

*A Round Table on American  
Constitutional Law*

*Marbury v. Madison:*  
History, Legitimacy, Influence



# The Reach of Review: Of Judges, Cases, and Constitutions

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The topic is the origin and the current role of judicial review in American law, with emphasis on the origin. This phrase, judicial review, has a particular meaning today, namely, how judges enforce constitutional norms by deciding cases. The current scope of judicial review is very broad, but it was not always so. Judicial review, then, has a history and that history is mostly one of its expansion and refinement. As such, the history of judicial review is linked to the history of the Supreme Court itself as an institution. Beginning as indeed the weakest branch of the federal government, the Court made common cause with the executive and the legislative branches against the interests of the states. That was one sort of judicial review, and it was substantially in place by the advent of the Civil War. The constitutional norms the Court enforced against the states were largely those of national interests against local interests, a vertical or top-down judicial review.

Judicial review in a more problematic, horizontal form involves the enforcement of constitutional norms against coordinate branches

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of the federal government<sup>1</sup>. Such judicial law-making, however, may seem to resemble the practices of judges in the English and American legal traditions in the less exalted and less problematic crafting of private law and criminal law. By borrowing from this ordinary sense of the judge's task, judicial review might seem to be merely the epitome of judge-made law and therefore almost inevitable, given the tradition from which it springs<sup>2</sup>. This role of judges can seem almost natural to the American legal mind.

Consider a contemporary case in point. Because it deals with the intransigent, highly controversial issue of affirmative action or racial discrimination<sup>3</sup>, *Gratz v. Bollinger* may turn out to be the best-known case of the 2002 term of the United States Supreme Court. There the Court must determine the constitutionality of college and law-school admission practices that rely upon the race of applicants for admission to a state university. At the end of the day, either the university will be permitted to persist in the practices it currently uses, or it will not. The case is about much more than that, however. It will affect admissions practices at other state uni-

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<sup>1</sup> This history has a history. Some argue or suggest that the power of judges to enforce "higher law" horizontally against legislatures had been accepted in state constitutional law by the time of the ratification of the 1787 Constitution: Daniel A. FARBER and Suzanna SHERRY, *A History of the American Constitution*, at 68 (1990) (seven state supreme courts tested constitutionality of state statutes of which five were "invalidated"). Farber and Sherry cite and rely upon the earlier work of William Winslow CROSSKEY, *Politics and the Constitution in the History of the United States* (1953), e.g., vol. II, c. XXVIII: "The Supreme Court as a Board of Legislative Review and the Pre-Constitutional Precedents for Its Acting in This Capacity". Crosskey, having begun with nine possible cases in eight states concludes that they were basically "unimpressive" as proof that the states generally accepted, let alone practiced, judicial review when the Constitution was drafted and ratified. Furthermore, the two or three plausible candidates for judicial review on the list dealt with "legislative attempts to invade the judiciary's own peculiar prerogatives" under state constitutional law (vol. II, at 943, 973 and 974). Professor Viator argues that this "departmental" theory is precisely what *Marbury* legitimately does stand for (*infra*, tracing it to Madison's notes). See also: Robert Lowry CLINTON, *Marbury v. Madison and Judicial Review* (1989), who surveys the literature on this point, and concludes that Crosskey accepts the fewest cases as precedential, and who notes the "disoriented state of scholarship" on this question. *Id.* at 54.

<sup>2</sup> One should not ignore its absence from the English tradition. Both Professor Anastaplo and Professor Tremblay make the connection.

<sup>3</sup> One sign of an issue on which a durable compromise is currently impossible is that there is no single neutral phrase that describes it.

versities in other states. But even more than that, it is plain that the Supreme Court through its ruling on this dispute will communicate to the polity at large on the permissible and the impermissible in matters of race within local, state, and federal governments and to a surprising degree in private matters – to the country, in short. The Court will decide for the nation. As evidence of this state of things, during oral argument Justice Ginsburg said:

*We're part of a world and this problem is a global problem. Other countries operating under the same equality norm have confronted it. Our neighbor to the north, Canada, has. The European Union. South Africa. And they have all approved this kind of – they call it "positive discrimination." They have rejected what you recited as the ills that follow from this. Should we shut that from our view or should we consider what judges in other places have said on this subject?*<sup>4</sup>

Thus, Justice Ginsburg implies that it would be quite natural that the United States (through the Court) should consult the views of other nations in crafting a policy on "positive discrimination". The particular form of this consultation is intriguing, however, and is highly revelatory of the utility and even timeliness of the papers in this *Table ronde*. The Court, according to Justice Ginsburg, might consult how other countries have implemented this "same equality norm" by looking at what *judges* in other places have said.

It is certain that upon reflection Justice Ginsburg would recall that in many other legal systems the implementation of fundamental norms, particularly those involving the delicate balancing of interests on controversial questions, is usually worked out in elected legislatures, less frequently within administrative or executive agencies responsible to elected officials, and only rarely in a part of the government that is not accountable democratically.

But her initial reaction is altogether in keeping with the mindset of an American jurist. Like it or not, nuanced constitutional interpretation on the floor of the Senate or the House of Representatives or from the agents of the President is perhaps rare. The same would have been true five years ago, with the possible exception of questions of impeachment, on which there was not *always* less light than heat. Or ten years ago. And the reason may be a pragmatic

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<sup>4</sup> Question of Justice Ginsburg during oral argument by Solicitor General Olson in *Gratz v. Bollinger*, 1 April 2003. Available at [<http://www.oyez.org/oyez/frontpage>] (last visited 20 April 2003).

one: members of the legislature and agents of the executive may entertain opinions about constitutionality, but they generally acknowledge that the Supreme Court establishes it. When one wants to know about American constitutional law, one starts with the Supreme Court.

How did this happen? Other national systems with written constitutions do not have this feature and tend to find it odd that America does<sup>5</sup>. *Marbury v. Madison* is the beginning of the story.

Who was Marbury? Who was Madison? What was their case about? What significance does the case that bears their names hold for American constitutional law? Taking our cue from Professor Tremblay, who invokes *The Little Prince* in his paper, we might begin our tale with “Once upon a time there was a justice of the peace who did not receive his commission.” But Marbury is merely a minor figure in legal history, a fifth business<sup>6</sup>, who, having been appointed to the august post of Justice of the Peace for the District of Columbia in 1801 was destined to fade from that height into obscurity. Madison is a major figure in American legal history: moving force in the drafting of the Constitution, defender of that text in key contributions to the Federalist Papers, drafter of the Bill of Rights, later two-term President of the United States – but in this context Secretary of State to President Thomas Jefferson, who nominated him on March 5, 1801<sup>7</sup>.

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<sup>5</sup> France is a notable example for two reasons. First, its constitutional system differs so clearly from America’s. See, e.g.: Bernard CHANTEBOUT, *La constitution française: propos pour un débat*, Paris, Dalloz, 1992 (English translation by David Gruning, 1998). Second, French jurists have observed the foreign system, and critically, without much interest in imitating this aspect of it. See, e.g.: Édouard LAMBERT, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis: l’expérience américaine du contrôle judiciaire de la constitutionnalité des lois*, Paris, M. Giard & Cie, 1921; Édouard LAMBERT and J.R. XIRAU, *L’ancêtre américain du droit comparé: la doctrine du Juge Story*, Paris, Sirey, 1947; Jacques LAMBERT, *Les origines du contrôle judiciaire de constitutionnalité des lois fédérales aux États-Unis: Marbury v. Madison* (1933). More balanced are André and Suzanne TUNC, *Le système constitutionnel des États-Unis d’Amérique*, Paris, Domat-Montchrestien, 1954, vol. 1, n° 74 and vol. 2, section III.

<sup>6</sup> See: Robertson DAVIES, *Fifth Business*, Toronto, Macmillan of Canada, 1970.

<sup>7</sup> Irving BRANT, *James Madison – Secretary of State: 1800-1809*, at 35 (1953).

Marbury demanded that Madison as Secretary of State deliver a document – his commission – to him attesting to the appointment. Madison refused<sup>8</sup>, on Jefferson’s instructions or with his glad consent. Congress in the Judiciary Act of 1789 had granted the Supreme Court the power to issue writs of mandamus to officers of the federal government. Madison being such an officer, Marbury asked the Supreme Court for such a writ to compel Madison to deliver the commission. The Supreme Court held for Madison and against Marbury. The Court reasoned that the Constitution had not accorded to the Supreme Court the power to issue this writ. Nor could Congress grant the Supreme Court that power by statute. Therefore, the Supreme Court did not order Madison to deliver the commission to Marbury. The dispute thus ends in 1803<sup>9</sup>.

Marshall’s opinion annoyed Jefferson, who disliked him, even though they were both Virginians and indeed cousins. Henry Adams (whose great-grandfather, John Adams, as outgoing President was essential to setting the stage for *Marbury*) wrote that when President-elect Jefferson, Vice President Aaron Burr, and Chief Justice Marshall appeared before the Senate during Jefferson’s inauguration, “the assembled senators looked up at three men who profoundly disliked and distrusted each other”<sup>10</sup>. Perhaps anything Marshall did would have annoyed Jefferson, but in *Marbury* Marshall asserted a power in the Court *vis à vis* the Executive branch as

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<sup>8</sup> Or so the story goes. “Needless to say, the Republicans were not pleased by the prospect of these new Federalist judges taking office, and they took several steps. First, Jefferson’s Secretary of State, James Madison, refused to deliver the remaining commissions for the Justices of the Peace.” John E. NOWAK and Ronald D. ROTUNDA, *Constitutional Law*, 6th ed., at 2 (2000). This is probably the standard student treatise on American constitutional law. No doubt the story *tells* better that way. One can easily imagine the fury on the faces of Jefferson and Madison when they confront this insult in the very first minutes of their executive duties. As Professor Viator points out, though, the history could not have happened this way – Madison was delayed for two months by the death of his father and by his own poor health. Without doubt, thousands more students will again be taught the story, not the history. And yet the history communicates so much more *of* the time. The illusion may be useful, even salutary, as Professor Anastaplo writes. But it cannot be good in the long run to forget that it is an illusion.

<sup>9</sup> Marbury might perhaps have sought the writ of mandamus in a different court, but did not.

<sup>10</sup> Henry ADAMS, *History of the United States of America during the Administrations of Thomas Jefferson*, at 133 (first published 1889-1891, Library of America Edition, 1986).

well as the power to review congressional legislation. This threatened a continuing rearguard action on the part of the Court. Yet any fear Jefferson might have had on that score – that the Court might try to frustrate the Jeffersonian legislative agenda – was misplaced. The Marshall Court invalidated no other act of Congress – not one. Marshall died in 1835.

So much for who they were and what their case was about. The significance of their case for American constitutional law is difficult to measure, even approximately. One way to assess it is to determine whether the case is used in teaching law students the subject: and it is, emphatically. Most American casebooks and student handbooks feature it prominently as one of the first matters addressed<sup>11</sup>. Teaching materials or manuals with either a more theoretical or a more historical approach may vary the order of presentation, but still present it in a key position and thus adhere to the pattern substantially<sup>12</sup>. Another way to gauge its importance is to observe how often the case is referred to in the legal literature. An electronic search of a standard legal journals database shows that

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<sup>11</sup> Typical in this regard is Charles A. SHANOR, *American Constitutional Law: Structure and Reconstruction* (2001) (first case discussed) (hereinafter “Shanor”). This is the most recent constitutional law casebook published by West, guaranteeing a solid reception. Donald E. LIVELY, Phoebe A. HADDON, Dorothy E. ROBERTS, Russell L. WEAVER and William D. ARAIZA, *Constitutional Law: Cases, History, and Dialogues*, 2d ed. (2000) (first case presented). Major commentaries and student manuals give it similar prominence. J.E. NOWAK and R.D. ROTUNDA, *op. cit.*, note 8 (Chapter 1 is “The Origins of Judicial Review” and *Marbury* is the first case discussed, on page 1); Norman REDLICH, John ATTANASIO and Joel K. GOLDSTEIN, *Understanding Constitutional Law*, 2d ed. (1999) (second case mentioned, first analyzed, beginning at §1.02 on page 4); Christopher N. MAY, *Constitutional Law: National Power and Federalism* (1998) (first case analyzed); Jethro K. LIEBERMAN, *The Evolving Constitution* (1992) (second case discussed, at page 16, the first being *McCulloch v. Maryland*).

<sup>12</sup> *E.g.*, Laurence H. TRIBE, *American Constitutional Law*, 2d ed. (2000) (begins with two substantial methodological chapters: Chapter 1, “Approaches to Constitutional Analysis” and Chapter 2, Model I – “The Model of Separated and Divided Powers”), reaching *Marbury* in the third chapter (Chapter 3, “Federal Judicial Power”), where it is the first case discussed); Paul BREST and Sanford LEVINSON, *Processes of Constitutional Decisionmaking: Cases and Materials*, 3d ed. (1992) (Chapter 1, “The Bank of the United States: A Case Study”, treating *McCulloch v. Maryland*; Chapter 2, “The Marshall Court”, *Marbury* is the first case analyzed); Douglas W. KMIEC and Stephen B. PRESSER, *The American Constitutional Order: History, Cases, and Philosophy* (1998) begin with two substantial chapters on history, followed by Chapter 3, “A Structurally Divided



the case is cited *very* frequently<sup>13</sup>. Foreign observers also give the case great prominence<sup>14</sup>.

So, to understand judicial review in the United States, or to understand something of how an American lawyer understands the concept (or is it an institution?), short of being a dyed-in-the-wool contrarian, one must begin with *Marbury v. Madison*.

A word is in order to explain why the University of Montreal hosted this Round Table on *Marbury v. Madison*<sup>15</sup>. The idea of a Round Table first came up as a way to provide a basis for discussion of American-style judicial review, primarily for the students taking a particular course and secondarily for colleagues and visitors. That course is an introduction to American constitutional law, which is part of a graduate program inaugurated in the fall of 2001, the “*diplôme des études supérieures spécialisées en common law nord-américaine*”, or the DESS<sup>16</sup>. Students in the course had already completed at least three years of law study, some had completed

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Government”. This chapter begins with a good deal of historical and philosophical material. The first case discussed is *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), for the point that Congress may reduce the Supreme Court’s appellate jurisdiction, with a reference to the second case discussed, *Marbury*, for the point that Congress may not alter the Court’s original jurisdiction. *Id.*, at 357, 364.

<sup>13</sup> A simple search on Westlaw (using the Key Cite function) shows that the case has been cited by documents within Westlaw’s databases 7942 times. It has been cited 4691 times by law reviews that Westlaw has included. William S. Hein’s online database of law reviews contains generally an older set of materials than does either Westlaw or Lexis, legal history being its primary purpose. Here, a full text search shows that the phrase “*Marbury v. Madison*” appears in perhaps 2890 volumes, perhaps because the number of possibilities seems to outstrip the capacity of the software at its current stage. Search carried out on [heinonline.org] March 28, 2003.

<sup>14</sup> See, e.g.: Elisabeth ZOLLER, *Droit constitutionnel*, 2d ed., Paris, P.U.F., 1998 (first case discussed in Chapitre 3, “Le contrôle judiciaire de la constitutionnalité aux États-Unis”).

<sup>15</sup> The substance of the three papers that follow was presented orally by the authors at a Round Table discussion at the University of Montreal, *Faculté de droit* on May 23, 2002.

<sup>16</sup> Thus, the students in the course had already studied Canadian constitutional law as part of their first law degree that otherwise focussed on the civil law of Quebec in so far as private law is concerned. In this way, the course works as an exercise in comparative constitutional law. Basic information on the program can be found through links at [http://www2.droit.umontreal.ca/].

still more, and several were already members of the Quebec bar. Thus, the course sought to provide an introduction to the American legal system by presenting its constitutional law historically. In so doing, the course intended to communicate something of the American understanding of what it means to be a judge, to interpret the law as a judge, to make law as a judge.

And that understanding depends, it seemed to me, just as much on contemporary judicial practice, particularly judicial review, as it does on understandings of the deep sources of the judicial role in the English common-law tradition, which are themselves powerful but remote. Those two traditions work very much hand in hand, though. A third tradition is the distinctively American one of state law-making, beginning with a private law that was by and large home-made, particularly in the newer states, with the notable exception of Louisiana, where there was an appreciably rationalized form of legislation in the continental civil-law tradition as early as 1808. But although Louisiana was a new state (in 1812), it was a far older society. It was not the same with the other states to be carved out of the Louisiana Purchase or out of the Northwest Territory. (The Louisiana Purchase, of course, was being negotiated and concluded during the same season in which the Supreme Court delivered its opinion in *Marbury*. Of the two events, the purchase was of infinitely greater significance at the time.)

The three papers that follow represent three distinct approaches to the question. The first paper places the case in its historical context. How much do we know today about what happened in this case two hundred years ago? Professor Viator gives a thorough exposition of the political background of the case. This background, it would appear, is far too often omitted from its usual classroom presentation. And yet it is far from impossible to do economically, as his article shows. In addition, he ties that exposition to the scholarly treatments of the case, both the classic and the contemporary<sup>17</sup>. Then he provides a reading of the case, supplying in the process a deft example of how the case might (or ought) convincingly be distinguished, emphasizing that the Court had only to do

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<sup>17</sup> See authorities cited in his footnotes passim. In my view, the best for student use is William E. NELSON, *Marbury v. Madison: The Origins and Legacy of Judicial Review*, at 59 (2000), concise, clear and current (though it replaces the usual textual references with a bibliographical essay). The best for those beginning to go further (again, in my view) is R.L. CLINTON, *op. cit.*, note 1.

with a statute that unconstitutionally meddled with the judiciary. On this precedent, the Court could not (and in Professor Viator's view, did not) construct a theory of judicial supremacy on matters of constitutional interpretation. After giving us the beginning, he states the end of the story that we now know: today *Marbury v. Madison* stands for the proposition that American courts were created to decide, among other things, whether federal legislation is consistent with the norms of the Constitution, and for the proposition that the Supreme Court of the United States is now the final arbiter of that consistency. The author clearly doubts the wisdom of judicial review in this form.

The second paper tackles the legitimacy of judicial review as such, and does so with a touch that may appear deceptively light<sup>18</sup>. It is also clear that judicial review in its current form or as currently practiced does not exactly or does not always please Professor Anastaplo either. Like the first paper, the second emphasizes historical connections. Here, however, these are less the political specifics of the controversy surrounding the decision itself. Rather, the connections emphasized are the presuppositions that must have been embedded in the lawyerly mind of 1787 (and presumably still in 1803). That mind, Professor Anastaplo reasons, would understand the judicial branch provided for by Article III of the Constitution in terms of the judiciary that existed under the (unwritten) Constitution of Great Britain. Continuing forward in time through two centuries, the second paper finds that the constitutional decisions of the Court have more often been wrong and the constitutional decisions of Congress have more often been right. In the end, what is "salutary" about judicial review for Professor Anastaplo is its teaching that the Constitution is "authoritative in the governance of the political affairs of the United States"<sup>19</sup>. Thus, the first and second papers appear to come to an agreement in the sense that interpretation of the Constitution was not then and should not be now the exclusive province of the Supreme Court.

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<sup>18</sup> Note the eloquent use of the three-letter adjective "sad" to describe the case arising out of the 2000 presidential election, which he seemingly cannot bring himself to cite in his footnote 5. It is *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>19</sup> See text at footnote 39 of Professor Anastaplo's contribution. Note that he ends his paper with a paradox with this notion of saving the Constitution extra- (he does not say "un-") constitutionally. To follow up, see: George ANASTAPLO, *Abraham Lincoln: A Constitutional Biography* (2001).

In the third paper, Professor Tremblay examines the reception<sup>20</sup> of American-style judicial review in Canadian constitutional jurisprudence. He notes that the influence of the American model (including judicial review) was quite weak until the adoption of the *Canadian Charter of Rights and Freedoms* in 1982<sup>21</sup>. This is consistent with the papers of Professors Viator and Anastaplo, who agree that judicial review as we know it was not in place for many decades after *Marbury*<sup>22</sup>. Thus, initially it could not be borrowed because it was not ready to be. More fundamentally, of course, Canada was not ready to use it until after 1982. For only then did the constitutional foundation become established in the people<sup>23</sup>. Now, Pro-

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<sup>20</sup> The word may be too strong. The classic example of reception in private law is that of Roman law in Germany beginning in the 13th century. John P. DAWSON, *The Oracles of the Law*, at 148ff., 177 (1968). See also: Alan WATSON, *Sources of Law, Legal Change, and Ambiguity* (Chapter 3, "Reception and Partial Reception: Italy, France, and Scotland"). At the other end of the scale is the deliberate reception of a single legal device from a source legal system into another legal system in which it is "foreign" in some sense. David GRUNING, "The Reception of the Trust in Louisiana", 57 *Tul. L. Rev.* 89 (1982). Professor Tremblay does say that *Marbury* becomes "an explicit part of Canadian constitutional rhetoric" in the first paragraph and further in part III of his paper, citing at footnote 47, *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357. This, the first case under the 1982 Charter, cited *Marbury* several times.

<sup>21</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K. 1982, c. 11).

<sup>22</sup> They appear to disagree on what that moment is. Professor Viator emphasizes the importance, in 1958, of *Cooper v. Aaron*. See footnote 6 of his article, and accompanying text. For Professor Anastaplo, the process is more gradual, emphasizing the Supreme Court's use of the commerce clause to frustrate the New Deal in the early 1930s. See footnote 10 and accompanying text of his paper.

<sup>23</sup> There is an irony here. The notion that the American constitution reposed on the people of the United States was the basis of Marshall's reasoning in *Marbury* but even more in *McCulloch v. Maryland*, as Professor Tremblay points out. Marshall's Federalist party, of course, was initially ideologically attuned to centralizing, Anglophilic, and even quasi-monarchist ideas and many of its adherents harbored a fundamental suspicion, if not fear, of the people. As Hamilton put it in Federalist 55, "Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." And this statement appeared in a document authored to persuade members of the New York ratification convention to approve the 1787 Constitution. The effect then was to lend the people's legitimacy to a judiciary largely populated by Federalist judges after the election of the people's candidate, Thomas Jefferson, in 1800. Also attributed to Hamilton is the phrase: "Your people, Sir, is a *beast!*" Recent research unfortunately shows that he did not say it. James M. BANNER, Jr., Book Review of Stephen F. Knott, *Alexander Hamilton and the Persistence of Myth* (Kansas 2002), 107, #5 *Amer.*

fessor Tremblay demonstrates, “*la mayonnaise est prise*”: judicial review of legislation according to norms embodied in a written constitution is very much a part of Canadian law, and *Marbury* is the touchstone<sup>24</sup>.

Perhaps now the Canadian example, at least, may offer something of the relevance for American constitutional law that Justice Ginsburg suggested in the remarks quoted above<sup>25</sup>. Even if the Court does not accept that notion, now or tomorrow, certainly the interest of the Canadian situation, if not relevance, for the observer with a mind to compare constitutional law cannot be gainsaid<sup>26</sup>. On such questions, we are not in a situation in which only contrast is possible, and not comparison<sup>27</sup>.

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*Historical Rev.* (Dec. 2002) (last visited 2 May 2003 at [http://www.historycooperative.org/journals/ahr/107.5/br\_38.html]). Well, he probably *felt* like saying it.

<sup>24</sup> One notes that Professor Tremblay treats *Marbury*, in his *The Rule of Law, Justice, and Interpretation* (Montreal, McGill-Queen's University Press, 1997), as do standard texts on Canadian constitutional law. Peter W. HOGG, *Constitutional Law of Canada*, student edition, Scarborough, Carswell, 2002, §5.5(a) and 8.6(c); Jacques-Yvan MORIN and José WOERHLING, *Les constitutions du Canada et du Québec du régime français à nos jours*, t. 1, “Études”, Montréal, Éditions Thémis, 1994, at 351.

<sup>25</sup> It does seem likely, however, that in matters of positive (or negative) racial discrimination legal history will continue to trump comparative law as the sub-discipline offering needed or useful insights to the problem at hand. This was the substance of Solicitor General Olson's response to Justice Ginsburg's remark above.

<sup>26</sup> The burning issues today have less to do with separation of powers than with individual or fundamental rights. Thus Canadian courts are reading equality under the Charter to mean that homosexual couples cannot be denied the right to marry. In this case, it is provincial courts that are ruling a federal prohibition on such marriages unconstitutional. See, e.g.: Janice TIBBETTE, “B.C. court joins same-sex chorus”, *Montreal Gazette*, 2 May 2003, A12 (Ontario, Quebec, and British Columbia). Cases in the United States involve state supreme courts enforcing state constitutional norms against state marriage legislation, as in Vermont. See, e.g.: *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (Vermont 1999), and the Symposium on this case and civil unions in the Fall 2000 issue of the *Vermont Law Review*.

<sup>27</sup> H. ADAMS, *op. cit.*, note 10, at 114 (even a “trifler and butterfly” of 1800 had to recognize “that as between the morals of politics and society in America and those then prevailing in Europe, there was no room for comparison – there was room only for contrast.”)

A final word of thanks to the participants in the Round Table, on behalf of my students and myself, for having contributed fruitful insights to the course and to the program it is a part of. As moderator and professor, I can only hope for another occasion in the not-too-distant future to reassemble them to continue the discussion<sup>28</sup>. I also wish to thank my students for having worked with extraordinary interest and energy throughout the course and indeed throughout the program<sup>29</sup>.

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<sup>28</sup> The next meeting unfortunately can never duplicate the expression of astonishment of one of my American colleagues upon learning of the existence of the celebrated (notorious?) “notwithstanding clause” of the 1982 *Canadian Charter of Rights and Freedoms*. Memory will have to serve.

<sup>29</sup> Jean-François Bernier’s enthusiasm for Madison’s *Federalist 10* was especially appreciated.

# *Marbury* and History: What Do We Really Know About What Really Happened?

James Etienne VIATOR<sup>\*</sup>

That the Supreme Court of the United States may invalidate Acts of Congress is a concept so commonplace in modern American culture that school children are taught in civics classes that courts have the “final say over any law”<sup>1</sup>. The case of *Marbury v. Madison*<sup>2</sup> is usually offered as the fountainhead of this extraordinary power<sup>3</sup>. As one scholar describes the conventional wisdom, *Marbury* asserted the judicial authority “to enforce the Constitution against unconstitutional acts” through Chief Justice Marshall’s “claim that the Constitution is included within that law for which it is ‘the province and duty of the judicial department to say what the law is’ ”<sup>4</sup>.

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<sup>1</sup> James E. DAVIS and Phyllis Maxey FERNLUND, *Civics: Participating in Our Democracy*, at 225 (1991). Persons even better educated in the details and technicalities of constitutional law make the same mistake. See: Kenneth W. STARR, *First Among Equals: The Supreme Court in American Life*, at 12 (2002) (stating that “it is the [federal] judiciary’s interpretation that ultimately counts”).

<sup>2</sup> 5 U.S. (1 Cranch) 137 (1803) [hereinafter *Marbury*].

<sup>3</sup> See: J.E. DAVIS and P.M. FERNLUND, *op. cit.*, note 1, at 226; K.W. STARR, *op. cit.*, note 1, at 5 (“What if the president or Congress reads the Constitution differently from the Supreme Court? Which branch prevails? In the case that resolved this issue, William Marbury invoked a measure passed by [the first federal] Congress and signed into law by George Washington.”)

<sup>4</sup> Sylvia SNOWISS, *Judicial Review and the Law of the Constitution*, at 1 (1990) (footnote omitted).

If *Marbury* is the source<sup>5</sup>, then the 1958 opinion in *Cooper v. Aaron* is the apotheosis of the conventional view of the Supreme Court's power to declare legislation and Executive actions unconstitutional and impose those interpretations on all levels and branches of government<sup>6</sup>. Americans of the late twentieth century have therefore lived through a constitutional coup that gave the United States Supreme Court (and other federal courts) the lion's share of authority over American constitutional law. Concealed behind the bland phrase "judicial review", this new dispensation grants federal courts the ultimate authority to define the meaning of all constitutional clauses, even those addressed to the coordinate, coequal branches of government<sup>7</sup>. This regnant theory is not merely descriptive, for it holds that the Supreme Court not only is,

<sup>5</sup> Actually the *Marbury* opinion never proffered an assertion of judicial supremacy, see *infra* notes 10-14 and accompanying text, although many courts and commentators have mistakenly thought so. See, e.g.: *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (per each Justice; dictum); K.W. STARR, *op. cit.*, note 1, at 9 ("[Chief Justice Marshall] had established the fundamental role of the judiciary ... to interpret the Constitution *finally* and *authoritatively*, even when one of the other branches of government (or both) had come to a contrary view." (emphasis added)).

<sup>6</sup> *Cooper v. Aaron*, *supra* note 5, at 1. See: Robert A. BURT, "Constitutional Law and the Teaching of the Parables", 93 *Yale L.J.* 455, 476 (1984) (pointing out that in *Cooper v. Aaron* "the Justices were making a transcendent claim to command obedience"). I take my definition of "judicial supremacy" largely from Rachel E. BARKOW, "More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy", 102 *Columbia L. Rev.* 237, 240 and 241 (2002):

*My focus [in defining judicial supremacy] is on the Supreme Court's view of its own power and ability, vis-à-vis Congress and the Executive, to decide constitutional questions. In particular, my emphasis is on the Supreme Court's view in recent years that it alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions ... The seeds for this vision of the Supreme Court's power can be found in Cooper v. Aaron ...*

(footnote omitted).

<sup>7</sup> See: *City of Boerne v. Flores*, 521 U.S. 507 (1997) (denying Congress any ability under its 14th-Amendment enforcement authority to define the substantive meaning of the 14th-Amendment's restrictions on the States); see also: Timothy ZICK, "Marbury Ascendant: The Rehnquist Court and the Power to 'Say What the Law Is'", 59 *Washington & Lee L. Rev.* 839 (2002) (discussing the recent decline in the deference the Court extends to Congressional legislation enacted under section 5 of the 14th Amendment on account of the Court's jealous view of its own authority to define the substance of 14th-Amendment rights).



but *should be* the branch of government that exclusively determines the ultimate meaning of the United States Constitution<sup>8</sup>.

The Supreme Court's newfound supremacy in constitutional interpretation is exactly that, however – “newfound”; for the historical record does not contain any such claim until the decision in *Cooper v. Aaron* in 1958<sup>9</sup>, which is rather late in the day for the assertion of such a momentous realignment in both the traditional separation of powers and the concept of legislative supremacy that Americans had learned from Blackstone. Moreover, it is ironic that the legal justification for the *Cooper* Court's assertion of judicial supremacy is *ultimately* based on just one “landmark” case, *Marbury v. Madison*<sup>10</sup> – ironic in that we should even style *Marbury* a “landmark case”, for viewed precisely and historically, the *Marbury* understanding of judicial authority was really quite simple and commonplace<sup>11</sup>. *Marbury* is only a landmark because of what later courts and lawyers made of it – or “did to it”, might be a better phrase<sup>12</sup>.

<sup>8</sup> See: William J. BRENNAN, Jr., “The Constitution of the United States: Contemporary Ratification”, reprinted in Jack N. RAKOVE (ed.), *Interpreting the Constitution: The Debate over Original Intent* 23, 33 (1990); Larry ALEXANDER and Frederick SCHAUER, “On Extrajudicial Constitutional Interpretation”, 110 *Harv. L. Rev.* 1359, 1362 (1997) (extolling the doctrine of *Cooper v. Aaron* for “its assertion of judicial primacy”).

<sup>9</sup> See: Robert Lowry CLINTON, *Marbury v. Madison and Judicial Review* x, 15, 80 (1989); Christopher WOLFE, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*, at 281 (rev. ed. 1994).

<sup>10</sup> *Cooper v. Aaron*, *supra* note 5 (citing *Marbury* as having established “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution”). See: R.L. CLINTON, *op. cit.*, note 9, at 15 (arguing that “the view of *Marbury* embodied in the *Cooper* dictum is ahistorical”); William E. NELSON, *Marbury v. Madison: The Origins and Legacy of Judicial Review*, at 59 (2000) (“[The *Marbury* Court] had no intention to behave as the Supreme Court ultimately would in *Cooper v. Aaron*, a 1958 school desegregation case in which the Court for the first time in its history explicitly arrogated to itself the exclusive power to interpret the Constitution”).

<sup>11</sup> See: *infra* notes 12, 24, 126, 132-134 and accompanying text.

<sup>12</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 14 (“Careful scrutiny of the Marshall opinion ... reveals no explicit declaration of the Court's authority to issue final proclamations on constitutional issues generally, so as to bind coordinate departments to the judicial declaration”); *id.* at 98 and 99 (“Since [Marshall's lines that the judiciary has ‘the province and duty ... to say what the law is’] have frequently been cited as precedent for a view of the judicial power which renders the Supreme Court ultimate arbiter of constitutional questions, it is equally important to assess what is *not* said in them. No exclusive power to interpret the fundamental law is claimed for the Court, here or anywhere else in *Marbury*”); Charles F.

Despite the irony, however, the legal profession has an overblown view of *Marbury*<sup>13</sup>, which has led to a jurocentric view of constitutional decisionmaking<sup>14</sup> that is all out of proportion to a properly demythologized understanding of Marshall's opinion<sup>15</sup>. Such jurocentrism has prompted an unhealthy deference to the judiciary that is fast becoming the normal politics of the American system. Indeed, only some fifty years after *Cooper v. Aaron*, it is already difficult for many lawyers and law professors even to imagine an alternative way of conducting constitutional debate or making constitutional

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HOBSON, *The Great Chief Justice: John Marshall and the Rule of Law*, at 67 (1996) (concluding that *Marbury* "should not be read as implying any claim to judicial supremacy in expounding the Constitution or to exclusive guardianship of the fundamental law"); Leonard W. LEVY, *Original Intent and the Framers' Constitution*, at 77 (1988) (noting that *Marbury* has achieved "mythic status as the foremost precedent for judicial review", so that the Court has been thought to have "ultimate authority over Congress and the President", whereas "[i]n fact Marshall did not make that claim").

<sup>13</sup> In 1974 the American Bar Association polled law professors, lawyers, and judges as to the most important Supreme Court decisions in American history up to that time – *Marbury* won. See: "Publisher's Forward", in Jethro K. LIEBERMAN, *Milestones! – 200 Years of American Law: Milestones in Our Legal History* v, at vi-vii (1976); see also: J.M. BALKIN and Sanford LEVINSON, "The Canons of Constitutional Law", 111 *Harv. L. Rev.* 963, 1010 (1998) (noting the consensus of modern law professors that *Marbury* is "the crown jewel in the constitutional canon").

<sup>14</sup> See, e.g.: Archibald COX, *The Court and the Constitution*, at 45 (1987) (declaring that *Marbury* is the "cornerstone of judicial supremacy in applying the Constitution"); L.W. LEVY, *op. cit.*, note 12, at 84 (noting that *Marbury's* "reputation as the great case of first impression that provides the foundation of judicial review over the other branches of the national government" is neither accurate nor deserved (emphasis added)).

<sup>15</sup> Numerous revisionist historians have on various grounds begun the task of demythologizing *Marbury's* status as the *deus ex machina* "beginning" of binding and exclusive judicial review of constitutional issues. See, e.g.: R.L. CLINTON, *op. cit.*, note 9, at 98 and 99, quoted *supra* note 12; David P. CURRIE, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 69 and 70 (1985) (pointing out the many judicial precedents and political arguments for constitutional judicial review that had appeared in the years from 1787-1802); L.W. LEVY, *op. cit.*, note 12, at 84, quoted *supra* note 14; Sanford LEVINSON, "Law as Literature", 60 *Tex. L. Rev.* 373, 389 (1982) (describing Marshall's opinion in *Marbury* as "intellectually dishonest" (footnote omitted)).

decisions – a way that would regularly involve the other more popular branches of government<sup>16</sup>.

Furthermore, in a civically corrosive manner, this jurocentric theory completely erases the distinction between the Constitution ratified by “We the People of the United States” and constitutional opinions written by unelected federal judges – in other words, it does not recognize that *the Constitution* and judicial opinions *about* the Constitution are two different things<sup>17</sup>. Viewed historically, this is a shocking elision that was not made in earlier eras by earlier

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<sup>16</sup> Louis Fisher, Sanford Levinson, and Walter Murphy are among the handful of scholars who have consistently appreciated the role of Congress and the President in constitutional interpretation and development. See, e.g.: Louis FISHER, *Constitutional Dialogues: Interpretation as Political Process*, at 231-274 (1988) (arguing for “coordinate” or “departmental” constitutional review whereby each branch of the federal government has the duty, having the authority and competence, to interpret the Constitution for itself); Paul BREST, Sanford LEVINSON and others, *Processes of Constitutional Decisionmaking: Cases and Materials* xxxii (4th ed. 2000) (“Although courts play a central role in the history of constitutional law, other parties play roles equally important in shaping constitutional meaning ... For this reason, we have included constitutional arguments from the executive and legislative branches of government, as well as constitutional interpretations offered by representatives of social movements like abolitionism and the movement for woman suffrage.”); H. Jefferson POWELL, *The Moral Tradition of American Constitutionalism: A Theological Interpretation*, at 115-117 (1993) (criticizing the Marshallian constitutional tradition as the practice of an elitist caste of judges and lawyers who monopolized the task of constitutional exposition and thereby excluded the popular political branches); Keith E. WHITTINGTON, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 1 (1999) (arguing that besides the judiciary, “other government officials, and ultimately engaged citizens, share the responsibility for interpreting the [constitutional] text”); Louis FISHER, “Congressional Checks on the Judiciary”, in Colton C. CAMPBELL and John F. STACK, Jr. (eds.), *Congress Confronts the Court: The Struggle for Legitimacy and Authority in Lawmaking*, at 21 (2001); Walter F. MURPHY, “Who Shall Interpret? – The Quest for the Ultimate Constitutional Interpreter”, 48 *Rev. of Politics* 401 (1986) (arguing for departmental constitutional review).

<sup>17</sup> Mark Tushnet and others have recently written about the normative distinctions between the Constitution and judicial opinions about the Constitution. See: Mark TUSHNET, *Taking the Constitution Away From the Courts*, at 165 and 166 (1999); see also: Sanford LEVINSON, “Could Meese Be Right This Time?”, 61 *Tulane L. Rev.* 1071 (1987) (criticizing the common but erroneous identification of the Constitution with judicial decisions interpreting the Constitution).

justices<sup>18</sup>, and it is shocking because though often overlooked nowadays, the United States Constitution in fact makes no *explicit* provision for Supreme Court authority to hold acts of President and Congress unconstitutional<sup>19</sup>. Sections 1 and 2 of Article III coupled with the supremacy clause of Article VI might have been sufficient<sup>20</sup>, if judicial review had been a well-known, established practice in the courts of Confederation-era America; but as the eminent constitutional historian Edward S. Corwin concluded toward the end of a lifetime of researching the history of judicial review, “the case that could be made for judicial review in 1787 on either the

<sup>18</sup> See, e.g.: R.L. CLINTON, *op. cit.*, note 9, at 18, 161-175 (arguing that there is a great difference between judicial review as understood and practiced in the early national era (1788-1828) and in the modern era); S. SNOWISS, *op. cit.*, note 4, at 50-58 (same); C. WOLFE, *op. cit.*, note 9, at 323-329 (same).

<sup>19</sup> As I tell my students, “Read it – you’ll see it isn’t there: like Lewis Carroll’s Cheshire cat, the grin of *Marbury* has no constitutional body to support it”. See also: D.P. CURRIE, *op. cit.*, note 15, at 69 (observing that “[s]tate courts [in the 1790s] had set aside state statutes under constitutions no more explicit about judicial review than the federal [Constitution]” (footnote omitted)); L.W. LEVY, *op. cit.*, note 12, at 100 (“The problem of legitimacy [for judicial review] begins with the fact ... that the Framers neglected to specify that the Court was empowered to exercise judicial review. If they intended the Court to have the power, why did they not explicitly provide for it?”); Jerry J. PHILLIPS, “*Marbury v. Madison* and Section 13 of the 1789 Judiciary Act”, 60 *Tenn. L. Rev.* 51, 51 (1992) (noting that “the Constitution does not expressly confer [the] power [of judicial review]”).

<sup>20</sup> Marshall certainly relied on these clauses in *Marbury*, as well as the judges’ oath of office to support the Constitution. See: *Marbury*, *supra* note 2, at 178-180. As Leonard Levy points out, however, “Articles III and VI no more vest judicial review than does the oath”: L.W. LEVY, *op. cit.*, note 12, at 108 and 109.

Article III provides in pertinent part:

*Section. 1. The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish...*

*Section. 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties ...*

*In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction.*

U.S. Const. art. III, §§ 1 & 2.

Article VI provides in pertinent part:

*This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land ...*

U.S. Const. art. VI, cl. 2.

ground of proved workability or of ‘precedent’ was a shadowy one at best”<sup>21</sup>.

How, then, can it be that American law has so recently lapsed into a state of judicial supremacy in constitutional interpretation? The first step toward the current state, we are told by law professors<sup>22</sup>, was the *Marbury* case. Our task, however, as students who want a clear understanding of that alleged “first step”, is to clear away the pet theories of law professors about the necessity for their favorite versions of judicial review<sup>23</sup>; for if we clear these modern accretions from view, we can see that the Constitution was originally thought (when it was thought about at all) to contain a far more modest version of judicial review than the post-1958 theory of judicial supremacy<sup>24</sup>. The logical place to begin this analysis is the *Marbury* opinion itself in order to see exactly what Chief Justice Marshall claimed and did not claim about judicial review<sup>25</sup>.

To place Marshall’s opinion in proper constitutional perspective, we need to appreciate the political dispute that led to the case in the first place. In Dean Alfange’s wry simile, “to discuss *Marbury* without placing it in its political context is exactly like trying to analyze Hamlet’s behavior without attaching any significance to his

<sup>21</sup> Edward S. CORWIN, *Court Over Constitution: A Study of Judicial Review as an Instrument of Popular Government*, at 25 (1938).

<sup>22</sup> See *supra* notes 12-14 and accompanying text.

<sup>23</sup> See: C. WOLFE, *op. cit.*, note 9, at 329-352 (describing and criticizing some of these versions).

<sup>24</sup> See: L.W. LEVY, *op. cit.*, note 12, at 85 (“*Marbury* ... claimed neither finality of power nor the authority of the Court to bind President and Congress. The mythic *Marbury* and the real *Marbury* inhabit different constitutional galaxies.”); R. Kent NEWMYER, *John Marshall and the Heroic Age of the Supreme Court*, at 171 (2001) (“Nor did [Marshall’s opinion in *Marbury*] claim that Congress was bound by the Court’s interpretation [of the Constitution]”); Jean Edward SMITH, *John Marshall: Definer of a Nation*, at 323 and 324 (1996) (“Marshall did not say that the Supreme Court was the ultimate arbiter of the Constitution. He did not say that the authority to interpret the Constitution rested exclusively with the Court, and he certainly did not endorse grandiose schemes that envisaged the Supreme Court as a board of review sitting in judgment on each act of Congress to determine its constitutionality.” (footnote omitted)); C. WOLFE, *op. cit.*, note 9, at 84 (arguing that the *Marbury* opinion “does not explicitly argue that Court interpretations of the Constitution ... are binding on other branches”).

<sup>25</sup> See: *Marbury*, *supra* note 2, at 176-180.

father's murder"<sup>26</sup>. And the reader immediately sees evidence of the underlying political dispute on the first page of the reported case, in the second line, where reference is made to the four disappointed federal (and Federalist Party) justices of the peace for the District of Columbia<sup>27</sup>. These four were but a small part of a larger Federalist scheme to retain control of the unelected judicial branch of government<sup>28</sup> after the Federalist Party's defeat in the national elections of 1800, a close but resounding defeat whereby the Federalists lost the presidency and both houses of Congress to the Jeffersonian Republicans<sup>29</sup>. The bitterness of this election had no parallels in prior United States history and few since<sup>30</sup>, and the political grievances and differences between the two parties were so great<sup>31</sup> that

<sup>26</sup> Dean ALFANGE, Jr., "Marbury v. Madison and Original Understandings of Judicial Review: In Defense of Traditional Wisdom", 1993 *Supreme Court Rev.* 329, 349 and 350.

<sup>27</sup> *Marbury*, *supra* note 2, at 137. See: L.W. LEVY, *op. cit.*, note 12, at 78 ("Marbury v. Madison arose from the refusal of the [Jefferson] administration to deliver the commissions of four of these appointees, including one William Marbury.") For a thumbnail sketch of each disappointed appointee, see: James F. SIMON, *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*, at 175 (2002).

<sup>28</sup> Louis FISHER, *American Constitutional Law*, at 43 (4th ed. 2001) ("When the Jeffersonians swept the elections of 1800, the Federalists looked for ways to salvage their dwindling political power."); John C. MILLER, *The Federalist Era, 1789-1801*, at 275 (1960) ("The Federalists were not wholly unprepared for the impending ordeal [of a Republican Congress and President]. In January, 1801, they had succeeded in converting the national judiciary ... into a bastion of defense against the victorious democrats").

<sup>29</sup> Richard J. ELLIS, *The Jeffersonian Crisis: Courts and Politics in the Young Republic*, at 15 (1971); J.C. MILLER, *op. cit.*, note 28, at 274.

<sup>30</sup> See, e.g.: J.C. MILLER, *op. cit.*, note 28, at 251-277; *id.* at 264 ("[I]t was chiefly upon propaganda that the Federalists relied to bar the Virginia 'Jacobin' from the Presidency. All the forces of bigotry and intolerance were recruited in this cause."); Samuel Eliot MORISON, *The Oxford History of the American People*, at 356 (1965) (noting that "the politicians managed to make the campaign of 1800 very scurrilous"); W.E. NELSON, *op. cit.*, note 10, at 74 (noting "the frightful partisanship of the 1800 election").

<sup>31</sup> See: Stanley ELKINS and Eric MCKITRICK, *The Age of Federalism*, at 740 (1993) (explaining that the "Republican party was by 1800 united in a version of the public good very different from that which had animated Federalism since 1789"); J.C. MILLER, *op. cit.*, note 28, at 251.

ever after Thomas Jefferson referred to the Republican Party's victory as "The Revolution of 1800"<sup>32</sup>.

The first scene in the political (and judicial) drama came on 20 January 1801 when lame-duck Federalist President John Adams nominated John Marshall as the fourth Chief Justice of the United States<sup>33</sup>, which occurred about one month after Adams had finished second in the Presidential election, behind Republicans Thomas Jefferson (presidential candidate) and Aaron Burr (vice-presidential candidate) who were tied for first in the electoral-college votes<sup>34</sup>. At the time of his appointment, Marshall had been Adams's Secretary of State for about nine months, and thus Marshall was, and had been, at serious political odds with his distant cousin Thomas Jefferson, who would in due course take office as President<sup>35</sup>. In a pattern that came to typify the lame-duck Federalist Congress, Marshall was quickly and unanimously confirmed by the Senate on 27 January 1801<sup>36</sup>.

This lame-duck Federalist Congress, with President Adams's support, also took two other actions *vis-à-vis* the national judiciary in an effort to preserve Federalist-Party influence during the forthcoming Jefferson Administration. First, on 13 February 1801 (a mere nine days after Marshall had been sworn in as Chief Justice on February 4th<sup>37</sup> and only four days before Jefferson was at last elected President by the House of Representatives on February

<sup>32</sup> S. ELKINS and E. MCKITRICK, *op. cit.*, note 31, at 691, 750; see generally: Daniel SISSON, *The American Revolution of 1800* (1974); Donald Grier STEPHENSON Jr., *Campaigns and the Court: The U.S. Supreme Court in Presidential Elections*, at 27-52 (1999); Bernard WEISBERGER, *America Afire: Jefferson, Adams, and the Revolutionary Election of 1800* (2000).

<sup>33</sup> See: Albert J. BEVERIDGE, *The Life of John Marshall*, vol. 2, at 553 (1916); Charles WARREN, *The Supreme Court in United States History*, vol. 1, at 175 (rev. ed. 1926).

<sup>34</sup> See: Ralph KETCHAM, *James Madison: A Biography*, at 405 (1971) ("By mid-December Madison knew his party was victorious. Republican discipline, however, had been so firm that Jefferson and Burr, the intended *vice* president, each had 73 votes, thus unexpectedly throwing the election into the House of Representatives." (footnote omitted)); J.F. SIMON, *op. cit.*, note 27, at 128, 131.

<sup>35</sup> See: J.F. SIMON, *op. cit.*, note 27, at 129; C. WARREN, *op. cit.*, note 33, at 181-183.

<sup>36</sup> See: J.F. SIMON, *op. cit.*, note 27, at 134; R.K. NEWMYER, *op. cit.*, note 24, at 142.

<sup>37</sup> See: A.J. BEVERIDGE, *op. cit.*, note 33, at 558 and n. 2.

17th<sup>38</sup>), Congress adopted the Judiciary Act of 1801<sup>39</sup>, which altered the national judiciary in two importantly partisan ways: first, by reducing the number of Supreme Court Justices from six to five (effective with the next vacancy), the Federalists planned to stop Jefferson from appointing a replacement for Justice Cushing who was ill<sup>40</sup>; and, second, by establishing six new circuit courts with sixteen new judges<sup>41</sup>, all of whom, predictably, would be loyal Federalists appointed by Adams<sup>42</sup>, the Federalists hoped to maintain a stronghold for their unpopular views within the national government<sup>43</sup>. And on 2 March 1801, just two days before the government passed to Jefferson and the Republicans, the Federalist Senate confirmed all sixteen of President Adams's appointments<sup>44</sup>.

These judges constituted only the first installment of partisan Federalists who, due to the lateness of their judicial appointments, came to be called "The Midnight Judges"<sup>45</sup>; and so the Judiciary Act of 1801 was not itself the *immediate* cause of the dispute in the

<sup>38</sup> See: R. KETCHAM, *op. cit.*, note 34, at 405.

<sup>39</sup> Act of Feb. 13, 1801, ch. 4, 2 Stat. 89, 90, 98 (repealed 1802).

<sup>40</sup> See: L.W. LEVY, *op. cit.*, note 12, at 86; C. WARREN, *op. cit.*, note 33, at 189; William W. VAN ALSTYNE, "A Critical Guide to *Marbury v. Madison*", *Duke L.J.* 1, 4 (1969).

<sup>41</sup> Act of Feb. 13, 1801, ch. 4, § 6, 2 Stat. 89, 90 (repealed 1802). These were "new" circuit courts for two reasons. First, the *Judiciary Act of 1789*, the first national "judiciary" statute, set up only three circuit courts. Act of Sept. 24, 1789, ch. 20, § 4, 1 Stat. 73, 74 and 75, reprinted in Maeva MARCUS (ed.), *The Documentary History of the Supreme Court of the United States, 1789-1800: Organizing the Federal Judiciary*, vol. 4, at 22, 44 and 45 (1992). Second, the original "1789 circuit courts" were not independently staffed by special "circuit judges", but instead were composed of one trial judge from a district within that circuit and two Supreme Court Justices riding circuit. *Id.* See: Julius GOEBEL, Jr., *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, vol. 1, at 471 and 472 (1971) (describing the three-tier court schema of the *Judiciary Act of 1789*); Erwin C. SURRENCY, *History of the Federal Courts* 22 (2d ed. 2002) (same).

<sup>42</sup> See: L.W. LEVY, *op. cit.*, note 12, at 86 (noting that "President Adams appointed only Federalists to the sixteen positions"). But see: C. WARREN, *op. cit.*, note 33, at 188 (stating that the 16 new judges were "chosen *practically* entirely" from the Federalist Party (emphasis added)).

<sup>43</sup> See *supra* note 28. See also: John A. GARRATY, "The Case of the Missing Commissions", in John A. GARRATY (rev. ed.), *Quarrels That Have Shaped the Constitution* 7, 8 (1987).

<sup>44</sup> C. WARREN, *op. cit.*, note 33, at 188.

<sup>45</sup> J.A. GARRATY, *loc. cit.*, note 43, 9.



*Marbury* case<sup>46</sup>. Instead, *Marbury* arose from another post-election Federalist effort to control judicial and related offices during the forthcoming Jefferson administration<sup>47</sup>, the *District of Columbia Organic Act*, which became law on 27 February 1801<sup>48</sup>. Through this Act, President Adams appointed an astoundingly large number of justices of the peace (forty-two) for the sparsely populated District of Columbia<sup>49</sup>. The Republicans quite naturally denounced these partisan appointments and the two “Midnight Judges” Acts as a grave abuse of power and an attempt to defeat the popular will expressed in the recent elections<sup>50</sup>. President-elect Jefferson himself bitterly complained that the Federalists “have retired into the judiciary as a strong-hold, ... and from that battery all the works of Republicanism are to be beaten down and destroyed”<sup>51</sup>.

Predictably enough, and again at the midnight hour, the forty-two justice-of-the-peace nominees were all confirmed by the Senate on 3 March 1801, just one day before the national government changed hands<sup>52</sup>. At virtually the moment of Senate confirmation, the justice-of-the-peace commissions, their official licenses, were being made out by John Marshall, who was still serving as Secretary of State for the Adams administration, even though he had also been Chief Justice for nearly a month<sup>53</sup>. Marshall, aided by his

<sup>46</sup> See: W.W. VAN ALSTYNE, *loc. cit.*, note 40, at 4.

<sup>47</sup> *Id.*

<sup>48</sup> *An Act Concerning the District of Columbia*, ch. 15, § 11, 2 Stat. 103, 107.

<sup>49</sup> See: L.W. LEVY, *op. cit.*, note 12, at 78 (describing 42 justices of the peace for the District of Columbia as “a preposterous number”).

<sup>50</sup> See: Noble E. CUNNINGHAM, Jr., *In Pursuit of Reason: The Life of Thomas Jefferson*, at 248 (1987) (noting that “the haste of President Adams in filling the new judgeships with Federalists gave the measure a partisan character never forgotten nor forgiven by the Republicans”).

<sup>51</sup> “Letter of Thomas Jefferson to John Dickinson (19 Dec. 1801)”, quoted in George Lee HASKINS and Herbert A. JOHNSON, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801-15*, vol. 2, at 147, 153 (1981).

<sup>52</sup> See *id.* at 183; David F. FORTE, “Marbury’s Travail: Federalist Politics and William Marbury’s Appointment as Justice of the Peace”, 45 *Catholic Univ. L. Rev.* 349, 353 (1996) (“[O]n Monday, March 2, President Adams dispatched nominations to the Senate for [the 42] justices of the peace ... The Senate approved the nominations the following day, the last day of President Adams’ administration.” (footnote omitted)).

<sup>53</sup> G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 183. See also: A.J. BEVERIDGE, *op. cit.*, note 33, at 558 and 559; R.K. NEWMYER, *op. cit.*, note 24, at 159.

brother James and a clerk, worked late into the night of March 3<sup>54</sup>, but by quitting time (perhaps midnight)<sup>55</sup>, they had still not been able to seal and deliver seventeen of the commissions<sup>56</sup> – and among these seventeen were the four whose names are listed in the second and third lines of the report of the *Marbury* opinion<sup>57</sup>.

Shortly after assuming office on 4 March 1801, President Jefferson decided to retain the seventeen commissions that had not yet been delivered<sup>58</sup>. Thus, on 16 December 1801, William Marbury and the other three petitioners filed suit within the original jurisdiction of the Supreme Court, seeking the issuance of a writ of mandamus to compel Secretary of State Madison to deliver their

<sup>54</sup> See: J.F. SIMON, *op. cit.*, note 27, at 174.

<sup>55</sup> All that historians know for certain (or reasonably certain) is that President Adams signed commissions at his desk in the President's House until 9 p.m. on 3 March 1801. See, *e.g.*: A.J. BEVERIDGE, *op. cit.*, note 33, vol. 2, at 560 (citing a letter of Jefferson to Benjamin Rush for the "nine o'clock" stopping time of President Adams); J.F. SIMON, *op. cit.*, note 27, at 147, 173. Because neither the commissions themselves nor the State Department ledgers were produced at the trial in the Supreme Court (and have never been discovered since), see: J.E. SMITH, *op. cit.*, note 24, at 624 n. 47, we cannot know whether Acting Secretary of State Marshall, as Republicans later alleged, sealed commissions right up to the change of administration at the stroke of midnight. See: A.J. BEVERIDGE, *op. cit.*, note 33, vol. 2, at 561 and 562.

<sup>56</sup> G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 184.

<sup>57</sup> *Marbury*, *supra* note 2, at 137. See: J.A. GARRATY, *loc. cit.*, note 43, at 9 and 10. Professors Haskins and Johnson give the following description of the rushed and confused last day of the Adams Administration:

*In his haste to finish up business before his term of office as Secretary [of State] expired, Marshall left the [justice-of-the-peace] commissions at the Department of State. Immediately after Jefferson was inaugurated, he directed his new Secretary of State, James Madison, to withhold seventeen of the forty-three [sic] commissions. Four of the seventeen men affected, including William Marbury, applied to the Supreme Court for a writ of mandamus to compel delivery of the commissions.*

G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 184 (footnote omitted).

<sup>58</sup> Many modern historians have incorrectly concluded from Madison's position as Jefferson's Secretary of State (and perhaps also from his listing as defendant in the *Marbury* case) that Madison was the one who discovered and, on Jefferson's order, withheld the commissions. See, *e.g.*: A.J. BEVERIDGE, *op. cit.*, note 33, vol. 3, at 110 ("When Jefferson was inaugurated, he directed Madison ... to withhold the commissions ..."); G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 184 ("Immediately after Jefferson was inaugurated, he directed his new Secretary of State, James Madison, to withhold seventeen of the forty-three [sic] commissions"); Herbert A. JOHNSON, *The Chief Justiceship of John Marshall, 1801-*

commissions<sup>59</sup>. Marbury was represented by Charles Lee, who had been Attorney General in the Washington and Adams Administrations<sup>60</sup>, which pedigree indicates that the case had the earmarks of a Federalist *cause célèbre*.

The partisan legislative jockeying that produced the *Marbury* case had not yet ended, however, and now it was the Republicans' turn to play; so before Mr. Marbury's claim could be heard in the Supreme Court, the new Republican Congress on 3 March 1802 – exactly a year to the day after Marbury's commission had been signed – passed an act<sup>61</sup> that repealed the *Judiciary Act of 1801*. This was followed in short order, on April 23, with a measure<sup>62</sup> eliminating several forthcoming terms of the Supreme Court, which

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1835, at 57 (1997) (“Upon assuming office, President Jefferson ordered his secretary of state, James Madison, to withhold all of the undelivered commissions”); W.E. NELSON, *op. cit.*, note 10, at 57 (“Secretary of State Marshall was unable to deliver the commission for one of the new justices of the peace for the district, a certain William Marbury, before the end of President Adams’s term, and James Madison, the new secretary of state, refused to make the uncompleted delivery”); R.K. NEWMYER, *op. cit.*, note 24, at 159 (“The problem was [the 42 commissions] had not yet been delivered, as Madison discovered when he assumed his duties as secretary of state on March 5 ... [Jefferson] ordered Madison not to deliver the commissions”); W.W. VAN ALYSTYNE, *loc. cit.*, note 40, 4 (“Jefferson ordered his new Secretary of State, James Madison, to hold up all commissions which had not yet been delivered”).

Actually, Madison did not arrive in the capital until 1 May 1801. R. KETCHAM, *op. cit.*, note 34, at 407. Madison’s father had died on 27 February 1801, only a few days before Jefferson’s inauguration, see “Letter of James Madison to Thomas Jefferson (28 Feb. 1801)”, in 17 David B. MATTERN and others (eds.), *The Papers of James Madison*, 474, 475 (1991), and his own health had been poor for some time, see “Letter of James Monroe to James Madison (27 Feb. 1801)”, *id.* at 474. Therefore, “Madison’s continuing ill-health and the settlement of his father’s estate prevented him from being in Washington a day or two after Jefferson’s inauguration to accept his appointment as Secretary of State (made on March 5), and to help the President ‘put things under way’”. R. KETCHAM, *op. cit.*, note 34, at 406.

<sup>59</sup> See: J.F. SIMON, *op. cit.*, note 27, at 176; J.E. SMITH, *op. cit.*, note 24, at 299.

<sup>60</sup> See: J.F. SIMON, *op. cit.*, note 27, at 175.

<sup>61</sup> Repeal Act of 1802, ch. 8, 2 Stat. 132. See: R.J. ELLIS, *op. cit.*, note 29, at 50.

<sup>62</sup> *An Act to Amend the Judicial System of the United States*, 2 Stat. 156 (Amending Act of 1802) (eliminating the December and June sessions of the Court that had been established by the *Judiciary Act of 1801* and repealing the section of the *Judiciary Act of 1789* that had provided for August and February terms and replacing it with a single annual term of Court commencing on the first Monday of February). See: R.J. ELLIS, *op. cit.*, note 29, at 60.

resulted in a hiatus of some fourteen months before the Court convened again<sup>63</sup>. Passage of this Amending Act was likely a ploy by the Republican Congress to prevent the Supreme Court from ruling upon the constitutionality of the Repeal Act *before* it took effect<sup>64</sup>; but one of its incidental results was to postpone the Supreme Court's trial of the *Marbury* case until its February 1803 Term<sup>65</sup>. By that time, the *Marbury* claims had created a political sensation<sup>66</sup>, and discussions about impeaching Federalist judges had even begun<sup>67</sup>.

Thus, it was no coincidence that on 4 February 1803, only a week before the Court met to hear arguments in the *Marbury* case, President Jefferson instructed Congress to impeach Judge John Pickering<sup>68</sup>, and Federalist leaders had also recently learned of Republican plans to impeach Supreme Court Justice Samuel Chase<sup>69</sup>. Something of the partisan passion surrounding *Marbury* was captured in a Republican newspaper article that was probably written while the Supreme Court was hearing arguments of counsel in the case: "The *attempt* of the Supreme Court ... of the United States, by a mandamus, to control the Executive functions, is a new experiment. It seems to be no less than a commencement of war... The Court must be defeated and retreat from the attack; or march on, till they incur an impeachment and removal from office"<sup>70</sup>.

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<sup>63</sup> See: A.J. BEVERIDGE, *op. cit.*, note 33, vol. 3, at 97 (noting that after passage of the Amending Act of 1802, "the Supreme Court of the United States was practically abolished for fourteen months"); Robert J. LUKENS, "Jared Ingersoll's Rejection of Appointment as One of the 'Midnight Judges' of 1801: Foolhardy or Farsighted?", 70 *Temple L. Rev.* 189, 198 (1997).

<sup>64</sup> See: R.J. ELLIS, *op. cit.*, note 29, at 59 (noting that the Amending Act of 1802 "was a skillful maneuver to deny the Supreme Court an opportunity to overturn the repeal act before it went into effect" and that it "was recognized as such by the Federalists"); see also: A.J. BEVERIDGE, *op. cit.*, note 33, vol. 3, at 96.

<sup>65</sup> See: A.J. BEVERIDGE, *op. cit.*, note 33, vol. 3, at 111.

<sup>66</sup> See: R.J. ELLIS, *op. cit.*, note 29, at 58; G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 181; L.W. LEVY, *op. cit.*, note 12, at 79; J.F. SIMON, *op. cit.*, note 27, at 167.

<sup>67</sup> See: G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 205; L.W. LEVY, *op. cit.*, note 12, at 79.

<sup>68</sup> See: R.J. ELLIS, *op. cit.*, note 29, at 71.

<sup>69</sup> See: G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 185, 205; L.W. LEVY, *op. cit.*, note 12, at 79.

<sup>70</sup> *Independent Chronicle* (Boston), 10 March 1803, quoted in A.J. BEVERIDGE, *op. cit.*, note 33, vol. 3, at 112 and 113 n. 2.

In this charged political atmosphere, historians have concluded, Marshall and his Federalist brethren faced unappealing alternatives: if the Court issued the writ, the Jefferson Administration would have defied it, thereby humiliating the Court<sup>71</sup>, and might even have sought wholesale impeachments for the justices' violation of the separation of powers<sup>72</sup>. But to withhold the writ would have placed the Federalist judges in the "impossibly distasteful" position of giving support to Jefferson in his assault on the Midnight Judges<sup>73</sup>, which simultaneously violating "the Federalist principle that the Republican administration was accountable under the law"<sup>74</sup>. As a careful reading of the *Marbury* opinion discloses, however, "Marshall was equal to the occasion"<sup>75</sup>.

Marshall's opinion for the court addresses three central questions<sup>76</sup>. The first covers a little over a dozen pages<sup>77</sup> and deals with

<sup>71</sup> Robert G. McCLOSKEY, *The American Supreme Court*, at 41 (1960); G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 185; R.K. NEWMYER, *op. cit.*, note 24, at 160; W.W. VAN ALSTYNE, *loc. cit.*, note 40, at 30 ("If the Court had concluded that the [1789 judiciary] act was constitutional, presumably it would have issued the writ against Madison. If Madison, on Jefferson's instruction, had refused to honor that writ how would it have been enforced? ... The prospect of this problem may well have influenced the decision as to the constitutionality of section 13").

<sup>72</sup> See, e.g.: L.W. LEVY, *op. cit.*, note 12, at 79 and 80; J.F. SIMON, *op. cit.*, note 27, at 162.

<sup>73</sup> R.G. McCLOSKEY, *op. cit.*, note 71, at 41.

<sup>74</sup> L.W. LEVY, *op. cit.*, note 12, at 80; see also R.K. NEWMYER, *op. cit.*, note 24, at 160 (noting that if the mandamus was not issued, "the justices would be damned by their own caution").

<sup>75</sup> R.G. McCLOSKEY, *op. cit.*, note 71, at 41.

<sup>76</sup> It "has become something of a Musgrave ritual" for scholars and students of the *Marbury* opinion to track "the Chief Justice's three questions." Thomas E. BAKER and James E. VIATOR, "Not Another Constitutional Law Course: A Proposal to Teach a Course on the Constitution", 76 *Iowa L. Rev.* 739, 741 (1991); see also: G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 184; C.F. HOBSON, *op. cit.*, note 12, at 48 ("In considering [Marbury's mandamus] application, the Supreme Court affirmed that Marbury had a legal right to his commission and that a mandamus was the proper remedy. But the Court ultimately denied relief on the ground that it lacked jurisdiction to issue the writ"); H.A. JOHNSON, *op. cit.*, note 58, at 58 and 59; R.G. McCLOSKEY, *op. cit.*, note 71, at 41; W.E. NELSON, *op. cit.*, note 10, at 60-62; R.K. NEWMYER, *op. cit.*, note 24, at 165 n. 26.

<sup>77</sup> *Marbury*, *supra* note 2, at 154-168. See: G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 197 n. 60.

the related questions of whether William Marbury had a “legal title” to his office and thus a right to his commission. Concerning these interrelated points, the Court made two straightforward rulings: first, Marshall ruled for the unanimous Court that the *delivery* of the commission was merely incidental to Mr. Marbury’s appointment, which had become “complete” when signed by President Adams and sealed by Secretary of State Marshall, and that therefore President Jefferson’s Secretary of State was *not* legally warranted in later withholding the commission<sup>78</sup>.

Next, on a simple “*ubi jus, ibi remedium*” basis, Marshall easily ruled that it is the duty in a government of laws to supply remedies for violated rights<sup>79</sup>, which then brought Marshall to his crucial third question<sup>80</sup>, which contained two issues: first, whether the requested mandamus against Madison was an appropriate legal remedy for Mr. Marbury’s dilemma<sup>81</sup>; and, second, whether the Supreme Court had authority to issue the requested writ<sup>82</sup> – in other words, whether the court could licitly take jurisdiction of the case for the purpose of issuing a writ of mandamus<sup>83</sup>. Marshall answered this jurisdictional question in the negative, on the ground that the statute Mr. Marbury relied on – Section 13 of the *Judiciary Act of 1789* – impermissibly *enlarged* the original jurisdiction of the

<sup>78</sup> *Marbury*, *supra* note 2, at 157-162. Notice the alleged Federalist “political strategy” at work here: Marshall has begun the accusation that the Jefferson Administration engaged in illegal conduct and abuse of office. See: R.G. McCLOSKEY, *op. cit.*, note 71, at 42 (arguing that “the declaration that the commission was illegally withheld scotched any impression that the Court condoned the administration’s behavior”).

<sup>79</sup> *Marbury*, *supra* note 2, at 162-168. See: W.W. VAN ALSTYNE, *loc. cit.*, note 40, at 10 and 11 (stating that Marshall’s “first step” in his argument of the second question “is a kind of self-evident matter: *ubi jus, ibi remedium*”).

<sup>80</sup> *Marbury*, *supra* note 2, at 168 (“It remains to be enquired whether, 3dly. He is entitled to the remedy for which he applies”).

<sup>81</sup> *Id.* at 168-173.

<sup>82</sup> *Id.* at 173-180.

<sup>83</sup> Professor Van Alstyne, in his justly famous essay, explained that Marshall treated the final question of the Court’s authority to issue the writ “as though it involved two parts only: (1) Is section 13 of the 1789 Judiciary Act which purports to grant such power unconstitutional in that it attempts to enlarge the original jurisdiction of the Supreme Court in violation of Article III [of the Constitution], and (2) is the Court free to make its own determination of this question in deciding whether it should proceed with this case?”: W.W. VAN ALSTYNE, *loc. cit.*, note 40, at 14.

Supreme Court as exclusively set out in Article III of the Constitution<sup>84</sup>.

Now, notice what Chief Justice Marshall has decided and in what order: he ruled that Mr. Marbury was entitled to his commission, that he had applied for the appropriate legal remedy (*mandamus*), but that he was in the wrong court because the Supreme Court has no jurisdiction to hear his claim<sup>85</sup>. Many scholars have observed that taking the questions in this order was an odd way to handle this case and write this opinion<sup>86</sup>; for as every freshman civil-procedure student learns, every case should start with the *jurisdictional* question first<sup>87</sup>. Some commentators have suggested that Marshall's unorthodox ordering of the issues may perhaps be explained by early nineteenth century legal conventions – that is, perhaps in 1803 there was not yet a generally recognized orthodoxy in regard to the proper ordering of issues in legal opinions<sup>88</sup>. This

<sup>84</sup> *Marbury*, *supra* note 2, at 179 and 180. Section 13 of the *Judiciary Act of 1789* provides in pertinent part:

And be it further enacted, that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers ... The Supreme Court shall also have appellate jurisdiction ... in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts ... and writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

Act of Sept. 24, 1789, ch. 20, § 13, 1 Stat. 73, 80-81 (footnotes omitted). For the text of Article III, see *supra* note 20.

<sup>85</sup> See *supra* text accompanying notes 76-84.

<sup>86</sup> Many commentators have remarked on Marshall's inverted order of issue presentation. See, e.g.: D.P. CURRIE, *op. cit.*, note 15, at 66; G.L. HASKINS and H.A. JOHNSON, *op. cit.*, note 51, at 184; C.F. HOBSON, *op. cit.*, note 12, at 48; L.W. LEVY, *op. cit.*, note 12, at 82-83; James M. O'FALLON, "Marbury", 44 *Stanford L. Rev.* 219, 252 (1992) ("Twenty-one pages into a twenty-eight page opinion, Marshall finally came to the jurisdictional issue upon which Marbury's case foundered.")

<sup>87</sup> See: Margaret Z. JOHNS, *Professional Writing for Lawyers: Skills and Responsibilities*, at 200 and 201 (1998) (explaining, in a section entitled "Form and Content of an Appellate Brief", that the first point to appear immediately after the table of contents is "a statement of the basis for jurisdiction").

<sup>88</sup> See: W.W. VAN ALSTYNE, *loc. cit.*, note 40, at 16.

explanation is scotched, however, by the order in which Marbury's attorney, Charles Lee, presented the issues to the Court: "1st. Whether the supreme court can award the writ of mandamus in any case. 2d. Whether it will lie to a secretary of state in any case whatsoever. 3d. Whether in the present case the court may award a mandamus to James Madison, secretary of state"<sup>89</sup>. Clearly, then, at least one prominent attorney of the early nineteenth century knew how to properly order the three questions in the *Marbury* case by commencing with the "authority" or jurisdictional issue. This ability of Charles Lee's has prompted some historians to accuse Marshall of having "deliberately reversed the sequence of questions, making Lee's first one the last one to be dealt with"<sup>90</sup>.

As to Marshall's motives for this reversal of the issues, however, historians have only been able to speculate, given the lack of explanatory documents such as letters from Marshall or other justices discussing the odd inversion. Some have argued that Marshall, a master politician, took the issues in reverse order so that he could, in the first breath, lecture the Jefferson Administration on having abused its office by willfully failing to do its duty by Mr. Marbury, but in the next breath avoid a perhaps impeachable confrontation with the President by announcing, on jurisdictional grounds, that Madison had won the case because the statute attempting to give the Supreme Court jurisdiction was null and void<sup>91</sup>. This is why Pulitzer-Prize winning historian Leonard Levy has written that "from the standpoint of judicial craftsmanship, [*Marbury*] resulted in one of the worst opinions ever delivered by the Supreme Court ... As a matter of judicial politics, however, it ranks among the craftiest in constitutional history ..."<sup>92</sup>.

For present purposes, however, accepting at face value Marshall's assertion that the Court simply *had* to confront an unavoidable collision between Article III and an Act of Congress, let us examine the "judicial review" norm-setting third question of the *Marbury* opinion<sup>93</sup>. This is the issue that promoted the famous

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<sup>89</sup> *Marbury*, *supra* note 2, at 146.

<sup>90</sup> L.W. LEVY, *op. cit.*, note 12, at 83.

<sup>91</sup> See: J.M. O'FALLON, *loc. cit.*, note 86, at 252.

<sup>92</sup> L.W. LEVY, *op. cit.*, note 12, at 75.

<sup>93</sup> *Marbury*, *supra* note 2, at 173-180. Marshall's famous third question was succinctly phrased: "Whether it [the requested writ of mandamus] can issue from this court." *Id.* at 173.



arguments justifying the Court's actual disposition of the case, namely, the Court's refusal to apply Section 13 of the *Judiciary Act of 1789* in Mr. Marbury's litigation, which led to the dismissal of Marbury's mandamus petition. This third question of the *Marbury* opinion actually contains two sub-arguments<sup>94</sup>. The first sub-argument<sup>95</sup> supports Marshall's conclusion that "an act of the legislature, repugnant to the constitution, is void"<sup>96</sup>. The second sub-argument<sup>97</sup> "supports an altogether different conclusion"<sup>98</sup> – the conclusion at the very end of the opinion that "*courts*, as well as other departments, are bound by that instrument"<sup>99</sup>, by the Constitution. In the second sub-argument Marshall reached a conclusion that clearly distinguishes between, on the one hand, a law's *being* null and void for incompatibility with the Constitution and, on the other hand, a court's having the *authority* to declare such a law null and void<sup>100</sup>. Obviously, this conclusion to the second sub-argument of Question Three relates directly to the power of a court to review acts of a coequal branch of government for constitutionality<sup>101</sup>. Thus, it is the second sub-argument that raises the core issue in modern theories of judicial review, namely, whether the Supreme Court has the power to bind co-ordinate branches of the national government to its own view of the Constitution<sup>102</sup>.

<sup>94</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 16. See also *supra* text accompanying notes 80-83.

<sup>95</sup> This sub-argument covers two pages of the published opinion. See: *Marbury*, *supra* note 2, at 176 and 177.

<sup>96</sup> *Id.* at 177.

<sup>97</sup> The second sub-argument covers three pages in the opinion. See *id.* at 177-180.

<sup>98</sup> R.L. CLINTON, *op. cit.*, note 9, at 16.

<sup>99</sup> *Marbury*, *supra* note 2, at 180.

<sup>100</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 16.

<sup>101</sup> *Id.*

<sup>102</sup> And this core issue of course implicates the *Urproblem* of modern constitutional debate: the proper role of the judiciary in the republican form of government established by the U.S. Constitution. See: Michael J. GERHARDT, "On Revolution and Wetland Regulations", 90 *Georgetown L.J.* 2143, 2143 (2002). See generally: "Introduction", in Michael J. GERHARDT and others, *Constitutional Theory: Arguments and Perspectives*, 2d ed., at 2-5 (2000) (describing the focus of modern constitutional theory as an effort to confute the "counter-majoritarian difficulty", *i.e.*, the problem of excessive or unprincipled judicial interference with democratic governance (quoting Alexander BICKEL, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2d ed., 15 and 16 (1986))).

Now, after our overview of Question Three, let us look more closely at Marshall's two conclusions to the two sub-arguments. As Professor Robert L. Clinton has pointed out, Marshall's first conclusion – that “an act of the legislature, repugnant to the constitution, is void”<sup>103</sup> – flows from “a straightforward argument”<sup>104</sup>. Marshall first observed that the Constitution derives from an original and fundamental right, namely, the right of the sovereign people to establish their own forms of government, and that therefore the Constitution is a law of superior obligation since it stems *directly* from a sovereign act of the American people<sup>105</sup>. Marshall then noted that the Constitution of the United States is *written*<sup>106</sup>, and he argued that the idea of unconstitutional laws as an absolute nullity is a theory “essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society”<sup>107</sup>.

Marshall concludes, then, that because the American organic law of superior obligation is a written one that defines and limits legislative power – that is, because Americans have a written Constitution limiting the power delegated from the people to the central government – *all* legislative acts “repugnant to the constitution”<sup>108</sup> are *ipso facto* void because their passage has occurred without any delegated authorization from the people<sup>109</sup>, and therefore all such statutes are literally *ultra vires*. The schema of this argument proceeds, for Marshall, by simple logical deduction – that is, the notion that any legislative act not authorized by the Constitution is *ipso*

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<sup>103</sup> *Marbury*, *supra* note 2, at 177. See *supra* text accompanying notes 95 and 96.

<sup>104</sup> R.L. CLINTON, *op. cit.*, note 9, at 16.

<sup>105</sup> *Marbury*, *supra* note 2, at 176. Marshall asserted that to answer the not-very-intricate question of “whether an act, repugnant to the constitution, can become the law of the land”, it is “only necessary to recognize certain [well-established] principles”, the first of which is that “the people have an original right to establish ... such principles [of government] as, in their opinion, shall most conduce to their own happiness ...” *Id.* See also: R.L. CLINTON, *op. cit.*, note 9, at 16 and 17.

<sup>106</sup> *Marbury*, *supra* note 2, at 177.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* See: William M. WIECEK, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937*, at 31 (1998) (“*Marbury*’s core idea was that the written Constitution was ‘a superior, paramount law’ established by the people in their sovereign capacity”).

<sup>109</sup> R.L. CLINTON, *op. cit.*, note 9, at 17.

*facto* void follows, for Marshall, simply and logically from the premise that the Constitution establishes, in written form, a government of limited and delegated powers<sup>110</sup>.

Under this syllogism, whether “an act repugnant to the constitution” can be valid law is “not of an intricacy proportioned to its interest”<sup>111</sup>. In short, in Marshall’s analysis, the question is a “no-brainer”. There is, however, a simple reason why the conclusion to the first sub-argument of Question Three does not contain “an intricacy proportioned to its interest”<sup>112</sup>. This conclusion is largely beside the point because it does not address the crucial question of what is to be done *about* congressional legislation repugnant to the Constitution<sup>113</sup>. The difficult and intricate question of what to do about an unconstitutional statute begins to appear in the reasoning that supports Marshall’s conclusion to his second sub-argument. This conclusion is that the courts, as well as other departments, are bound by the Constitution<sup>114</sup>.

<sup>110</sup> Professor William Wiecek has noted that Marshall moved “easily (and simplistically)” from the idea of a written, organic Constitution to the assertion that “since courts routinely apply law, when they confront a conflict between two laws, Constitution and statute, they simply apply the law of superior authority.” W.M. WIECEK, *op. cit.*, note 108, at 31. Then Wiecek explained how the “seductive power of this reductionist idea” led to the modern assertions of judicial supremacy:

*There was a latent ambiguity in Marshall’s easy identification of the Constitution with law, and in his conclusion that “it is emphatically the province and duty of the judicial department to say what the law is.” In exercising this power, did judges act in their ordinary judicial role, adjudicating a legal dispute that happened to involve a constitutional question? Or did Marshall’s words about “the province and duty” endow the Court with some authority as the expositor of the Constitution, superior to the authority of legislators? The Supreme Court in modern times, acting in moments of constitutional stress, has chosen the latter alternative, identifying itself the “ultimate interpreter of the Constitution” and its interpretations as “the supreme law of the land”.*

*Id.* at 32 (footnotes omitted).

<sup>111</sup> *Marbury*, *supra* note 2, at 176. See: R.L. CLINTON, *op. cit.*, note 9, at 17.

<sup>112</sup> *Marbury*, *supra* note 2, at 176.

<sup>113</sup> Professor Leonard Levy has noted the distinction, and early-national Americans’ awareness of the distinction, between unconstitutionality and the authority to declare unconstitutionality: “By 1803 no one doubted that an unconstitutional act of government was null and void, but the question not then resolved was: Who is to judge that the act is unconstitutional?”: L.W. LEVY, *op. cit.*, note 12, at 77. See also *supra* text accompanying notes 100-102.

<sup>114</sup> See *supra* text accompanying notes 97-99.

The second sub-argument commences with the rhetorical question that closed the first sub-argument<sup>115</sup>: “If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?”<sup>116</sup>. The answer to that rhetorical question begins, in the next paragraph of the opinion, with the most famous quotation from all of the United States Reports: “It is emphatically the province and duty of the judicial department to say what the law is”<sup>117</sup>. Thus, if an act repugnant to the Constitution is *not law* – which was the conclusion to Marshall’s first sub-argument<sup>118</sup> – and if the court’s duty is to apply *law* in particular cases<sup>119</sup>, then the application of an unconstitutional statute would violate both the judge’s normal duties of applying the proper law(s) in litigated cases and the judge’s oath to support the Constitution<sup>120</sup>. Courts therefore are cast on the twin horns of a dilemma, as Marshall explains:

*So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.*<sup>121</sup>

Thus, courts will either have to apply the statute, thereby disregarding the Constitution, or apply the Constitution, thereby disregarding the statute. And this dilemma, as Marshall explains, is the “essence of judicial duty”<sup>122</sup>. The way out of the dilemma, as Marshall explains in the next paragraph, is to apply the Constitution, since it is “superior to any ordinary act of the legislature”<sup>123</sup>. This constitutional superiority means that judges are not bound to “close their eyes on the constitution, and see only the law”<sup>124</sup>.

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<sup>115</sup> R.L. CLINTON, *op. cit.*, note 9, at 17.

<sup>116</sup> *Marbury*, *supra* note 2, at 177.

<sup>117</sup> *Id.*

<sup>118</sup> See *supra* text accompanying notes 95 and 96.

<sup>119</sup> See *supra* text accompanying notes 114-117.

<sup>120</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 17.

<sup>121</sup> *Marbury*, *supra* note 2, at 178.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

At this point, inquiring (or skeptical) students of *Marbury* might be wondering, “Where in Marshall’s opinion is this notion of judicial supremacy that American courts and law professors have claimed to find in the *Marbury* case”<sup>125</sup>? On the basis of what is written in *Marbury*, as opposed to written *about Marbury*, the answer would seem to be, as many scholars have concluded, that Marshall never proffered any claim of judicial exclusivity or supremacy in matters of constitutional interpretation<sup>126</sup>. The only claim to be plausibly made for Marshall’s theory of judicial review is that the court is entitled, is duty bound, to disregard *ultra vires* legislation in resolving particular controversies, with nothing said about the other coequal branches being bound by these rulings. Moreover, some historians have detected in the opinion an important proviso: the Court is bound to disregard such legislation *only when* the challenged statute bears directly upon the performance of judicial functions<sup>127</sup>.

Now, how do historians and legal scholars know that Marshall’s point about ignoring *ultra vires* legislation is limited to statutes concerning or directed to the judiciary? By application of the standard

<sup>125</sup> See *supra* text accompanying notes 9-15.

<sup>126</sup> See, e.g.: L.W. LEVY, *op. cit.*, note 12, at 77, 85; W.E. NELSON, *op. cit.*, note 10, at 59; R.K. NEWMYER, *op. cit.*, note 24, at 171 (noting that Marshall’s opinion in *Marbury* did not “claim that Congress was bound by the Court’s interpretation”); J.E. SMITH, *op. cit.*, note 24, at 326 (“With the decision in *Marbury v. Madison*, Marshall was neither embarking on a crusade for judicial supremacy, nor was he charting new territory”); R.E. BARKOW, *loc. cit.*, note 6, at 239 (“The problem, of course, is that this eloquent excerpt from *Marbury* cannot be taken out of context. The duty ‘to say what the law is’ does not necessarily imply a court monopoly on [constitutional] interpretation”); Neal DEVINS and Louis FISHER, “Judicial Exclusivity and Political Instability”, 84 *Virginia L. Rev.* 83, 106 (1998) (“No single institution, including the judiciary, has the final word on constitutional questions”); David E. ENGDAHL, “John Marshall’s ‘Jeffersonian’ Concept of Judicial Review”, 42 *Duke L.J.* 279, 280 (1992) (arguing that Marshall embraced Jefferson’s view of coordinate or departmental constitutional review under which “each organ of government is obliged to decide independently ... constitutional questions”); J.M. O’FALLON, *loc. cit.*, note 86, at 219 (rejecting “the traditional view of *Marbury* as a statesmanlike opinion that clearly established the Supreme Court’s authority as the final arbiter of the Constitution”). See also *supra* note 12.

<sup>127</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 18 (arguing that *Marbury* “entitles the Court to disregard legislation in resolving particular controversies *only where such legislation bears directly upon the performance of judicial functions*” (footnote omitted)); Leonard W. LEVY, “Judicial Review, History, and Democracy”, in Leonard W. LEVY, *Judgments: Essays on American Constitutional History* 24, 27

first-year law student analytical skills – namely, briefing the case and separating *obiter dicta* from the precise holding of the case<sup>128</sup>. First, notice that *Marbury* involved a constitutional provision *and* a statute, both of which are addressed directly to the Supreme Court. We know they are addressed to the Court, first, because of the name of the statute (the *Judiciary Act of 1789*), second, because section 13 of the Act authorized the Supreme Court to issue writs of mandamus, and, third, because the statute aimed to implement the Article III distribution of Supreme Court original and appellate jurisdiction<sup>129</sup>. Hence, section 13 of the *Judiciary Act of 1789* has to be read as authorized by, as arising under, Article III. Furthermore, as observed earlier<sup>130</sup>, according to Marshall only statutes made in pursuance of the Constitution, only laws that accurately track the Constitution, are truly law and thus are statutes that the Court must apply; and under the normal principles of case analysis, the topic of this particular Congressional Act necessarily limits what Marshall has to say about judicial review of statutes<sup>131</sup>.

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(1972); Michael J. KLARMAN, "How Great Were the 'Great' Marshall Court Decisions?", 87 *Virginia L. Rev.* 111, 1120 and 1121 (2001) (maintaining that the *Marbury* opinion exemplified the orthodox early-national understanding that the power of judicial review was limited to "only those laws that fell within the special purview of the judiciary – for example, a law restricting access to jury trials – and not any old piece of legislation" (footnote omitted)); Ralph A. ROSSUM, "The Courts and the Judicial Power", in Leonard W. LEVY and Dennis J. MAHONEY (eds.), *The Framing and Ratification of the Constitution* 222, 235 and 236 (1987).

<sup>128</sup> See: Kenneth J. VANDEVELDE, *Thinking Like a Lawyer: An Introduction to Legal Reasoning*, at 33 (1996) ("The doctrine of *stare decisis* is qualified by a distinction between the holding of a case and dictum. Dictum is any statement by the court that is not strictly necessary to the decision of the case before it. The word 'dictum' is an abbreviation for the Latin phrase *obiter dictum*, which can be loosely translated as 'a word said incidentally'. Under the doctrine of *stare decisis*, only the holding is considered binding; dictum is not").

<sup>129</sup> See: C.F. HOBSON, *op. cit.*, note 12, at 48 ("Although the *Judiciary Act of 1789* authorized the Supreme Court to issue writs of mandamus to officers of the federal government, the Court declared this provision void as purporting to enlarge the Court's original jurisdiction beyond that prescribed by Article 3 of the Constitution").

<sup>130</sup> See *supra* text accompanying notes 95 and 96.

<sup>131</sup> See, e.g.: William P. STATSKY and R. John WERNET, Jr., *Case Analysis and Fundamentals of Legal Writing*, 2d ed., at 164-172 (1984); K.J. VANDEVELDE, *op. cit.*, note 128, at 27-35.

Applying these principles to the facts of *Marbury* means that Marshall has simply argued that the Supreme Court must follow explicit commands of the Constitution in preference to conflicting statutes *only when such constitutional commands are directed to the court itself* rather than to another branch of government – that is, all of the *Marbury* language about preferring supreme, constitutional law and declaring “what the law is” concerns only Article III, and it concerns only cases like this one, where the paramount law of Article III conflicts with a statute that is directed to the Court, like Section 13 of the *Judiciary Act of 1789*<sup>132</sup>. Hence, *Marbury* contains no assertion that the Court has a general or exclusive authority to set aside the general acts of other co-equal branches of the national government<sup>133</sup>; under the *Marbury* holding, the Court has no such authority unless those acts concern the judiciary, unless those acts are “of a judiciary nature”.

As Professor Robert Clinton has concluded, then, the most that may be claimed for the judicial review exercised in *Marbury* is that the Court is entitled to disregard legislation in deciding cases properly before it *only* where such legislation concerns the judiciary and

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<sup>132</sup> See, e.g.: R.L. CLINTON, *op. cit.*, note 9, at 23, 99, 101; Donald O. DEWEY, *Marshall Versus Jefferson; The Political Background of Marbury v. Madison*, at 142 and 143 (1970) (“[I]t is evident that, at least in 1804, the judicial review exercised in *Marbury v. Madison* was acceptable to Jefferson because the Supreme Court was interpreting legislation involving its own judicial sphere. This ... probably accounts for the Republicans’ lack of concern about the ‘limited’ review in *Marbury v. Madison*”); R.K. NEWMYER, *op. cit.*, note 24, at 171 (“Not only was the idea of judicial review set forth in *Marbury* not original, but its application to the case at hand was limited by the circumstances that gave rise to it ... [T]he voided act dealt exclusively with the federal courts, which in a strict sense of precedent limited the sweep of the decision. If Marshall intended that the Courts’ powers of review extend to nonjudicial matters as well, he never said so explicitly”); J.M. O’FALLON, *loc. cit.*, note 86, at 252 (“Both the question of *Marbury*’s right to the commission and the question of the Court’s jurisdiction involved conflict with another branch’s claim of authority. Of the two questions, the conclusion regarding the Judiciary Act could easily be seen as involving less of a reach by the Court ... because it involved the Court’s view of a matter – jurisdiction – which even many critics of the Court’s ambitions conceded to be within its authority” (footnote omitted)).

<sup>133</sup> See *supra* notes 10, 12-14 and 24.

bears directly upon the performance of judicial functions<sup>134</sup>. It seems reasonably clear, moreover, that this narrower reading of *Marbury* expresses the understandings of those in the Constitutional Convention of 1787 who debated the judicial power. Judicial review of national law is often thought to be constitutionally grounded in the Article III, section 2 extension of federal judicial authority to cases “arising under” the Constitution, laws, and treaties of the United States<sup>135</sup>; and the most explicit contemporaneous statement regarding the scope of this authority is found in James Madison’s *Notes on the Federal Convention*<sup>136</sup>. Madison recorded a statement he himself had made in late August of 1787 when the debate centered on Article III. As it reads today, Article III, section 2 provides: “The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties ...”<sup>137</sup>. A discussion took place on August 27th concerning the perimeters of national judicial authority, and at that point, the draft of Article III, section 2 read, “The Jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States”<sup>138</sup>, with no mention of “cases arising under the Constitution”. Madison’s *Notes* record the following discussion of this section:

*Doctor Johnson moved to insert the words “this Constitution and the” before the word “laws”*

*Mr. Madison doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this [judiciary] nature ought not to be given to that Department.*

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<sup>134</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 18. Furthermore, since the Supreme Court believed that the provision invalidated in *Marbury* was one that impermissibly *enlarged* its original jurisdiction, an even *narrower* reading of *Marbury*’s holding is possible: that the Supreme Court is entitled to disregard laws only when such laws violate constitutional restrictions on judicial power by attempting to *enlarge* the judiciary’s delegated authority. *Cf. id.*

<sup>135</sup> See: L.W. LEVY, *op. cit.*, note 12, at 108.

<sup>136</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 18, 28, 60.

<sup>137</sup> U.S. Const. art. III, § 2, cl. 1.

<sup>138</sup> Wilbourn E. BENTON (ed.), *1787: Drafting the U.S. Constitution*, vol. 2, at 1352 (1986).



*The motion of Doctr. Johnson was agreed to nem: con: [unanimously] it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.*<sup>139</sup>

Madison's *Notes* thus indicate that the Convention extended the Supreme Court's authority to cases "arising under this Constitution" only after agreeing that the constitutional jurisdiction was to be "constructively limited to cases of a Judiciary nature". Moreover, on linguistic and common sense grounds, this limiting phrase "cases of a judiciary nature" cannot mean "all cases that happen to get to the Supreme Court", because that would be no limitation at all: it would merely be a redundant recasting of the "all cases arising under" phrase in Article III.

Further evidence of what Madison meant by this phrase came two years later when as a representative in the First Federal Congress, Madison took part in the congressional debate over the President's removal power. On 17 June 1789, Madison flatly denied the power of *any* branch of the national government, including the judiciary, to definitively set the constitutional boundaries of government power. In responding to the charge that Congress had no authority to interpret the Constitution<sup>140</sup>, Madison declared:

*I acknowledge, in the ordinary course of government, that the exposition of the laws and constitution devolves upon the judicial. But, I beg to know, upon what principle it can be contended, that any one department draws from the constitution greater powers than another, in marking out the limits of the powers of the several departments. If the constitutional boundary of either be brought into question, I do not see that any one of these independent departments has more right than another to declare their sentiments on that point ...*

*There is not one government on the face of the earth, ... there is not one in the United States, in which provision is made for a particular authority to determine the limits of the constitutional division of power between the branches of the government. In all systems there are points which must be adjusted by the departments themselves, to which no one of them is competent.*<sup>141</sup>

<sup>139</sup> Max FARRAND, *The Records of the Federal Convention of 1787*, vol 2 (rev. ed.), at 430 (1937).

<sup>140</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 27.

<sup>141</sup> Charlene Bangs BICKFORD, Kenneth R. BOWLING and Helen E. VEIT (eds.), *Documentary History of the First Congress of the United States of America: Debates in the House of Representatives*, vol. 11, at 926 and 927 (1992).

As several scholars have observed, this speech indicates that Madison espoused his mentor Thomas Jefferson's theory of departmental (or coordinate) constitutional review<sup>142</sup>. Madison says that among the "points which must be adjusted by the departments themselves" are all questions pertaining to "the constitutional division of power between the branches of the government"; and since no single department "draws from the Constitution" greater authority than another to define the powers of the several departments, the Framers' constructive limitation of the "arising under" jurisdiction to cases "of a Judiciary nature" has to be construed as a denial of the power of the Supreme Court to issue constitutional pronouncements in *all cases whatsoever*<sup>143</sup>. In light of what Madison said in this Congressional debate, it must be, then, that there is a limited power given to the Supreme Court to mark out the limits of constitutional powers only in "cases of a Judiciary nature", that is, only in cases involving the Constitution's grant of powers to the Supreme Court<sup>144</sup>.

As Professor Robert Clinton explains in his cogent monograph:

*Madison [in the removal debate] only denies the power of the courts to issue final constitutional pronouncements in those cases which involve interpretations of the constitutional powers of coordinate agencies of government. Cases not of a judiciary nature that also arise under the Constitution are preeminently those that require determination of the constitutional authority of the legislative or executive branch. Thus appropriate cases [for judicial review] must be those which do not require*

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<sup>142</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 28 (arguing that Madison's removal-power speech referred to "the three branches of government working out the functional differentiations inherent in the separation of powers" and that "these ideas led the Founders straight to a theory of constitutional review that is best described as functional coordinate review – the controlling doctrine of American constitutional law throughout much of the nineteenth century", to which "John Marshall and his Court adhered"); C. WOLFE, *op. cit.*, note 9, at 95 ("James Madison seems to have shared Jefferson's views regarding judicial review of acts of coordinate branches ... Madison stated his views on the ... question in the removal power debate on June 17, 1789"). For insightful discussions of Jefferson's theory of coordinate constitutional review, see: David N. MAYER, *The Constitutional Thought of Thomas Jefferson*, at 257-294 (1994); D.E. ENGD AHL, *loc. cit.*, note 126, at 279-289; Samuel KRISLOV, "Jefferson and Judicial Review: Refereeing Cahn, Commager and Mendelson", 9 *J. Public Law* 375 (1960).

<sup>143</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 28.

<sup>144</sup> *Id.*

*such a decision. Is it not likely, then, that the 1787 cases of a judiciary nature are exactly those 1789 cases in which, “in the ordinary course of government”, the exposition of the “constitution devolves upon the judicial”? If so, then coordinate review is the appropriate reading of Article III.*<sup>145</sup>

Thus Madison and the other Framers appear to advance a theory of judicial review that did not recognize the courts as the exclusive or final interpreters of all parts of the Constitution in all cases. In other words, limiting the court’s power of constitutional review to “cases of a Judiciary nature” logically means that the Supreme Court does *not* have authority to issue final constitutional pronouncements in cases *not* “of a Judiciary nature”.

What, then, are these cases *not* of a judiciary nature that *also* arise under the Constitution? As described by Madison (and Professor Clinton), these are cases that require a decision about the constitutional authority of the legislative or executive branch<sup>146</sup>. Appropriate cases for judicial review, then, are those that do *not* require such a determination – that is, cases that involve a determination by the judiciary of its own powers. Such cases are, in Madison’s description, “cases of a Judiciary nature”. And that is exactly the sort of case Marshall confronted in *Marbury v. Madison*.

Notice, then, how very narrow is the notion of Supreme Court authority and finality set forth in *Marbury*. The only notion of final, authoritative review that can be drawn from *Marbury* is that the congressional statute ignored<sup>147</sup>, Section 13 of the *Judiciary Act of*

<sup>145</sup> *Id.*

<sup>146</sup> See *supra* text accompanying notes 144 and 145.

<sup>147</sup> Perhaps the true source of the limited “finality” available to Supreme Court opinions would become clearer if scholars and judges spoke more precisely about what a court does when it engages in constitutional review: the Supreme Court does not – because it cannot – “invalidate” or “strike down” laws, as if by judicial ukase they would disappear from the United States Code. Instead, the Court can only “declare” the unconstitutionality of the statutes. As Justice Scalia has accurately explained in this regard:

*In fact, what a court does with regard to an unconstitutional law is simply to ignore it. It decides the case “disregarding the [unconstitutional] law,” Marbury v. Madison, 1 Cranch 137, 178 (1803) (emphasis added), because a law repugnant to the Constitution “is void, and is as no law,” Ex parte Siebold, 100 U.S. 371, 376 (1880).*

*Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 830-31 (1995) (Scalia, J., concurring, joined by Thomas, J.).

1789, pertains to the Court's performance of its own functions, and that therefore the Court's pronouncement on Section 13 is final and binding on the other departments because section 13 sets forth powers and tasks which only the Court can exercise. In other words, the statute is addressed to the courts and concerns the business and jurisdictional authority of the courts, so the Supreme Court necessarily enjoys exclusive (and therefore final)<sup>148</sup> interpretive authority *vis-à-vis that* particular statute in specific cases properly brought to its bar<sup>149</sup>.

Furthermore, this understanding of judicial review also fits perfectly with the notion of separation of powers contained in the U.S. Constitution<sup>150</sup>, for the Constitution does not contain a pure separation of *functions* – that is, the Constitution did not set up a schema of strictly or absolutely separated powers<sup>151</sup>. Instead, each branch of government is given the tools with which to defend itself against encroachments by the other branches. The U.S. Constitution, in short, contains separated *and balanced* powers, separation *with* checks and balances<sup>152</sup>, and each defensive or “checking” tool is uniquely specific to each branch of government: the President has the veto power, Congress has funding authority, and the Supreme Court has the power of judicial review to protect itself

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<sup>148</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 30 (“Finality is an essential aspect of all cases which are of a ‘purely judiciary’ nature, for such cases are susceptible, *by their very nature*, to a final judicial determination. Clearly, if a specific decision could be overturned by another agency of government without recourse, then the case could not have been ‘judiciary’ in that important respect. What is here meant is that susceptibility which obtains when a court is asked to apply a statute which involves the court’s exercise of its own functions ...”).

<sup>149</sup> *Id.* at 17, 29 and 30.

<sup>150</sup> See: *United States v. Nixon*, 418 U.S. 683, 704 and 705 (1974) (linking judicial authority “to say what the law is” to the “basic concept of separation of powers and the checks and balances that flow from the scheme of tripartite government” (citing *The Federalist No. 47* (James Madison); *Marbury*, *supra* note 2, at 177)).

<sup>151</sup> See generally: Glen E. THUROW, “The Separated and Balanced Constitution”, 21 *Texas Tech L. Rev.* 2389 (1990).

<sup>152</sup> *Id.* at 2402 (“The division of powers among the branches, while following the principled division into three kinds of power, must also violate that principled division for the sake of maintaining it”). See also: Jacob E. COOKE (ed.), *Federalist Nos. 47 & 48*, at 323, 332 (James Madison) (1961). Professor Gerhard Casper has referred to the “mixing” of executive and legislative powers that took place under the American dispensation of separation of powers. See: Gerhard CASPER, *Separating Power: Essays on the Founding Period*, at 19-22 (1997).

from legislative acts that impinge upon the Court's own domain, its own jurisdictional authority, *i.e.*, judicial review "in cases of a Judiciary nature"<sup>153</sup>.

Under this reading of *Marbury*, therefore, it is only in cases that involve constitutional provisions directly addressed to the judiciary that the Supreme Court's refusal to apply relevant statutory law is necessarily final<sup>154</sup>. In cases involving constitutional provisions addressed to other branches of government – for example, the legislative powers contained in Article I, section 8 – in such cases, "the Court may surely refuse to apply the law in a particular case, but it may *not* do so with finality in the strict sense"<sup>155</sup>. Even though, as Presidents Jackson and Lincoln recognized, the Court's decision may bind the parties litigant, that does not settle the matter<sup>156</sup>. Congress might still disregard the Court's constitutional ruling by passing another statute to the same effect while withdrawing Supreme Court appellate jurisdiction through the "exceptions and

<sup>153</sup> See: M.J. KLARMAN, *loc. cit.*, note 127, at 1122 (noting that "to the extent that James Madison contemplated the practice of judicial review, it was only in this narrow sense of courts being empowered to protect themselves against deprivations by the other branches of government" (footnote omitted)); R.A. ROS-SUM, *loc. cit.*, note 127, at 235 ("It is not so much that judicial review can be inferred from separation of powers, as that separation of power can be inferred from the specific powers that the Constitution assigns to the branches, thereby enabling each one to be 'a constitutional check on the others' ").

<sup>154</sup> See *supra* note 148.

<sup>155</sup> R.L. CLINTON, *op. cit.*, note 9, at 29.

<sup>156</sup> Some dozen years after the Marshall Court had favorably ruled on the constitutionality of the Bank of the United States in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), President Andrew Jackson vetoed the *Act to Recharter the Second Bank of the United States* based on his own independent evaluation of the constitutional issues:

*It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent...*

*If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of the Government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution ... It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision.*

Andrew JACKSON, "Veto Message" (10 July 1832), reprinted in *Documents of American History*, at 270, 271 and 272 (Henry Steele Commager 9th ed., 1973).

regulations” clause of Article III<sup>157</sup>. In these sorts of cases, Congress, not the Court, will have the “final” decision<sup>158</sup>. This was the theory of coordinate constitutional review espoused by at least three other Presidents besides Madison – *viz.*, Thomas Jefferson<sup>159</sup> Andrew Jackson<sup>160</sup>, and Abraham Lincoln<sup>161</sup> – and even, perhaps, by Chief Justice Marshall himself<sup>162</sup>.

So Madison’s theory of judicial review proffered at the Constitutional Convention and in the First Federal Congress divides constitutionally defective laws into two categories: first, those instances or cases where the unconstitutional law affects the functions and tasks of the judiciary, and second, those where it does not. The most obvious example of the former type of case – a case involving a law “of a Judiciary nature” – is an act of Congress which operates “unconstitutionally” on a court’s performance of its own duties, exactly as occurred in *Marbury*; and it is only here that judicial review can be binding and final<sup>163</sup>.

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President Abraham Lincoln expressed similar views in his First Inaugural Address:

*I do not forget the position assumed by some, that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit ... And, while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case ... can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government ... is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal.*

Abraham LINCOLN, “First Inaugural Address”, reprinted in *id.* at 385, 387.

<sup>157</sup> See *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); see also: R.A. ROSSUM, *loc. cit.*, note 127, at 237.

<sup>158</sup> See: R.L. CLINTON, *op. cit.*, note 9, at 29 and 30.

<sup>159</sup> See *supra* note 142 and accompanying text.

<sup>160</sup> See *supra* note 156; see also: C. WOLFE, *op. cit.*, note 9, at 114 and 115.

<sup>161</sup> See *supra* note 156.

<sup>162</sup> See *supra* note 142; see also generally: D.E. ENGDahl, *loc. cit.*, note 126.

<sup>163</sup> See *supra* text accompanying notes 146-149. Another example of this would be a case involving a constitutional provision like the Sixth Amendment right to confront one’s accusers in a federal criminal trial. Suppose Congress tried to take this right away? That would impinge upon the peculiar functions of the judiciary in handling criminal litigation and thus presents a “case of a Judiciary nature” that is fit and proper for binding, final judicial review. See: R.L. CLINTON, *op. cit.*, note 9, at 30.

For activities in Madison's other category, however – the category of cases arising under a statute involving congressional or executive powers – in such cases, binding or final judicial review is *inappropriate* (indeed, impossible<sup>164</sup>), because the activities in those categories will be unhindered by the constitutional infirmity of the law. For example, executive branch officials can continue applying the statute as written, disregarding the Court's constitutional gloss on the law<sup>165</sup>. Madison's theory, then, is fatal to any doctrine of judicial supremacy on all constitutional topics.

Ironically enough, then, given modern claims about *Marbury* as the historical source of judicial supremacy, this alleged precedent for judicial primacy actually better illustrates James Madison's *narrow* theory of judicial review. And enhancing this historical irony, of course, is the fact that the case involves Madison himself as the defendant. Instead, the first case that actually *does* provide a precedent for the modern theory of judicial supremacy is the second Supreme Court opinion to declare unconstitutional an Act of Congress, the notorious *Dred Scott v. Sandford*<sup>166</sup> – but that's another case, with another lesson, for another day.

<sup>164</sup> See: M.J. KLARMAN, *loc. cit.*, note 127, at 1123 (noting that “Marshall was able to make his decision stick only because he issued no order that Secretary of State Madison could have defied”).

<sup>165</sup> Even more than Congress, the President has numerous means and great flexibility to make sure that the Supreme Court's views in cases *not* of a judiciary nature will not be final and binding. This untouchable flexibility was recently employed to great effect by President Clinton, as suggested in the following newspaper report:

*With a war on, a lot of news is getting crowded off the front pages, some of it even good. For example, the U.S. Labor Department has finally issued regulations enforcing the Supreme Court's 1988 Beck decision. That decision gave union members the right to demand a refund of their dues not used for collective bargaining. Labor unions have fought the decision, and the Clinton Administration refused to implement it lest this bountiful source of coerced, political cash dry up.*

“Just Dues”, *The Wall St. Journal*, 16 Oct. 2001, A26.

<sup>166</sup> 60 U.S. (19 How.) 393 (1856). See: R.L. CLINTON, *op. cit.*, note 9, at 126 (noting that without the *Marbury* myth, “modern judicial review [would have to be] grounded on what would be its primary progenitor ...: *Dred Scott v. Sandford*, the first case in which the Supreme Court set aside a national law on substantive policy grounds alone” (footnote omitted)).





# On the Sometimes Salutary Illusions of Judicial Review

George ANASTAPLO<sup>\*</sup>

*He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.*

*He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.*

The Declaration of Independence<sup>1</sup>

## I.

In discussions of judicial review in the United States, one cannot reasonably hope to say anything both new and important. One can hope only to clarify this matter, perhaps recalling and developing whatever of merit has been said before<sup>2</sup>.

I consider here more the long-term consequences of *Marbury v. Madison*<sup>3</sup> than I do the details of the case itself. That 1803 case did not deal with issues intrinsically momentous, however threatening

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<sup>1</sup> See, for a discussion of the Declaration of Independence: George ANASTAPLO, *Abraham Lincoln: A Constitutional Biography*, at 11-31 (1999).

<sup>2</sup> My amplifications of the constitutional principles discussed here may be found in George ANASTAPLO, *The Constitutionalist: Notes on the First Amendment* (1971; to be reprinted by Lexington Books of Rowman & Littlefield); George ANASTAPLO, *The Constitution of 1787: A Commentary* (1989); George ANASTAPLO, *The Amendments to the Constitution: A Commentary* (1995). See also *infra* note 39.

<sup>3</sup> 5 U.S. (1 Cranch) 137 (1803).

one decision or another might have seemed personally to Chief Justice Marshall and his colleagues<sup>4</sup>.

There is no serious claim that there is anything in the Constitution of 1787 which explicitly provides for any “judicial review” permitting the Courts of the United States (what we now call “the Federal Courts”) to *invalidate acts of Congress as “unconstitutional”*, whatever those Courts might sometimes have to do to protect themselves from legislative or executive encroachments upon their constitutionally-conferred powers<sup>5</sup>.

The Supremacy Clause in Article VI of the Constitution is sometimes looked to for judicial authority here, but it is clearly *not* that. The principal concern exhibited there is that State actions be made to conform to the general constitutional arrangement. Half-hearted attempts were made in the Constitutional Convention of 1787 to provide to the Courts of the United States (or to some other body) the power to review Acts of Congress routinely for their constitutionality – but those attempts did not get far<sup>6</sup>.

One argument for judicial review might rest on the expectation that Courts would be more likely than Congress to interpret the Constitution correctly. But this has not proved a well-founded expectation, beginning with the likely misreading of Article III by the Supreme Court even in *Marbury v. Madison*<sup>7</sup>.

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<sup>4</sup> See, on the Chief Justice’s apprehension with respect to the Jefferson Administration: William W. CROSSKEY, *Politics and the Constitution*, at 765, 802-805 (1953); Albert J. BEVERIDGE, *The Life of John Marshall*, vol. III, at 50-100, 112ff., 157-222 (1919). See also *infra* notes 20 and 35.

<sup>5</sup> Compare, on the sad case of the United States Supreme Court and the Year 2000 Presidential Election, George ANASTAPLO, “Prudence and the Constitution”, in Ethan FISHMAN (ed.), *Tempered Strength: Studies in the Nature and Scope of Prudential Leadership*, at 203 (2002). See also *infra* notes 26 and 36.

<sup>6</sup> See, e.g.: A.J. BEVERIDGE, *op. cit.*, note 4, at 114-116. Judicial review was sometimes presupposed during the Ratification Campaign, as in *Federalist No. 78*, but such talk was tailored to the circumstances, particularly to the stage of the Ratification debate in any particular State, making the *Federalist* not fully reliable for constitutional interpretation thereafter. See: A.J. BEVERIDGE, *op. cit.*, note 4, at 119 and 120. See, on the use and abuse of the *Federalist*: G. ANASTAPLO, *The Constitution of 1787: A Commentary*, *op. cit.*, note 2, p 334 (Index); G. ANASTAPLO, “The Constitution at Two Hundred: Explorations”, 22 *Texas Tech L. Rev.* 967, 1042 (1991).

<sup>7</sup> See, e.g.: G. ANASTAPLO, *The Constitution of 1787: A Commentary*, *op. cit.*, note 2, at 139-145. See also *infra* note 17.

Indeed, in all of the great controversies in which Congress and the Supreme Court have differed about Constitutional interpretations for two centuries now, Congress has been clearly correct and the Court has been simply wrong. There have been times, of course, when both Congress *and* the Court have been wrong, as with respect to some of the repressive measures of the Cold War. Notable instances in which the Court and Congress differed, with the Congress clearly having been right, have been the pre-Civil War *Dred Scott Case*<sup>8</sup>, the post-Civil War *Civil Rights Cases*<sup>9</sup>, and the early New Deal *Commerce Clause Cases*<sup>10</sup>. In all of these, and in like instances, the Supreme Court finally came around to the view of the Congress.

Judicial unreliability, if not even irresponsibility, in these matters may be seen in the *Commerce Clause Cases*: the Court's chronic misreadings of the Commerce Clause (for almost a century) obliged Congress to resort to legislative and other contortions in order to get around judicially-imposed obstacles. This may be seen, for example, in *Missouri v. Holland*<sup>11</sup>, which records the treaty subterfuge relied upon (in which Canada figured) so that the Government of the United States could protect migratory birds in its own Country, the kind of objective that could have been readily dealt with (as it is today) using the powers provided by a properly-read Commerce Clause.

We have seen in recent years attempts by some Members of the Supreme Court to return to the Commerce Clause follies of the pre-1940's<sup>12</sup>. But these current experiments are likely to be swept aside as the implications and requirements of economic globalization become apparent. It has long been understood by prudent citizens that the Government of the United States is simply not going to be the only government of a modern industrialized country which does *not* have comprehensive authority (for ill as well as for good) over its domestic economy. This authority is likely to extend to all, or to

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<sup>8</sup> 60 U.S. (19 How.) 393 (1857).

<sup>9</sup> 109 U.S. 3 (1883).

<sup>10</sup> See, on commerce and the Commerce Power: G. ANASTAPLO, *The Constitution of 1787: A Commentary, op. cit.*, note 2, at 332 (Index).

<sup>11</sup> 252 U.S. 416 (1920)

<sup>12</sup> See, e.g.: George ANASTAPLO, " 'McCarthyism', The Cold War, and Their Aftermath", 43 *S.D. L. Rev.* 103, 151-156 (1998).

virtually all, activities which materially affect the economy of the Country.

## II.

We cannot be reminded too often that the judiciary under the Constitution of 1787 is patterned upon the judiciary under the British Constitution. This is one reason why Article III (the Judiciary Article) could be as short as it is, compared to the articles in the Constitution establishing the Legislative and the Executive. Since judicial review of Acts of Parliament was never contemplated by the British Constitution, it would have been expected in 1787 that reliance upon judicial review of *Acts of Congress* would require explicit constitutional authorization. It is sometimes said that a written constitution empowers the judiciary to review legislation for constitutionality. But it should be noticed that some of the more important parts of the British Constitution are written, even as some parts of the Constitution of the United States (including essential understandings inherited from the British) are unwritten – and yet the British courts are certainly not expected to judge Acts of Parliament for their constitutionality<sup>13</sup>.

On the other hand, the highest judicial (as well as political) authority in Great Britain *could* review, for constitutionality and otherwise, the governmental acts of the British Colonies in North America. Similarly, the highest judicial (as well as the highest legislative) authority in the United States are explicitly authorized to supervise acts of the States to insure their conformity to both the Constitutions *and Laws* (as well as the Treaties) of the United States. This is recognized in, among other places, the Supremacy Clause in Article VI<sup>14</sup>.

One can better appreciate the lack of authorization of judicial review of Acts of Congress by the Courts of the United States by noticing the explicit authority required for something like judicial review in Canada and in a few Western European countries since

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<sup>13</sup> Are not the British courts expected, however, to keep in mind the British Constitution as they interpret Acts of Parliament?

<sup>14</sup> British courts, too, may now have to assess Acts of Parliament in the light of the rules and rulings of the European Union and other international associations.

the Second World War<sup>15</sup>. How, then, can judicial review be considered provided for if, recalling the inherited constitutional background of 1787, there is no explicit provision for it in the Constitution of 1787?

It is not generally noticed that there was not, before the 1857 *Dred Scott Case* (seventy years after the Constitutional Convention), any major piece of Congressional legislation declared unconstitutional by the United States Supreme Court<sup>16</sup>. The 1803 ruling in *Marbury v. Madison* dealt, somewhat peculiarly, with a minor provision of the *Judiciary Act of 1789*<sup>17</sup>. We should ask ourselves, therefore, how respect for the Constitution was maintained in the United States for those seven decades. We should also ask ourselves how respect for the Supreme Court was maintained in such matters after its disastrous intervention in 1857. We can see here how an article of faith can be persisted in long after the evidence against it has seemed conclusive<sup>18</sup>.

### III.

The exercise of judicial review is not the only major departure by the United States Supreme Court from its British model. There is also that Court's 1938 disavowal (in *Erie Railroad Company v. Tompkins*<sup>19</sup>) of power in the Federal Courts to shape in any way the Common Law of the Country, if only through its rulings in whatever civil litigation does happen to find its way before those Courts.

This means that the Federal Courts, including the Supreme Court, must now be governed entirely in their Common Law rulings

<sup>15</sup> See, on judicial review in Canada: T.A. CROMWELL, "Aspects of Constitutional Judicial Review in Canada", 46 *S.C. L. Rev.* 1027 (1995).

<sup>16</sup> See, on *Dred Scott*: G. ANASTAPLO, *The Constitution of 1787: A Commentary*, *op. cit.*, note 2, at 333 (Index); G. ANASTAPLO, *The Amendments to the Constitution: A Commentary*, *op. cit.*, note 2, at 457 (Index); see, also: A.J. BEVERIDGE, *op. cit.*, note 4, at 131 and 132 n. 2.

<sup>17</sup> See, on the *Judiciary Act of 1789*: A.J. BEVERIDGE, *op. cit.*, note 4, at 127-130; Albert J. BEVERIDGE, *Encyclopedia of the American Constitution*, vol. 3, at 1075 (1986). See, on *Marbury v. Madison*, *id.*, at 1199; A.J. BEVERIDGE, *op. cit.*, note 4, at 101-156; see, also, *supra* note 7.

<sup>18</sup> Related questions deal with how it was expected, between 1777 and 1789, that constitutionalism would govern under the Articles of Confederation, which provided for no general judicial system.

<sup>19</sup> 304 U.S. 64 (1938).

by whatever happens to have been said on the points in question by the State judiciary deemed authoritative in the particular case. The State Courts, in such matters, can do what Common Law judges (in “discovering the law”) have always done – but which the Federal Courts (even when serving as Common Law judges) are now forbidden by the United States Supreme Court (*not* forbidden by either the Constitution or the Congress) to do<sup>20</sup>.

The 1938 abandonment (in *Erie Railroad Company v. Tompkins*) of the longstanding practice (justified by Justice Joseph Story in the 1840 case of *Swift v. Tyson*<sup>21</sup>) – that abandonment was prompted, in part, by a desire to discourage “forum shopping” by plaintiffs. Forum shopping continues, however, but in a more sophisticated (and hence less obvious) form<sup>22</sup>.

But more critical in the movement that led to the 1938 shift was a fundamental change in the authoritative jurisprudential opinion in the United States as to what Law is and does. Once Law came to be seen primarily as an expression of power, the Common Law ceased to be regarded primarily as a dictate of reason to be discovered (or uncovered) with a view to doing justice and drawing both upon enduring standards of good and bad and upon instructive precedents<sup>23</sup>. Instead, emphasis is placed upon the dependence of

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<sup>20</sup> See, on *Erie Railroad Company v. Tompkins*: W.W. CROSSKEY, *op. cit.*, note 4, at 1391 (Index); see, also: George ANASTAPLO, “Mr. Crosskey, the American Constitution, and the Natures of Things”, 15 *Loy. Univ. Chic. L.J.* 181 (1984); Malcolm P. SHARP, “Crosskey, Anastaplo, and Meiklejohn on the United States Constitution”, 1973 *U. Chic. Law School Record* 3 (1973). Most common law determinations in the Courts of the United States would be in cases coming within the diversity jurisdiction of those Courts. See, on the diversity jurisdiction of the Courts of the United States: John T. NOONAN, Jr., “Judicial Impartiality and the Judiciary Act of 1789”, 14 *Nova L. Rev.* 152 (1989).

<sup>21</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>22</sup> For example, one will try to get one’s litigation into the Federal Courts as soon as possible if it is anticipated that the law in the relevant State Courts is likely to change in a way not favorable to one’s interest whenever those State Courts have an opportunity to return to that law.

<sup>23</sup> See, on the sources for such enduring standards: George ANASTAPLO, *But Not Philosophy: Seven Introductions to Non-Western Thought*, at 303-343 (2002).

the Common Law upon some sovereign – and that is now said to be a State Government (including its judiciary)<sup>24</sup>.

Thus, both *Marbury* and *Erie* depend upon mistaken, if not even bizarre, notions about what judges do and what the constitutional history of the Anglo-American people has been.

#### IV.

As a practical matter – and in these matters one *should* try to be practical – as a practical matter, it is Congress which has mostly to be depended upon for effective review of the laws of the United States for their constitutionality. There are many kinds of laws which the Courts cannot, or at least do not, review. Certainly, there is no established schedule for such review by the Courts of the United States, which can mean, for example, that the constitutionality of an Act of Congress may not be assessed, until decades after its enactment, in a Court of the United States<sup>25</sup>. The conduct that cannot be reviewed includes the highly questionable “supermajority” rule now in effect in the United States Senate<sup>26</sup>.

Congress, on the other hand, has the opportunity, as well as the duty, to review early on all bills for their constitutionality. Congress does not depend, for *its* opportunity to pass on constitutionality, upon chance litigation and jurisdictional requirements. And Congress can properly do what Courts find it hard *not* to do: Con-

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<sup>24</sup> This bears upon the question whether the Bill of Rights of 1791 should be considered applicable against State Governments as well as against the National Government. Another way of putting this question is to ask whether *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), was rightly decided. See: W.W. CROSSKEY, *op. cit.*, note 4, at 1056-1082, 1090-1101, 1124 and 1134; see, also: G. ANASTAPLO, *The Amendments to the Constitution: A Commentary*, *op. cit.*, note 2, at 455 (Index); *infra* note 32; G. ANASTAPLO, “Law, Judges, and the Principles of Regimes: Explorations”, 70 *Tenn. L. Rev.* 519 (“A Return to *Barron v. Baltimore*”) (2003).

We should notice here that whatever the applicability of the Bill of Rights, a judicial invalidation of the repressive Alien and Sedition Acts was evidently not much relied upon by the opponents of those 1798 Acts. May a jury, in applying a law, consider its constitutionality? See: A.J. BEVERIDGE, *op. cit.*, note 4, at 117.

<sup>25</sup> This was evident both in *Marbury* and in *Dred Scott*. See *supra* notes 3 and 8.

<sup>26</sup> See, *e.g.*: George ANASTAPLO, “*Bush v. Gore* and a Proper Separation of Powers”, 34 *Loy. Univ. Chic. L.J.* 101 (2002), n. 12. See, also, *supra* note 5.

gress can mix both constitutional and policy (or political) considerations in passing on proposed legislation, something that Courts are *not* supposed to do.

Thus, there need not be for Congress the kind of artificiality, evident in the post-Civil War *Civil Rights Cases*, which sees the Supreme Court invalidating Congressional provisions on one ground even as it recognizes that such provisions might someday be validated on other grounds that did not happen to be argued on that occasion<sup>27</sup>.

The constant Congressional review of proposed statutes for constitutionality is the kind of review that the People of the United States, as the ultimate authority, are best able to supervise and to guide. And it is also usually through the Congress that the People initiate constitutional amendments that may seem to be necessary<sup>28</sup>.

One unfortunate consequence of the expectation of judicial review in the United States is that it encourages Congress to shirk its duty to review all proposed legislation for constitutionality – and this despite the fact that judicial review considers, as a matter of practice, only a small part of the constitutional issues which confront Congress. We should be reminded of the routine, and evidently effective, reliance upon Congressional respect for the Constitution before 1857.

## V.

Even the President was intended to have a more systematic “say” about the constitutionality of Congressional legislation than were the Courts<sup>29</sup>. But the formal power of the President here is limited to less than a fortnight, while Congress may have months, if not years, to assess constitutionality at various stages of the deve-

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<sup>27</sup> See: *Civil Rights Cases*, 109 U.S. 3, at 19.

<sup>28</sup> Certainly, it is much easier for the People to encourage correction by Congress of its misreadings of the Constitution than it is to encourage correction by the Supreme Court of its misreadings.

<sup>29</sup> See, on the implications for judicial review (or the lack thereof) as well as for legislative supremacy, of the Presidential veto power: G. ANASTAPLO, *The Constitution of 1787: A Commentary*, *op. cit.*, note 2, at 339 (Index).



lopment and application of legislation. In addition, Congress can return to any questionable legislation, after its enactment, for reassessment and correction. Most of what Congress does here is not obvious, but it is continuing and vital.

The unreliability of the Executive as a guardian of constitutionality is testified to by the fact that no President, in the last six decades, has considered himself obliged to ask for a Congressional declaration of war before embarking upon full-scale hostilities abroad. Presidential single-mindedness with respect to these matters does not inspire confidence in those who consider it prudent for the Government of the United States both to respect *and to seem to respect* its Constitution<sup>30</sup>.

A salutary, however rare, correction in these matters was provided by the United States Supreme Court in the 1952 *Steel Seizure Case*<sup>31</sup>. It would have been better, of course, if Congress had taken the lead in checking Presidential usurpation on that occasion, something that Congress does do from time to time through its use of the Power of the Purse and otherwise. Perhaps Congress would once again do more if everybody involved (including the People) came to recognize that Congress was intended, by the Framers of the Constitution, to be the dominant branch of the National Government of the United States<sup>32</sup>.

## VI.

The powers of Congress are still such that it can, whenever it chooses, severely restrict the doings not only of the Executive but also of the Judiciary.

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<sup>30</sup> Consider, however, the use of United Nations authorization for the Korean War in 1950 and for the Gulf War in 1990. See, on the effort to curb the President through the War Powers Resolution: G. ANASTAPLO, *The Constitution of 1787: A Commentary*, *op. cit.*, note 2, at 339 (Index).

<sup>31</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 572 (1952).

<sup>32</sup> Perhaps more should also be done by Congress with the Republican Form of Government Guarantee in Article IV of the Constitution. This could bear on the question of the applicability (from the outset) of the Bill of Rights against the States (see *supra* note 24) and on the proper correction of legislative apportionment in the States. See: G. ANASTAPLO, *The Amendments to the Constitution: A Commentary*, *op. cit.*, note 2, at 438 and 439 n. 205.

The underlying illusions of judicial review conceal from view the authority of Congress to control much of what the National Courts do, including when Courts meet and perhaps what they might consider. Even in *Marbury*, it should be remembered, the Congress did not permit the Supreme Court to act as soon as it might have<sup>33</sup>.

And, in *Marbury*, the Court, in its reading of Article III, in effect conceded – perhaps improperly – that the Congress can effectively strip the Supreme Court of much of its jurisdiction<sup>34</sup>. The Supreme Court very much depends here upon public opinion to shield it from improper Congressional interference, including that radical (however rarely resorted to) form of interference, impeachment of Justices and their removal from office<sup>35</sup>.

All this is not to deny that the Courts, like the President, may have a duty to try to protect themselves from improper Congressional interference. Vital to the safety, and the continuing effectiveness, of the National Courts in the United States is that they do, and do well, only that – but yet *all* of that – which they, as Judges, were sensibly intended to do<sup>36</sup>.

## VII.

One presupposition of judicial review as we know it should be noticed, and that is the notion that because an Act of Congress happens to have been identified by the Supreme Court as “unconstitutional”, then that Act is void. We could well have had, instead, a situation in which the Court expresses its *opinion* that an Act is

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<sup>33</sup> See: A.J. BEVERIDGE, *op. cit.*, note 4, at 94-97, 111. “On Friday, April 23, 1802, [a] bill passed [the House of Representatives] and the Supreme Court of the United States was practically abolished for fourteen months”. *Id.*, at 97.

<sup>34</sup> See: *Marbury v. Madison*, *supra* note 3, 173ff. (1803); see, also: A.J. BEVERIDGE, *op. cit.*, note 4, at 136ff.

<sup>35</sup> This evidently was a concern which guided Chief Justice Marshall in so shaping his *Marbury* Opinion that the Court did not order the Jefferson Administration to *do* anything. Also important is what Congress and the President may do to enlarge the membership of Courts. See *supra* note 4.

<sup>36</sup> It is odd that the Supreme Court has depended upon Congress to recognize, which Congress has yet to do, all of the jurisdiction conferred upon the Court by the Constitution. Here, too, misreadings of the Constitution have distorted the proper relations among branches of the National Government. See the text at note 5, above.

unconstitutional, leaving it to Congress to decide what to do with that assessment<sup>37</sup>.

The *opinions* that Courts have in these matters can, and probably should, guide Congress in what it does. Certainly, the prospect of judicial review, however questionable it may be in its origins and however limited it may be in its applications, can encourage Congress to restrain itself somewhat.

One salutary consequence of *Marbury*, whatever reservations one may have about it and its progeny<sup>38</sup>, is that it does teach, emphatically, that the Constitution should be authoritative in the governance of the political affairs of the United States, so much so that even extra-constitutional measures might sometimes have to be resorted to (by one or another branch of the National Government) in order to advance the cause of constitutionalism<sup>39</sup>.

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<sup>37</sup> This is what happens, in effect, when the President vetoes a bill because of its supposed unconstitutionality, or for any other reason, which veto Congress can then override by a two-thirds vote in each House.

<sup>38</sup> An extreme form of that progeny is *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>39</sup> See, on the measures resorted to by President Lincoln: G. ANASTAPLO, *op. cit.*, note 1, at 177, 185, 197. See, for other discussions of the matters touched upon in this survey, the bibliographies in John A. MURLEY, William T. BRAITHWAITE and Robert L. STONE (eds.), *Law and Philosophy: The Practice of Theory*, at 1073-1145 (1992); G. ANASTAPLO, "Law & Literature and the Moderns: Explorations", 20 *Northern Ill. Univ. L.R.* 251, 581-710 (2000); G. ANASTAPLO, "Constitutionalism, The Rule of Rules: Explorations", 39 *Brandeis L.J.* 17, 219-286 (2000-2001); see also the massive bibliography in political philosophy compiled by Professor John A. MURLEY, Rochester Institute of Technology (to be published by Lexington Books).

The matters discussed in this article are returned to in George ANASTAPLO, "September 11. The ABC's of a Citizen's Responses: Explorations", *Oklahoma City University Law Review* (forthcoming).



# *Marbury v. Madison* and Canadian Constitutionalism: Rhetoric and Practice<sup>\*</sup>

LUC B. TREMBLAY<sup>\*\*</sup>

*Marbury v. Madison*<sup>1</sup> established important constitutional principles that have legitimate claim to universality. Indeed, Chief Justice Marshall's reasoning is partly responsible for the worldwide spread of judicial review<sup>2</sup>. Since the entrenchment of the *Canadian Charter of Rights and Freedoms*<sup>3</sup> in the Constitution in 1982, *Marbury* has become an explicit part of Canadian constitutional rhetoric. The main question I address in this text is whether, or the extent to which, the constitutional principles recognized in *Marbury* underlie and can make sense in Canadian constitutional discourse and practice.

*Marbury* is a complex case. It dealt with many difficult issues and suggests various levels of understanding. For Canadian constitutional lawyers, for example, the case is generally understood as supplying the basic legal and logical justification of two principles: the supremacy of the written Constitution and the legitimacy of

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<sup>\*</sup> A version of this text has been presented at a seminar on *Marbury v. Madison* held at the University of Montreal in 2002 and at a Symposium to mark the 200th anniversary of *Marbury v. Madison*, held at the George Washington University Law School in April 2003. I wish to thank my colleagues David Gruning and Jean Leclair for having read a previous draft of this text and for their comments. I also thank the Social Sciences and Humanities Research Council of Canada for its financial support.

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<sup>1</sup> 5 U.S. (1 Cranch) 137 (1803) [hereinafter *Marbury*].

<sup>2</sup> See, for example: W.E. NELSON, *Marbury v. Madison, The Origins and Legacy of Judicial Review* (2000), chapter 8 entitled "The Worldwide Spread of Judicial Review".

<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, (U.K.) 1982, c. 11 [hereinafter "the Charter"].

judicial review of the constitutionality of legislative and executive acts<sup>4</sup>. But *Marbury* can also be understood as expressing the dominant characteristics of what I shall call the “American model of constitutionalism”. Now, Canadian constitutionalism also recognizes the supremacy of the written Constitution and the legitimate authority of the judiciary to review the constitutionality of legislative and executive acts. Moreover, it has become almost natural to hear in Canada that the Canadian Constitution has been “americanized” – at least to a certain extent. Given the Canadian British legal heritage of Canada and the preamble of the *British North America Act*, now the *Constitution Act, 1867*<sup>5</sup>, providing that the Constitution is “similar in principle to that of the United Kingdom”, it is interesting to verify whether, or the extent to which, the American model of constitutionalism underlies and can make sense of Canadian constitutional discourse and practice.

The question whether the Canadian Constitution is similar in principle to that of the United States, as opposed to that of the United Kingdom, has always been a contested issue within Anglo-Canadian constitutional theory. Albert V. Dicey, for example, the most important British constitutional theorist in modern times, argued in 1885 that the preamble of the *British North America Act* was a “diplomatic inaccuracy”. The truth required one to substitute the word “States” for the word “Kingdom”. In Dicey’s mind, it was clear that “the Constitution of the Dominion [was] in its essential features modelled on that of the Union [that is, the United States]”<sup>6</sup>. Many Canadian constitutional lawyers disagreed. For example, in 1892, in his treatise on constitutional law, William Henry Pope Clement argued that Dicey’s view was “quite erroneous [and] founded upon a very superficial observation of the structure of government in this Dominion”<sup>7</sup>. In 1889, in his own treatise, J.E.C. Munro asserted that Dicey’s view was “very far from the truth”<sup>8</sup>. Of course, the value

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<sup>4</sup> See, for example: P.W. HOGG, “The Charter of Rights and American Theories of Interpretation”, (1987) 25 *Osgoode Hall L.J.* 87, at 92.

<sup>5</sup> 30 & 31 Vict., c. 3 (U.K.), reprinted in R.C.S. 1985, App. II, No. 5.

<sup>6</sup> A.V. DICEY, *Introduction to the Study of the Law of the Constitution*, 10th ed., London, MacMillan Education, 1950, at 165 and 166.

<sup>7</sup> W.H.P. CLEMENT, *The Law of the Canadian Constitution*, Toronto, Carswell, 1892, at 3.

<sup>8</sup> J.E.C. MUNRO, *The Constitution of Canada*, Cambridge, Cambridge University Press, 1889, at 2.

of these positions might depend on what elements are taken as “essential” characteristics of the Canadian, American and British constitutions. For example, Dicey emphasized the nature of Canadian federalism whereas Clement and Munro emphasized the Parliamentary nature of the Canadian system of governance. Moreover, the value of the contested positions might depend on what essential characteristics are taken as similarities and differences in “principle”.

So, in a first section, I shall describe what I mean by American model of constitutionalism. Then, in a second section, I shall argue that this model of constitutionalism played no significant role in Canadian constitutional law and theory from the creation of Canada in 1867 up until 1982. In a third section, I shall show that since 1982, however, the American model of constitutionalism has become part of Canadian constitutional rhetoric. Chief Justice Marshall’s reasoning in *Marbury* has actually been conceived as offering the theoretical premises that can justify the supremacy of the Canadian Constitution and the legitimacy of judicial review in Canada. Finally, in a fourth section, I shall argue that Canadian constitutional practice, namely constitutional adjudication and interpretation, is radically inconsistent with the American constitutional rhetoric. When we look at what the courts do, instead of looking at what they say they do, one should conclude that Canada has not adopted the American model of constitutionalism. I shall conclude by suggesting that Canadian constitutionalism peculiarly resembles, not entirely facetiously, to that of the first planet visited by the little prince in the St. Exupery’s tale.

## I.

The American model of constitutionalism, as I understand it, derives from Chief Justice Marshall’s reasoning in *Marbury*. The model provides that the written Constitution is a founding legal text made morally legitimate by virtue of an original act of consent by the people. The legal supremacy of the Constitution and the legitimate authority of the judiciary to review the constitutionality of legislative and executive acts directly flow from and are justified in terms of this basic idea. This model can be described in four theses<sup>9</sup>.

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<sup>9</sup> These theses are not meant to review the various questions and arguments analysed in *Marbury v. Madison*.

I shall call the first the “Sovereign People” thesis. It claims that the people have an original right to establish their own Constitution. The specific form in which the people can exercise this basic right does not really matter, but it should amount to a form of popular consent to a set of principles, rules or standards (it could be a form of ratification, such as in the United States, or an *a posteriori* referendum). What is significant in this thesis is the claim that the people have supreme, indeed ultimate, moral and political authority to establish the legal Constitution of their country. It follows from this thesis that the exercise of this basic right by the people gives the principles of the Constitution their supreme normative legal and political force, that is, their supremacy. This thesis has been stated by Chief Justice Marshall in *Marbury*:

*That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent. ... Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation.<sup>10</sup>*

The second thesis follows from the first. I shall call it the “Agency of the People” thesis. It claims that all legitimate governmental powers in the State owe their existence, scope and normative force to the sovereign will of the people as expressed in the written Constitution. Accordingly, the authority of the various branches of government, either the courts, the legislatures or the executives, is derivative. It is delegated by and subordinated to the original will of the people. Of course, the powers delegated to the government can be limited or unlimited and, where they are limited, the Constitution should be written. But in all cases, the various branches of government should be conceived as agents or trustees of the people. It follows from this thesis that any governmental action or decision that goes beyond the sphere of powers delegated by the people originally is of no force and effect, that is, void. This thesis is supported by the following assertions of Chief Justice Marshall:

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<sup>10</sup> *Marbury*, *supra* note 1, 176 and 177.



*This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description. The powers of the legislature are defined and limited, and that those limits may not be mistaken, or forgotten, the constitution is written. ... Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.<sup>11</sup>*

The Agency of the People thesis has been clearly stated in *McCulloch v. Maryland*<sup>12</sup>:

*The government proceeds directly from the people; is 'ordained and established,' in the name of the people ... The Government of the Union then (whatever may be the influence of this fact on the case) is, emphatically and truly, a Government of the people. In form and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit. ... [T]he Government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the Government of all; its powers are delegated by all; it represents all, and acts for all.<sup>13</sup>*

The third thesis follows from the first two. I shall call it the “Judicial Duty” thesis. It claims that the specific province of the courts is to say what the law is, including the explanation and interpretation of particular rules, in order to act in accordance with it. Thus, if two laws appear to conflict in particular cases, the judges must determine which one should govern the cases, that is, the one that is superior in validity, obligation and authority. Since the Constitution is the supreme law of the land, it must be upheld by the courts against all inconsistent governmental actions. This judicial duty follows from the fact that the original authority of the sovereign people (thesis 1) is superior to the delegated or derivative authority of its agents (thesis 2). It follows from this thesis that judicial review of the constitutionality of governmental actions is legitimate. It has been legally and morally authorized by the original will of the sovereign people, as expressed in the written Constitution,

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<sup>11</sup> *Id.*

<sup>12</sup> 17 U.S. (4 Wheat.) 316 (1819) [hereinafter *McCulloch*].

<sup>13</sup> *Id.*, 404 and 405.

conceived as superior in legal and moral authority to the subordinate will of its agents, including the courts. In a well-known passage, Chief Justice Marshall said:

*It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the Constitution; and the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply.<sup>14</sup>*

Now, as we have seen, in Marshall's view, "all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation"<sup>15</sup>.

The fourth thesis follows from the foregoing theses. I shall call it the "Original Intention" thesis. Since all laws (constitutional, legislative) are made legitimate by virtue of the people's original right to establish the constitution of their choice (theses 1 and 2) and since judicial review of the constitutionality of governmental actions is made legitimate by virtue of the original will of the sovereign people, as expressed in the written Constitution (thesis 3), the constitutional norms on the basis of which the courts may legitimately determine the legal validity of governmental actions must have been declared or intended by or must derive from or be justified in terms of this original will. This presupposes, as a matter of logical necessity, that there are original constitutional norms, that is, that the written Constitution possesses some objective and determinate original meaning, and that there exists a rational methodology that makes it possible for the courts to ascertain them. It follows from this thesis that the original constitutional norms and the rational interpretive methodology must be determined and understood in accordance with a version of what American constitutional scholars

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<sup>14</sup> *Id.*, 177 and 178.

<sup>15</sup> *Id.*, 177.

now call “originalism”. Of course, the true nature of the original constitutional norms and the nature of true originalist methodology is a matter of debate among specialists. But the significant point is the formalist claim that no judicial interpretation and application of the written Constitution is legitimate unless it is made in accordance with the principles (rules, purposes, values, standards) intended or understood by the original people.

It is not unfair to say that Chief Justice Marshall’s theory of constitutional interpretation and meaning came within some version of originalism, although not within strict constructionism. The assertions that the principles established by the original people are fundamental and “designed to be permanent” and that it was the province and duty of the judicial department “to say what the law is”, came in all probability within some version of what has been called the “declaratory theory”<sup>16</sup>. In *Marbury*, with respect to another issue, he asserted that even if it may be difficult for the courts to apply a given rule of law to particular cases, “there cannot, it is believed, be much difficulty in laying down the rule”<sup>17</sup>. He examined the “obvious meaning” of the words<sup>18</sup> and the formal logic of the constitutional text so as to ascertain the original intention<sup>19</sup>. Yet, Marshall’s legal formalism was best stated in *Osborn v. Bank of the United States*<sup>20</sup> and in *McCulloch v. Maryland*<sup>21</sup>. In *Osborn*, he professed his commitment to formalism:

*Judicial power, as contradistinguished from the powers of the laws, has no existence. Courts are mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is mere legal discretion, a discretion to be exercised in discerning the course described by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.*<sup>22</sup>

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<sup>16</sup> The declaratory theory of judging holds that judges do not make or create the law, but “declare” the rules or norms that already exist in the body of case law, statutes and constitutional texts in order to apply them to relevant cases. The theory was particularly influential in the nineteenth century.

<sup>17</sup> *Marbury*, *supra* note 1, 165.

<sup>18</sup> *Id.*, 175.

<sup>19</sup> For example, *id.*, 174, 177ff.

<sup>20</sup> 9 Wheat 738 (1824), 866 [hereinafter *Osborn*].

<sup>21</sup> *Supra* note 12.

<sup>22</sup> *Supra* note 20.

In *McCulloch*, he applied it to constitutional interpretation:

*A constitution, to contain an accurate detail of all subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language... [W]e must never forget, that it is a constitution we are expounding.<sup>23</sup>*

These four theses are constitutive of the American model of constitutionalism. They provide the basic justification of the principles most closely associated with *Marbury*, namely, the supremacy of the written Constitution and the legitimacy of judicial review of legislation.

Of course, within the American model of constitutionalism, judicial review is plainly designed to be a “counter-majoritarian force” in the system of government<sup>24</sup>. But this fact raises no problem of legitimacy. Majoritarianism, as a normative theory of democracy, is not conceived as the ultimate ground of political legitimacy. The ultimate ground of legitimacy is the original will of the people. Accordingly, even if the members of the legislatures are elected and collectively represent the electorate, as political bodies, they act as subordinate “agents” of the original people. Their collective will, even supported by the electorate, cannot be conceived as a source of legitimate laws beyond what the original people have agreed to authorize the legislatures to do. The relevant question, then, is not whether judicial review is consistent with majoritarianism, but whether the original people intended to authorize the legislatures to do such or such things. It is a question of constitutional interpretation<sup>25</sup>.

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<sup>23</sup> *McCulloch*, *supra* note 12.

<sup>24</sup> A. BICKEL, *The Least Dangerous Branch*, at 16 (1962).

<sup>25</sup> From this point of view, Bickel’s counter-majoritarian objection to judicial review hits directly not only judicial review, but also the normative force of the American model of constitutionalism. It is made intelligible through a set of normative assumptions that postulate the validity of majoritarianism.

## II.

Chief Justice Marshall in *Marbury* expressed very powerful and, in my view, coherent constitutional ideas. Have his views ever been received in Canadian constitutional law? The answer is no, at least not until 1982.

Before 1982, Canadian cases rarely referred to *Marbury* explicitly. Yet, the Judicial Committee of the Privy Council and the Canadian courts recognized the supremacy of the *British North America Act* and the legitimacy of judicial review on the basis of arguments quite similar to that of Chief Justice Marshall. In 1869, for example, two years after the creation of Canada, Chief Justice Ritchie of New Brunswick stated in *The Queen v. Chandler*<sup>26</sup> that “[if legislatures] do legislate beyond their powers, or in defiance of the restrictions placed on them, their enactments are no more binding than rules or regulations promulgated by any other authorized body”<sup>27</sup>. Ten years later, in 1879, Chief Justice Meredith of the Quebec Superior Court explicitly referred to Chief Justice Marshall’s reasoning in *Marbury*, “to whom a higher authority can not be cited”, in order to justify the supremacy of the Constitution, the nonlegal character of legislative acts taken beyond the limits of the authority conferred upon them by the Constitution and the judicial duty to disregard laws that do not respect these limits<sup>28</sup>. In *Langlois v. Valin*<sup>29</sup>, he said: “To me it seems plain that a statute, emanating from a legislature not having power to pass it, is not law; and that it is as much the duty of a judge to disregard the provisions of such a statute, as it is his duty to obey the law of the land”<sup>30</sup>.

One might think, therefore, that Canadian constitutionalism had originally been conceived as coming within the American model of constitutionalism. But this would be wrong for the following reasons. First, the supremacy of the Canadian Constitution did not derive from the fact that the *British North America Act* was the

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<sup>26</sup> (1869) 12 N.B.R. 556.

<sup>27</sup> *Id.*, 567. See, in general: B.L. STRAYER, *The Canadian Constitution and the Courts*, 3th ed., Toronto, Butterworths, 1988, at 19-22, 38-50.

<sup>28</sup> B.L. STRAYER, *id.*, at 41.

<sup>29</sup> (1879) 5 Que. L.R. 1, aff’d 3 S.C.R. 1, aff’d 5 A.C. 115 (P.C.).

<sup>30</sup> *Id.*, 17. See also the reference to Alexander Hamilton asserting that “no legislative acts, therefore, contrary to the constitution can be valid”, at 16.

expression of a sovereign people having an original right to establish or consent to their own principles of government. It derived from the fact that it was an Act of the British Parliament recognized by judges as having sovereign legal authority. The Constitution was an ordinary statute enacted by the Imperial Parliament. Accordingly, the supremacy of the Constitution was not based upon the Sovereign People thesis. It was a mere corollary of the doctrine of sovereignty of Parliament, as understood within orthodox British constitutional theory, and applied to colonial context. As it has been said, it was based upon imperialism<sup>31</sup>.

Secondly, although the Canadian legislatures and Parliament were regarded as non-sovereign law-making bodies, having a form of delegated authority, as in the American model, they were not conceived as subordinated to the original authority of the people. They were subordinated to the sovereign authority of the British Parliament. Their laws were similar in principle to municipal by-laws or English railway company by-laws. Thus, if Canadian legislative institutions could be characterized as “agents”, they were agents of the sovereign British Parliament. Their agency could not be conceived as coming within the Agency of the People thesis<sup>32</sup>.

Thirdly, the duty of the Canadian courts to give effect to the Constitution where a law is inconsistent with it did not derive from the superior authority of the will of the sovereign Canadian people as expressed in the Constitution. It directly derived from the tradition of British constitutionalism, associated with the sovereignty of Parliament. It was a judicial duty to invalidate all subordinate laws that are not within the powers conferred by Act of Parliament, that is, that are inconsistent with the will of the British Parliament as expressed in its Acts. Formally, the Judicial Duty Thesis is not specifically American. One might even argue that the duty of American judges to invalidate legislative acts inconsistent with the American Constitution derived its formal logic from British constitutional

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<sup>31</sup> See: P. RUSSELL, *The Judiciary in Canada: The Third Branch of Government*, Toronto, McGraw-Hill Ryerson, 1987, at 93.

<sup>32</sup> In *Langlois v. Valin*, *supra*, note 29, at 16, Chief Justice Meredith explicitly referred to a passage written by Hamilton for the purposes of asserting that “[t]here is no position which depends upon clearer principles that every act of a delegated authority contrary to the tenor of the commission under which it is exercised is void”. This position, found in *The Federalist*, No. 78 (1788), was plainly consistent with British constitutional theory.

practice and tradition. Indeed, in both traditions, the courts must obey the law<sup>33</sup>.

Thus, the recognition of the sovereignty of the Imperial Parliament entailed the judicial duty to uphold the Act of the Imperial Parliament recognized as Canadian Constitution against inconsistent Canadian legislation. As Dicey argued:

*The courts ... may be called upon to adjudicate upon the validity or constitutionality of any Act of the Dominion Parliament. For if a [colonial] law really contradicts the provisions of an Act of Parliament extending to [the colony], no court throughout the British dominions could legally, it is clear, give effect to the enactment of the Dominion Parliament. This is an inevitable result of the legislative sovereignty exercised by the Imperial Parliament. In the supposed case the Dominion Parliament commands the judges to act in a particular manner, and the Imperial Parliament commands them to act in another manner. Of these two commands the order of the Imperial Parliament is the one which must be obeyed. This is the very meaning of Parliamentary sovereignty.*<sup>34</sup>

Judicial power to review the constitutionality of colonial laws was moreover explicitly recognized, and somewhat circumscribed, by another Imperial Statute, the *Colonial Laws Validity Act, 1865*<sup>35</sup>. Section 2 of this Act provided that “Any colonial law ... repugnant to the provisions of any Act of Parliament extending to the colony ... shall ... be and remain absolutely void and inoperative”. Judicial review was thus limited to colonial laws inconsistent with any Act of Parliament, intended by the Imperial Parliament to extend to the colony. Nevertheless, the normative force of this Imperial Act also derived from the sovereign authority of the British Parliament.

Fourthly, the constitutional norms on the basis of which the courts could legitimately determine the legal validity of governmental actions did not have to be declared by, intended by, derived from or be justified in terms of the will of the original people. Being an Act of the British Parliament, the Canadian Constitution should be

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<sup>33</sup> See, for example: A.V. DICEY, *op. cit.*, note 6, at 159.

<sup>34</sup> *Id.*, at 109 [emphasis added].

<sup>35</sup> 28 & 29 Vict., c. 63 (U.K.).

interpreted as any other British statute<sup>36</sup>. Accordingly, the paramount interpretive constraint within the process of constitutional interpretation was to enforce a norm that could fit the “words” used in the Constitution<sup>37</sup>. This constraint has been understood in various ways and has given rise to competing interpretive methodologies<sup>38</sup>. But the central idea was that judicial interpretation should be based on the words of the Act of Parliament. Insofar as the concept of legislative intent has played a normative role in that process, such intention had also to be inferred from the words of the Act taken as a whole. As Dicey said: “The courts will take no notice of the will of the electors. The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament”<sup>39</sup>.

*[T]he English Bench have always refused, in principle at least, to interpret an Act of Parliament otherwise than by reference to the words of the enactment. An English judge will take no notice of the resolutions of either House, of anything which may have passed in debate (a matter of which officially he has no cognisance), or even of the changes which a Bill may have undergone between the moment of its first introduction to Parliament and of its receiving the Royal assent.*<sup>40</sup>

But the words of the Constitution are weak constraints. Judges could determine the meaning of words in accordance with a whole range of competing interpretive approaches. In practice, they have had no hesitation in using almost all of them. They have elaborated the content of certain words or provisions in accordance with some version of formalism that have favoured either strict or liberal constructionism, formal deductive reasoning or abstract conceptual-

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<sup>36</sup> In *Bank of Toronto v. Lambe*, (1887) 12 A.C. 575, 579. It is true that the Judicial of the Privy Council has stated later that the words of the Canadian Constitution should be given a broad, generous and progressive interpretation. But that was justified by the specific purpose of the *Imperial Act*, namely the creation of a new country (as opposed to the purposes of other statutes), and not by a distinct theory of legal interpretation. See, for example: *Edwards v. A.-G. Canada*, [1930] A.C. 124, 136 and 137.

<sup>37</sup> See: A.V. DICEY, *op. cit.*, note 6, at 407.

<sup>38</sup> Dicey himself, for example, thought that judges who interpret the words of enactments are “influenced by the feelings of magistrates no less than by the general spirit of the common law”. A.V. DICEY, *op. cit.*, note 6, at 413. See also *supra* note 36.

<sup>39</sup> *Id.*, at 73 and 74.

<sup>40</sup> *Id.*, at 407 and 408.



ism, with some version of the purposive approach and have even departed from past interpretations by using a progressive interpretive approach, and so on. Indeed, the words of the Constitution, conceived as formal signs, can often support many competing meanings. Yet, so long as judges interpreted the words of the text, as opposed to changing, ignoring or amending them notably by referring to values that could not plausibly fit the words themselves (*e.g.*, to define the word “bank” in the light of the “right to education”), the constitutional norms that resulted from the process of interpretation were recognized as legitimate. As Peter Hogg argued, “the principle of progressive interpretation is as firmly established in Canada as is the principle of minimal reliance on legislative history”<sup>41</sup> and both progressive and purposive interpretation constitute “orthodox Canadian constitutional law”<sup>42</sup>. Words were therefore paramount; original intention almost absent. Canadian constitutionalism had nothing to do with the Original Intention thesis.

It follows that, before 1982, Canadian constitutionalism did not come within the American model of constitutionalism rooted in *Marbury* and expounded in terms of the four theses described in the previous section. The references to the original Canadian people were not part of the picture and were totally absent from the premises of the arguments supporting the supremacy of the Constitution and the legitimacy of judicial review. Yet, things have changed in the last twenty years.

### III.

In 1982, the United Kingdom Parliament enacted the *Canada Act 1982*<sup>43</sup>. This Act included the *Constitution Act, 1982*<sup>44</sup> which contained, among other things, a procedure for the amendment of the written Constitution and the *Charter of Rights and Freedoms*. Canadian constitutional rhetoric consequently changed and the

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<sup>41</sup> See: P.W. HOGG, *loc. cit.*, note 4, 97.

<sup>42</sup> *Id.*, 103.

<sup>43</sup> *Supra* note 3.

<sup>44</sup> *Supra*, note 3.

vocabulary came to be conceived in terms similar to those of American constitutional law and theory<sup>45</sup>.

One of the main purposes of the *Canada Act 1982* was to terminate the authority of the Imperial Parliament over Canada, notably through the adoption of a process of constitutional amendment that would be entirely local. This meant that the Canadian Constitution would become, truly, a “Canadian” Constitution. Since Canada would now have the entire legal control over its structure and content, the Constitution would now “really” be the Constitution of all Canadians. It would become “their” Constitution; the Constitution of their nation. For this purposes, the original name of the Constitution, the *British North America Act*, was even changed into “*Constitution Act, 1867*”, suggesting that the text should not be referred to as an old Imperial Act, but as the Constitution of an independent and sovereign country. Perhaps Peter Hogg went a bit far when he claimed that this modification was an attempt to “re-write history”<sup>46</sup>. But it was certainly an attempt to change for the future the deep meaning the constitutional text has for the Canadian people.

But what would be the normative foundation of the supreme authority of the Constitution and of the legitimacy of judicial review in this post-1982 context in which Canadians could not, in principle, legitimately appeal to the supreme authority of the Imperial Parliament? This has been one of the most pressing questions within Canadian constitutional law and theory after 1982. The Supreme Court of Canada found part of the answer in Chief Justice Marshall’s reasoning in *Marbury*. For example, in the very first case on the *Charter of Rights and Freedoms* decided by the Court in 1984, *Law Society of Upper Canada v. Skapinker*<sup>47</sup>, the Court denied that the fact that the *Constitution Act, 1982* had been enacted by the United Kingdom Parliament could have special legitimating force. This fact, the Court held, should be conceived as having a “mere historical curiosity value”<sup>48</sup>. In other words, it was a mere formal

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<sup>45</sup> Indeed, it has become a daily experience to hear lawyers, politicians, public figures or journalists speaking about the “Americanization” of the Canadian Constitution.

<sup>46</sup> Peter W. HOGG, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at 8.

<sup>47</sup> [1984] 1 S.C.R. 357 [hereinafter *Skapinker*].

<sup>48</sup> *Id.*, 365.

process of constitutional amendment that has lost relevancy “on the ultimate adoption of the instrument as the Constitution”<sup>49</sup>. The right position, then, is to conceive the *Constitution Act, 1982* as “a part of the constitution of a nation”<sup>50</sup>. Then, it quoted many important passages of *Marbury*.

This was highly significant. From now on, the Court’s rhetoric would generally follow the American model of constitutionalism. First, the Court has argued for the supremacy of the Constitution in accordance with the Sovereign People thesis. For example, in an important decision dealing with the supremacy of the Constitution and the legitimacy of judicial review, *Motor Vehicle Act (B.C.) Reference*, the Court said that: “It ought not be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada”<sup>51</sup>. Indeed, the expression “elected representatives of the people of Canada”, as opposed to the “Imperial Parliament”, emphasized the legitimating source of the Charter, as opposed to its legal source. More recently, in a case calling into question the legitimacy of the Constitution, the *Québec Secession Reference*, the Court stated that the proclamation of the *Constitution Act, 1982* was legitimate, although formally enacted by the Parliament of the United Kingdom: “the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the *Patriation Reference*, had ruled was in accordance with our Constitution”<sup>52</sup>. As for the legitimacy of the *Constitution Act, 1867*, the Court asserted that this Act, although legally instituted by the Imperial Parliament, resulted from “an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial fiat”<sup>53</sup>. Not only were the resolutions that subsequently became the *British North America Act* approved by local delegates, but they were confirmed by Local Parliaments before being translated into law by the Imperial Parliament.

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Motor Vehicle Act (B.C.) Reference*, [1985] 2 S.C.R. 486, 497.

<sup>52</sup> *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, para. 47 [hereinafter *Quebec Secession Reference*].

<sup>53</sup> *Id.*, para. 35.

These assertions constituted an important shift within Canadian constitutional rhetoric. The Constitution would now derive its normative force from the fact that the people living in the colonies in 1867 and the Canadian people living in 1982, or perhaps the “elected representatives of the people then living in the colonies” and the “elected representatives of the people of Canada” living in 1982, had an original right to establish for their future the political institutions of their choices. At the very least, the Constitution is made morally legitimate by some act of consent by an original people, at least through their elected representatives. In any case, the Canadian people is now regarded as having supreme, indeed ultimate, moral and political authority to establish, amend or replace the Constitution of their country.

It follows, secondly, that the kind of Agency thesis that supported the Court’s understanding of Canadian constitutionalism before 1982 should henceforth be read as a version of the “Agency of the People” thesis. In the *Quebec Secession Reference*, for example, the Court asserted that Canadian laws and political institutions have no other source, authority and legitimacy than what is provided for in the Constitution and that the legitimacy of the Constitution derived from the people.

*Simply put, the constitutionalism principle requires that all government action comply with the Constitution. ... This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch ... They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.*<sup>54</sup>

*The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit “the people” in their exercise of popular sovereignty to secede by*

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<sup>54</sup> *Id.*, para. 72.

*majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.*<sup>55</sup>

It follows that the authority of the various branches of government is derivative and that any governmental action or decision that goes beyond the sphere of powers determined by the people or their elected representatives in the Constitution is of no force and effect.

Thirdly, the Supreme Court of Canada has explicitly accepted the Judicial Duty thesis as expounded by Chief Justice Marshall. As I said, in *Skapinker*, the Court approved and quoted at length the relevant passages written in *Marbury*. Judicial review of the constitutionality of governmental actions and decisions is therefore accepted as legitimate on the ground that it has been morally authorized by the elected representatives of the people of Canada who consented to the enactment of the Constitution. The Court said: "It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy"<sup>56</sup>. The same argument has been repeated many times since. For example, it has been said that:

*The ability to nullify the laws of democratically elected representatives derives its legitimacy from a super-legislative source: the text of the Constitution. This foundational document (in Canada, a series of documents) expresses the desire of the people to limit the power of legislatures in certain specified ways. Because our Constitution is entrenched, those limitations cannot be changed by recourse to the usual democratic process. They are not cast in stone, however, and can be modified in accordance with a further expression of democratic will: constitutional amendment.*<sup>57</sup>

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<sup>55</sup> *Id.*, para. 75.

<sup>56</sup> *Motor Vehicle Act (B.C.) Reference*, *supra*, note 51, 497.

<sup>57</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, para. 314. This passage is drawn from the dissent of Mr. Justice La Forest. It should be said that the majority did not disagree with this point of principle. See *id.*, para. 93; see also: *Quebec Secession Reference*, *supra*, note 52, para. 53: "A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review".

So far, the Canadian Supreme Court's rhetoric seems to entail that Canadian constitutionalism has become similar in principle to the American model of constitutionalism. The Canadian people have become the apex of the moral and political reasoning supporting both the legitimacy of the supreme authority of the Constitution and the legitimacy of judicial review.

What about the Original Intention thesis? Given the Supreme Court's acceptance of the three foregoing theses, it should be committed, at least in principle, to the fourth thesis, the Original Intention thesis. Insofar as the supreme authority of the Constitution, the limited powers of the various branches of government, and judicial review of governmental actions are made legitimate by virtue of some original and supreme decision or consent of the Canadian people or of their elected representatives, the constitutional norms on the basis of which the courts can determine the validity of governmental actions should be declared or intended by or must derive from or be justified in terms of this original and supreme decision or act of consent. So, what about the Original Intention thesis?

#### IV.

The practice of constitutional adjudication and interpretation in Canada is radically inconsistent with the Original Intention thesis. This introduces much incoherence into our representation of Canadian constitutionalism. Canadian practice of constitutional adjudication and interpretation is radically inconsistent with the Canadian rhetoric based upon the American model of constitutionalism.

The very first judicial decisions made under the Charter by the Supreme Court of Canada clearly intended to refute the Original Intention thesis. In 1985, for example, in an important decision of principle, the Supreme Court stated that the meaning of the Constitution, that is, its substance or its norms, should not derive from the original intention of the bodies which adopted the Charter or from the original meaning as understood at the moment of adoption<sup>58</sup>. Various considerations supported this view: the "historical usage of the terms used [was] shrouded in

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<sup>58</sup> *Motor Vehicle Act (B.C.) Reference*, *supra* note 51.

ambiguity”<sup>59</sup>, the relevant statements and speeches by prominent figures were “inherently unreliable”<sup>60</sup> and that the “intent” of the legislative bodies that adopted the Constitution should be regarded as a fact which was “nearly impossible of proof”<sup>61</sup>. But the most important reason was that constitutional meaning should not be “frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs”<sup>62</sup>. In the Court’s opinion, constitutional interpretation should be progressive. Constitutional values must grow and develop “over time to meet new social, political and historical realities often unimagined by its framers”<sup>63</sup>. The Constitution, in short, should be understood as a “living tree”<sup>64</sup>.

This position was quite paradoxical. In the same case, the written Constitution was conceived as the ground for the legitimacy of judicial review for the specific reason that it had resulted from an original act of popular consent through the elected representatives<sup>65</sup>. One would have expected that the norms that may legitimately be used as judicial reason not to enforce or to invalidate legislative acts would have to derive from what has been consented to, that is, the original norms of the Constitution. In principle, judicial review based upon norms that have not been consented to by the Canadian people or their elected representatives cannot be accepted as legitimate. Now, progressive interpretation entails that the norms that are used as judicial reason not to enforce or to invalidate legislation may not have been willed or consented to by the people or their elected representatives. The courts are responsible for the conditions at which constitutional norms must be adjusted to societal needs and may be authors of the norms they apply in the process of constitutional review. The idea that original consent is the source of legitimate norms is therefore refuted.

Moreover, the Supreme Court of Canada held that the interpretation of constitutional provisions must be ascertained by an analysis of

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<sup>59</sup> *Id.*, 512.

<sup>60</sup> *Id.*, 508.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*, 509.

<sup>63</sup> *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 155.

<sup>64</sup> *Motor Vehicle Act (B.C.) Reference*, *supra* note 51.

<sup>65</sup> *Supra* notes 50-55 and accompanying texts.

their purposes<sup>66</sup>. But such purposes are not understood as corresponding to some “original” purposes, that is, to the subjective purposes the constituent had in mind when the text was written down. The purposes result from a process of reasoning that constructs them in the light of the Constitution’s larger objects and the Constitution’s “proper linguistic, philosophic and historical contexts”<sup>67</sup>. Accordingly, constitutional purposes result from a process of interpretation that produces what philosophers call a “wide reflective equilibrium” between historical, linguistic, conceptual and philosophical competing considerations, that have something relevant to say about the meaning of the provisions, but that may have nothing, or very little, to do with what the elected representatives of the Canadian people consented to as a matter of historical, political or legal fact<sup>68</sup>. The purposes of constitutional provisions, therefore, constitute various judicial constructions that can be conceptually detached from what is supposed to give the Constitution its normative force.

There is good reason to believe, therefore, that the main constraint within the process of constitutional interpretation has remained what it had always been: to give the Constitution meanings that reasonably fit the “words” of constitutional provisions<sup>69</sup>. This is why Peter Hogg, for example, could describe as “orthodox constitutional law” the propositions that “judicial review of legislation must be based exclusively on the words of the constitution, and that the words of the constitution should receive a progressive interpretation [and] a ‘purposive’ interpretation”<sup>70</sup>. With respect to progressive interpretation, he argued that:

*[J]udicial review can be derived from the constitution while departing from or ignoring the original understanding. The doctrine of progressive interpretation is no less faithful to the constitutional text than interpretivism. Like interpretivism, it is based on the words of the constitution, read in the context of the document as a whole. It differs from interpretivism only in*

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<sup>66</sup> *Hunter v. Southam Inc.*, *supra* note 63.

<sup>67</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 344.

<sup>68</sup> On an analysis of the process of purposive interpretation, see: Luc B. TREMBLAY, “L’interprétation téléologique des droits constitutionnels”, (1995) 29 R.J.T. 459. On the concept of “wide reflective equilibrium” in this context, see *id.*, 489-491.

<sup>69</sup> See *supra* notes 36-41 and accompanying text.

<sup>70</sup> See: P.W. HOGG, *loc. cit.*, note 4, 103.



*that the doctrine of progressive interpretation assumes that the words of the constitution need not be frozen in the sense in which they were understood by the framers, but are to be read in a sense that is appropriate to current conditions.*<sup>71</sup>

Similarly, he maintained that a purposive approach to constitutional interpretation is “useful in elaborating those words ... that are especially vague or ambiguous”<sup>72</sup>, even if the actual purpose is “usually unknown”<sup>73</sup> and if the Constitution pursues “a range of purposes”<sup>74</sup>. As long as the interpretation is consistent with the terms of the constitutional provisions, judicial review is acceptable. Indeed, Hogg argued that “judicial review is only legitimate if it is based on the text of the constitution”<sup>75</sup>.

However, since 1982, the Canadian Supreme Court might even have departed from orthodox constitutional law. In various cases, it has recognized that judicial review could legitimately be based upon what it has described as “unwritten constitutional principles”. Indeed, judicial appeal to unwritten constitutional principles may serve different purposes. The courts may refer to them merely as aids in the process of interpreting the specific text of constitutional provisions. In these cases, where the resulting interpretations reasonably fit the express terms of the Constitution, judicial review based upon unwritten principles is not different in kind from judicial review based upon progressive and purposive interpretation that reasonably fits the express terms of the Constitution. Both forms of review come within orthodox constitutional law. But the courts may also refer to unwritten principles as independent grounds for the purposes of directly reviewing the constitutionality of legislative and executive acts. Here, the unwritten constitutional principles are used to “fill out the gaps in the express terms of the constitutional scheme”<sup>76</sup>. They are referred to as a reason to create new constitutional rules or principles or new exceptions to existing constitutional rules or principles. In these cases, the resulting

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<sup>71</sup> *Id.*, 101.

<sup>72</sup> *Id.*, 103.

<sup>73</sup> P.W. HOGG, *op. cit.*, note 46, at 814.

<sup>74</sup> P.W. HOGG, *loc. cit.*, note 4, 113.

<sup>75</sup> *Id.*

<sup>76</sup> *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, *supra* note 57, para. 85.

constitutional norms or exceptions based upon the body of unwritten constitutional principles do not reasonably fit the express terms of the Constitution. Consequently, this aspect of the practice of judicial review in Canada is inconsistent with orthodox constitutional law.

One might think that the unwritten constitutional principles may have been fixed by the original intention or decision of the elected representatives of the Canadian people. Accordingly, judicial review based upon them can at least be consistent with the Original Intention thesis and, therefore, with Canadian constitutional rhetoric. But the Court does not understand them this way. For example, in various cases relating to the independence of provincial courts, the majority of the Supreme Court asked the question whether the constitutional source of the principle of judicial independence lies in the express provisions of the Constitution Acts, 1867 to 1982, or exterior to the sections of those documents. The answer was that it lies outside, in the preamble:

*[T]he express provisions of the Constitution Act, 1867 and the Charter are not an exhaustive written code for the protection of judicial independence in Canada. Judicial independence is an unwritten norm, recognized and affirmed by the preamble to the Constitution Act, 1867. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located.<sup>77</sup>*

Yet, the preamble of the *Constitution Act, 1867* need not be understood in accordance with what it meant in 1867. Consequently, the interpretation of the principles it embodies can be progressive.

*The historical origins of the protection of judicial independence in the United Kingdom, and thus in the Canadian Constitution, can be traced to the Act of Settlement of 1701. As we said in Valente, ... that Act was the "historical inspiration" for the judicature provisions of the Constitution Act, 1867. Admittedly, the Act only extends protection to judges of the English superior courts. However, our Constitution has evolved over time. In the same way that our understanding of rights and freedoms has grown, such that they have now been expressly entrenched through the enactment of the Constitution Act, 1982, so too has judicial inde-*

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<sup>77</sup> *Id.*, para. 109.

*pendence grown into a principle that now extends to all courts, not just the superior courts of this country.*<sup>78</sup>

It follows that judicial review based upon the body of unwritten constitutional principles that support the recognition of constitutional norms or exceptions that do not reasonably fit the express terms of constitutional provisions cannot be made legitimate in accordance with the Original Intention thesis and, therefore, with Canadian constitutional rhetoric. Moreover, as we saw, it cannot be made legitimate in accordance with orthodox constitutional law. This explains the Justice La Forest's vigorous dissent in these cases:

*Judicial review, therefore, is politically legitimate only insofar as it involves the interpretation of an authoritative constitutional instrument. In this sense, it is akin to statutory interpretation. In each case, the court's role is to divine the intent or purpose of the text as it has been expressed by the people through the mechanism of the democratic process. Of course, many (but not all) constitutional provisions are cast in broad and abstract language. Courts have the often arduous task of explicating the effect of this language in a myriad of factual circumstances, many of which may not have been contemplated by the framers of the Constitution. While there are inevitable disputes about the manner in which courts should perform this duty, for example by according more or less deference to legislative decisions, there is general agreement that the task itself is legitimate. This legitimacy is imperiled, however, when courts attempt to limit the power of legislatures without recourse to express textual authority.*<sup>79</sup>

In these cases, the majority of the Court argued that the preamble constituted the "written" source of the principles<sup>80</sup>. But this

<sup>78</sup> *Id.*, para. 106.

<sup>79</sup> *Id.*, para. 315 and 316. On this case, see: Jean LECLAIR and Yves-Marie MORISSETTE, "L'indépendance judiciaire et la Cour suprême: reconstruction historique douteuse et théorie constitutionnelle de complaisance", (1998) 36 *Osgoode Hall L.J.* 485; JEFFREY GOLDSWORTHY, "The Preamble, Judicial Independence and Judicial Integrity", (2000) 11 *Constitutional Forum* 60; Robin ELLIOT, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution", (2001) 80 *Can. Bar Rev.* 67.

<sup>80</sup> Chief Justice Lamer wrote:

*There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review. Given these concerns, which go to the heart of the project of constitutionalism, it is of the utmost*

was formalistic. The preamble does not explicitly mention the principle of judicial independence; hence its unwritten character. In any event, less than a year later, the Supreme Court of Canada made it clear that the existence of the unwritten principles of the Constitution could be explained without any reference to the preamble. Unwritten principles are now conceived as constituting the substantive constitutional theory that makes the best sense of the body of express constitutional provisions when they are read in accordance with history and precedent. In the *Quebec Secession Reference*, for example, it was said that:

*Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. ... Our Constitution has an internal architecture, or ... a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. ... Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them.<sup>81</sup>*

According to the Court, the recognition of unwritten constitutional principles should not be taken as an invitation to dispense with the written text of the Constitution. In other words, they should be referred to in ways that are consistent with orthodox constitutional law. Yet, the Court added that in "certain circumstances", the unwritten principles may

*give rise to substantive legal obligations (have "full legal force" ...), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.<sup>82</sup>*

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*importance to articulate what the source of those unwritten norms is. In my opinion, the existence of many of the unwritten rules of the Canadian Constitution can be explained by reference to the preamble of the Constitution Act, 1867.*

*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, supra note 57, para. 93 and 94.*

<sup>81</sup> *Supra* note 52, para. 49-51.

<sup>82</sup> *Id.*, para. 54

This may suggest that the court can refer to such principles, not only for the purposes of interpreting the express terms of constitutional provisions, but also to “fill out the gaps in the express terms of the constitutional scheme”<sup>83</sup>. To this extent, the court confirmed that judicial review could proceed beyond what has been accepted within orthodox constitutional law.

There might exist various competing approaches and theories for the determination of the unwritten principles that constitute the best or the true unstated assumptions upon which the constitutional text is based. But in all cases, the principles are basically determined by judges themselves, without formal authorization coming from the original intention of the elected representatives of the people or from the terms of constitutional provisions. The practice of judicial review based upon unwritten principles, therefore, appears as inconsistent with the Original Intention thesis as with orthodox constitutional law.

In Canada, the judicial practice of reviewing the constitutionality of legislation is therefore inconsistent with the Canadian constitutional rhetoric based upon the American model of constitutionalism. Insofar as the American model is correct, valid or justified in principle, the Canadian practice of judicial review cannot be accepted as legitimate. Indeed, the practice of Canadian judges contradicts the rhetoric that has been conceived to give the supremacy of the written Constitution and the practice of judicial review their political legitimacy.

My thesis, then, is simple. Canadian constitutional rhetoric within the Supreme Court has become similar to that of Chief Justice Marshall in *Marbury*. This rhetoric has been accepted for the purposes of justifying both the supreme authority of the Constitution and the legitimacy of judicial review in a context in which the Imperial Parliament could not be referred to as the ultimate legitimating source anymore. However, the practice of constitutional interpretation developed for the purposes of applying the Constitution within the process of constitutional review has remained radically inconsistent with one of the constitutive theses of the American model of constitutionalism, the Original Intention thesis. This is

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<sup>83</sup> Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, *supra* note 57, para. 85.

incoherent. If the original consent of the elected representatives of the Canadian people constitutes the ultimate moral basis justifying judicial review based upon the supreme authority of constitutional norms, then this consent should play a significant role in the process of determining the nature and content of the practical constitutional norms that have supreme authority for the purposes of judicial review. A substantial theoretical choice must therefore be made: either Canadians accept the American rhetoric and turn to some version of originalism for the purposes of constitutional interpretation or they abandon the rhetoric of American constitutionalism in order to look for new grounds establishing the legitimacy of judicial review and the supremacy of the Constitution.

One might object that what makes the Canadian judicial position look incoherent should be explained by the fact that judges have broken up with the kind of formalism that underlain Chief Justice Marshall's methodological assumptions on constitutional interpretation. As we have seen, the American model of constitutionalism might be plausible if judges could ascertain the objective original meaning of constitutional provisions. But Canadian judges are realist. They cannot share the view that the original meaning of the Constitution can be objectively found and it would be quite unfair to require them to do so. Judges know, as Justice Lamer said, that the original intention is a "fact which is nearly impossible of proof"<sup>84</sup>. Therefore, Canadian constitutional theory must live with the incoherence. In my view, if it is true that legal formalism constitutes a theoretical position Canadian judges cannot live with, then Canadian constitutional rhetoric based upon the American model of constitutionalism should be radically called into question. What constitutes the moral basis of the supreme authority of constitutional norms and of the authority of the judiciary to review the constitutionality of legislative and executive acts on the basis of these norms should be revisited. Canadians, especially Canadian judges, should construct a theory of Canadian constitutionalism that is both coherent and justified.

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<sup>84</sup> *Id.*

Canadian constitutional practice is inconsistent with Canadian constitutional rhetoric and, consequently, with the American model of constitutionalism. What does it entail for Canadian constitutionalism? Is it more similar in principle to that of the United States or to that of the United Kingdom? At the moment, it is similar to none. In fact, one might believe that Canadian constitutionalism appears similar in principle to that of the first planet visited by the little prince in Antoine de St-Exupéry's tale. This tale will constitute my conclusion.

At some point in his life, in order to add to his knowledge, the little prince decided to visit his neighbourhood. The first planet was inhabited by a king covered with a magnificent robe, seating upon a throne which was at the same time both simple and majestic. The king was an absolute monarch. He tolerated no disobedience. Moreover, he ruled over everything, his planet, the other planets, and all the stars. His rule was universal. When the king saw the little prince coming, he proudly said: "Here is a subject", because for him all men are subjects. Since the little prince was tired, he looked everywhere to find a place to sit down, but he could not: the entire planet was crammed and obstructed by the king's magnificent ermine robe. So the little prince remained standing upright and yawned. Then the king said: "I forbid you to yawn in front of the King; this is contrary to the rule of etiquette". The little prince replied: "I can't stop myself, I am tired". "Ah", the king said, "then, I order you to yawn. Yawn! Yawn again! It is an order!" Frightened by such order, the little Prince said: "I cannot, any more..." Thus, the king replied: "All right, then, I order you sometimes to yawn and sometimes not to yawn". When the little prince timidly asked if he may sit down, the King said: "I order you to sit down". When he begged to be excused to ask a question, the king answered: "I order you to ask me a question". And so on.

That sounds funny, doesn't it? Indeed, the kind of authority enjoyed by the king looks completely absurd. For what can be the point of claiming supreme and absolute authority over the whole universe if you always command your subjects to do what they wish to do? What is the meaning of such authority? As funny or absurd as it may sound, it represents fairly well the actual state of Canadian constitutional discourse and law. The authority of the original elected representatives of the Canadian people is similar to the king's authority. The elected representatives of the Canadian people would have supreme and absolute authority with respect to

constitutional commands, but their commands would order judges to do what they wish to do anyway. The courts should act in accordance with the constitutional commands of the sovereign people, but the commands would reflect what judges prefer or think appropriate or just in particular contexts ("You think that freedom of expression includes child pornography? I order you to give freedom of expression a meaning that recognizes child pornography. You think the contrary? I order you not to give freedom of expression a meaning that recognizes child pornography."). What then is the point of legitimating the Constitution on the original consent of the people? Wouldn't it be more coherent and legitimate to favour originalism?

Perhaps. But the point of my conclusion is not to promote originalism. Insofar as the actual practice of judicial review in Canada is accepted as desirable, Canadian constitutional theory must find a justified and coherent basis for its legitimacy. Whatever it is, I suggest that it might have something to do with what St-Exupéry wanted the tale to mean. The moral of the story has something to do with the legitimacy of law based upon reason. The king fundamentally wanted his authority to be respected. Therefore, according to the author, "because he was a very good man, he made his orders reasonable." So the king said: "One must require from each one the duty which each one can perform. Accepted authority rests first of all on reason. If you ordered your people to go and throw themselves into the sea, they would rise up in revolution. I have the right to require obedience because my orders are reasonable."

Indeed, what is reasonable depends on context. But the examples clearly show that the only kind of commands those who are submitted to them can accept and respect are commands that the subjects themselves find reasonable and justifiable from their own point of view and for their own good. For example, there is a beautiful passage on the power of the King to order a sunset to happen precisely at the time it should naturally happen. Indeed, the king said that he will command the sunset, even if, according to his science of government, he must "wait until conditions are favourable", that is, after having "consulted a bulky almanac", until the evening at about twenty minutes to eight. But the king will order the sun to set on the right time and we will see how well he is obeyed. So, the king asked: "If I ordered a general to change himself into a sea bird, and if the general did not obey me, that would not be the fault of the general. It would be my fault". Similarly, "If I ordered a general to fly from one flower to another like a butterfly, or to write a tragic



drama, or to change himself into a sea bird, and if the general did not carry out the order that he had received, which one of us would be in the wrong? The general, or myself?" The little prince answered: "You".

The authority of the king might not be so absurd, after all. The king candidly admitted that the authority of his commands is ultimately a matter of reason, as opposed to will. If there is a constitutional lesson to draw from the tale, it should be the following. The authority of constitutional norms should rest upon reason, not on original will or consent to the norms, that is, upon meanings those who are subject to the constitution can find reasonable and justifiable from their own point of view and for their own good. To the extent to which Canadian constitutional practice can be understood as guided by some reason-based legitimacy criteria, as opposed to original will, Canadian constitutionalism might be conceived as justifiable and coherent. But this would require, as a first step, a rhetoric that departs from the American model of constitutionalism as inferred from Chief Justice Marshall in *Marbury*.