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Marbury V. Madison: A Case Study of Judicial Review

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Judicial review currently stands at the heart of a heated controversy. That controversy involves several issues, including the proper role of a Supreme Court justice, the separation of powers, and constitutional interpretation. Difficult as it is to separate these issues from each other—they naturally overlap—I will focus on the institution of judicial review in this paper. My thesis is that understanding judicial review as the Founders did may provide a key to solving the current controversy surrounding that institution. To understand judicial review as the Founders did, as well as contemporary criticisms of that understanding, I will review a variety of sources both primary and secondary. Because Justice Marshall's opinion in *Marbury v. Madison* established judicial review as a political institution, that is where I begin.

*Marbury v. Madison*.

Marshall begins his opinion by posing the following questions: (1)
Does Marbury have a right to the commission he demands? (2) "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?" (3) "If they do afford him a remedy, is it a mandamus issuing from this court?" Each question deserves individual attention to fill out Marshall's reasoning. Because Marshall establishes judicial review in answer to the final question, it will be examined most carefully.

Marshall argues that if Marbury has a right to the commission he demands, then he must have been legally appointed before President Jefferson entered office. Marshall first ascertains that President Adams duly appointed Marbury and that the Senate approved Marbury's nomination. From there the issue becomes more intricate. For once the President has nominated and the Senate has approved a judicial nominee, a commission must be signed by the President and sealed by the Secretary of State with the great seal of the United States. Marshall concludes that since the commission was signed by the President and sealed by the Secretary of State, Marbury's appointment was legally binding. Madison's counsel argues that the commission must be delivered to be legally binding, comparing a mandamus to a deed. Marshall refuses to
accept this analogy because the appointment would remain legal if the commission were lost or stolen. In such a case a copy of the commission would be readily made. The salient question, then, according to Marshall, is whether the appointment is legally binding once the great seal has been affixed to the commission. Marshall asserts that this is the case and concludes that Marbury has the right to the commission he demands.

Marshall then asks whether the laws of the United States afford Marbury a remedy from the right that has been violated. He affirms this and says that Madison's refusal to deliver Marbury's commission violates Marbury's legal right. And as in any case where a legal right is violated, Madison's refusal to deliver Marbury's commission violates Marbury's right, "for which the laws of his country afford [Marbury] a remedy."  

Marshall finally addresses the question of whether or not a writ of mandamus is the appropriate remedy in Marbury's case. He says that the answer to this question depends on three elements: (4) "the nature of the writ applied for," (5) "the power of this court" (6) "the nature of the writ." The first question is easily answered. A writ of mandamus commands "the performance of a
particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived." Based on the facts of the case, Marshall reasons that the nature of a mandamus makes it an appropriate remedy for Marbury.

In review, Marbury has a right to the commission he demands, Madison's violation of his right to that commission may be remedied by law, and a writ of mandamus is the appropriate remedy. Every point has been conceded to Marbury except one: the power of the Supreme Court to grant a writ of mandamus in his case.

Marshall agrees that the Judiciary Act of 1789 grants the Supreme Court "power to issue . . . writs of mandamus, in cases warranted by the principle and usages of law, to any . . . persons holding office under the authority of the United States." However, Marshall argues that this statutory power is repugnant to the Constitution. He reaches this conclusion by inquiring whether a writ of mandamus is a power issuing from original or appellate jurisdiction. (Marshall assumes that the statute confers original jurisdiction—that assumption reads "original" into the statute.)

The principle of jurisdiction is
important here because it is the "Power and authority of a court to hear and determine a judicial proceeding" or, as Marshall puts it, "to say what the law is." And the Constitution clearly spells out the Supreme Court's original jurisdiction, while leaving the Court's appellate jurisdiction to be determined by congressional statute. On this distinction Marshall rests his argument against the power of the Supreme Court to issue a writ of mandamus to Madison. For if a mandamus is directly related to original jurisdiction, and if the Court lacks original jurisdiction in Marbury's case, then the Court lacks the power to issue a writ of mandamus to Madison. But to say this implies the power of judicial review.

Marshall's reasoning is crucial here. Marshall says that the language in the Judiciary Act of 1789, which authorizes the Supreme Court to issue writs of mandamus, contradicts the Constitution. He rests this conclusion on three grounds: (1) the Supremacy Clause; (2) the nature of a written, limited constitution; and (3) the nature of judicial power.

The Supremacy Clause of the Constitution reads, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties
made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." This clearly gives precedence to the Constitution and to laws "made in Pursuance thereof." But when an act of Congress directly contradicts the Constitution, which of them should prevail?

Marshall answers this by referring to the nature of a written, limited Constitution. He notes that "The powers of the legislature [Congress] are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." Because the Constitution is one of enumerated powers, Marshall reasons that congressional power is limited. And one of those limits is on Congress's power to alter the Supreme Court's original jurisdiction. For though the Constitution gives Congress the power to determine the Supreme Court's appellate jurisdiction, it does not grant Congress the power to determine the Court's original jurisdiction. Therefore Congress cannot alter what the Constitution specifically enumerates and leaves outside the congressional sphere.

Marshall answers the final question by referring to the nature of judicial power. As I have already noted, he affirms the right of the Court "to say what the law is." He
further argues that the jurisdiction of the Court to decide the case implies the power to decide which of two conflicting laws ought to prevail. Moreover, because the Constitution is the fundamental law, it "controls any legislative act repugnant to it."\(^{13}\)

On these grounds, Marshall decides that Marbury may not receive his remedy. Marbury certainly deserves the commission he demands. The laws clearly offer him a remedy for the right Madison violates by refusing to deliver Marbury's commission. And a mandamus is the appropriate remedy in his case. But because the Constitution has clearly enumerated the scope of the Supreme Court's original jurisdiction, because a mandamus belongs within that scope, and because the Court's original jurisdiction does not extend to a case such as Marbury's, the Court lacks the power to issue a writ of mandamus in Marbury's case.

Criticism of Marbury

Marshall's reasoning in Marbury has come under considerable attack. Christopher Wolfe has made the useful distinction between criticism grounded in the case itself and criticism grounded in Marshall's
constitutional interpretation. Under the first heading is the objection raised by Jefferson, who contended that Marshall spoke at great length on the merits of the case before saying that the Court lacked jurisdiction. Under the second is the broader objection raised by those who disagree with Marshall's defense of judicial review.

Jefferson's objection rests on a sound legal foundation. Legal opinions are economical. If a court lacks jurisdiction or the case lacks justiciability, the opinion generally says so directly without referring to the merits of the case. To do otherwise may violate the spirit of judicial power, which is limited to deciding specific cases. For if the case cannot be heard on its merits for whatever reason, the court has the duty to say that and nothing else. Such is the convention.

The circumstances surrounding Marbury suggest why Marshall departed from such a convention. The nation was eleven years old. The first major transfer of power from one party to another had just occurred. Although the Federalists had every constitutional right to appoint "midnight judges," the Jeffersonians resented the appointments and sought to counter them. One of those methods was unconstitutional:

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refusing to deliver the remaining judicial commissions. There was even some talk among the Jeffersonians that Federalist judges, including Supreme Court justices, ought to be impeached. It was in this atmosphere of novelty and acrimony that Marshall fashioned the *Marbury* opinion. Given these circumstances, it is easy to see why Marshall did not limit his opinion to the question of jurisdiction. He wanted the Jeffersonians to know that the judiciary would not be controlled by its political opponents.16

The grounds for criticizing Marshall's defense of judicial review are broader and more complex. Perhaps the most wounding indictment of judicial review was leveled by Alexander Bickel, who noted the "counter-majoritarian difficulty" of defending judicial review in a democratic society.17 Bickel argues that a democratic society rests on the principles of consent and representation. The legislature, because it is elected to represent certain segments of "the people," epitomizes these principles. Bickel extends this reasoning and finds that judicial review violates these principles. Though he admits that Hamilton defends judicial review in Federalist 78 along the same lines that Marshall does in *Marbury*, he, nevertheless, asserts that a panel of
justices cannot invalidate a statute without thereby subverting the principles of consent and representation. Federal justices are not elected; they are appointed to terms of "good behavior," which amounts to lifetime tenure. This insulates them from the kind of political pressure that ostensibly keeps other political offices, such as the Presidency and the Congress, close to the people. The "counter-majoritarian difficulty" occurs when the legislature passes a measure that the Court rules unconstitutional. If the legislature, which is elected and representative, determines a policy that it judges to be in the public interest, what right has the judiciary, which is appointed and nonrepresentative, to invalidate that policy? The most notable answer to this question is provided in Federalist 78 by Alexander Hamilton. 18

Federalist 78

Hamilton defends the principle of an independent judiciary in Federalist 78. Since the mode of appointment is previously discussed, he does not repeat those arguments here. Instead, he concentrates on the reasoning behind an independent judiciary. Tenure during "good
behavior" is the first principle of an independent judiciary. Such tenure is, as Hamilton says, "[an] excellent barrier to the encroachments and oppressions of the representative body." He proceeds to characterize the judiciary as the "least dangerous" branch of government, because it lacks the legislative power of the purse or the executive power of the sword. It is in this context that Hamilton defends judicial review. And it is here that the connection between Hamilton's reasoning in Federalist 78 and Marshall's reasoning in Marbury becomes apparent.

Like Marshall, Hamilton grounds his defense of judicial review on the connections between the necessity of an independent judiciary; the nature of a written, limited constitution; and the nature of judicial power. Hamilton's argument is similar enough to Marshall's to largely avoid repeating it. But Hamilton differs from Marshall on two important points. Hamilton emphasizes an aspect of judicial power that Marshall does not when he observes that "the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." And he notes an important qualification on judicial
power that Marshall does not emphasize: "Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments." So Hamilton provides three primary reasons why judicial review is defensible in a popular regime. (1) An independent judiciary provides an important check on the excesses of the legislature. (2) The judiciary poses less danger than the other branches of government, so long as it remains separate from them. (3) The judiciary has the duty of deciding what the law is. Because the Constitution is the fundamental law, this duty implies the power of settling conflicts between the Constitution and a statute (which power is another name for judicial review).

Reply to Bickel

In light of Hamilton's reasoning, we can answer Bickel's "counter-majoritarian difficulty." The legislature is the majoritarian power in our republic. As such, it has great power. Given unlimited power, it could prove as tyrannical as the eighteenth-century British parliament. The Constitution specifically limits that power by
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proscribing ex-post-facto laws, bills of attainder, and the like. It also limits legislative power by placing the judiciary between it and the people. Thus judicial review is counter-majoritarian only in the sense that it does not allow the legislature unlimited power to pass laws that may alter the Constitution. Some suggest that such judicial power is dangerous. Hamilton's answer to this objection is clear: keep the judiciary from uniting with the other branches of government. In other words, so long as the judiciary does not exercise legislative or executive powers, it will remain "the least dangerous branch."

Additional Criticism and Plausible Answers

Bickel's objection to judicial review is perhaps the strongest, but others have posed objections that also deserve some attention. They may be grouped under the following categories. (1) Lacking precedent or textual justification, Marshall invented judicial review in Marbury. (2) The Founders disagreed over the nature of judicial review enough that we may hesitate when characterizing Marshall and Hamilton's reasoning as authoritative. Precedent must
always be seen in light of historical context. The United States was fourteen years old when Marshall wrote *Marbury*. Thus there was little precedent for Marshall to rely on, especially when we remember that the Founders emphasized the novel nature of the American Constitution. Wolfe notes, however, that the Court had already entertained the question of constitutionality in *Hylton v. United States* nearly a decade before *Marbury*. Though *Hylton* was decided without raising the question of constitutionality, there was some precedent for entertaining the question itself when the Court was confronted with *Marbury*. Given this perspective, the objection that Marshall did not pay deference to *stare decisis* is unpersuasive.

Textual justification is harder to come by. Nowhere in the Constitution does it read, "Any act by another branch of government, which is repugnant to the Constitution, shall be invalidated by the judiciary."

However, Marshall was not altogether without textual evidence for judicial review. The Constitution provides that "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their
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Authority." The provision certainly allowed Marshall to take cognizance of Marbury. But it is the combination of this provision, the Supremacy Clause, and the "case or controversy" requirement of article III that provides Marshall with the textual basis for his defense of judicial review in *Marbury*. Each provision depends on the other. Together they define judicial power so as to include judicial review. Article III, section 1 grants "the judicial Power of the United States" to supreme and inferior courts. Section 2 of the same article says that those courts have jurisdiction over certain cases and controversies. The Supremacy Clause (article VI, section 2) defines the relationship between state and federal laws. Judicial review includes such a relationship by textual enumeration. That it also encompasses the relationship between congressional statutes and the Constitution is evident from the Court's power to hear cases "arising under this Constitution." As Marshall points out, it would be absurd to acknowledge this power without acknowledging the Court's corresponding power to invalidate a law which contradicts the Constitution. And this, of course, is another way of expressing judicial review.

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An answer to the second objection must understandably be brief. Some argue that the Founders disagreed over judicial review enough to make one hesitate in accepting Marshall and Hamilton's position as authoritative. This argument ignores the important relationship, which the Founders acknowledged, between judicial review and the separation of powers. Hamilton's defense of judicial review in *Federalist* 78 has already been shown in context: a defense of an independent judiciary. Madison may be considered an advocate for the party opposite Hamilton. But on this question the two agree. As Madison says, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." And he points to the same source for this threat as Hamilton does: unlimited legislative power. In response to those who suggest that judicial review belongs with Congress, John Adams suggests that Congress would be ill-suited to judicial power because it is "too numerous, too slow, and too little skilled in the laws." The Founders evidently agreed on the necessity for the separation of powers; the primary threat of the legislature to that separation, and the impropriety of granting judicial review to the legislature. Some
disagreement between the Founders over political policies may be freely admitted, but they apparently agreed with Marshall and Hamilton over what judicial review should be. They also agreed that judicial power is designed to check legislative power, a fact seemingly ignored by Bickel and others.

Conclusion

The controversy over judicial review is complex but not insolvable. Understanding judicial review as the Founders—a means of checking legislative power and upholding the Constitution as the fundamental law—leads us to conclude that judicial review works best when it pursues those ends for which it was created. An important qualification on judicial review is that judges cannot exercise legislative or executive power without thereby endangering liberty.  

Such a conception of judicial review is neither simple nor dismissible. No simple rule will ever govern the interpretation of law, especially if that law purports to be fundamental like the Constitution. It is difficult to interpret current statutes in light of a text written over two-hundred
years ago. Yet we cannot escape this difficulty by dismissing judicial review. Its history predates the Constitution, and sound reasoning supports its preservation. However, it does present us with a dilemma that was best expressed by Tocqueville, who wrote "Judges seem to intervene in public affairs only by chance, but that chance recurs daily."

Though judges cannot initiate public policy as the other branches of government do, they nevertheless "intervene in public affairs" almost daily. The dilemma is to so intervene without crossing the line between judicial and legislative power.
The facts of Marbury illuminate Marshall's reasoning. I therefore include a brief recitation of those facts here, for which I am indebted to the following: Craig R. Ducat and Harold W. Chase, Constitutional Interpretation, 4th ed., (St. Paul, Minn.: West, 1988), 16-17.

In the election of 1800 the Jeffersonians won control of the Presidency and both houses of Congress. To keep what political power they could, the Federalists under President John Adams appointed a series of federal judges. When Thomas Jefferson entered the Presidency four judicial commissions remained undelivered. One of these undelivered commissions belonged to William Marbury, who had been appointed justice of the peace for the District of Columbia. Under the direction of President Jefferson, Secretary of State James Madison refused to deliver the remaining commissions. Consequently, Marbury sued Madison before the Supreme Court. Pursuant to section 13 of the Judiciary Act of 1789, Marbury requested that the Court issue a writ of mandamus directing Madison to deliver the commission. Because Congress suspended the Court's 1802 session, the Court did not decide
Marbury's case until 1803. The opinion of the Court was written by Chief Justice Marshall.


3. Id., 168

4. Ibid.


10. Constitution, art. VI, sec. 2.


12. Id., 177.
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13. Ibid.


15. Ibid., 87.

16. Id.


18. It is helpful to remember the conditions under which *The Federalist* was written. It is a series of articles written to persuade the people of New York to ratify the Constitution. But, as Martin Diamond suggests, "It seems clear that its authors also looked beyond the immediate struggle and wrote with a view to influencing later generations by making their work the authoritative commentary on the


20. Federalist 78.7-8.

21. Hamilton's argument on the first two points is so cogent and concise that I take the liberty of reproducing it here. "The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for
instance, as that it shall pass no bills of attainder, no *ex-post-facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing" (*Federalist* 78.9).

22. To compare the two arguments, see especially Marbury v. Madison, 5 U.S. (1 Cranch) 176-80; and *Federalist* 78.9-22.

23. *Federalist* 78.12, emphasis added.
24. *Federalist* 78.8, emphasis added.
25. *Federalist* 1.2.


30. Federalist 47.3.

31. See Federalist 48.3.


33. Federalist 78.8.