

# Making a Mountain Out of a Molehill? *Marbury* and the Construction of the Constitutional Canon

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Everybody “knows” that Chief Justice John Marshall and the U.S. Supreme Court “established” or “created” the power of judicial review in the case of *Marbury v. Madison* in 1803.<sup>1</sup> The *Marbury* case is now one of the foundation stones of Marshall’s historical legacy. It stands near the center of what makes Marshall the great chief justice. As the power of constitutional review has spread and courts have struggled to win their independence and gain respect from other political actors, *Marbury* has taken on a global stature.<sup>2</sup>

*Marbury*’s place in the constitutional canon is secure. Scholars at the turn of the twentieth century heatedly debated whether John Marshall had used the case to foist judicial review on an unsuspecting nation, or whether he merely followed the logic of the law and laid bare the constitutional foundations of the new republic.<sup>3</sup> The debate was seemingly premised on the self-evident importance of *Marbury* itself. There is perhaps no greater declaration of *Marbury*’s importance than the U.S. Supreme Court’s invocation of the case in the middle of the twentieth century, at the tail end of the Little Rock desegregation crisis. In responding to the Arkansas governor and legislature, the unanimous Supreme Court thought it “necessary only to recall some basic constitutional propositions which are settled doctrine.”<sup>4</sup> Quoting *Marbury* to the effect that “[I]t is emphatically the province and duty of the judicial department to say what the law is,” the

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1. *Marbury v. Madison*, 5 U.S. 137 (1803).
2. JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW* 99 (2001).
3. *See, e.g.*, EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 1–80 (1914); LOUIS B. BOUDIN, *1 GOVERNMENT BY JUDICIARY* 220–24 (1932).
4. *Cooper v. Aaron*, 358 U.S. 1, 17 (1958).

Court added its gloss “that the federal judiciary is supreme in the exposition of the law of the Constitution.”<sup>5</sup> This was a contentious reading of *Marbury* to be sure, yet scholars at mid-century shared the Court’s view that *Marbury* was fundamental.<sup>6</sup> Civics and history textbooks, including those written by Supreme Court justices, have followed along, declaring that *Marbury* “established”<sup>7</sup> the Court’s “role as guardian of the Constitution.”<sup>8</sup>

Recent revisionist literature on *Marbury*, however, has challenged that received wisdom. Revisionists have questioned the importance of *Marbury* in establishing judicial review, the originality of its arguments, and the scope of the power that Marshall was claiming for the Court. Such work has led the constitutional historian Michael Klarman “to prompt other scholars to reconsider prevalent assumptions about the importance of canonical Supreme Court rulings generally and the ‘great’ Marshall Court decisions specifically.”<sup>9</sup>

This study contributes to the *Marbury* revisionism by examining how and when the case entered the constitutional canon. In particular, this study takes up Robert Lowry Clinton’s influential claim that *Marbury* was “little noticed during the first century of our national existence.”<sup>10</sup> The key evidence that Clinton marshals for this startling conclusion is data on citations to *Marbury* in subsequent U.S. Supreme Court opinions. Clinton’s initial finding helped launch a great deal of the revisionist literature on *Marbury*, but the basic empirical claim itself has been taken as a given and has not been subject to much additional scrutiny, analysis or extension.<sup>11</sup>

This Article reconsiders the reception and influence of *Marbury* by dramatically expanding the evidentiary base. We reconsider the quantity and quality of citation data to *Marbury* in the U.S. Supreme Court. More importantly, we examine the reception of *Marbury* in the lower federal courts and the state supreme courts across American history. *Marbury* was quite possibly recognized in nineteenth century legal culture as having “established” the power of judicial review even if it was rarely cited for

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5. *Id.*, at 17–18.

6. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1964); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1 (1969).

7. WILLIAM H. REHNQUIST, *THE SUPREME COURT* 99 (1987).

8. Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 100, 134 (2009).

9. Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?* 87 VA. L. REV. 1111, 1113 (2001).

10. ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 125 (1989).

11. See *infra* notes 33-36 and accompanying text.

that proposition by the U.S. Supreme Court in its own opinions. We likewise examine references to *Marbury* in legislative and executive documents. Finally, we examine the treatment of *Marbury* in legal treatises and commentaries in the nineteenth century to gauge both the reception of the case and the beginning of its transition into the constitutional canon.

Our analysis gives a much more complete picture of when and how *Marbury* entered into the constitutional canon and how the case has been deployed by the courts. Our findings modify the view that *Marbury* was “little noticed” by the courts for most of the nineteenth century. The legal commentary of the period shows that *Marbury* was not widely regarded as a special case that “won for the Supreme Court the power to construe the Constitution with finality . . . [and] made the Court’s interpretation binding on all others.”<sup>12</sup> More accurate is the phrasing of a recent textbook, which characterizes *Marbury* as simply “enunciating the doctrine of judicial review.”<sup>13</sup> Nonetheless, a Federalist narrative of a herculean Chief Justice Marshall in *Marbury* was being laid down in the early republic and eventually became integrated into a standard narrative of the case. The rhetorical use of *Marbury* to bolster the authority of the judiciary as a constitutional interpreter is a distinctly twentieth century phenomenon and follows clear patterns of legal and political conflict in the various levels of American courts. Judging from the use of the case by the courts, one might well say that it was *Brown v. Board of Education*<sup>14</sup> and its aftermath that truly brought *Marbury* into the constitutional canon in its modern form.<sup>15</sup> *Cooper v. Aaron*<sup>16</sup> transformed *Marbury* into the modern symbol of judicial power, and elevated a different dimension of John Marshall’s argument into the standard judicial and legal rhetoric of the late twentieth century.

*Marbury* has a particular meaning and significance for us in the early twenty-first century, and the case occupies an especially prominent place in the modern constitutional canon. *Marbury* did not always have the same resonance that it does today. It took time to convert *Marbury* into a case primarily about judicial review; to elevate *Marbury* above a variety of other sources from the early republic as the standard citation for the authority of courts to interpret and enforce constitutional limits; and to suggest that

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12. ALPHEUS THOMAS MASON & WILLIAM M. BEANEY, *THE SUPREME COURT IN A FREE SOCIETY* 11 (1968).

13. JEFFREY A. SEGAL, HAROLD J. SPAETH, & SARA C. BENESH, *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 14 (2005).

14. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

15. Stephen M. Griffin, *The Age of Marbury: Judicial Review in a Democracy of Rights*, in *ARGUING MARBURY V. MADISON* (Mark Tushnet ed., 2005).

16. *Cooper v. Aaron*, 358 U.S. 1 (1958).

*Marbury* was not merely a case in which the Supreme Court exercised or explained the power of judicial review, but one that somehow created or established the power of judicial review. As the power of judicial review became more salient to the constitutional and political system and also more contested, judges and commentators turned to the powerful rhetoric of John Marshall to help legitimate the institution to new generations.

Part I of this Article reviews the revisionist case regarding *Marbury*. Part II steps back to consider the broader idea of the constitutional canon. Part III examines citation data on *Marbury* in the U.S. Supreme Court, the U.S. circuit courts, and the state supreme courts. Part IV reviews congressional and executive references to *Marbury*, and Part V examines nineteenth century legal commentary on the *Marbury* case.

### I. *Marbury* Revisionism

There are three aspects to the *Marbury* revisionism. One aspect focuses on the content of the opinion itself and the legal and theoretical meaning of Chief Justice John Marshall's argument in the case. A second aspect focuses on the originality of *Marbury* and the extent to which the case was distinctive in claiming or exercising the power of judicial review. The third aspect focuses on the reception of *Marbury* and the extent to which the case was recognized as significant in its own time. Although potentially interrelated and mutually reinforcing (it would make sense if an unoriginal, minimalist decision went largely unnoticed by contemporaries), they raise separable and independent questions. This Article focuses particularly on the third issue raised by the revisionist literature, the question of *Marbury*'s reception and use.

There are various strands to recent debates over this first aspect—that is, the meaning, scope and presuppositions of Marshall's argument for judicial review in *Marbury*. What unites them is the view that the version of judicial review defended by Marshall in the early nineteenth century bears little resemblance to the form of judicial review with which we are now familiar. The very term “judicial review,” in the constitutional sense, is a modern invention and does not appear in nineteenth century debates.<sup>17</sup> But the concept and practice outlined in *Marbury* may not bear a close resemblance to the modern institution of judicial review.<sup>18</sup> For instance, some have contended that Marshall's argument only involved the judiciary in the game of constitutional interpretation, holding in a departmentalist

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17. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 28 (2007).

18. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031 (1997).

fashion that judges could act on their own understanding of the Constitution but not taking the supremacist step of declaring that the judiciary's understandings were binding on other political actors.<sup>19</sup> Others have argued that Marshall's understanding of judicial review incorporated a high level of deference to the decisions of the other branches of government.<sup>20</sup> Still others have concluded that Marshall's argument did not extend any further than to cases involving the constitutional powers and jurisdiction of the Article III courts themselves.<sup>21</sup>

The second aspect of the revisionist literature on *Marbury* is less dispersed. It simply observes that "*Marbury* cannot have established the power of judicial review, since that power already was widely accepted before the Supreme Court's ruling."<sup>22</sup> A variety of legal and political precedents for such a power predated the formation of the U.S. Constitution.<sup>23</sup> Constitutional framers, congressmen, state legislators, and essayists had already endorsed the power of courts to monitor the constitutionality of legislation and to set aside laws when they conflicted with constitutional requirements.<sup>24</sup> Both state and federal courts had already begun to exercise the power of judicial review and had provided justifications for the power in advance of the *Marbury* decision in 1803.<sup>25</sup> State judges had successfully reviewed and struck down state statutory provisions under state constitutions well before *Marbury*. Lower federal court judges had reviewed the constitutionality of state laws as well as federal laws. The U.S. Supreme Court itself had evaluated the constitutionality of federal laws and their applications in cases that had come before it in a handful of cases prior to 1803.<sup>26</sup>

The third and least developed aspect of the *Marbury* revisionism considers the reception and use of the case over time. If *Marbury* was a foundational case in creating a power to void legislation, then courts might

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19. See, e.g., David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279 (1992).

20. See, e.g., SYLVIA SNOWISS, JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION 109–112 (1990).

21. See, e.g., CLINTON, *supra* note 10, at 81–101.

22. Klarman, *supra* note 9, at 1113–14.

23. SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER (2011); PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008); GORDON S. WOOD, EMPIRE OF LIBERTY 442–455 (2009).

24. Mark A. Graber, *Establishing Judicial Review: Marbury and the Judicial Act of 1789*, 38 TULSA L. REV. 609 (2003); Matthew P. Harrington, *Judicial Review before John Marshall*, 72 GEO. WASH. L. REV. 51 (2003).

25. William Michael Treanor, *Judicial Review before Marbury*, 58 STAN. L. REV. 455 (2005).

26. Keith E. Whittington, *Judicial Review of Congress before the Civil War*, 97 GEO. L.J. 1257 (2009).

be expected to have taken note of its significance. Robert Lowry Clinton was perhaps the first to observe that the U.S. Supreme Court rarely cited *Marbury* as support for the idea of judicial review in the nineteenth century. Instead, when cited at all, the case was primarily referenced for its jurisdictional holdings and implications for the mandamus power. Clinton contends that from 1803 until well after the Civil War and Reconstruction, the Supreme Court never cited *Marbury* as a case about judicial review. According to Clinton, the first discussion of *Marbury* in the context of the power of judicial review in a Supreme Court opinion does not happen until 1887 and is not repeated until 1895.<sup>27</sup> Only eight more references are made before the Little Rock desegregation case in 1958. By contrast, over the next quarter century fifty Supreme Court cases cite *Marbury* as support for the power of judicial review.<sup>28</sup> Other scholars have detailed the extent to which leading lawyers turned to *Marbury* in public celebrations and treatises to build legitimacy and support for the exercise of judicial review—but not until the early twentieth century as the *Lochner*<sup>29</sup> era took hold.<sup>30</sup> For nearly a century, *Marbury* stood in “relative insignificance as a decision associated with judicial review.”<sup>31</sup> It “became an important precedent for courts and commentators seeking to justify judicial review,” and thus became a “great case,” only in the twentieth century.<sup>32</sup>

Such evidence has helped convince many that *Marbury* was “relatively unimportant at first” and that “its ascendance in the American constitutional law canon came much later . . . after its meaning was recast in ‘mythic’ form.”<sup>33</sup> *Marbury*’s nineteenth century significance may well have been in its meaning for administrative law rather than in its meaning for judicial review of legislation.<sup>34</sup> The significance of *Marbury* as a “pivotal event” in the history of judicial review could be a “classic anachronism,” with modern commentators reading significance into a case that it did not possess when it was written.<sup>35</sup> Even critics of Clinton’s interpretation of

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27. CLINTON, *supra* note 10, at 120.

28. CLINTON, *supra* note 10, at 123.

29. *Lochner v. New York*, 198 U.S. 45 (1905).

30. Davison M. Douglas, *The Rhetorical Use of Marbury v. Madison: The Emergence of a “Great Case,”* 38 WAKE FOREST L. REV. 375 (2003).

31. *Id.* at 386.

32. *Id.* at 386–87.

33. Theodore W. Ruger, “A Question Which Convulses A Nation”: *The Early Republic’s Greatest Debate About Judicial Review Power*, 117 HARV. L. REV. 826, 890 (2004).

34. Thomas W. Merrill, *Marbury v. Madison as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 503 (2004).

35. Charles F. Hobson, *John Marshall, the Mandamus Case, and the Judiciary Crisis, 1801–1803*, 72 GEO. WASH. L. REV. 289, 290 (2003).

the *Marbury* opinion's meaning have accepted his evidence for its virtual nonexistence (as a case about judicial review) in the judicial record of the nineteenth century.<sup>36</sup>

This Article focuses on the evidence for this third strand of the revisionist literature and reexamines the reception and use of *Marbury* over time, which has received far less empirical development despite its apparent importance to our understanding of *Marbury*. Doing so has immediate implications for thinking about the rhetoric of judicial authority and the process of constructing the constitutional canon. Reflecting on the empirical evidence of the reception of *Marbury* over time may also shed light on just how novel or foundational the case was thought to have been in the early decades of American constitutional history. We are agnostic in this Article on the substantive content of the *Marbury* argument and do not focus on how the courts and commentators understood the power of judicial review over time.

## II. The Rhetoric of Judicial Authority and Constitutional Canons

Focusing on the reception and use of *Marbury* raises the question of why Supreme Court cases are cited and discussed at all. *Marbury* is most narrowly interpreted as holding that the federal courts have the power to declare acts of Congress unconstitutional and thus null and void. More broadly, *Marbury* has come to stand for the general proposition that courts have the ultimate power to interpret the Constitution and review the validity of the actions of other branches of government. Either of those tenets is easy enough to write. Why cite *Marbury*?

Some scholars have suggested that the transmission of precedents across courts through citation is a measure of influence. The prestige of the judge who authored the original opinion is among the factors affecting whether others will choose to cite that opinion.<sup>37</sup> Others have argued that the citation of precedent reflects strategic considerations. Judges might make a “display of authority” precisely when their rulings are likely to be

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36. Dean Alfange Jr., *Marbury v. Madison and Original Understanding of Judicial Review: In Defense of Traditional Wisdom*, 1993 SUP. CT. REV. 329 (1993).

37. Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178 (1985); DAVID F. KLEIN, *MAKING LAW IN THE UNITED STATES COURTS OF APPEALS* (2002).

contested.<sup>38</sup> Innovative or legally difficult cases prod judges to bolster their opinions with the support of other prestigious sources.<sup>39</sup>

Quite separately, scholars have become interested in the formation of the constitutional canon. The legal canon, like the literary canon, is neither timeless nor natural. The tradition of what cases and materials are regarded as important about the constitutional past is an invented one, and the timing of “when certain materials enter and leave the canon” is likely connected “to political and social issues of the time.”<sup>40</sup>

Cases enter the constitutional canon and sustain their place there to the extent that they serve a function for the various audiences for which that canon has meaning, whether academic, legal, or public. As cases are canonized, they become less important as legal precedents and more important as “symbols ‘shedding and gathering meaning over time and altering in form.’”<sup>41</sup> The legal and political community may create “judicial icons” that bear only a limited relationship to the original case but that serve a symbolic function for those who make use of it.<sup>42</sup> The process of canonization, and de-canonization, turns on the substantive attractiveness and utility of the opinion to contemporary audiences rather than any intrinsic, original feature of the opinion itself.<sup>43</sup>

There is no question that *Marbury* is now part of the constitutional canon. What remains uncertain is when, and relatedly why, *Marbury* became a central case and gained particular importance.<sup>44</sup> *Marbury* is now the ultimate display of judicial authority. Citations to and quotations taken from *Marbury* not only borrow from the ancient authority and prestige of John Marshall, but also specifically empower the courts vis-à-vis other government institutions. References to *Marbury* are part of a rhetorical strategy for asserting judicial supremacy in the face of political conflict. The process of canonization has less to do with how novel or persuasive or influential or important *Marbury* was in its own context as a statement about judicial review than on how useful it is to later commentators in

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38. Peter Harris, *Difficult Cases and the Display of Authority*, 1 J.L., ECON. & ORG. 209 (1985).

39. David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 L. & SOC'Y REV. 337 (1997); Robert J. Hume, *The Use of Rhetorical Sources by the U.S. Supreme Court*, 40 L. & SOC'Y REV. 817 (2006).

40. J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1008 (1998).

41. Robert L. Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095 (2005).

42. WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW* (2004).

43. Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998); KEN I. KERSCH, *CONSTRUCTING CIVIL LIBERTIES* (2004).

44. Balkin & Levinson, *supra* note 40, at 1009.



building the power of the courts to determine constitutional meaning and exercise the power of judicial review.

### III. Judicial Citations to *Marbury*

In order to gain a more complete picture of when and how *Marbury* entered into the constitutional canon and how the case has been deployed by the courts, an examination of the quantity and quality of citations to *Marbury* is necessary. The sheer quantity of citations to *Marbury* can serve as one indicator for when the case became historically important and entered the constitutional canon. It can also serve to illustrate the way in which the judiciary has employed *Marbury* over time. The quality of the *Marbury* citations and the degree to which they are used for judicial review rather than for jurisdictional holdings or for the implications of the mandamus power can also tell the story of when *Marbury* was transformed from a case that made a variety of substantively important holdings about constitutional law and statutory interpretation to a case that made judicial review possible.

In the following discussion, we give particular attention to three distinct time periods where the literature suggests different patterns in the judiciary's level of citation to and qualitative use of *Marbury*. The first time period encompasses the first century after *Marbury* was handed down. As noted above, Clinton and others have argued that *Marbury* was "little noticed" during this period and that we therefore would expect few citations to the case.<sup>45</sup> Furthermore, we would not expect these citations to be for the judiciary's authority to exercise a power of judicial review, but instead for such matters as jurisdiction and the use of the writ of mandamus. The second time period extends from the centennial anniversary of *Marbury* in 1903, which was designed to draw increased attention to both the case and Chief Justice John Marshall, until *Cooper v. Aaron* was handed down in 1958. *Marbury* revisionists have suggested that it was the efforts of the conservative bar to celebrate *Marbury* in the midst of *Lochner* era controversies that spurred a transformation in the historical importance of the case. This change would suggest a rise of citations and shift in the nature of citations at the turn of the century. Finally, the third time period runs from the year *Cooper v. Aaron* was handed down in 1958 to the present. It is appropriate that the Court's strong exposition of judicial authority in *Cooper v. Aaron* marks the beginning of this period, famously pointing back to Marshall's declaration in *Marbury* that "[i]t is emphatically the province and duty of the judicial

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45. CLINTON, *supra* note 10, at 125.

department to say what the law is” while declaring that the Court’s decisions were supreme and binding on the other branches of government. The Court’s powerful declaration of judicial supremacy in *Cooper v. Aaron* as well as the judiciary’s increasingly frequent exercise of judicial authority during this time period, might itself be expected to mark a distinct break in the judicial rhetoric regarding *Marbury* and judicial review.

In order to study the judiciary’s changing tendency to cite *Marbury*, we created an original dataset of federal and state cases citing *Marbury*. A review of all citations to *Marbury* offers important advantages over previous scholarship. Previous analyses have relied heavily on evidence from the U.S. Supreme Court to draw conclusions about *Marbury*’s prominence, but the Court is only one source of evidence for juridical perceptions of the case. Its citation patterns in the nineteenth century, however, may well have been idiosyncratic (Chief Justice John Marshall himself often neglected to cite relevant precedents).<sup>46</sup> A broader analysis of the Court’s entire history and of the lower federal courts and the state courts provides a more comprehensive basis for drawing conclusions about the legal community’s reception and use of *Marbury*, and its significance as a source of authority in judicial argument. Evidence from state courts and lower federal courts might be expected to cut against Clinton’s findings. States often needed to initiate and justify judicial review in their own constitutional systems (and thus might be expected to cite *Marbury* if it were thought to be a significant authority for such a power), and lower federal courts might be expected to cite a prominent, authoritative case of their own superior court. We can better gauge *Marbury*’s importance over time by assembling a comprehensive, systematic portrait of when and how it was used.

The original dataset was constructed using both Westlaw Campus and Lexis Nexis. A “KeyCite” or “Shepardization” search as well as a keyword search for “Marbury w/2 Madison” was used to construct a comprehensive list of citations in the Supreme Court, federal circuit courts, and state courts. All citations, including those in majority, concurring, and dissenting opinions, as well as references by counsel in the case, were included.

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46. Susan Low Bloch & Maeva Marcus, *John Marshall’s Selective Use of History in Marbury v. Madison*, 1986 WISC. L. REV. 301 (1986); Christopher L. Eisgruber, *John Marshall’s Judicial Rhetoric*, 1996 SUP. CT. REV. 439 (1996). The average number of citations in each U.S. Supreme Court opinion has gradually increased across time, but the average number of precedents cited from any given year has been fairly constant over the course of the Court’s history. See James H. Fowler, Timothy R. Johnson, James F. Spriggs II, Sangick Jeon, & Paul J. Wahlbeck, *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANAL. 324, 333 (2007).

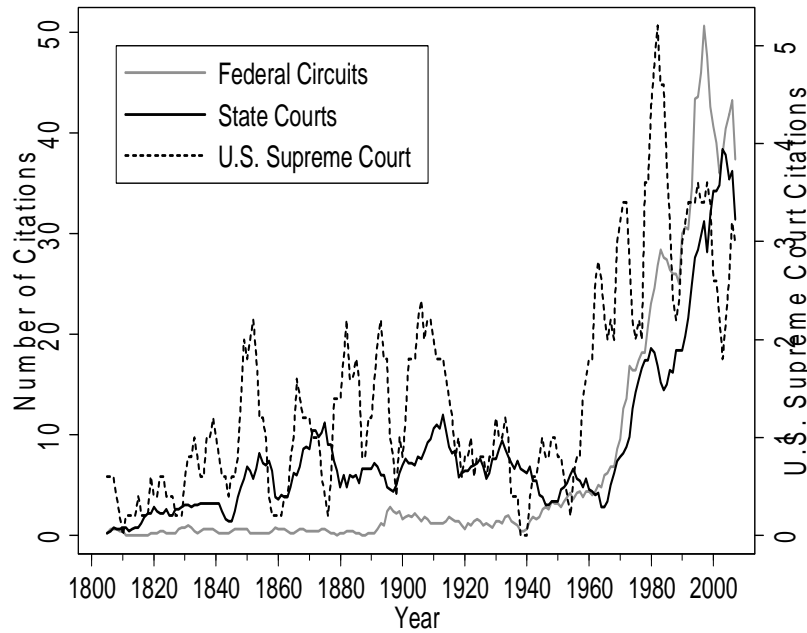


Figure 1: Number of Federal and State Cases Citing *Marbury v. Madison*, 1803–2008. Note: Centered, five-year moving average. U.S. Supreme Court citations on the right axis.

The first step in the analysis focuses on any case that makes a specific reference to *Marbury v. Madison*, regardless of the nature of the case making the citation. The results are shown in Figure 1 (using a centered, five-year moving average to smooth the year-to-year fluctuations). The judicial citation data partly reinforce and partly modify expectations from the existing literature. As expected, the citation pattern shows a marked increase in the rate of citation to *Marbury* in the Supreme Court, circuit courts, and state courts over time, with the number of citations being relatively low and sporadic until the twentieth century.

The citation behavior of the state and federal circuit courts reinforce the evidence from the U.S. Supreme Court and indicate that *Marbury* took on a new significance in the twentieth century. From 1803–1901, before *Marbury* came to prominence as a judicial review case, citations to *Marbury* were relatively infrequent but not rare, with the Supreme Court citing *Marbury* an average of only 0.88 times a year while the federal circuit courts and state courts cited *Marbury* an average of 0.52 and 4.56 times a year, respectively. During the second time period, from 1903–1957, the judiciary was slightly more likely to cite *Marbury*. The Supreme

Court cited *Marbury* an average of 1.05 times a year and the federal circuit courts and states courts cited *Marbury* on average 1.89 and 7.00 times a year from 1902 to 1957. These averages obscure a noticeable but short-lived wave of *Marbury* citations at the turn of the twentieth century, especially in the U.S. Supreme Court. The increased salience of *Marbury* at the turn of the century is consistent with the current literature, which has taken note of both the newfound significance of judicial review during the *Lochner* era and the self-conscious celebration of the centennial of *Marbury* by conservative lawyers.<sup>47</sup> Such efforts may have helped transform the perception of *Marbury*, but their direct influence on the judiciary was not so enduring, and by the New Deal, citations to *Marbury* had dropped to nineteenth-century levels.<sup>48</sup>

The rate that the judiciary cited *Marbury* exploded during the third time period from 1958–2008, with the Supreme Court leading the way and the state supreme courts and federal circuit courts following after a brief lag. The average number of citations per year to *Marbury* during this time period rose to 3.0 in the Supreme Court, 22.5 in the federal circuit courts, and 18.98 in the state courts. While the increase was very significant in all of the courts, it was the most dramatic in the circuit courts. The percent increase in average citations per year from period 2 to period 3 was 190% in the Supreme Court, 1091% in the federal circuit courts, and 171% in the state courts.

If Figure 1 reveals that *Marbury* became increasingly prominent in the twentieth century, it also reveals the fact that *Marbury* was a notable case in the nineteenth century, as well. *Marbury* was frequently cited in both the U.S. Supreme Court and the state courts in the nineteenth century, though not at the levels it would reach in the twentieth century. *Marbury* did not sit in obscurity over the course of the nineteenth century, but rather made an appearance in dozens of cases. The revisionists too often underplay the extent to which *Marbury* was a well-known case in the nineteenth century. The question that Figure 1 raises is how *Marbury* was used by the courts in the nineteenth century and beyond.

As a second step, we supplement the citation analysis with a content analysis of the cases citing *Marbury*. Crucial to Clinton's argument is that

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47. See CLINTON, *supra* note 10; Douglas, *supra* note 30.

48. In a sense, there were more "opportunities" to cite *Marbury* in later years as the number of cases and the number of courts increased, but what is of interest here is the salience and utility of *Marbury* as part of the constitutional rhetoric. Notably, *Marbury* citations do not correlate with the timing of the entry of states into the union and the creation of their own judiciaries. Likewise, *Marbury* citations are not correlated with the overall number of signed decisions issued by the U.S. Supreme Court or the state supreme courts. Total *Marbury* citations and the caseload of the federal circuit courts do follow a similar pattern.

the Supreme Court rarely cited *Marbury* in the nineteenth century, and that those few cites did not reference the power of judicial review or use the case as an authority for the power of judicial review.<sup>49</sup> Figures 2 and 3 report the results of a comparable but broader content analysis of cases citing *Marbury*.

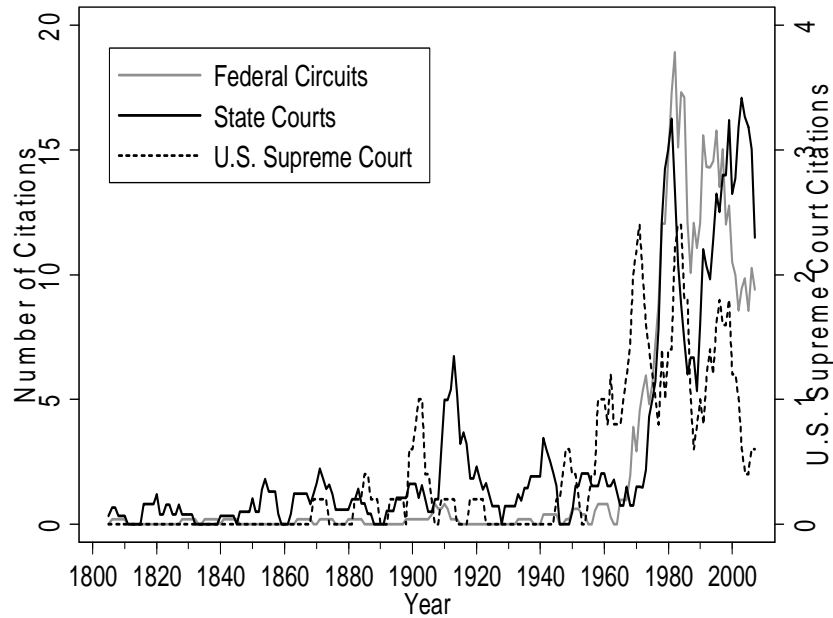


Figure 2: Number of Federal and State Cases Citing *Marbury v. Madison* for the Power of Judicial Review, 1803–2008. Note: Centered, five-year moving average. U.S. Supreme Court citations on the right axis. Figure based on a content analysis of decisions citing *Marbury v. Madison*. Figure includes all U.S. Supreme Court cases and estimate of state and circuit court cases based on content analysis of stratified, random sample of *Marbury*-citing cases.

49. CLINTON, *supra* note 10.

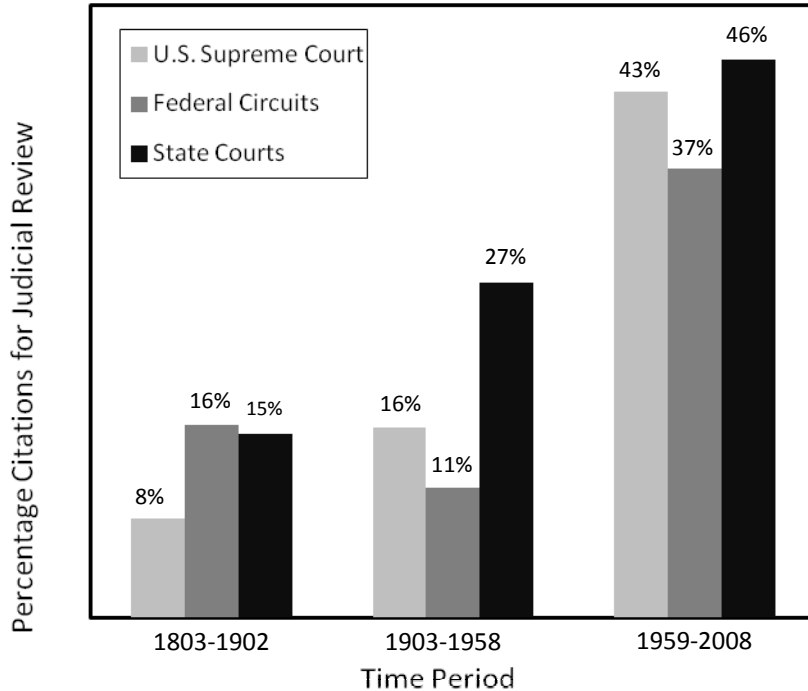


Figure 3: Proportion of Cases Citing *Marbury* for the Power of Judicial Review by Type of Court and Time Period. Note: Figure based on a content analysis of decisions citing *Marbury v. Madison*. Figure includes all U.S. Supreme Court cases and estimate of state and circuit court cases based on content analysis of stratified, random sample of *Marbury*-citing cases.

In order to understand when *Marbury* became important for its judicial review component, we conducted a content analysis of these citations in the Supreme Court, federal circuit courts, and state courts. All U.S. Supreme Court opinions and a stratified, random sample of state supreme court and federal circuit court opinions citing *Marbury* were coded as providing authority for the power of judicial review or for some other proposition. In Figure 2, we show the rate at which *Marbury* was cited specifically for judicial review in the Supreme Court, federal circuit courts, and states courts over time.

Figure 2 shows that *Marbury* was regularly cited as authority for judicial review in the nineteenth century, but at relatively low levels. This use of *Marbury* is easily missed unless the analysis is expanded beyond the

U.S. Supreme Court. Comparing Figure 1 with Figure 2 shows a sharp reduction in the number of cases citing *Marbury*, but a generally similar ratio over time of overall citations to judicial review-specific citations. Figure 2 does show a distinct flattening of judicial review citations in the nineteenth century compared to Figure 1, however, and highlights the temporary surge in *Marbury* citations at the turn of the century not only in the U.S. Supreme Court but also in the state supreme courts. It also suggests the significance of the centennial activities and the *Lochner*-style controversies in increasing the salience of *Marbury* as an authority for judicial review. The justices on the Vinson Court make scattered and modest use of *Marbury*, often in dissent, but the turning point in *Marbury*'s prominence in judicial rhetoric in the postwar period came in *Cooper*.

Figure 3 further illuminates these relationships. In Figure 3 we show the percentage of citations to *Marbury* that refer to it as a precedent for the power of judicial review, organized by type of court and by time period. Most notably, Figure 3 reveals what Figure 2 can only suggest—the proportion of *Marbury*-citing cases that cite it as an authority for judicial review, and how that proportion has changed over time. In the Supreme Court, we found that only 8% of *Marbury* citations during the first time period were for judicial review. This doubled to 16% during the second time period and rose again to 43% during the period after *Cooper v. Aaron*. The federal circuit courts followed a broadly similar pattern. They started from a higher base, with 16% of *Marbury* citations in the nineteenth century using the case as support for the power of judicial review, with a comparable citation pattern in the first half of the twentieth century. In the post-*Cooper* period, however, the proportion of judicial review citations increased to more than a third of all *Marbury* citations (a statistically significant difference at the 0.05 level). The pattern in the state courts borrows from both the circuit courts and the U.S. Supreme Court. The baseline in the nineteenth century is relatively high, but the proportion of judicial review citations increases in a stepwise fashion across the twentieth century. *Marbury* citations for judicial review made up 15% of citations during the first time period, 27% during the second time period, and 46% during the final time period (both differences are statistically significant at the 0.05 level). A comparison of Figure 2 and Figure 3 reveals that, though each type of court does cite *Marbury* as an authority for judicial review in the nineteenth century in a non-trivial percentage of its cases citing *Marbury*, most of those judicial review references come decades after the case was handed down, in the latter part of the nineteenth century.

One issue worth considering is the relationship between the exercise of judicial review and citations to *Marbury*. As the literature of judicial displays of authority suggests, judges are more likely to make reference to

a case like *Marbury* when the political stakes are high and the legitimacy of the court's action is likely to be questioned.<sup>50</sup> We might expect that the Court will cite *Marbury* more when it strikes down statutes and is otherwise at risk of being labeled "activist." More fundamentally, cases involving questions of the constitutionality of statutes may create opportunities for the Court to cite *Marbury* as an authority for the doctrine of judicial review. If the Court is not exercising the power of judicial review, there may be little opportunity or reason to cite *Marbury*. These relationships are harder to test for the lower federal courts and the state courts, due to data limitations, so we focus on the U.S. Supreme Court.<sup>51</sup> As expected, there is a small but positive relationship between citations to *Marbury* by the Court and the number of times that the Court strikes down federal laws in that year (at the 0.05 level).<sup>52</sup> Moreover, there is a substantively small but similarly positive relationship between citations and total number of cases reviewing federal statutes (at the 0.05 level).<sup>53</sup> These relationships are not stable across history, however. The correlation between citations to *Marbury* and cases striking down federal laws is strong in the twentieth century,<sup>54</sup> but loses statistical significance in the nineteenth century.<sup>55</sup> A reverse pattern occurs with cases upholding federal legislation against constitutional challenge. *Marbury* citations are correlated with such cases in the nineteenth century,<sup>56</sup> but not across the entire period.<sup>57</sup> On the whole, there is not a strong correlation between the exercise of judicial review and citations to *Marbury* by the Supreme Court, and the Court frequently exercises the power of judicial review without citing *Marbury*. The presence of cases involving the constitutionality of statutes on the Court's docket may create opportunities (and incentives) for the Court to cite *Marbury*, but the effect is a weak one.

#### IV. Congressional and Executive References to *Marbury*

Government officials other than state and federal judges have also been capable of recognizing the potential significance of *Marbury* and

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50. See *supra* notes 38, 39.

51. The data on Supreme Court review of federal statutes derives from the Judicial Review of Congress database. See Whittington, *supra* note 26, at 1261–66. The period analyzed includes U.S. Supreme Court cases from 1804–2005.

52.  $b=0.173$ ,  $SE=0.04$ .

53.  $b=0.039$ ,  $SE=0.015$ .

54.  $b=0.19$ ,  $SE=0.058$ .

55.  $b=0.201$ ,  $SE=0.115$ .

56.  $b=0.105$ ,  $SE=0.046$ .

57.  $b=0.024$ ,  $SE=0.019$ .



making use of it to bolster their arguments. Legislators referred to *Marbury* in floor debates and committee reports, presidents cited the case in messages, and attorneys general cited it in official opinions. The rhetoric of non-judicial actors provides evidence on how the legal and political communities perceived the case over time, and how they advanced the process of placing *Marbury* in the constitutional canon.

In many ways, the evidence from the elected branches reinforces the judicial citations evidence. *Marbury* citations were less common in the nineteenth century and increased dramatically in the twentieth century outside the courts just as they did inside the courts. Moreover, the significance of *Marbury* also shifted over time, with greater attention towards the relevance of the case to the power of judicial review in the twentieth century than in the nineteenth. These patterns are relatively muted in the executive branch, however, which consistently but rarely cited *Marbury* over time and primarily in regard to questions relating to appointments, removals and commissions.<sup>58</sup>

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58. A notable exception is the 1865 opinion by Attorney General James Speed, who cited *Marbury* in support of the proposition that unconstitutional laws are void from their origin and thus “it is equally the duty of the officer holding the executive power of the Government, for the purposes of his own conduct and action” to determine the constitutionality of a law. 11 Op. Att’y. Gen. 209, 214 (1865). The departmentalist reading of *Marbury* also made appearances in nineteenth century congressional debates, including Senator Bedford Brown’s suggestion that “the opinion of the illustrious Jefferson” that each branch should interpret the Constitution for itself was “recorded in the case of *Marbury vs. Madison*.” 10 REG. DEBATES 867 (1834).

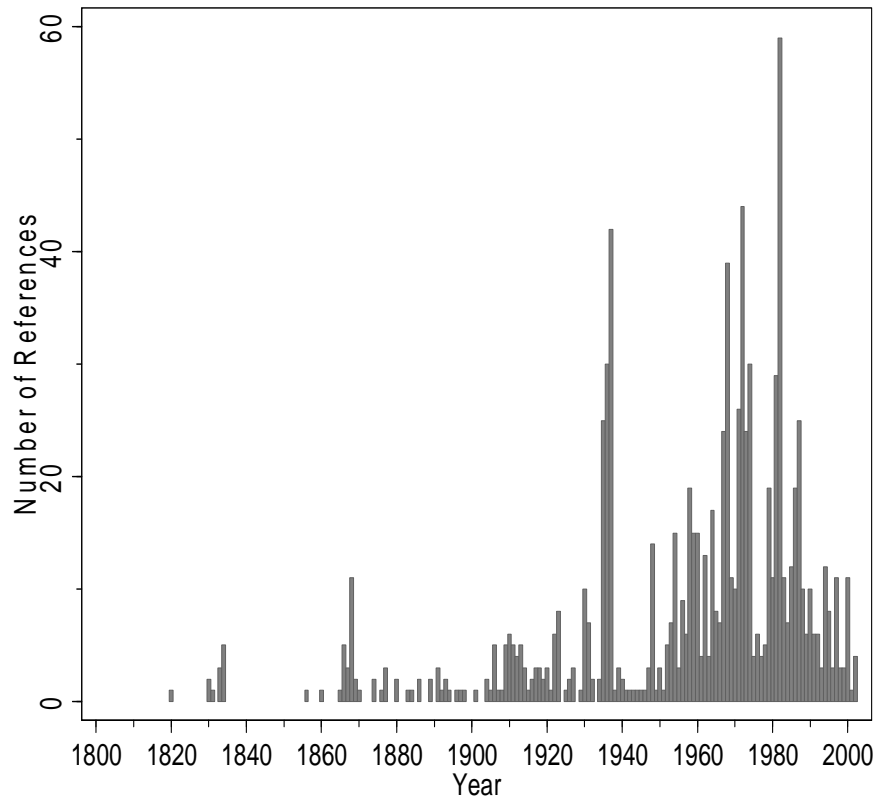


Figure 4: Annual Number of References to *Marbury* in Congressional Debates, 1803–2002.

Figure 4 reports the number of recorded references to *Marbury* in congressional debates each year across time. *Marbury* made an appearance in congressional debates in the nineteenth century, but references were sporadic and rare prior to the Civil War. The annualized pattern reveals that the citation rates in Congress do not progress steadily but are instead highly responsive to particular events. Political controversies over executive appointments and removals in the Jackson administration, the Andrew Johnson presidency, and the late nineteenth century all spurred legislators to cite the case to bolster their position. By contrast, twentieth century debates surrounding the New Deal and Court-packing, *Brown*, the end of the Warren Court and the beginning of the Reagan administration all provoked discussions of *Marbury* and judicial review. For twentieth-century legislators, as for judges, *Marbury* had become a standard part of the discourse when controversies erupted over judicial review, but the case

had tended to play a different role in the nineteenth century when it had the greatest salience in debates over appointments and removals. To a significant degree, *Marbury* was best known (and well known) in the nineteenth century as a case about William Marbury and his commission. Only in the mid-twentieth century did *Marbury* take on its primary modern resonance as a case about the Court's power to invalidate a provision of the Judiciary Act.

### V. Early Commentary on *Marbury*

Judicial citation patterns, as well as evidence from congressional and executive documents, support the notion that *Marbury* was known within the political and legal communities in the nineteenth century but was not exclusively or even primarily known as a case about judicial review. *Marbury*'s importance and identity changed over time, however. *Marbury* became a more prominent, more frequently cited case in judicial and political debates in the twentieth century, particularly in the late twentieth century, and those references increasingly focused on *Marbury*'s relevance to the power of judicial review.

Although judges may have particular reason to look for authorities to support their exercises of judicial review, they are not the only representatives of the legal culture who could recognize or construct the significance of *Marbury*. If judges did not cite *Marbury* on judicial review to any great degree until well into the twentieth century, it remains to be determined how the case was substantively discussed. It is through these substantive discussions that the path of canonization can be traced.

This section reviews a variety of authors who discussed *Marbury*, primarily treatise writers but also judges, memorialists, and legislators, in order to further unpack the meaning of Figures 1 and 2.<sup>59</sup> The focus is on the nineteenth century, for that is where the qualitative transformation in the understanding of *Marbury* takes place. It is clear that by the early twentieth century, *Marbury* is a much discussed part of the constitutional canon and is at the heart of debates about the power of judicial review.<sup>60</sup> The question raised by Clinton and other revisionists is whether *Marbury* held this status from the beginning. In order to investigate the revisionist claims, we should examine how *Marbury* was discussed and used in the nineteenth century and when the characterization of *Marbury* as a case

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59. The following discussion builds on a comprehensive survey of cases and commentaries citing *Marbury* in the nineteenth century. Particular examples in the text are illustrative of broader tendencies.

60. See, e.g., EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 1 (1914); CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 168 (1914).

about establishment of judicial review began to take on its familiar, modern form.

*Marbury* was immediately recognized as a case that was relevant to the power of judicial review. It was not, however, generally held up as being a foundational case that uniquely or critically established the power of judicial review. For many nineteenth century commentators, *Marbury* was simply part of the general constitutional landscape. There were early exceptions such as Joseph Story who did highlight *Marbury* and John Marshall's role in empowering the courts,<sup>61</sup> and they developed a narrative that would become commonplace by the end of the century.

There was little contemporaneous reaction to John Marshall's assertion of the power of judicial review in *Marbury*. As Supreme Court historian Charles Warren thoroughly documented, *Marbury* was a high-profile case that generated substantial public discussion and controversy.<sup>62</sup> Public comment at the time revolved around other questions raised by the case, most notably the chief justice's assertion that the courts could monitor and correct how cabinet members conducted their duties. The near silence surrounding the discussion of judicial review in *Marbury* sharply contrasts with the public notice taken of the power during earlier controversies and following earlier decisions, including the determination by the federal circuit courts in the 1790s that provisions of the Invalid Pensions Act was unconstitutional.

The *Marbury* opinion had high prestige and salience in the nineteenth century in the political and administrative law context. As Figure 1 illustrates, *Marbury* was routinely discussed in the courts in the nineteenth century, but for the substantive content that is frequently ignored today. It was in this context that Justice Joseph Story extolled the case in a circuit court opinion as "the great case of *Marbury v. Madison* . . . great, not only from the authority which pronounced it, but also from the importance of the topics which it discussed."<sup>63</sup> Similarly, when state judges wrote paeans to the "celebrated case"<sup>64</sup> of *Marbury* and talked about it as "one of the ablest arguments of Chief Justice Marshall," it was not for his establishment of the power of judicial review but for his substantive defense of the constitutional jurisdiction of the courts and the prohibition on legislatures

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61. JOSEPH STORY, *Judiciary – Organization and Powers*, in 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 428–33 (1833).

62. CHARLES WARREN, 1 THE SUPREME COURT IN UNITED STATES HISTORY 245–62 (1926).

63. *Johnson v. United States*, 13 F. Cas. 868 (D. Me. 1830).

64. *G. & D. Taylor & Co. v. R.G. & J.T. Place.*, 4 R.I. 324 (1856).

“imposing on those Courts a succession of new duties.”<sup>65</sup> In 1860, Republican Representative James Hale sought to deflate judicial prestige somewhat and so reminded his colleagues of the “famous case” of *Marbury* because it represented a great clash between the chief justice and the president over the mandamus power and the completion of commissions.<sup>66</sup> *Marbury* revisionists have had a tendency to downplay the nineteenth-century significance of the case, but such casual references by judges and legislators to the “great case” of *Marbury* should temper that inclination. *Marbury* was memorable for many things, and many nineteenth-century commentators focused on the politics surrounding the case or the substantive matters of law discussed in Marshall’s opinion when recalling the case and tracing its lessons. Those traits made it an attractive candidate for transmission and canonization when interest did eventually turn to judicial review.<sup>67</sup>

As the revisionists would expect, the earliest cases that took note of *Marbury* at all as a precedent for judicial review did not tend to give inordinate attention to it. U.S. District Court judge John Davis, for example, dealt with *Marbury* in a two-sentence footnote in his opinion upholding the constitutionality of the Jeffersonian embargo in *United States v. The William* (1808).<sup>68</sup> Judge Davis did not seem to think there was any question to be raised about “the duty of the court” to make a “comparison of the law with the constitution.” But the question of whether the courts could properly invalidate legislation that did not contradict “express provisions” of the Constitution was more difficult, and Davis canvassed a range of authorities to illuminate that issue. He gave sustained attention to various circuit court and Supreme Court decisions from the 1790s that had evaluated the constitutionality of state and federal laws. *Marbury* simply was in “affirmance of the general doctrine, exhibited in the cases cited in the text.”<sup>69</sup> Similarly, the South Carolina Constitutional Court of Appeals

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65. *Caulfield v. Hudson & Hudson*, 3 Cal. 389 (Ca. 1853).

66. CONG. GLOBE, 36th Cong., 1st Sess. 762 (1860).

67. The California Supreme Court discussed *Marbury* and the mandamus power in language eerily similar to the famous line in *Cooper v. Aaron*, and suggests that the gap between two sorts of powers was not vast. “The power of the Courts to interfere in this behalf is resisted on the ground that the power of the Legislature is political in its character, and cannot be controlled, and that the duties devolved up the officers are also political, and cannot be interfered with by the judiciary. . . . The act of drawing a warrant, or paying money out of the treasury, is, in most cases, merely ministerial, and in such case the officer is amenable to the Courts and bound by their orders. This proposition was determined in the case of *Marbury v. Madison*, by the Supreme Court of the United States, as early as 1803, and has ever since been regarded as the settled law of the country.” *Nougues v. Douglass*, 7 Cal. 65, 80 (1857).

68. *United States v. The William*, 28 F. Cas. 614 (D. Mass. 1808).

69. *Id.* at 618.

included *Marbury* as part of a string cite along with other state and federal cases and St. George Tucker's *Commentaries*<sup>70</sup> in support of the proposition that each "department of the government, is the constitutional judge of its own powers; each within its own sphere" and that judges are bound to "refuse to execute" statutes "contrary to the manifest tenor of the constitution."<sup>71</sup> Pennsylvania's court similarly emphasized Tucker's treatise and Justice Patterson's circuit court opinion in *Vanhorne's Lessee v. Dorrance*<sup>72</sup> before adding that Marshall's opinion in *Marbury* "strengthened and confirmed the sentiments I have ever entertained" (the defense counsel had noted that the power of judicial review "had been repeatedly affirmed by judicial decisions" but did not include *Marbury* in his list of authorities).<sup>73</sup>

As time passed, both lawyers and judges included *Marbury* in a fluctuating list of state and federal cases and extrajudicial materials that provided authority for the proposition that unconstitutional acts were null and void. Often, *Marbury* was simply part of a lengthy string cite as in the New Hampshire case of *Merrill v. Sheburne* (1818),<sup>74</sup> or the Louisiana case of *Louisiana Ice Co. v. State National Bank* (1880).<sup>75</sup> Sometimes, *Marbury* was named as part of a shorter list of examples of courts exercising the power of judicial review, or was even allowed to stand on its own, but unadorned with any description of its particular importance in establishing judicial review. For example, the Indiana case *Dawson v. Shaver* (1822) matter-of-factly cited *Emerick* and *Marbury* to support its point that "the duty of the Court is imperative, and its authority is unquestionable" to declare unconstitutional statutory provisions null and void.<sup>76</sup> U.S. District Judge Robert Wells included *Marbury* along with *Vanhorne's Lessee* and the *Federalist Papers* to lend support for "the principles intended to be established by the framers of the constitution; and . . . established judicial principles" when writing one of the few antebellum lower court opinions declaring a federal law unconstitutional. This was also one of the very few nineteenth century references to *Marbury* for the power of judicial review in a federal court opinion.<sup>77</sup> Legislators showed a similar tendency throughout the first decades of the nineteenth century, when they

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70. ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES (1803).

71. *White v. Kendrick*, 1 S.C.L. 469 (1 Brev.) (1805).

72. *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304 (1795).

73. *Emerick v. Harris*, 1 Binn. 416 (Pa. 1808).

74. *Merrill v. Sheburne*, 1 N.H. 199 (1818).

75. *Louisiana Ice Co. v. State Nat'l Bank*, 1 McGl. 181 (La. Ct. App. 1880).

76. *Dawson v. Shaver and Another*, 1 Blackf. 204 (Ind. 1822).

77. *In re Klein*, 14 F. Cas. 719 (D. Mo. 1843).

referenced *Marbury* in relation to judicial review. During the South Carolina nullification debate, for example, Senator Miles Poindexter asserted that “[a]ll parties agreed” at the time of the founding that unconstitutional laws were “absolutely null and void,” and he pointed out that this “principle has often been recognized by judicial decisions, both in the federal and the State courts.” *Marbury* was simply one of several cases “on this point.”<sup>78</sup> During the Reconstruction debates, Senator Reverdy Johnson leapt to correct the suggestion that there had been doubts at the time of the founding about the power of judicial review and similarly emphasized the myriad statements and decisions in support of such a power. Marshall’s careful exposition of the power in *Marbury* was “for the purpose, not of satisfying the minds of the court that they had the power to declare an act of Congress unconstitutional, but to satisfy the public mind” that the justices had done “their duty” while exercising such a power.<sup>79</sup> By the mid-nineteenth century, however, some judges had already found Marshall’s language to be particularly quotable, and *Marbury* was cited not for its importance but for its eloquence. Thus, the Iowa Supreme Court provides an extended excerpt from the case with the preface, “Chief Justice Marshall lays down the doctrine in the following clear, pointed and forcible language.”<sup>80</sup>

Yet there were isolated exceptions in the state courts in the early nineteenth century that seemed to attribute greater significance to *Marbury*. Judge John D. Cook, a short-tenured Whig on the Missouri Supreme Court, sounded an exceptionally modern note at the conclusion of his opinion in *Baily v. Gentry* (1822), writing “[s]ince the case of *Marbury v. Madison* . . . this question [of the judicial authority to decide “on the validity of the acts of the Legislature”] has been generally looked upon as settled.”<sup>81</sup> Somewhat more ambiguously, in an early alcohol prohibition case the Indiana Supreme Court rebutted the suggestion of the state’s attorneys that the safety of the people was the supreme law by observing that there were constitutional barriers to legislative power that the judiciary was obliged to enforce, and that “[t]his duty of the judicial department, in this country, was demonstrated by chief justice Marshall, in *Marbury v. Madison* . . . and has since been recognized as settled American law.”<sup>82</sup> This sort of “since *Marbury*” rhetoric is familiar to modern ears, especially after *Cooper*, but such characterizations of *Marbury* were uncommon in the early nineteenth

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78. 9 REG. DEBATES 630 (1833).

79. CONG. GLOBE, 40th Cong., 2d Sess. 772 (1868).

80. Reed v. Wright, 2 Greene 15 (Iowa 1849).

81. Baily v. Gentry and Wife, 1 Mo. 164 (Mo. 1822).

82. Beebe v. State, 6 Ind. 501 (1855).

century. Somewhat differently, Pennsylvania's Judge John Gibson famously singled out *Marbury* for special criticism in his opinion in *Eakin v. Raub* (1825), contending that "although the right in question ["to declare all unconstitutional acts void"] has long been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall."<sup>83</sup> Gibson's idiosyncratic dissent had little influence with his contemporaries until it was recovered and given new attention and status by James Bradley Thayer and other scholars concerned with *Marbury* and the history of judicial review at the turn of the twentieth century.<sup>84</sup> Even these ambiguous statements of *Marbury*'s significance were highly unusual in the nineteenth century judiciary. These three references were very much the exceptions to the more common pattern noted above, and collectively they were hardly clear in indicating a belief that John Marshall had created or established a power of judicial review.

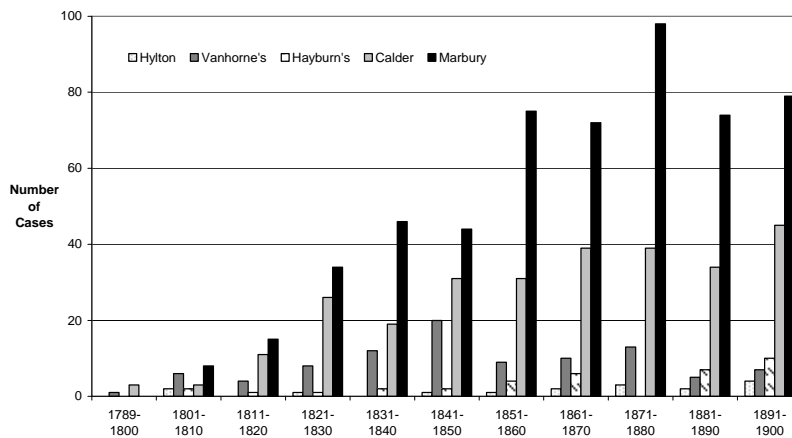


Figure 5: Number of Federal and State Cases Citing Early Federal Judicial Review Cases, 1789–1900.

83. *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825).

84. CLINTON, *supra* note 10, at 128.



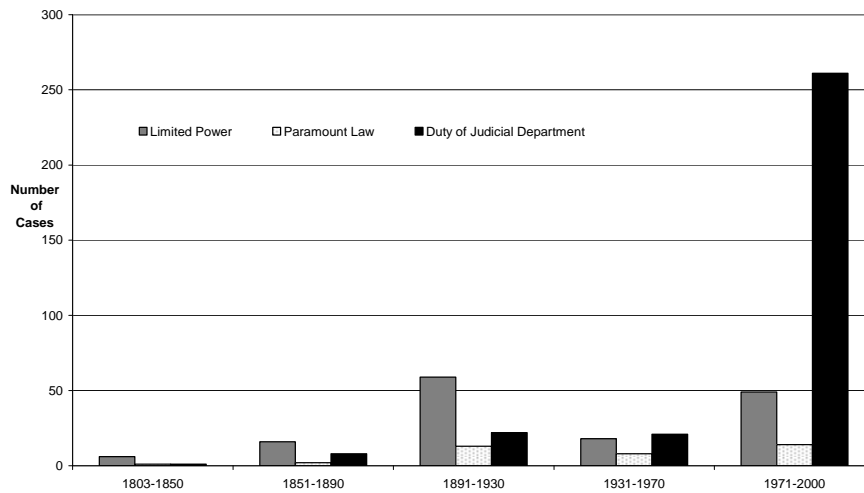


Figure 6: Number of Federal and State Cases Quoting from *Marbury v. Madison*, 1803–2000. Note: Includes all state and federal cases quoting from select lines of the *Marbury* opinion from 1803–2000, found using Westlaw. “Duty of Judicial Department” category includes cases quoting from “emphatically the duty and province of the judicial department to say what the law is.” “Paramount Law” category includes cases quoting from “constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts.” “Limited Power” category is a composite including cases quoting from any of the following: “giving to the legislature a practical and real omnipotence”; “the powers of the legislature are defined, and limited”; “distinction, between a government with limited and unlimited powers, is abolished”; “to what purpose are powers limited.”

*Marbury* was an oft-cited example of the judicial review power, but it had not been generally elevated by nineteenth-century judges to canonical status as the wellspring of the power of judicial review. Figures 5 and 6 shed additional light on the process by which *Marbury* gained new significance in the courts. Figure 5 traces the fate of some of the competing candidates for canonization as the preferred cite for the power of judicial review. The figure includes all citations in state and federal courts to several federal cases that were commonly included in early string cites on the power for judicial review, including *Hylton*,<sup>85</sup> *Vanhorne’s*,<sup>86</sup> *Hayburn’s*,<sup>87</sup> *Calder*,<sup>88</sup> and *Marbury*. The early importance of *Marbury* as “the mandamus case” gave it a salience and staying power that carried it

85. *Hylton v. United States*, 3 U.S. 171 (1796).

86. *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304 (1795).

87. *Hayburn’s Case*, 2 U.S. 409 (1792).

88. *Calder v. Bull*, 3 U.S. 386 (1798).

through the nineteenth century. Meanwhile, other cases that had been routinely paired with *Marbury* or that had overshadowed *Marbury* as authorities for the power of judicial review were less cited for other points of law and gradually dropped from judicial opinions as leading precedents for the power of courts to nullify unconstitutional laws. No single state case ever achieved the same universality of reference as the federal cases, and extrajudicial sources passed in and out of favor over time.

Part of the explanation for the rise of *Marbury* appears to be its quotability. As string cites on the authority of courts to exercise the power of judicial review declined, favored quotes from *Marbury* replaced them. Here too, however, Marshall proved to be a man for all seasons. As Figure 6 illustrates, judges up until the New Deal favored Marshall's bold language on unchanging constitutional limits on legislative power. This was the John Marshall featured in *In re Jacobs* (1885), the landmark New York labor regulation case that helped launch the *Lochner* era.<sup>89</sup> Judges have in recent decades overwhelmingly followed *Cooper* in favoring Marshall's sentence on the judicial authority to say what the law is. A post-1980s resurgence in Marshallian language on constitutional limitations is visible in Figure 6 as well, reflecting renewed interest by the courts in the possibility of enforcing enumerated powers. Marshall's line about the Constitution being a "superior, paramount law, unchangeable by ordinary means" sits comfortably with an emphasis on both constitutional limits and judicial supremacy, and it has been a less prominent but steady presence in judicial opinions since the *Lochner* era.

The treatise literature of the nineteenth century dealt with *Marbury* in a comparable manner.<sup>90</sup> A review of the major works of the period reveals that *Marbury* was not generally treated with the special reverence that it gets in the twentieth century. In his influential digest of all federal court decisions, Richard Peters included twenty-four numbered paragraphs on "general principles" relating to the constitutionality of statutes and judicial review.<sup>91</sup> Peters led the discussion with excerpts from *Vanhorne's Lessee*, and he drew only three of those paragraphs from *Marbury*. Likewise, Nathan Dane's earlier digest of American law included *Marbury* in a string cite on the judicial duty to declare unconstitutional statutes void.<sup>92</sup> By contrast, in his digest limited to Supreme Court decisions, Justice Benjamin

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89. *In re Jacobs*, 98 N.Y. 98 (1885).

90. Douglas, *supra* note 30; CLINTON, *supra* note 10.

91. RICHARD PETERS, 2 DIGEST OF THE DECISIONS OF THE COURTS OF THE UNITED STATES 618-19 (1860).

92. NATHAN DANE, 6 A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 614 (2d ed., Cummings, Hilliard & Co. 1824).

Curtis simply cited *Marbury* for the first proposition under his constitutional law heading: “An act of congress repugnant to the constitution is not law.”<sup>93</sup>

Early constitutional commentaries were matter-of-fact about the judicial authority to interpret the Constitution and set aside unconstitutional statutory requirements. *Marbury* was not generally identified as playing a pivotal or foundational role in the creation or development of the power of judicial review in the major treatises of the first decades of the nineteenth century (with two significant exceptions to be discussed below). Henry St. George Tucker observed that the “power to pronounce a law unconstitutional has been ably and successfully maintained on some memorable occasions,” and listed several examples. However, he provided an extended quote from *Marbury*, explaining in “that case the argument is condensed by Judge Marshall with his usual force.”<sup>94</sup> In the second published edition of his constitutional law lectures at Columbia, William Duer added an extended footnote with precedents for courts declaring acts of legislatures “void as against the Constitution.”<sup>95</sup> He did not include *Marbury* in his list, and the authority that he chose to discuss in the body of his original lecture was Federalist No. 78. William Rawle discussed, without particular reliance on authority, the judicial power to enforce the Constitution as one of the checks on legislative power.<sup>96</sup> John Norton Pomeroy defended the role of the judiciary as the “final arbiter as to the meaning of the Constitution,” but did not rely on specific precedents to make the point. “In fact, the whole history of the Supreme Court is an authority.” For “important and leading cases,” in which the issue was examined with “a cogency of argument which never has been, and never can be, answered,” Pomeroy pointed the reader to several opinions, *not* including *Marbury*.<sup>97</sup> Thomas Cooley feared “wearying the patience of the reader in quoting from the very numerous authorities upon the subject,” and pointed the reader to a number of judicial and extrajudicial sources, including *Marbury*, but provided in that text an extended quotation from a

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93. BENJAMIN R. CURTIS, DIGEST OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES 101 (1856).

94. HENRY ST. GEORGE TUCKER, 1 COMMENTARIES ON THE LAWS OF VIRGINIA 14 (1831).

95. WILLIAM ALEXANDER DUER, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 126 (2d ed., Cummings, Hilliard & Co. 1856).

96. WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 277 (1825).

97. JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 95 (1868).

speech by Daniel Webster.<sup>98</sup> Rawle and other treatise writers did take note of the substantive significance of *Marbury* as a statement about the constitutional jurisdiction of the courts and the mandamus power.<sup>99</sup>

Published obituaries and eulogies at the time of Marshall's death largely avoided detailed discussions of his work on the Court or references to individual cases, but they did not portray *Marbury* as among his significant accomplishments or the power of judicial review as an unsettled question at the time of his ascension to the Court. Horace Binney's (1835) eulogy may have been the most popular, and it alludes to a variety of important decisions that settled disputed constitutional questions and that were "not to be shaken so long as the law has any portion of our regard."<sup>100</sup> *Marbury* was not among them. Binney did not suggest that judicial review was an open question when Marshall assumed the position of chief justice, or that establishing the power of judicial review was among his accomplishments. Instead, Binney more modestly observes that at the time of Marshall's appointment "in many parts of the greatest difficulty and delicacy, [the Constitution] had not then received a judicial interpretation."<sup>101</sup> The judicial "rules of interpretation were still to be settled, and the meaning of its doubtful clauses to be fixed."<sup>102</sup> Similarly, in his eulogy for Marshall, James Bryant took for granted that it was the "prerogative and duty" of the Court to "test" statutes against the requirements of the Constitution.<sup>103</sup> The praise owed to Marshall was not in creating or establishing such a power but in how he exercised the responsibility with which he had been entrusted. *Marbury* was observed

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98. THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 45–6 (3d ed., 1874). The relative insignificance of *Marbury* to Cooley can be seen in his comparable and more extensive discussion of the power judicial review of statutes in a later treatise. In his *General Principles of Constitutional Law*, Cooley illustrated his discussion with numerous cites to judicial decisions, primarily by state courts, but did not cite or mention *Marbury* at all. THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 144–55 (1880). *Marbury* was treated as a case about judicial oversight of the executive. *Id.* at 157. Henry Wade Rogers, dean of the Michigan Law School, later made the point even more explicit, when introducing a set of lectures by Cooley and others: "Before the Federal Constitution was framed the constitutions of the several States had established supreme courts within their States, and those courts exercised the power of declaring legislative acts void, when in conflict with their respective constitutions, before ever the Supreme Court of the United States asserted a similar power in 1803, in the great case of *Marbury v. Madison*." Henry Wade Rogers, *Introduction, in CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW* 10 (1889).

99. Rawle, *supra* note 96, at 216.

100. HORACE BINNEY, AN EULOGY ON THE LIFE AND CHARACTER OF JOHN MARSHALL 61 (1835).

101. *Id.* at 57.

102. *Id.* at 64.

103. JAMES R.M. BRYANT, EULOGIUM ON CHIEF JUSTICE MARSHALL 12 (1835).

only for the purposes of illuminating Marshall's self-restraint, in "refusing to exercise a prerogative" granted to him by Congress but unauthorized by the Constitution.<sup>104</sup>

James Kent and Joseph Story were two notable exceptions in laying the groundwork for the canonization of *Marbury*. Personal friends and ideological allies, they both wrote highly influential treatises that appeared near the end of Marshall's tenure on the Court, whom they held in great admiration. In his *Commentaries on American Law*, Kent provides a lengthy discourse on judicial review. Not only did the "courts of justice have a right, and are in duty bound, to bring every law to the test of the constitution" but the "judicial department is the proper power in the government to determine whether the statute be or be not constitutional."<sup>105</sup> Only by exercising "the exalted duty of expounding the constitution, and trying the validity of statutes by that standard" will the courts be able to protect the people from "undue and destructive innovations upon their chartered rights."<sup>106</sup> Kent thought this to be "a settled principle in the legal polity of this country," and he traced its "progress" from *The Federalist Papers* through judicial decisions in the federal circuit and state courts.<sup>107</sup> His narrative culminates in *Marbury*. Until 1803, "this question . . . was confined to one or two of the state courts, and to the subordinate, or circuit courts of the United States." Only in *Marbury* did the question receive "clear and elaborate discussion" by the "Supreme Court of the United States" and only then was the power "declared in an argument approaching to the precision and certainty of a mathematical demonstration." After that, Kent concluded, the "great question may be regarded as now finally settled."<sup>108</sup> Kent importantly introduces the notion that *Marbury* "settled" the question of judicial review. Kent does not, however, give any indication that the power of judicial review was particularly contested prior to *Marbury* or that John Marshall exercised some creative force in establishing it. His key point of contrast is between "the English government" and "this country," and the primary virtue attributed to Marshall's opinion is to its "clear and elaborate discussion" of the

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104. *Id.* at 13.

105. JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 421 (1826).

106. *Id.* at 422.

107. *Id.*

108. *Id.* at 424. Theodore Sedgwick repeats the Kent narrative in his treatise on interpretation, concluding that, [f]inally, the whole subject was elaborately examined and discussed by the Supreme Court of the United States, and the principle deliberately and definitively settled." THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 479 (1857).

important subject.<sup>109</sup> Kent concludes his discussion of the power of judicial review by emphasizing that there had never been “any doubt or difficulty in this state, in respect to the competency of the courts to declare a statute unconstitutional.”<sup>110</sup> Kent did not indicate whether there had ever been “any doubt or difficulty” in any other state.

In his *Commentaries on the Constitution*, Joseph Story took a similar view of the judicial power. “The universal sense of America has decided, that in the last resort the judiciary must decide upon the constitutionality of the acts and laws of the general and state governments.”<sup>111</sup> By firmly and independently doing so, the courts could “subdue the oppression of the other branches of the government.”<sup>112</sup> To support his point, Story offered extended excerpts from Federalist No. 78 and *Marbury*, observing that the “reasoning of the Supreme Court . . . on this subject is so clear and convincing, that it is deemed advisable to cite it in this place, as a corrective to those loose and extraordinary doctrines, which sometimes find their way into opinions possessing official influence.”<sup>113</sup> Even more than Kent, Story was writing with the Jacksonians, and specifically the threat of state nullification in mind. Neither Kent nor Story was content to merely observe the existence of the power of judicial review; they wanted to celebrate it and emphasize it. For Kent, the power was crucial to “constitutional liberty, and . . . the security of property in this country,” and thus worth an extended discussion.<sup>114</sup> For Story, the authority of the Supreme Court to interpret the Constitution was under threat from other institutions, and so the basis of judicial review needed reinforcement to combat those “extraordinary doctrines.” As a justice of the U.S. Supreme Court writing specifically on the U.S. Constitution, Story was perhaps more inclined to quote from his friend John Marshall’s opinion in *Marbury*, and to leave out references to state cases of the sort that Chancellor Kent included in his more general treatise.

Some legislators in the Civil War era went even further in suggesting that *Marbury* was a special case in the history of judicial review, but they did not always seek to praise the work that Marshall had done. Fueled by lingering concerns over *Dred Scott* and the constitutionality of war and Reconstruction measures, Republican Charles Drake used his brief time in the U.S. Senate to propose eliminating the power of judicial review. He

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109. Kent, *supra* note 105, at 420, 422, 424.

110. Kent, *supra* note 105, at 425.

111. Story, *supra* note 61, at 429.

112. Story, *supra* note 61, at 434.

113. Story, *supra* note 61, at 431.

114. Kent, *supra* note 105, at 425.

singled out *Marbury* as the “leading case” that gave “authoritative exposition of the grounds upon which the dogma rests.”<sup>115</sup> This “judicial claim . . . rests wholly upon an interpretation of its own power by the judiciary, coupled with the unobjecting silence of the legislative department.” Given the insignificance of the statutory provision at issue, Congress had slept during “this first attempt by the judiciary to disregard its laws,” allowing the practice to take hold.<sup>116</sup> Drake was an anti-judicial review gadfly, and he had good reason to minimize the Court’s authority to exercise the power of judicial review. He anticipated later Progressive critics of the Court in singling out *Marbury* as unique and as the illegitimate wellspring of the power of judicial review. But he was not completely alone among congressmen in highlighting *Marbury*. In the previous Congress, Democratic Representative James Beck had pointed to *Marbury* as the case in which “the Supreme Court had defined its own powers and announced what its duties, privileges, and rights are whenever Congress attempts to pass any unconstitutional act,” and had read an extended excerpt from Marshall’s opinion as part of his warning that a Reconstruction measure was unconstitutional.<sup>117</sup> Unlike Drake, Beck had no objection to the Court playing its role, but he agreed with Drake in characterizing *Marbury* as the source of its power.<sup>118</sup> Such claims for the uniqueness or foundational quality of *Marbury* were still not common among legislators during the period, but it is striking that they had begun to emerge at all.

In the late nineteenth century, the significance of *Marbury* in establishing the power of judicial review became a prominent theme. As the power of judicial review became more salient and more contested in the second half of the century, commentators began to suggest that the question of whether the courts had such a power had once been open but had been

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115. CONG. GLOBE 41st Cong., 2d Sess. 89 (1870).

116. *Id.*

117. CONG. GLOBE, 40th Cong., 2d Sess. 546 (1868). Unionist Senator Garrett Davis provided a somewhat more conventional formulation to the same effect when observing that the “great constitutional principle, that an act of Congress in conflict with the Constitution must yield to it, and is of no validity whatever, was first enunciated by the Supreme Court, Chief Justice Marshall being the organ, in the case of *Marbury vs. Madison* . . . since which it has never been questioned.” CONG. GLOBE, 39th Cong., 1st Sess. 935 (1866).

118. By contrast, during the impeachment trial of President Andrew Johnson, Republican Representative Ben Butler went so far as to deny that *Marbury* was even among the precedents for judicial review in his bid to counter the claim that other branches could realistically question the constitutionality of congressional statutes. CONG. GLOBE, 40th Cong., 2d Sess. Supp. 36 (1868).

permanently closed by Marshall's decisive action.<sup>119</sup> George van Santvoord's popular *Sketches of Lives of the Chief Justices* was initially published just before the Civil War, and was republished in a series of highly successful new editions in the decades after. He praised *Marbury* as "[o]ne of the most important of these cases of constitutional construction, as it is the earliest in point of time," and as containing an argument that "has ever since been regarded as the fundamental principle, the very sheet anchor of the Constitution, namely, that it is the right and the duty of the judicial department to determine the constitutionality of a legislative act." Although van Santvoord admitted that "this principle had, indeed, been asserted at an earlier period" by other judges, he offered what would become an influential claim about the importance of *Marbury*. Van Santvoord asserted that despite such cases as *Dorrance*, this principle of judicial review "does not appear to have been considered by the professional mind as settled."<sup>120</sup> As evidence, he pointed to Justice Samuel Chase to suggest that the power of judicial review was an open question in 1803. Chase had hedged in *Calder v. Bull* (1798), a case involving a challenge to a state law under a state constitution, "[w]ithout giving an opinion, at this time, whether the Court has jurisdiction to decide that any law made by Congress is void, I am fully satisfied that this Court has no jurisdiction to determine that any law of any State Legislature contrary to any Constitution of such State is void."<sup>121</sup> He had likewise said in a circuit court opinion of *Cooper v. Telfair* that "all acts of the Legislature in direct opposition to the provisions of the Constitution would be void; yet it still remains a question *where the power resides to declare them void*" (emphasis added by van Santvoord). Van Santvoord carefully neglected to quote Chase's next sentence in that opinion, in which he observed that although "there is no adjudication of the Supreme Court itself upon this point" as of 1800 (the court reporter would later add a footnote taking account of *Marbury*), the existence of the power of judicial review was "expressly admitted by all this bar," had been individually ruled on by Supreme Court justices sitting in circuit, and was not thought to be in doubt by Chase himself. Chase agreed "in the general sentiment" of "the period, when the existing constitution came into operation," that the judiciary

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119. On challenges to the courts in the late nineteenth century, see generally WILLIAM G. ROSS, *A MUTED FURY* (1994).

120. GEORGE VAN SANTVOORD, *SKETCHES OF THE LIVES AND JUDICIAL SERVICES OF THE CHIEF JUSTICES* 353 (1856). By contrast, the competing work of Henry Flanders made only the more modest claim that *Marbury* was the "first case involving a constitutional question of any importance." HENRY FLANDERS, *2 THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE UNITED STATES* 437 (1858).

121. *Calder v. Bull*, 3 U.S. 386 (1798).



could declare unconstitutional acts void.<sup>122</sup> Chase did not believe the power of judicial review was an unsettled question in 1800; he simply believed that there was not yet a Supreme Court opinion endorsing the practice of declaring laws void. Nonetheless, van Santvoord leveraged Chase's words in cases that had frequently been cited as authorities for the power of judicial review to build up the importance of *Marbury* as "the first authoritative exposition of the Court on the subject" and a "final decision" that "put the question at rest then and for ever."<sup>123</sup> Van Santvoord's biographical account of Marshall and his rendition of *Marbury*'s significance became a standard reference in the latter nineteenth century, being cited and quoted on this proposition by publications ranging from the *Albany Law Journal*<sup>124</sup> to *Appleton's Cyclopaedia of American Biography*<sup>125</sup> to Edward Elliott's *Biographical Story of the Constitution*.<sup>126</sup> This led Hampton Carson in his official centennial history of the Court to characterize *Marbury* as "subjecting, once and forever, all executive and ministerial officers as well as Congress itself to the control of the Court."<sup>127</sup>

The clarity and source of *Marbury* was now thought to take on particular significance. Whereas earlier commentators had grouped a wide range of sources as offering support for the power of courts to give binding interpretations of constitutions and declare statutes void, Carson characterized all earlier decisions as "slow, timid, and halting footsteps" that would culminate in the authoritative pronouncement by John Marshall in *Marbury*.<sup>128</sup> The pioneering political scientist W.W. Willoughby took note of earlier cases declaring laws unconstitutional, but argued that what was important was that "in 1803 . . . the principle was first definitely and clearly applied by the Supreme Court."<sup>129</sup> By becoming "involved in a consideration of the fundamental question whether the constitution was to be regarded as an absolute limit to the legislative power," Willoughby suggested, the Court was able to decide the issue "if possible, once for all" and having set it forth the power "has never been seriously questioned since."<sup>130</sup> Other textbooks did the same. Take for example that of Clark

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122. *Cooper v. Telfair*, 4 U.S. 14, 19 (1800).

123. Santvoord, *supra* note 120, at 354.

124. Isaac Thomas, *John Marshall*, 13 ALBANY L.J. 439, 443 (1876).

125. *John Marshall*, 4 APPLETON'S CYCLOPEDIA OF AMERICAN BIOGRAPHY 224 (James Grant Wilson & John Fiske, eds. 1888).

126. EDWARD C. ELLIOTT, BIOGRAPHICAL STORY OF THE CONSTITUTION 130–33 (1910).

127. HAMPTON L. CARSON, 1 THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 9 (1891).

128. *Id.* at 180.

129. W.W. WILLOUGHBY, THE SUPREME COURT OF THE UNITED STATES 39 (1890).

130. *Id.* at 40.

Hare, which called *Marbury* “noteworthy not only for the point directly involved, but as having authoritatively established that the judicial branch of the United States is paramount, and may virtually annul every act or ordinance.”<sup>131</sup> As casebooks became the dominant pedagogical tool for legal training at the turn of the twentieth century, *Marbury* entered the teaching canon.<sup>132</sup> Other cases receded in significance or disappeared altogether.<sup>133</sup>

By the end of the nineteenth century, celebrations of John Marshall’s contribution to judicial review in *Marbury* were in full swing. Chief Justice Waite added to the myth of *Marbury* with his address during the unveiling of the statue of John Marshall on the fiftieth anniversary of his death. According to Waite, by the time of Marshall’s ascension to the bench, “nothing had been done judicially to define the powers or develop the resources of the Constitution.”<sup>134</sup> Waite simply stated that the Supreme Court announced “for the first time” in *Marbury* that “it was the duty of the judiciary to declare an act of the legislative department of the Government invalid if clearly repugnant to the Constitution.”<sup>135</sup> This was the only decision of Marshall’s that Waite singled out in his speech, and it was also singled out in similar terms by representatives of the Philadelphia bar who helped fund the statue. The British commentator James Bryce singled out *Marbury* as the “famous judgment” that “laid down” the doctrine that courts gave binding interpretations of the Constitution.<sup>136</sup>

By the end of the Gilded Age, the authority of courts to control legislatures was increasingly contested but was also being held up as essential to the constitutional enterprise. *Marbury* became the symbol of this feature of American constitutionalism. Other features of *Marbury* that had made the case of great importance to judges and lawyers earlier in the nineteenth century were deemphasized. *Marbury* was repositioned as a case centrally about judicial review, which in turn was regarded as essential to “constitutional liberty” and “security of property,” as Kent had argued a half century before.<sup>137</sup> Henry Hitchcock, a co-founder and eighteenth president of the American Bar Association, declared that the “power of the

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131. J.I. CLARK HARE, 2 AMERICAN CONSTITUTIONAL LAW 1169 (1889).

132. EMLIN MCCLAIN, A SELECTION OF CASES ON CONSTITUTIONAL LAW (1900); JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW (1894).

133. CLINTON, *supra* note 10, at 164.

134. MORRISON R. WAITE, EXERCISES AT THE CEREMONY OF UNVEILING THE STATUE OF JOHN MARSHALL 16 (1884).

135. *Id.* at 19–20.

136. JAMES BRYCE, 1 THE AMERICAN COMMONWEALTH 366 (1888).

137. Kent, *supra* note 105, at 454.

court to declare void an Act of Congress repugnant to the Constitution” was “determined” and “establish[ed]” in *Marbury*. Hitchcock took note of the fact that others had tended to dwell on the “immense importance” of the decision for subjecting executive branch officers “to the control of the courts,” but he believed that it was Marshall’s “demonstration” of the power of courts to void legislation that “lies at the very root of our system of government.”<sup>138</sup> Hitchcock’s emphasis on the importance of judicial review was echoed by others at the turn of the century. Justice David Brewer told the New York Bar Association that the “salvation of the nation” depended on the “independence and vigor of the judiciary” that would not “yield to the pressure of numbers, that so-called demand of the majority.”<sup>139</sup> Similarly, Justice Stephen Field warned during the centennial celebration of the Supreme Court that only with the support of the people and the bar could the judges be expected to act with necessary “fearlessness” and guard against “unrestrained legislative will . . . [and] arbitrary power.”<sup>140</sup> In his presidential address to the American Bar Association, John F. Dillon warned his colleagues of the “despotism of the many—of the majority” and called on them to “defend, protect and preserve” the constitutional provisions and the power of judicial review that had been put in place as “the only breakwater against the haste and the passions of the people.”<sup>141</sup> It was Dillon who organized a national celebration of “Marshall Day” in honor of the appointment of the great chief justice, and who helped mobilize the memory of John Marshall and the canonization of *Marbury* as supports for the maintenance and exercise of judicial review at the turn of the twentieth century.<sup>142</sup>

Ironically, the supporters of judicial review at the end of the nineteenth century preferred to rest their case on the historical reputation of a single individual—John Marshall—and in doing so downplayed the other authorities for judicial review that predated the mandamus case. Where earlier judges and commentators, like Justice Chase, had tended to

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138. Henry Hitchcock, *Constitutional Development in the United States as Influenced by Chief-Justice Marshall*, in CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW 77 (1889).

139. DAVID J. BREWER, PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION, SIXTEENTH ANNUAL MEETING 47 (1893).

140. Stephen J. Field, *The Centenary of the Supreme Court of the United States*, 24 AM. L. REV. 351, 359 (1890).

141. JOHN F. DILLON, REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 206, 211 (1892).

142. See Douglas, *supra* note 30, at 398–403; MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 209–11 (1987); CLINTON, *supra* note 10, at 182–83.

emphasize the “general sentiment”<sup>143</sup> of the period as expressed in extrajudicial sources, state cases, federal circuit court cases, and Supreme Court cases, late-nineteenth century commentators and judges tended to give exclusive emphasis to *Marbury* as an authoritative statement on the power of the courts to enforce constitutional limits on legislatures. On one hand, this focused attention on the “clear” and “forcible”<sup>144</sup> language of John Marshall and on the prestige of the author and institution, and traded on the already established importance of *Marbury* as a case about executive power and court jurisdiction. On the other hand, this emphasis opened up the argument to the vulnerability that Marshall might have usurped authority and invented the power of judicial review out of whole cloth at the late date of 1803. Regardless, both sides of the Progressive era debates agreed on *Marbury*’s importance to the doctrine of judicial review, and variations of the claim that Chief Justice John Marshall and the Supreme Court had done something special in 1803 to establish a power of judicial review were common by the early twentieth century in a way that they had not been through most of the nineteenth century.

### Conclusion

*Marbury* is now firmly entrenched in the constitutional canon, and it stands most preeminently for the power of courts to authoritatively interpret constitutions and nullify laws that they believe violate constitutional requirements. The U.S. Supreme Court itself now readily points to *Marbury* as “establish[ing] beyond question” the power of judicial review.<sup>145</sup> Nothing is more basic to modern cultural literacy about American constitutionalism than to attribute the creation of the power of judicial review to John Marshall and *Marbury v. Madison*.

This construction of *Marbury* is of modern origin. *Marbury* became the flashpoint for debates over the legitimacy of judicial review of legislation during the *Lochner* era. Revisionist scholarship on *Marbury* has suggested that the case was not that important to establishing judicial review in the early republic and that it was not seen as an especially significant case in the early republic. This Article replicates and extends the existing work on the reception and use of *Marbury*, shedding light on its meaning over time, and on the process of constitutional canonization and the transmission and transformation of precedents.

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143. *Cooper v. Telfair*, 4 U.S. 14, 19 (1800).

144. *Reed v. Wright*, 2 Greene 15 (Iowa 1849).

145. *United States v. Lopez*, 514 U.S. 549, 575 (1995).

Our findings reinforce and modify the lessons of the existing literature on *Marbury* and on the theory of the constitutional canon. Our extended citation analysis from federal and state courts and legislative and executive documents, along with our qualitative analysis of judicial opinions and legal commentators support the view that *Marbury* did not carry the meaning and significance relative to the power of judicial review in the early nineteenth century that it carries now. At the same time, we believe earlier scholars have gone too far in concluding that *Marbury* was of little significance in the nineteenth century. Although the U.S. Supreme Court rarely cited the case in support of its authority to exercise the power of judicial review in its opinions before the twentieth century, it routinely cited *Marbury* for other purposes. Other courts and commentators likewise recognized *Marbury* as being a “great case” from early in the nineteenth century because of its substantive statements about the constitutional jurisdiction of courts and the judicial authority to oversee the executive branch. As a high-profile case standing firmly for the view that the American constitutional system was one of “a government of laws, and not of men,” it was a short step to borrow its authority when judicial review of legislation became more salient in the late nineteenth century.<sup>146</sup> Moreover, *Marbury* was routinely included as part of a set of authorities that were cited to support or demonstrate the power of judicial review in the nineteenth century. *Marbury* was a prime candidate for canonization.

Early commentators varied in whether they treated *Marbury* as a notable case relative to judicial review. Some ignored it entirely. Others highlighted it. Most simply included it in a long list of relevant authorities on the subject. What distinguishes most early discussions of *Marbury* and judicial review from later discussions is context and significance. Early commentators recognized *Marbury* as one of many authorities on the subject, and (for the most part) they gave no particular pride of place to *Marbury* and did not attribute any causal significance for constitutional development relative to judicial review to the Marshall Court’s decision in the case. By the turn of the twentieth century, however, *Marbury* was increasingly allowed to stand on its own as an authority for the power of judicial review and commentators were increasingly attributing special significance to Marshall’s opinion. It was no longer merely a quotable summary of a common sentiment of the founding era. Through force of reasoning and will, *Marbury v. Madison* is now thought to have somehow decisively settled an open question. Most lawyers and judges in the nineteenth century knew better. But the heroic vision of Chief Justice John

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146. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Marshall and his opinion in *Marbury* as active forces in American constitutional history were promulgated by particularly influential advocates in the form of Joseph Story, James Kent, and George van Santvoord. Marshall had the benefit of great publicists.