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The Rise of Judicial Power before *Marbury v. Madison*

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At the end of the twentieth century judicial review and the expansion of judicial power suddenly became popular around the world.[1] Much of the time before that, the United States stood alone in allowing federal courts to exercise that power. Courts of other countries looked enviously at the authority of the Supreme Court of the United States, but their governments found judicial review anathema. Now, however, nations wishing to establish judicial review use the United States as an example of its successful employment in a democracy.[2] But they point to the U.S. Supreme Court in its twentieth-century guise, when it had become more powerful than ever before in its history. (Some scholars label the period as one of judicial supremacy.) It took almost two hundred years for the Court to achieve that position. Scholars and politicians forget that the Court's rise to equality – or more – with the other two branches of the federal government was not foreordained; no theory of judicial review predicted the Court's trajectory. To understand how the Court became so powerful one must read more than its opinions. *Marbury v. Madison*,[3] decided by the Supreme Court in 1803 and deified as the cornerstone of the practice of judicial review in the United States, may have set out a blueprint for its exercise, but the Court in reality lacked the power to implement the theory. One must know the history of the Court before *Marbury* in order to understand its true significance. For more than thirty years I have researched and written about the history of the Supreme Court's first ten years (1789–1800), which ended on the eve of the commencement of the *Marbury* case. Being invited to discuss the results of my research with an eye to its utility for comparative international studies creates an opportunity to examine and to eliminate some of the myths that have grown up about the development of judicial review and the expansion of judicial power in the United States and to offer a cautionary tale to those scholars who rely solely on theoretical explanations.

The absence of any mention of judicial review in the Constitution of the United States makes the American experience different from that of countries whose constitutions explicitly set

1 C. N. Tate, Why the Expansion of Judicial Power?, in: The Global Expansion of Judicial Power, ed. by C. N. Tate, T. Vallinder, New York 1995, 27, 28.
2 T. Ginsburg, Judicial Review in New Democracies, New York 2003, 3.
3 5 *U.S.* 153 (1803).

forth that power.[4] Despite the omission of an express authority to declare acts of Congress or state legislatures unconstitutional, all three branches of government recognized from the outset the validity of the principle of judicial review. Friends and foes of the Constitution alike saw the use of this power by the courts as legitimately flowing from the structure of government set up by the Constitution.[5] But in a charge to a grand jury while on circuit – the first ever given under the system of federal courts set up by the Judiciary Act of 1789 – Chief Justice John Jay put his finger on what would become throughout the history of the Supreme Court the subject of recurrent controversy: »A judicial Controul, general & final, was indispensable. The Manner of establishing it, with Powers neither too extensive, nor too limited; rendering it properly independent, and yet properly amenable, involved Questions of no little Intricacy.«[6] Jay warned his fellow citizens that »if the most discerning and enlightened Minds may be mistaken relative to Theories unconfirmed by practice,« and »if the Merits of our opinions can only be ascertained by experience,« then the American people would have to be patient and expect that by trial and error the United States would eventually arrive at a better form of government.[7]

The initial decade of Supreme Court history demonstrates that Chief Justice Jay was prescient. As the United States tried to establish itself as an independent nation, the Court worked – sometimes in unorthodox ways, testing what would be acceptable to the American people and to foreign governments – with the other branches of government to make judicial review a reality. Scholars who have omitted the work of the judiciary in their interpretations of the growth of the early republic have missed this development entirely.[8]

The first case with which the Court dealt, *West v. Barnes*,[9] illustrates the justices' concerns. Their opinions reflected their belief that the Court's rulings carried weight beyond the immediate question being considered; they took great care with what they said. In *West v. Barnes*, the justices were faced with a dilemma: should they construe the procedural provisions of section 23 of the Judiciary Act[10] literally – producing inequitable results for litigants who lived in states distant from the nation's capital (Philadelphia in 1791) – or should they effectively rewrite the statute to avoid this inequitable result?[11] Although the justices realized that their

4 »Virtually every post-Soviet constitution has at least a paper provision for a constitutional court with the power of judicial review.« Ibid. 10.

5 To quell fears expressed by anti-federalists like »Brutus« that the »supreme court under this constitution would be exalted above all other powers in the government,« Alexander Hamilton, in Federalist #78, tried to play down the expansiveness of the authority that the Constitution gave to the judiciary. Brutus, Essay XV, The Complete Anti-Federalist, ed. by H. Storing, Chicago 1981, 2:437; A. Hamilton, The Federalist No. 78, ed. by J. E. Cooke, Middletown, Ct. 1961, 522–523. Members of Congress, throughout the first decade of the U.S. Government's existence, stated during debates on various bills that the constitutionality of the bill would be decided by the Supreme Court. M. Marcus, Judicial Review in the Early Republic, in: Launching the »Extended Republic«: The Federalist Era, ed. by R. Hoffman, P. J. Albert, Charlottesville, Va. 1996, 29–35.

6 John Jay's Charge to the Grand Jury of the Circuit Court for the District of New York, April 12, 1790, in: The Documentary History of the Supreme Court of the United States, 1789–1800 (hereafter DHSC), ed. by M. Marcus, 8 vols., New York 1986–2007, 2:27.

7 Ibid.

8 See, for example, St. Elkins, E. McKitrick, The Age of Federalism, New York 1993.

9 *West v. Barnes*, 2. U.S. 401 (1791). For a discussion of the case, see DHSC, 6:7–26.

10 Judiciary Act of 1789, section 23, *U.S. Statutes-at-Large* (hereafter *Stat.*), 1:85.

11 In *West v. Barnes*, the contested issue concerned whether a writ of error obtained from a lower court to appeal its own decision to a higher court (in this case, the Supreme Court) was legitimate, and the Supreme Court decided that litigants must follow the common law procedure of obtaining writs, signed by the clerk, from the clerks office of the higher court.

decision would create problems for writ-seeking litigants who lived far from Philadelphia, they believed that correction could come only from the legislature that wrote section 23; Congress had to provide the remedy, not the Court. As Justice Iredell declared, »It is of infinite moment that Courts of Justice should keep within their proper bounds, and *construe*, not *amend*, acts of Legislation.«[12] He fully expected Congress to change the law immediately. When it did not, he continued all cases in his circuit where section 23 was implicated and sent a letter to President Washington explaining his action and requesting the President to urge Congress to act.[13] Eventually, Congress did make different provisions for writs of error.[14]

The following year, Congress again had cause to deal with a federal court decision. In *Hayburn's Case*,[15] two Supreme Court justices on circuit in Pennsylvania decided that the court could not proceed under the Invalid Pensions Act of 1792,[16] effectively declaring it unconstitutional without specifically saying so. Although the circuit court's refusal to act was brought to the Supreme Court for review, that Court postponed a decision on the merits, undoubtedly hoping that Congress would correct the 1792 act. Congress obliged at its next session.[17] In these early years of the republic, the Federalist party dominated all three branches of government, and the justices of the Supreme Court and members of Congress were united in their belief that the Court could exercise judicial review.[18]

The Supreme Court's next assertion of constitutional power proved more controversial. Although the Court's action in *Chisholm v. Georgia* may not have been judicial review in its narrowest sense (a review of federal or state statutes), the ruling most surely represented an assertion of judicial power to interpret the Constitution. The clause of the Constitution at issue in the case appears in Article III, section 2, and extends the judicial power to controversies between a state and citizens of another state, among other parties listed. In the Judiciary Act of 1789, the jurisdiction given the Supreme Court includes controversies »between a state and citizens of other states, or aliens,« but the statute did not establish a procedure by which a state could be summoned into federal court.[19] When a citizen of South Carolina sued the state of Georgia for a debt owed since the time of the American Revolution, and Georgia refused to acknowledge the jurisdiction of the

12 Federal Gazette, August 2–3, 1791, in: DHSC, 6:22.

13 James Iredell to George Washington, February 23, 1792, in: DHSC, 2:240–241.

14 »An Act for regulating Processes in the Courts of the United States, and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses,« (May 8, 1792), section 9, *Stat.*, 1:278.

15 *Hayburn's Case*, 2 *U.S.* 409 (1792). For a full discussion of the case, see DHSC, 6:33–46.

16 »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 to Invalid Pensions« (March 23, 1792), *Stat.*, 1:243.

17 »An Act to regulate the Claims to Invalid Pensions« (February 28, 1793), *Stat.* 1:324. Congress had discussed the bold decision of the circuit court of Pennsylvania, and members were well aware that this was the first exercise of judicial review in the young nation's history. See Proceedings of the United States House of Representatives, April 13, 1792, in: DHSC, 2:48.

18 See note 5 above. In grand jury charges, notes for opinions, and in opinions, the justices expressly stated that the Court had the power to declare acts of Congress or state legislatures in conflict with the Constitution invalid. See, for example, DHSC, 2:27, 218–219; 3:236, 236n, 346–347, 412, 414; 5:83; 2 *U.S.* 304, 410, and 412–414; 3 *U.S.* 171 ff.

19 Judiciary Act of 1789, section 13, *Stat.*, 1:80. The lack of a specified procedure was noted by Justice Iredell in his dissent in the case. 2 *U.S.* 431–32.

Supreme Court, the justices had no choice but to decide whether, under the Constitution, the Court could hear such a suit.

The question of whether a state could be sued in federal court appeared to be non-controversial at the time of the constitutional convention, passing without recorded debate. Once the proposed Constitution was sent to the states to be ratified, however, questions arose. Two anonymous essayists, »Federal Farmer« and »Brutus,« wrote that it would be humiliating for a state to be compelled to answer an individual's suit in a federal court. Some supporters of the Constitution tried to find ways to interpret the Article III provisions to mean that states could only be plaintiffs, not defendants, in such cases, but others honestly admitted that the proposed Constitution did allow for suits against states. Three states proposed amendments to the Constitution that would have removed such jurisdiction, but none of them was adopted by the First Congress. And section 13 of the Judiciary Act of 1789, which gave the Supreme Court such jurisdiction, was enacted with little dissent.[20]

But by 1793, when the Supreme Court had to rule in *Chisholm v. Georgia*, the political situation had changed. Opposition within and without the Washington administration to various government policies created divisions that would ultimately lead to the formation of two political parties by the end of the 1790s. The Supreme Court, nevertheless, did not hesitate to announce its decision: not only did it have jurisdiction over suits against states initiated by citizens of other states, but it could also order default judgments against states that refused to appear in court.[21] Because the ruling provoked the passage of the Eleventh Amendment, which was presumed to eliminate the Supreme Court's jurisdiction,[22] the conventional story told by scholars and adopted by the Supreme Court itself in an opinion in 1890[23] is that the decision »fell upon the country with a profound shock«[24] – a story that is belied by what actually happened.

Resolutions proposing a constitutional amendment surfaced in the House of Representatives and the Senate within days of the *Chisholm* decision, but they received no consideration before Congress adjourned for the session. By the next year, enough support had been garnered to pass the text of what would become the Eleventh Amendment, and it was sent out to the states for ratification. In the course of the following year the requisite

20 *DHSC*, 5:2–4.

21 2 *U.S.* 419 (1793).

22 The Eleventh Amendment states that »The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.« The meaning of this amendment continues to be the subject of dispute to this day.

23 *Hans v. Louisiana*, 134 *U.S.* 1 (1890).

24 C. Warren, The Supreme Court in United States History, 3 vols., Boston 1923, 1:96.

number of states – eleven – consented to the constitutional amendment, but many of them failed to notify the national government of their actions. As a result, it was not until January, 1798, that President John Adams, after an effort by his administration to canvas the states, announced that the Eleventh Amendment had been adopted.[25]

In the five years between the *Chisholm* decision and the ratification of the amendment, the Supreme Court continued to entertain a number of suits against states. Although the involved states, with the exception of Maryland,[26] tried to postpone appearances in the Supreme Court, they made preparations to comply.[27] In the case of *Oswald v. New York*, the state not only eventually replied to the summons from the Supreme Court but also participated in a jury trial in that Court. The jury issued a verdict in favor of the plaintiff, and New York paid the damages awarded to Oswald.[28] Even the state of Georgia, which had so resisted the authority of the Court, chose lawyers to represent them when a default judgment was threatened. In February, 1794, Georgia unsuccessfully opposed a motion to enter the Court's order. The justices ruled in favor of Chisholm and granted a writ of inquiry to determine the damages sustained by Chisholm because of Georgia's »breach of promise and other defaults.«[29] That the case never came to a conclusion before the Supreme Court – continuances were granted from term to term until the ratification of the Eleventh Amendment, when the Court removed all suits against states from its docket[30] – does not diminish the respect paid to the Court's authority in these years, because Georgia chose to settle the case rather than have a judgment outstanding against it.[31]

Soon after the Supreme Court delivered its *Chisholm* ruling, the President asked the Court for an advisory opinion – another mark of respect for the Supreme Court – on questions resulting from the issuance of his Neutrality Proclamation on April 22, 1793.[32] In an official letter, the justices declared that the Court could not advise the President on legal questions presented by the interpretation of treaties of the United States and by the nation's involvement in foreign affairs. Giving such opinions might compromise the justices' duty as a court of last resort, they told the President.[33] That the Supreme Court turned down the President's request is a well known fact. That President Washington anticipated such an answer is less well known.

25 For the full story of how the Eleventh Amendment was ratified, see DHSC, 5:597–604.

26 In the case of *Van Staphorst v. Maryland*, commenced in 1791, Maryland did not take issue with the Supreme Court's jurisdiction and willingly appeared, although the state later settled the case. DHSC, 5:9–20.

27 For example, *Hollingsworth v. Virginia*, DHSC, 5:288.

28 This case does not appear in the United States Reports, which are incomplete for the 1790s. For a discussion of the case, see DHSC, 5:57–67.

29 Minutes of the Supreme Court, August 13 and 14, 1794, DHSC, 1:226, 226–27.

30 Minutes of the Supreme Court, February 14, 1798, ibid., 1:305–306.

31 DHSC, 5:136–137.

32 G. Washington, Proclamation of Neutrality, April 22, 1793, in: American State Papers, Foreign Relations, Washington, D. C. 1833, 1:140.

33 For the text of the letter, see DHSC, 6:755.

Following Washington's orders, Secretary of State Thomas Jefferson had written to Chief Justice John Jay requesting the justices to come to Philadelphia in advance of their August session, to answer questions about treaties of the United States and the laws respecting them. Jay first visited with the president privately, and, as a result of that meeting, Washington asked Jefferson to draft a letter that would bring before the justices the preliminary question of »whether the business w[hi]ch, it is proposed to ask their opinion upon is, in their judgment, of such a nature as that they can comply.«[34] Jay considered this question so important that he delayed answering until all the justices had arrived in Philadelphia and could discuss the matter. Chief Justice Jay's letter of refusal, signed by the justices who were present, evidences a firm belief in separation of powers: »The Lines of Separation drawn by the Constitution between the three Departments of Governmenttheir being in certain Respects checks on each otherand our being Judges of a court in the last Resortare Considerations which afford strong arguments against the Propriety of our extrajudicially deciding the questions alluded to.«[35] A close look at the actions of the President, his cabinet, and the justices before that letter was sent, however, indicates that the views of the justices may have been somewhat more complicated.

For the public, the Court announced in its letter a constitutional doctrine of separation of powers that would keep the judges away from any political interaction. But in its private dealings with President Washington and Secretary of State Thomas Jefferson, the Court seems to have communicated its opinion that to enable the government to be perceived as strong in the particular circumstances of the European war, the executive branch needed to enunciate neutrality rules on its own, to be supported later by Congress – which it was, in the Neutrality Act of 1794 – and after that by the judiciary to give the policy greater force. And one of the justices probably informed a cabinet member that the Court would have occasion shortly to consider a case that might be the proper vehicle for this purpose. In the event, in the case of *Glass v. Sloop Betsey*, the questions that Washington had put to the justices were answered in an official decree of the Supreme Court.[36]

The Court's decision is traditionally noted for the help it gave to the foreign policy of the young United States. The justices declared that federal district courts could exercise all the powers

34 Ibid., 745.
35 Ibid., 755.
36 3 *U.S.* 6 (1794).

of admiralty courts, and that such courts could not be erected on American soil by foreign countries. For those not expert in the eighteenth-century law of admiralty and prize, the revolutionary nature of this ruling is not self-evident. Its substance reversed numbers of lower federal court rulings that U.S. district courts lacked jurisdiction in cases with facts similar to those in *Glass* and announced to the world that the Supreme Court had a role to play in interpreting treaties and statutes. To make certain that the public could not miss the force behind the justices' declaration of a new admiralty regime more favorable to the interests of a weak neutral nation, the Supreme Court opened its decree with the phrase, »This Court being decidedly of opinion,« and started the following paragraph with »The said Supreme Court being further clearly of opinion,« and the next one again with, »The said Supreme Court being further of opinion.«[37] Knowing the questions that the Washington administration had wanted answered in an advisory opinion, the justices enunciated the desired principles but now with the repeated imprimatur of the third branch of government. In declining to answer in a private capacity, the justices refrained from providing extrajudicial advice. Thus, they could pay homage to the important constitutional principle of separation of powers, but they were secure in the knowledge that they would soon be considering cases that would allow them to provide the guidelines wanted by President Washington. And *Glass* was only the first. In numerous admiralty and prize cases throughout the remainder of the 1790s, the Court would show its support for the policies of the executive branch.

As the decade wore on, the Supreme Court had further opportunities to exert its power. In 1796, exercising the power of judicial review, the Court, in *Ware v. Hylton*[38] and *Hylton v. United States,*[39] determined two major issues. *Ware* concerned the right of British creditors to recover pre-revolutionary war debts owed to them by Americans, as required by the Definitive Treaty of Peace of 1783, and its resolution depended on establishing the supremacy of federal treaties over state laws. When the Court held in favor of the British creditors, this point of law was settled.[40]

Having exercised judicial review to void a state statute, the Supreme Court, at the same term, passed on the constitutionality of a federal statute, the Carriage Tax Act of 1794.[41] Before enacting the legislation, Congress had debated the constitutional validity of

37 Decree of the Supreme Court, February 18, 1794, DHSC, 6:347–648.

38 *Ware v. Hylton*, 3 *U.S.* 199 (1796). For a full discussion of the case, see DHSC, 7:203–222.

39 *Hylton v. United States*, 3 *U.S.* 171 (1796). For a full discussion of the case, see DHSC, 7:358–369.

40 Although the holding in *Ware* is good law today, the practical effect of the decision was less successful. Because of the difficulty British creditors had in recovering their prewar debts, the Jay Treaty between the United States and Great Britain had stipulated that a binational commission would consider claims when the British failed to obtain compensation through the judicial system. Jay Treaty (1794), Article 6, in: Treaties and Other International Acts of the United States of America, ed. by H. Miller, 8 vols., Washington, D.C., 1931–1948, 2:249.

41 »An Act laying duties upon Carriages for the conveyance of Persons« (June 5, 1794), *Stat.*, 1:373.

such a tax, discussing whether it was a »direct tax« (and therefore unconstitutional because not properly apportioned according to the population of each state as specified by Article I, sections 2 and 9) or a lawful »indirect tax.« Opponents and proponents of the statute sought to bring it before the Court for an authoritative decision on these questions.

One day after its decision in the British debts case, the Supreme Court ruled the Carriage Tax Act constitutional. The justices upheld the carriage tax as an indirect tax. All the justices acknowledged that they were engaged in an exercise of judicial review, weighing the congressional statute against the Constitution. They knew they had the power to overturn the act, if necessary. While there were critics of the substantive decision in *Hylton*, the Court's power of judicial review was not questioned.

For the remainder of the decade, the Supreme Court continued to act as if its powers were indisputable. In grand jury charges and opinions, the justices repeated their belief that they could declare acts in conflict with the Constitution void.[42] But in 1798, after the passage of the Alien and Sedition Acts,[43] political divisions in the country increased, and opposition to the Adams administration focused not only on the President but also on the judges. Anger grew at the justices who conducted trials of those accused of seditious libel in the circuit courts of the United States, because the justices would not permit juries to consider the question of the constitutionality of the Sedition Act. Suggestions to lodge the power of judicial review elsewhere, in the states for example, began to surface. They received little support.[44] But the political tide was turning, and the sea change culminated in the election of 1800 that brought in a new Republican-majority Congress and a Republican president, Thomas Jefferson, after the House of Representatives, into which the election was thrown because of a quirk in the electoral college,[45] decided his fate.

The last acts of the Federalist dominated Congress had concerned the judiciary. With hindsight, the most important appeared to be the Senate's confirmation of John Marshall (not President Adams's first choice) as chief justice of the United States, although in January, 1801, his nomination was contested.[46] But at the time, the Federalists considered passage of the Judiciary Act of 1801[47] to be their greatest achievement. Throughout the 1790s, attempts had been made to reform the judicial system, as problems with the

42 See, for example, Samuel Chase's charge to the grand jury in the circuit court for the district of Pennsylvania, April 12, 1800, DHSC, 3:412, and opinions in the case of *Cooper v. Telfair*, 4 *U.S.* 19 (1800).

43 The following four acts are collectively referred to as The Alien and Sedition Acts (1798): »An Act supplementary to and to amend the act, entitled ›An act to establish an uniform rule of naturalization; and to repeal the act heretofore passed on that subject‹« (June 18, 1798), Stat., 1:566; »An Act Concerning Aliens« (June 25, 1798), *Stat.*, 1:570; »An Act Respecting Alien Enemies« (July 6, 1798), *Stat.*, 1:577; »An Act in addition to the act, entitled ›An act for the punishment of certain crimes against the United States‹« (July 14, 1798), *Stat.*, 1:596.

44 While Kentucky and Virginia advocated for this power in their resolutions of 1798 and 1799, other states failed to support them, and some state legislatures rejected this theory of nullification. M. Peterson, Virginia and Kentucky Resolutions, in: Encyclopedia of the American Constitution, ed. by L. Levy, 6 vols., New York 2000, 4:1974–1975.

45 Later fixed by the Twelfth Amendment, ratified in 1804.

46 DHSC, 4:291–292; 1:151–153, 918–929. Adams had offered the position of chief justice to John Jay again, and the Senate confirmed him, but Jay returned his commission.

47 »An Act to provide for the more convenient organization of the Courts of the United States,« February 13, 1801, *Stat.*, 2:89.

federal court system created by the Judiciary Act of 1789 became evident. Years in the making, the 1801 act responded to the major criticisms in a way that John Marshall characterized as »capable of an extension commensurate with the necessities of the nation.«[48] The biggest changes the act made were to give the courts a broad grant of federal question jurisdiction and to create a separate tier of judges to preside at the circuit courts, thus eliminating the need for Supreme Court justices to ride circuit. In his final days in office, President Adams nominated, and the Senate confirmed, the judges who were to fill the new judicial positions, thus turning the judiciary into a stronghold of the Federalist Party.

Little more than a year later, the reform for which Federalists had agitated met a premature death at the hands of the Jefferson administration. Congress repealed the Judiciary Act of 1801 and returned the federal judiciary to the organization specified in the 1789 act. The newly appointed circuit court judges were eliminated, and the Supreme Court justices were forced to ride circuit and act as circuit judges again.[49] Although there had been talk of a repeal as soon as Thomas Jefferson took office, the Supreme Court's show cause order in December 1801, in the case of *Marbury v. Madison* appeared to be the precipitating factor in bringing the repeal act to fruition.[50]

The facts in *Marbury* appeared to give the Court the opportunity to review acts of the executive branch, something that the Court had not done before. Marbury had been named a justice of the peace by President Adams, who had signed his commission, but it had not been delivered. Marbury asked the Court to order Secretary of State James Madison to deliver the commission. The Court ordered Madison to show cause on the fourth day of the next term why Marbury's petition should not be granted.[51] The Republicans immediately took umbrage at the audacity of the Court and set about weakening the judicial branch. The repeal and the subsequent judicial act lessened the power of the judiciary in major ways, and even managed to arrange things so that the Supreme Court would not meet for more than a year.[52]

Secretary of State Madison did not even bother to have legal representation at the hearing before the Supreme Court in February 1803, and Chief Justice John Marshall knew that he had to take great care with the decision in the case. The Court's ruling stated that it was the duty of the Court to examine certain acts of

48 John Marshall to William Paterson, February 2, 1801, DHSC, 4:707.

49 »An Act to repeal certain acts respecting the organization of the Courts of the United States; and for other purposes,« March 8, 1802, *Stat*., 2:132; »An Act to amend the Judicial System of the United States,« April 29, 1802, ibid., 156. Broad federal question jurisdiction was not granted to the courts again until 1875, and the new system of courts was not resurrected until 1891. »An Act to Determine the Jurisdiction of Circuit Courts of the United States …,« *Stat*., 18:470; Evarts Act, *Stat*., 26:826.

50 R. E. Ellis, The Jeffersonian Crisis: Courts and Politics in the Young Republic, New York 1974, 43–45.

51 *Marbury v. Madison*, 5 *U.S.* 153–54.

52 This meant that the justices would have to ride circuit before their Court would have an opportunity to decide if the repeal was constitutional. According to the Constitution, federal judges held their offices for life (»during good Behaviour«). By eliminating a whole tier of courts, the repeal act removed from office those circuit judges who had taken their oaths. This was a serious constitutional question, but clearly the Supreme Court justices feared what the Republican Congress might do to them (Congress had the power of impeachment), if they declared the repeal invalid. By riding circuit, which they did in 1802, they effectively acquiesced in the constitutionality of the repeal act.

the executive that were properly brought before it. Marbury had a legal right to his commission, but, according to the Constitution, the Court did not have the power to remedy the denial of his right. Section 13 of the Judiciary Act of 1789, giving the Court this power, was unconstitutional, because it enlarged the original jurisdiction of the Supreme Court beyond that specified in Article III.[53] By declaring it had no jurisdiction, the Court escaped having to order the executive branch to do anything – an order the justices knew would be ignored. John Marshall wrote an extensive opinion on the Court's power to review both certain executive branch actions and acts of Congress, thus leaving to future Courts a brilliant defense of judicial review. But his theory of judicial review was powerless before the political imperatives of the moment.

Marshall's disingenuousness becomes evident when the decision in *Marbury* is looked at together with the Court's ruling six days later in *Stuart v. Laird*.[54] This is the case in which the justices had to rule officially on the constitutionality of the practice of having them serve as circuit judges, and, as they had already been on circuit in 1802, it was approved. The rationale on which the Court relied in order to validate the constitutionality of the system was new. Justice Paterson, delivering the Court's opinion, noted that the First Congress, in the Judiciary Act of 1789, had imposed the dual roles of circuit judge and Supreme Court justice on Court members. Since then, the justices had performed circuit duty without interruption. Practice under the act, Paterson continued, »for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.«[55]

One might ask why, in *Marbury*, judicial acceptance, in the 1790s, of the constitutionality of section 13 should not have furnished an equally »irresistible answer.«[56] Side by side, these two opinions demonstrate that reading their texts cannot give a true picture of the position of the federal judiciary at this time in American history. The belief that the decision in *Marbury* represents the first use of judicial review is inaccurate, although it is the first written exposition of the theory of that power and the first

53 Throughout the 1790s, the Supreme Court had adjudicated cases as an original matter that did not fall within the two categories of original jurisdiction specified in the Constitution. Marshall's brethren in 1803 had participated in these previous rulings. Marshall himself, as a congressman, had advocated congressional expansion of the original jurisdiction of the Supreme Court. Two of his associates, Justices William Paterson and Bushrod Washington, had advised a congressional committee that drafted a judiciary bill that provided for original jurisdiction for the Court in cases not enumerated in the Constitution. For a complete explication of this thesis, see S. L. Bloch, M. Marcus, John Marshall's Selective Use of History in *Marbury v. Madison*, in: Wisconsin Law Review (1986) 326–337.

54 5 *U.S.* 299 (1803).

55 Ibid., 309.

56 See note 53 above. Marshall used the argument of past judicial acquiescence in congressional constructions of the Constitution to great effect in later cases. See *McCulloch v. Maryland*, 17 *U.S.* 401 (1819); *Cohens v. Virginia*, 19 *U.S.* 418, 420–21.

time the Supreme Court overturned a Congressional statute. And the idea that the judiciary lacked authority in the decade before *Marbury* clearly lacks a basis in fact. The early years of Supreme Court history provided Marshall with the material he needed to fashion a theory of judicial review. But the introduction of party politics made it more difficult to put into practice. Not until 1857 did the Court declare another act of Congress unconstitutional and that was in the disastrous *Dred Scott*[57] case.

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57 *Dred Scott v. Sandford*, 60 U.S. 393 (1857).