

HOFSTRA UNIVERSITY  
SCHOOL OF LAW

CONSTITUTIONAL LAW I

SECTION A

Appendix:

Part 1

(Assignments 1 through 7)

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Fall 2014

Review Exercises

Experience demonstrates that learning in this course is greatly enhanced (and unhappiness at the time of the final examination greatly reduced)\* by building in a mechanism requiring you to synthesize regularly.

Accordingly, there will be three review exercises given this semester on dates that will be announced reasonably (about a week) in advance along with detailed directions.

You must take two of these review exercises. You are strongly encouraged to take all three.\*\*

The questions will be distributed in advance and are to be answered at home in lieu of one reading assignment that would otherwise be due. For example, if you have an exercise given to you on a Monday you will need to be prepared as usual for the class on the next Wednesday. At that class you will hand in your exercise, identified only by number. I will review the group's papers but not mark them individually. Instead I will distribute an answer memorandum before the next class. On the following Monday one assignment will be due as usual but the other hour will be devoted to a discussion of the problem.

I should add that my questions sometimes incorporate elements that I have used in the past on review exercises or exams. But please be wary of any unofficial test materials from prior years that may be floating around (as opposed to the official ones in the library which are there as a resource for you). My practice is to make legally significant alterations to any fact patterns that I re-use. (And if I don't, it is likely because the law has changed significantly in the interim).

E.M.F.

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\* As you know from the syllabus, there is a single closed-book final examination in this course at the end of the semester.

\*\* The purpose of this is to allow for individual contingencies. Thus, there will be no make-up. That is one of several reasons that you should plan on taking all three exercises. Another such reason is that if your submission reveals that you have not made a good faith effort I reserve the right to deem it not to have been submitted.

Where We Are Going, and Why it is That  
We Are Going That Way

As generations of Constitutional Law professors have discovered (and their students along with them) there is no intuitively obvious way to structure the material.

The reason is simple: the dynamic forces tugging on the federal government come from not one, but several, directions. Challenges to its power to act may take the form of any of the following:

(1) No government, national or state, has the power to do this (e.g. punish a speeder by cutting off his foot).

(2) The national government may not do this because any action in this sphere must be left to the states (e.g. the creation of substantive rules of law in state court actions).

(3) The national government may do this, but the wrong branch of the national government has exercised the power (e.g. the President has expelled a Senator from her seat).

Since it is impossible to teach three dynamic tensions simultaneously, I have chosen (and picked a casebook which chooses) to illustrate these matters through the order of topics listed below. Generally speaking, we deal with issues (2) and (3) during the first semester, and then turn to issue (1) during the second. We proceed this way:

A. Historical Background

One of the purposes here is to suggest that all three of the issues posed above were prominently in the minds of the founders, and that they sought to serve consistent purposes in the decisions they made in all three areas.

Another is to suggest a unique aspect of this field of law. Legal decisionmakers approach each case with a special sensitivity to where it fits in the arc of history. Unless you do the same, you will not be able to communicate with them effectively.

B. Judicial Review and Its Limits

As we will discuss, this topic sees the judicial branch of the federal government set both against the other branches of the federal government and against the states.

C. The Powers of Congress

We first consider the powers of Congress as against those of the states. (Note that it didn't have to be this way. We could have started with Congress as against the other branches of the federal government, but we do that in Part E).

#### D. The Powers of the States

Our next topic is the powers of the states as against the national government. This comes here because our primary example is the power of the states over commerce, which is also the congressional power that we emphasize in Part C (for reasons you will see when we get to it).

#### E. The Powers of the President

By discussing the allocation of powers among the branches of the federal government, we define the powers of the President by distinguishing them from those of Congress.

At this point, having largely completed our discussion of issues (2) and (3), we turn to issue (1) and consider a series of subject areas in which no level of government, state or federal, may act in particular ways.

The precise topics will vary depending on class progress,<sup>1</sup> but may include:

- a. Economic Liberty
- b. Equal Protection of the Laws (first in the racial area, and later in sex and others)
- c. Implied Fundamental Rights (including abortion, among others)
- d. Procedural Due Process
- e. Freedom of Expression
- f. Freedom of Religion

By the time we have completed our studies I hope that you will have gained (1) a basic literacy<sup>2</sup> in some, but by no means all, of the key areas of the Constitution<sup>3</sup> and (2) more importantly, the substantive and methodological skills to recognize and confront with confidence any constitutional law issue that you may encounter in the future, regardless of the particular state of doctrine at that time.

E.M.F.

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<sup>1</sup>I pause to stress this point. I have laid out the tentative schedule because students are often interested in knowing it; I am not bound by it, and you should anticipate that it will be changed to some degree.

<sup>2</sup>Note that almost every one of the areas that we cover is also the subject of one or more advanced seminars, which assume that you have been introduced to the rudiments by this course.

<sup>3</sup>Note that we will not have covered such critical subjects as the Fourth, Fifth, and Sixth Amendments (covered in Criminal Procedure), not to mention the Seventh Amendment (which you already know all about from Civil Procedure).

## Outline to Introductory Remarks

Administrative items, focusing on means of improving student-teacher interaction.

### **I. Course Goals**

"Craft constitutional law arguments of the highest quality by the standards of the legal profession, with the aim of persuading judicial decisionmakers."

"Provide appropriate advice to clients."

#### **A. Tools for achieving goals**

1. Law
2. Policy
3. History

### **II. Study Tips**

1. Remember your legal knowledge
2. Stay up to date on current events
3. Include surrounding history as part of case preparation
4. Come to class prepared; notetaking tips.
5. Speak up

### The Constitution in Historical Context

The purpose of this handout is not to scare you; it is to generate intellectual excitement. We will spend a good deal of time during the course on the ideas introduced below, and they will become very clear. However, in response to those of you who asked for a head start, I offer the following as food for thought.

#### Introduction

In this course, as in your others, your teacher will be repeatedly asking: what are we trying to accomplish through the legal rules? why? what is the best way to accomplish that?

But, to a much greater degree than is true in the courses you have had so far, you will not be able to find meaningful answers to those questions in this course unless you can first recreate the history from which the rules evolved. For this reason, you should throughout the course be paying special attention to the dates of the cases you read. Although the material is organized doctrinally (see the handout "Where We Are Going ..." for more details) try to relate the cases to each other and to contemporaneous events in the life of the country.

I am aware, of course, that you begin your study of Constitutional Law with varying degrees of historical background, and that some of you will be more familiar than others with the material that follows. But, regardless of where you begin, I hope these pages remind you of what you already know, and stimulate you to look into what you don't know. Your objective should be to understand the events underlying the condensed and incomplete summary presented here to the point that you are capable of generating your own ideas about them, and, by the end of the course, linking those ideas to what we have learned regarding the structure of our government.

#### England

The colonists who settled this country beginning in 1607 were overwhelmingly English. The 17th century was a very politically active one in England. As you can trace in any one of a number of basic texts that I have put on reserve, or through the audiotape about Tudor and Stuart England that is also on reserve, the period saw the execution after trial of Charles I, a devastating Civil War, the restoration of the monarchy, the Glorious Revolution (whose gains were formalized in a Bill of Rights), a series of politically charged impeachment trials in Parliament, and a series of politically charged libel trials in the courts. (The highlights are summarized in Appendix 1 to this handout, which you should probably consult before reading any farther).

Through these tumultuous times, Englishmen considered what checks could control the King. Among the things they thought about were these:

God - There are a number of reasons for the intensity of the religious conflicts of the period. One of them is that everyone agreed that the King was subject to the laws of God. This made it a matter of considerable interest what God the King believed in. Specifically, it made a considerable difference whether the King's theology was Protestant (direct revelation, every person capable of reading Bible and deciding for himself or herself what God wished) or Catholic (access to God mediated through Church, with Pope at its head). Why?

Revolution - Note that two Kings were deposed during this century, Charles I and James II. In both cases legal forms were followed, to the extent that some people argued vigorously in each case that no revolution had taken place at all. What forms were they? What was the justification for using those forms? Why were any forms needed at all? These are not antiquarian questions; the Bill of Rights in our Constitution has close textual similarities to the Bill of Rights that emerged from England's Glorious Revolution, and the clamor for our Bill of Rights came from people intimately familiar with this history. For reasons I will elaborate in class; all of this has become even more important since 9/11.

Law - With respect to "statutory" law as a check on the King, there were at least two fundamental problems: (1) the King's prerogative and dispensing power (i.e. his power to suspend the effectiveness of acts of Parliament), and (2) a serious unresolved issue as to whether the King was bound by acts Parliament at all (or was "above the law"), an issue arising from the unanswered question of whether Parliament was an independent branch of government or merely an advisory body to the King.

These problems could be avoided in a variety of ways, including: (1) presenting a petition to the King and having him grant it, as indeed took place with the English Bill of Rights, cf. U.S. Const. Amd. 1 (preserving right of people to petition for redress of grievances), and (2) persuading the King to issue a statement of his intentions, either informally (something like a press release, e.g. the Declaration of Breda) or formally (something like an executive order).

With respect to judge-made law as a check on the King, there were similar problems, including the fact that the King appointed the judges. Thus, although there were a few exceptions later in the period respecting issues of personal liberty, many of the most important victories took place when juries could make the decisions (as in the trial of the seven bishops).

Virtue - We will talk about this concept early in the course. You need to be sure to understand the view of human nature upon which it was based.

Natural law - We will also talk about this early in the course. At that point, you should be able to answer the question: why was this concept necessary in view of the existence of the tools already listed? By the end of the course, you should know: how did it evolve through our constitutional history? how does it survive today? (This would be a very fair essay question on an exam).

Politics - Importantly for our purposes, Parliament might assert itself by impeaching one of the King's ministers (sitting as a court, convicting the minister of crimes, and sentencing him to punishment) or by passing a bill of attainder (a legislative act declaring the minister guilty of crimes). Among the questions we will address are: How did these two differ? What were the flaws in each mechanism? How did the drafters of the Constitution react to these experiences, both in the specific provisions they wrote and in the general structure of the government they set up?

Public opinion - Why should this matter in a monarchy? If it does, what new political battlegrounds open up? Where is this recognition to be found in the English Bill of Rights, in the Constitution and in its Bill of Rights?

### America

As noted above, the colonists settled this country beginning in 1607. That means that by the time of the Declaration of Independence in 1776, nearly as much time had gone by as has gone by since. During that period there were functioning and (because communications were very poor) largely autonomous governments in each colony.

Increasingly, as the colonists (who were English, remember) thought about the problems of their government, they focused not so much on how to put checks on the power of the King as on how to put checks on the power of the government as a whole. Why?

At the same time, the legislative branch in the colonies was relatively stronger than it was in England. Why?

In addition, social structures tended to be more fluid. Why?

How do these phenomena, and the others that you know of from your own study of the period relate to the validity of the following eminently debatable items that have been offered at various times as constituting our inheritance from the Revolutionary generation:

1. The common law, not so much as a system of rules as a mode of discourse. In America, decisions on public affairs, by whatever branch they are made, tend to be characterized by flexibility, pragmatism, compromise, empiricism, and gradualism.

2. Distrust of possible abuses of power as the fundamental principle for deciding the distribution of governmental functions and the propriety of governmental actions. This flows from deep doubts about the extent to which human virtue is strong enough to overcome the temptations offered to officeholders once they obtain power.

3. Protection of political minorities from domination by political majorities, especially protection against any actions that might impede today's minority in its quest to become tomorrow's majority.



4. The idea that governors are subordinate to law. ("A government of laws, not of men," "The rule of law," "In America, the law is king.")

5. The concept that law is a human creation, framed by people to achieve particular ends and capable of alteration by them as necessary. Cf. Thomas Jefferson: "The earth belongs in usufruct to the living." A related important idea is that the people are the ultimate source of governmental power. One very significant form of implementation of these notions is the expansive interpretation of legal documents to accomplish their root purposes.

6. The Constitution as a civil religion, i.e. the concept that it embodies what is good. Among numerous other effects of this legacy is a recurring moralistic tone to public discourse on Constitutional matters and a deep-seated public view that what is wrong is unconstitutional, and what is not unconstitutional is not wrong.

### Do You Seriously Expect any Practicing Lawyer to Care About this Stuff?

Yes. See Appendix 2 to this handout. (The ruling under discussion there was reversed by the Supreme Court in an opinion we will study during the semester).

As you will see throughout the course, and as was dramatized when cases arising out of the war on terrorism were decided by the Supreme Court in 2004, 2006, 2008, judges who make constitutional law decisions do so with a keen sense of where they fit in the flow of history. See Appendix 3 to this handout. Any argument seeking to convince those judges must do the same. You can see this for yourself if you browse online the Supreme Court briefs in the Guantanamo cases, Boumediene v. Bush, 06-1195, and Al Odah v. U.S., 06-1196, <http://www.mayerbrownrowe.com/probono/news/index.asp>.

### Readings

Your primary responsibility is to master the assigned course readings. For those of you who wish to read further in particular areas, however, I have placed a number of relevant works on reserve in the law library.

The most important supplemental materials are described in the "Additional Resources" section of Part 1 of the Syllabus. The next few paragraphs describe some of the others. But there are more for you to discover on your own at the reserve desk.

The Gunpowder Plot of 1607 (in which a group of English Catholics whom the government accused of being linked to Spain planted 39 barrels of gunpowder under the Houses of Parliament in an effort to kill the entire Parliament and royal family) and the government's response to it raise many issues of contemporary relevance. The best account is that of Antonia Fraser.

The intertwined political and religious struggles of the 1600's in America and England are

well covered in John M. Barry, Roger Williams and the Creation of the American Soul: Church, State and the Birth of Liberty (2012).

For a straightforward chronological account of the period 1763-89 in America I suggest Middlekauff, The Glorious Cause. Useful and readable interpretive narratives by Bailyn, Hendrickson, Morgan, and Woods are on reserve. The most recent addition to this part of the collection is Maier, Ratification: The People Debate the Constitution, 1787-1788 (2010), which is the subject of an illuminating book review at [http://www.harvardlawreview.org/media/pdf/vol125\\_klarman.pdf](http://www.harvardlawreview.org/media/pdf/vol125_klarman.pdf). Ron Chernow's 2004 biography of Alexander Hamilton, is a good read that provides much background on the politics of the period, as is the biography of George Washington by Joseph Ellis.

For consideration as we turn to the Civil War Amendments, Abraham Lincoln and the politics of his time are well covered in Team of Rivals by Doris Kearns Goodwin, and in David Herbert Donald's biography.

Historians of America are keenly aware that in many locations early colonial society was multi-ethnic and multi-cultural – in part because the territory that is America today was during the 18<sup>th</sup> century occupied by various European powers, and in part because of complex interactions between those groups, native Americans, and people of African origins. An illuminating reminder of the diversity of European traditions underlying the structure of government that eventually emerged under English rule is Shorto, The Island at the Center of the World (2004). For a good sense of the racial fluidity in the South during the decades surrounding the Civil War, you might enjoy the Pulitzer-prize winning novel by Edward P. Jones, The Known World (2003).

## Appendix 1

### Key Events Leading to the Glorious Revolution

Between 1629 and 1640, Charles I managed to rule England without ever calling into session the Parliament, with which he was having political disagreements. The significance of this was that only Parliament could provide the legal authority to collect revenues, and it generally did so on an annual basis (and, potentially, subject to conditions on how the money might be spent). However, through the energy and efficiency of his chief minister, Thomas Wentworth, the Earl of Strafford, Charles managed to get by for twelve years by collecting numerous long-forgotten but still legal taxes, and by pushing to the limit those unilateral powers that he had.

Eventually, however, Charles ran out of money and found it necessary to summon Parliament. The angry members took their revenge, by first "impeaching" and then "attainting" Wentworth. With Charles' consent (as an attempt to appease Parliament) Wentworth was soon executed (quoting, as he went to the gallows, the biblical verse "Put not your trust in princes.").

This did not stop the disagreements between Charles and the Parliament. A Civil War broke out, and eventually Charles fell into the hands of his opponents. He was tried in Westminster Hall on a charge that in essence amounted to breach of contract, *viz.*, that having been made King of England and "thereby entrusted with a limited power to govern by and according to the law of the land," he had instead sought "unlimited and tyrannical power" by levying war against the Parliament and the people. He was found guilty and executed within ten days.

From that time, January of 1649, through 1660, England had no King, and was primarily governed by Oliver Cromwell. But after his death, anarchy grew. Meanwhile Charles II was following events from Breda, in Holland. Seeing the tide turning in his favor, he published a document known as the Declaration of Breda, in which he announced among other things, that, if placed on the throne, he would rule only with Parliament.

With this promise, the monarchy was restored in May of 1660. Charles II ruled until his death in early 1685, when he was succeeded by James II, who, unlike the other Kings mentioned so far, was a Catholic. There were a number of anti-Catholic laws on the books, and James claimed and exercised the powers first to "dispense" with these in individual cases, and then to "suspend" them altogether.

In response to one of these suspensions, seven leading Protestant bishops presented a petition to the King objecting to his actions. He responded by having them brought up on criminal charges of seditious libel. All but one of the judges were willing to sustain these charges, but the bishops were entitled to a trial by jury, and the jury acquitted them.

At this point, James was without popular support and soon fled the country. The Parliament came back into session and declared that this flight constituted an abdication, and that the throne was vacant. They offered it to William of Orange, on condition that he agree to a Bill

of Rights. This provided, among other things, for the abolition of the dispensing power, the prohibition of taxation without Parliamentary consent, the right of subjects to petition the King, and the protection of freedom of Parliamentary debate. More fundamentally, the very existence of the Bill of Rights established the principle that it was in fact Parliament that had made the King. Thus, unlike the situation existing at the time of Charles I, there was indeed a contract between the King and his subjects. In other words, the King was subject to the rule of law.

The whole "Glorious Revolution" consists of nothing more or less than the acceptance by the King and the people of this new basis for their relationship. The "Glorious Revolution" was not some violent and bloody uprising. It was simply a set of non-violent protests against James II which resulted in a new contract between the people and the rulers. By this time many of the American colonies had been settled for more than half a century and their inhabitants considered themselves full participants in the new arrangements.

### Chronological Summary

January - May, 1641 - Impeachment, attainder, and execution of Thomas Wentworth, Earl of Strafford, chief minister to Charles I.

1642-46 - English Civil War.

January, 1649 - Trial and execution of Charles I.

March - May, 1660 - Declaration of Breda. Restoration of Charles II.

February, 1685 - Ascension of James II.

1688-89 - Trial of the Seven Bishops. Flight of James II. Ascension of William III. Signature of Bill of Rights.

## Lest We Forget

### Hamdi and The Case Of the Five Knights

BY ERIC M. FREEDMAN

**T**here is no reason to believe that Yaser Esam Hamdi has ever read the Case of the Five Knights. More strangely, there's no evidence that three judges of the U.S. Court of Appeals for the 4th Circuit had read it before they ruled on Jan. 8 that Hamdi, an American citizen being held in military custody in Virginia, could be detained indefinitely incommunicado as an "enemy combatant" on the mere say-so of the executive branch.

But whether or not the Court of Appeals chose to benefit from consideration of the knights' story, those of us concerned about the future of civil liberties in this country—as well as the Supreme Court, when it looks at Hamdi's case—should certainly remember it.

#### KING VERSUS COUNTRY

Almost from the time he became king in 1625, Charles I was at odds with Parliament. The lawmakers disapproved of his military and political policies overseas and would not fund them except on conditions he found unacceptable.

So Charles dissolved Parliament in 1626 and began to assess forced loans from the citizens and to imprison those who would not pay. Late in 1627, five knights confined on this basis in the Tower of London sought release by writ of habeas corpus.

The keeper's response was that they were being held "by the special command of his Majesty." The prisoners assailed this

opaque formulation as meaningless and thus legally insufficient to justify their continued detention.

Their argument did not convince the court. It ruled that the king's will represented the law, which the judges were bound to enforce. The court held that it could not look into "the cause of the imprisonment" (i.e., the underlying merits), but could only consider the basis of "the detention" (i.e., the king's command). And even as to that, "the Court is not to examine the truth" of the jailer's response, "but must take it as it is."

This decision provoked widespread outrage in the country, and Charles found it expedient to release the knights shortly thereafter. He then called a new Parliament, which supplied him with funds, but only in exchange for his imprimatur on the Petition of Right. This specifically forbade the practice of detaining prisoners by his "Majesty's special command . . . without being charged with anything to which they might make answer according to the law."

At this point, Charles once more attempted to rule without Parliament. Among other expedients, he tried to collect "ship money," a feudal levy traditionally raised when there were fears of a foreign invasion. John Hampden, a leader in the House of Commons and a wealthy landowner, refused to pay the ship tax on the basis that Parliament had not authorized it. The Crown sued Hampden for the sum in the Court of Exchequer, which ruled in the king's favor by a split vote.

Concurring in this judgment, Sir Robert Berkeley stated, in a dictum that has stained his name in the annals of jurisprudence,

"I never read nor heard that *Lex* was *Rex*, but it is common and most true, that *Rex* is *Lex*, for he is a *lex loquens*, a living, a speaking, an acting law."

This too proved unacceptable to the public. On Parliament's return in 1640, it vacated the judgment in the ship money case and impeached, convicted, and fined Justice Berkeley for his role in it.

Further, Parliament codified the Petition of Right by specifically providing that every person held by command of the king should have the right to bring habeas corpus proceedings wherein judges must "examine and determine whether the cause of such commitment . . . be just and legal or not."

These landmark episodes in the history of the rule of law bequeathed two enduring lessons to the people of England and its colonies: Detentions by the executive on the basis of his will alone are tyrannical, and judges have an independent duty to inquire into them.

### BURR'S THREAT

The new American republic had early occasion to apply these lessons. After Aaron Burr left office as vice president following his duel with Alexander Hamilton, he allegedly conspired with Spanish agents to break off some of this country's western territories from their allegiance to the United States. ("Western" in those days began at the Appalachian Mountains.)

Among his alleged co-conspirators were Dr. Erick Bollman and Samuel Swartwout. In December 1806, the pair was seized by Gen. James Wilkinson, denied counsel and access to the courts, and sent by warship to Washington.

There, the U.S. attorney asked the Circuit Court for the District of Columbia to have the two imprisoned pending trial for treason. In support of this, he proffered an affidavit from Gen. Wilkinson and a message from President Thomas Jefferson to Congress stating that Wilkinson's information proved the plot "beyond question." Over the objections of defense counsel, a politically divided bench granted the motion.

The prisoners thereupon applied to the Supreme Court for a writ of habeas corpus. Sitting in court, they listened for five days as Chief Justice John Marshall and his colleagues "fully examined and attentively considered" on an item-by-item basis "the testimony on which they were committed," just as "the court below ought to have done" (according to Marshall's opinion). Finding the prosecution's factual proffer insufficient to justify the detention, the Supreme Court ordered the prisoners discharged.

Plainly, the prosecutors of Bollman and Swartwout were simply practicing law 200 years too soon. Had they only had the benefit of last month's 4th Circuit opinion in *Hamdi v. Rumsfeld*, they would have known just how to proceed: announce that the defendants, having been seized in the midst of an armed plot on behalf of a foreign power, were "enemy combatants" and could therefore be held without access to counsel or any opportunity to respond to the allegations against them until such time as, in the president's opinion, Spain no longer posed a threat to national security.

### RELYING ON MOBBS

Hamdi, an American citizen, was detained by American

forces in Afghanistan. The circumstances of that detention are known only from a declaration submitted by one Michael Mobbs, a special adviser to the undersecretary of defense for policy based in Washington. On the basis of "my review of the relevant records and reports," Mobbs stated that Hamdi, in possession of an AK-47 rifle, was fighting with a Taliban unit against the Northern Alliance; that the unit surrendered to the Northern Alliance, which transferred Hamdi to U.S. custody; and that the government had accordingly classified him as an "enemy combatant."

Considering this document, the federal trial judge, a conservative Republican, had a series of questions for the prosecutor, starting with Mobbs' identity and the sources of his knowledge. Unsatisfied with the responses, he ordered the government to turn over, among other information, copies of any statements made by Hamdi or members of the Northern Alliance concerning the circumstances of Hamdi's capture.

An outraged government appealed this order to the 4th Circuit. The question was whether the Mobbs declaration by itself was sufficient to support the detention. The 4th Circuit answered yes.

Chiding the district judge for expressing skepticism about the government's presentation, for approaching "the Mobbs declaration by examining it line by line," and for suggesting the possibility that Hamdi might have to be produced in court, the 4th Circuit held that once "the government has identified the source of the authority to detain Hamdi as Article II, Section 2 of the Constitution, wherein the President is given the war power," it need only present factual assertions that "would, if accurate, provide a legally valid basis for Hamdi's detention under that power."

That is, if the government has a lawyer competent enough to draft an affidavit that, if true, justifies holding the prisoner, then the prisoner may not be heard, through counsel or otherwise, to assert that the affidavit is untrue. Indeed, counsel may not even see the prisoner.

While the *Hamdi* court pays lip service to "meaningful judicial review" and confines its precise holding to seizures taking place in combat zones abroad, its decision ignores the broader teachings of Anglo-American history from 1627 through the prosecution of Dr. Wen Ho Lee—in which executive allegations of devastating threats to national security collapsed when subjected to adversary testing before an independent judiciary.

To be sure, there is one case that the 4th Circuit might have cited in support of its result—one clear precedent for the proposition that once the government has stated its authority ("by the special command of his Majesty"), a court hearing a citizen's petition for a writ of habeas corpus "is not to examine the truth" of the jailer's response, "but must take it as it is."

On second thought, perhaps it is not so strange after all that if the judges of the 4th Circuit had ever read the Case of the Five Knights, they chose to keep that fact to themselves. ■

*Eric M. Freedman, who teaches legal history and constitutional law at Hofstra Law School, was one of many law professors who joined an amicus brief in support of Yaser Esam Hamdi in the 4th Circuit. Freedman is the author of Habeas Corpus: Rethinking the Great Writ of Liberty (NYU Press, 2002).*

Appendix 3

# English Revolution Redux

It is no surprise that the causes of that civil war, some 350 years ago, play out today between president and Congress.

BY DANIEL J. KORNSTEIN

**B**ooks sometimes surprise us, and that is one of the many joys of reading. We choose a volume because we like the author or are interested in the subject, but then, as we are reading, the unexpected suddenly happens. The pages we are perusing come alive all at once and take on new meaning. They connect with other things we have been reading and illuminate other subjects in stimulating and previously unseen ways.

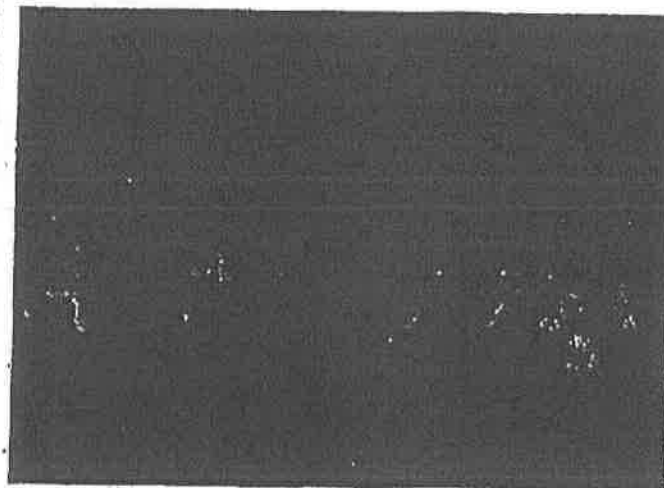
"The Tyrannicide Brief," published in England in 2005 by Geoffrey Robertson, a prominent barrister known for his defense of human rights, vividly tells the story of the relatively unknown lawyer, John Cooke, who in 1649 prosecuted Charles I for treason during the English Civil War. The main thrust of "The Tyrannicide Brief" is to explain how Cooke conducted the first trial of a head of state for waging war on his own people, which foreshadowed the prosecutions in our day of Pinochet, Milosevic and Saddam Hussein.

But as I read about the causes of the English Civil War over 350 years ago, I could not help thinking about current events. Today's hot-button controversies—executive privilege, torture, extraordinary rendition, indefinite detention without counsel or habeas corpus, secret military trials with abbreviated procedural rights, even the power to wage war—all relate back to 17th-century English history.

The core issue in the English Civil War was the struggle for power between King Charles I and Parliament. Today the single most important and controversial structural issue in American government is the struggle for power between President Bush and Congress.

I was struck by the similarities. In each case, separated by centuries, the executive and the legislature compete for dominance. I would read a page about 17th-century English history, and it often seemed as if I could have been reading the front page from tomorrow's *New York Times*. The cliché about history repeating itself leaped to mind.

The similarities between then and now have not been lost on everyone. Some of those who defend President Bush's actions claim to find support in the 17th-century powers of the English king. One such defender is John Yoo, who as a lawyer in the Justice Department's influential Office of Legal Counsel, played a key role in some of



At one point in 1649, Charles I entered the House of Commons with an armed force searching for five traitorous members (the MPs, it turned out, had already slipped away).

those decisions.

Yoo wrote that English political history should inform the Constitution's war powers and grant "monarchical" power to the President. In a 2002 article, Yoo claimed that the President had the "plenary powers of the king" except when explicitly abrogated by the Constitution. Similarly, argued Yoo, the 17th-century English king's royal "prerogative" power to "suspend" or "dispen[s]" with Parliamentary laws is authority for a president to ignore statutes passed by Congress—such as prohibitions on torture and warrantless eavesdropping on Americans—whenever he claims that "national security" or "military necessity" is at issue.

Yoo is right to compare today's events to 17th-century English history, but demonstrably wrong in his conclusions. He ignores the end results. Charles I favored what some now call a unitary executive. He relentlessly tried to gather all power into his own hands. He dissolved Parliament in 1628. He used what was referred to as his "negative voice" (what we might call a veto or vetoing statement) to nullify what Parliament did. He removed judges whose decisions displeased him. The notorious court of Star Chamber used the power to arrest, to torture and to sentence to indefinite imprisonment ("at his Majesty's pleasure") for

political offenses such as seditious libel.

In the 1600s, for instance, the English king had the right to declare war, but Parliament alone could decide whether and how to raise any tax to fight that war. But Charles I, violating this rule, chose to raise taxes himself, and an obsequious court in 1633 generated much discontent when it upheld the king: "The King may dispense with any laws in case of necessity... Rex is Lex... The King can do no wrong." Another judge on the same court said the king had unlimited discretion to act for what, in his unchallengeable subjective view, was the public good: His good faith had to be assumed on the question of whether the kingdom was in danger.

But the outcome of England's Civil War repudiated those royal claims. The court of history ruled against Charles I's notion that the king is above the law. Charles's fundamental error, according to barrister Robertson, was to pit his "single judgment" against the law made by the people of England through their elected representatives. Charles's prosecutor thought tyranny occurred when rulers showed "their fixed intention to govern without Parliament or an independent judiciary or any other democratic check on their power."

Rather than support an Imperial presidency, the history of 17th-century England

mitigated compellingly against it. On regaining power after the Restoration in 1660, some highly placed monarchists wanted to keep republican diaphs in prison indefinitely. But since the Magna Carta allowed anyone in England to use habeas corpus to challenge his imprisonment, someone in authority came up with a pernicious idea that echoes today. The King would keep his political "enemy combatants" in custody forever not in England but the offshore islands of Jersey and the Isle of Man. This attempted end run was so unpopular that the official who came up with it had to leave office, and Parliament in 1679 passed the Habeas Corpus Act, which made the "great writ" apply extraterritorially. In 2004 the U.S. Supreme Court cited this history in *Rasul v. Bush*, a case dealing with detainees at Guantanamo.

Perhaps we should not be surprised that the causes of the English Civil War still play themselves out in current American history. Much of American legal and political experience has its roots in the ferment of 17th-century English history. Englishmen settled the American colonies during the 17th century and as colonists took with them the prevailing ideas of the day and then built on those ideas, adapting them to American soil. Those intellectual, legal and political ideas of the American colonists—which created certain lasting concepts of liberty that would have an important role in the American Revolution and after—[included ending the divine right of kings.

And perhaps we also should not be surprised if any nation has continual governance struggles. That is what separation of powers and checks and balances are all about. They are "essential to the preservation of liberty," as Madison wrote in *Federalist No. 51*.

A review of current events in light of the English Civil War calls to mind a famous speech by Patrick Henry, a self-taught Virginia lawyer, in the run-up to the American Revolution. Speaking in 1768, patriot Henry, complaining about the unpopular Stamp Act, referred to the events of 17th-century English history and declared, "George the Third may profit from their example."

Our George the Second may also profit from their example.

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# How Democracy Swept the World

By ANTHONY SCALIA

If the turning of a millennium serves any purpose profitable to those of us who are not computer programmers, it is to help put things in perspective. The Western mind, at least, is not prone to assess the sweep of history with the degree of remorse displayed by the Chinese ruler (in the version I heard, it was Mao) who, when asked by an American visitor (Nixon) what he thought was the impact of Napoleon upon the world, replied that it's too early to tell.

I have been asked to contribute to this series of articles my assessment of the most significant development in the law over the past thousand years. For the reason that the foregoing story suggests, that is a risky business. What is of ultimate significance in the past is that which is likely to endure, in itself or in its consequences, far into the future—so that evaluating the past in these millennial terms is as much an exercise in prediction as in history. By engaging in this hazardous enterprise, moreover, one is not likely to cover himself with glory; anything significant enough to merit the award Legal Development of the Millennium is not likely to have escaped general notice. ("He had to go to Harvard Law School to figure that out?") Even so, I will take a stab.

## Swept the Board

My candidate for the award is the principle that law should be made not by a ruler, or his ministers, or his appointed judges, but by representatives of the people. This principle of democratic self-government was virtually unheard of in the

feudal world that existed at the beginning of the millennium; at its close, there are few nations that do not, superficially at least, embrace it. So thoroughly has it swept the board that even many countries that in fact do not observe it pretend to do so, going through the motions of sham, unopposed elections.

We Americans have become so used to democracy that it seems to us the natural order of things. Of course it is not. During almost all of recorded human history, the overwhelming majority of mankind has been governed by rulers determined by heredity, or selected by a powerful aristocracy, or imposed through sheer force of arms. Kings and emperors have been at ways with us; presidents for their equivalent

lent) have been very rare. This is not entirely the result of the application of superior force against the multitudes. There is something in human nature that wants a "leader" (the old German word is *Führer*). In our forthcoming presidential elections, we shall cheer candidates who promise to "lead" us into the 21st century.

And face it, democracy is not always preferable to autocracy, especially for those who happen not to be among the democratic majority. Ethnic minorities in the Balkans were perhaps better off under

Franz Joseph or even Josip Broz (Tito). Thus it is that democracies have displayed a distressing tendency—from the Athenian Republic to the Roman Republic to the First French Republic to the Weimar Republic—to deteriorate into despotism. Abraham Lincoln was not invoking the unimaginable when he alluded to the prospect that government of the people, by the people and for the people might perish from this earth.

Thus, my assessment that this *fin-de-millennaire's* flowering of democracy will be enduring rests, I must confess, upon my belief that we have finally managed to get the kinks out of the system. The principal kink is that majorities, no less than individual rulers, want to have their own way and can be as tyrannical as a dictator—which is what their excesses will ultimately produce. (The exuberant First Republic leads to Napoleon.) The Framers of the American Constitution were well aware of this: "An elective despotism," wrote Madison in the *Federalist Papers*, "was not the government we fought for."

The solution for the problem—in the U.S. Constitution and in any other democratic constitution that is likely to endure—can be described (pejoratively) as calculated inefficiency: The will of the people (that is, of the majority of the people) shall prevail, but not immediately, and not without overcoming bothersome obstacles that have intentionally been placed in its path.

In our system, of course, the most formidable obstacle is the constitutional guarantee of certain individual rights, which

the majority can modify only by the extraordinarily difficult (and not very majoritarian) process of amending the Constitution. I say not very majoritarian because an amendment requires the approval of three-quarters of the states, which means that, in theory, less than 2.5% of the population—a bare majority in the 13 least-populous states—can prevent an amendment from being adopted.

For legislation that does not require amendment of the Constitution, the most significant obstacle is our two-headed Congress. Imagine how much easier it would be to get legislation through a single body, rather than through two houses, elected in different fashions, whose leaders have divergent ambitions and agendas. In one of the two houses, moreover, the members are elected for long enough terms that they are more resistant to the transient popular will. And if that were not handicap enough, the president is something of a third house, participating intensively in the legislative process through the exercise and threatened exercise of his power to kill all measures that cannot muster a two-thirds vote

of each house.

There is added to this, of course, our federal structure. That structure is not as vigorous as it once was, a consequence of the 17th Amendment, which eliminated the principal protection of the states against federal expansion: election of the Senate by the state legislatures. But as a practical matter it still restricts the scope and hence the size of the central government and, on most matters, insulates minority views that are dominant within their states from a contrary national majority. And to a greater or lesser degree, the same law-making inefficiencies described above are built into the constitutions of the states, the principle exception being that the Supreme Court's one-man-one-vote decision forbids the states to apportion one of their legislative houses (like the U.S. Senate) on the basis of regional interest rather than sheer population.

Given this deliberately crafted system, it ought to be profoundly distressing to hear Americans complain generically about legislative "gridlock" in Washington. The structure was designed to make legislation difficult, which is ultimately the most significant protection of minority views against the majority will.

## Liberal Disposition

My selection of democratic self-government as development of the millennium assumes—perhaps optimistically—a continuing appreciation of the need for these structural checks. It also assumes, as the precondition for that appreciation, what our Framers would have called a liberal disposition on the part of the people: a reluctance to impose their views by law in the face of significant opposition, a reluctance to require others to love all that they love and to hate all that they hate. A society that feels passionately about everything, or that lightly—without a sure and certain need—adopts laws oblivious to





many of its members, cannot sustain democratic self-government, and is fit only to be ruled by others.

The point was put well by the great Learned Hand, in his comments to a group of newly naturalized Americans: "The spirit of liberty is the spirit which is not too sure that it is right; the spirit of liberty is the spirit which seeks to understand the minds of other men and women; the spirit of liberty is the spirit which weighs their interests alongside its own without bias."

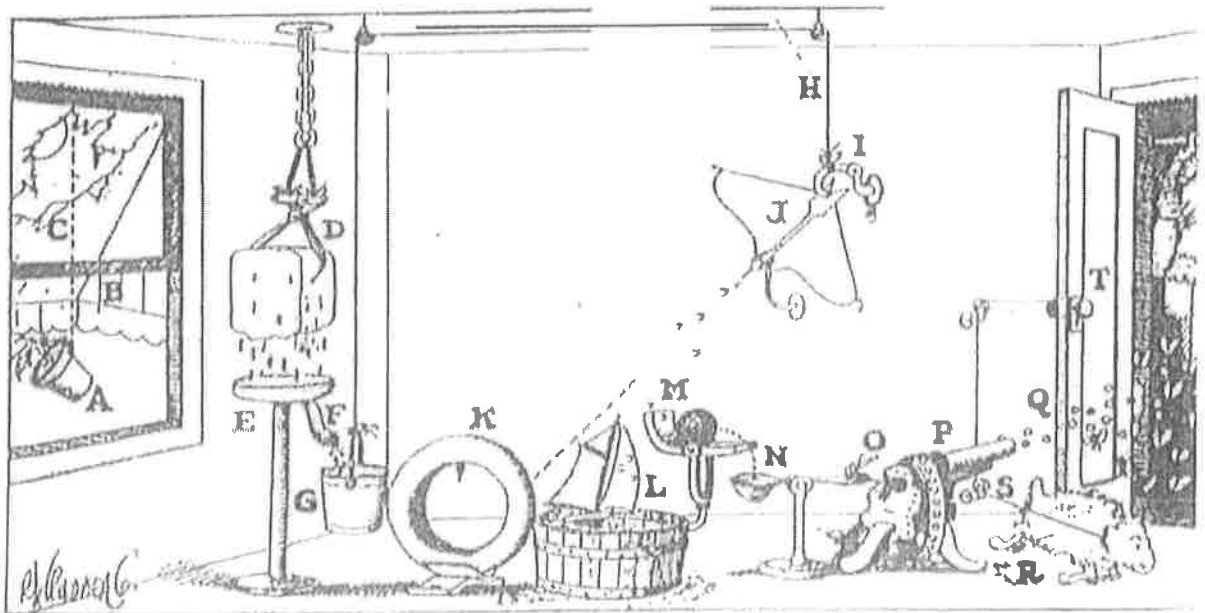
*Mr. Bealla is an associate justice of the U.S. Supreme Court.*

Rube Goldberg's "A Device for the  
Extermination of Moths"

THE PROFESSOR, EMERGES FROM THE GOOFY BOOTH WITH A DEVICE FOR THE EXTERMINATION OF MOTHS.

START SINGING. LADY UPSTAIRS, WHEN SUFFICIENTLY ANNOYED, THROWS FLOWER POT (A) THROUGH AWNING (B). HOLE (C) ALLOWS GUN TO COME THROUGH AND MELT CAKE OF ICE (D). WATER DRIPS INTO PAN (E) RUNNING THROUGH PIPE (F) INTO PAIL (G). WEIGHT OF PAIL CAUSES CORD (H) TO RELEASE HOOK (I) AND ALLOW ARROW (J) TO SHOOT INTO FIRE (K). ESCAPING AIR BLOWS AGAINST TOY SAILBOAT (L) DRIVING IT AGAINST LEVER (M) AND CAUSING BALL TO ROLL INTO SPOON (N) AND PULL STRING (O) WHICH SETS OFF MACHINE GUN (P) DISCHARGING CAMPHOR BALLS (Q). REPORT OF GUN FRIGHTENS LAMB (R) WHICH RUNS AND PULLS CORD (S), OPENING CLOSET DOOR (T). AS MOTHS (U) FLY OUT TO EAT WOOL FROM LAMB'S BACK THEY ARE KILLED BY THE BARRAGE OF MOTH BALLS.

IF ANY OF THE MOTHS ESCAPE AND THERE IS DANGER OF THEIR RETURNING, YOU CAN FOOL THEM BY MOVING.



## The Framers Approach The Drafting Process

Sitting down with the background of (A) some theoretical ideas about politics and (B) some recent experiences, they sought to solve pragmatically a series of practical issues.

### (A). *The Theoretical Ideas*

#### (1) Republicanism

Persisting tugging and hauling between

##### (I) Communitarian Vision (Critical Legal Studies, Republican Revival)

- the view that the primary purpose of government was to achieve the ends of the community, which was an entity of higher importance than the individual; and

##### (II) Lockean Social Contract (Individualism, Classic liberalism)

- the idea that government had been created by free individuals who were its ultimate masters and each of whom had reached an agreement to surrender only the minimum amount of power necessary to continue to preserve his or her own ability to remain free.

#### (2) Virtue

Persons given public office inevitably abuse their power. Therefore although we hope that their innate virtue will keep them from doing so, we frame governments on the opposite assumption. (Federalist 51: "If men were angels ...")

#### (3) Democracy

Unmediated majority rule is a bad thing.

Federalist 10: A faction is, "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse [1] to the rights of other citizens [i.e. tyranny of the majority], or [2] to the permanent and aggregate interests of the community [i.e. bad public policy, which can only be changed if we avoid no. 1]."

Solutions: (1) prohibitions on government action, (2) checks and balances, (3) federalism. (These last two are summarized in Federalist 51: "In the compound republic of America ...")

#### (4) Natural law

At the founding period referred to a concept of justice so fundamental, being divinely ordained, that any contrary law would be void. Not pursued legally in this country because judicial review incorporated it.

Meaning of the term had changed by time of Civil War.

(B) *The Recent Experiences*

Offered as metaphors for clusters of ideas.

(1). Drafting of Articles of Confederation

Idea cluster - pragmatic political compromise  
Underlying reality of conflicting state interests.

(2). Shays Rebellion

Idea cluster - dangers of unbridled democracy, anarchy, faction, licentiousness  
Underlying reality of social, economic, and political divisions among the population.

1. Debtors v. Creditors
2. Farmers/Country People v. Merchants/City People
3. East v. West
4. North v. South (Slavery plus)
5. French-leaning radicals/British-leaning moderates

(3) Debates over Ratification of the Constitution

Idea cluster - significant long-term legacy of these debates.

1. Empirical. Ratification debates are the basic raw material for historical work on the Constitution.
2. Competitive. Political theories to explain Constitutional structure were generated during ratification debates.
3. Bonding. Memory of how sharp political divisions had been overcome.
4. Legal. Origin of the Bill of Rights.

Marbury v. Madison

1. *"Has the applicant a right to the commission he demands"?*

A. Not a constitutional law issue

B. Answer is yes.

2. *"If he has a right, and if that right has been violated, do the laws of his country afford him a remedy"?*

(More precisely: "does the violation of this right give rise to a claim that a court can adjudicate"?)

A. This is a constitutional law issue, and the answer depends on whether the government act sought to be reviewed is ministerial (so that the question to be resolved is "legal" and the judiciary has been entrusted with its resolution) or discretionary (in which the question to be resolved is "political" and the judiciary has not).

B. In this case, the question is "legal" and so Marbury presents a justiciable claim.

3. *Is "he entitled to the remedy for which he applies"?*

A. Is mandamus the right remedy?

a. Not a constitutional law issue

b. Answer is yes

B. May this Court issue a mandamus?

Answer: Only if: (a) a statute grants it that power and (b) the statute is constitutional.

(a)

Three possible readings of the statute at issue here (Sec. 13 of Judiciary Act of 1789, CB 28 n.\*):

1. Marshall's reading. Read the material after the final semicolon to mean "The Supreme Court shall have ... [original jurisdiction] to issue ... writs of mandamus ... to persons holding office under the authority of the United States."

In that case, (a) the statute does grant the Court the power to do what Marbury wants, but (b) the statute is unconstitutional as extending the original jurisdiction of the Court beyond the confines of the first sentence of the second paragraph of Article III, Sec. 2.

II. A possible reading that Marshall used in construing the textually parallel Section 14 of the Judiciary Act in *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). Read the entire final sentence as a whole to deal only with appellate jurisdiction and as authorizing the issuance of writs of mandamus only in conjunction with those cases.

In that case (a) the statute does not give the Court the power to do what Marbury wants (i.e. it does not grant the Court the power to issue an original writ of mandamus), but (b) it is constitutional under the second sentence of the second paragraph of Article III, Sec. 2 (because it confers only appellate jurisdiction).

This reading is possible but, for the reasons Marshall gives (CB 30, 2d and 3d paras.), i.e. the reference to "persons holding office," not the best.

III. The most likely reading.

The first two sentences give "original jurisdiction." The fourth sentence up to the semi-colon gives "appellate jurisdiction." The fourth sentence beyond the semi-colon gives the Court "power" to issue appropriate writs in conjunction with cases over which it has been granted subject matter jurisdiction by the preceding statutory language.

In that case, (a) the statute does not give the Court the power to do what Marbury wants (because the first two sentences do not grant the Court original jurisdiction over this matter), but (b) it is constitutional (because the statutory grants of both original and appellate jurisdiction are squarely authorized by the second paragraph of Article III, Sec. 2).

(b)

Once having picked Reading I,\* Marshall's holding that the statute as so read was unconstitutional seems quite correct, both for the reasons he gives (CB 29, "If it had been ...") and for the historical and practical reasons summarized in the Amar article in the syllabus.

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\*His reasons for doing so in this case are well known to you. But, as you will see again in the important Note preceding Assignment 6, a court will normally try hard to choose a reading of a statute that would make it constitutional. Why?

**GREAT IRONIES OF HISTORY:**

**The Peculiar Historic Fable of *Marbury v. Madison***

**By**  
**Eric J. Beckerman**

On the first day of virtually every course in American Constitutional Law the case of Marbury v. Madison<sup>1</sup> is taught. Students are usually told that this is the case that established what we refer to today as judicial review. They are instructed as to the continuing controversy of how "The Great Chief Justice," John Marshall, created out of thin air the power of the courts to pronounce acts of the other branches of government unconstitutional. A cursory review of the bare facts of the case usually accompanies the legal analysis of the opinion generally followed by extensive commentary and criticism by past and contemporary legal scholars. All in all the student is left with the impression that the ultimate power that the Supreme Court wields today was invented by, and is a direct lineal descendent of, John Marshall and his opinion in the case of Marbury v. Madison.

This paper will briefly attempt to dispel this legend. The first part of this piece will trace some of the origins of judicial review to show that it was not the creation of John Marshall in 1803, but rather sprang from circumstances of a century and a half of history that were peculiar to the American colonies and the new republic. In addition, it will be shown that judicial review had in fact been exercised in the courts of America numerous times before the decision in Marbury, and that this power must have been within the contemplation of the framers at the time the constitution was written.

The second part of this paper will examine the whole case and controversy. By examining the events surrounding the case it will be shown that the motives compelling the decision were rooted in a fierce political battle and that the entire issue of judicial review, which need not have been addressed in the decision at all, would never have come up but for this political warfare.

The final part of this paper will attempt to show that the case, at the time, did not stand for what it has come to mean today. The continuing controversy that is taught in law schools today is a controversy that did not heat up until long after John Marshall was dead and subsequent Supreme

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



Courts used his eloquence on the matter to expand the power of the Supreme Court to dimensions that John Marshall never had intended nor even imagined possible.

## I. American Origins of Judicial Review

The power of American judges is unparalleled among western nations.<sup>2</sup> Nowhere else in the world do judges wield as much power in shaping the contours of society as they do in this country.<sup>3</sup> Traditionally, law students are taught that this power emanates from John Marshall's opinion in the case of *Marbury v. Madison*, but this is not altogether accurate. It is true that this case established a precedent that subsequent Supreme Courts have cited extensively to justify sweeping judicial activism but this turn of events is largely a modern phenomenon.<sup>4</sup> That this opinion conceived judicial review as it is applied by the Supreme Court today is implied, if not actually stated outright in Constitutional law classes. It is, however, an assertion that is patently false. The philosophical conceptualization of what we call judicial review long predates John Marshall. And, as we shall see, its first implementation hardly occurred in *Marbury*, Marshall was, however, the first to make the argument for it in a Supreme Court opinion.

To understand the evolution of judicial review one must first examine the sources that lie in the first century and a half of American colonial history and in American attitudes towards the law.<sup>5</sup> The idea that there existed some supreme law as to which the ordinary laws of the colonial legislatures had to conform with was not the stuff of abstract legal and moral philosophy for the colonists, but rather was an every-day part of their judicial system. The thirteen colonial legislatures were dependent governments and at all times had to conform to the laws of Parliament.

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<sup>2</sup> Wood, *The Origins of Judicial Review*, 22 SUPR. U.L. REV. 1293 (1988).

<sup>3</sup> *Id.*

<sup>4</sup> Clinton, *Precedent as Mythology: The Case of Marbury v. Madison*, 1989 YEARBOOK OF THE SUPREME COURT INST. SOC. 78 (1989).

<sup>5</sup> Wood, *supra* note 2, at 1297.

The Privy Council in England possessed the power to disallow laws adopted by the thirteen colonial assemblies. This power of review was exercised when the colonial legislatures exceeded their authority in adopting certain laws and when colonial laws conflicted with the superior laws adopted by Parliament.<sup>6</sup> Additionally, the questions of colonial conformity were most often judicial questions, for the Privy Council sat as a court of law with regard to American colonial enactments.<sup>7</sup> To all colonial Americans, therefore, judicial control of this sort would have been entirely familiar. To the American colonial lawyer it would have had to have been second nature.<sup>8</sup> This circumstance alone, however, does not explain how a concept as "radical" as judicial review would become a part of the American legal psyche. For this we need to develop an understanding of the whole intellectual climate and legal culture of the time.

The starting point of such an analysis is the idea that if a sovereign's legislative power has limits, it is limited by principles of a more "fundamental law". Fundamental law, in its purest sense, is law beyond human invention. Law which is "out there somewhere," a kind of lurking omnipresence, whether God's law, the law of nature, the law of reason, the law of custom or some other like thing.<sup>9</sup> Such law was discovered as an act of revelation. In the early seventeenth century, in England, Lord Edward Coke was to expound, in dictum, the concept that was to become the ideological underpinnings of modern judicial review. In *Dr. Bonhams Case*<sup>10</sup> Coke stated that "it appears in our books, that in many cases, the Common Law will control Acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, . . . the Common Law will control it, and adjudge such act to be void."<sup>11</sup>

<sup>6</sup> E. RUSSEL, *THE REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL* 227 (1976), according to Charles Grove Haines, the Privy Council reviewed 8563 acts adopted by the colonial legislatures between 1696 and 1776, and 469 or 5.5% were disallowed by orders of the council. C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 49 (1959); See also C. WOLFE, *THE RISE OF MODERN JUDICIAL REVIEW* 74 (1986).

<sup>7</sup> Black, *An Astonishing Political Innovation: The Origins of Judicial Review*, 49 U. PITT. L. REV. 691, 693 (1988)

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 694.

<sup>10</sup> *Id.* at 107

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

Unfortunately Coke's early notions of judicial review never caught on in England. By the late eighteenth century the views of William Blackstone were dominant in England.<sup>12</sup> Blackstone spoke of positivism, where law is an act of authority and that all law is of human invention.<sup>13</sup> In Blackstone's view there was nothing Parliament was not empowered to do. Blackstone was not completely adverse to the idea of fundamental law, but to him it was merely a moral inhibition or conscience existing in the minds of the legislators. The intrinsic problem with this interpretation of fundamental law was that it was so basic and so primal that it was enforceable only by the people's right of revolution; relief could hardly run in the ordinary court system.<sup>14</sup>

Of these competing legal philosophies it was Coke's that had the greatest impact in the American colonies.<sup>15</sup> It has been asserted that as early as 1688 the men of Massachusetts did much quote Lord Coke.<sup>16</sup> Even earlier than that, in the case of *Giddings v. Brown*,<sup>17</sup> Coke's dictum received practical application, something which never actually happened in England, though the act overturned was merely a town vote. Magistrate Symonds based his judgment for the plaintiff upon the following grounds, "The fundamental law which God and nature has given to the people cannot be infringed. The right of property is such a right. In this case the goods of one man were given to another without the former's consent. This resolve of the town being against fundamental law is therefore void, and the taking was not justifiable."<sup>18</sup> This colonial American embrace of Coke continued on into the eighteenth century.

12 Black *supra* note 7, at 694.

13 See generally 1 BLACKSTONE, COMMENTARIES.

14 Wood, *supra* note 2 at 1297.

15 Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102, 105 (1910).

16 *Id.*

17 *Id.*, citing RENSCH, COLONIAL COMMON LAW: SELECT ESSAYS IN ANGOLO-AMERICAN LEGAL HISTORY, Vol. 1 pg. 376

18 *Id.* Corwin cites many examples of Coke's jurisprudence on the subject in eighteenth century American colonial courts starting with the seminal opening argument of James Otis in the *Writs of Assistance* case in Boston in 1761. His argument being that whether the writs were warranted by an act of Parliament or not, was a matter of indifference, since such an act of Parliament would be against the Constitution and against natural equity and therefore void. The executive courts must pass such acts into disuse. Coke's famous dictum was raised again in 1765 when Governor Hutchinson, referring to the opposition to the Stamp Act, wrote that the prevailing reason at this time is that the act of Parliament is against the Magna Charta, and the natural rights of Englishmen, and therefore, according to Lord Coke, null and void. In 1776, at the outbreak of the war, Justice Cushing charged a Massachusetts jury to ignore certain acts of Parliament as void and inoperative.

The colonists found Coke's ideas appealing and relevant, not just because of their immediate self-serving usefulness in the imperial debate of the late 1700's, but because such ideas fit their notion of what law ought to be. Their experience predisposed them to find Coke's ideas meaningful.<sup>19</sup> The colonists believed that the overriding nature of law lay in the "immutable maxims of reason and justice,"<sup>20</sup> in something other than the will of the legislature. To the Americans the Common Law fit nicely into this category. The Common Law, as the American colonists saw it, was the fundamental law that was superior to the ordinary legislative acts of men. To them it embodied the principles, rules, procedures, precedents and truths of the legal system that presumably went back to time immemorial.<sup>21</sup> For many colonists the Common Law had been frozen at the time of the initial migrations in the seventeenth century. English precedents were important up to around 1607 or maybe 1650, but any decision after that date might be disregarded for want of relevance to American conditions.<sup>22</sup>

This predisposition to Coke's ideas, on its own, could not gestate into the adoption of the practice of judicial review. This legal philosophy however combined with other conditions that were uniquely germane to the colonial legal system and created a synergistic effect, inadvertently giving powers to the colonial judges that their English counterparts could never attain. The reasons for this had to do with the simplicity of the colonial court system as compared with the numerous and specialized courts back in England.<sup>23</sup> This circumstance created an unforeseen but incredible paradox. The highly complex and diversely rooted varieties of English law intermingled together with the widely derived colonial laws,<sup>24</sup> but were applied within simple, often single court,

19 Wood *supra* note 2 at 1298

20 *Id.* at 1299.

21 *Id.* Wood points out that in stunning contrast, to the Englishmen of the eighteenth century the common law was a much more complete and dynamic thing than it was for the colonists. For the English the common law was something living and growing; it included not only the reports and decisions of Coke and other judges in the past, but all the subsequent judicial determinations and legislative additions of the seventeenth and eighteenth centuries. To the English the common law was the current law.

22 *Id.*

23 "What was most obviously simpler about the American legal system was the undifferentiated nature of the courts. The colonists had none of the hodgepodge of courts that existed in England - no ecclesiastical courts, no merchant courts, no courts of the manor, no courts of the borough, and so on. In some colonies there were not even separate equity courts or probate courts." Wood *supra* note 2, at 1300.

24 "The colonists' law had several sources, both from England in the common law reports, new judicial interpretations, and parliamentary statutes, and from each colonies own legislative statutes and local judicial customs." *Id.*

judicial systems.<sup>25</sup> This peculiar administrative contradiction caused wholesale confusion to run rampant through the colonial courts. The end result of this addled state of affairs was that colonial courts were unintentionally encumbered with the novel necessity of judicial discretion.

Because of the very perplexities facing them, colonial judges were free, if not forced, to select and innovate in order to adjust to continuously evolving local circumstances.<sup>26</sup> Far removed from the strict procedures and protocols of English jurisprudence, colonial jurisprudence was characterized by flexibility and uncertainty, and an unprecedented degree of judicial discretion. The very complex nature of the colonists' legal situation forced them to revert to a kind of medieval English jurisprudence where the right reason and the morality of the Common Law controlled. Once common law lawyers began thinking along these lines, deciding on the basis of reason or common sense whether they would or would not follow a particular form or procedure, then a new legal world opened up. The Common Law was based on just such complicated forms and procedures but by resting their law on some principle beyond statutory will or the technicalities of the Common Law - rather on principles of morality or justice or common sense or even just utility - the colonists primed the way for the mechanism that we now call judicial review.<sup>27</sup>

These archaic philosophical underpinnings aside, there existed more concrete notions of judicial review abounding in America at the time of the revolution. Conceptually, judicial review is the implicit *sine qua non* of the very theory of written constitutions as higher law. Even positivists could be included in this line of reason. If all law is of human invention and a mere act of will, as positivists believe, a sovereign people can exercise its will to bind those who legislate with a higher law in the form of a written constitution. Such a constitution would be adopted in a special, solemn manner by the people, and not subject to alteration by any but the most extraordinary

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<sup>25</sup> *Id.*

<sup>26</sup> The fact that the colonists approximated without really duplicating England's common law procedures contributed to the legal confusion. Many of the English common law forms were present but often with defects and irregularities. The use of some writs and not others, the corrupting and blending of forms of action, the avoidance of special pleading and insufficiency of pleading in general - pleading lying at the heart of the common law - helped to create an atmosphere of permissiveness and uncertainty that a sharp lawyer like John Adams, armed with a collection of English precedents no one had ever heard of, could turn to advantage. *Id.* at 1301.

<sup>27</sup> Wood *supra* note 2, at 1302-03.

procedures therein established, procedures which, once again are rooted in acceptance by the people.<sup>28</sup>

An examination of decisions in the state courts after the revolution lends further credence to the idea that judicial review of legislation was an established feature of American jurisprudence well prior to the *Marbury* decision. The first authenticated case in which a court ventured to refuse enforcement to a legislative enactment on the ground that it conflicted with the provisions of a written constitution is that of *Holmes v. Walton*<sup>29</sup> which was argued before the Supreme Court of New Jersey in November of 1779.

The notion of judicial review was broached again in the case of *Commonwealth v. Caton*<sup>30</sup> decided by the Virginia Court of Appeals in November of 1782,<sup>31</sup> and again in 1786 in Rhode Island in the case of *Trevett v. Weeden*.<sup>32</sup> This case is considered a transitional case because the plea to overturn the statute was based on the notion that the statute (which dealt with trial by jury) was contrary to *fundamental law* as opposed to being in conflict with a written constitution. (Evidently Coke's dictum was still very much alive).<sup>33</sup> A genuine case of judicial review of the second type, namely the negating of a legislative enactment as being in conflict with a written constitution occurred in 1784 in Connecticut in the *Synsbury Case*.<sup>34</sup>

This brings us to the time of the Constitutional Convention. While the convention was actually in session the Supreme Court of North Carolina, after more than a years hesitation,

<sup>28</sup> Black *supra* note 7, at 695.

<sup>29</sup> See Corwin *supra* note 15, at 110. Professor Corwin cites several scholarly works that refer to this case although no official court citation is given.

<sup>30</sup> 4 Coll (Va.) 5 (1782), cited in Corwin at 112.

<sup>31</sup> "The act in question was the so-called Treason Act of 1776. Randolph, attorney general, argued for the commonwealth that whether the act of assembly pursued the spirit of the constitution or not, the court was not authorized to declare it void. The act was upheld but the judges were generally of the opinion that if they found it to be in conflict with the constitution they would have had the power to declare it void." *Id.*

<sup>32</sup> *Id.*, at 113. *Trevett v. Weeden* is considered a focal point in the idea of judicial review although no statute was overturned. Madison makes reference to it in his notes on the constitutional convention. Madison's Notes, July 17, 1787.

<sup>33</sup> *Id.*, at 114

<sup>34</sup> Kirby (Conn) 444-7 (1784), cited in Corwin at 114. The facts of this case were that a later grant of land by the legislature was set aside in the interest of an earlier similar grant of the same parcel, upon the ground that the act of the general assembly could not legally operate to curtail the land previously granted.

pronounced unconstitutional, in the case of *Bayard v. Singleton*,<sup>35</sup> an Act of Confiscation dating from the Revolution. These cases certainly reinforce the position that judicial review of legislation was not only theoretically known in the state courts but was actually implemented on many occasions as well. These cases could not have been unknown to the conventioners. In fact, a plausible argument can be advanced that the power of coordinate judicial review was not specifically enumerated in the Constitution because it was taken for granted as an inevitable feature of the very concept of governing pursuant to, and in accordance with, a written constitution.

Judicial review was, in fact, discussed at the convention. The topic came up after a proposal to adopt a Council of Revision had been considered.<sup>36</sup> The proposed council would have been comprised of the President and members of the judiciary, exercising the veto power against congressional bills when appropriate. This proposal was rejected primarily because it violated the constitutional principle of the separation of the powers.<sup>37</sup> An argument exists that another reason for rejecting the council was that the delegates assumed the power of judicial review already existed.<sup>38</sup> This assertion can be supported by an exchange between Delegates Luther Martin of Maryland and George Mason of Virginia. Martin asserted:

As to the constitutionality of laws, that point will come before the Judges in their official character. In this character they have a negative on the laws. Join them with the Executive in the revision, and they will have a double negative.<sup>39</sup>

Mason agreed with Martin about the existence of judicial review although disagreed about how that double negative would operate. What is significant though is the clear assumption underlying

<sup>35</sup> 1 Martin (N.C.) 42 (1787), cited in Corwin at 119.

<sup>36</sup> Dionisopoulos and Peterson, *Rediscovering The American Origins of Judicial Review: A Rebuttal to the Views Stated by Currie and Other Scholars*, 18 J. MARSH. L. REV. 49, 56 (1984) (Hereinafter REBUTTAL).

<sup>37</sup> *Id.*, citing JOURNAL OF THE CONSTITUTIONAL CONVENTION KEPT BY JAMES MADISON 104-05, 107 (B. Scott ed. 1893) (Hereinafter MADISON'S JOURNAL).

<sup>38</sup> REBUTTAL at 57.

<sup>39</sup> MADISON'S JOURNAL at 402.

Martin's objection to the Council of Revision: the Court already had a negative power in the form of judicial review.<sup>40</sup>

Just as certain powers were assumed to be part of the presidential power, judicial review was assumed to be part of the judicial power.<sup>41</sup> This is essentially the logic behind Hamilton's argument in Essay No. 78 of *The Federalist*. Hamilton's argument for judicial review occurs in the context of his discussion for the need for tenure during good behavior in order to protect judicial independence. Independence is a particularly necessary feature of a limited constitution, that is a constitution that limits itself in certain specified ways. "Limitations of this kind can be preserved in practice in no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all reservations of particular rights or privileges would amount to nothing."<sup>42</sup>

Hamilton goes on to add that:

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. . . It is not otherwise supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose 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.<sup>43</sup>

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<sup>40</sup> REBUTTAL at 57. The authors maintain that the true political leaders of the convention were all in favor of judicial review. Included among them were James Madison, Alexander Hamilton, James Wilson, Elbridge Gerry, Luther Martin and George Mason, who were certainly political leaders at the time. Therefore when Gerry, an advocate of judicial review, informed his colleagues at the convention that this power was claimed by several state courts (see above) and that this was done with general approval, there was no opposition to his contention. *Id.* at 56 *citing* MADISON'S JOURNAL at 101.

<sup>41</sup> REBUTTAL at 58.

<sup>42</sup> *Federalist* No. 78

<sup>43</sup> *Id.*



The heart of Hamilton's argument lies in assertions he makes about both the nature of judicial power, ("the interpretation of the laws is the proper and peculiar province of the courts"), and the nature of a constitution, ("a constitution is in fact, and must be, regarded by the judges as a fundamental law"). From these assumptions it follows that judges "ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."<sup>44</sup> This implies the superiority not of the judiciary to the legislature, but of the power of the people to both.<sup>45</sup>

Other influential men of the time also had similar views on judicial review. Speaking at the Pennsylvania Ratifying Convention, James Wilson, second only to James Madison in terms of his influence on the drafting of the Constitution,<sup>46</sup> and later to be a Justice of the Supreme Court, evidenced his support for the concept.<sup>47</sup> Even Thomas Jefferson had indicated support for judicial review. In a December, 1787 letter to Madison concerning the new Constitution, Jefferson did not seem to realize that the federal courts would have a negative power, and he complained about this deficiency.<sup>48</sup> Subsequently Jefferson was enlightened as to the fact the Judiciary had such a negative power and had wrote at least one letter to Madison indicating his approval.<sup>49</sup> Madison also echoed such approval.<sup>50</sup>

All this evidence alone might lead one to conclude that judicial review was established prior to *Marbury* but the argument is even stronger when you consider the fact that the Federal Courts

<sup>44</sup> He adds that "If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents".

<sup>45</sup> Wolfe *supra* note 6, at 75.

<sup>46</sup> REBUTTAL at 59

<sup>47</sup> Wilson stated "If a law should be made inconsistent with those powers vested by this Instrument in Congress, the Judges, as a consequence of their Independence, and the particular powers of government being defined, will declare such law to be null and void, for the power of the constitution predominates. Anything therefore, that will be enacted by Congress contrary thereto, will not have the force of Law. PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788 354 (J. McMaster & F. Stone eds. 1970) cited in REBUTTAL at 59, n. 65.

<sup>48</sup> He wrote that "I like the negative given to the Executive with a third of either house, though I should have liked it better had the Judiciary been associated for that purpose, or invested with a similar and separate power. 12 THE PAPERS OF THOMAS JEFFERSON 440 (J. Boyd ed. 1955) cited in REBUTTAL at 59.

<sup>49</sup> REBUTTAL at 60.

<sup>50</sup> In House debates over the Bill of Rights Madison stated that "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the [Bill] of Rights. 1 ANNALS OF CONG. 457 (1789).

of the United States had already exercised the power in the 1790's, up to a full ten years prior to Marbury v. Madison.<sup>51</sup> Scholars contend that on a federal level, statutes were declared unconstitutional on three separate occasions; in Hayburns Case <sup>52</sup> in 1792, in Chandler v. Secretary of War, and in United States v. Todd, both in 1794.<sup>53</sup> These are what are known as the Invalid Pensioners cases.<sup>54</sup>

A problem arose under the third extension of the original bill in 1792.<sup>55</sup> Under the 1792 law, Congress authorized the Secretary of War to correct mistakes made by the circuit courts. Section four of this act described the duties and responsibilities of the Secretary, who could overturn judgments rendered by the judges.<sup>56</sup> What this meant seemed clear to the circuit court judges: judges were being utilized as executive officials, with their findings subject to being overturned by the Secretary of War. This appeared to be a clear violation of the principle of separation of powers. It was this section of the law that was nullified by the circuit courts.<sup>57</sup> The basis for the objections was the fact that the law did not recognize that the federal courts were judicial, and neither Congress nor the President could constitutionally assign the judiciary any duties, but such as are properly judicial, and to be performed in a judicial manner.<sup>58</sup>

The Supreme Court refused to proceed on the case and the following day, April 13, 1792, William Hayburn reported this to Congress. A subsequent discussion arose where it was noted:

<sup>51</sup> For a general discussion of this theory and an analysis of the actual cases involved see REBUTTAL *supra* note 36.

<sup>52</sup> 2 U.S. (2 Dall.) 409 (1792).

<sup>53</sup> The Supreme Court decided these cases on Feb. 14 and Feb. 17, 1794 respectively. Dallas did not report these cases. Nevertheless, they are found in 11 ANNALS OF CONGRESS 903-04 (1802). REBUTTAL *supra* note 36, at n.2.

<sup>54</sup> The Invalid Acts were statutes which provided pensions for disabled veterans of the Revolutionary War. The federal government had taken over this responsibility from the states in 1789, and paid the pensions under regulations promulgated by the President. The law of 1789 only appropriated money for one year, so Congress enacted new bills in 1790 and 1791 to extend those payments. *Id.* at 63.

<sup>55</sup> Act of March 23, 1792, ch. 11, § 4, 1 Stat. 218 (obsolete) entitled "An Act to provide for the settlement of the Claims of Widows and Orphans barred by the limitations heretofore established, and to regulate the Claims of Invalid Pensioners." *Id.*

<sup>56</sup> REBUTTAL at 63. "The Secretary of War would place the names of claimants to pensions on the list with this proviso: 'Provided always, that in any case, where the said Secretary shall have cause to suspect imposition or mistake, he shall have power to withhold the name of such applicant from the pension list and then report this to Congress.' *Id.*

<sup>57</sup> Whereas all five members of the Supreme Court, in letters to President Washington, expressed serious doubts as to the constitutionality of the law, only the middle circuit voided it. *Id.* at 65

<sup>58</sup> *Id.*

This being the first instance in which a court of justice had declared a law of Congress to be unconstitutional, the novelty of the case produced a variety of opinions with respect to the measures to be taken on the occasion. At length a committee of five was appointed to inquire into the facts contained in the memorial, and to report thereon.<sup>59</sup>

Representative William Murray even suggested to Congress that it enact a law which would provide some regular mode whereby federal judges shall give official notice of their refusal to act under any law of Congress, on the ground of unconstitutionality.<sup>60</sup>

Congress responded not with outrage over a perceived usurpation of power by the Judiciary, but rather by passing a new statute concerning invalid pensions in February of 1793.<sup>61</sup> This new statute sought to correct the operation of the review for mistakes by taking the power away from the Secretary of War and giving it to Congress, and by providing some review to the Supreme Court. This did not necessarily cure the defect though.

In 1794 the issue came before the Supreme Court in the *Chandler* and *Todd* cases. The cases are unreported and not that much is known about the facts of the particular cases, especially the *Chandler* case, but their outcome can be reported on with reasonable certainty. The Supreme Court had nullified the 1792 and 1793 statutes for exactly the same reasons that were stated by the middle court two years earlier.<sup>62</sup> Congress once again deferred to the Court by passing yet another revised Invalid Pension statute in February of 1794. The new bill removed the provisions for review of the judges' determinations by the Secretary of War or by Congress. The determinations of the judges were to stand. Congress, by its actions, and lack of objection, implicitly accepted the constitutional adjudication of the Courts.<sup>63</sup>

<sup>59</sup> 3 ANNALS OF CONG. 556

<sup>60</sup> *Id.* cited in REBUTTAL *supra* note 36, at 66.

<sup>61</sup> Act of Feb. 28, 1793, ch. 17, 1 Stat. 324 (expired), entitled "An Act to regulate the Claims of Invalid Pensions," *Id.*

<sup>62</sup> See REBUTTAL at 70.

<sup>63</sup> *Id.*

Faced with all this evidence, one would be hard pressed to maintain that judicial review was invented by John Marshall in 1803 in Marbury v. Madison. The question therefore remains why did Marshall do what he did. If judicial review was a fundamental part of the American legal psyche, why did Marshall take such pain to pronounce this policy in the most forceful language? Why did he go to such extraordinary lengths to construe Section 13 of the Judiciary Act of 1789 to be unconstitutional when an alternative construction was available to him that did not reach a constitutional conflict? Why did he construe Article III of the Constitution so narrowly as to find such a conflict when a broader reading of the Constitution would also have vitiated the need for a constitutional determination? Why indeed?

## II. Political Sleaze as Historical Icon

The answers to the above questions lie in the political story behind Marbury v. Madison. The political events of the first years of the nineteenth century are what created the compelling need for Marshall to do what he did. The great precedent for Judicial Review, (*i.e.*, Marbury v. Madison) was, in its time, an exercise in naked partisanship and political damage control. It was an accident of history that created a fable worthy of Aesop. A legend so sacrosanct that modern Courts could exploit it to expand the power of the Supreme Court to dimensions unimagined by Marshall or his contemporaries.

The story<sup>64</sup> is actually an amusing one viewed with the dispassion that nearly two hundred years will bring. At the time though it was as intense and emotional as a political issue could get, but not for the reasons one would expect.

The story begins with the elections of 1800. In the Presidential and Congressional election of 1800 something happened in the new republic that had not happened before: the incumbent ruling party had lost the election and been thrown out of power. The Federalist candidate,

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<sup>64</sup> The narrative I am about to recite is primarily derived from D. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND TO MARBURY V. MADISON, (1970), which is the only scholarly book devoted exclusively to the topic. Additional references come from A. BEYBRIDGE, THE LIFE OF JOHN MARSHALL, vol. III (1919), and R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE NEW REPUBLIC, (1971).

President John Adams, had lost his bid for reelection. Along with the loss of the Presidency the Federalist Party had also lost their majority in both houses of Congress. The victors were the (Democratic-) Republicans led by President-Elect Thomas Jefferson. The decade of the 1790's saw a rift develop between the once united revolutionaries. Simply put, on the one hand there were the Federalists, led for the most part by Alexander Hamilton. The Federalists were aristocratic in their approach to government. They believed, in varying degrees, in a strong central government controlled by an elite group who would know what was best for the country. On the other hand were the Republicans (also known as the Jeffersonians), who believed strongly in states' rights and in the principles of the French Revolution, (i.e. aristocracy is an evil, and the government's function should not be to protect inherited wealth).

As stated, the election of 1800 ousted the Federalist party from dominance of the federal government and set the stage for the first true transfer of power the new nation was to experience. The Federalists, however, were determined not to go "gently into that good night." The election was held in November of 1800, but the transfer of power was not to occur until March 4, 1801. During that lame duck period of the Adams administration prior to Jefferson's inauguration, the Federalists hatched a plan to retrench to the only bastion of power left to them, the federal judiciary. In January of 1801 Adams named, then Secretary of State, John Marshall to replace John Jay as Chief Justice of the Supreme Court. This move was not only a way of preserving Federalist power, but more than that, it laid down the gauntlet to the Jeffersonians. John Marshall was not only a Federalist but also a lifelong enemy of Thomas Jefferson. Marshall's long standing antagonism for Jefferson would certainly make his advancement to a lifetime position in Washington unpleasant medicine for the incoming President and his Republican congressional majority.

Interestingly enough, Marshall was not very popular among his own party for the very reasons that should have made him a palatable choice to the Republicans. Most Federalists thought Marshall was far too moderate. He resided squarely in the moderate wing of the Federalist majority when he served in Congress and his Virginia background made him an easy target for

New England Federalists. He looked to George Washington for his political ideals rather than Alexander Hamilton. Although this irritated some of his prominent Federalist contemporaries, it turned out to be a brilliant political choice because at the time not even Jefferson himself would openly attack George Washington. This political astuteness served to make him an even more formidable adversary to Jefferson.

The feud between the two men for the most part remains unexplained. Oddly, it seemed that if there was any Federalist that could have gotten along with Jefferson and the Republicans it would have been John Marshall. Compared to the other leading Federalists like Hamilton or Fisher Ames or Timothy Pickering, he was extraordinarily conciliatory. For some reason though the two men despised each other. Both men's backgrounds were actually quite similar. Both were from Virginia, in fact they were third cousins. Both went to the same law school (College of William and Mary) and they both studied under the same teacher (George Wythe). From this similar background it is hard to see how they came to feel such enmity towards each other.

It is possible that Marshall, in part, married into his antagonism for Jefferson. Marshall married the daughter of Rebecca Ambler, an early love of Jefferson who was later spurned. Thomas Jefferson thus was quite possibly viewed as a cad and a rather unheroic figure by the entire Ambler Family. The two men's differences appear to be more related to personality and style rather than pure political ideology. Both were influenced by the ideas of John Locke and David Hume. Both were believers in limited government and natural rights. Both believed in representative government but each interpreted it differently. Jefferson saw centralization as the principal threat to this form of government whereas Marshall saw fragmentation as the principal threat. (Jefferson believed that Marshall was an advocate of monarchy or at least aristocracy, Marshall felt that Jefferson was leading an uneducated rabble to political dominance). Against this backdrop the melodrama of Marbury v. Madison was to be played.

After the debacle of the elections of 1800 the outgoing Federalists were determined not only to hold on to their control of the federal courts but to strengthen it. They chose to accomplish this goal via a sweeping overhaul of the entire federal judiciary. Most everyone agreed that the judicial

court system was in need of reform. The Federalists, for one reason or another never got around to doing this while it would not have caused political warfare. The organization of the federal judiciary at that time was set up according to the Judiciary Act of 1789, passed by the first Congress pursuant to Article III of the Constitution. This act had made several blunders, chief among them was the fact that the Supreme Court justices were required to "ride the circuit," or in other words to serve as Circuit Court judges in addition to their duties on the high court. In practical terms this meant that, in their capacity as Supreme Court justices, they were required to hear appeals on the very cases which they themselves had decided below on the Circuit Court level.

Along with this legal anomaly was the fact that "riding the circuit" was not an activity that suited the justices well. Transportation at the time left much to be desired for. It was a long, arduous and dangerous proposition for even the most virile of men let alone the men of advancing years that usually made up the Supreme Court. Both the executive and the judiciary disliked this state of affairs but never got around to doing anything about it. Never that is until the lame duck period of the Adams administration.

The Federalists, in their last scramble for power, completely overhauled the structure of the federal judiciary via the Judiciary Act of 1801 (the "Reform Act"), passed by Congress in January and February of 1801 and signed by President Adams on February 13. A mere 19 days before the Jefferson administration was due to assume office and the Republicans were to get control of both houses of Congress, the Federalists totally changed the federal judicial system. Among other things the Reform Act relieved the Supreme Court justices of their Circuit Court duties, and also reduced the number of justices on the high Court to 5 (presumably to avoid any chance of a tie but also to deprive the Republicans of a Republican appointee).

The Reform Act, although generally a commendable piece of legislation, was just abominably timed. It had the stench of dirty politics fueled by its last minute, lame duck passage. It allowed Adams, if he did not dally, to appoint 16 Circuit Court judges, plus a number of marshals and district attorneys. In addition "An Act concerning the District of Columbia" passed

even closer to the last day of the Adam's administration, providing for the appointment of three judges to the Circuit Court of the District of Columbia and an unlimited number of justices of the peace and other officials. In his last month in office (a short month yet), Adams placed 217 nominations before the Senate, 53 of these were appointed to offices in the District of Columbia including one William Marbury. Not only were virtually all of these new appointees "right honorable Federalists," but Adams also sought to make sure that any Federalist who occupied a pre-existing judicial position, that might be contemplating retirement, do so before March 4 in order for the position to be filled with another Federalist rather than allow Jefferson to fill the post with a Republican.

Needless to say the Republicans were not amused by this bit of political chicanery. Within a week of the new law's enactment there were Republican grumblings about the possibility of repeal. The Republicans would now control both houses of Congress and the Presidency and although Jefferson could not remove these "midnight judges" the legislative act that created their positions could be repealed. Jefferson would not publicly mention the matter until the Republican Congress was seated in December of 1801. Jefferson could however hold up delivery of any appointments not yet perfected. In the confusion of the last days of the Adam's administration not all of the commissions were actually delivered (although they had been signed and sealed). William Marbury's commission was, of course, one of the commissions that had not been delivered and held up by Jefferson.

Jefferson made his intentions clear with respect to the Reform Act when he addressed the just seated Congress on December 8, 1801. In his address he stated that "The Judiciary system of the United States, and especially that part of it recently enacted, will of course present itself to the contemplation of Congress." With this veiled reference Jefferson touched off a political firestorm that raged for nearly two years, and served as the catalyst for an exercise of judicial review that would never had occurred but for these particular circumstances and the political agendas that were at stake.



The event that served to galvanize the Republican Congress into action on the repeal matter was the fact that on December 21, a mere two weeks later, William Marbury (et al), represented by attorney Charles Lee appeared before the Supreme Court seeking a writ of mandamus to command Secretary of State James Madison to deliver the commission that was owed to him. The next day Marshall issued an order for Madison to show cause why the writ should not be issued (Madison ignored the order). Argument was set for the next term, which should have been August 1802 but turned out to be February 1803 for related reasons discussed below. This law suit outraged the Republicans in Congress (not to mention Jefferson himself). They saw this as a deliberate attempt to usurp power and insult the President, perpetrated by his enemy John Marshall. John Breckinridge, a leading Republican in Congress, remarked that it was "a bold stroke against the executive authority of the government and a high-handed exertion of judicial power." The Republicans were thus provoked into action and the debate over the repeal of the Federalist Judiciary Act of 1801 then began in earnest.

This debate ran from January to March of 1802. In contrast to the days of the Republicans being the opposition minority in Congress, the Federalists were loudly outspoken. They raised two issues in the debate. First, Could Congress abolish previously created courts and judicial positions and; Second, if it could, what would become of the judges whose lifetime term was established by the Constitution and was to be held "during good behavior?" It was obvious that the second point was the stronger of the two and it was the one that received the most attention. The debate that followed set the stage for Marshall's decision in *Marbury*.

The Constitutional question was that if the judges held their office during good behavior, without proof of less than good behavior, their positions were constitutionally protected. The Federalists felt sure the federal judiciary could invalidate the contemplated repeal law because it removed from office Article III judges whose behavior had been good. This argument put the Republicans in a corner. The Republicans' responded by asserting that no court could overturn the repeal law because there was no such thing as judicial review because it was nowhere to be found in the Constitution.

This was a politically expedient argument. If the Republicans could win this argument, it would not matter that the Federalists controlled the Judiciary, for the Judiciary would be powerless to effect the Republican agenda. Both the Federalists and the Republicans had a political stake in the outcome of this debate. The argument had nothing whatsoever to do with the greater concept of the structure and operation of our government for all time to come, but rather only concerned a struggle for political power at that particular time. Power politics resulted in an ideological squabble over judicial review that degenerated into a two month long political battle waged on the floor of the Congress a whole year prior to the decision in *Marbury*.

Whether the Republicans truly believed their rhetoric about judges not empowered to invalidate laws that were unconstitutional is subject to debate. A valid argument can be made that they did not actually believe this. The Republicans did however pass the Repeal Act on March 3, 1802, thereby reinstating the Judiciary Act of 1789. If they truly did not believe that the Supreme Court was empowered to rule on its constitutionality, they had a peculiar way of showing it. The following April, after almost no debate, the Congress amended the restored Judiciary Act of 1789. The amendment called for the abolition of the August and December terms of the Supreme Court. The Court was now to meet annually just once, in February. The consequence of this action was that it put the Supreme Court out of business for fourteen months (and delayed the case of *Marbury v. Madison* until February of 1803). Via this amendment Congress prevented a timely judicial response to the Repeal Act. The mere fact that the Republicans took such a precaution is somewhat indicative that they believed the Supreme Court could review the constitutionality of the Repeal Act.<sup>65</sup>

The battle over judicial review was not won, however, or even fought for that matter, over the Repeal Act. The Supreme Court never did rule on the matter choosing instead to accept the defeat of the Federalist judicial retrenchment plan. Considering the precarious political position of

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<sup>65</sup> The constitutionality of the Repeal Act did in fact come before the federal courts in the case of *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). Marshall, sitting on the circuit court, dismissed the case on a writ of error. When it was appealed to the Supreme Court Marshall recused himself (one of the only times he did so) because it was his case below. The rest of the Supreme Court also avoided the constitutional issue in the disposition of the case. The decision in this case followed the decision in *Marbury v. Madison* by about a week.

the Federalists at that time, had they tried to rule it unconstitutional history might have a much different tale to tell with respect to the role of the judiciary in the checks and balances of our government. The battle was actually fought and won over the case of the "midnight" justices of the peace who did not get their commissions, or "the mandamus case" as it was called at the time. Strangely, although the battle was won on this front, almost nobody at the time truly realized it or even recognized the fact that it was fought. For the most part, this great and significant historical event emanated from a matter of such insignificant minutia that its final disposition meant virtually nothing to the principals involved (but was of extraordinary significance with respect to the principles involved).

Jefferson's actions in withholding the Justice of the Peace commissions curiously angered no one at the time. The much larger and impassioned controversy was the overhaul and Federalist stacking of the Article III Courts. The Justice of the Peace commissions were such a minor matter that both Republicans and Federalists generally acted with restraint, with the notable exceptions of William Marbury, Robert Townshend Hooe, Dennis Ramsay, and William Harper, who of course filed the lawsuit. Of the 42 commissions that were undelivered when Jefferson took office, 25 were actually delivered by the Jefferson administration, only 17 were held back. Three of the Federalist appointees actually refused the commissions because either the stature of the office was beneath their dignity, or they found accepting them from Jefferson insulting. Of the 17 commissions that were denied only those four pressed the issue. Marbury himself was certainly not in need of the meager salary the commission involved, for he was well enough off on his own. It is likely that he pressed the case merely because he felt it was his duty to do so as a loyal Federalist.

The significance of the case at the time had little to do with whether the Justices of Peace got their commissions or not, nor did it even remotely concern judicial review, rather it was the mandamus question that enraged the Republican's and encouraged the Federalists. The issue concerned the power of the Supreme Court in the early years of the new republic. In those early days the Supreme Court was very weak compared to the other branches of the federal government.

It controlled "neither the purse nor the sword" as Hamilton put it in Federalist #78. This was not much of an issue in the very early days of the new republic because there was no political division among the coordinate branches, all were controlled by the Federalists. But after the elections of 1800 the inevitable question as to the limits of power in the coordinate branches finally came to a head. At issue was whether the Supreme Court could issue an order of mandamus to the executive branch. If it could this would mean that the Court would possess a superior power to that of the Executive. This concept infuriated the Republicans. Why this infuriated them seems rather obvious, the Supreme Court was stacked with Federalists, led by the hated enemy of Thomas Jefferson. In retrospect the Republicans were probably much less concerned with the fact that such a power existed rather than the fact that it was the arch-villain John Marshall and his Federalist cronies who possessed it.

Up until this time no one thought very highly of the Supreme Court, for it hadn't really done very much. It had no official residence of its own, in fact the Court was held in a small office in what had once been the Senate Clerk's office. (History seems to have this odd habit of occurring in obscure places). So, as with the rest of this story, the reasons why the events occurred as they did harken back to motivations that were quite far removed from the philosophical arguments of limited government and fundamental law.

The facts surrounding the case involve a fair degree of humor. The trial itself has been referred to as a comic opera. The man whose negligence had actually caused the commissions not to be delivered was the man who was presiding at trial, Chief Justice John Marshall himself.<sup>66</sup> Marshall had been Adams' Secretary of State at the "midnight hour" back in February and March of 1801. It was his responsibility to see that all of the commissions were received. The commissions were complete (signed and sealed) except for delivery. In the hectic last days of the Adam's administration these commissions were somehow lost or misplaced.

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<sup>66</sup> There is evidence that suggests that as many as three associate justices did not take part, Marshall wrote the opinion for the whole court as he did in virtually all the cases the Court decided when it possessed federalist unanimity.

As noted above, the case started on December 21, 1801 when Charles Lee, attorney for the plaintiffs, sought the writ of mandamus to compel Secretary of State James Madison to produce the commissions. The Jefferson administration sent Attorney-General Levi Lincoln to the Court merely to say that he had nothing to say. Madison ignored the entire matter from the start. Marshall issued the order the next day for Madison to show cause and scheduled argument for the next term, which turned out to be February 1803. In the intervening time Marbury had asked the now Republican Senate for evidence concerning the previous Senate's confirmation of his nomination. This once again incensed the Republican's in Congress who felt that Marshall, the scoundrel, was attempting to issue orders to Congress, and they refused to comply.

At trial Marbury's case was virtually uncontested. Madison did not bother to show up. Attorney-General Lincoln was there only as an observer and part-time witness. There was no official account of the trial, only the unofficial report of volunteer court reporter William Cranch. Cranch, as history would have it, was himself one of the midnight judges who found himself unemployed when the Republicans passed the Repeal Act and eliminated his court. It is likely that Madison never even saw the commissions he was being sued for. Some have said that it was likely that the commissions were thrown out with wastepaper when the office was cleaned prior to the arrival of the Jefferson administration. It has been nearly 200 years and there is still no sign of them.

Lee called several witnesses in order to prove that the commissions did in fact exist. Of course the best witness would have been John Marshall, who had been the last person in possession of them, but of course Lee could not call him. Lee summoned two State Department clerks, Chief Clerk Jacob Wagner and Daniel Brent, to testify but it turned out that they had had pretty bad memories. They had remembered seeing some commissions but they were not sure whose name was on them or what became of them. Their memory lapse probably had something to do with the fact that they were holdovers from the prior Federalist administrations and they did not want to jeopardize their jobs at the now Republican State Department.

Lee then called Lincoln, who was Acting-Secretary of State when Jefferson took over, to answer questions. Lincoln, of course did not want to participate at all and made this intention plain. He requested that the court respect his right not to incriminate himself or to divulge matters pertaining to his official duties. He asked that the questions be submitted in writing and that he be given a day to answer them. This request was honored, but when he came back the next day with his answers, they did not reveal anything. A Federalist newspaper of the time, *The Washington Federalist* chided him, printing that "this great man who, when sworn in the usual manner, was asked a simple question, but could not answer it until they gave it to him in writing, and he went off and spent a whole day and night . . . behind closed doors, and then only made out to remember that he had forgotten everything about it."

Nevertheless Lee did prove, to the satisfaction of the Court, that the commissions existed. Now it was up to John Marshall to do something about it. By this time, February 1803, it appeared that Marshall had no avenue to achieve a Federalist victory. Jefferson and the Republicans now had more to gain from this case than did Marshall and the Federalists. Either Marshall's decision would bring direct conflict between the executive and the judiciary at a time when Thomas Jefferson held all the high cards, or the Court would be forced to expose its weakness by validating the judicial removal policies of Jefferson.

To decide this case against Jefferson would have been a very dangerous move. In the first instance, if the writ of mandamus was issued, Jefferson most probably would have ignored it. The Supreme Court had no way of enforcing its decisions. Andrew Jackson, in 1832, once put it succinctly when the Marshall Court did something he did not agree with. He stated that "John Marshall has made his decision now let him go and enforce it." Such a move on Jefferson's part during the infancy of the country would have exposed the inability of the Supreme Court to enforce its mandate against an Executive who ignored it. 1803 was a much more dangerous time for the Court to demonstrate weakness than was 1832. Judicial prestige would have been shattered before it ever had a chance to take root. To further complicate matters for Marshall, the Republicans in Congress were drooling at the prospect of having a pretext for instituting impeachment proceedings

against the Federalist Court on the grounds of partisanship. If Marshall had ordered the mandamus he stood a good chance of losing his job.

On the other hand, to decide this case against Marbury would vividly demonstrate that judicial power was a mirage from which no preservation of Federalist principles could be expected. Although this probably was a truism, such a highly public prostration, as it would have been viewed at the time, would have exposed the utter weakness of the Court and shattered judicial prestige. For all these reasons it appeared that Marshall was in a no-win situation, but John Marshall turned out to be the master of snatching victory from the jaws of certain defeat.

Marshall's resolution of the issue, for courage, statesmanlike foresight and for perfectly calculated audacity has few parallels in judicial history. In two weeks time (although he did have the 14 month hiatus to think about it), he issued the opinion that all at once gave Jefferson the decision he wanted along with a tongue lashing that the Federalists wanted for him, and, in no uncertain language, to the Supreme Court he gave the precedent for judicial review which he wanted.

The decision was a lengthy one. It comprised some 11,000 words and 154 paragraphs. The opinion is divided into three sections. In the first section Marshall asks if the applicant has a right to the commission he demands. Marshall devotes 48 paragraphs to this question and concludes the answer to this is yes, he does have a right to it. "That by signing the commission to Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the appointment, and that the appointment conferred on him a legal right to the office for the space of five years."

In the second part of the opinion he asked "If he has a right, and that right has been violated, do the laws of his country afford him a remedy?" He answered this question in 28 paragraphs concluding that "having this legal title to office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his

country afford him a remedy." It was in this section that Marshall lambasted Jefferson, lecturing the President at length about disobeying the laws of the country. To give added bite to this scolding, Marshall made his point using language laden with Jeffersonian rhetoric (rights of the people, limited government, etc. . . ).

The third part of the opinion asked the question "if the laws of the country afford him a remedy, is it a mandamus issuing from this court?" Marshall answered this question in 32 paragraphs. He stated that Marbury was indeed entitled to a writ of mandamus but then added 46 paragraphs to explain why he could not have it. It is this final part of the opinion that Marshall established his precedent for judicial review. It is this pronouncement that today we are taught invented and established judicial review in the courts of the United States of America.

Marshall established this precedent without relying on any cases that had reviewed statutes in the past, (i.e. The Invalid Pensions cases) even though he was certainly aware of them. His arguments of why judicial review existed were nothing new. Most of it came directly out of *Federalist* #78. Additionally, all of the arguments for and against judicial review had already played on the floor of the Congress a full year prior to the decision during the debate over the Repeal Act. Marshall just treated judicial review as an accomplished fact, which for the most part it was. It was irrelevant that the merits of the case did not necessitate this constitutional finding but rather it was the political implications that dictated it.

Marshall had to twist Section 13 of the Judiciary Act of 1789 in order to reach the point he wanted to make. He could have easily construed the statute as not granting the Supreme Court original jurisdiction to hear a mandamus case. In fact, the clause discussing mandamus occurs within a sentence laying out the appellate jurisdiction of the Court. He could have dismissed the case on the grounds that the Court could only hear the case on appeal. He also did not have to construe Article III of the Constitution so narrowly as to insure a constitutional clash. In fact Marshall was known for giving very broad constructions to the Constitution in all opinions subsequent to *Marbury*.



The point was that here was his opportunity to pronounce, once and for all, in a decision of the Supreme Court, the power of judicial review, and to do it in such a way that he was untouchable as far as political backlash was concerned. If the pronouncement of judicial review had occurred in the case concerning the Repeal Act of 1802, *Stuart v. Laird*, Marshall might have been impeached by the Republicans in Congress along with the rest of the Federalists on the Court. But here the deed was done in the context of Jefferson winning the case. Most observers at the time did not realize the significance of the event. Invalidating Section 13 of the Judiciary Act of 1789 was the only new wrinkle Marshall added to the debate on judicial review.

The newspapers of the time clearly misunderstood the significance of what had happened. Most of the papers, both Republican and Federalist just printed the decision verbatim. Most Republican newspapers either printed the decision without editorial comment, or gloated over the victory of the President on the mandamus question, after all the mandamus was not issued.

The Federalist newspapers seemed to be more impressed with the length of the decision rather than its content. They were as clueless to its significance as the general public was. The *Alexandria Gazette* interpreted the decision to mean that the Court could not grant mandamus in Washington D.C., but if the question arose in one of the states there would have been no problem. Other Federalist newspapers were mostly excited by the tongue lashing that Marshall gave Jefferson.

With the hindsight of history it is difficult to imagine how little understood the decision was. This probably occurred because judicial review was not at the core of the case. Judicial review was at the center of the debate over the Repeal Act, and that had been played out a year earlier. The Republicans had won that fight, and the passions over the issue had pretty much cooled. Those passions were not rekindled by what Marshall did. The statute that he invalidated was an arcane bit of judicature that no Republican really cared about. The Jeffersonians perceived this event as having no relation to, or affect upon, their political agenda, and they were right, at least at the time.

Even the concept of judicial review that was established was rather limited. The only notion of finality which legitimately may be drawn from the opinion appears to be that which results from the fact that the statutory provision invalidated in the case is one which pertains to the Court's performance of its own functions.<sup>67</sup> The judicial review holding solely concerned jurisdiction of the Supreme Court, and did not affect any popular bit of legislation.

This limited exercise of judicial review went only to judicial independence, which was something the Jeffersonians begrudgingly accepted. Had they realized that it established a precedent that has justified the type of judicial review the Court exercises today, which amounts to judicial superiority over the other coordinate branches of government, they might not have been so complacent. Jefferson, in later years would write that the part of the opinion that most riled him was not the assertion of judicial review but rather the lecture he received from Marshall, and the fact that the opinion stated that the Court could have, and would have, issued the mandamus to the executive if it had had jurisdiction.

Several events happened subsequent to *Marbury* that knocked the issue right out of the spotlight. Within months Jefferson was entangled with the Louisiana Purchase, problems on the frontier, problems with Spain, and the Aaron Burr affair, to name just a few. *Marbury* rapidly faded from view. This was no accident because Marshall intentionally left the decision alone. He never would cite it for the proposition that the Supreme Court has the final say over what is the law of the land.

### III. *Marbury* as cited by the Supreme Court

The idea that the proposition for what *Marbury* stood for was very limited must have been shared by the Supreme Court during the 19th century. During Marshall's tenure on the court there were only ten references to *Marbury*.<sup>68</sup> Nine are jurisdictional in nature, reinforcing holdings as

<sup>67</sup> Clinton, *The Strange History of Marbury v. Madison in the Supreme Court of the United States*, 8 ST. L. UNIV. PUB. L. REV. 13, 24 (1989).

<sup>68</sup> *Id.*, at 28.

to the distribution of jurisdiction contained in Article III.<sup>69</sup> The remaining reference is made in support of the ruling that writs of mandamus may issue to executive officials only when engaged in the performance of purely ministerial duties.<sup>70</sup>

Further support for the idea that the Court's decision in *Marbury* was viewed by Marshall's contemporaries as but a step in the continuous clarification of the restrictive theory of judicial function, rather than an explosive decision establishing the power of judicial review is provided by examining the character of other constitutional decisions rendered by the Marshall Court in the early years.<sup>71</sup> An examination of constitutional cases throughout the remainder of the Marshall period tends to confirm the pattern laid down by the Court in the early years.<sup>72</sup> In substantive areas, the Court allowed wide latitude to the discretion of the people's representatives in Congress,<sup>73</sup> and in the states as well,<sup>74</sup> unless explicit violations of relatively unambiguous constitutional limitations were evident.<sup>75</sup> The preponderance of these decisions hardly reveals a Court desirous of expanding its authority at the expense of either Congress or the states. Rather they exhibit a Court somewhat deferential to democracy, yet prepared to defend individuals rights against clear-cut excesses of government.<sup>76</sup>

<sup>69</sup> *Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 100 (1807); *Id.*, at 102-05 (Johnson, J., dissenting); *McClung v. Silliman I*, 15 U.S. (2 Wheat.) 369, 370-71 (1817); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 394, 399-402 (1821); *McClung v. Silliman II*, 19 U.S. (6 Wheat.) 598, 604 (1821); *United States v. Ortega*, 24 U.S. (11 Wheat.) 468, 471 (1826); *Ex Parte Crane*, 30 U.S. 190, 200, 202-04, 206, 208-210, 217, 219 (1831) (Baldwin, J., dissenting); *Ex Parte Watkins*, 32 U.S. 568, 572-73 (1833); *Harrison v. Nixon*, 34 U.S. 483, 510 (1833) (Baldwin, J., dissenting). Cited in Clinton at n. 86.

<sup>70</sup> *United States v. Arredondo*, 31 U.S. 691, 729-30 (1832).

<sup>71</sup> Clinton *supra* note 67, at 28. Clinton maintains that the entire constitutional output of the Court between 1801 and 1810, with the exception of two cases, dealt with purely jurisdictional issues. Four involved the federal diversity jurisdiction, three (including *Marbury*) decided questions pertaining to Article III's original/appellate distribution, three involved the general jurisdiction of the federal courts. Eight of these decisions (again including *Marbury*) may be plausibly construed as having narrowed the scope of federal judicial power, lending support to the proposition that self-restraint and extreme caution in asserting jurisdiction characterized the Supreme Court from 1801-1815. *Id.*

<sup>72</sup> *Id.*, at 29.

<sup>73</sup> See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805); *The Flying Fish*, 6 U.S. (2 Cranch) 170 (1804). See Clinton *supra* note 67 at n.97.

<sup>74</sup> See, e.g., *Willson v. Blackbird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Providence Bank v. Billings*, 27 U.S. (4 Pet.) 514 (1830).

<sup>75</sup> See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819). See Clinton *supra* note 67, at 29.

<sup>76</sup> Clinton, *supra* note 67, at 30.

In the years following Marshall's tenure on the Court until the end of the Civil War, *Marbury* is cited in fifteen separate opinions in the United States Reports. Once again the largest number of citations is found in the jurisdictional area.<sup>77</sup> Six concern nuances in the mandamus remedy,<sup>78</sup> but none of them even mention judicial review.<sup>79</sup> The Taney court for the most part continued Marshall's policy of a limited judicial role with but one notable exception.

One of history's greatest paradoxes is the fact that the case that truly set the precedent for the Supreme Court having the power to nullify popular legislative acts, ones that do not concern judicial function, is the case of *Dred Scott v. Sandford*.<sup>80</sup> This is the infamous decision by the Supreme Court that outlawed the Missouri Compromise of 1820. The Court ruled that the Compromise was null and void because Congress did not possess the constitutional power to outlaw slavery in the new territories, and that such an act was an unconstitutional invasion of property rights. The most amazing aspect of the holding, for this discussion, is the Court's startling failure to cite *Marbury v. Madison* as precedent for its exercise of judicial review. It is not hard to see why *Dred Scott* never became the modern precedent for judicial review. The activist Courts of the latter part of the twentieth century found it much easier looking to the oratory of the "Great Chief Justice" to support the sweeping judicial activism that they engaged in rather than cite the most infamous decision in the Court's history, the decision that held that slaves were merely property and not people within the contemplation of the Constitution.

Between the years 1803 and 1865 the Court had, without exception, read *Marbury v. Madison* as having settled either a narrow jurisdictional question, or a technical issue relating to the mandamus remedy. *Marbury's* importance as a precedent for judicial review of legislation was

<sup>77</sup> *Ex parte Whitney*, 38 U.S. 404, 407 (1839); *In re Metzger*, 46 U.S. 176, 191 (1847); *United States v. Chicago*, 48 U.S. 185, 197 (1849) (Catron, J., dissenting); *In re Kalne*, 55 U.S. 103, 119 (1852); *Florida v. Georgia*, 58 U.S. 496, 505 (1854) (Curtis, J., dissenting); *Ex parte Wells*, 59 U.S. 316, 317 (1855) (McClellan, J., dissenting); *Ex parte Vallandigham*, 68 U.S. 243, 252 (1863); *Daniels v. Railroad Co.*, 70 U.S. 250, 254 (1865).

<sup>78</sup> *Kendall v. United States*, 37 U.S. (12 Pet.) 527, 617-18 (1838); *Id.* at 651 (Barbour, J., dissenting); *Id.* at 38 U.S. 609-12 (Catron, J., dissenting); *Decatur v. Paulding*, 39 U.S. 497, 513 (1840); *Id.* at 602 (Baldwin, J., dissenting); *Reeside v. Walker*, 52 U.S. 272, 291-92 (1850).

<sup>79</sup> *Clinton supra* note 67, at 30.

<sup>80</sup> 60 U.S. (19 How.) 1.

never mentioned by the Court, not even in the only other case of the period wherein the Court invalidated an act of Congress. This pattern continued during the period extending from 1865 through 1894. During these years the Court invalidated national laws in no fewer than twenty cases,<sup>81</sup> yet *Marbury* is not cited in any of them.<sup>82</sup>

During that time period the instances where *Marbury* is cited relate primarily to the jurisdictional area, or to the mandamus remedy. A few of the citations refer to *Marbury's* distinction between political and ministerial acts of administrative officials. Two refer to the technical finality of acts within the Executive discretion. One refers to the equitable right/remedy maxim announced in the first section of the opinion.<sup>83</sup> Finally, for the first time in the history of the Supreme Court, *Marbury v. Madison* is cited as precedent for the idea that courts may enforce constitutional limitations on legislative bodies. This citation comes in the case of *Mugler v. Kansas* decided in 1887.<sup>84</sup>

Professor Clinton asserts that the Court's use of *Marbury* in this instance was inappropriate. He first claims that the Court used a passage of Marshall's opinion that originally stood for the premise that legislative acts contrary to the Constitution are void, to support the proposition that the courts have the power to refuse application of them. Second, adding insult to injury, the Court in *Mugler* then proceeds to employ *Marbury* in the service of the developing the doctrine of substantive due process by stating that "the courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty - indeed, are under a solemn duty - to look at the substance of things, whenever they enter upon the inquiry whether the legislature has

<sup>81</sup> *Gordon v. United States*, 69 U.S. (2 Wall.) 561 (1865); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Relchart v. Phelps*, 73 U.S. (6 Wall.) 160 (1868); *The Alcega*, 74 U.S. (7 Wall.) 571 (1869); *Heppburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870); *United States v. DeWitt*, 76 U.S. (9 Wall.) 41 (1870); *The Justice v. Murray*, 76 U.S. (9 Wall.) 274 (1870); *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *United States v. Railroad Co.*, 84 U.S. (17 Wall.) 322 (1873); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Fox*, 95 U.S. 670 (1878); *The Trade Mark Cases*, 100 U.S. 82 (1879); *United States v. Harris*, 106 U.S. 629 (1883); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Boyd v. United States*, 116 U.S. 616 (1886); *Baldwin v. Franks*, 120 U.S. 678 (1887); *Callan v. Wilson*, 127 U.S. 540 (1888); *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

<sup>82</sup> Clinton *supra* note 67, at 32.

<sup>83</sup> See *id.* at 33 and notes 119-23.

<sup>84</sup> 123 U.S. 623, 661 (1887).

transcended the limits of its authority."<sup>85</sup> The foreshadowing to the *Lochner* era of substantive due process is a clear indication of the direction in which the Court was heading, and its use (or rather misuse) of *Marbury* in this context was the first link in a long chain of opinions that created the legend (or myth, as Professor Clinton prefers to call it) of *Marbury v. Madison*.<sup>86</sup>

The first time the Court officially cites *Marbury v. Madison* as precedent for an actual exercise of its power to invalidate acts of Congress occurs in the *Income Tax Case* <sup>87</sup> in 1897. There the Court cites *Marbury* to support the idea that "it is within judicial competency by express provisions of the Constitution or by necessary inference and implication, to determine whether a given law of the United States is or is not made in pursuance of the Constitution, and to hold it valid or void accordingly."<sup>88</sup>

In sum for the first hundred years or thereabout, at least as far as the Supreme Court was concerned, *Marbury v. Madison* did not mean what it has come to mean today. It was only in the twentieth century, and especially the latter part thereof that *Marbury* became the standard bearer for an activist Court. Between 1895 and 1957, *Marbury* is cited only 38 times, hardly more often than during the thirty year period immediately preceding 1895.<sup>89</sup> Of these 38 references only eight pertain to the judicial power to invalidate laws.<sup>90</sup>

It is fair to say then that although the Court began to notice *Marbury's* judicial review holding during the first half of the present century, it continued to recognize the restrictive nature of that holding. Nowhere is there anything even approaching a declaration that the Court is the "final

<sup>85</sup> *Id.*, at 661, cited in Clinton, *supra* note 67, at 34.

<sup>86</sup> All this occurs in a passage that was essentially *obiter dicta*, since the actual decision in *Mugler* was merely the upholding of a state prohibition on manufacture and sale of intoxicating beverages. Clinton *supra* note 67, at 34.

<sup>87</sup> 157 U.S. 429, 554 (1894).

<sup>88</sup> *Id.*, cited in Clinton, *supra* note 67, at 35.

<sup>89</sup> *Id.*, at 36.

<sup>90</sup> *Fairbank v. United States*, 181 U.S. 283, 285 (1900); *Dooley v. United States*, 183 U.S. 151, 173 (1901) (Fuller, J., dissenting); *Muskat v. United States*, 219 U.S. 346, 357 (1910); *Myers v. United States*, 272 U.S. 52, 139 (1926); *Adamson v. California*, 332 U.S. 46, 90 (1946) (Black, J., dissenting); *United States v. Commodities Corporation*, 339 U.S. 121, 124 (1949); *Touhy v. Ragon*, 340 U.S. 462, 468 (1950); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 464 (1956) (Frankfurter, J., dissenting).

arbiter of constitutional questions."<sup>91</sup> On a broader scale, of the ninety-two citations of *Marbury* by Justices of the Supreme Court between 1803 and 1957, only ten refer to that part of the Marshall opinion which has been said to have established the power of judicial review. *Marbury*, at least throughout most of its history in the Supreme Court of the United States, has been thought primarily to have settled other matters.<sup>92</sup>

What the Supreme Court of the United States has done subsequent to 1957, with respect to *Marbury*, stands as a radical departure from what was done prior to that year. Between 1958 and 1983 there are 89 separate citations of *Marbury*, a total which almost equals that of the previous 154 years.<sup>93</sup> Of these 89, fifty utilize *Marbury* in support of some kind of judicial review. Of these fifty, at least eighteen read *Marbury* as having justified sweeping assertions of judicial authority.<sup>94</sup> In addition, of these eighteen, nine cite *Marbury* in order to support the idea that the Court is the "final" or "ultimate" interpreter of the Constitution, with the power to issue binding proclamations to any other agency or department of government with respect to any constitutional issue.<sup>95</sup> It would thus appear that the legend that is *Marbury v. Madison* was established not by John Marshall or his contemporaries, but rather was established and developed by the Warren and Burger Courts. Modern constitutional scholars for the most part have just accepted the fable the modern Court told.

<sup>91</sup> Clinton *supra* note 67, at 38.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Cooper v. Anron*, 358 U.S. 1, 18 (1958); *Clay v. Sun Insurance Office*, 363 U.S. 207, 222 (1959) (Black, J., dissenting); *Flemming v. Nestor*, 363 U.S. 603, 626 (1959) (Black, J., dissenting); *Hutcherson v. United States*, 369 U.S. 599, 632 (1961) (Warren, C.J., dissenting); *Gildden Co. v. Zdanok*, 370 U.S. 530, 602 (1961) (Douglas, J., dissenting); *Bell v. Maryland* 378 U.S. 226, 244 (1963); *Powell v. McCormack*, 395 U.S. 486, 503 (1968); *Id.* at 549; *Id.* at 552 (Douglas, J.); *Goldberg v. Kelly*, 397 U.S. 254, 274 (1969) (Black, J., dissenting); *Oregon v. Mitchell*, 400 U.S. 112, 204 (1970) (Harlan, J., dissenting); *McGautha v. California*, 402 U.S. 183, 250 (1970) (Brennan, J., dissenting); *Doe v. McMillan*, 412 U.S. 306, 326 (1972) (Douglas, J., concurring); *United States v. Watson*, 423 U.S. 411, 443 (1975) (Marshall, J., dissenting); *United States v. Santana*, 427 U.S. 38, 45 (1976) (Marshall, Brennan, JJ., dissenting); *Nixon v. Administrator of General Services*, 433 U.S. 425, 503 (1977) (Powell, J., concurring); *City of Rome v. United States*, 446 U.S. 156, 207 (1979) (Rehnquist, J., dissenting); *INS v. Chadha*, 462 U.S. 919, 942 (1982). Cited in Clinton *supra* note 67, at n. 172.

<sup>95</sup> *Cooper v. Aaron*; *Flemming v. Nestor*; *Gildden Co. v. Zdanok*; *Powell v. McCormack*; *Goldberg v. Kelly*; *Doe v. McMillan*; *Nixon v. Administrator of General Services*; *City of Rome v. United States*; *INS v. Chadha*; *supra* note 94.

## Conclusion

As previously stated, it is easy to understand why *Marbury* was used in this manner by the activist Warren and Burger Courts. The true precedent for the type of judicial review that was invoked by these Courts was, as it turns out, the *Dred Scott* case. Were it not for *Marbury* and Marshall's eloquence and stature as the "Great Chief Justice," the "Expounder of the Constitution" the precedent quite probably would have been *Dred Scott*. This certainly would have produced one of history's great and perverse ironies. The Warren and Burger Courts, which achieved so much in the area of civil rights and school desegregation, would have had to rely on the infamous decision that held that the black slaves were not people within the contemplation of the Constitution, in order to empower themselves to do it.<sup>96</sup>

The only irony that approaches that magnitude is the legendary myth that permeates the current state of constitutional law, namely that the power of judicial review, as exercised by the Supreme Court of the United States, was conceived by, and originates from, John Marshall's opinion in the case of *Marbury v. Madison*. Like it or not, students of Constitutional Law will continually be taught this on the first day of class, and scholarly articles to the contrary probably will not change this state of affairs. An examination of the recent Court opinions, especially the nine mentioned above, reveals that each case, save *Cooper*, involved either the internal functioning of Congress, the internal functioning of the Executive, or the relation between the two.<sup>97</sup> In other words, each appears to constitute precisely the sort of case with which the historical *Marbury* has nothing whatever to do. This suggests that *Marbury* has indeed become a myth; one which, like Plato's ignoble lie, imparts a flavor of time-honored truth to what really is a quite modern notion of judicial guardianship.<sup>98</sup>

<sup>96</sup> In the History of the Supreme Court there is only one citation that mentions *Dred Scott v. Sandford* and *Marbury v. Madison* in the same context and that case is *Blyew v. United States*, 80 U.S. 581 (1871) where the Court just notes that these were the only two cases, until that time, that had held an act of Congress to be unconstitutional.

<sup>97</sup> Clinton *supra* note 67, at 43.

<sup>98</sup> *Id.*



SEC. 25. And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution: But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

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Book Review

\*226 CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE*, WESTPORT, CONN.: GREENWOOD PRESS, 1998. XIV, 215 PP. \$59.95.

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The substance of this volume was published as an eponymous law review article in the Summer 1994 issue of the *Hastings Constitutional Law Quarterly*. But since the book is aimed at a less specialized audience, it is--at the price of the deletion of some valuable material, notably several suggestions for congressional action--slightly more accessible in its presentation. It also benefits from some modest updating. (It does not, however, reach *Clinton v. New York*, 524 U.S. 417 (1998), which strengthened the author's position by invalidating the Line Item Veto Act of 1996).

"Since the mid-1970s," the book begins, "American presidents have with growing frequency claimed that they have the power simply to ignore any law that, in their view, is unconstitutional" (p. xiii). Two radical flaws should lead to rejection of the claim, according to May. First, it is an attempt "to resurrect the suspending power, a royal prerogative that was abolished in English by the Bill of Rights of 1689 after centuries of struggle between Parliament and the Crown" (p. 153), and that was squarely and unanimously rejected on all hands during the debates over the Constitution.

Second, a review of actual practice shows that, while presidents have frequently objected to statutes on constitutional grounds, "cases of actual presidential defiance were extraordinarily rare until the last half of the twentieth century" (p. 127). The first such instance--which followed a number of others in which presidents complied with statutes to which they had raised constitutional objections--did not take place until 1860, and only ten occurred between that date and 1968. Thus, if "there is now an emerging practice of presidential defiance of allegedly

unconstitutional laws, it is one that dates from the 1970s--too late in the day to upset the framework created by the Founders" (p. xiv).

Both of these arguments are solidly documented. The first is overwhelming, and has been strengthened in the book. Responding to the justification raised by White House counsel in recent years that modern presidents need new powers because they face omnibus bills which they are politically unable to veto based on a particular objectionable provision, May shows that "the legislative practices to which Reagan, Bush and Clinton objected are not 'modern' and do not entail a departure by Congress from the context in which the Constitution was framed. These practices were centuries old at the time of the eighteenth century and were well known to the framers" (p. 31). Similarly, the asserted limitation on the power, that it may be exercised only on constitutional grounds, is neither new, nor, in light of lawyers' creativity, much of a limitation.

The second argument is based on exhaustive research into presidential behavior--including both the form of the initial constitutional objection and the follow-up to it--that promises to stand as definitive for many years to come. Along the way, May not only exposes as "apocryphal" some oft-cited cases of presidential defiance (pp. 116-18), but illustrates the broad range of tools that presidents have available to respond to constitutionally objectionable legislation.

The academy and the public will benefit if the author undertakes the arduous task of updating this research beyond the 1789-1981 period that he treats in depth. For his work is a tribute to the societal value of pure scholarship. The enormous amount of empirical data that May has unearthed will necessarily improve the quality of ongoing scholarly and legal debates, no matter what position the debater \*227 takes. In particular, his documentation should force presidential lawyers to retreat from some of their extraordinarily ill-founded assertions of recent times.

Recognizing that there are perils not only in the scope of the claimed presidential power, but also in the prospect that, under certain circumstances, "Congress could ignore the Constitution with impunity, a danger that the Founders feared and expressly sought to avoid" (p. 144), May concludes by advancing a moderate position. The president, he suggests, would be justified in refusing to execute an assertedly unconstitutional law if four conditions were satisfied: "First, the situation must be such that defiance is the only way to bring the law's validity before the courts. Second, the unconstitutionality of the law must be [clear]. Third, the White House must have exhausted all available avenues for redressing the matter through the lawmaking process. Fourth, if the executive does defy the law, it must take all possible steps to insure that judicial review actually occurs" (pp. 144-45).

Whatever the merits of these views, they are presented in a work that will not only be impossible to ignore in its own field, but should encourage by example all those who believe that there is a difference between sound and unsound constitutional argumentation.

## *McCulloch v. MD: A Schematic and a Question*

### I. The State's First Argument

Even assuming we are not entitled to tax an entity of the United States, we can tax this bank because Congress had no power to create it and hence it is not a legitimate entity of the United States.

#### Marshall's Response:

1. History

[2. A digression into dictum]

3. Congress had the implied power to create the bank.

A. The powers enumerated in the Constitution carry with them implied powers, as is shown by:

a. the nature of constitutions

b. the structure of this government

c. text - the Necessary and Proper Clause

B. The creation of this bank falls within powers fairly implied from the powers enumerated in the Constitution.

### II. The State's Second Argument

Even assuming that the United States was entitled to create the bank, a state is entitled to tax it unless and until the federal government acts pursuant to the Supremacy Clause to protect itself.

#### Marshall's Response

1. The nature of the judicial role

a. The interaction between the court and other governmental actors, federal and state

b. Representation-reinforcing review – the idea that the more public opinion can be expected to lead to the constitutionally correct result, the less intrusive judicial review need be.

*Consequence:* an important limit on the holding that one might otherwise expect to see.

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**Question:** How do the foregoing relate to the counter-majoritarian difficulty?

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(Cite as: 130 S.Ct. 1949)

Supreme Court of the United States  
UNITED STATES, Petitioner,  
v.  
Grayson Earl COMSTOCK, Jr., et al.

No. 08-1224.  
Argued Jan. 12, 2010.  
Decided May 17, 2010.

### Syllabus

Federal law allows a district court to order the civil commitment of a mentally ill, sexually dangerous federal prisoner beyond the date he would otherwise be released. 18 U.S.C. § 4248. The Government instituted civil-commitment proceedings under § 4248 against respondents, each of whom moved to dismiss on the ground, *inter alia*, that, in enacting the statute, Congress exceeded its powers under the Necessary and Proper Clause, U.S. Const., Art. I, § 8, cl. 18. Agreeing, the District Court granted dismissal, and the Fourth Circuit affirmed on the legislative-power ground.

*Held:* The Necessary and Proper Clause grants Congress authority sufficient to enact § 4248. Taken together, five considerations compel this conclusion. Pp. 1956 – 1965.

(1) The Clause grants Congress broad authority to pass laws in furtherance of its constitutionally enumerated powers. It makes clear that grants of specific federal legislative authority are accompanied by broad power to enact laws that are “convenient,” “useful” or “conductive” to the enumerated power’s “beneficial exercise,” *e.g.*, *McCulloch v. Maryland*, 4 Wheat 316, 313, 418, 4 L.Ed. 579, and that Congress can “legislate on that vast mass of incidental powers which must be involved in the constitution,” *id.*, at 421. In determining whether the Clause authorizes a particular federal statute, there must be “means-ends rationality” between the enacted statute and the source of federal power. *Gabri v. United States*, 541 U.S. 600, 605, 124 S.Ct. 1941, 158 L.Ed.2d 891. The Constitution “address[es]” the “choice of means” “primarily . . . to the judgment of Congress. If it can be seen that the

means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.” *Burrheads v. United States*, 290 U.S. 534, 547–548, 54 S.Ct. 287, 78 L.Ed. 484. Thus, although the Constitution nowhere grants Congress express power to create federal crimes beyond those specifically enumerated, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, or to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others, Congress possesses broad authority to do each of those things under the Clause. Pp. 1956 – 1958.

(2) Congress has long been involved in the delivery of mental health care to federal prisoners, and has long provided for their civil commitment. See, *e.g.*, Act of Mar. 3, 1855, 10 Stat. 682; Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241–4247. A longstanding history of related federal action does not demonstrate a statute’s constitutionality, see, *e.g.*, *Walt v. Tax Comm’n of City of New York*, 397 U.S. 664, 678, 90 S.Ct. 1409, 25 L.Ed.2d 697, but can be “helpful in reviewing the substance of a congressional statutory scheme,” *Gonzalez v. Ratch*, 545 U.S. 1, 21, 125 S.Ct. 2195, 162 L.Ed.2d 1, and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests. Section 4248 differs from earlier statutes in that it focuses directly upon persons who, due to a mental illness, are sexually dangerous. Many of these individuals, however, were likely already subject to civil commitment under § 4246, which, since 1949, has authorized the post-sentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous (whether sexually or otherwise). The similarities between § 4246 and § 4248 demonstrate that the latter is a modest addition to a longstanding federal statutory framework. Pp. 1958 – 1961.

(3) There are sound reasons for § 4248’s enactment. The Federal Government, as custodian of its prisoners, has the constitutional power to act in order to protect nearby (and other) communities from the danger such prisoners may pose. Moreover, § 4248 is

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"reasonably adapted" to Congress' power to act as a responsible federal custodian. *United States v. Darby*, 312 U.S. 100, 121 L.Ed. 451, 85 L.Ed. 609. Congress could have reasonably concluded that federal inmates who suffer from a mental illness that causes them to "have serious difficulty in refraining from sexually violent conduct," § 4247(a)(6), would pose an especially high danger to the public if released. And Congress could also have reasonably concluded that a reasonable number of such individuals would likely not be detained by the States if released from federal custody. Congress' desire to address these specific challenges, taken together with its responsibilities as a federal custodian, supports the conclusion that § 4248 satisfies "review for \*1953 means-end rationality," *Sabri, supra*, at 605, 124 S.Ct. 1941, Pp. 1961 - 1962.

(4) Respondents' contention that § 4248 violates the Tenth Amendment because it invades the province of state sovereignty in an area typically left to state control is rejected. That Amendment does not "reserve to the States" those powers that are "delegated to the United States by the Constitution," including the powers delegated by the Necessary and Proper Clause. See, e.g., *New York v. United States*, 505 U.S. 144, 159, 112 S.Ct. 2408, 120 L.Ed.2d 120. And § 4248 does not "invade" state sovereignty, but rather requires accommodation of state interests: Among other things, it directs the Attorney General to inform the States where the federal prisoner "is domiciled or was tried" of his detention, § 4248(d), and gives either State the right, at any time, to assert its authority over the individual, which will prompt the individual's immediate transfer to State custody, § 4248(d)(1). In *Greenwood v. United States*, 350 U.S. 366, 375-376, 76 S.Ct. 410, 100 L.Ed. 412, the Court rejected a similar challenge to § 4248's predecessor, the 1949 statute described above. Because the version of the statute at issue in *Greenwood* was less protective of state interests than § 4248, *a fortiori*, the current statute does not invade state interests. Pp. 1962 - 1963.

(5) Section 4248 is narrow in scope. The Court rejects respondents' argument that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. See, e.g., *McCulloch, supra*, at 412. Nor will the Court's holding today confer on Congress a general "police power" which the Founders denied the National Government

and reposed in the States," *United States v. Morrison*, 529 U.S. 598, 618, 120 S.Ct. 1740, 146 L.Ed.2d 658. Section § 4248 has been applied to only a small fraction of federal prisoners, and its reach is limited to individuals already "in the custody of the" Federal Government, § 4248(a). Thus, far from a "general police power," § 4248 is a reasonably adapted and narrowly tailored means of pursuing the Government's legitimate interest as a federal custodian in the responsible administration of its prison system. See *Yee v. New York, supra*, at 157, 112 S.Ct. 2408, Pp. 1963 - 1965.

The Court does not reach or decide any claim that the statute or its application denies equal protection, procedural or substantive due process, or any other constitutional rights. Respondents are free to pursue those claims on remand, and any others they have preserved. P. 1965.

551 F.3d 274, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, GINSBURG, and SOTOMAYOR, JJ., joined. KENNEDY, J., and ALITO, J., filed opinions concurring in the judgment. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined in all but Part III-A-1-b. Solicitor General Elena Kagan for the petitioner.

Justice BREYER delivered the opinion of the Court.

A federal civil-commitment statute authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released. 18 U.S.C. § 4248. We conclude that the Constitution grants Congress the authority to enact § 4248 as "necessary and proper for carrying into Execution" the powers "vested by" the "Constitution in the Government of the United States." Art. I, § 8, c. 18.

#### I

The federal statute before us allows a district court to order the civil commitment of an individual who is currently "in the custody of the [Federal] Bureau of Prisons," § 4248, if that individual (1) has previously "engaged or attempted to engage in sexually violent conduct or child molestation," (2) currently "suffers from a serious mental illness, abnormality, or disorder," and (3) "as a result of" that mental illness, abnormality, or disorder is "sexually dangerous to others," in that "he would have serious

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difficulty in refraining from sexually violent conduct or child molestation if released," § 4247(a)(5)-(6).

In November and December 2006, the Government instituted proceedings in the Federal District Court for the Eastern District of North Carolina against the five respondents in this case.

They claimed that the commitment proceeding in enacting the statute, Congress exceeded the powers granted to it by Art. I, § 8 of the Constitution, including those granted by the Commerce Clause and the Necessary and Proper Clause.

On appeal, the Court of Appeals for the Fourth Circuit upheld the dismissal on this latter, legislative-power ground, 551 F.3d 274, 278-284 (2009). It did not decide the standard-of-proof question, nor did it address any of respondents' other constitutional challenges. *Id.*, at 276, n. 1.

\*1956 The Government sought certiorari, and we granted its request, limited to the question of Congress' authority under Art. I, § 8 of the Constitution.

## II

[1] The question presented is whether the Necessary and Proper Clause, Art. I, § 8, cl. 18, grants Congress authority sufficient to enact the statute before us. In resolving that question, we assume, but we do not decide, that other provisions of the Constitution—such as the Due Process Clause—do not prohibit civil commitment in these circumstances. Cf. *Hendricks*, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501; *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). In other words, we assume for argument's sake that the Federal Constitution would permit a State to enact this statute, and we ask solely whether the Federal Government, exercising its enumerated powers, may enact such a statute as well. On that assumption, we conclude that the Constitution grants Congress legislative power sufficient to enact § 4248. We base this conclusion on five considerations, taken together.

[2][3][4] First, the Necessary and Proper Clause grants Congress broad authority to enact federal legislation. Nearly 200 years ago, this Court stated that the Federal "[G]overnment is acknowledged by all to be one of enumerated powers," *McCulloch, 4 Wheat.*, at 405, which means that "[e]very law enacted by Congress must be based on one or more of" those

powers. *United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). But, at the same time, "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." *McCulloch, 4 Wheat.*, at 408. Accordingly, the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are "convenient, or useful" or "conducive" to the authority's "beneficial exercise." *Id.*, at 413, 418; see also *id.*, at 421 ("[Congress can] legislate on that vast mass of incidental powers which must be involved in the constitution ..."). Chief Justice Marshall emphasized that the word "necessary" does not mean "absolutely necessary." *Id.*, at 413-415 (emphasis deleted); *Link v. Richland County*, 538 U.S. 456, 462, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003) ("[W]e long ago rejected the view that the Necessary and Proper Clause demands that an Act of Congress be 'absolutely necessary' to the exercise of an enumerated power"). In language that has come to define the scope of the Necessary and Proper Clause, he wrote:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch, supra*, at 421.

[5] We have since made clear that, in determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. *Sabri v. United States*, 541 U.S. 600, 605, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (using term \*1957 "means-ends rationality" to describe the necessary relationship); *ibid.* (upholding Congress' "authority under the Necessary and Proper Clause" to enact a criminal statute in furtherance of the federal power granted by the Spending Clause);.

[7] We have also recognized that the Constitution "address[es]" the "choice of means"

"primarily ... to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the



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extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone." Burroughs v. United States, 290 U.S. 534, 547-548, 54 S.Ct. 287, 78 L.Ed. 484 (1934).

See also Lottory Case, 188 U.S. 321, 355, 23 S.Ct. 321, 47 L.Ed. 492 (1903) ("[T]he Constitution ... leaves to Congress a large discretion as to the means that may be employed in executing a given power"); Morrison supra at 607, 120 S.Ct. 1740 (applying a "presumption of constitutionality" when examining the scope of Congressional power); McCullach supra at 410, 421.

[8] Neither Congress' power to criminalize conduct, nor its power to imprison individuals who engage in that conduct, nor its power to enact laws governing prisons and prisoners, is explicitly mentioned in the Constitution. But Congress nonetheless possesses broad authority to do each of those things in the course of "carrying into Execution" the enumerated powers "vested by" the "Constitution in the Government of the United States," Art. I, § 8, cl. 18—authority granted by the Necessary and Proper Clause.

[9] *Second*, the civil-commitment statute before us constitutes a modest addition to a set of federal prison-related mental-health statutes that have existed for many decades. We recognize that even a longstanding history of related federal action does not demonstrate a statute's constitutionality. See, e.g., Pike v. The Comm'n of City of New York, 397 U.S. 661, 678, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) ("[N]o one acquires a vested or protected right in violation of the Constitution by long use ..."); cf. Morrison, 529 U.S. at 612-614, 120 S.Ct. 1740 (legislative history is neither necessary nor sufficient with respect to Art. I analysis). A history of involvement, however, can nonetheless be "helpful in reviewing the substance of a congressional statutory scheme," Gonzales, 545 U.S. at 21, 125 S.Ct. 2195; Walt supra, at 678, 90 S.Ct. 1409, and, in particular, the reasonableness of the relation between the new statute and pre-existing federal interests.

Here, Congress has long been involved in the delivery of mental health care to federal prisoners, and has long provided for their civil commitment.

\*1961 In 2006, Congress enacted the particular statute before us. § 302, 120 Stat. 619, 18 U.S.C. § 4248. It differs from earlier statutes in that it focuses directly upon persons who, due to a mental illness, are sexually dangerous. Notably, many of these individuals were likely already subject to civil commitment under § 4246, which, since 1949, has authorized the post-sentence detention of federal prisoners who suffer from a mental illness and who are thereby dangerous (whether sexually or otherwise). But cf. H.R. Rep. No. 109-218, pt. 1, p. 29 (2005). Aside from its specific focus on sexually dangerous persons, § 4248 is similar to the provisions first enacted in 1949. Cf. § 4246. In that respect, it is a modest addition to a longstanding federal statutory framework, which has been in place since 1855.

[10][11] *Third*, Congress reasonably extended its longstanding civil-commitment system to cover mentally ill and sexually dangerous persons who are already in federal custody, even if doing so detains them beyond the termination of their criminal sentence. For one thing, the Federal Government is the custodian of its prisoners. As federal custodian, it has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose. Cf. Youngberg v. Raineo, 457 U.S. 307, 320, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) ("In operating an institution such as [a prison system], there are occasions in which it is necessary for the State to restrain the movement of residents—for example, to protect them as well as others from violence" (emphasis added)). Indeed, at common law, one "who takes charge of a third person" is "under a duty to exercise reasonable care to control" that person to prevent him from causing reasonably foreseeable "bodily harm to others." Restatement (Second) of Torts § 310, p. 129 (1963-1964); see Kolungus, 595 F.3d at 7-8 (citing cases); see also United States v. S. A., 129 F.3d 995, 999 (C.A.8 1997) ("[Congress enacted § 4246] to avert the public danger likely to ensue from the release of mentally ill and dangerous detainees"). If a federal prisoner is infected with a communicable disease that threatens others, surely it would be "necessary and proper" for the Federal Government to take action, pursuant to its role as federal custodian, to refuse (at least until the threat diminishes) to release that individual among the general public, where he might infect others (even if not threatening an interstate epidemic, cf. Art. I, § 8, cl. 2). And if confinement of such an individual is a "nec-

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essary and proper" thing to do, then how could it not be similarly "necessary and proper" to confine an individual whose mental illness threatens others to the same degree?

[14] *Fifth*, the links between § 4248 and an enumerated Article I power are not too attenuated. Neither is the statutory provision too sweeping in its scope. Invoking the cautionary instruction that we may not "pile inference upon inference" in order to sustain congressional action under Article I, *Lopez*, 514 U.S., at 567, 115 S.Ct. 1624, respondents argue that, when legislating pursuant to the Necessary and Proper Clause, Congress' authority can be no more than one step removed from a specifically enumerated power. See Brief for Respondents 21–22; Tr. of Oral Arg. 27–28. But this argument is irreconcilable with our precedents. Again, take *Greenwood* as an example. In that case we upheld the (likely indefinite) civil commitment of a mentally incompetent federal defendant who was accused of robbing a United States Post Office, 350 U.S., at 369, 375, 76 S.Ct. 410. The underlying enumerated Article I power was the power to "Establish Post Offices and Post Roads," Art. I, § 8, cl. 7. But, as Chief Justice Marshall recognized in *McCulloch*,

"the power 'to establish post offices and post roads' ... is executed by the single act of *making* the establishment ... [F]rom this has been inferred the power and duty of *carrying* the mail along the post road, from one post office to another. And, from this *implied* power, has *again* been inferred the right to *punish* those who steal letters from the post office, or rob the mail." 4 *Wheat.*, at 412, 4 L.Ed. 579 (emphasis added).

And, as we have explained, from the implied power to punish we have *further* inferred both the power to imprison, see *supra*, at 1958, and, in *Greenwood*, the federal civil-commitment power.

[15] Indeed even the dissent acknowledges that Congress has the implied power to criminalize any conduct that might interfere with the exercise of an enumerated power, and also the additional power to imprison people who violate those (inferentially authorized) laws, and the additional power to provide for the safe and reasonable management of those prisons, and the additional power to regulate the prisoners' behavior even after their release. Thus, we must reject

respondents' argument that the Necessary and Proper Clause permits no more than a single step between an enumerated power and an Act of Congress.

The Framers demonstrated considerable foresight in drafting a Constitution capable of such resilience through time. As Chief Justice Marshall observed nearly 200 years ago, the Necessary and Proper Clause is part of "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs." *McCulloch v. Wheat*, at 415, 4 L.Ed. 579 (emphasis deleted).

\*\*\*

We take these five considerations together. They include: (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope. Taken together, these considerations lead us to conclude that the statute is a "necessary and proper" means of exercising the federal authority that permits Congress to create federal criminal laws, to punish their violation, to imprison violators, to provide appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others. The Constitution consequently authorizes Congress to enact the statute.

We do not reach or decide any claim that the statute or its application denies equal protection of the laws, procedural or substantive due process, or any other rights guaranteed by the Constitution. Respondents are free to pursue those claims on remand, and any others they have preserved.

The judgment of the Court of Appeals for the Fourth Circuit with respect to Congress' power to enact this statute is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Justice THOMAS, with whom Justice SCALIA joins in all but Part III-A-1-b, dissenting.

The Necessary and Proper Clause empowers Congress to enact only those laws that "carri[y] into

130 S.Ct. 1949, 176 L.Ed.2d 878, 78 USLW 4412, 10 Cal. Daily Op. Serv. 6016, 2010 E. J. Journal D.A.R. 7096, 22 Fla. L. Weekly Fed. S 305 (Cite no: 130 S.Ct. 1949)

Execution" one or more of the federal powers enumerated in the Constitution, Art. I, § 8, cl. 18. Because § 4248, "Execut[es]" no enumerated power, I must respectfully dissent.

1

Chief Justice Marshall famously summarized Congress' authority under the Necessary and Proper Clause in *McCulloch*, which has stood for nearly 200 years as this Court's definitive interpretation of that text:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." 4 *Wheat*, at 421, 4 L.Ed. 579.

*McCulloch's* summation is descriptive of the Clause itself, providing that federal legislation is a valid exercise of Congress' authority under the Clause if it satisfies a two-part test: First, the law must be directed toward a "legitimate" end, which *McCulloch* defines as one "within the scope of the [C]onstitution"—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution. Second, there must be a necessary and proper fit between the "means" (the federal law) and the "end" (the enumerated power or powers) it is designed to serve. *Ibid.* *McCulloch* accords Congress a certain amount of discretion in assessing means-end fit under this second inquiry. The means Congress selects will be "necessary" if they are "appropriate" and "plainly adapted" to the exercise of an enumerated power, and "proper" if they are not otherwise "prohibited" by the Constitution and not "[i]nconsistent" with its "letter and spirit." *Ibid.*

Critically, however, Congress lacks authority to legislate if the objective is anything other than "carrying into Execution" one or more of the Federal Government's enumerated powers, Art. I, § 8, cl. 18.

This limitation was of utmost importance to the Framers. During the State ratification debates, Anti-Federalists expressed concern that the Necessary and Proper Clause would give Congress virtually unlimited power. See, e.g., Essays of Brutus, in 2 *The Complete Anti-Federalist* 421 (H. Storing ed.1981).

Federalist supporters of the Constitution swiftly refuted that charge, explaining that the Clause did not grant Congress any freestanding authority, but instead made explicit what was already implicit in the grant of each enumerated power. Referring to the "powers declared in the Constitution," Alexander Hamilton noted that "It is expressly to execute these powers that the sweeping clause ... authorizes the national legislature to pass all necessary and proper laws." The Federalist No. 33, at 245. James Madison echoed this view, stating that "the sweeping clause ... only extend[s] to the enumerated powers." 3 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 455 (2d ed. 1854) (hereinafter Elliot). Statements by delegates to the state ratification conventions indicate that this understanding was widely held by the founding generation. E.g., *id.*, at 245-246 (statement of George Nicholas) ("Suppose [the Necessary and Proper Clause] had been inserted, at the end of every power, that they should have power to make laws to carry that power into execution; would that have increased their powers? If, therefore, it could not have increased their powers, if placed at the end of each power, it cannot increase them at the end of all").<sup>FN2</sup>

<sup>FN2</sup> See also 4 Elliot 141 (2d ed. 1836) (statement of William Maclaine) ("This clause specifies that [Congress] shall make laws to carry into execution all the powers vested by this Constitution, consequently they can make no laws to execute any other power"); 2 *id.*, at 468 (statement of James Wilson) ("[W]hen it is said that Congress shall have power to make all laws which shall be necessary and proper, those words are limited and defined by the following, 'for carrying into execution the foregoing powers.' [The Clause] is saying no more than that the powers we have already particularly given, shall be effectually carried into execution"); Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 *U. Pa. L. Const. L.* 183, 185-186 (2003); Lawson & Oranger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 *Duke L.J.* 267, 274-275, and n. 24 (1993).

Roughly 30 years after the Constitution's ratification, *McCulloch* firmly established this under-

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130 S.Ct. 1949, 176 L.Ed.2d 878, 78 USLW 4412, 10 Cal. Daily Op. Serv. 6016, 2010 Daily Journal D.A.R. 7096, 22 Fla. L. Weekly Fed. S 305 (Cite as: 130 S.Ct. 1949)

standing in our constitutional jurisprudence. 4 Wheal, at 421, 423, 4 L.Ed. 579. Since then, our precedents uniformly have maintained that the Necessary and Proper Clause is not an independent fount of congressional authority, but rather "a caveat that Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of § 8 'and all other Powers vested by this Constitution.' "

II

No enumerated power in Article I, § 8, expressly delegates to Congress the power to enact a civil-commitment regime for sexually dangerous persons, nor does any other provision in the Constitution vest Congress or the other branches of the Federal Government with such a power. Accordingly, § 4248 can be a valid exercise of congressional authority only if it is "necessary and proper for carrying into Execution" one or more of those federal powers actually enumerated in the Constitution.

Section 4248 does not fall within any of those powers. The Government identifies no specific enumerated power or powers as a constitutional predicate for § 4248, and none are readily discernable.

Indeed, it is clear, on the face of the Act and in the Government's arguments urging its constitutionality, that § 4248 is aimed at protecting society from acts of sexual violence, not toward "carrying into Execution" any enumerated power or powers of the Federal Government. See Adam Walsh Child Protection and Safety Act of 2006, 120 Stat. 587 (entitled "[a]n Act [t]o protect children from sexual exploitation and violent crime"), § 102, *id.*, at 590 (statement of purpose declaring that the Act was promulgated "to protect the public from sex offenders"); Brief for United States 38–39 (asserting the Federal Government's power to "protect the public from harm that might result upon these prisoners' release, even when that harm might arise from conduct that is otherwise beyond the general regulatory powers of the federal government" (emphasis added)).

But the Constitution does not vest in Congress the authority to protect society from every bad act that might befall it. New York v. United States, 505 U.S. 144, 157, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992) ("The question is not what power the Federal Government ought to have but what powers in fact have

been given by the people' ")

In my view, this should decide the question. Section 4248 runs afoul of our settled understanding of Congress' power under the Necessary and Proper Clause. Congress may act under that Clause only when its legislation "carri [ies] into Execution" one of the Federal Government's enumerated powers. Art. I, § 8, cl. 18. Section 4248 does not execute any enumerated power. Section 4248 is therefore unconstitutional.

III

The Court perfunctorily gestures to McCulloch's framework for assessing Congress' Necessary and Proper Clause authority, and to the principle of dual sovereignty it helps to maintain, then promptly abandons both in favor of a novel five-factor test supporting its conclusion that § 4248 is a " 'necessary and proper' " adjunct to a jumble of unenumerated "authorit [ies]." *Ante*, at 1965. The Court's "1975 newly minted test cannot be reconciled with the Clause's plain text or with two centuries of our precedents interpreting it. It also raises more questions than it answers. Must each of the five considerations exist before the Court sustains future federal legislation as proper exercises of Congress' Necessary and Proper Clause authority? What if the facts of a given case support a finding of only four considerations? Or three? And if three or four will suffice, which three or four are imperative? At a minimum, this shift from the two-step McCulloch framework to this five-consideration approach warrants an explanation as to why McCulloch is no longer good enough and which of the five considerations will bear the most weight in future cases, assuming some number less than five suffices. (Or, if not, why all five are required.) The Court provides no answers to these questions.

A

I begin with the first and last "considerations" in the Court's inquiry. *Ante*, at 1956. The Court concludes that § 4248 is a valid exercise of Congress' Necessary and Proper Clause authority because that authority is "broad," *ibid.*, and because "the links between § 4248 and an enumerated Article I power are not too attenuated," *ante*, at 1963. In so doing, the Court first inverts, then misapplies, McCulloch's straightforward two-part test.

130 S.Ct. 1949, 176 L.Ed.2d 878, 78 USLW 4412, 10 Cal. Daily Op. Serv. 6016, 2010 Daily Journal D.A.R. 7096, 22 Fla. L. Weekly Fed. S 305 (Cite as: 130 S.Ct. 1949)

1

a

By starting its inquiry with the degree of deference owed to Congress in selecting means to further a legitimate end, the Court bypasses *McCulloch*'s first step and fails carefully to examine whether the end served by § 4248 is actually one of those powers. See Part III-A-2, *infra*.

b

Second, instead of asking the simple question of what enumerated power § 4248 "carries" into Execution" at *McCulloch*'s first step, the Court surveys \*1976 other laws Congress has enacted and concludes that, because § 4248 is related to those laws, the "links" between § 4248 and an enumerated power are not "too attenuated"; hence, § 4248 is a valid exercise of Congress' Necessary and Proper Clause authority. *Ante*, at 1963.

But that is not the question. The Necessary and Proper Clause does not provide Congress with authority to enact any law simply because it furthers *other laws* Congress has enacted in the exercise of its incidental authority; the Clause plainly requires a showing that every federal statute "carries" into Execution" one or more of the Federal Government's enumerated powers.<sup>FN8</sup>

FN8, *McCulloch* makes this point clear. As the Court notes, *ante*, at 18-19, *McCulloch* states, in discussing a hypothetical, that from Congress' enumerated power to establish post offices and post roads "has been inferred the power and duty of carrying the mail," and, "from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail." 4 *Wheat.*, at 417. 4 L.Ed. 579. Contrary to the Court's interpretation, this dictum does not suggest that the relationship between Congress' implied power to punish postal crimes and its implied power to carry the mail is alone sufficient to satisfy review under the Necessary and Proper Clause. Instead, *McCulloch* directly links the constitutionality of the former to Congress' enumerated power "to establish post offices and post roads." *Ibid.* (explaining that "the right to ... punish those who rob [the mail] is not indispensably necessary to the establishment

of a post office and post road," but is "essential to the beneficial exercise of th[at] power").

Federal laws that criminalize conduct that interferes with enumerated powers, establish prisons for those who engage in that conduct, and set rules for the care and treatment of prisoners awaiting trial or \*1977 serving a criminal sentence satisfy this test because each helps to "carry" into Execution" the enumerated powers that justify a criminal defendant's arrest or conviction. For example, Congress' enumerated power "[t]o establish Post Offices and post Roads," Art. I, § 8, cl. 7, would lack force or practical effect if Congress lacked the authority to enact criminal laws "to punish those who steal letters from the post office, or rob the mail." *McCulloch, supra*, at 417. Similarly, that enumerated power would be compromised if there were no prisons to hold persons who violate those laws, or if those prisons were so poorly managed that prisoners could escape. Civil detention under § 4248, on the other hand, lacks any such connection to an enumerated power.

2

After focusing on the relationship between § 4248 and several of Congress' implied powers, the Court finally concludes that the civil detention of a "sexually dangerous person" under § 4248 carries into execution the enumerated power that justified that person's arrest or conviction in the first place. In other words, the Court analogizes § 4248 to federal laws that authorize prison officials to care for federal inmates while they serve sentences or await trial. But while those laws help to "carry" into Execution" the enumerated power that justifies the imposition of criminal sanctions on the inmate, § 4248 does not bear that essential characteristic for three reasons.

First, the statute's definition of a "sexually dangerous person" contains no element relating to the subject's crime. See §§ 4247(a)(1)-(6). It thus does not require a federal court to find any connection between the reasons supporting civil commitment and the enumerated power with which that person's criminal conduct interfered. As a consequence, § 4248 allows a court to civilly commit an individual without finding that he was ever charged with or convicted of a federal crime involving sexual violence. §§ 4248(a), (d). That possibility is not merely hypothetical: The Government concedes that nearly 20% of individuals against

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130 S.Ct. 1949, 176 L.Ed.2d 878, 78 USLW 4412, 10 Cal. Daily Op. Serv. 6016, 2010 Daily Journal D.A.R. 7096, 22 Fla. L. Weekly Fed. S 305 (Cite as: 130 S.Ct. 1949)

whom § 4248 proceedings have been brought fit this description

Second, § 4248 permits the term of federal civil commitment to continue beyond the date on which a convicted prisoner's sentence expires or the date on which the statute of limitations on an untried defendant's crime has run. The statute therefore authorizes federal custody over a person at a time when the Government would lack jurisdiction to detain him for violating a criminal law that executes an enumerated power.

Third, the definition of a "sexually dangerous person" relevant to § 4248 does not require the court to find that the person is likely to violate a law executing an enumerated power in the future.

B

The remaining "considerations" in the Court's five-part inquiry do not alter this conclusion.

1

First, in a final attempt to analogize § 4248 to laws that authorize the Federal Government to provide care and treatment to prisoners while they await trial or serve a criminal sentence, the Court cites the Second Restatement of Torts for the proposition that the Federal Government has a "custodial interest" in its prisoners, *ante*, at 1965, and, thus, a broad "constitutional power to act in order to protect nearby (and other) communities" from the dangers they may pose, *ibid.* *ante*, at 1961. That 1979 citation is puzzling because federal authority derives from the Constitution, not the common law. In any event, nothing in the Restatement suggests that a common-law custodian has the powers that Congress seeks here. While the Restatement provides that a custodian has a duty to take reasonable steps to ensure that a person in his care does not cause "bodily harm to others," 2 Restatement (Second) of Torts § 312, p. 129 (1963-1964), that duty terminates once the legal basis for custody expires.

Once the Federal Government's criminal jurisdiction over a prisoner ends, so does any "special relationship" between the Government and the former prisoner

2

Second, the Court describes § 4248 as a "modest" expansion on a statutory framework with a long his-

torical pedigree. *Ante*, at 1958. Yet even if the antiquity of a practice could serve as a substitute for its constitutionality—and the Court admits that it cannot, *ibid.*—the Court overstates the relevant history.

The historical record supports the Federal Government's authority to detain a mentally ill person against whom it has the authority to enforce a criminal law. But it provides no justification whatsoever for reading the Necessary and Proper Clause to grant Congress the power to authorize the detention of persons without a basis for federal criminal jurisdiction.

3

29 States appear as *amici* and argue that § 4248 is constitutional. They tell us that they do not object to Congress retaining custody of "sexually dangerous persons" after their criminal sentences expire because the cost of detaining such persons is "expensive"—approximately \$64,000 per year—and these States would rather the Federal Government bear this expense. Brief for Kansas et al. 2; *ibid.* ("[S]ex offender civil commitment programs are expensive to operate"); *id.*, at 4 ("these programs are expensive"); *id.*, at 8 ("[T]here are very practical reasons to prefer a system that includes a federal sex offender civil commitment program.... One such reason is the significant cost").

Congress' power, however, is fixed by the Constitution; it does not expand merely to suit the States' policy preferences, or to allow State officials to avoid difficult choices regarding the allocation of state funds. By assigning the Federal Government power over "certain enumerated objects only," the Constitution "leaves to the several States a residuary and inviolable sovereignty over all other objects." The Federalist No. 39, at 285 (J. Madison).

I respectfully dissent.

## Some External Limits on Judicial Review

### I. Legal

#### A. Constitutional Amendment

#### B. Statute

##### a. Substantive

This works where the Court has held that some practice (e.g., wiretapping reporters) is not unconstitutional. A statutory fix is not possible where court has held that a practice is unconstitutional and public wants the practice (e.g., racially segregated schools)

##### b. Jurisdiction-stripping

Limits not subject of much case law because of (2) below.

##### 1. Legal Limits

###### A. Ex Parte McCardle (CB 75)

###### B. Independent constitutional barriers (CB 79 n.4)

###### C. Judicial Function (Ex Parte Klein, CB 79 n.5)

##### 2. Practical Limits

###### A. Consequences of stripping Supreme Court

###### B. Consequences of stripping all federal courts.

### II. Political

#### A. Agitation

#### B. Appointment

#### C. Impeachment

### III. On-the-Ground

#### A. Federalism

States may always provide more liberty than the Constitution requires. They just may not provide less. This is a limitation on the power of Supreme Court holdings that a certain practice (e.g., outlawing same-sex sexual intercourse) is not unconstitutional.

#### B. Reality

Supreme Court is unlikely to do something it thinks will be ignored.

133 S. Ct. 2675; 2013 U.S. LEXIS 4921, \*;  
81 U.S.L.W. 4633; 2013-2 U.S. Tax Cas. (CCH) P50,400

UNITED STATES, PETITIONER v. EDITH SCHLAIN WINDSOR, IN HER  
CAPACITY AS EXECUTOR OF THE ESTATE OF THEA CLARA SPYER, ET  
AL.

No. 12-307.

SUPREME COURT OF THE UNITED STATES

133 S. Ct. 2675; 2013 U.S. LEXIS 4921; 81 U.S.L.W. 4633; 2013-2 U.S. Tax Cas.  
(CCH) P50,400; 111 A.F.T.R.2d (RIA) 2385; 24 Fla. L. Weekly Fed. S 445

March 27, 2013, Argued

June 26, 2013, Decided

NOTICE:

The LEXIS pagination of this document is subject to change pending release of the final published version.

PRIOR HISTORY: [\*1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT  
*Windsor v. United States*, 699 F.3d 169, 2012 U.S. App. LEXIS 21785 (2d Cir. N.Y., 2012)

DISPOSITION: Affirmed.

SYLLABUS

The State of New York recognizes the marriage of New York residents Edith Windsor and Thea Spyer, who wed in Ontario, Canada, in 2007. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the federal estate tax exemption for surviving spouses, but was barred from doing so by §3 of the federal Defense of Marriage Act (DOMA), which amended the Dictionary Act--a law providing rules of construction for over 1,000 federal laws and the whole realm of federal regulations--to define "marriage" and "spouse" as excluding same-sex partners. Windsor paid \$363,053 in estate taxes and sought a refund, which the Internal Revenue Service denied. Windsor brought this refund suit, contending that DOMA violates the principles of equal protection incorporated in the Fifth Amendment. While the suit was pending, the Attorney General notified the Speaker of the House of Representatives that the Department of Justice would no longer defend §3's constitutionality. In response, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene [\*2] in the litigation to defend §3's constitutionality. The District Court permitted the intervention. On the merits, the court ruled against the United States, finding §3 unconstitutional and ordering the Treasury to refund Windsor's tax with interest. The Second Circuit affirmed. The United States has not complied with the judgment.

*Held:*

1. This Court has jurisdiction to consider the merits of the case. This case clearly presented a concrete disagreement between opposing parties that was suitable for judicial resolution in the District Court, but the Executive's decision not to defend §3's constitutionality in court while continuing to deny refunds and assess deficiencies introduces a complication. Given the Government's concession, *amicus* contends, once the District Court ordered the refund, the case should have ended and the appeal been dismissed. But this argument elides the distinction between Article III's jurisdictional requirements and the prudential limits on its exercise, which are "essentially matters of judicial self-governance." *Warth v. Seldin*, 422 U. S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343. Here, the United States retains a stake sufficient to support Article III jurisdiction on appeal and in this [\*3] Court. The refund it was ordered to pay Windsor is "a real and immediate economic injury," *Hein v. Freedom From Religion Foundation, Inc.*, 551 U. S. 587, 599, 127 S. Ct. 2553, 168 L. Ed. 2d 424, even if the Executive disagrees with §3 of DOMA. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction. Cf. *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764, 77 L. Ed. 2d 317.

Prudential considerations, however, demand that there be "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369



133 S. Ct. 2652; 186 L. Ed. 2d 768;  
2013 U.S. LEXIS 4919, \*; 81 U.S.L.W. 4618

U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663. Unlike Article III requirements-- which must be satisfied by the parties before judicial consideration is appropriate--prudential factors that counsel against hearing this case are subject to "countervailing considerations [that] may outweigh the concerns underlying the usual reluctance to exert judicial power." *Warth, supra*, at 500-501, 95 S. Ct. 2197, 45 L. Ed. 2d 343. One such consideration is the extent to which adversarial presentation of the issues is ensured by the participation of *amici curiae* prepared to defend with vigor the legislative act's constitutionality. See *Chadha, supra*, at 940, 103 S. Ct. 2764, 77 L. Ed. 2d 317. [\*4] Here, BLAG's substantial adversarial argument for §3's constitutionality satisfies prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree. This conclusion does not mean that it is appropriate for the Executive as a routine exercise to challenge statutes in court instead of making the case to Congress for amendment or repeal. But this case is not routine, and BLAG's capable defense ensures that the prudential issues do not cloud the merits question, which is of immediate importance to the Federal Government and to hundreds of thousands of persons. Pp. 5-13.

JUSTICE KENNEDY delivered the opinion of the Court.

Two women then resident in New York were married in a lawful ceremony in Ontario, Canada, in 2007. Edith Windsor and Thea Spyer returned to their home in New York City. When Spyer died in 2009, she left her entire estate to Windsor. Windsor sought to claim the estate tax exemption for surviving spouses. She was barred from doing so, however, by a federal law, the Defense of Marriage Act, which excludes a same-sex partner from the definition of "spouse" as that term is used in federal statutes. Windsor [\*9] paid the taxes but filed suit to challenge the constitutionality of this provision. The United States District Court and the Court of Appeals ruled that this portion of the statute is unconstitutional and ordered the United States to pay Windsor a refund. This Court granted certiorari and now affirms the judgment in Windsor's favor.

Spyer died in February 2009, [\*11] and left her entire estate to Windsor. Because DOMA denies federal recognition to same-sex spouses, Windsor did not qualify for the marital exemption from the federal estate tax, which excludes from taxation "any interest in property which passes or has passed from the decedent to his surviving spouse." 26 U. S. C. §2056(a). Windsor paid \$363,053 in estate taxes and sought a refund. The Internal Revenue Service denied the refund, concluding that, under DOMA, Windsor was not a "surviving spouse." Windsor commenced this refund suit in the United States District Court for the Southern District of New York. She contended that DOMA violates the guarantee of equal protection, as applied to the Federal Government through the Fifth Amendment.

While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U. S. C. §530D, that the Department of Justice would no longer defend the constitutionality of DOMA's §3. Noting that "the Department has previously defended DOMA against . . . challenges involving legally married same-sex couples," App. 184, the Attorney General informed Congress that "the President has [\*12] concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny." *Id.*, at 191. The Department of Justice has submitted many §530D letters over the years refusing to defend laws it deems unconstitutional, when, for instance, a federal court has rejected the Government's defense of a statute and has issued a judgment against it. This case is unusual, however, because the §530D letter was not preceded by an adverse judgment. The letter instead reflected the Executive's own conclusion, relying on a definition still being debated and considered in the courts, that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.

Although "the President . . . instructed the Department not to defend the statute in *Windsor*," he also decided "that Section 3 will continue to be enforced by the Executive Branch" and that the United States had an "interest in providing Congress a full and fair opportunity to participate in the litigation of those cases." *Id.*, at 191-193. The stated rationale for this dual-track procedure (determination [\*13] of unconstitutionality coupled with ongoing enforcement) was to "recogniz[e] the judiciary as the final arbiter of the constitutional claims raised." *Id.*, at 192.

In response to the notice from the Attorney General, the Bipartisan Legal Advisory Group (BLAG) of the House of Representatives voted to intervene in the litigation to defend the constitutionality of §3 of DOMA. The Department of Justice did not oppose limited intervention by BLAG. The District Court denied BLAG's motion to enter the suit as of

133 S. Ct. 2652; 186 L. Ed. 2d 768;  
2013 U.S. LEXIS 4919, \*, 81 U.S.L.W. 4618

right, on the rationale that the United States already was represented by the Department of Justice. The District Court, however, did grant intervention by BLAG as an interested party. See Fed. Rule Civ. Proc. 24(a)(2).

## II

It is appropriate to begin by addressing whether either the Government or BLAG, or both of them, were [\*15] entitled to appeal to the Court of Appeals and later to seek certiorari and appear as parties here.

There is no dispute that when this case was in the District Court it presented a concrete disagreement between opposing parties, a dispute suitable for judicial resolution. Windsor suffered a redressable injury when she was required to pay estate taxes from which, in her view, she was exempt but for the alleged invalidity of §3 of DOMA.

The *amicus* submits that once the President agreed with Windsor's legal position and the District Court issued its judgment, the parties were no longer adverse. From this standpoint the United States was a prevailing party below, just as Windsor was. Accordingly, the *amicus* reasons, it is inappropriate for this Court to grant certiorari and proceed to rule [\*17] on the merits; for the United States seeks no redress from the judgment entered against it.

This position, however, elides the distinction between two principles: the jurisdictional requirements of Article III and the prudential limits on its exercise. See *Warth v. Seldin*, 422 U. S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). The latter are "essentially matters of judicial self-governance." *Id.*, at 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343. The Court has kept these two strands separate: "Article III standing, which enforces the Constitution's case-or-controversy requirement, see *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 559-562, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); and prudential standing, which embodies judicially self-imposed limits on the exercise of federal jurisdiction," *Allen [v. Wright]*, 468 U.S. [737,] 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 [(1984)]." *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11-12, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004).

The requirements of Article III standing are familiar:

"First, the plaintiff must have suffered an 'injury in fact' -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural or hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of--the injury has to be 'fairly [\*18] . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan, supra*, at 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (footnote and citations omitted).

Rules of prudential standing, by contrast, are more flexible "rule[s] . . . of federal appellate practice," *Deposit Guaranty Nat. Bank v. Roper*, 445 U. S. 326, 333, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980), designed to protect the courts from "decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth, supra*, at 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343.

In this case the United States retains a stake sufficient to support Article III jurisdiction on appeal and in proceedings before this Court. The judgment in question orders the United States to pay Windsor the refund she seeks. An order directing the Treasury to pay money is "a real and immediate economic injury," *Hein*, 551 U.S., at 599, 127 S. Ct. 2553, 168 L. Ed. 2d 424, indeed as real and immediate as an order directing [\*19] an individual to pay a tax. That the Executive may welcome this order to pay the refund if it is accompanied by the constitutional ruling it wants does not eliminate the injury to the national Treasury if payment is made, or to the taxpayer if it is not. The judgment orders the United States to pay money that it would not disburse but for the court's order. The Government of the United States has a valid legal argument that it is injured even if the Executive disagrees with §3 of DOMA, which results in Windsor's liability for the tax. Windsor's ongoing claim for funds that the United States refuses to pay thus establishes a controversy sufficient for Article III jurisdiction.

While these principles suffice to show that this case presents a justiciable controversy under Article III, the prudential problems [\*22] inherent in the Executive's unusual position require some further discussion. The Executive's agreement with Windsor's legal argument raises the risk that instead of a "real, earnest and vital controversy," the Court faces a "friendly, non-adversary, proceeding . . . [in which] a party beaten in the legislature [seeks to] transfer to the courts an inquiry as to the constitutionality of the legislative act." *Ashwander v. TVA*, 297 U. S. 288, 346, 56 S. Ct. 466,

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80 L. Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Chicago & Grand Trunk R. Co. v. Wellman*, 143 U. S. 339, 345, 12 S. Ct. 400, 36 L. Ed. 176 (1892)). Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U. S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962).

In the case now before [\*24] the Court the attorneys for BLAG present a substantial argument for the constitutionality of §3 of DOMA. BLAG's sharp adversarial presentation of the issues satisfies the prudential concerns that otherwise might counsel against hearing an appeal from a decision with which the principal parties agree.

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**DENNIS HOLLINGSWORTH, ET AL., PETITIONERS v. KRISTIN M. PERRY  
ET AL.**

No. 12-144.

**SUPREME COURT OF THE UNITED STATES**

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Fair Empl. Prac. Cas. (BNA) 1446; 24 Fla. L. Weekly Fed. S 461

March 26, 2013, Argued  
June 26, 2013, Decided

**NOTICE:**

The LEXIS pagination of this document is subject to change pending release of the final published version.

**PRIOR HISTORY: [\*1]**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

*Perry v. Brown*, 671 F.3d 1052, 2012 U.S. App. LEXIS 2328 (9th Cir. Cal., 2012)

**DISPOSITION:** 671 F.3d 1052, vacated and remanded.

**SYLLABUS**

After the California Supreme Court held that limiting marriage to opposite-sex couples violated the California Constitution, state voters passed a ballot initiative known as Proposition 8, amending the State Constitution to define marriage as a union between a man and a woman. Respondents, same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and naming as defendants California's Governor and other state and local officials responsible for enforcing California's marriage laws. The officials refused to defend the law, so the District Court allowed petitioners--the initiative's official proponents--to intervene to defend it. After a bench trial, the court declared Proposition 8 unconstitutional and enjoined the public officials named as defendants from enforcing the law. Those officials elected not to appeal, but petitioners did. The Ninth Circuit certified a question to the California Supreme Court: whether official proponents of a ballot initiative have [\*2] authority to assert the State's interest in defending the constitutionality of the initiative when public officials refuse to do so. After the California

Supreme Court answered in the affirmative, the Ninth Circuit concluded that petitioners had standing under federal law to defend Proposition 8's constitutionality. On the merits, the court affirmed the District Court's order.

*Held:* Petitioners did not have standing to appeal the District Court's order. Pp. 5-17.

(a) Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." §2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. In other words, the litigant must seek a remedy for a personal and tangible harm. Although most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, Article III demands that an "actual controversy" persist throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, 568 U. S. \_\_\_, \_\_\_, 133 S. Ct. 721, 184 L. Ed. 2d 553. Standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonaans for Official English v. Arizona*, 520 U. S. 43, 64, 117 S. Ct. 1055, 137 L. Ed. 2d 170. [\*3] The parties do not contest that respondents had standing to initiate this case against the California officials responsible for enforcing Proposition 8. But once the District Court issued its order, respondents no longer had any injury to redress, and the state officials chose not to appeal. The only individuals who sought to appeal were petitioners, who had intervened in the District Court, but they had not been ordered to do or refrain from doing anything. Their only interest was to vindicate the constitutional validity of a generally applicable California law. As this Court has repeatedly held, such a "generalized grievance"--no matter how sincere--is insufficient to confer standing. See *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 573-574, 112 S. Ct. 2130, 119 L. Ed. 2d 351. Petitioners claim that the California Constitution and election laws give them a "unique," "special," and "distinct"

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role in the initiative process," Reply Brief 5, but that is only true during the process of enacting the law. Once Proposition 8 was approved, it became a duly enacted constitutional amendment. Petitioners have no role--special or otherwise--in its enforcement. They therefore have no "personal stake" in defending its enforcement [\*4] that is distinguishable from the general interest of every California citizen. No matter how deeply committed petitioners may be to upholding Proposition 8, that is not a particularized interest sufficient to create a case or controversy under Article III. Pp. 5-9.

(b) Petitioners' arguments to the contrary are unpersuasive. Pp. 9-16.

(1) They claim that they may assert the State's interest on the State's behalf, but it is a "fundamental restriction on our authority" that "[i]n the ordinary course, a litigant . . . cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U. S. 400, 410, 111 S. Ct. 1364, 113 L. Ed. 2d 411. In *Diamond v. Charles*, 476 U. S. 54, 106 S. Ct. 1697, 90 L. Ed. 2d 48, for example, a pediatrician engaged in private practice was not permitted to defend the constitutionality of Illinois' abortion law after the State chose not to appeal an adverse ruling. The state attorney general's "letter of interest," explaining that the State's interest in the proceeding was "essentially co-terminous with" Diamond's position, *id.*, at 61, 106 S. Ct. 1697, 90 L. Ed. 2d 48, was insufficient, since Diamond was unable to assert an injury of his own, *id.*, at 65, 106 S. Ct. 1697, 90 L. Ed. 2d 48. Pp. 9-10.

(2) Petitioners contend the California Supreme Court's determination [\*5] that they were authorized under California law to assert the State's interest in the validity of Proposition 8 means that they "need no more show a personal injury, separate from the State's indisputable interest in the validity of its law, than would California's Attorney General or did the legislative leaders held to have standing in *Karcher v. May*, 484 U. S. 72, 108 S. Ct. 388, 98 L. Ed. 2d 327 (1987)." Reply Brief 6. But far from supporting petitioners' standing, *Karcher* is compelling precedent against it. In that case, after the New Jersey attorney general refused to defend the constitutionality of a state law, leaders of New Jersey's Legislature were permitted to appear, in their official capacities, in the District Court and Court of Appeals to defend the law. What is significant about *Karcher*, however, is what happened after the Court of Appeals decision. The legislators lost their leadership positions, but nevertheless sought to appeal to this Court. The Court held that they could not do so. Although they could participate in the lawsuit in their official capacities as presiding officers of the legislature, as soon as they lost that capacity, they lost standing. *Id.*, at 81, 108 S. Ct. 388, 98 L. Ed. 2d 327. Petitioners here hold no office

[\*6] and have always participated in this litigation solely as private parties. Pp. 10-13.

(3) Nor is support found in dicta in *Arizonans for Official English v. Arizona*, *supra*. There, in expressing "grave doubts" about the standing of ballot initiative sponsors to defend the constitutionality of an Arizona initiative, the Court noted that it was "aware of no Arizona law appointing initiative sponsors as agents of the people of Arizona to defend, in lieu of public officials, the constitutionality of initiatives made law of the State." *Id.*, at 65, 117 S. Ct. 1055, 137 L. Ed. 2d 170. Petitioners argue that, by virtue of the California Supreme Court's decision, they *are* authorized to act as "agents of the people of California." Brief for Petitioners 15. But that Court never described petitioners as "agents of the people." All the California Supreme Court's decision stands for is that, so far as California is concerned, petitioners may "assert legal arguments in defense of the state's interest in the validity of the initiative measure" in federal court. 628 F.3d 1191, 1193. That interest is by definition a generalized one, and it is precisely because proponents assert such an interest that they lack standing under this Court's [\*7] precedents. Petitioners are also plainly not agents of the State. As an initial matter, petitioners' newfound claim of agency is inconsistent with their representations to the District Court, where they claimed to represent their *own* interests as official proponents. More to the point, the basic features of an agency relationship are missing here: Petitioners are not subject to the control of any principal, and they owe no fiduciary obligation to anyone. As one *amicus* puts it, "the proponents apparently have an unelected appointment for an unspecified period of time as defenders of the initiative, however and to whatever extent they choose to defend it." Brief for Walter Dellinger 23. Pp. 13-16.

(c) The Court does not question California's sovereign right to maintain an initiative process, or the right of initiative proponents to defend their initiatives in California courts. But standing in federal court is a question of federal law, not state law. No matter its reasons, the fact that a State thinks a private party should have standing to seek relief for a generalized grievance cannot override this Court's settled law to the contrary. Article III's requirement that a party invoking [\*8] the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in the federal system of separated powers. States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse. Pp. 16-17.

671 F. 3d 1052, vacated and remanded.

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CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

I

In 2008, the California Supreme Court held that limiting the official designation of marriage to opposite-sex couples violated the equal protection clause of the California Constitution. [\*10] *In re Marriage Cases*, 43 Cal. 4th 757, 76 Cal. Rptr. 3d 683, 183 P. 3d 384. Later that year, California voters passed the ballot initiative at the center of this dispute, known as Proposition 8. That proposition amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const., Art. I, §7.5.

Respondents, two same-sex couples who wish to marry, filed suit in federal court, challenging Proposition 8 under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Federal Constitution. The complaint named as defendants California's Governor, attorney general, and various other state and local officials responsible for enforcing California's marriage laws. Those officials refused to defend the law, although they have continued to enforce it throughout this litigation. The District Court allowed petitioners--the official proponents of the initiative, see Cal. Elec. Code Ann. §342 (West 2003)--to intervene to defend [\*12] it. After a 12-day bench trial, the District Court declared Proposition 8 unconstitutional, permanently enjoining the California officials named as defendants from enforcing the law, and "directing the official defendants that all persons under their control or supervision" shall not enforce it. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1004 (ND Cal. 2010).

Those officials elected not to appeal the District Court order. When petitioners did, the Ninth Circuit asked them to address "why this appeal should not be dismissed for lack of Article III standing." *Perry v. Schwarzenegger*, Civ. No. 10-16696 (CA9, Aug. 16, 2010), p. 2. After briefing and argument, the Ninth Circuit certified a question to the California Supreme Court:

"Whether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when

the public officials [\*13] charged with that duty refuse to do so." *Perry v. Schwarzenegger*, 628 F. 3d 1191, 1193 (2011).

The California Supreme Court agreed to decide the certified question, and answered in the affirmative. Without addressing whether the proponents have a particularized interest of their own in an initiative's validity, the court concluded that "[I]n a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state's interest in the initiative's validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so." *Perry v. Brown*, 52 Cal. 4th 1116, 1127, 134 Cal. Rptr. 3d 499, 265 P. 3d 1002, 1007 (2011).

Relying on that answer, the Ninth Circuit concluded that petitioners had standing under federal law to defend the constitutionality of Proposition 8. California, it reasoned, "has standing to defend the constitutionality of its [laws]," and States have the "prerogative, as independent sovereigns, to decide for themselves who may assert their interests." *Perry v. Brown*, 671 F. 3d 1052, 1070, 1071 (2012) (quoting *Diamond v. Charles*, 476 U. S. 54, 62, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)). [\*14] "All a federal court need determine is that the state has suffered a harm sufficient to confer standing and that the party seeking to invoke the jurisdiction of the court is authorized by the state to represent its interest in remedying that harm." 671 F. 3d, at 1072.

We directed that the parties brief and argue "Whether petitioners have standing under Article III, §2, of the Constitution in this case." 568 U. S. \_\_\_, 133 S. Ct. 786, 184 L. Ed. 2d 526 (2012).

II

Article III of the Constitution confines the judicial power of federal courts to deciding actual "Cases" or "Controversies." §2. One essential aspect of this requirement is that any person invoking the power of a federal court must demonstrate standing to do so. This requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). In other words, for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and

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tangible harm. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements." *Diamond, supra*, at 62, 106 S. Ct. 1697, 90 L. Ed. 2d 48.

The doctrine of standing, [\*16] we recently explained, "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U. S. \_\_\_, \_\_\_, 133 S. Ct. 1138, 1146, 185 L. Ed. 2d 264, 275 (2013). In light of this "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines v. Byrd*, 521 U. S. 811, 820, 117 S. Ct. 2312, 138 L. Ed. 2d 849 (1997) (footnote omitted).

Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an "actual controversy" persist throughout all stages of litigation. *Already, LLC v. Nike, Inc.*, 568 U. S. \_\_\_, \_\_\_, 133 S. Ct. 721, 184 L. Ed. 2d 553 (2013) (slip op., at 4) (internal quotation marks omitted). That means that standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U. S. 43, 64, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997). We therefore must decide whether petitioners had standing to appeal the District Court's order.

Respondents initiated this case in [\*17] the District Court against the California officials responsible for enforcing Proposition 8. The parties do not contest that respondents had Article III standing to do so. Each couple expressed a desire to marry and obtain "official sanction" from the State, which was unavailable to them given the declaration in Proposition 8 that "marriage" in California is solely between a man and a woman. App. 59.

After the District Court declared Proposition 8 unconstitutional and enjoined the state officials named as defendants from enforcing it, however, the inquiry under Article III changed. Respondents no longer had any injury to redress—they had won—and the state officials chose not to appeal.

The only individuals who sought to appeal that order were petitioners, who had intervened in the District Court. But the District Court had not ordered them to do or refrain from doing anything. To have standing, a litigant must seek relief for an injury that affects him in a "personal and individual way." *Defenders of Wildlife, supra*, at 560, n. 1, 112 S. Ct. 2130, 119 L. Ed. 2d 351. He must possess a "direct stake in the outcome" of the case. *Arizonans for Official English, supra*, at 64, 117 S.

Ct. 1055, 137 L. Ed. 2d 170 (internal quotation marks omitted). Here, however, [\*18] petitioners had no "direct stake" in the outcome of their appeal. Their only interest in having the District Court order reversed was to vindicate the constitutional validity of a generally applicable California law.

We have repeatedly held that such a "generalized grievance," no matter how sincere, is insufficient to confer standing. A litigant "raising only a generally available grievance about government--claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large--does not state an Article III case or controversy." *Defenders of Wildlife, supra*, at 573-574, 112 S. Ct. 2130, 119 L. Ed. 2d 351; see *Lance v. Coffman*, 549 U. S. 437, 439, 127 S. Ct. 1194, 167 L. Ed. 2d 29 (2007) (*per curiam*) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree."); *Allen v. Wright*, 468 U. S. 737, 754, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984) ("an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court"); *Massachusetts v. Mellon*, 262 U. S. 447, 488, 43 S. Ct. 597, 67 L. Ed. 1078 (1923) ("The party who invokes the [judicial] power must be able to show . . . that he has sustained or [\*19] is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.").

Article III standing "is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond*, 476 U. S., at 62, 106 S. Ct. 1697, 90 L. Ed. 2d 48. No matter how deeply committed petitioners may be to upholding Proposition 8 or how "zealous [their] advocacy," *post*, at 4 (KENNEDY, J., dissenting), that is not a "particularized" interest sufficient to create a case or controversy under Article III.

The Article III requirement that a party invoking the jurisdiction of a federal court seek relief for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers. "Refusing to entertain generalized grievances ensures that . . . courts exercise power that is judicial [\*34] in nature," *Lance*, 549 U. S., at 441, 127 S. Ct. 1194, 167 L. Ed. 2d 29, and ensures that the Federal Judiciary respects "the proper--and properly limited--role of the courts in a democratic society," *DaimlerChrysler Corp. v. Cuno*, 547 U. S. 332, 341, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006) (internal quotation marks omitted). States cannot alter that role simply by issuing to private parties who otherwise lack standing a ticket to the federal courthouse.

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\* \* \*

Because petitioners have not satisfied their burden to demonstrate standing to appeal the judgment of the District Court, the Ninth Circuit was without jurisdiction to consider the appeal. The judgment of the Ninth Circuit is vacated, and the case is remanded with instructions to dismiss the appeal for lack of jurisdiction.

*It is so ordered.*

**DISSENT BY: KENNEDY**

**DISSENT**

JUSTICE KENNEDY, with whom JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE SOTOMAYOR join, dissenting.

The Court's opinion is correct to state, and the Supreme Court of California was careful to acknowledge, that a proponent's standing to defend an initiative in federal [\*35] court is a question of federal law.

The Court's reasoning does not take into account the fundamental principles or the practical dynamics of the initiative system in California, which uses this mechanism to control and to bypass public officials--the same officials who would not defend the initiative, an injury the Court now leaves unremedied

There is much irony in the Court's approach to justiciability in this case. A prime purpose of justiciability is to ensure vigorous advocacy, yet the [\*53] Court insists upon litigation conducted by state officials whose preference is to lose the case. The doctrine is meant to ensure that courts are responsible and constrained in their power, but the Court's opinion today means that a single district court can make a decision with far-reaching effects that cannot be reviewed. And rather than honor the principle that justiciability exists to allow disputes of public policy to be resolved by the political process rather than the courts, see, e.g., *Allen v. Wright*, 468 U. S. 737, 750-752, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984), here the Court refuses to allow a State's authorized representatives to defend the outcome of a democratic election.

In California and the 26 other States that permit initiatives and popular referendums, the people have exercised their own inherent sovereign right to govern themselves. The Court today frustrates that choice by nullifying, for failure to comply with the Restatement of Agency, a State Supreme Court decision holding that state law authorizes an enacted initiative's proponents to defend the law if and when the State's usual legal advocates decline to do so. The Court's opinion falls to abide by precedent and misapplies basic principles of justiciability. Those errors necessitate this respectful dissent.

III



## Outline of Class on Current Supreme Court Standing Doctrine

### **I. Irreducible Minima**

Jurisdictional; define "Case or Controversy" in Article III.

Must show all of:

A. Injury in Fact

B. Causation, i.e. "that the injury can fairly be traced to the challenged action."

*Problems with this:*

1. Counter to normal and appropriate operation of statutes.
2. Excessive judicial control over federal subject matter jurisdiction. (See Greenfest Article on TWEN).

C. Redressability, i.e. "that the injury is likely to be redressed by a favorable decision."

*Problem with this*

1. Determining when it, rather than (B), is to be applied.

### **II. Prudential Principles**

Assuming plaintiff meets foregoing, standing may still be denied as a matter of discretion on any one of the following three grounds (which, however turn out to be only one additional ground).

A. Must assert own rights, not that of third party.

*Comment:* No different than I.A above

B. Zone of interests

*Comment:* Rendered meaningless by Valley Forge, Hein (CB 112), and Arizona Christian School Tuition Org. v. Winn, 131 S.Ct. 1436 (2011) all of which consider this factor as part of I.A above.

C. Court will not adjudicate "abstract questions of wide public significance," which amount to "generalized grievances."

*Comment:* It follows from the foregoing that this is the only additional barrier a plaintiff who satisfies the irreducible minima must cross.

*Limitations to appropriate application:*

1. Should not be applied to a plaintiff whose injury is greater than that of the group generally.

2. Congress may override.

E.g., FEC v. Akins (CB 106 n.2); Mass. v. EPA (bot. CB 98); Vermont Agency (CB 117).

PERSPECTIVE: Roberts Took Narrow View Of Court's Power to Decide Ne

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BYLINE: Nell Thomas Proto

BODY:

In 1884, Oliver Wendell Holmes said "that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived." Holmes, a veteran of the Civil War, author of "The Common Law" and a Harvard Law School teacher, was 43 years old. Before President Roosevelt nominated him to the U.S. Supreme Court in 1902, Holmes also experienced the realities of judging the fate of lives and property as a member of the Massachusetts judiciary.

Holmes could easily have been describing the meaning of the experience that imbued the "People's Lawyer," Louis Brandeis, or the tempered courage of Thurgood Marshall or the integrity of Sandra Day O'Connor to thwart gender discrimination. That "action and passion" affected their view of the law's purpose.

Judge John Roberts' professional career is well-known: he is a Washington insider--within a smaller group of former Supreme Court clerks and Solicitors General--and a highly skilled and valued mediator and appellate advocate. The narrowness of that experience is affirmed by the admonition that in all such cases he was representing "clients" or "the Administration" and was unaccountable or disconnected from the law's practical and daily effects on people elsewhere. His values, we are told, do not come from this experience in the life of the law.

Another way to examine his experience is through the one law review article John Roberts wrote, which was published in April 1993 in the Duke Law Journal. He was in private practice, constrained, perhaps, only by his need for commercial availability. The article concerned the Constitutional requirement, found in Article III, of "standing to sue." That requirement--that the Court's jurisdiction is limited to "all Cases" or "Controversies"--is central to judicial access: who--if anyone--gets to invoke the court's power of reason and the long view to decide the great issues of the day. Without standing, the availability of health insurance to the poor or elderly, abortion, environmental protection, corporate wrongdoing, or the protection of those whose religion, language, skin color or views are not popular falls prey to momentary political power in Congress, vagaries in the market forces, unchecked executive decisions or, as Justice Brandeis characterized it, "the insidious encroachment by men of zeal, well meaning but without understanding."

Deep division exists on and off the Court over how standing is determined. Judge Roberts's view is that ephemeral--exercised political judgments--not the text in Article III--are the essential prism through which he views his judicial role. The Senate needs to master the reasons for the division in order to properly weigh Judge Roberts's experience.

Relying on Chief Justice John Marshall's opinion in *Marbury v. Madison* (1803), Justice William O. Douglas wrote in *Frost v. Cohen* (1968), that the "judiciary is an indispensable part of the operation of our federal system." In *Marbury*, Marshall--a contemporary of the framers' explicit unease with elected representatives--was confronted by the argument the Court must defer to the elected branches. His response: "The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intentions of [the framers], to say, that in using it, the constitution should not be looked into?...This is too extravagant to be maintained." Any abdication of that duty "would be giving to the legislature a practical and real omnipotence...[and would reduce] to nothing...a written constitution."

Douglas's adherence to a strict construction of the text and to John Marshall's first-hand knowledge perhaps also reflected Douglas's own rural Northwest upbringing or his teaching at Yale Law School or his service as Chairman of the Securities and Exchange Commission. He later wrote, in "Points of Rebellion," that "Corporate interests have been largely taken care of by highly qualified lawyers...that define the 'aggrieved' persons who have standing ... But the

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voices of the mass of people go unheard; and the administrative agencies have their own way." It was in *Flast v. Cohen* that the Court, including Justice Douglas, embraced the affirmative duty to decide reflected in the "all Cases...or Controversy" text of Article III.

In *Flast*, the Court had decided that a taxpayer had standing to challenge federal funds disbursed to religious schools in violation of the First Amendment. All nine justices (including Justice John Harlan, in the only dissent) began their analysis within the precise text of Article III to determine that when a "case" or "controversy" existed, they had an affirmative duty to decide the merits of the issue raised. All nine also agreed, as the majority expressed it, that "whether a particular person is a proper party to maintain the action does not...raise separation of powers problems related to improper interference in areas committed to [the elected] branches.... Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated." The Court's obligation is to determine standing only with respect to its own duty in Article III.

Adherence to the text's duty to decide and John Marshall's guidance governed the Warren and early Burger courts. They found standing in *Association of Data Processing v. Camp* (1970) (corporate association had standing to challenge banks for violating federal law), *Barlow v. Collins* (1970) (tenant farmers had standing to challenge the Agriculture Department for violating the upland cotton program), *United States v. Student Challenging Regulatory Agency Procedures* (1973) (law students had standing to challenge the Interstate Commerce Commission for violating environmental law) and *Roe v. Wade* (1973) (a woman, although not pregnant throughout the judicial process, had standing to challenge an abortion law).

In 1975, Justice Lewis Powell moved the Court away from a strict construction of the textual requirements and judicial duty. It was a contentious fight. In *Warth v. Seldin*, the court denied standing to low-income minority residents who complained the adjoining town was "excluding persons of low...income" through exclusionary zoning. Justice Powell posited that "prudence limitations" were paramount in determining standing because of "the proper-and properly limited-role of the court in a democratic society." Although he acknowledged "judicial intervention may be necessary to protect individual rights," other institutions "may be more competent to address the questions." Justice Powell incorporated into Article III standing a judicially-conducted political assessment: do we want the case or should it be resolved elsewhere? The dissent, including generally conservative Justice Byron White, believed Powell's denial of standing could be explained "only by an indefensible hostility" to housing integration. Echoing Marbury, the dissent added: "[C]ourts cannot refuse to hear a case on the merits merely because they would prefer not to."

Adherence to the politically-tempered "prudence" approach governed the latter Burger and Rehnquist courts. In *Valley Forge Christian College v. Americans United for Separation of Church and State* (1982), the majority denied standing to a group challenging the conveyance of federal property at an cost to a non-profit religious institution. The majority, the dissent wrote, had engaged in a "dissembling enterprise" by "employ[ing] the rhetoric of 'standing' to deprive a person, whose interest is clearly protected, by the law, of the opportunity to prove that his own rights have been violated."

The Court did the same in *Allen v. Wright* (1984), when it denied standing to parents of black public school children challenging tax exemptions granted to racially discriminatory private schools in communities undergoing desegregation. Citing Judge Robert Bork's court of appeals opinion in *Funder Jagt v. O'Neill* (1983), the majority stated that "the law of Article III standing is built on a single basic idea-- the idea of separation of powers." Uncertain where and how the inherently subjective meaning of the "separation of powers" notion should be crafted into the precise text of Article III, the majority, nonetheless, concluded that the correct judicial inquiry must be: "Is the injury...otherwise not appropriate, to be judicially cognizable?" Such an inquiry, Justice Stevens said in dissent, "is nothing more than a poor disguise for the Court's view of the merits of the underlying claims" that "can only encourage undisciplined, ad hoc litigation." As Justice Brennan added: "By relying on generalities concerning our tripartite system of government, the Court is able to conclude that the respondents lack standing...without acknowledging the precise nature of the injuries they have alleged."

In 1988, before his Supreme Court nomination, Justice Antonin Scalia expressed his adherence to the essential need for judicial political decisions. "Standing," he wrote, "is a crucial and inseparable element" of the separation of powers notion. Because, in his view, it is of seemingly incidental importance, he added that, "for want of a better vehicle" the relevant text is in Article III. Rhetoric aside, it is Justice Scalia's confidence in his experience in life and the exercise of future political acumen that underpins his position that he can determine--and the majority of the court should determine--where and by whom a petitioner's claim should be resolved. It also was Justice Scalia's 1992 opinion for the majority in *Lujan v. Defenders of Wildlife* (standing denied to Defenders of Wildlife members to challenge Interior De-

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partment funding of overseas activities affecting endangered species) that provided the basis for John Roberts' Duke Journal article.

Without referencing the textual duty to decide in Article III or John Marshall's contemporaneous knowledge concerning the framer's unease with the elected branches, John Roberts embraced the Powell-Bork-Scalia view. He wrote that standing is a "constitutionally based doctrine designed to implement the Framers' concept of 'the proper-and properly limited-role of the courts in a democratic society'" In his experience as an advisor to others and as an appellate advocate--and apparently believing that no division of views ever existed--he also concluded that, "Standing is an apolitical limitation on judicial power." The cases he cited to support such an obviously flawed historical conclusion begin primarily in 1975--and plainly with only the majority opinion in *Warth v. Seldin*--when, essentially, Roberts began the study of law. To suggest standing is "apolitical" also may reflect the narrow experience of a highly valued and skilled professional operating in a small world of deciding, tactically, how to win or how not to lose. His conclusion also reflects a disquieting failure to understand the real life consequences of a judicial decision denying a party the right to invoke the Court's power because of a lack of standing to sue.

Roberts went further: He acknowledged candidly, albeit perhaps unwittingly, what the standing inquiry had become for many on the Court: "Standing is thus properly regarded as a doctrine of judicial self-restraint." Put differently, it is essentially, a political inquiry by the Justices, to be made ad hoc and without the textual duty to decide "all Cases...or Controversy" that looks first to the merits of the case and then decides which branch of the government--or the market forces--should determine the petitioner's fate.

With respect to standing as Roberts wrote about it in 1993, the Senate will be deciding whether to affirm the role of non-elected officials making ephemeral political judgments of such substantial consequence and whether Judge Roberts brings to the Court the experience in the life of the law that prepares him for such a task. There is hardly an inquiry concerning judicial duty that will tell the nation more about what to expect if Judge Roberts is confirmed.

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