resolution for a just adjudication on the merits.”¹²⁶ In another 1969 dissent, Harlan found in *Marbury* support for the principle that “it is the function of this Court to decide controversies between parties only when they cannot be settled by the litigants in any other way.”¹²⁷

The competing and repetitive use of *Marbury* in the 1960s is evidence of the heightened stature that this precedent had acquired by the end of the Warren Court. Not only were Justices employing *Marbury* to lend support to preferred views of constitutional rights and judicial duties, but they were actively competing to secure control over the meaning and application of the 1803 precedent. Indeed, the intense competition to control the meaning of *Marbury v. Madison* might reasonably be seen as one of the central jurisprudential battles of the 1960s. There is ample evidence that Justices like Black, Harlan, and Douglas understood that the “philosophical” teaching that was identified with *Marbury* carried extraordinary weight not only in legal but political affairs. It is clear, for example, that Black and Harlan

122. 381 U.S. 479 (1965).

123. *Id.* at 513-14 n.6 (striking down a Connecticut law banning the use of contraceptives by married couples, the Court set out a defense in *Griswold* for a general right to privacy). Previously, the Warren Court had defended a right to privacy in association. *See NAACP v. Alabama*, 357 U.S. 449 (1958).

124. *Allen v. State Bd. of Elections*, 393 U.S. 544, 596 (1969) (italics added) (internal citation omitted). In another 1969 case, Black, drawing on *Marbury*, cautioned the Court about using its review powers to make it difficult for states to correct their own mistakes. *See Hunter v. Erickson*, 393 U.S. 385, 397 (1969).

125. *Chapman v. California*, 386 U.S. 18, 47 (1967).

126. 394 U.S. 244, 258 (1969) (Harlan, J., dissenting).

127. *Utah Comm’n v. El Paso Gas Co.*, 395 U.S. 464, 476 (1969).

sought to employ *Marbury* to put the brakes on what they considered to be undesirable judicial activism, an activism that had been defended with the use of *Marbury* in cases like *Baker v. Carr*,¹²⁸ *Powell v. McCormack*,¹²⁹ *Bell v. Maryland*,¹³⁰ and *Griswold v. Connecticut*.¹³¹

The Burger Court did not turn the clock back to pre-Warren Court practices when it came to invocations of *Marbury*. The transition from the 1960s to the 1970s, at least as far as *Marbury* is concerned, appears almost seamless. The same could be said of the 1980s and 1990s as well. If the Burger Court retreated from some of the more "liberal" decisions of the Warren Court in areas affecting national protection of rights, it left intact the elevated status accorded *Marbury* as a legitimizing precedent.¹³² Citations to the case appear more than two dozen times in the 1960s and again more than two dozen times in the 1970s. As in the 1960s, *Marbury* was at the center of a spirited debate among Burger Court Justices over the proper role of the judiciary in the American constitutional order.

By the early 1970s, the campaign to connect *Marbury* with a restraintist rather than activist judicial philosophy was both expanded and invigorated. Harlan cited *Marbury* at least four times in his last two years on the Court (1970-1971).¹³³ On two of those occasions, he quoted what is arguably the most famous line in Marshall's opinion: "It is emphatically the province and duty of the judicial department to say what the law is."¹³⁴ He combined this quote in a 1971 opinion with the observation that the Court must treat cases consistently, adding that the power of judicial review must be used responsibly.¹³⁵ Black, like Harlan, continued to rely on *Marbury* into the 1970s, and as was the case with his use of this precedent at the end of the 1960s, Black insisted that the power defended by Marshall was not infinite in scope. Justice Black reminded his colleagues that the judiciary did not have "an unlimited power to survey the statute books and pass judgment on laws before the courts are called upon to enforce them."¹³⁶ William Rehnquist picked up on this theme in one of his earliest opinions. Dissenting in *Furman v. Georgia*, the 1972 case that brought a temporary halt to executions while governments redrafted rules pertaining to capital punishment, Rehnquist invoked Marshall's "classic opinion" in *Marbury* while caution-

128. 369 U.S. 186 (1962).

129. 395 U.S. 486 (1969).

130. 378 U.S. 226 (1964).

131. 381 U.S. 479 (1965).

132. For evidence of the Burger Court's re-entrenchment of the liberal extension of both the standing and the commerce clauses, compare *Flast v. Cohen*, 392 U.S. 83 (1968), with *Warth v. Seldin*, 422 U.S. 490 (1975); and compare *Maryland v. Wirtz*, 392 U.S. 183 (1968), with *National League of Cities v. Usery*, 426 U.S. 833 (1976).

133. See *Oregon v. Mitchell*, 400 U.S. 112, 204 (1970); see also *Mackey v. United States*, 401 U.S. 667, 678 (1971); *Chandler v. Judicial Council*, 398 U.S. 74, 96 (1970) (Harlan, J., concurring); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 401 n.3 (1971) (Harlan, J., concurring).

134. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), cited in *Mitchell*, 400 U.S. at 204; *Mackey*, 401 U.S. at 678.

135. *Mackey*, 401 U.S. at 678-79.

136. *Younger v. Harris*, 401 U.S. 37, 52 (1971).

ing his brethren to both restrain their use of judicial review and show proper deference to “legislative judgment.”¹³⁷ Blackmun, for his part, was equally blunt when reminding his colleagues of the limits of the Court’s review powers in *Doe v. McMillan*, a 1973 case having to do with congressional discretion over legislative publications.¹³⁸ Blackmun insisted that Marshall would be “astonished” to see how far the Court was willing to intrude into matters that should fall under the discretion of the legislative branch.¹³⁹ Again in 1973, Justice White attached *Marbury* to his argument that courts are not “roving commissions” that are duty bound to pass judgment on all governmental activity.¹⁴⁰ This observation appeared in an opinion for the Court upholding the constitutionality of Oklahoma’s confinement of the political activities of civil service personnel under its version of the federal Hatch Act.¹⁴¹

The practice of attaching *Marbury* to arguments associated with judicial self-restraint or even retrenchment was especially pronounced during the early years of the Burger Court. Powell counseled the “prudent” use of *Marbury* in a pair of 1974 cases, *Mayor of City of Philadelphia v. Educational Equality League*¹⁴² and *United States v. Richardson*,¹⁴³ and particularly reminded the Court of the limits placed by the doctrine of separation of powers on the exercise of judicial review.¹⁴⁴ Powell worried aloud in his concurrence in *Richardson*, a case arising out of a complaint that Congress had failed to discharge its constitutional duties when it consented to hide the CIA’s annual appropriations, that the Court would endanger the democratic bona fides of the political system if it opened its doors to everyone who complained of unfair governmental action.¹⁴⁵ Burger repeated this refrain in his opinion for the Court in *Richardson*. In refusing to enlarge judicial power by permitting parties to litigate generalized grievances, Burger noted that “[a]s far back as *Marbury v. Madison* this Court held that judicial power may be exercised only in a case properly before it—a ‘case or controversy’ not suffering any of the limitations of the political-question doctrine, not then moot or calling for an advisory opinion.”¹⁴⁶ By associating

137. 408 U.S. 238, 466, 468 (1972).

138. 412 U.S. 306 (1973).

139. *Id.* at 337-38.

140. *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973).

141. *Id.* at 618.

142. *See* 415 U.S. 605, 615 (1974).

143. 418 U.S. 166, 191 (1974).

144. *Id.* at 191-92.

145. *Id.* at 188. Powell was actively involved in tightening the rules of standing during the 1970s. He saw the “liberalization” of standing as a threat to the proper functioning of the system of checks and balances, as well as to democratic principles of government: “Relaxation of standing requirements is directly related to the expansion of judicial power. It seems to me inescapable that allowing unrestricted taxpayer or citizen standing would significantly alter the allocation of power at the national level, with a shift away from a democratic form of government.” *Id.* (footnote omitted); *see also* *Warth v. Seldin*, 422 U.S. 490 (1975).

146. *Richardson*, 418 U.S. at 171 (italics added) (internal citation omitted).

Marbury with restraintist reasoning, Burger and Powell were consciously seeking to wrestle this critical precedent away from the liberal bloc.

If some members of the Court were counseling a “restrained” interpretation of *Marbury* in the early 1970s, other Justices like William Brennan persisted in using the 1803 precedent to justify an activist approach to judicial protection of rights. In an important 1971 ruling that weakened the barrier to damage awards created by the sovereign immunity doctrine, Brennan quoted directly from *Marbury* on the subject of legal protection of rights: “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.”¹⁴⁷ Two years later, Douglas cited Marshall’s “seminal decision” as affirming the responsibility of the judiciary to assess the validity of legislative action that affects rights.¹⁴⁸ Douglas and Brennan resisted, sometimes successfully, all efforts to dilute *Marbury*’s utility as a rights-affirming precedent that legitimated an expansive use of the judiciary’s oversight and remedial powers.

The attachment of *Marbury* to arguments for and against versions of judicial activism and self-restraint continued through the remainder of the 1970s. Marshall’s declaration in *Marbury* that “the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws” found its way into separate opinions by Justices White and Brennan in the late 1970s.¹⁴⁹ In *Butz v. Economou* and *Davis v. Passman*, the quotation was employed in defense of expanded judicial protection of rights irrespective of specific congressional authorization. In each instance, dissenters replied with charges that the Court was overstepping its bounds. Rehnquist responded to White’s use of *Marbury* in *Butz* by insisting that Marshall’s decision did not support open-ended judicial action.¹⁵⁰ Again citing *Marbury* at the very end of the decade, Rehnquist declared that “Article III courts are not commissioned to roam at large, gratuitously righting perceived wrongs and vindicating claimed rights.”¹⁵¹

147. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). The sovereign immunity doctrine historically provided extensive protection to government employees against suits for damages. For a rather explicit example of judicial use of *Marbury* to confer legitimacy, see Brennan’s opinion for the Court in the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), and specifically his use of *Marbury* to support the proposition that constitutional rights must be protected. *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 142 (1974).

148. *Doe v. McMillan*, 412 U.S. 306, 326 (1973).

149. White included the passage from *Marbury* in his opinion for the Court in *Butz v. Economou*, 438 U.S. 478, 485 (1978) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163) (extending the erosion of the sovereign immunity doctrine). Brennan inserted the quote in *Davis v. Passman*, 442 U.S. 228, 242 (1979) (implying a cause of action and a damage remedy directly from the Fourth Amendment).

150. *Butz*, 438 U.S. at 523 (Rehnquist, J., dissenting). Rehnquist’s argument actually paralleled White’s restrained position in *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973). White’s position in *Butz*, a governmental immunity case, reflected his belief that the Court should not make it difficult to hold public officials accountable. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731, 764 (1982) (White, J., dissenting).

151. *Orr v. Orr*, 440 U.S. 268, 299 (1979) (Rehnquist, J., dissenting).

The competing use of *Marbury* by Justices like Brennan and Rehnquist to legitimize various manifestations of judicial activism or self-restraint, or aggressive or restrained judicial protection of rights, was admittedly not new. What is significant is that by the 1970s *Marbury* was the “go to” decision whenever a Justice, whether liberal, conservative or moderate, sought to justify judicial review of government action. Emphasizing the Court’s obligation “to say what the law is,” Chief Justice Burger found support in *Marbury* for judicial oversight of invocations of executive privilege in *United States v. Nixon*, the controversial Watergate Tapes case of 1974.¹⁵² Like Warren before him in *Powell v. McCormack*,¹⁵³ Burger employed *Marbury* to undercut the argument that the Court was prevented from taking the Watergate Tapes case because it fell under the political questions doctrine.¹⁵⁴ As in *Powell*, Burger effectively narrowed the political questions doctrine as a barrier to judicial action and ordered President Richard Nixon to turn over the tapes to the District Court.¹⁵⁵ With full knowledge of the likely consequences of a decision against Nixon, the Chief Justice not only inserted several references to *Marbury* in his opinion but included more than a half-dozen quotations and case citations associated with John Marshall—strong evidence of the substantial legitimizing force of the *Marbury* case and Marshall himself by the late twentieth century.¹⁵⁶ For his part, Rehnquist relied on *Marbury* several years after the Watergate Tapes case when justifying judicial examination of the legality of Congress’s decision to assure governmental custody of documents accumulated by Nixon.¹⁵⁷ Borrowing Marshall’s declaration that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”¹⁵⁸ Rehnquist approvingly set out a broad understanding of judicial review powers: “Any argument that *Marbury* is limited to cases involving the powers of the Judicial Branch and that the Court had no power to intervene in any dispute relating to separation of powers between the other two branches has been rejected”¹⁵⁹ This use of *Marbury* by Justices like Rehnquist and Burger is notable precisely because it is reminiscent of citations of the 1803 precedent by liberal Justices like William Brennan to justify extensions of judicial power or expansions in governmental protection of rights. In fact, *Marbury* had become the equivalent of the Court’s “utility infielder” or an “all-purpose” cleaner—a precedent that was being mustered into the service of just about any cause by every conceivable bloc on the Court. The common denominator was the association of *Marbury* with “responsible” jurisprudence,

152. *United States v. Nixon*, 418 U.S. 683, 705 (1974).

153. 395 U.S. 486, 549 (1969).

154. *Nixon*, 418 U.S. at 705-07.

155. *Id.* at 713-14.

156. *See id.* at 703-04, 708, 715.

157. *Nixon v. Adm’r of Gen. Serv.*, 433 U.S. 425, 559 n.7 (1977) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)) (alteration in original).

158. *Id.*

159. *Id.* Rehnquist concluded that the law enacted by Congress regarding possession of the papers of President Nixon represented a “significant intrusion into the operations of the Presidency.” *Id.* at 558.

whether taken to mean the aggressive protection of rights, the separation of powers, or the defense of important structural dimensions of the constitutional system—what Rehnquist saw himself doing in the presidential documents case.

Marbury clearly had emerged as *the* “legitimizing” precedent by the 1980s. Citations to this case were peppered across the pages of the United States Reports from 1980 to the end of the decade. More than three dozen opinions authored during this period by liberal, conservative, and “swing” Justices included some reference to *Marbury*. As was true in the 1970s, *Marbury* was at the center of the continuing debate over the proper role of the Court in the American constitutional order. Due to its legitimizing qualities, invocations of the 1803 case appear alongside arguments favoring judicial activism as well as those favoring judicial self-restraint.

In striking contrast to the nineteenth century, or even the first half of the twentieth century, references to *Marbury* appear in more than two dozen cases in the short period between 1980 and 1983. Powell and Rehnquist began the decade by tying *Marbury* to arguments for judicial self-restraint. In *Owen v. City of Independence*, a sovereign immunity case involving the exposure of local governments to suits, Powell drew attention to Marshall’s counsel that courts are not empowered to examine the discretionary actions of “executive officers.”¹⁶⁰ He added that Marshall insisted that judicial officials must be sensitive to “[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive.”¹⁶¹ Later that same term, Rehnquist reminded his colleagues in a dissenting opinion in *Carlson v. Green* that there are limits to the power of judges to grant relief.¹⁶² He objected to Brennan’s willingness to infer a private civil damage remedy in the Eighth Amendment. As the lone dissenter in *Richmond Newspapers v. Virginia*, a 1980 case that held that absent some extraordinary consideration a criminal trial must be public, Rehnquist argued that the logic and “reasoning” of *Marbury* does not “require” the Court to “smother . . . pluralism” through an “ever-broadening use of the Supremacy Clause.”¹⁶³ Writing for the majority in *Valley Forge College v. Americans United for Separation of Church and State, Inc.* two years later, a case that reinforced the Burger Court’s endorsement of strict rules of standing that significantly confined access to the judicial forum, Rehnquist described the review power found in *Marbury* as a “tool of last resort.”¹⁶⁴ But in keeping with the practice of employing the 1803 case as an all-purpose precedent, Rehnquist, along with

160. 445 U.S. 622, 668 (1980).

161. *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

162. 446 U.S. 14, 39, 42 n.8 (1980). Rehnquist argued that the creation of civil damage remedies is a task that falls more appropriately to the legislative rather than the judicial department of the government.

163. 448 U.S. 555, 606 (1980).

164. 454 U.S. 464, 474 (1982). In a 1983 dissent, Rehnquist returned to *Marbury* to remind that it is not the “province” of the judiciary “to inquire how the executive, or executive officers, perform duties in which they have a discretion.” *Maryland v. United States*, 460 U.S. 1001, 1005 (1983) (quoting *Marbury*, 5 U.S. (1 Cranch) at 170).

Powell and Burger, did not shy away from invoking *Marbury* during this same period to lend support to judicial action that they believed was constitutionally sound.

By the 1980s, Marshall's declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is"¹⁶⁵ was commonly employed even by advocates of judicial self-restraint not only to legitimate exercises of judicial power, but to bring closure to any debate over the propriety of judicial action. Writing for the Court in *Diamond v. Chakrabarty*, a case having to do with the issuance of a patent for a genetically engineered bacterium, Burger inserted the "province and duty" line in a passage devoted to the separate duties of Congress and the federal judiciary.¹⁶⁶ Burger inserted the same passage from *Marbury* in another 1980 case that contained a somewhat pointed observation about the importance of legislative and executive respect for the judiciary's duty "to say what the law is."¹⁶⁷ For Burger, *Marbury* confirmed that the judiciary has a constitutional job to discharge that should not be confused with problematic exercises of raw judicial will. On the heels of *Chakrabarty*, Powell associated *Marbury* with a responsible, as compared to a merely activist, judiciary when justifying careful judicial scrutiny of legislation containing racial categories: "The Judicial Branch has the special responsibility to make a searching inquiry into the justification for employing a race-conscious remedy."¹⁶⁸ Unhappy with congressional action that seemed to place localities in a "straightjacket," Rehnquist also cited *Marbury* in another 1980 case when faulting the majority for abdicating their responsibility to ensure the constitutionality of legislative action: "While the presumption of constitutionality is due to any act of a coordinate branch of the Federal Government or of one of the States, it is this Court which is ultimately responsible for deciding challenges to the exercise of power by those entities."¹⁶⁹ In all these instances, *Marbury* was the "weapon" of choice for Justices seeking to immobilize opponents by undercutting the credibility of their position.

Perhaps the best example of *Marbury*'s heightened status during this period can be found in *Nixon v. Fitzgerald*, a case having to do with the exposure of presidents to civil suits for damages.¹⁷⁰ No less than four Justices

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

166. 447 U.S. 303, 315 (1980).

167. *United States v. Will*, 449 U.S. 200, 217 (1980) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

168. *Fullilove v. Klutznick*, 448 U.S. 448, 510 (1980). Justice Powell's dissent in *Garcia v. San Antonio Metropolitan Transit Authority* faulted the majority for allowing members of Congress to act as the "sole judges of the limits of their own power." 469 U.S. 528, 567 (1985) (Powell, J., dissenting). Quoting from *Marbury*, he added that "it has been the settled province of the federal judiciary 'to say what the law is' with respect to the constitutionality of Acts of Congress." *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 177). Powell reminded his colleagues that *Marbury* constituted "the most famous case in our history." *Id.* By contrast, a more cautious view of the Court's power "to say what the law is" appears in his majority opinion in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

169. *City of Rome v. United States*, 446 U.S. 156, 207 (1980).

170. 457 U.S. 731 (1982).

referenced *Marbury* in opinions submitted in the 1982 case.¹⁷¹ Powell for the Court and Burger in a concurrence made use of the 1803 precedent, as did White and Blackmun in dissenting opinions.¹⁷² In each instance, *Marbury* was treated as a critically important source of leverage. If the Constitution remained the principal touchstone of legitimacy in the 1980s, *Marbury* plainly was the “frosting on the cake.”

Writing for the Court in *Nixon v. Fitzgerald*, Powell employed *Marbury* to rebut the proposition that the judiciary must be constantly available to claimants seeking redress for injuries.¹⁷³ He was emphatic in reminding the Court that William Marbury “lost his case in the Supreme Court.”¹⁷⁴ While acknowledging *Marbury*’s teaching that the judiciary has a job to do, Burger cautioned in his concurring opinion that the Court should not “probe” in such a way as to “interfere[] with the independence that is imperative to the functioning of the office of a President.”¹⁷⁵ According to Burger, if the principle of separation of powers requires that the Court be allowed to do its work, so this same principle requires that presidents be able to do their work as well.¹⁷⁶

Where Powell and Burger found distinct outer boundaries to judicial action in *Marbury*, Justice White drew extensively on Marshall’s reasoning to justify a broad view of the oversight powers of the judiciary. According to White, the ruling in *Nixon v. Fitzgerald* was not merely at odds with Marshall’s conception of a responsible judiciary, but with his basic understanding of the integrity of the entire constitutional system. White included two key passages from *Marbury* in his dissenting opinion: “The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right;”¹⁷⁷ and a second recognizable passage with a unmistakable message: “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.”¹⁷⁸ For White, *Marbury* cannot be reconciled with a jurisprudence that leaves injured parties without avenues of redress. Blackmun repeated the “very essence of civil liberty” passage from *Marbury* while arguing that no one, not even the President, should be above the law and, hence, beyond the reach of

171. *Id.*

172. *Id.*

173. *Id.* at 754, 761, 764 n.7 (Burger, J., concurring); *id.* at 766, 768, 783, 789, 797 (White, J., dissenting); *id.* at 797 (Blackmun, J., dissenting).

174. *Id.* at 755 n.37 (Powell, J.).

175. *Id.* at 761.

176. *Id.* at 762-63. Responding to what might be seen as an opening in Powell’s opinion for congressional authorization of damage actions against a president, Burger added a blunt warning to Congress about improperly meddling with the presidency or the judiciary: “Nothing in the Court’s opinion is to be read as suggesting that a constitutional holding of this Court can be legislatively overruled or modified.” *Id.* at 764 n.7 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) at 137, 177 (1803)).

177. *Id.* at 768 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

178. *Id.* at 783 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163). White repeated the second quotation again later in his opinion. *See id.* at 789.

injured parties.¹⁷⁹ The desire of both sides to claim *Marbury* for themselves is indicative of the weight Marshall's opinion carried by the 1980s, especially in disagreements over the role of the Court in the constitutional system and the comprehensiveness of constitutional protection of individual rights. Significant in this regard is the fact that Justices Powell and White directly commented on their competing uses of *Marbury*.¹⁸⁰

Disputes over how far the Court can and should go in providing remedies to parties claiming injuries continued to feature references to *Marbury* during the remainder of the decade of the 1980s. Justice Thurgood Marshall quoted the "essence of civil liberty" passage while faulting the Court for not going far enough to protect rights in a 1983 dissent.¹⁸¹ He returned to *Marbury* a year later in another dissent that featured an attack on the majority for not extending sufficient protection to aggrieved parties.¹⁸² Stevens, writing for the Court in *Bush v. Lucas*, relied on *Marbury* for support when arguing that legal remedies should be available to persons who have suffered injuries to legally recognized rights.¹⁸³ Stevens incorporated quotes and references to *Marbury* in a half dozen opinions between 1984 and 1990, specifically citing the "essence of civil liberty" passage in half of those opinions and Marshall's famous judicial review statement ("[i]t is emphatically the province and duty of the judicial department to say what the law is")¹⁸⁴ in several more.¹⁸⁵ Stevens tied *Marbury* to a broad understanding of the Court's responsibility to defend rights and to a generous view of the protection that the Constitution affords persons seeking remedies for injuries. For Stevens, and for the Burger Court as a whole, *Marbury* was clearly more than the precedent "de jour" when it came to defining the role of the judiciary and the nature of the constitutional system. If the Rehnquist Court was destined to be more ideologically divided than the Burger Court, *Marbury* remained close to the center of the dispute between the warring parties. Burger's departure did not coincide with any diminution in the stature of

179. *Id.* at 797, 798 n.2 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

180. *Id.* at 755 n.37, 783 n.26.

181. *Briscoe v. LaHue*, 460 U.S. 325, 368 (1983) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

182. *Hobby v. United States*, 468 U.S. 339, 359 (1984). Marshall included another of *Marbury*'s passages that has to do with judicial protection of rights: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 359 n.8 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

183. 462 U.S. 367, 373 n.10 (1983). This case arose from an aggrieved federal government employee's attempt to recover damages under the First Amendment for a demotion that followed critical public comments of NASA, his employing agency. The Court refused to create a new, non-statutory damages remedy, citing the availability of redress under existing laws. *Id.* at 367.

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

185. Justice Stevens used the phrase "essence of civil liberty" in several opinions. See, e.g., *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), *superceded by statute*, 28 U.S.C. § 1331 (2000); *Oklahoma City v. Tuttle*, 471 U.S. 808, 843 n.32 (1985) (Stevens, J., dissenting); *United States v. Leon*, 468 U.S. 897, 978 n.36 (1984) (Stevens, J., concurring in part and dissenting in part). The "emphatically the . . . duty" passage is cited in *Allen v. Wright*, 468 U.S. 737, 794 (1984) (Stevens, J., dissenting), and *Thompson v. Oklahoma*, 487 U.S. 815, 833 n.40 (1988). In a dissenting opinion in *United States v. Dalm*, Stevens attached *Marbury* to the "presumption that for every right there should be a remedy." 494 U.S. 596, 616 (1989) (Stevens, J., dissenting).

Marbury as a legitimizing decision; indeed, if anything, the 1803 precedent grew in importance following Rehnquist's appointment as Chief Justice.

IV. *MARBURY* AND THE REHNQUIST COURT: "THE BEAT GOES ON"

Recourse to *Marbury* remained a fixture of American jurisprudence during the decade of the 1990s. It continued to be employed to legitimize selective interpretations of judicial power or preferred constitutional "values." Justice Scalia, the member of the Rehnquist Court most closely associated with the philosophy of "original intent," made particularly heavy use of *Marbury* during this period. Thus, for example, while endorsing a strict interpretation of the rules of standing in a 1992 case, *Lujan v. Defenders of Wildlife*,¹⁸⁶ he took pains to associate Marshall with a carefully confined view of judicial power: "The province of the court . . . is, *solely*, to decide on the rights of individuals."¹⁸⁷ The task of vindicating the public interest, Scalia noted, falls to the political departments of the government.¹⁸⁸ Interestingly, Justice Kennedy authored a concurring opinion in *Lujan* in which he used *Marbury* in mocking Scalia's originalism. According to Kennedy, "Modern litigation has progressed far from the paradigm of *Marbury* suing Madison to get his commission."¹⁸⁹ *Lujan* was one of a number of cases in the 1990s where Justices fought for control over the meaning and utility of *Marbury*. For Blackmun, writing in dissent, *Marbury* stands preeminently for the principle that "[t]he 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."¹⁹⁰ White, writing for the Court in *Franklin v. Gwinnett County Public Schools*,¹⁹¹ a 1992 sexual harassment case involving an action for damages, also made use of *Marbury* to affirm the principle that the laws should provide remedies for injuries.¹⁹² White tied *Marbury* to Blackstone's declaration that "where there is a legal right, there is also a legal remedy . . . whenever that right is invaded."¹⁹³

It was Scalia, however, who relied most heavily on *Marbury* during the last decade of the twentieth century. He returned to the 1803 case twice more in 1992, linking it on one occasion with an argument that authority to subject public officials to judicial injunction is not unlimited,¹⁹⁴ and tying it on a second occasion to an attack on the Court's view of *stare decisis* in a

186. 504 U.S. 555 (1992).

187. *Id.* at 576 (emphasis added) (internal citation omitted).

188. *Id.*

189. *Id.* at 580 (Kennedy, J., concurring).

190. *Id.* at 606 (Blackmun, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

191. 503 U.S. 60 (1992).

192. *Id.* at 66.

193. *Id.* at 66 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (Garland Publ'g Co. 1978) (1783)). An excellent example of the importance White attached to legal redress for injuries appears in his dissent in *Nixon v. Fitzgerald*, 457 U.S. 731, 764 (1982) (White, J., dissenting).

194. *Franklin v. Massachusetts*, 505 U.S. 788, 827 n.2 (1992).

major abortion case that included a subtle but obvious reference to the judiciary's inflation of its review powers since 1803.¹⁹⁵ Later in the decade, Scalia found support in *Marbury* for the principle that Congress may not force federal courts to reopen final judgments.¹⁹⁶ The authority to "say what the law is,"¹⁹⁷ he argued, includes the power "not merely to rule on cases, but to decide them."¹⁹⁸ Here was a defense of judicial prerogatives and authority that would have made William Brennan, Scalia's principal nemesis during the 1980s, smile. For Scalia, the judiciary's powers are limited, but complete where they exist. Where the powers exist, of course, is *the* critical issue that separates restraintists from activists. Scalia again defended the judiciary's authority to disregard defective laws in a concurrence in another 1995 case, *Reynoldsville Casket Co. v. Hyde*.¹⁹⁹ Relying on *Marbury* for support, he observed that "what a court does with regard to an unconstitutional law is simply to *ignore* it."²⁰⁰ Here is a construction of *Marbury* that clearly is calculated to preserve the judiciary's review powers without legitimizing government by the judiciary.²⁰¹

In what was arguably the most significant ruling of 1995, Rehnquist drew on the power of *Marbury* as he overturned the federal Gun-Free School Zones Act of 1990 in *United States v. Lopez*.²⁰² He reminded Congress of Marshall's teaching that it is "the Judiciary's duty 'to say what the law is.'"²⁰³ Writing for a heavily divided Court, Rehnquist concluded that Congress had stretched the commerce power to the max and beyond. Here, for Rehnquist, who had labeled *Marbury*'s judicial review power as a "tool of last resort" in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*,²⁰⁴ was an appropriate occasion for the

195. *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 993 (1992) (Scalia, J., concurring in part and dissenting in part). Scalia used *Marbury* in his *Casey* dissent to critique the plurality's (O'Connor, Kennedy, and Souter) interpretation of *stare decisis* and to remind his colleagues that the Court has gone far beyond the scope of the review powers defended by Marshall: "I wonder whether, as applied to *Marbury v. Madison*, for example, the new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts." *Id.* (internal citation omitted).

196. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995).

197. *Id.* at 218 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

198. *Id.* at 218-19 (emphasis omitted).

199. 514 U.S. 749 (1995).

200. *Id.* at 760 (speaking for the Court, Justice Breyer used the supremacy clause to invalidate an Ohio law).

201. *See id.*

202. 514 U.S. 549 (1995). Rehnquist had been seeking a major victory for his position on the limits of federal commerce clause authority since his defeat in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). Writing for the Court in *Garcia*, Justice Blackmun reversed Rehnquist's ruling in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which relied, in part, on 10th Amendment limitations on federal power. *Garcia*, 469 U.S. at 531. Rehnquist's brief dissent in *Garcia* announced that he looked forward to the eventual vindication of his position as set out in *National League*. *Id.* at 579-80 (Rehnquist, C.J., dissenting).

203. *Lopez*, 514 U.S. at 566 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Kennedy, also using *Marbury* in his concurrence in *Lopez*, reminded Congress that "[j]udicial review is . . . established beyond question." *Id.* at 575 (Kennedy, J., concurring).

204. 454 U.S. 464, 474 (1982).

Court to exercise its power of judicial review to preserve the American federal system and the principle of limited government.²⁰⁵

If *Marbury*'s use between 1990 and 1995 left anyone unconvinced that it was considered heavy armament by the Justices, the "artillery" status of Marshall's 1803 opinion was unmistakable by 2000. Kennedy, Souter, Thomas, and Stevens, for example, all sought to add the weight of *Marbury* to various opinions in 1997. Speaking for a slim majority in *City of Boerne v. Flores*,²⁰⁶ Kennedy reminded Congress that it is the judiciary that has the power both to "to say what the law is" and "to determine if Congress has exceeded its authority."²⁰⁷ Drawing on Marshall's declaration in *Marbury* that the Constitution as "paramount law" must be superior to "ordinary legislative acts,"²⁰⁸ Kennedy overruled the Religious Freedom Restoration Act of 1993 on the grounds that Congress had overextended its remedial powers under the Fourteenth Amendment.²⁰⁹ Interestingly, Congress passed RFRA to provide enhanced protection of religious freedoms in response to a 1990 ruling which held that most neutral government regulations challenged on free exercise grounds did not have to pass a strict scrutiny test.²¹⁰ Later, in 1997, Justice Thomas would follow Kennedy's lead in attaching *Marbury* to his argument that the Constitution created a government of enumerated, and hence limited, powers.²¹¹ As the Court looked to *Marbury* for support when enforcing limits on Congress's commerce powers in *Lopez*,²¹² now Marshallian reasoning was being cited to support the enforcement of important limits on the legislature's Fourteenth Amendment authority. In effect, the judiciary was curbing Congress's employment of the two sections of the Constitution that had accounted for the most important legislative actions of the century—and *Marbury* was now connected with this judicially mandated retrenchment.

Members of the Rehnquist Court's liberal bloc did not abandon *Marbury* to the conservative side in 1997. Liberal and conservative Justices had a shared interest in defending the Court's review powers, even if they might employ them to advance competing ends. Justice Souter, concurring in a case that upheld Washington state's ban on physician assisted suicide, found support in *Marbury* for the claim that the Court has a duty to review legisla-

205. *Lopez* was followed by several other controversial commerce clause decisions that overturned high profile federal laws. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Morrison*, 529 U.S. 598 (2000).

206. 521 U.S. 507 (1997).

207. *Id.* at 536. Four years later, Kennedy repeated the argument that it is "the province and the duty of the judicial department to say what the law is." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

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

209. *Flores*, 521 U.S. at 511.

210. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

211. See *Printz v. United States*, 521 U.S. 898, 937-39 (1997) (Thomas, J., concurring). Writing for the Court late in 2001, he included a reference to *Marbury*'s passage concerning the review powers of the judiciary in *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 130 (2001).

212. See *United States v. Lopez*, 514 U.S. 549, 566 (1995).

tion for conformity with the Constitution.²¹³ If judicial review had been treated historically as a discretionary tool to be used judiciously and sparingly, it was becoming increasingly common at the end of the twentieth century to encounter the argument that the Court was duty-bound to exercise its constitutional review powers. Stevens, generally associated with the liberal bloc by the late 1980s, inserted the “emphatically the province and duty” declaration from *Marbury* in an opinion for the majority that rejected President Clinton’s claim that the Constitution requires the judiciary to defer all but the most exceptional civil suits brought against the chief executive for unofficial actions until the completion of his term.²¹⁴

Rehnquist, Scalia, Souter, and Stevens all returned to *Marbury* in 1999 and 2000 to support the full range of arguments now associated with the 1803 case. Souter employed the “essence of civil liberty” passage from *Marbury* in 1999 when challenging Justice Kennedy’s expansion of the state sovereign immunity principle.²¹⁵ Writing for the Court in *Alden v. Maine*, Kennedy announced that Congress could not abrogate state sovereign immunity by authorizing private actions for money damages against non-consenting states in their own courts.²¹⁶ For Souter, this reasoning flew in the face of Marshall’s assertion that the United States will only deserve to be called a republic of rights if redress is available to parties whose civil liberties have been denied. Souter’s appeal to *Marbury* in *Alden* followed on Scalia’s reference to this precedent earlier in the term in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,²¹⁷ another controversial case that extended the principle of state immunity.²¹⁸

Marbury made two memorable appearances in 2000. Chief Justice Rehnquist appealed to *Marbury* in a high profile commerce clause case,²¹⁹ and Stevens found the same precedent to be useful when defending the actions of the Florida Supreme Court in *Bush v. Gore*,²²⁰ the case that put an end to vote counting in the 2000 presidential election. Following the rulings in *Lopez* and *Printz*, Rehnquist reminded Congress in *United States v. Morrison*, a case that overturned the Violence Against Women Act of 1994,²²¹ that its powers are “defined and limited” by the Constitution.²²² Drawing on *Marbury*, Rehnquist curtly declared that “limitation of congressional author-

213. *Washington v. Glucksberg*, 521 U.S. 702, 763 (1997) (Souter, J., concurring). Souter also cited *Marbury* in a concurrence in a line-item veto case decided the same term as *Glucksberg*. See *Raines v. Byrd*, 521 U.S. 811, 834 (1997) (Souter, J., concurring).

214. *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

215. *Alden v. Maine*, 527 U.S. 706, 812 (1999) (Souter, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).

216. *Id.* at 754.

217. 527 U.S. 666 (1999).

218. Writing for the Court, Scalia observed in a matter-of-fact way that whether *Marbury* was rightly or wrongly decided was not an open issue for judicial officials. *Id.* at 688.

219. See *United States v. Morrison*, 529 U.S. 598 (2000).

220. 531 U.S. 98 (2000).

221. *Morrison*, 529 U.S. at 602.

222. *Id.* at 607.

ity is not solely a matter of legislative grace.”²²³ Going to *Marbury* for a third time in his opinion, Rehnquist added in a footnote that legislative self-restraint is not the only mechanism for the enforcement of constitutional limits on Congress.²²⁴ For Rehnquist, the judiciary has a special duty to protect special features of the American constitutional system, such as the system of separated and divided powers, the principle of limited government, and federalism. The tug-of-war over *Marbury* was explicitly acknowledged by Souter who contested the conservative bloc’s attempt to wrap itself in Marshall’s reasoning in *Morrison*.²²⁵ Countering Rehnquist’s appropriation of the mantle of *Marbury*, Souter insisted that Marshall’s reasoning dovetailed much more closely with the position taken by the dissenters rather than that of the majority.²²⁶ It was in dissent, as well, that Stevens cited *Marbury* when protesting the majority’s decision in *Bush v. Gore* to check the Florida Supreme Court’s decision to permit selective recounts to continue in that state’s presidential contest.²²⁷ Stevens insisted that the Florida Supreme Court had properly exercised the authority to decipher legislative intent under its power to “say what the law is.”²²⁸

There is little doubt that, by the end of the twentieth century, *Marbury* had emerged as the preeminent legitimizing case in American constitutional law. In sharp contrast to nineteenth century practices, the twentieth century ended with *Marbury* typically associated with judicial assertiveness, whether in the service of individual freedoms, federalism, or the system of checks and balances. The prominence of the case during the period of Rehnquist’s tenure as Chief Justice arguably eclipsed its status at any prior moment in our history, including the era of the Warren Court when it figured in major cases such as *Baker v. Carr*²²⁹ and *Powell v. McCormack*.²³⁰ The fight for possession of *Marbury*, and over its real meaning, has been intense and important not only for parties immediately affected by the Court’s decisions, but for everyone on the “sidelines” as well. While it might be going a bit far to say that *Marbury* has been “prostituted” by Justices looking to add weight to their side, it is clearly the case that many ref-

223. *Id.* at 616.

224. *Id.* at 116 n.7.

225. *Id.* at 651 n.19 (Souter, J., dissenting).

226. *Id.*

227. *Bush v. Gore*, 531 U.S. 98, 128 n.7 (2000) (Stevens, J., dissenting).

228. *Id.* (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Stevens returned to *Marbury* and specifically the “‘essence of civil liberty” passage again in dissent in 2002, see *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 223 n.2 (2002) (Stevens, J., dissenting) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163). *Marbury* appeared as well in the 9th Circuit’s disposition of *Newdow v. U.S. Congress*, 328 F.3d 466, 471 (2003) (Reinhardt, J., concurring) (Pledge of Allegiance case). Opinions in two significant 2004 cases featured invocations of Marshall’s name. Justice Thomas referenced Marshall in his dissent in *Hamdi v. Rumsfeld*, 542 U.S. 507, 581 (2004) (Thomas, J., dissenting), one of several high-profile enemy combatant cases. Justice Kennedy referenced Marshall in a controversial executive privilege case. *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 381-82 (2004).

229. 369 U.S. 186, 208 (1962).

230. 395 U.S. 486, 549 (1969).

erences to the 1803 case tend to be almost off-handed, matter-of-fact, and self-serving, rather than genuinely reasoned or “academic.” There is good reason to believe that Marshall would find cause to be both cheered and troubled by contemporary uses of his *Marbury* opinion.

V. JUDICIAL FAITHFULNESS OR WANDERING INDULGENCE?: CONFRONTING MARSHALL ON *MARBURY*

There is ample evidence that John Marshall devoted a great deal of care to his *Marbury* opinion as he devoted great care to his legal writings in general. He understood that *Marbury*, like *McCulloch v. Maryland* and *Gibbons v. Ogden* later, would have a shaping influence on the American republic. Marshall deserves the title of “Founding Father” as much as Madison, Washington, Hamilton, or the other delegates who attended the Federal Convention of 1787. Like Madison, Marshall was a self-conscious Founder. There is considerable evidence that he understood the role he was playing and took that role seriously.²³¹ Marshall understood, for example, that the “delicate” and “novel” issues involved in the *Marbury* case required “a complete exposition of the principles on which the opinion to be given by the court [was] founded.”²³² The confrontation with President Thomas Jefferson and the executive department made the case both sensitive and difficult, but this was only part of the problem facing Marshall. The matter of lodging a power of constitutional review in the courts was repeatedly addressed at the Federal Convention of 1787. There is good evidence in Madison’s notes from the convention that in the end the delegates decided to invest only a limited power of constitutional review in the judicial department, that is, the authority to expound the Constitution only in “cases of a Judiciary nature.”²³³ Although Hamilton later associated a general power of judicial review with the Constitution in *Federalist* No. 78, Madison was positioned to argue that the delegates had not embraced an expansive view of judicial power at the Convention.²³⁴ Marshall understood that his opinion would have to neutralize the concerns that prompted Madison himself to

231. Consider the following language from the beginning of Marshall’s opinion in *McCulloch v. Maryland*:

The constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps, of hostility of a still more serious nature; and if it is to be so decided, by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.

17 U.S. 316, 400-01 (1819).

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

233. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 14, at 430.

234. Hamilton’s defense of a general power of judicial review occurs as an extension of his discussion of life tenure for judges in THE FEDERALIST NO. 78 (Alexander Hamilton).

favor a limited power of judicial review while also persuading Americans that a general power of judicial review was a “natural” feature of the type of constitutional system they had just ratified. Marshall’s success may well have exceeded his expectations.

Marshall’s credentials as an advocate of judicial protection of rights and of an independent judiciary predated his appointment to the Supreme Court by President John Adams. Included in his early law notes that have survived is the observation that “for every injury a man shall have an action [and] for every right he has a remedy.”²³⁵ As a representative from Fauquier County in the House of Delegates in 1783, Marshall signed his name to a Council of State document declaring that a law giving the executive the authority to inquire into certain actions taken by county magistrates was “contrary to the fundamental principles of our constitution.”²³⁶ The document ends with the observation that action against a magistrate should commence in a proceeding before a “Court of Justice.”²³⁷ Marshall left no doubt about the depth of his commitment to due process and judicial protection of rights during the Virginia Ratifying Convention. Reflecting on the failures of the existing confederation system, he drew attention to an especially deplorable violation of the fundamental procedures of free government:

Can we pretend to the enjoyment of political freedom, or security, when we are told, that a man has been, by an act of Assembly, struck out of existence, without a trial by jury—without examination—without being confronted with his accusers and witnesses—without the benefits of the law of the land? . . . Shall it be a maxim, that a man shall be deprived of his life without the benefit of law?²³⁸

Here was a passionate defense of personal liberty and due process of law worthy of Patrick Henry.

Written large in Marshall’s opinion in *Marbury* is the argument that judicial procedures should be equal to the protection of rights.²³⁹ What also appears in dramatic form in *Marbury*, but receives inadequate attention in commentaries, is his belief that the courts must keep to their proper sphere.²⁴⁰ Neither jurors nor judges should roam at will. Marshall was pain-

235. John Marshall, Law Notes, in 1 THE PAPERS OF JOHN MARSHALL 51 (Herbert A. Johnson et al. eds., 1974).

236. John Marshall, Council of State Opinion, *supra* note 235, at 97.

237. *Id.*

238. John Marshall, The Virginia Ratifying Convention: Speech, June 10, 1788, *supra* note 235, at 257 (footnotes omitted). Marshall’s comments on jury proceedings at the Ratifying Convention anticipated the successful action he took as a first-term congressman in 1799 requiring that a jury decide bankruptcy and debt issues. See John Marshall, Congressional Career: Editorial Note, in 4 THE PAPERS OF JOHN MARSHALL 34 (Charles T. Cullen & Leslie Tobias eds., 1984). He also understood, however, that juries could be mischievous without the guidance of thoughtful judges. See John Marshall, *Ross v. Pynes*, 1790: Argument, in 5 THE PAPERS OF JOHN MARSHALL 497 (Charles F. Hobson et al. eds., 1987).

239. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

240. See *id.* at 177.

fully clear about the existence of outer boundaries to the judiciary's powers. He understood the theory and utility of separated and divided powers. A revealing pre-*Marbury* statement on this subject appears in a speech he delivered in the United States House of Representatives on March 7, 1800:

By the constitution, the judicial power of the United States is extended to all *cases in law and equity* arising under the constitution, laws and treaties of the United States; but the resolutions declare the judicial power to extend to *all questions* arising under the constitution, treaties and laws of the United States If the judicial power extended to every *question* under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power . . . could exist no longer, and the other departments would be swallowed up by the judiciary...

By extending the judicial power to all *cases in law and equity*, the constitution had never been understood to confer on that department any political power whatsoever.²⁴¹

Marshall's defense of a limited power of judicial review has virtually disappeared from accounts of his jurisprudence. Indeed, he is most closely associated with the defense of a broad, if not unlimited, power of constitutional review on the part of courts. While *Marbury*, more than any other case, is responsible for Marshall's identification with an expansive judicial oversight power, a careful reading of his opinion reveals that in 1803 he had not abandoned the position that was set out in his speech before the House of Representatives in 1800.

Marbury v. Madison ranks as *the* paradigmatic political case in American history, and not merely due to its connection with the election of 1800. While *Marbury* cannot properly be understood apart from the political controversies that gave it life, it warrants classification as the preeminent "political" case in American jurisprudence for another reason. It is to this case that Americans look for instruction on issues that are related to the very nature and ends of the constitutional order or, more specifically, for instruction regarding how properly to construe the fundamental law that shapes and gives direction to the American way of life—nothing could be more "political" than this. Marshall's opinion amounts to a civics lesson on sub-

241. John Marshall, Speech to House (Mar. 7, 1800), in 4 THE PAPERS OF JOHN MARSHALL, *supra* note 233, at 95. Marshall added the following observation in his speech about the limits of judicial power:

The question whether vessels captured within three miles of the American coast . . . were legally captured or not, and whether the American government was bound to restore them if in its power, were questions of law, but they were questions of political law, proper to be decided and they were decided by the executive and not by the courts.

Id. at 103.

jects such as limited government, due process protection of rights, and separation of powers. His advice is sober and realistic. Marshall combines an emphatic warning about the dangers of arbitrary and unlimited government with an acknowledgement that the “discretionary” actions of the President are not proper subjects for judicial examination.

It is fitting that *Marbury* should be the principal legitimizing decision in constitutional law. While this development doubtless would please Marshall, it is not so clear that he would applaud the matter-of-fact association of the case with an almost unlimited power of judicial review. He was careful to identify the limits of judicial oversight powers in *Marbury*. In his extended response to the second of three questions posed at the beginning of his opinion (“If he has a right, and that right has been violated, do the laws of his country afford him a remedy?”),²⁴² Marshall left no doubt that some matters are not appropriate for judicial examination:

[W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable.²⁴³

Marshall repeated this argument when responding to the third question (“If [the laws] do afford him a remedy, is it a *mandamus* issuing from this court?”):²⁴⁴

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.²⁴⁵

Marshall’s defense of a limited power of judicial review in *Marbury* fits well with his cautionary remarks in *Cohens* regarding abstract, or non-contextual applications of the arguments found in his 1803 opinion.

Marshall’s preeminent achievements were in the field of practical governance and involved reconciling appeals to personal liberties with the real demands of domestic and foreign politics. Like so many of the Founders, Marshall subscribed to Lockean-style modern natural rights theory. *Marbury* contains as blunt a statement on the significance of legal protection of rights as appears anywhere in American jurisprudence: “The government of the United States has been emphatically termed a government of laws, and

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

243. *Id.* at 166.

244. *Id.* at 154.

245. *Id.* at 170.

not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."²⁴⁶ His *Marbury* opinion also stands for the principle that the judiciary has a special responsibility for the protection of those rights and for the interpretation of the Constitution and laws that define those rights. It is easy to understand the attractiveness of *Marbury* to scholars and jurists who subscribe to an expansive view of personal freedoms and favor a broad reading of the judiciary's checking powers. Justice Brennan recurred to *Marbury* in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*²⁴⁷ when seeking to extend judicial protection of rights, and Chief Justices Warren and Burger invoked the authority of *Marbury* when asserting the judiciary's authority to scrutinize congressional and executive actions that threaten rights in *Powell v. McCormack*²⁴⁸ and *United States v. Nixon*.²⁴⁹

While Marshall likely would be heartened by the continuing vitality of his *Marbury* opinion, he might not be entirely comfortable with exaggerated constructions or applications of his reasoning. He understood that there were outer boundaries to the protection of rights and the exercise of judicial review powers. It is this dimension of *Marbury* that receives inadequate attention today. There is ample evidence that Marshall was sensitive to the problematic side of judicial oversight of the activities of elected officials in a democracy. This is not the same as saying that he questioned the legitimacy of all oversight of the coordinate branches, only that he understood that the judiciary's review powers were to be carefully guarded and cautiously used.

John Marshall was a serious and self-conscious participant in the entire founding project. He recognized and utilized the judiciary's power to give shape to the new national system that the Constitution called into being. He understood that this power brought with it the responsibility to instruct people not only in the value of rights, but in the importance of preserving competence in government. Marshall carefully noted in his opinion in the Aaron Burr case that the interests of the government "ought to be treated with respect."²⁵⁰ The events Marshall witnessed during the confederation period, both in Virginia and the nation, convinced him that natural rights cannot be well protected if government officials are invested with insufficient powers or are placed in a situation that discourages reasonable use of discretionary authority. Any doubts that he might have had about the fragility of decent republicanism were likely dispelled during his service as a diplomat in France. His insertion of a defense of the discretionary powers of the President in *Marbury* undoubtedly followed from his recognition of the impor-

246. *Id.* at 163. For a detailed example of John Locke's description of natural rights, see JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* 4-11 (1690) (Liberty Books 1952).

247. 403 U.S. 388, 397 (1971).

248. 395 U.S. 486, 549 (1969).

249. 418 U.S. 683, 703 (1974).

250. *United States v. Burr*, 25 F. Cas. 55, 84 (C.C.D. Va. 1807) (No. 14,693).

tance of preserving an effective executive and not from any desire to conciliate Jefferson or to soften the effects of his defense of a general power of judicial review.

Compelling evidence of Marshall's conviction that the Constitution accommodates the demands of practical politics can be found in *Gibbons v. Ogden*,²⁵¹ an 1820s commerce case that unsettled defenders of states' rights and slavery. His opinion in *Gibbons*, like that in *Marbury*, was designed both to resolve a particular legal dispute and illuminate the meaning and ends of the Constitution. As in so many of his opinions, Marshall's principal aim in *Gibbons* was to give instruction on constitutional interpretation while pointing governmental action in salutary directions. Although he finally rested his decision on the supremacy clause, Marshall devoted much of his opinion in *Gibbons* to a discourse on the federal commerce power. His message was both direct and unmistakable: appropriate use of the commerce power is typically to be determined through political, not judicial, processes:

The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in [the regulation of commerce], as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.²⁵²

This passage not only makes an important concession to governmental and political interests, but articulates an important limitation on judicial review. Significantly, Marshall's position on the limits of the judiciary's review powers did not change over the course of his tenure as Chief Justice.

Marshall's legal writings remind us that political existence, even in modern, rights-oriented nation states, is not one-dimensional. While popular consent and a commitment to the protection of rights are the critical tests of legitimacy, it also is the case that governments must be permitted to exercise legitimate powers effectively and to insist that citizens abide by the duties that march alongside rights. Particularly instructive in this regard is a passage found in Marshall's opinion in *Providence Bank v. Billings*: "However absolute the right of an individual may be, it is still in the nature of that right, that it must bear a portion of the public bur[d]ens; and that portion must be determined by the legislature."²⁵³ He went on to note that "[legislative power] may be abused; but the constitution of the United States was not intended to furnish the corrective for every abuse of power which may be

251. 22 U.S. (9 Wheat.) 1 (1824).

252. *Id.* at 197.

253. *Providence Bank v. Billings*, 29 U.S. 514, 563 (1830).

committed by the state governments.”²⁵⁴ Reminiscent of his argument in *Gibbons*, he added that the principal checks on “unwise” legislation are the “wisdom and justice” of legislators and devices that insure their accountability to the people.²⁵⁵

John Marshall did not associate constitutional republicanism with utopian ends or extraordinary human sacrifice. This is not the same as saying that he believed that it would be easy to perpetuate a nation state based on republican principles of individual rights, due process of law, or limited government. He did believe that it was within the grasp of the American people to achieve a reasonable balance between protection of rights and maintaining effectiveness in government. This would require instruction from persons like Washington and Marshall, hence his careful construction of a biography of Washington. Marshall was convinced that the judiciary had an important role to play not only in resolving the disputes that would arise when contrasting appeals to personal rights and governmental interests collide, but in cultivating reasonable expectations regarding exercises of individual rights and governmental powers. There is good evidence that Marshall believed the last function, an educational one, eclipsed in significance the judiciary’s dispute resolution duties. His constitutional reasoning counsels sobriety and moderation, the moderation that he believed was critical to having a decent and competent democratic republic. Immoderation in the pursuit of rights or in the exercise of judicial powers is no less a problem for the American republic in Marshall’s estimation than unchecked exercises of legislative or executive authority.

Like James Madison and George Washington, Marshall understood that there is a limit to the resilience of even modern democratic republics. Rather than take decency and competence for granted, Marshall labored to instruct government officials and the American people about the conditions required to preserve the health and vitality of a modern rights-oriented republic. These conditions include the preservation of limited government on the one side, and the recognition that effectiveness in government must be insured on the other. Marshall’s defense of a general power of judicial review was framed by his attention to these concerns. If *Marbury*’s status as the principal “legitimizing” case in the entire corpus of Supreme Court decisions would be a source of comfort to Marshall, he likely would be troubled by the ease with which the contemporary Supreme Court invokes its *Marbury* review powers. He understood that this is a formidable power, especially in a democratic nation state; and, as such, a power that is to be judiciously and cautiously used by his successors. In short, Marshall probably would be pleased with the vitality of *Marbury* at its bicentennial, but his assessment no doubt would contain instructions regarding the careful use of the “loaded weapon” that he believed was an essential ingredient of a constitutional

254. *Id.* Justice Harlan offered a similar argument in his dissenting opinion in *Baker v. Carr*, 369 U.S. 186, 330 (1962) (Harlan, J., dissenting).

255. *Id.* at 515.

system that could satisfy the noble goals associated with the new American republic of 1789.