Introduction

Marbury v. Madison, decided in February 1803, is conventionally taken as the origin of judicial review in the United States. As Suzanna Sherry's chapter here shows, scholars have known for years that this understanding is wrong. The Constitution's framers assumed that the national courts would have the power to overturn laws that the judges found were inconsistent with the limitations the Constitution placed on government power. In the decades before *Marbury* state courts around the country exercised the power of judicial review as well.

The arguments—that is, the reasons—for judicial review were well-established by the time Chief Justice John Marshall wrote the Court's opinion in *Marbury*. The argument—that is, the presentation to the Supreme Court of their positions by advocates for both sides—in *Marbury*, in contrast, did not even take place. As David Strauss's reflections on presenting the executive's position indicate, President Thomas Jefferson ensured that no one showed up to offer the Court Madison's side of the case.

On the two hundredth anniversary of *Marbury v. Madison* four prominent federal judges sat as a bench to hear oral arguments in the case—although, as Judge Harry Edwards indicated at the argument's conclusion—not to render judgment. The transcript of that argument opens this book. Professor Strauss and I attempted to present arguments, based on the materials available in 1803, that made sense to lawyers in 2003. We could not forget, of course, what judicial review had become over the succeeding two hundred years. Still, we attempted to rely only on ideas about the U.S. Constitution and about constitutionalism more generally that were common currency in 1803. At the least, the argument shows how far we have traveled from the origins of judicial review.

The facts of *Marbury* are familiar, so only a summary is necessary here. The case arose out of the confluence of policy and politics. Members of the first Congress knew that federal courts were needed, but they did not have a firm grasp on the details of good institutional design—not surprisingly, as they were designing a system from scratch. They also worried that there might not be enough judges with a sufficiently national orientation to staff a full court system, and they wanted to save money. Finally, they faced some political constraints arising out of the nervousness about national power that had led the Constitutional Convention to propose, not a constitutionally entrenched system of national courts, but only that Congress would have the power to create such courts.

The first Judiciary Act of 1789 tried to accommodate all these concerns. It set up a system with three levels. At the bottom were federal district judges, at least one in each state. The district judges handled minor matters on their own. At the top was the Supreme Court. In the middle were circuit courts. The circuit courts were not conventional appeals courts of the sort we know today. They were the trial courts in which some major cases were to be heard first. Among these were so-called diversity cases, suits between citizens of different states, and between citizens and noncitizens. These lawsuits frequently were the continuation of disputes arising out of the Revolutionary War and the economic turmoil of its aftermath. The circuit courts were staffed by a district judge and two Supreme Court justices, later reduced to one. The justices therefore had to "ride circuit" to sit in the circuit courts, in addition to their duties as Supreme Court justices.

The next decade showed that this design was an administrative nightmare. Supreme Court justices would have to hear appeals from their own decisions in the circuit courts. More important were the physical burdens that circuit riding placed on the justices. Distances were long and roads were bad. The justices grumbled about how hard it was to go from the nation's capital out on circuit, then return for the Supreme Court's own work. Pressures for reforming the structure of the nation's judiciary built up over the 1790s.

Congress eventually responded with the Judiciary Act of 1801. It expanded the jurisdiction of the lower federal courts, for the first time giving them the power to hear cases raising issues of national law. The Act abolished the existing circuit courts, thereby eliminating circuit riding. It created in their place six new circuit courts, to be staffed by sixteen new federal judges.

Considered as a reform aimed at improving the administration of justice in the national courts, the 1801 Judiciary Act was a sensible response to problems that had arisen over the prior decade. But in 1801 and 1802 it could not be considered only in those terms. The Act was also a major episode in the transformation of national politics. The political setting gave *Marbury* its importance.

The Constitution's framers imagined that the system they designed would lead to the selection of the best national leaders from all over the country, who would combine representation of their localities with a national perspective. They did not expect that nationally organized political parties would emerge rapidly, but they were wrong. Such parties began to develop in conflicts between Thomas Jefferson and Alexander Hamilton in the first years of the 1790s, and crystallized into real organized parties by the end of the decade.

The creation of a party system transformed the constitutional order. The election of 1800 demonstrated how a national crisis could arise when parties were inserted into a Constitution that did not expect them to exist. In that election Thomas Jefferson and his running mate Aaron Burr clearly prevailed over John Adams and his running mate Charles Cotesworth Pinckney. "Prevailing" meant that electors pledged to Jefferson and Burr outnumbered electors pledged to Adams and Pinckney. The 1789 Constitution provided that each elector would cast two votes, without distinguishing between votes for the presidential and vice-presidential candidates. The electors cast their votes and, because of poor planning, Jefferson and Burr received the same number of votes. This sent the election to the House of Representatives, which went through more than thirty votes before some of Adams's supporters resolved the crisis by letting Jefferson become president.

Jefferson and the Democratic Party he headed swept the elections in late 1800, gaining control not only of the presidency but of the Senate and the House of Representatives as well. But, once again, a flaw in the 1789 Constitution emerged. Jefferson would not take office until March 4, 1801, leaving Adams and his Federalist Party allies in control of the government from November 1800 through the end of February 1801. The Judiciary Act of 1801 was adopted on February 13, 1801. Understandably, Jefferson and the Democrats saw it as a politically motivated statute, not an administrative reform. The Act would give the outgoing and repudiated president the opportunity to entrench sixteen of his political allies in the new circuit courts. Even more, in what Jeffersonians took to be dramatic evidence of the Act's political motivation, the

Act reduced the size of the Supreme Court from six to five as soon as a sitting justice left the Court, which meant that Jefferson would not have the chance to fill the first vacancy that occurred during his term.

Jefferson and his allies immediately moved to repeal the Judiciary Act of 1801. Members of Congress engaged in an extended debate over the constitutionality of the repeal, with Federalists contending that repealing the 1801 Act would violate the Constitution's requirement that federal judges have life tenure by eliminating the sixteen new judgeships. The question of judicial review recurrently arose during these debates, with Federalists asserting that, were the repeal to be enacted, the Supreme Court would hold it unconstitutional. Fearing that the Federalists were right, the Democratic Congress included a provision in the repeal, eventually adopted as the Judiciary Act of 1802, postponing the next sitting of the Supreme Court, apparently hoping that a cooling-off period might lead the justices to accept what Congress had done.

Marbury raised questions about the power of the courts to declare national legislation unconstitutional, and so implicated the repeal of the Judiciary Act of 1801. Marbury himself, though, was not one of the sixteen judges who lost their jobs as a result of the repeal. He got his job (or seemed to) from *another* statute enacted by the lame-duck Congress in 1801. That statute created a new circuit court of the District of Columbia, the significance of which is discussed in Susan Low Bloch's essay here. This second statute also authorized the president to appoint forty-five new justices of the peace in the District. Adams rushed to fill the new posts, but—as every student of *Marbury* knows—the paperwork was incomplete when Jefferson took office. Four commissions signed by Adams were sitting on the desk of his Secretary of State, awaiting delivery to the new justices of the peace, on March 4. As the oral argument indicates, the Secretary of State was John Marshall himself, serving for a few weeks as both Chief Justice of the United States and Secretary of State (another indication of the underdeveloped character of the national government at the time). Jefferson directed his Secretary of State James Madison to withhold delivery, whereupon Marbury sued.

Readers of this collection will already know the complexities of the questions Marshall found in Marbury's case, and I do not plan to address them in detail here. But it is worth noting that some receive less attention than they should. Marshall's opinion for the Supreme Court conceals some of the prob-

lems with establishing the merits of Marbury's claim. Was Marbury entitled to his commission? The oral argument suggests not: All federal judges have to have life tenure, but Marbury's term was limited by statute to five years. Perhaps, then, Marbury was not a "judge" in a constitutional sense. What then might he have been? Perhaps an employee of the executive branch, something like today's administrative law judges. But, then, the designation of a specific term of office might be an unconstitutional intrusion on the president's power to discharge executive branch employees, a matter that received some attention in the first half of the nineteenth century—in contrast to the inattention paid during those years to *Marbury*'s holding on judicial review. And, further, even if, as Marshall eventually concluded, Marbury's appointment as a justice of the peace was complete when Adams signed his commission, perhaps Jefferson's refusal to deliver the document should be treated as firing Marbury, an act, on this view, within the president's complete discretion.

Beyond this are the questions, at the heart of Marshall's opinion, about whether Marshall offered a defensible (or even plausible) interpretation of the jurisdictional statute on which Marbury relied, or a defensible (or even plausible) interpretation of the provisions of Article III of the Constitution on which Marshall relied in holding unconstitutional Congress's attempt—as Marshall saw it—to give the Supreme Court jurisdiction over cases like Marbury's. Generations of law students have worried over these questions, and I can add nothing to the well-developed discussions of them.

Addressing the constitutional questions did give Marshall a chance to establish that the national courts had the power to declare acts of Congress unconstitutional—not, in itself, a controversial proposition. What would have been controversial was a more direct confrontation with Jefferson's administration and the Jeffersonian Congress. That confrontation would have occurred had the Supreme Court agreed with the Federalists' objections to the repeal of the 1801 Judiciary Act.

A week after *Marbury* was announced, the Court again avoided that confrontation, in *Stuart v. Laird*. John Laird won a judgment against Hugh Stuart from one of the circuit courts created by the 1801 Act. He then had to get hold of Stuart's property to satisfy the judgment. Doing so required that he go back to court. But, by the time Laird returned to court, the 1801 Act had been repealed and the circuit judge who had heard Laird's case was gone. Instead, Con-

gress told litigants like Laird that they could go to the revived old circuit courts, the ones with a district judge and Supreme Court justices riding circuit. Laird did so, and got what he wanted. Stuart then appealed to the Supreme Court, arguing that only the court that issued the judgment in the first place could enforce it and that the Constitution did not allow Supreme Court justices to ride circuit. In three paragraphs the Court unanimously rejected Stuart's arguments. On circuit riding, the Court said that the practice had been in place from the beginning of the national court system, and that this practice was a "contemporary interpretation of the most forcible nature." The Court treated Congress's decision to direct the second case into the old circuit court as a mere administrative question, involving the "transfer" of a case from one court to another. Nowhere did the Court discuss the reason the transfer was necessary, that the judge who had heard the case the first time had had his court kicked out from under him. Perhaps, though, the Court's decision implicitly upheld the elimination of the circuit courts created in 1801. A contrary decision would almost certainly have led to efforts in Congress to retaliate against the Supreme Court, perhaps through an aggressive use of the impeachment process.

Marbury confirmed that the national courts had the power of judicial review. *Stuart v. Laird* confirmed that the justices were likely to be prudent in exercising that power—at least for a while. What was the power's reach? I think it helpful to distinguish between what some scholars call "departmentalist" judicial review, itself with two variants, and judicial review as judicial supremacy.

The examples of judicial review that preceded *Marbury*, and most of the theoretical discussions of judicial review in the early Republic, adopted what might be called a self-defensive departmentalist view, a position that Professor Strauss supports (modestly) in his argument. According to this view, courts had the power to declare unconstitutional those statutes that interfered with their proper functioning. *Marbury* itself could be seen as exercising self-defensive departmentalist review, with the Court saying that Congress had tried to thrust on the Supreme Court tasks that it could not constitutionally be asked to carry out. Depending on what precisely would count as an intrusion on the courts, self-defensive departmentalist review could have quite a broad scope. Expansive departmentalist review of this sort might allow the courts to refuse to enforce criminal statutes they believed to be unconstitutional, on the theory that Congress in enacting the statute and the executive branch in enforcing it were at-

tempting to dragoon the courts into helping them make effective an unconstitutional law. Marshall's example in *Marbury* of a statute that unconstitutionally allowing conviction of treason on the basis of only one witness might be an example of expansive self-defensive review.

Some aspects of statutory law might lie outside the scope of self-defensive departmentalist review, as when the national government administers an entitlement program through agencies rather than through the courts. Yet, the courts provide valuable resources to the other branches, and in the real world self-defensive departmentalist review might cover an enormous amount of what the government does. For example, another of Marshall's examples involves an unconstitutional tax on the export of cotton. Tax collectors usually find it helpful to use the courts, suing tax delinquents, at which point the courts could declare the tax unconstitutional. Only if the government avoided the courts completely, for example by simply seizing the delinquent's property, might the theory of self-defensive departmentalism fail to provide the courts a chance to invalidate the unconstitutional tax. And, even here, there are some possibilities. The person whose property is seized might sue the government, or the tax collector as an individual, invoking whatever general authority Congress conferred on the courts. At that point a self-defensive departmentalist court could say, "You, Congress, asked us to resolve the kind of problem this lawsuit presents, and we can't resolve it in a way that implicates us in your unconstitutional action, so we will award damages to the taxpayer."

A different version of departmentalism might be called "independent-judgment" departmentalism. According to this view, each branch is entitled to make—and act on—its own independent judgment of what the Constitution means. At least as represented by Professor Strauss, Jefferson held this view. Congress in enacting a statute might be taken to express its judgment that the statute is constitutional; the president in refusing to deliver a commission might be taken to express his judgment that refusing to deliver the commission is constitutional. And, importantly, the fact that a court disagrees with those judgments is of no special significance. It is a datum that Congress or the president might want to take into account. So, for example, it might be that Congress did not focus on the constitutional question when it enacted the statute but that, the defect being called to its attention, it might want to revise the statute or even repeal it. Contemporary theorists have characterized one ver-

sion of independent-judgment departmentalism as encouraging a view of judicial review, and more broadly of the Constitution, as encouraging dialogues among the branches about the Constitution's meaning. (The metaphor of dialogue has been particularly important in discussions of the Canadian Charter of Rights, which in turn has influenced discussions of the U.S. Constitution.)

The problem with independent-judgment departmentalism is obvious: It seems to be a formula for permanent, or at least recurrent, constitutional crisis. There are many reasons why crises might not occur all that often in a system of independent-judgment departmentalism. The courts' position is likely to have some political support. Getting Congress or the president to do something might be difficult, and not always a matter of high political priority. Compromise rather than confrontation will usually be the easier path.

Still, independent-judgment departmentalism does pose the *risk* of crisis. In the 1830s President Andrew Jackson may have said something like, "John Marshall has made his decision; now let him enforce it," when Jackson disagreed with the Supreme Court's decision in a case involving the rights of native Americans. Independent-judgment departmentalism certainly licenses, and might encourage, presidents and members of Congress to insist on their own constitutional interpretations, in situations were disagreements between the branches might disrupt the orderly functioning of government. One might hope for some way to avoid these crises.

One solution is perhaps not inherent to independent-judgment departmentalism, but might be a component of the worldview that might have made independent-judgment departmentalism attractive to the founding generation. The solution is, in short, statesmanship on all sides, and is exemplified by *Stuart v. Laird*. Precisely because forceful assertions of independent-judgment departmentalism might provoke constitutional crises, prudent statesmen would do what they could to accommodate each other. Sometimes the courts would prudently refrain from acting, as perhaps occurred in *Stuart v. Laird*; sometimes Congress would revise its statutes, perhaps grudgingly, to eliminate the constitutional problems the courts found.

Yet, as James Madison wrote in *The Federalist 10*, "Enlightened statesmen will not always be at the helm." The only other solution to the problem posed by independent-judgment departmentalism is to give someone the last word. Over the two centuries since *Marbury*, the constitutional system in the United States

has come to do so by giving the courts the last word, treating judicial review as entailing judicial supremacy. Often the implications of judicial review as judicial supremacy have not been apparent to the public or even to major political actors. Barry Friedman's chapter analyzes why judicial review as judicial supremacy has not always been intensely controversial, arguing that the American public accepts the practice—perhaps because it contributes a kind of stability that would be lacking under any other system of judicial review.

Occasionally, though, judicial review as judicial supremacy becomes controversial. We may be experiencing one such moment today, as the Supreme Court invalidates statutes with broad congressional and popular support, explicitly using a theory of judicial supremacy and sometimes casting aspersions on the ability of Congress to legislate responsibly. Stephen Griffin argues for historicized normative theories of judicial review, which would support different roles for the courts at different times, and criticizes the current Supreme Court for adopting the theory of judicial review as judicial supremacy in an era where, according to Professor Griffin, commitment among legislators to protecting basic rights is quite strong. Vicki Jackson and L. Michael Seidman conclude by raising questions about the possibility of a historicized normative theory and about the extent to which even today we have a democracy of rights that could afford some theory of judicial review other than judicial supremacy.

Americans and constitutionalists around the world have been arguing about *Marbury* for generations. This collection is predicated on the hope that setting those arguments in the context of an argument of the case will contribute new elements to a long conversation.