

CONTENTS

Editors' Preface	ix
Acknowledgments	xi
Introduction	1
1. The Localized Structure of Power	11
2. The Consensus Community	23
3. James Otis and the <i>Writs of Assistance Case</i>	35
4. The Stamp Act and the Townshend Act	45
5. The State Cases and the 1787 Convention	56
6. The Politics of Constitutional Change	68
7. John Marshall	78
8. <i>Marbury</i> and the Crisis of 1801–1803	90
9. The Early Impact of <i>Marbury</i>	107
10. Judicial Review Becomes Politically Charged	119
11. The Judiciary as Protector of Minorities	129
12. The Worldwide Spread of Judicial Review	138
Conclusion: The Relevance of <i>Marbury</i> to Judicial Review Today	147
Chronology	155
Bibliographical Essay	157
Index	165





EDITORS' PREFACE

At first glance, one might wonder why such an old chestnut as *Marbury v. Madison* would merit inclusion in a modern series on landmark cases. After all, not only is the doctrine that the highest court in the land has the duty as well as the authority to decide on the constitutionality of federal and state legislation almost two hundred years old, it has been confirmed innumerable times. The case itself was decided by a unanimous court and did not bring about a revolution in the legal system or the politics of the times. Indeed, its author, Chief Justice John Marshall, crafted it to avoid a direct encounter between the Federalists on the US Supreme Court and President Thomas Jefferson and his new Republican majority in Congress.

The fact remains that the case is an essential part of the adolescence of American democratic republicanism, for in it the Court upheld the rule of law without calling into question the electoral revolution that turned the Federalists out of office and brought in the Jeffersonian Republicans. Marshall and his court also protected the independence of the judiciary and the High Court at a time when these institutions were under attack. Thus, the legacy of the case is not only its doctrinal contribution of judicial review to American constitutionalism but its proof that the Court could remain, if not above all political considerations, at least safe from overt partisanship.

This was no easy task, for as Professor Nelson so incisively demonstrates, Marshall faced two dangers. The first was the Republican animus for a Federalist-dominated judiciary. The second was the temptation to use the courts to further the Federalist program. This included a strong central government and strong courts. Marshall succumbed to neither the fear of the first nor the allure of the second. By insisting upon the traditional view that the task of courts was one of discovering rather than making law, he placed the decision of the Supreme Court out of the reach of both parties.

But later American courts, in a different political context, have changed the way in which judicial review functions. In an age when the consensus that eighteenth-century Anglo-American elites shared has given way to the politics of interest groups, Nelson argues, we have come to see courts as policy-making bodies weighing the com-

peting interests behind the cases brought to the bar. Thus, for us, judicial review becomes something that would be quite foreign to Marshall—a final balancing of the interests.

This is an exciting book, broad in scope and daring in conception. It combines legal history, constitutional theory, and political science. In the final chapter, Nelson goes beyond the boundaries of the United States to apply the lessons of *Marbury* to nations that did not exist when Marshall handed down his decision. For now, these new states face the same issues of law and politics, constitutionalism and partisanship, that Marshall understood so well.



University Press of Kansas

ACKNOWLEDGMENTS

My work on this book, as well as the articles and the chapter of another book from which parts of this book are derived, has resulted in the accumulation of many debts. The research staff of the New York University Law Library fulfilled every request for materials that I presented to it, and the Nassau County Public Library System, which has an excellent American history collection, was equally helpful. I am especially indebted to Ronald Brown, Elizabeth Evans, and Gretchen Feltes, reference librarians at the NYU Law Library, and to Jeffrey Mason, a former reference librarian at the Hewlett-Woodmere Public Library.

I wish to acknowledge permission from Oxford University Press to reprint portions of chapter 7 of William E. Nelson, *The Common Law in Colonial America*, vol. 4: *Law and the Constitution on the Eve of Independence, 1735–1776* (New York: Oxford University Press, 2018). I also acknowledge permission to reprint portions of the following articles:

William E. Nelson, “The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence,” *Michigan Law Review* 76 (1978): 893.

William E. Nelson, “History and Neutrality in Constitutional Adjudication,” *Virginia Law Review* 72 (1986): 1237.

William E. Nelson, “Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860,” *University of Pennsylvania Law Review* 120 (1972): 1166.

Footnotes are available in the earlier chapter and articles.

A draft of the first edition of this book was presented to the Legal History Colloquium at New York University School of Law, and I am indebted to all of its participants for their helpful comments and criticisms, but especially to R. B. Bernstein, Mark Brilliant, Barry Friedman, William LaPiana, and Howard Venable. Thomas Mackey read a draft of the second edition and offered helpful suggestions. My former colleagues Bruce Ackerman, Christopher Eisgruber, and Larry Kramer each contributed in significant ways to the refinement of my thinking as I wrote early articles on *Marbury* and judicial review and then transformed the earlier articles into a book. The late

Edward Weinfeld, himself a judge of the same Olympian qualities as John Marshall, had for years urged me to turn my article on Marshall's constitutional jurisprudence into a book, and he thereby made me especially receptive when Peter Hoffer offered me the opportunity to do so. Hoffer's patient editing and suggestions improved both editions of the book, as did the reader's reports of G. Edward White on both editions and David Thomas Konig and Charles F. Hobson on the second edition. David Congdon, an acquisitions editor at the University Press of Kansas, was especially helpful in positioning this volume in the Landmark Law Cases series.

I also owe an immeasurable debt of gratitude to John Sexton, who made New York University School of Law the best place in the world for the scholarly study of law in general and of legal history in particular. Generous support for the writing of both the first and second editions of this book was provided by the Filomen D'Agostino and Max E. Greenberg Faculty Research Fund of New York University School of Law. I thank Lisa Koederitz and Shirley Gray for all their assistance in shepherding both editions of the book, and Dennis Garcia for his research assistance on the second edition.

I have dedicated the book to my family—my wife, Elaine; my daughter, Leila; and my son, Gregory—because of the relationship between their lives and the principal subject of this book: the origins of the rule of law. With help from Muslim friends and a female Muslim judge who urged us to get Leila out of the country quickly, Elaine and I spent seven weeks in 1974 adopting Leila in Iran, when it was ruled by a shah and secret police rather than law. We learned of young people who had protested against the regime being taken from their parents' homes and never seen again. When Leila's adoption was completed, we congratulated ourselves on saving her from an authoritarian police state and bringing her to safety in rule-of-law America. Four years later we adopted Gregory, who has a Native American genetic heritage, from Guatemala, again with confidence that the rule of law would guarantee his safety in America.

The rule of law is now under challenge, however, and our confidence in our children's safety is shaken. As any reader of the pages that follow will see, I, for one, recognize the limitations of courts and law—in particular, the incapacity of constitutional law to provide full social justice to discrete and insular minorities. The power of

the political process is required to achieve true equality and justice for all. But the rule of law nonetheless serves the important end for which Elaine and I brought Leila and Gregory to America—security and the protection of liberty. The rule of law is a true conservative value. But will Americans support it? In the years to come, people of Leila and Gregory’s generation, as well as people who are younger, will need to decide whether to urge judges to fight to keep America under the rule of law or to continue pressing judges to create a more perfect world, perhaps at the cost, however, of further undermining the one we have long enjoyed.

Woodmere, New York
September 2017



University Press of Kansas



Introduction

When I first wrote a book about *Marbury v. Madison* nearly two decades ago, I called the case “foundational.” Indeed, I thought at the time and continue to think that, along with *Brown v. Board of Education*, *Marbury* is one of the two most significant cases that the Supreme Court of the United States has ever decided. Like everyone else who has written about the case, I concluded that its importance lay in it being the first case in which the Supreme Court “explicitly ruled . . . that it possessed what we now call the power of judicial review, or jurisdiction to examine whether legislation enacted by Congress is consistent with the Constitution.”

I have spent most of the last fifteen years studying and writing about the legal and constitutional history of Great Britain’s thirteen North American colonies. My research has been published in four volumes under the title *The Common Law in Colonial America*. In this work, I have concluded that the power of courts to review the constitutionality of legislation was well established in the United States by the end of the colonial period. *Marbury v. Madison* achieved nothing new or foundational in declaring that the Supreme Court possessed that power.

Nonetheless, *Marbury* still remains foundational. This book asks why *Marbury* is still so important and offers a new understanding of the significance of the case. That new understanding rests, in turn, upon an appreciation that the Supreme Court’s approach to its decision-making process in *Marbury* was almost the polar opposite of its approach to judicial review cases today.

Today we understand that, in deciding whether or not to invalidate an act of a coordinate legislative body, a court inevitably must choose between competing social policies. We believe, for example, that when the Supreme Court decides whether to allow Congress to

adopt a law giving different tax treatment to married same-sex couples than it gives to married heterosexual couples, the Court must make an inevitable policy choice about the treatment to be accorded to same-sex marriage. This tenet that constitutional decisions by the Supreme Court necessarily involve policy choice originated in progressive and legal realist critiques of the Court early in the twentieth century. Over time these critiques resulted in what, until recently, has remained the conventional wisdom about *Marbury*, judicial review, and the Marshall Court.

This conventional wisdom, articulated by progressive historians and legal scholars ranging from Albert Beveridge, Robert G. McCloskey, and J. M. Sosin to Felix Frankfurter and Charles Warren, contended that John Marshall, in deciding *Marbury*, consciously furthered the political goals of the Federalist Party, to which he had belonged—first, by stretching the Constitution’s meaning to increase national power at the expense of state power, and, second, by designing constitutional doctrines, such as judicial review, that protected the upper classes’ privileges against the growing democratic onslaught that in 1829 finally placed Andrew Jackson in the White House.

Frankfurter arguably expressed the conventional view most clearly when he declared in his 1937 book *The Commerce Clause under Marshall, Taney and Waite* that the deepest article of Marshall’s faith was the need for a strong central government, not because the Constitution requires it but because such a government would become “the indispensable bulwark of the solid elements of the nation.” This conventional wisdom continues even today to claim adherents. In one article, for example, Christopher Eisgruber has advanced an eloquent argument that Marshall’s interpretation of the Constitution as a bulwark of national judicial power reflected a policy judgment that the national judiciary was an institution well suited to promoting the happiness and prosperity of the American people.

Nonetheless, during the past several decades, the conventional wisdom has begun to come under attack. Beginning with my own essay “The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence,” historians have advanced new explanations by focusing on what, once it is stated, is obvious—that Marshall and his contemporaries, like all historical actors, understood

only the world in which they grew to maturity and could not foresee the future. As James O’Fallon has observed, we need to understand *Marbury* as a case “born of the bitter political battle of its time” and should not credit its author, Chief Justice Marshall, “with foresight that would honor an oracle.” If we are to comprehend *Marbury* and the Marshall Court, in short, we need to situate them in the context of eighteenth-century legal and political theory, not in the ideological matrix of twentieth- and twenty-first-century progressivism and legal realism.

It must be stated emphatically that few, if any, Americans in the decades before and after 1800 believed that policy choice should be an inherent element in judicial decision making. Such was not the understanding of the framers who drafted the Constitution at the Philadelphia Convention in 1787 or secured its ratification during the year thereafter. Nor was it the understanding of the Marshall Court when it handed down *Marbury v. Madison*. The framers of the Constitution and the justices who decided *Marbury* understood that only an entity possessing sovereignty—that is, the power to make the ultimate policy choices inherent in changing or creating law—could resolve policy questions. Courts, which did not possess sovereignty, could only find the law as it already existed.

But political thinkers in late eighteenth-century America also had been witness to a decades-long battle over the proper location of sovereignty—a battle that had culminated in war and other momentous political events. Classical British political theory, especially as articulated by William Blackstone in his leading treatise, *Commentaries on the Laws of England*, which was published during the 1760s, posited that sovereignty lay with the king in Parliament: that is, only the House of Commons, the House of Lords, and the Crown, acting together in conjunction, could change the law by enacting legislation. But when Parliament gave vent to this theory in the Declaratory Act of 1766, which stated that the king in Parliament could make laws binding on its American colonies in all cases whatsoever, Americans objected. In their view, Parliament could not be their sovereign, since they lacked representation therein.

For the next nine years, Britain persisted in its claim of parliamentary sovereignty over its colonies, and Americans persisted in their rejection of the claim. Finally, in 1776, Americans declared their

independence. Although the Declaration of Independence did not definitively establish the locus of sovereignty, most Americans of the Revolutionary generation assumed that sovereignty lay in the newly independent state legislatures.

Granting full sovereignty to the states, however, left the national government weak, and by the mid-1780s leaders who would come to be known as Federalists began a campaign that culminated in the drafting and ratification of the federal Constitution and in the establishment in 1789 of the federal government. During that campaign, they frequently had to address the issue of sovereignty. They could not leave sovereignty with the states, since state sovereignty made the national government too weak, nor could they place sovereignty in the national government, since Americans who had fought a Revolutionary War against a centralized sovereign government remained too fearful of power to establish a new sovereign national state. During the ratification debates, some Federalists made the intellectual leap of urging that sovereignty lay with the people, not with any governmental body.

There is no need for the purposes of this book to resolve the question of where, in the view of most Americans in the early 1800s, sovereignty—the power to make or change law through the resolution of issues of social policy—lay. If any institution of government was thought in 1803 to possess sovereignty, surely it was not the Supreme Court of the United States. Thus, no one could have thought that the Court, in asserting the power of judicial review, was assuming jurisdiction to make the choices of social policy that only a sovereign could make. In deciding *Marbury v. Madison*, Chief Justice Marshall and his colleagues thus were doing something other than adopting judicial review as we now know it at the beginning of the twenty-first century.

Recent historians and constitutional theorists have offered several suggestions about what the Marshall Court was doing, all of which capture part of reality. One useful book by Charles Hobson, who has been working for many years on a multivolume edition of John Marshall's papers, situates *Marbury* and Marshall's career in the shift from the classical republican political culture of the Revolutionary era, which emphasized the good of the community as a whole, to a liberal political culture emphasizing individual rights and freedom,

which was more or less in place by 1840. Most historians probably would reject Hobson's thesis, since the current wisdom in the profession doubts whether eighteenth-century republicanism differed enough from nineteenth-century liberalism to give either concept much explanatory power. Even if one accepts the current wisdom, however, Hobson's book still has special value as a result of the author's access to information about John Marshall, his Court, and his jurisprudence that no other scholar possesses.

Sylvia Snowiss has authored a second book that places Marshall's *Marbury* decision in a late eighteenth-century context. Her argument draws a distinction between ordinary law, which she claims was routinely enforced in the courts, and fundamental law, such as a constitution, which, in her view, could not be enforced by courts but only by electoral or other political action, ultimately by revolution. Snowiss is surely correct in recognizing that important leaders, such as Thomas Jefferson, author of the Declaration of Independence and future president, understood that the people themselves could enforce fundamental law—a view most Americans no longer hold. But, as we shall see in chapter 1, she underestimates the role of popular law-finding, through the institution of the jury, in the enforcement of ordinary law. Moreover, her distinction, although useful in explaining why the doctrine of judicial review enunciated in *Marbury v. Madison* differed radically from the sort of judicial review practiced by courts today, does not identify the element in the eighteenth-century background of *Marbury* that enabled John Marshall to assert, as he did, the power of the Supreme Court to enforce fundamental law. Snowiss's book, in the end, offers a strong, implicit critique of the sort of broad-ranging, policy-oriented judicial review practiced by many constitutional courts today, rather than an explanation of how the practice came into being historically.

A third book, by Robert Lowry Clinton, does offer such an explanation. Clinton interprets *Marbury* in light of Blackstone's principles of statutory construction, the most relevant of which allowed judges to ignore a statute if its application would result in absurdity, repugnancy, or impossibility of performance, but denied the judiciary power to revise or repeal statutes on grounds of policy. Clinton establishes that American ideas about judicial power at the time of *Marbury* were consistent with Blackstone's principles and that those

ideas changed, so as to allow judicial invalidation of legislation on constitutional policy grounds, only at the end of the nineteenth century. I do not disagree with Clinton's interpretation, do not question that Blackstonian analytical principles were in the air at the time the Supreme Court decided the *Marbury* case, and do not doubt that those principles may have played some role in Marshall's crafting of his opinion. But they do not account for his decision.

The most important recent book is Larry D. Kramer's *The People Themselves: Popular Constitutionalism and Judicial Review*. Kramer shows persuasively that the general public debated constitutional issues repeatedly during the second half of the eighteenth century—issues ranging from the power of Parliament to tax the colonies and regulate colonial life to the form of state constitutions, the adoption of the federal Constitution, and the power of Congress to charter a national bank and regulate political speech. These issues produced a vast amount of printed literature, including such tracts as the *Federalist Papers*; extralegal meetings such as the Continental Congress and the 1787 Constitutional Convention; riotous activity such as the Boston Tea Party; and ultimately the War for Independence. Kramer sees judicial activity during the course of these events as merely a minor part of a vast popular constitutional movement. His history all points toward a normative conclusion—that today's Supreme Court should return the Constitution to the people by deferring to popular judgments on the Constitution's meaning and not imposing the justices' own interpretations in regard to divisive social issues.

My goals and interests in this book are different. Unlike Kramer and prior scholars such as Sylvia Snowiss and the progressive historians, I am not striving to evaluate whether the Marshall Court usurped power or otherwise made a wrong decision in asserting the power of judicial review in *Marbury*. Like Snowiss, as well as Clinton and Hobson, I do believe that judicial review in *Marbury*, which granted judges authority to decide only issues of law and directed them to avoid political decision making, differed significantly from judicial review as it is practiced today, when judges frequently make choices of policy. But, unlike Hobson, I am not concerned whether Marshall's decision in *Marbury* was consistent with classical, eighteenth-century political thought, and, unlike Clinton, I am not

concerned whether the decision was consistent with technical legal doctrines of the Blackstone era.

My main objective is neither to criticize nor to praise *Marbury v. Madison*. Rather, my goal is to assist readers in understanding the decision as a step in the ongoing elaboration of American and, more recently, global constitutionalism. In particular, I hope to establish something different from what other historians have shown—namely, how the Marshall Court, in deciding *Marbury*, was striving to preserve what the justices and nearly all their fellow citizens found best in eighteenth-century constitutionalism, while at the same time accommodating that constitutionalism to new nineteenth-century political realities. I also will attempt in the closing chapters of the book to explain how *Marbury*-style judicial review, which was grounded on a distinction between law and politics, was transformed over the next century and a half into today's judicial review, which we understand inevitably requires judges to resolve contentious issues of constitutional social policy.

My narrative begins with an analysis of the constitutional polity of eighteenth-century colonial British North America. I make two central claims—the first in chapter 1 and the second in chapter 2. The first claim is that coercive power in colonial America was situated mainly in local, usually county, courts and that judges and juries in those courts frequently nullified legislation and other commands of central political authorities. My second claim, however counterintuitive it may seem to Americans at the outset of the twenty-first century, is that mid-eighteenth-century American colonials did not want any government entity to engage in social policy choice. They understood law as fixed and immutable, not as something that government could change in response to shifting conceptions of social good. Indeed, they equated fixed law with liberty, and changeable law with arbitrary rule and tyranny.

From there I move on in chapter 3 to James Otis's initial articulation of the doctrine of judicial review in the *Writs of Assistance Case*. My argument is that Otis was simply describing the practice, with which he was familiar, of judicial and jury nullification of statutes and other central political commands. Having articulated the doctrine in 1761, Otis then disseminated it widely in his 1764 pamphlet, *The Rights of the British Colonies Asserted and Proved*. Chapter 4 next shows

how several colonial judges and lawyers used the doctrine in 1765–1766 in holding the Stamp Act unconstitutional. Chapter 5 turns to judicial review cases in the states following the War of Independence, as well as to the implicit adoption of judicial review at the federal level in the 1787 Constitutional Convention.

Chapter 2, as noted above, focuses on colonial understandings about the fixed nature of law and the undesirability of policy choice. However, during the four decades between the end of the Seven Years' War with France in 1763 and the decision of *Marbury v. Madison* in 1803, Americans engaged in debate with advocates of parliamentary sovereignty, declared their independence, fought a war to establish it, drafted and ratified new constitutions, and put new governments into operation. And, for the first time in American history, the election of 1800 peacefully transferred power from a political group advocating one set of social policies to a rival party advocating opposing policies. Thus, by 1803, the American public could not avoid recognition of the fact that law sometimes did change as a result of policy choice.

But public understanding that some legal change was inevitable did not mean that people found change desirable or that they expected significant amounts of change to continue to occur. Americans still understood that liberty was founded upon fixed and immutable law, however much the democratic political process might debate policy choice and produce social change. The core thesis of this book, examined in chapter 8, is that, in *Marbury v. Madison*, Chief Justice John Marshall drew a line, which nearly all citizens of his time believed ought to be drawn, between the legal and the political—between those matters that most Americans agreed were fixed and immutable, and thus subject to legal control, and those matters open to fluctuation and change, and thus the subjects of democratic politics.

Although the Supreme Court lost some power by withdrawing from political decision making, its withdrawal coincidentally strengthened the law. Before *Marbury*, courts were merely one more government entity performing the same legal-political functions that all other entities performed. After *Marbury*, in contrast, courts and law became distinctive and special, superior to and capable of invalidating political decisions in regard to matters subject to the law. In a

sense, *Marbury v. Madison* thus accomplished what jurists have long assumed it accomplished—it did not establish judicial review, which was already in place, but over time it created the concept of the rule of law as a mechanism capable of controlling excesses generated in the democratic political process.

Marbury's immediate effect was to protect private property from political interference. The vast majority of adult white men in early nineteenth-century America either already owned land or expected to acquire land at some point during their lives. Moreover, they understood that the law protected and should protect ownership rights. Although they also understood that the law regulated property rights, little demand existed at the time for regulation of a redistributive nature. Thus, when the Marshall Court indicated in dictum in *Marbury v. Madison* that the Constitution and its rule of law barred political actors from interfering with rights akin to the right of property in land, virtually all Americans agreed that the Court's decision was correct.

For more than a century after *Marbury*, judges continued to protect private property, as they had always done. In doing so, they could understand that they were preserving the law of property as something fixed and immutable—that they were upholding Marshall's distinction between law and politics. But as vast accumulations of commercial wealth, which conferred monopoly power on its holders and enabled them to dominate others' lives, grew in the late nineteenth century, demands for redistributive regulation grew, and those who demanded the new regulation came to see the judiciary's constitutional protection of established rights as controversial and political rather than as legal and immutable. For some Americans, at least, Marshall's distinction between law and politics began to dissolve, and judicial review, as shown in chapter 10, began to pass into the realm of policy choice.

The demand for redistributive regulation triumphed during the New Deal, and beginning in 1937, New Dealers remade the Supreme Court. Chapter 11 shows how the Court, in turn, made the political choice to abandon its traditional protection of property rights and to enter upon a new role of safeguarding discrete and insular racial, religious, and cultural minorities who could not protect themselves through majoritarian democratic politics. This new role, in turn, in-

volved the Court in the ad hoc balancing of the policy claims put forth by minorities against the claims of legislative majorities.

Thus, judicial review as we know it today came to fruition. And, as chapter 12 shows, it has spread throughout a world that never shared John Marshall's concern in *Marbury v. Madison* about how to distinguish law from politics, but that, like twenty-first-century America, struggles continuously with the issue of reconciling the rights of ethnic, religious, and cultural minorities with the power of dominant political majorities. A conclusion examines the relationship between the changing function of judicial review and the role of policy choice in the judicial process.

