

## **EAKIN v. RAUB: REFUTATION OR JUSTIFICATION OF MARBURY v. MADISON?**

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On February 24, 1803, the United States Supreme Court, for the first time in recorded opinion, invalidated an Act of Congress in the case of *Marbury v. Madison*.<sup>1</sup> Twenty-two years later, Justice John Gibson of the Pennsylvania Supreme Court wrote a now-famous dissenting opinion in the case of *Eakin v. Raub*, discussing at length the circumstances in which judges may and may not declare statutes unconstitutional.<sup>2</sup> This dissent, obscure until its rediscovery late in the nineteenth century by James Bradley Thayer,<sup>3</sup> has come to be regarded by many scholars as the most elaborate, if not the only, contemporaneous rebuttal of Marshall's argument in support of judicial review.

Statements of the alleged *Marbury-Eakin* collision are so numerous as to defy computation. For example, Donald O. Dewey, author of the only full-length book devoted exclusively to *Marbury*, claims that "[b]y 1825, when Justice John B. Gibson of the Pennsylvania Supreme Court undertook a refutation of Marshall in *Eakin v. Raub*, he complained that judicial review had become 'a professional dogma' resting on faith rather than reason."<sup>4</sup> Rocco Tresolini and Martin Shapiro remark that, "The most effective answer to Marshall's argument was given in a dissenting opinion written by Judge Gibson of the Supreme Court of Pennsylvania in the relatively unimportant case of *Eakin v. Raub*, decided in 1825."<sup>5</sup> More recently, Stanley I. Kutler says that Judge Gibson's dissent is

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1. 5 U.S. (1 Cranch) 137 (1803). For an excellent general survey of the background of *Marbury*, see R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 3-16 (1971). See also 2 G. HASKINS & H. JOHNSON, OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 647-51 (1981).

2. 12 Serg. and Rawle 330, 343-58 (Pa. 1825).

3. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 130 (1893).

4. D. DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY V. MADISON 181 (1970).

5. R. TRESOLINI & M. SHAPIRO, AMERICAN CONSTITUTIONAL LAW 74 (3rd ed. 1970).

the "classic judicial refutation" of Marshall's position, and may be viewed as a "point-by-point refutation of Marshall's rationale and as a rejoinder in logical reasoning."<sup>6</sup> According to Robert F. Cushman, Gibson's opinion is perhaps "the most lucid and carefully reasoned answer to Marshall's argument in *Marbury v. Madison*."<sup>7</sup> Rossum and Tarr claim that Gibson "effectively presents, in a dissenting opinion the opposite side of the argument made by Chief Justice Marshall in *Marbury v. Madison*.<sup>8</sup>

In a more moderate vein, Feeley and Krislov appear to perceive a less violent incompatibility between *Marbury* and *Eakin*; they note that "Gibson was dealing with the Pennsylvania Constitution."<sup>9</sup> The implication is that the United States Constitution, Marshall's subject, is a different matter. Albert B. Saye observes that "Justice Gibson begins by pointing out that at common law the English judges had no power to pass upon the validity of statutes and that no express grant of such power is found in the Constitution."<sup>10</sup> Saye does not, however, say which constitution he thinks Gibson was discussing. John Schmidhauser, after commenting upon the dearth of contemporaneous criticism of *Marbury*'s judicial review holding, asserts that judicial review in relation to the separation of powers was fully discussed in *Eakin*.<sup>11</sup> Like Saye, Schmidhauser does not reveal which separation doctrine he thinks Gibson discussed. Finally, Peter Woll, who perhaps approaches more closely than anyone else the assertion of a less-than-complete incompatibility between *Marbury* and *Eakin*, nonetheless reads Gibson's argument as a rebuttal to Marshall's alleged implication of "a general judicial power of review over legislative acts under all circumstances."<sup>12</sup>

In short, the *Marbury-Eakin* commentary appears to fall into two general categories. One group of writers perceives a stark confrontation between Marshall's and Gibson's judicial philosophies. The other group finds a less sharp conflict, yet enough incompatibility to justify setting the opinions alongside one another as representative of differing conceptions of the judicial function in the United States.

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6. THE SUPREME COURT AND THE CONSTITUTION 31 (S. Kutler ed. 1984). See also A. SAYE, AMERICAN CONSTITUTIONAL LAW 32 (2d ed. 1979).

7. R. CUSHMAN, CASES IN CONSTITUTIONAL LAW 12 (6th ed. 1984).

8. R. ROSSUM & G. TARR, AMERICAN CONSTITUTIONAL LAW 72 (1983).

9. M. FEELEY & S. KRISLOV, CONSTITUTIONAL LAW 30 (1985). These authors proceed to acknowledge that others have regarded *Eakin* as a "cogent" critique of *Marbury*, without providing any further explanation.

10. A. SAYE, *supra* note 6, at 32.

11. J. SCHMIDHAUSER, CONSTITUTIONAL LAW IN AMERICAN POLITICS 65 (1984).

12. P. WOLL, CONSTITUTIONAL LAW: CASES AND COMMENTS 23 (1981).

My aim is to provide an alternative account of the relation between the two opinions, suggesting that they are largely if not wholly consistent, and that the infliction of an *Eakin-Marbury* dichotomy upon several generations of students in constitutional law courses may have contributed more to misunderstanding than to enlightenment. In order to establish the plausibility of such an interpretation, it is necessary to examine the opinions more closely, and to perform some rudimentary exegesis on each.

## I

*Eakin v. Raub* involved disputed land titles. The issue was the effect of Pennsylvania's statute of limitations on plaintiff's recovery. Plaintiff's counsel had suggested, during oral argument, that the interpretation of the statute contended for by defendant would render it unconstitutional, and oblige the court to rule accordingly. The court declined, however, to adopt such an interpretation and so avoided passing upon the constitutionality of the law.<sup>13</sup> Refusing to skirt the issue completely, Justice Tilghman, in his opinion for the majority, offered the following dictum:

I adhere to the opinion which I have frequently expressed, that when a judge is convinced, beyond doubt, that an act has been passed in violation of the constitution, he is bound to declare it void, by his oath, by his duty to the party who has brought the cause before him, and to the people, the only source of legitimate power, who, when they formed the constitution of the state, expressly declared that certain things '*were excepted out of the general powers of government, and should forever remain inviolate.*'<sup>14</sup>

In dissent, Justice Gibson responded to this passage by drawing a distinction between "political" and "civil" judicial powers. Civil powers are the ordinary powers of courts. They derive from the common law and do not require a constitutional grant, although of course a constitution may withdraw or limit them. Political powers, by contrast, are extraordinary. They exist only in consequence of express constitutional grants, or by "irresistible implication from the nature of the government." Since every power "by which one organ of the government is enabled to control another, or to exert an influence over its acts, is a political power," it follows that judicial annulment of legislation is "extraordinary," and improper without an express constitutional grant of such power, or by "irresistible

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13. *Eakin v. Raub*, 12 Serg. and Rawle 330, 333-39 (Pa. 1825).

14. *Id.* at 339. Justice Tilghman was certainly consistent throughout. He had been counsel in *Cooper v. Telfair*, decided by the United States Supreme Court some three years prior to the decision in *Marbury*, and had made a similar argument at that time. 4 U.S. (4 Dall.) 14, 16-17 (1800). The argument was accepted by the Court.

implication from the nature of the government.”<sup>15</sup>

An “irresistible implication,” Gibson explained, would arise only in the exceedingly rare case of a legislative usurpation so “monstrous” as to work a change “in the very structure of the government,” and bring about a revolution: “By this, I mean, that while the citizen should resist with pike and gun, the judge might co-operate with *habeas corpus* and *mandamus* . . . . [B]ut this is far from proving the judiciary to be a *peculiar organ*, under the constitution, to prevent legislative encroachment on the powers reserved by the people; and this is all that I contend it is not.”<sup>16</sup>

To the casual reader, this argument sounds like a rejection of *Marbury*. Indeed, Gibson himself said that Marshall was wrong, and he cogently rebutted several of Marshall’s arguments: that judicial review is entailed by a written constitution; or by the fact that the legislature is subordinate to the constitution; or by the necessity of deciding cases; or by the judicial function of deciding what the law is; or by the judges’ oath to support the Constitution; or by the supposed impropriety of giving effect to an unconstitutional law. Justice Gibson saw that most if not all of these arguments beg the question, for

the foundation of every argument in favor of the right of the judiciary, is found, at last, to be an assumption of the whole ground in dispute.

The constitution and the *right* of the legislature to pass the act, may be in collision; but is that a legitimate subject for judicial determination? If it be, the judiciary must be a peculiar organ, to revise the proceedings of the legislature, and to correct its mistakes: and in what part of the constitution are we to look for this proud preeminence?<sup>17</sup>

Although the general tenor of Gibson’s dissent was hostile to judicial review, a careful reading reveals some complexities. In the first place, Gibson believed that judges are entitled to ignore statutes that conflict with constitutional provisions establishing “rules for the judiciary.” Most constitutional provisions, he observed, “are to be carried into effect immediately by the legislature, and only mediately, if at all, by the judiciary.” “Rule[s] for the judiciary,” by contrast, are addressed to the judges. Gibson opined that in Pennsylvania’s constitution “perhaps” one provision was of this type: “to regulate the style of process, and establish an appropriate form of conclusion in criminal prosecutions . . . .”<sup>18</sup>

Justice Gibson was also careful to distinguish between nullifi-

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15. *Eakin*, 12 Serg. and Rawle at 345-46.

16. *Id.* at 355.

17. *Id.* at 347, 353.

18. *Id.* at 346-47.

cation of a law that conflicts with a state constitution and nullification of one that conflicts with the Federal Constitution. While he found no warrant for judicial "preeminence" in the state constitution, Gibson was confident that exactly the reverse is true "in regard to an act of assembly, which is found to be in collision with the constitution, laws or treaties of the *United States*." To support this proposition he invoked the clear logic of article VI: "By becoming parties to the federal constitution, the states have agreed to several limitations of their individual sovereignty, to enforce which, it was thought to be absolutely necessary, to prevent them from giving effect to laws in violation of those limitations, through the instrumentality of their own judges."<sup>19</sup>

If a state violates the Federal Constitution:

By the third article and second section, appellate jurisdiction of all cases arising under the constitution and laws of the *United States*, is reserved to the federal judiciary, under such regulations as congress may prescribe; and in execution of this provision, congress has prescribed regulations for removing into the supreme court of the *United States*, all causes decided by the highest court of judicature of any state, which involve the construction of the constitution, or of any law or treaty of the United States.<sup>20</sup>

Although Gibson is commenting on the power of the United States Supreme Court to invalidate state laws that conflict with the Constitution, there is no reason to doubt that he was thoroughly familiar with the "removal" provision of which he spoke. It was, of course, the Judiciary Act of 1789, Section 25.<sup>21</sup> This provision granted to the Court the power to review any decision of a state court of final resort wherein the validity of a federal law, among other things, was questioned. An affirmance by the Supreme Court of an invalidation of federal law below amounts, of course, to a final declaration of unconstitutionality. The Court therefore had such authority long before its decision in *Marbury v. Madison*. I shall later argue that Gibson was surely aware of this implication of the Judiciary Act, and thus would not have been disturbed by the power of the Supreme Court to invalidate federal laws in appropriate circumstances. I shall also argue that the circumstances of *Marbury* were among those which Justice Gibson would have considered appropriate.

## II

Gibson's *Eakin* dissent would be of little interest today were it

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19. *Id.* at 355-56.

20. *Id.* at 356.

21. 1 Stat. 73, at 85-86 (1789).

not regarded as a rebuttal of *Marbury*. The relevant portion of the *Marbury* opinion, justifying the Court's refusal to apply an unconstitutional statute, contains two segments. The first is an argument in support of the conclusion that "an act of the legislature, repugnant to the constitution, is void."<sup>22</sup> The second is an altogether different argument to the conclusion that "courts, as well as other departments, are bound by that instrument."<sup>23</sup> Marshall explicitly recognized the distinction which is the heart of the *Eakin* dissent: between (1) a law being a nullity due to its collision with the Constitution, on the one hand; and (2) a court's right to decide authoritatively whether such a collision exists, on the other.<sup>24</sup> Gibson's opinion, it will be recalled, is devoted entirely to a qualified rejection of the latter idea.

To be sure, Marshall invokes three of the principles which Gibson later challenges in *Eakin*: that the Constitution is a law of superior obligation;<sup>25</sup> the nature of the written constitution;<sup>26</sup> and the idea that unconstitutional statutes are "ipso facto" void.<sup>27</sup> But in Marshall's argument these are all steps toward the conclusion with which Gibson agreed: that a statute contrary to the Constitution is a nullity. Since none of these notions are used in support of Marshall's *second* argument, they have no application to Gibson's point of view.

Marshall begins his discussion of whether the Court may decide that an Act of Congress is invalid by asking a rhetorical question: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?"<sup>28</sup> His answer commences with what is perhaps the most famous sentence in the opinion: "It is emphatically the province and duty of the judicial department to say what the law is."<sup>29</sup> Unfortunately, the qualification which follows has too often been ignored: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule . . . . So . . . if both the law and the constitution apply to a particular case,

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22. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176-77 (1803).

23. *Id.* at 177-80.

24. The *Marbury* language, *id.* at 177, is as follows: "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect?" Compare this with Gibson's question in *Eakin*, 12 Serg. and Rawle at 347: "The constitution and the *right* of the legislature to pass the act, may be in collision; but is that a legitimate subject for judicial determination?"

25. *Marbury*, 5 U.S. (1 Cranch) at 177.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

. . . the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law . . . .”<sup>30</sup>

In other words, the answer to Marshall's rhetorical question is both affirmative and negative. The courts are not obliged to give effect to an unconstitutional law when, as in *Marbury*, both the Constitution and the law are applicable to a particular case which the court has a duty to decide. This concept is more ambiguous than a modern reader may realize. It may be interpreted as a justification of the broad judicial review that ultimately prevailed in this country. Gibson himself respectfully expressed disagreement with Marshall; so he evidently interpreted *Marbury* broadly. But Marshall's formulation is also amenable to a much narrower interpretation. After all, Gibson subscribed to precisely the same concept in *Eakin*, while observing that only one provision in Pennsylvania's constitution “furnishes a rule for the judiciary,” which “the legislature cannot alter, because it cannot alter the constitution. In all other cases, . . . the constitution and act of assembly, . . . do not furnish conflicting rules *applicable to the point before the court*; nor is it at all necessary, that the one or the other of them should give way.”<sup>31</sup>

Pennsylvania's Constitution of 1790 contains no jurisdictional provisions comparable to those in article III. Although Gibson did not address this point in his *Eakin* dissent, it seems likely that he would have considered article III “a rule for the judiciary.” If so, he would have agreed with the result in *Marbury*.

Marshall mentioned several clauses of the Constitution in the course of his argument that, “In some cases then, the constitution must be looked into by the judges.”<sup>32</sup> These were: (1) article III, section 2, wherein the “judicial power of the United States is extended to all cases arising under the constitution;” (2) article I, section 9, prohibiting passage of a “bill of attainder or ex post facto law,” and likewise prohibiting taxes or duties “laid on articles exported from any state;” (3) article III, section 3, prohibiting conviction for treason “unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

Concerning the last of these, Marshall's reasoning resembles Gibson's analysis of the provision regulating “the style of process” and establishing “an appropriate form of conclusion in criminal

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30. *Id.* at 177-78.

31. *Eakin*, 12 Serg. and Rawle at 347.

32. *Marbury*, 5 U.S. (1 Cranch) at 179.

prosecutions . . . .”<sup>33</sup> The treason clause, says Marshall, is “addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from.”<sup>34</sup> And according to Gibson, whenever “the judiciary, and not the legislature, is the immediate organ to execute” a constitutional provision, “they are bound by it, in preference to any act of assembly to the contrary; in such cases, the constitution is a rule to the courts.”<sup>35</sup> In other words, provisions like the treason clause are of a “judiciary nature.”<sup>36</sup>

Concerning article III’s “arising under” provision, we have already observed that Gibson regarded it as authority for Section 25 of the Judiciary Act of 1789. This section authorized the Supreme Court of the United States to review any “final judgment or decree . . . , in the highest court of law or equity of a state . . . ; where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; . . . .”<sup>37</sup> Such a decision may be “reversed or affirmed in the Supreme Court of the United States upon a writ of error.”<sup>38</sup> Now, it follows straightforwardly from this authorization, that if the highest court of a state enforces, for example, the article I, section 9 prohibition that “no tax or duty shall be laid on articles exported from any state” against Congress, the Supreme Court may affirm the judgment of that state court, thereby invalidating the act of a co-ordinate branch of government.

Gibson surely knew this. Perhaps that is why he so carefully confined his opinion “on the abstract right of the judiciary to declare an unconstitutional act of the legislature void,” to the “plain difference, hitherto unnoticed, between acts that are repugnant to the constitution of the particular state, and acts that are repugnant to the constitution of the *United States*;” his opinion being “that the judiciary is bound to execute the former, but not the latter.”<sup>39</sup> Else-

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33. *Eakin*, 12 Serg. and Rawle at 347.

34. *Marbury*, 5 U.S. (1 Cranch) at 179.

35. *Eakin*, 12 Serg. and Rawle at 352.

36. The phrase “judiciary nature” appears in the records of the Federal Convention and is arguably the primary rationale for extending a limited judicial veto to the Court. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION 430 (1911). According to Farrand, the framers accepted the extension of the federal judicial power to cases “arising under the Constitution, Laws, and Treaties of the United States” only after it had been “generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.” *Id.* According to B.F. Wright, “There is room to differ as to Madison’s meaning of ‘judiciary nature’ here, but at least it would appear to represent a theory of judicial review which did not recognize the courts as the exclusive or final interpreters of all parts of the Constitution.” B. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 18 n.24 (1967).

37. 1 Stat. 73, at 85 (1789).

38. *Id.* at 86.

39. *Eakin*, 12 Serg. and Rawle at 344-45.

where, while commenting upon the allegation that judicial power to nullify statutes is legitimate because, when exercised, "the judiciary does no positive act, but merely refuses to be instrumental in giving effect to an unconstitutional law," Gibson remarks that this

is nothing more than a repetition, in a different form, of the argument—that an unconstitutional law is *ipso facto* void; for a refusal to act under the law, must be founded on a right in each branch to judge of the acts of all the others, before it is bound to exercise its functions to give those acts effect. No such right is recognised in the different branches of the national government, except the judiciary (and that, too, on account of the peculiar provisions of the constitution) . . . .<sup>40</sup>

He did not identify these "peculiar provisions," but they may have been the ones that Marshall had invoked in *Marbury* to support the notion that the Constitution may be "looked into by the judges."<sup>41</sup>

In the American federal system, the national government is one of purely delegated authority, while state governments are not.<sup>42</sup> The tenth amendment reserves all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States," to the "States respectively, or to the people;"<sup>43</sup> acts of national legislation not pursuant to the Constitution are, indeed, "ipso facto" void.<sup>44</sup>

Such, however, is not the case with state statutes. They, according to Justice Gibson, "are, in no case, to be treated as *ipso facto* void, except where they would produce a revolution in the

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40. *Id.* at 351.

41. *Marbury*, 5 U.S. (1 Cranch) at 179.

42. Madison, in THE FEDERALIST No. 45, points to the practical result of the idea: "The powers delegated by the proposed Constitution to the Federal Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State." THE FEDERALIST No. 45, at 313 (J. Madison) (J. Cooke ed. 1961). According to Plano and Greenberg, "Although it was generally understood that the framers intended that the states would retain all powers not prohibited by the Constitution or delegated to the national government, the people insisted upon an express provision to that effect." The tenth amendment, of course, was the result. J. PLANO & M. GREENBERG, THE AMERICAN POLITICAL DICTIONARY 51 (7th ed. 1985).

43. "It is not possible to make a definitive list of state powers since, in the very nature of the federal system, the states may exercise any power that is not delegated to the national government . . . . These powers are frequently referred to as 'residuary.'" J. PLANO & M. GREENBERG, *supra* note 42, at 48.

44. "Under American federalism, the national government is one of delegated powers. With the exception of foreign affairs, it must find justification for its actions in a specifically authorized power, or in one that can be reasonably implied from those specifically authorized. The national government does not possess unlimited or general governmental power but only such power as is given to it in the Constitution." *Id.* at 36-37.

government; and that, to avoid them, requires the act of some tribunal competent, under the constitution (if any such there be), to pass upon their validity. All that remains, therefore, is, to inquire whether the judiciary or the people are that tribunal.”<sup>45</sup> Surely it pays more of the respect which Gibson’s great opinion deserves, to treat it rather as an exegesis of the tenth amendment, than as a quibble with *Marbury v. Madison*.

### III

The Supreme Court did not invoke *Marbury* as authority for judicial power to nullify statutes until *Mugler v. Kansas* in 1887.<sup>46</sup> *Marbury*, shrouded in relative obscurity until its resurrection in 1868 by Thomas M. Cooley in the most important legal treatise of the period,<sup>47</sup> was cited with increasing frequency by a group of legal

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45. *Eakin*, 12 Serg. and Rawle at 350.

46. 123 U.S. 623 (1887). Quoting *Marbury*, the *Mugler* Court asked, “‘To what purpose . . . are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.’” *Id.* at 661. Now, as we have already seen, this segment of Marshall’s argument was used in *Marbury* to support the conclusion that legislative acts contrary to the Constitution are void, *not* that courts have the power to refuse application of them. But the *Mugler* Court used the passage in support of the proposition that “the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed.” *Id.* Adding insult to injury, from an historical point of view, the Court then proceeded to employ *Marbury* in the service of the developing doctrine of substantive due process. All this, in a passage which was essentially dicta, since in *Mugler* the Court upheld a state prohibition of manufacture and sale of intoxicating beverages!

47. Cooley, after having spoken favorably concerning judicial power to invalidate legislation, says: “The same conclusion is reached by stating in consecutive order a few familiar maxims of the law. The administration of public justice is referred to the courts. To perform this duty, the first requisite is to ascertain the facts, and the next to determine the law that is applicable. The constitution is the fundamental law of the State, in opposition to which any other law, or any direction or decree, must be inoperative and void. If, therefore, such other law, direction, or decree seems to be applicable to the facts, but on comparison with the fundamental law it is found to be in conflict, the court, in declaring what the law of the case is, must necessarily determine its invalidity, and thereby in effect annul it. The right and power of the courts to do this are so plain, and the duty is so generally—we may now say universally—conceded, that we should not be justified in wearying the patience of the reader in quoting from the very numerous authorities upon the subject.” Then follows the citation of *Marbury*. T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 45-46 (1868). The reader should be reminded of our previous discussion of Judge Gibson’s *Eakin* dissent, where it was shown: (1) that any argument from a premise such as “The Constitution is a fundamental law” to the conclusion that “The courts have the power to annul statutes” is essentially question-begging (i.e., the validity of the argument virtually depends upon the insertion of something very much like the conclusion as an unstated premise); and (2) that no such argument was made by Chief Justice Marshall in *Marbury*. Cooley’s reference to *Marbury* is therefore inappropriate, and his argument about judicial power unfounded.

thinkers evidently seeking an adequate legal foundation for the developing doctrine of fourteenth amendment substantive due process.<sup>48</sup> This movement touched off a furious debate over the role of the judiciary in American society, one of the high points of which was the appearance of Thayer's classic article in 1893.<sup>49</sup> Beginning in 1895, the left wing of the American bar launched a concerted attack upon *Marbury*, alleging that the doctrine of judicial nullification had not been intended by the framers, and had been an invention of the Marshall Court.<sup>50</sup> This outburst was matched blow-for-blown by the conservative wing of the bar, which by 1903 had managed to elevate *Marbury* to a status commensurate with the Declaration of Independence and the Constitution itself.<sup>51</sup> Neither side doubted that *Marbury* had authorized a broad role for the courts.

It was but a short step to the famous assertion of Albert J. Beveridge, Marshall's most important biographer, that *Marbury* "for perfectly calculated audacity, has few parallels in judicial history."<sup>52</sup> Not long before Beveridge wrote, Edward S. Corwin, in an

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48. I. BROWN, SHORT STUDIES OF GREAT LAWYERS 206-07 (1878). E. Phelps, *Annual Address*, in REP. OF THE A.B.A. 173-92 (1879). For an excellent study of the effect of the American legal profession upon the development of the doctrine of laissez-faire in the Supreme Court, see B. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT (1942). See also B. COXE, AN ESSAY ON JUDICIAL POWER AND UNCONSTITUTIONAL LEGISLATION (1893); Doolittle, *The Veto Power of the Supreme Court*, 1 CHI. L. TIMES 177 (1887); Elliott, *The Legislatures and the Courts: The Power to Declare Statutes Unconstitutional*, 5 POL. SCI. Q. 224 (1890); Meigs, *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 175 (1885); Street, *How Far Questions of Public Policy May enter into Judicial Decisions*, 6 REP. OF THE A.B.A. 179 (1883).

49. See *supra* note 3 and accompanying text.

50. The attack was clearly a response to the Court's decision in *Pollock v. Farmers Loan and Trust Company*, 157 U.S. 429 (1895), the first instance of a United States Supreme Court citation of *Marbury* in a case wherein a national law was invalidated. 157 U.S. 429, 554 (1895). See Akin, *Aggressions of the Federal Courts*, 32 AM. L. REV. 669 (1898); Allen, *The Income Tax Decision: An Answer to Gov. Pennoyer*, 29 AM. L. REV. 847 (1895); Flanders, *Has the Supreme Court of the United States the Constitutional Power to Declare Void an Act of Congress?* 48 AM. L. REV. 385 (1900); Fowler, *The Origin of the Supreme Judicial Power in the Federal Constitution*, 29 AM. L. REV. 711 (1895); Parker, *The Supreme Court and its Constitutional Duty and Power*, 30 AM. L. REV. 357 (1896); Pennoyer, *The Income Tax Decision, and the Power of the Supreme Court to Nullify Acts of Congress*, 29 AM. L. REV. 550 (1895); Pennoyer, *The Case of Marbury v. Madison*, 30 AM. L. REV. 188 (1896).

51. See articles by Allen, Fowler, and Parker, *supra* note 50. Also statements of the memorialists at the centennial of Marshall's appointment to the Supreme Court, compiled in 3 JOHN MARSHALL: LIFE, CHARACTER AND JUDICIAL SERVICES (J. Dillon ed. 1903). Horace G. Platt, for example, says that *Marbury* was "as great a document as the Bill of Rights, as far-reaching as the Declaration of Independence, as essential to the healthy development of our Government under the Constitution as the Constitution itself." *Id.* at 231.

52. A. BEVERIDGE, 3 THE LIFE OF JOHN MARSHALL 132 (1916). "[*Marbury*,] for perfectly calculated audacity, has few parallels in judicial history. In order to assert that in the Judiciary rested the exclusive power to declare any statute unconstitutional, and to announce that the Supreme Court was the ultimate arbiter as to what is and what is not law

article published in 1910, had coined the phrase "judicial review."<sup>53</sup> Beveridge's view of *Marbury*, Corwin's phrase, and the connection between the two, have been passed on to generations of students in the fields of American politics and constitutional law. The myth contained therein likewise imparts legitimacy to the modern, "activist" conception of judicial review. If the significance of such a mythology is not immediately perceived, one has only to entertain for a moment the suggestion that we discard the myth and ground modern judicial review upon its actual progenitor: *Dred Scott v. Sanford* (1857), the first case in which the United States Supreme Court invalidated a national law on substantive policy grounds alone.<sup>54</sup>

So it is that Justice Gibson's mighty treatise, reconstituted as the contemporaneous contrary of the mythical *Marbury*, endures, if only as a curious reminder of the infirmities of the noble lie.

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under the Constitution, Marshall determined to annul Section 13 of the Ellsworth Judiciary Act of 1789 . . .

Marshall resolved to go still further. He would announce from the Supreme Bench rules of procedure which the Executive branch of the Government must observe." *Id.*

53. Corwin, *The Establishment of Judicial Review*, 9 MICH. L. REV. 102 (1910).

54. 60 U.S. (19 How.) 393 (1857).