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Marbury v. Madison: Bicentennial of a Landmark Decision

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may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained?

—Chief Justice John Marshall, Marbury v. Madison (1803)

The powers of the legislature are defined and limited; and that those limits

THE YEAR 2003 will mark the bicentennial year of Marbury v. Madison, one of the most influential opinions of the United States Supreme Court. Authored by Chief Justice John Marshall, Marbury v. Madison affirmed the Court's power of judicial review—its ability to review congressional and executive acts and overturn those it deems unconstitutional. The case also established the federal judiciary's position as a co-equal, independent branch of the federal government.

Marbury v. Madison has had a lasting impact on Supreme Court adjudication, serving as a precedent for some of the Court's most famous (Brown v. Board of Education) and infamous (Dred Scott v. Sandford) decisions. It also underlies current debates over "judicial activism" and "judicial restraint."

The study of Marbury v. Madison opens numerous perspectives on American political and legal history. The case was at the center of debate between the Federalists and Jeffersonian Republicans, offering insight into one of our nation's first great political struggles.

The power of judicial review established by Marbury has since defined many of the most significant eras in Supreme Court history—the Civil War, the Lochner-era Court of the early twentieth century, the New Deal, the civil rights movement, and the Court's recent turn toward federalism and states' rights. And the issue of judicial review raises questions central to our understanding of America's constitutional democracy. How is the voice of the people represented in our democracy? What gives the federal judiciary authority to invalidate laws passed by popularly elected representatives, given that federal judges are neither elected nor directly accountable to public opinion? What are the checks on the judiciary's power of judicial review?

This article first discusses Marbury v. Madison in its historical context and then offers a sketch of the opinion's legacy. Marbury v. Madison remains a vital part of Supreme Court jurisprudence and continues to shape our understanding of the powers our Constitution grants—and the limitations it places on—the branches of government at both the state and federal levels. In its bicentennial year, as questions about government power are again at the center of national debate, Marbury v. Madison deserves our study and attention more than ever.

"A Masterwork of Indirection": Marbury v. Madison in its Political Context

Marbury v. Madison has been described as a "masterwork of indirection, a brilliant example of [Chief Justice John] Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another."[1] As these references to "danger" and "opponents" suggest, Marbury v. Madison was decided in a climate of considerable political risk for the Supreme Court. That the Court managed to emerge from this risk claiming the power of judicial review over congressional and executive actions is remarkable.

Marbury v. Madison has its roots in the waning days of John Adams's presidency and his Federalist Party's domination of Congress. Thomas Jefferson and his Republicans had just defeated Adams and the Federalists in the 1800 elections. The 1800 Republican victory has been seen "as a victory for democracy and as the culmination of a period of popular involvement in politics."[2] This emphasis on populism, combined with the actions of the Federalists in their final days of power, set the stage for a battle between Jeffersonian Republicans and Federalists over the federal judiciary. Chief Justice John Marshall and Marbury v. Madison were at the center of this battle.

After their defeat and before Jefferson's inauguration, Adams and the Federalist-dominated Congress passed the highly controversial Judiciary Act of 1801 and additional legislation concerning the District of Columbia's judicial system. The Judiciary Act reduced the Supreme Court from six to five members, eliminated circuit-riding duties for Supreme Court justices, reorganized the federal courts into six judicial circuits, and created sixteen federal circuit judgships, among other provisions.[3] The District of Columbia legislation created a circuit court of three judges to serve during good behavior (for life, unless impeached) and allowed the appointment of as many justices of the peace as the president deemed necessary to serve five-year terms.

The Judiciary Act was not without virtue. The arduous task of "riding circuit," which required Supreme Court justices to travel to serve assigned circuit court duties in addition to their Supreme Court duties, had been an issue for the justices since the Court's inception. The creation of new circuit court judgeships also ensured that judges who had presided over a case at trial would not hear the same case on appeal. But the overwhelming perception of the Judi-

A portrait by Alonzo Chappel of Chief Justice John Marshall.

AP Photo

ciary Act was that the Federalists were trying to load an expanded federal bench with Federalist judges before the party lost its hold on Congress and the presidency—in other words, pack the courts.

Before he left office, Adams nominated, and the Federalist-controlled Senate quickly confirmed, all sixteen federal circuit court judges (promptly labeled the "Midnight Judges") authorized by the new judiciary act. Republicans were infuriated. Moreover, because the law reduced the Supreme Court's size, Jefferson would have to wait for the retirement of two Federalist-appointed justices before he would have the chance to make his first Court nomination.

William Marbury was part of another wave of "midnight appointments"—one of the forty-two justices of the peace nominated and confirmed for service in the District of Columbia in the final four days of Adams's term; and John Marshall himself was the individual responsible for authenticating and delivering his commission to serve. Marshall had become John Adams's secretary of state in 1800. In 1801, Adams nominated Marshall chief justice of the Supreme Court, and the Senate confirmed him on January 27, 1801. He nonetheless continued to serve as Adams's secretary of state for the remaining two months of the president's term. He was thus responsible for placing the Seal of the United States on Adams's judicial commissions and delivering them to the individuals concerned. Marbury's commission was among a handful that were sealed but not delivered before Adams's term expired.

When Jefferson took office, he refused to acknowledge Adams's commissions for the District of Columbia justices of the peace, although he reappointed twenty-five of the individuals selected by Adams to a reduced number of thirty positions (Marbury was one of seventeen of the Adams appointees not reappointed by Jefferson).

Republican response to the 1801 Judiciary Act was a more complicated matter. Although it was profoundly unpopular with both Jefferson and the now Republican-controlled Congress, there was no immediate action taken against it. One of the difficulties associated with repeal of the act was that it had created federal judges who, under Article III of the Constitution, were entitled to hold their offices "during good behavior." Could these positions be eliminated through repeal of the authorizing legislation?

Then, in December 1801, the Supreme Court directed James Madison, Jefferson's secretary of state, to show cause why the Court should not issue a writ of mandamus (an order compelling executive officers as well as the lower federal courts to perform a specific action) directing Madison to deliver commissions to William Marbury and two other coplaintiffs whom Jefferson had not reappointed to justice of the peace positions. The "show cause" order signaled that the Supreme Court was preparing to intervene in the controversy surrounding Adams's "midnight appointments." Many commentators have identified the order as the event that propelled the Republicans into action against the Judiciary Act. On March 8, 1802, Republicans passed an act that revoked the Judiciary Act of 1801 and eliminated the newly created sixteen circuit judgships. They then passed a new Judiciary Act on April 29, 1802, which again required Supreme Court justices to "ride circuit."

The Court thus faced an administration that considered Adams's appointment of the District of Columbia justices of the peace null and void, and that would likely refuse to recognize a Supreme Court order to deliver the commissions to Marbury and his coplaintiffs. It also faced a Congress that was demonstrably hostile to a judiciary dominated by Federalist appointees, and that had proved willing to use its powers of impeachment against the judiciary. The Supreme Court was in an apparent bind. On the one hand, it could find in Marbury's favor but demonstrate its weakness by issuing an order that the executive branch would refuse to acknowledge. On the other, it could deny Marbury's claim but risk the appearance of submission to Congress's threatened power.

The political turmoil underlying Marbury v. Madison is barely visible on the surface of Marshall's opinion when he notes "the peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it."[4] And as Marshall proceeds through his analysis, first affirming Marbury's legal right to the office, and then asserting that refusal to deliver the commission clearly violated that right, he seems to be leading the Court toward a direct confrontation with the Jefferson administration. It is only in the final pages of the opinion, in which Marshall declares that Congress violated the Constitution in granting the Supreme Court power to issue the writ sought by Marbury, that this confrontation is evaded. The genius of the opinion is that it manages to recognize the legitimacy of Marbury's claim, chastise Jefferson's administration for refusing to deliver it, and claim the right to define constitutional limits on Congress's power, while denying the Supreme Court's power to give Marbury the remedy he seeks.

Although Marbury is celebrated today primarily because it establishes the Supreme Court's right of judicial review, in 1803, attention—and controversy—focused much more on those sections of the opinion asserting the Court's right to inquire into the legality of certain actions taken by the executive. This is probably because the power of judicial review over congressional legislation had been largely accepted in American jurisprudence by 1803. Precedents for Marshall's opinion include Alexander Hamilton's Federalist No. 78, asserting the duty of courts of justice "to declare all acts contrary to the manifest tenor of the Constitution void"[5]; the opinions of several state supreme courts that had claimed power to review the constitutionality of actions by state legislatures; and even statements by members of Congress—including Jeffersonian Republicans—who, during debates on the repeal of the 1801 Judiciary Act, had acknowledged the Supreme Court's ability to declare acts of Congress unconstitutional.

The Supreme Court had itself implicitly claimed the power of judicial review prior to Marbury. In Chisholm v. Georgia (1793), some ten years before Marbury, Justice Iredell's dissenting opinion asserted that, in instances where an act of Congress exceeded the authority prescribed by the Constitution, "any act to that effect would be utterly void, because it would be inconsistent with the constitution, which is a fundamental law, paramount to all others, which we are not only bound to consult, but sworn to observe."[6]

Marbury v. Madison's significance thus lies not in the "invention" of the doctrine

3 Provide students with copies of section 25 of the Judiciary Act of 1789, which can be found at air.fjc.gov/history/legislation_frm.html. Ask them to read it, and then hold a discussion about what that section means. How does the jurisdiction of the Supreme Court today compare to the jurisdiction of the Court as originally proposed in section 25 of the 1789 act?

4 Have students conduct research on "circuit riding." What was "circuit riding?" Who rode the "circuits?" What were the main objections to the practice? Does the practice still take place in the United States? In other countries?

5 Provide students with some background information about President Franklin D. Roosevelt's 1937 proposal to increase the number of U.S. Supreme Court justices. (A brief introduction may be found at the American President documentary website, www.americanpresident.org/kotrain/courses/FDR/FDR_Domestic_Affairs.htm. All other readings for this activity may be found at newdeal.feri.org/court.)

Ask the entire class to read President Roosevelt's address to Congress about it. Then divide students into groups. Ask one group to read the objections of the U.S. Senate Committee on the Judiciary to the proposal, and then report back to the rest of the class the reasons why the committee did not support the proposal. Ask other groups to each read one of the newspaper/magazine articles of the day, and report back on the arguments made in the article. Make sure that groups report on articles both for and against the proposal. (Visit newdeal.feri.org/court.)

After each group has delivered its report, hold a discussion with the entire class about the pros and cons of the proposal. Describe the outcome. Ask students if they think the outcome was desirable and why.

6 Have students research a Supreme Court case. Ask them to summarize the issues raised by the case and the Court's decision. Ask them also to consider the larger consequences of the decision, or what happened as a result of the decision. Three examples are Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), In re Gault, 387 U.S. 1 (1967), and United States v. Nixon, 418 U.S. 683 (1974). (Information about these cases is on the Oyez Project of Northwestern University's website, oyez.nwu.edu. For a student handout summarizing In re Gault, visit www.abanet.org/publiced/lawday/schools/lessons/handout_gault2.html.) Then furnish students with the following excerpt from Alexander Hamilton's Federalist Paper No. 78, in which he discussed his vision for the judiciary:

> "Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution. . . . The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment. . . ."

As a class, discuss Hamilton's vision. Ask students to write a paragraph about Hamilton's view, in light of what they've learned from studying their case. Specifically, do students believe that the judiciary merely exercises judgment? Why or why not?

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of judicial review, but in the embedding of that doctrine firmly within American constitutional discourse. The political climate surrounding the opinion made Marshall's affirmation of judicial review risky, but that risk was mitigated by what constituted "an act of judicial self-denial."[7] Marbury struck down section 13 of the 1789 Judiciary Act, which had given the Supreme Court "power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."[8] Finding that "to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper," Marshall held that the 1789 act illegitimately extended the original jurisdiction of the Supreme Court beyond the original jurisdiction defined and limited by Article III, section 2 of the U.S. Constitution. As a result, the Supreme Court lacked jurisdiction to provide Marbury a remedy for what the Court had identified as his violated right to his judicial commission.

Marbury's Legacy: From Judicial Review to Judicial Supremacy

The Supreme Court's ruling on the writ of mandamus requested by William Marbury limited the Court's power in one fairly narrow respect, but Marshall's opinion claimed for the Court a much more broadly defined power of judicial review. This aspect of the opinion and its main arguments can be summarized as follows. The Constitution was the product of the people's exercise of their original right to establish the principles for their government. This exercise represented a "very great exertion" (176) by the people, one that cannot and should not be frequently repeated. The principles established by this "great exertion" are fundamental, and their authority is supreme. Because "it is emphatically the province and duty of the judicial department to say what the law is" (177), if two laws conflict, it is left to the courts to decide which is the governing law. And in a case in which a law opposes the Constitution, "the Constitution is superior to any ordinary act of the legislature; the Constitution, and not such ordinary act, must govern the case to which they both apply" (178).

This language provides the basis for more recent Court pronouncements: that Marbury v. Madison "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution"; and that "ever since Marbury, this court has remained the ultimate expositor of the constitutional text."[9]

Judiciary supremacy in constitutional matters was, however, far less settled at the time Marbury was written than was the Court's power to review for itself the constitutionality of a law it was being asked to apply in an individual case. The notion of the federal judiciary's supremacy as expositor of the Constitution is part of Marbury's legacy, but it also rests upon a foundation of trust in the Court's ability to determine cases impartially and in accordance with the public's interest. Emerging from the taint of partisan politics under the Federalist administration, the Court had to earn this trust over the course of many years.

Marshall was careful in his Marbury opinion to acknowledge that the other branches of the federal government were responsible for interpreting the Constitution within their own spheres of power. Marshall's assertion that "it is emphatically the province . . . of the judicial department to say what the law is" is one of the most frequently quoted lines from the opinion, but Marshall also notes,

> The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court. (170)

Earlier in the opinion, Marshall clarifies what he means by political questions: "The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive" (166). As examples, Marshall cited the actions of an executive officer performed according to the president's direction and the president's power to nominate to the Senate and to appoint the person nominated.[10]

With respect to Congress, Marbury has less to say, but subsequent decisions by the Marshall Court demonstrated its willingness to give broad deference to Congress's ability to interpret and apply the Constitution within its sphere of power. Most notable is McCulloch v. Maryland, the case that affirmed Congress's power to charter a central bank for the nation. In upholding this power, the Court offered an expansive reading of the "necessary and proper" clause of the Constitution's Article I, section 8, which grants Congress the power "to make all laws which shall be necessary and proper for carrying into execution" the powers explicitly granted to Congress. "Where the law is not

prohibited, and is really calculated to effect any of the objects entrusted to the government," wrote Marshall in his opinion for the Court, "to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."[11]

Following Marbury v. Madison, no other congressional action was judged unconstitutional for the remainder of Marshall's more than three decades as chief justice, demonstrating the Court's observance of the line circumscribing the judicial department. But the Supreme Court's power of judicial review did not lay dormant. In a series of decisions, the Court asserted its power to review the decisions of state supreme courts and the actions of state legislatures when they touched on issues involving the Constitution or federal legislation. The supremacy of the federal government over the states, in other words, became the focus of the Court's power of judicial review, not the judiciary's supremacy among the branches of the federal government as interpreter of the Constitution. By granting broad discretion to the federal Congress and the president and by focusing the power of judicial review on the states, the Court may well have circumvented fears of the power's countermajoritarian potential to undo the actions of popularly elected representatives during the highly populist Jeffersonian and Jacksonian eras of the early nineteenth centuries. Because the issues involved in the states' rights decisions involved only a discreet segment of the population, and at times pitted one state against another, it was difficult to argue that the Court's decision in any one of these cases was subverting the interests of a national majority.[12]

When the Supreme Court again used its power of judicial review to strike down an act of Congress, it needed all the good will it had accumulated during Marshall's tenure as chief justice. The case was Scott v. Sandford, commonly known as the Dred Scott decision, which is perhaps the most reviled opinion in Supreme Court history. The case was initiated by Dred Scott, a slave living in Missouri, who sued for his freedom based on a four-year period he had spent living with his master, Dr. John Emerson, in the free state of Illinois and at Fort Snelling in present-day Minnesota, then part of federal territory that had been proclaimed free territory by the 1820 congressional act known as the Missouri Compromise.

In 1850, Scott was declared free by a Missouri state trial court, whose decision was overturned by the Missouri Supreme Court. Scott's lawyers then initiated a new suit in the federal courts, which eventually made its way to the Supreme Court in 1856. In 1857, the Court ruled by a 7-2 majority that it had no jurisdiction over the case because, although states could grant rights of citizenship to blacks, blacks were not citizens of the United States with a right to sue in the federal courts.

Having found that Scott lacked standing to sue in federal court, Chief Justice Taney could have concluded his opinion for the majority. Instead, Taney went on to address the constitutionality of the Missouri Compromise. Concluding that "the right of property in a slave is distinctly and expressly affirmed in the Constitution" and that "no word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description," Taney declared "that the act of Congress which prohibited a citizen from holding and owning property of this kind in the territory of the United States north of the line therein mentioned, is not warranted by the Constitution, and is therefore void; and that neither Dred Scott himself, nor any of his family, were made free by being carried into this territory; even if they had been carried there by the owner, with the intention of becoming a permanent resident."[13] In so doing, the Court made clear that it would play no role in fashioning a judicial compromise for the slavery debate and placed significant constraints upon Congress's ability to negotiate compromise between the free and slave states legislatively. Dred Scott is frequently identified as a turning point in American history, setting the nation firmly on course toward the Civil War. It was ultimately rendered moot by the Thirteenth and Fourteenth Amendments to the Constitution, which, respectively, abolished slavery in the United States and made all persons born or naturalized in the United States citizens of the United States and of the state in which they reside.

Although Dred Scott dealt a serious blow to the Court's reputation, the Court had by the 1850s established itself as an institution sufficiently strong to withstand the damage inflicted by the opinion. And as the nation moved past the Civil War years and Reconstruction, the Court found within the language of the Fourteenth Amendment grounds from which it launched the first period of Supreme Court history defined primarily by the Court's exercise of judicial review—the Lochner era.

Section one of the Fourteenth Amendment provides that

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Part of a cluster of amendments passed in the years following the Civil War (which also included the Thirteenth Amendment, discussed above, and the Fifteenth Amendment, confirming the right to vote regardless of race, color, or "previous condition of servitude"), the Fourteenth Amendment was initially read solely in terms of the protections it guaranteed to former slaves. But in the 1870s, a group of lawsuits known as the Slaughterhouse Cases argued for a more expansive understanding of the amendment. The suits challenged that a state-granted monopoly to a centralized slaughterhouse company infringed upon the right to labor of independent butchers that was included within the privileges of citizenship protected by the Fourteenth Amendment. A five-member Court majority rejected this argument, but the seeds for a more expansive reading of the amendment were sown in Justice Field's dissent. Field argued that rights such as a right to labor were part of the "privileges and immunities" enjoyed by United States citizens.

The Slaughterhouse Cases also identified the battleground upon which Lochner-era conflicts between the Court and state and federal legislators would be fought. On the one hand was the legislative prerogative

to enact regulations protecting the health, safety, and morals of citizens, known at the state level as the "police powers." Louisiana's centralized slaughterhouse legislation, for example, was justified by the need to protect public health from potentially unsanitary slaughtering practices. On the other hand were "privileges and immunities" of United States citizens, as well as the "life, liberty, or property" that the Fourteenth Amendment protected against state abridgement "without due process of law." With the "privileges and immunities" clause having been limited by the majority in the Slaughterhouse Cases, the "due process" clause emerged as the source for "fundamental liberties" that the Court identified beneath the language of the Constitution and the Fourteenth Amendment, including the freedom to labor and the liberty to contract.

In Lochner v. New York, decided in 1905, a Court majority used the Fourteenth Amendment-based theory of "substantive due process" to strike down a New York state law regulating the maximum number of hours bakers could work in a given week as an improper interference with both bakers' and their employers' liberty of contract. Perhaps the most controversial aspect of the Lochner decision was the perceived usurpation by the Court of the legislature's authority to determine proper responses to public issues unless the proposed legislation is in clear violation of the Constitution. Today, this would be described as "judicial activism." The Lochner majority, for example, called into question arguments citing the health risks faced by bakers, which had supported the New York legislation. And, over the next thirty years, as the Court weighed "substantive due process" guarantees against the "police power" legislation that was beginning to define the modern-day regulatory state, it was difficult to detect a consistent standard of review.[14]

The end of the Lochner era coincided with the Court's conflict with the federal Congress and the Roosevelt administration over "New Deal" reforms. Following the Court's review and invalidation of key pieces of New Deal legislation, President Franklin D. Roosevelt in 1937 threatened to push through Congress a "court-packing" scheme as an alternative to constitutional amendments overriding the Court's decisions. The scheme would have enlarged the size of the court by up to five members, ensuring that Roosevelt would have a majority on the Court sympathetic to his agenda. It is unclear whether the political pressure put on the Court made it change its course, but a key "swing vote" justice moved to form a majority that began upholding challenged New Deal legislation (dubbed by journalists as "the switch in time that saved nine"). More important was the furor that erupted in response to the scheme, which ultimately confirmed popular support for an independent Court (the scheme is cited as one of President Roosevelt's few political failures).

The Court's use of judicial review in the post-1937 years followed two primary paths. The first was the protection of minority rights, based on a broad restatement of what was meant by the Fourteenth Amendment's guarantee of equal protection under the laws. This path is typified by the Court's 1954 decision in Brown v. Board of Education, which effectively overturned the doctrine of "separate but equal" that the Court had adopted in 1896 in Plessy v. Ferguson and struck down state "Jim Crow" laws that had mandated segregated public schools.

The second path followed the Court's identification of a constitutional "right to privacy," typified by the Court's decision in 1973's Roe v. Wade to strike down state legislation prohibiting abortion. Decisions based on the right to privacy have been more controversial over the long term than the Court's equal protection decisions; some commentators see in the right to privacy a modern-day equivalent of the "substantive due process" rights defined by the Lochner-era Court, lacking an explicit foundation in the Constitution's text. Yet few today would argue that, absent a constitutional amendment, either the Congress or the executive branch has the right to ignore the Court's holdings when interpreting or applying the Constitution in its own sphere of power.

The current Court has opened a new path of judicial review in the areas of federalism and states' rights. Congress has for many years tied much of its legislation to a broad interpretation of its constitutional right to regulate interstate commerce. But in 1995, Chief Justice William Rehnquist authored a majority opinion in United States v. Lopez that announced the Supreme Court's intention to define an outer limit on Congress's legislative authority under the Commerce Clause, striking down the Gun-Free School Zones Act of 1990 on the grounds that the act "neither regulates a commercial activity nor contains a requirement that the possession [of a firearm] be connected in any way to interstate commerce."[15]

Five years later, both United States v. Lopez and Marbury v. Madison were cited in a case that affirmed a lower court decision striking down the federal Violence Against Women Act (42 U.S.C. § 13981). In United States v. Morrison (2000), the Court again found that Congress had exceeded its Commerce Clause authority when it enacted the legislation. The Court rejected an additional Fourteenth Amendment claim on the grounds that the legislation was not directed at a state or state actor, but at individuals.

In both Lopez and Morrison, the Court rejected what it saw as an attenuated causal chain between essentially noneconomic violent conduct and the aggregate effect of that conduct on interstate commerce. The congressional record cited in Morrison, for example, noted fear of interstate travel and a diminution of national productivity as part of the commerce-related aggregate affect of violence against women. Such reasoning, the Court said, would essentially dissolve the boundaries between the national and the local, and would erode the police powers that the Constitution had vested in the states.

Conclusion

As this overview suggests, Marbury v. Madison and its legacy have played a central role in shaping the Supreme Court's powers and our perceptions of the Court. It has defined both "conservative" and "progressive" eras in the Court's history. The power of judicial review established by Marbury has enabled the Court to enact and enforce revolutionary change in our understanding of constitutional provisions, as in Brown v. Board of Education's reversal of the "separate but equal" doctrine, or to slow the pace of national change, as in the Lochner-era Court's resistance to the new regulatory state. This power has, not unexpectedly, drawn both criticism and praise over the Court's history. But it has never

ences, 1-800-257-5126 or www.films.com. Provides an overview of this historic case.

CD-ROM

The Interpreters: An Interactive Look at the Judicial Branch. Part of the "Branches of Government" series. A Cambridge Educational Program, 1999. Available from Films for the Humanities and Sciences, 1-800-257-5126 or www.films.com. Explains the judicial branch's organization, providing a step-by-step look at how decisions pass through the system. Also discusses the reasoning behind the checks and balances system.

Websites

"Basic Readings in U.S. Democracy." U.S. Department of State International Information Programs. usinfo.state.gov/usa/infousa/facts/democrac/demo.htm. See "Part II: Creating a Government" for an article on Marbury v. Madison and the full text of the Court's decision.

"The Federalist Papers." The Avalon Project at Yale Law School. www.yale.edu/lawweb/avalon/federal/fed.htm. Papers written in support of the ratification of the Constitution. See nos. 76-78 for Hamilton's discussion of the judiciary.

"Judicial Review." FindLaw. caselaw.lp.findlaw.com/data/constitution/article03/13.html. Provides a multifaceted look at judicial review, citing relevant Supreme Court cases, scholarly debates, and guidelines for its use.

"Landmark Judicial Legislation." The Federal Judicial Center. air.fjc.gov/history/legislation_frm.html. Provides full text of the Judiciary Acts of 1789, which established the federal court system, 1801, which reorganized the federal judiciary and established circuit judgeships, and 1802, which abolished the circuit judgeships and reorganized the federal courts.

"Marbury vs. Madison (1803)." Landmark Supreme Court Cases, a project of Street Law and the Supreme Court Historical Society. www.landmarkcases.org/marbury/home.html. Contains a wealth of resources and activities designed to help educators teach the case.

"Marbury vs. Madison (1803)." The James Madison Center at James Madison University. www.jmu.edu/madison/marbury. Includes general information and commentary about the case and its major players.

The Supreme Court Historical Society. www.supremecourthistory.org. The "Researching the Court" section contains extensive information on the justices, including biographies, papers, nomination hearings, and bibliographies. See the "History of the Court" section for a discussion of the Marshall Court and Marbury v. Madison.

"Thomas Jefferson on Politics & Government." Compiled and edited by Eyler Robert Coates. etext.lib.virginia.edu/jefferson/quotations/jeffcont.htm. Contains 2,700 quotations from Thomas Jefferson's writings. For Jefferson's thoughts on judicial review, see "III. The Structure of Republican Government."

"White House History Journal." The White House Historical Association. www.whitehousehistory.org/04_history/04_history.html. "Article VII. Midnight Appointments" discusses the events and circumstances behind President Adams's last-minute appointment of judges.

Court Cases

Marbury v. Madison, 5 U.S. 137 (1803). supreme.lp.findlaw.com/supreme_court/landmark/marbury.html. Through this landmark case, the Supreme Court asserted its power of judicial review.

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936). laws.findlaw.com/us/297/288.html. In his concurrence, Justice Brandeis outlines conditions under which the Supreme Court will not determine the constitutionality of legislation.

STUDENT ACTIVITIES

Michelle Parrini and Jennifer Kittlaus

1 Have students do some research to familiarize themselves with the background of Marbury v. Madison, 5 U.S. 137 (1803). Who was Marbury, who was Madison, and why did these parties end up in court? What were the events that caused this legal conflict? What specifically did Madison refuse to do? Be sure to have students look into the "midnight judges," or "midnight appointees," and discuss why they were so controversial. Also have them look into the political significance in this case of the presidency's transferring from President Adams to President Jefferson.

As a class, examine the Supreme Court's decision, and explain to students why the Court, despite saying that Marbury was entitled to his commission, claimed it was not able to force Madison to deliver it to him. Talk about the Court's claim that the power to issue writs under the Judiciary Act of 1789 was unconstitutional, and the significance this had in affirming the Supreme Court's power of judicial review—the power to review congressional and executive acts and overturn those they deem unconstitutional.

2 Ask students to take a look at the summaries of the acts from the "Timeline for Landmark Judicial Legislation" at the Federal Judiciary Center website, air.fjc.gov/history/legislation_frm.html. Ask pairs of students to create organizational charts about the structure of the judiciary created by each act starting with the Judiciary Act of 1789 through 1982. Ask each pair to report on the structure of the courts under its particular act. Distribute copies of the charts to students. Hold a discussion with the entire class about how the federal courts have changed over time.

been a power outside the control of the other branches of government. The extremity of the Dred Scott opinion, for example, was moderated by the Civil War amendments, while the president's and Senate's power to nominate and confirm justices to the court has sustained a link between the views of our elected officials and the views reflected on the Court.

At the same time, judicial review has ensured that the Supreme Court's justices, once confirmed, have sufficient power to exert their independence from the political branches and enforce constitutional limits on their powers. The Court's supremacy in constitutional interpretation rests primarily on popular respect and esteem for the Court's opinions; that such supremacy is widely acknowledged today is indicative of the care with which the Court has generally wielded its power of judicial review. And that power today is as important as ever. As the executive branch has sought to strengthen its ability to fight terrorism, the federal judiciary has demonstrated its willingness to balance the need for executive action against the limitations the Constitution has placed on executive power. Both the district and appellate federal courts have engaged in these deliberations over the past year, and we can reasonably expect that a Supreme Court holding on the limits of executive power will follow.

As the quote that opened this article declared, Marbury v. Madison was intended to give purpose to the limitations on government power that had been committed to writing in the Constitution. Describing and enforcing those limitations has been the ongoing work of the Supreme Court ever since. G

Notes

1. Robert G. McCloskey, The American Supreme Court, 3rd ed. (Chicago, Ill.: University of Chicago Press, 2000), 40.
2. Barry Friedman, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," New York University Law Review 73 (1998): 371.
3. Discussions of the 1801 and 1802 Judiciary Acts are based on summaries of the legislation prepared by the Federal Judicial Center and are available online at air.fjc.gov/history/legislation_frm.html.
4. Marbury v. Madison, 5 U.S. 137, 154 (1803). Subsequent references will be made parenthetically by page number.
5. Alexander Hamilton, "The Federalist Papers: No. 78," The Avalon Project at Yale Law School, online at www.yale.edu/lawweb/avalon/federal/fed78.htm.
6. David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888 (Chicago, Ill.: Univ. of Chicago Press, 1985), 20.
7. Charles F. Hobson, The Great Chief Justice: John Marshall and the Rule of Law (Lawrence, Kans.: University Press of Kansas, 1996), 55.
8. 1 Stat. 73, Chap. XX, Sec. 13; available online from the Federal Judicial Center at air.fjc.gov/history/landmark/02a_frm.html.
9. Cooper v. Aaron, 358 U.S. 1, 18 (1958), and United States v. Morrison, 529 U.S. 598, 617 n. 7 (2000). See also Rachel E. Barkow, "More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy," Columbia Law Review 102 (2002): 241.
10. For a full overview of Marshall's formulation of the "political question doctrine" in Marbury, see Barkow, "More Supreme than Court?", 248-50.
11. McCulloch v. Maryland, 17 U.S. 316, 423 (1819).
12. See Barry Friedman, "History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy," New York University Law Review 73 (1998): 409-412.
13. Scott v. Sandford, 60 U.S. 393, 451-52 (1856); note that the official title of the case incorrectly names Sanford as "Sandford."
14. See Paul Kens, "Lochner v. New York," in The Oxford Companion to the Supreme Court of the United States, ed. Kermit Hall (New York and Oxford: Oxford University Press, 1992), 509-511.
15. United States v. Lopez, 514 U.S. 549, 551 (1995).

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RESOURCES

Michelle Parrini and Jennifer Kittlaus

Books

Clinton, Robert L. Marbury v. Madison and Judicial Review. Lawrence, Kans.: University Press of Kansas, 1994. Attempts to shed light on this historic Court decision, which the author argues has been grossly misinterpreted and misused by legal scholars and historians.

Currie, David P. The Constitution in the Supreme Court: The First Hundred Years, 1789-1888. Chicago, Ill.: University of Chicago Press, 1992. Takes a critical look at the Court's first one hundred years, analyzing and evaluating decisions, while also comparing and contrasting the work of the different eras.

DeVillers, David. Marbury v. Madison: Powers of the Supreme Court. Berkeley Heights, N.J.: Enslow Publishers, Inc., 1998. Provides commentary on this historic case, including a look at the long-term effects of the Court's decision.

Kahn, Paul W. The Reign of Law: Marbury v. Madison and the Construction of America. New Haven, Conn.: Yale University Press, 2002. Argues that the idea that "the rule of law is rule by the people" is a myth sustained by legal rhetoric. According to the author, law "must be central to religious, anthropological, and philosophical studies of American life."

Nelson, William E. Marbury v. Madison: The Origins and Legacy of Judicial Review. Lawrence, Kans.: University Press of Kansas, 2000. Studies and analyzes this landmark case, in a style both general readers and students can understand.

Newmyer, R. Kent. John Marshall and the Heroic Age of the Supreme Court. Baton Rouge, La.: Louisiana State University Press, 2002. Explores the events and experiences that shaped Chief Justice Marshall's constitutional interpretation.

Perhac, Michael, and Mark A. Graber, eds. Marbury Versus Madison: Documents and Commentary. Washington, D.C.: CQ Press, 2002. Discusses judicial review from constitutional, political, and philosophical standpoints; also focuses on the lasting impact of the Court's decision.

Films

Marbury v. Madison. Part of the "Equal Justice Under Law: Landmark Cases in Supreme Court History" series. 30 minutes. WQED Pittsburgh, 1987. Available from Films for the Humanities and Sci-