

MARBURY'S WRONGNESS

*Michael Stokes Paulsen**

Is it possible that *everything* in *Marbury v. Madison*—except for the theorem of judicial review—is wrong? Surely, in the colorful, confident words of Chief Justice Marshall in *Marbury*, such a proposition “is too extravagant to be maintained.”¹ Such an assertion about the foundational case of American constitutional law would be “an absurdity too gross to be insisted on.”²

But I insist: Just about everything in *Marbury* is wrong, including the holding.³

First, a thumbnail sketch of what the case holds and what the case asserts (in dictum): On application of William Marbury, the Supreme Court, acting (apparently) in original jurisdiction, issued an order to Secretary of State James Madison to show cause why a writ of mandamus should not be entered against him directing him to provide Marbury with his commission as a justice of the peace for the District of Columbia. Madison ignored the show cause order, the case was argued before the Court, and a year and a half later (following various other interesting events involving the Republican Congress's actions with respect to the federal judiciary)⁴ the Court made several distinct pronouncements. First, Mr. Marbury was entitled to his commis-

* Briggs & Morgan Professor of Law, University of Minnesota Law School. Graduate, John Marshall Elementary School (Wausau, Wisconsin 1971). I would like to thank Eddie Hartnett, Dan Farber, and John Nagle for invaluable comments.

1. 5 U.S. (1 Cranch) 137, 179 (1803).

2. *Id.* at 177.

3. In this essay, I play the rude guest at *Marbury's* 200th birthday party, emphasizing all that is wrong with the case. I am not always so churlish. I praise *Marbury's* analysis on the question of judicial review (and lament its betrayal by the modern Court and scholars) in another anniversary essay. Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, ___ MICH. L. REV. ___ (2003). There, I cheer what is right about *Marbury*. Here, I jeer what is wrong about *Marbury*.

4. For entertaining and illuminating accounts, see Larry Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205 (2003); John Copeland Nagle, *The Lame Ducks of Marbury*, 20 CONST. COMMENT. 317 (2003); and Jack M. Balkin & Sandy Levinson, *What are the Facts of Marbury v. Madison?*, 20 CONST. COMMENT. 255 (2003).

sion because his appointment had been, following last-minute Senate confirmation, signed by President John Adams and sealed by the Secretary of State for the outgoing Adams administration—John Marshall. That made the appointment complete, notwithstanding Marshall's failure to deliver it before the administration of President Thomas Jefferson took over. Consequently, Madison, Jefferson's cabinet officer, had a duty to deliver it.⁵

Second, the Court held, a writ of mandamus directed to Secretary Madison was an appropriate remedy. The courts may issue mandatory orders to executive branch officers, where there exists a legal duty that such officers are (in the judgment of the Court) violating. Of course, the Court would never pretend to tell the President or his officers how to perform their *political* duties—the Court should not decide such political questions—but where the law imposes a nondiscretionary ministerial duty on an executive branch officer, the Courts can order that officer to do his duty.⁶

The third question gave rise to the holding for which *Marbury* is justifiably celebrated—the theorem of judicial review, deduced from the structural and textual premises of constitutional supremacy.⁷ That question was whether section 13 of the Judiciary Act of 1789 legitimately conferred original jurisdiction on the Supreme Court to issue the writ of mandamus. The Court construed section 13 as authorizing such action by the Court, but concluded that this enlarged the original jurisdiction of the Court in violation of the Original Jurisdiction Clause of Article III of the Constitution.⁸ Finally—here comes the proposition of judicial review—the Court held that it could not properly give effect to an unconstitutional statute of the legislature.⁹ Thus, the Court lacked proper jurisdiction and could not grant Marbury the requested writ of mandamus.

How many things are probably wrong with this picture? At least six, by my count.

5. *Marbury*, 5 U.S. at 167-68.

6. *Id.* at 170-71.

7. For the use of the mathematical term "theorem," and discussion of the constitutional postulates from which *Marbury's* holding of judicial review derives, see Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEORGETOWN L.J. 217, 226-27, 241-62 (1994). For a celebration of this holding and its implications, see Paulsen, *supra* note 3.

8. *Marbury*, 5 U.S. at 175-76.

9. *Id.* at 180.

1. For openers, why should William Marbury's appointment (or anyone else's) be considered complete when it has been signed and sealed, but not delivered? If the President, through his subordinates, has not *bestowed* the commission on an officer of the United States—has not *given* it to him—has he really been commissioned as an officer of the United States? Does he really hold the office if he doesn't hold the "deed" denoting him the officeholder? Chief Justice Marshall's opinion on this score has always struck me as dubious, and the best evidence of the "mischief" theory of the opinion. If an appointment is complete upon signing by the President (for the life of me I cannot figure out what possible constitutional significance affixing the seal of the United States might have), then *delivery* is utterly immaterial. If that is the case, then Marbury had no real beef with Madison in the first place. He was legally appointed the nanosecond that President Adams signed the commission. He did not need to sue for delivery of the commission. All he needed to do was ride to the tailor, order a nice robe made, and walk into the courthouse and start deciding cases.

In fact, why didn't he do so *after* Chief Justice Marshall issued his (advisory) quasi-declaratory-judgment opinion in *Marbury v. Madison*?¹⁰ After all, the opinion "holds" (after a fashion) that Marbury was lawfully appointed, because an appointment is complete upon signing and sealing. Surely no one would dispute his authority now!

Ah, but who would pay his salary? There's the rub—and, probably, the real nub of the dispute. What would happen when Marbury, after deciding cases for a few weeks, demanded his pay? President Jefferson almost surely would have directed his subordinates that Marbury was not a judge and should not be paid from the treasury. (In fact, President Jefferson might even have ordered this Judge Pretender removed from the courthouse.)

Thus, the real underlying dispute probably was whether William Marbury would be paid for the gig. Delivery of the piece of paper itself was no big deal. As Marshall wrote for the Court, delivery concerns "a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the pay-

10. Larry Alexander makes this point in his fascinating (though in most respects utterly misguided!) contribution to this symposium. Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement: Marbury v. Madison and the Case for Judicial Supremacy*, 20 CONST. COMMENT. 369, 370 (2003).

ment of ten cents . . .".¹¹ But the piece of paper would have been Marbury's proof that he was entitled to pay for his work. There was no way, however, that Marshall was going to order President Jefferson to pay Marbury's salary, for the simple reason that there was no way Jefferson would feel obliged to obey such an order.¹²

2. This points to a second obvious flaw in the case. The salary issue—the real, concrete stake of the parties—should remind every student of constitutional law of the famous “removal power” line of cases: *Myers*, *Humphrey's Executor*, *Weiner*, and *Morrison v. Olson*.¹³ Most of these were suits for salaries by fired executive branch officers. The constitutionally correct answer, which the Supreme Court has seldom gotten right, is that the President, as the sole repository of the executive power of the United States, must have the power to direct and control all exercises of executive power by all subordinate officers.¹⁴ This means the President must have the power to countermand subordinates' actions and (though this is slightly less certain) to remove subordinates who are insubordinate.

William Marbury was to have been a justice of the peace for the District of Columbia. True, this is in form a judicial office, but within the scheme of the Constitution, it is not an Article III judgeship but an agency, judicial in form, through which the national government administers the federal district over which it has exclusive jurisdiction. To cut to the chase, Marbury would have been the early nineteenth century equivalent of an administrative law judge—a glorified bureaucrat—whose administrative decisions should be subject to the President's direction and control and who should be removable at will by the President as a subordinate executive branch peon. Thus, even if Marbury were

11. *Marbury*, 5 U.S. at 170.

12. As several contributors to this symposium noted in their oral remarks, the one key feature of Marshall's strategy was that Marbury had to lose, so that Jefferson had no adverse order to defy (as I think he surely would have, see Paulsen, *supra* note 7 at 307), so that judicial authority would not be undermined. As I discuss below, this too is wrong in principle. If a litigant is entitled to judicial relief, that relief should not be withheld on the ground that the executive might disagree and nullify the Court's judgment. There is no legitimate room for a court to retreat from exercising its duty to render proper judgment, on pragmatic grounds of husbanding its own capital. See *infra* at 356-57.

13. *Myers v. United States*, 272 U.S. 52, 60 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602, 612 (1935); *Wiener v. United States*, 357 U.S. 349, 351 (1958). *Morrison v. Olson*, 487 U.S. 654 (1988), of course, challenged the power of an executive branch official to take prosecutorial action, not official deprivation of an official's salary.

14. Michael Stokes Paulsen, *Nixon Now: The Presidency and the Courts After Twenty-Five Years*, 83 MINN. L. REV. 1337, 1342-43, 1390-97 (1999).

lawfully appointed, President Jefferson should have been able to remove him.¹⁵ At the very least, the point is fairly arguable.¹⁶

I think the better answer is that Marbury's appointment was never completed, and even if it was, he was a removable-at-will subordinate executive officer. In either event, it seems plain that Marbury was not legally entitled to *serve* as justice of the peace for the District, against President Jefferson's wishes. The most he might have been entitled to was *damages* in some form—recovery of a salary, if the office was wrongfully withheld.

3. That leads to Dubious Holding Number Three. Why is *mandamus to deliver a commission* an appropriate remedy in the first place? If Marbury is not an Article III judge (Justice of the Peace for the District of Columbia was a five-year statutory office), why is not the appropriate remedy one for *damages* for a wrongfully withheld salary—the form of relief sought in the *Myers-Humphrey's Executor* line of cases?¹⁷ My day job is as a Civil Procedure teacher, but alas, I teach modern-day civil procedure and enjoy a certain blissful ignorance of things archaic and procedural.¹⁸ My perspective therefore tends to be somewhat anachronistic—critiquing common law procedures by way of modern perspectives—but sometimes anachronism, untainted by actual knowledge, is a good thing.

I am reliably informed by people more knowledgeable about such things that, at the time of *Marbury*, *mandamus* was regarded as a coercive remedy at law, not a form of equitable relief, but still an extraordinary remedy available only when no ordinary remedy will do.¹⁹ And Mr. Marbury, unlike the plaintiffs in the *Myers-Humphrey's Executor* line, had no Court of Claims

15. Consider Jefferson's later remark that it was "personally unkind" of Adams to have made last-minute appointments making it difficult for Jefferson to carry out his administration without having to either work through subordinates not of like mind or to fire such men. Nagle, *supra* note 4 at 317.

16. See also Akhil Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989). The best series of articles about the implied executive removal power, flowing from the unitary executive, has been written by Steve Calabresi and his co-authors. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

17. See note 12, *supra*.

18. When I have questions about such things, I call Eddie Hartnett, who is blissfully well-informed about such matters (and much else). See, e.g., Edward Hartnett, *Not the King's Bench*, 20 CONST. COMMENT. 283 (2003).

19. My thanks to Eddie Hartnett, see *supra* note 18, and to Dan Farber for pointing this out to me. See DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY* RULE 13 (1991).

in which to bring a damages action for recovery of his salary. Probably such an action would have been regarded by folks of the day, as by many folks today, as barred by sovereign immunity unless consented to by the government. (Such folks, then and now, would be wrong, I think, for reasons well explained by others.²⁰⁾

The failure to relegate Mr. Marbury to a damages remedy thus may count as another error of the case, albeit one entangled in numerous other misconceptions of the day. But Chief Justice Marshall's unexceptionable statement that every right ought to have a remedy²¹ surely overlooks the possibility that mandamus is not necessarily *the* single appropriate remedy for this case. Marshall thus errs, again, when he says (rejecting an alternative remedy of "detinue"—about which I know essentially nothing) that "[t]he value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing."²²

Come again? The value of the office, to Marbury, is its salary, insofar as Marbury has any *individual* right. Mr. Marbury, if wrongfully refused his commission, should have pursued a damages remedy to recover the salary he would have received for being a Justice of the Peace. To be sure, there might be something "cool" about being a judge, apart from the salary, even if the judgeship is a rinky-dink one. To be sure, the Federalists as a party and perhaps some segment of the public might want Marbury to have his office, not just his salary, for the benefit of the common weal. But Marbury was the litigant, and the proper role of the courts (even more so then than now) is not to provide a forum for airing generalized grievances of the public, but (in *Marbury's* words), "solely, to decide on the rights of individuals."²³ Marshall got that point right, at least. But if Marbury's personal interests are all that is at stake, mandamus to an executive branch officer to deliver a commission for a federal office would seem an improper remedy.

That brings me to another complaint with the mandamus remedy. In the American Constitutional System, with its separa-

20. See generally Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987). The short of it is that the idea of sovereign immunity ought not, in America, bar suits against government and government officials. The people are sovereign; government officials are mere agents. See generally *id.*

21. *Marbury*, 5 U.S. at 163 (quoting Blackstone).

22. *Marbury*, 5 U.S. at 173

23. *Id.* at 170.

tion of powers, where does a court get off making coercive orders to the executive, a coordinate branch of government, as if the executive must obey them? I have beaten this horse, or one of a similar color, in other writing and will not re-inflict the injury here.²⁴ I will merely note that "mandamus," in traditional English practice, was a way in which the King's courts, acting in the name of the King, ordered the King's officers to carry out their King-mandated duties. Or at least that was the legal fiction. Even in *Marbury*, the order to show cause is directed to Secretary Madison, not President Jefferson. (And in *Youngstown Sheet & Tube Co. v. Sawyer*, the nominal defendant is Secretary Sawyer, not President Truman.)²⁵ But this legal fiction collapses, in the regime of the U.S. Constitution. The courts are not the king's courts, doing his bidding, but a coordinate branch that cannot with propriety either give binding commands to the executive *or* be commanded *by* the executive. Under correct understandings of a unitary executive branch, Madison's obedience to the chief executive is a matter for the chief executive to assure. Conversely, judicial orders directed to Secretary Madison are judicial orders directed to President Jefferson. Jefferson understood this, and *this* was what he found objectionable about Marshall's decision in *Marbury*.²⁶

Thus, even if *Marbury* had been duly appointed (which I doubt) and even if he were *not* a removable-at-will subordinate executive branch administrative law judge (which I believe he was), mandamus relief—a coercive order directed to the executive branch—would seem to be the last place a court should go. Thus, even if Marshall had been right on the first two points, *Marbury* should have been held to have had a plain, speedy, and adequate alternative remedy at law, at least if the question is what *individual* relief he is entitled to. If John Marshall had been half as resourceful in figuring out how to get *Marbury* relief to which he was entitled as he was in figuring out how to create a conflict between the Judiciary Act and Article III of the Constitution, he could have resolved the case on this ground.

24. See Paulsen, *supra* note 14, at 1390-97; Paulsen, *supra* note 7, at 306-08 (arguing that *Marbury's* dictum, intimating that federal courts can issue orders to the executive, might be thought an assertion of judicial supremacy, in very serious tension with the reasoning by which *Marbury* finds the existence of a power and duty of constitutional legal review).

25. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

26. Paulsen, *supra* note 7, at 307 (citing Jefferson's correspondence and maintaining that Jefferson surely would have disobeyed Marshall's order, had he been given the chance to do so).

4. *Marbury's* fourth error is one of professional ethics. The Con Law casebooks typically make a cute point of this, but there is really more than something a little bit unseemly about John Marshall's even having sat on this case. This is especially true if the claimed remedy is one of mandamus. If the remedy really were properly one for mandamus to compel delivery of the judicial commission—if *delivery* were really the crux of the issue, as Marshall pretends—then the standard, casebook-footnote jab at Marshall that he should not have been sitting on a case involving his own conduct as an executive officer begins to have serious force. Sure, legal ethics standards were different in that day, but that is not a very persuasive defense of Marshall's misconduct. I am not saying that John Marshall should be hauled up posthumously on disciplinary charges under some Judicial Code of Conduct. I am saying that the principle that makes it self-evident, today, that a judge should not sit on a case in which the propriety or legal effect of his own acts or omissions in a different, non-judicial capacity, on precisely the same specific transaction at issue in the case, are themselves the basis for the legal claim, was just as sound a principle in 1803 as it is today. That principle should have led Marshall not to participate. (I have no similar objection to Marshall having *served* simultaneously as Secretary of State and Chief Justice. Today's prohibition on dual office-serving is more of a prophylactic safeguard against conflicts-of-interest, and strikes me as different in kind from the obvious principle that one should not serve as a judge in a case involving one's own conduct.)²⁷

I am inclined not to make too much of this error, though. Presumably, this meant only that John Marshall was disqualified, not that the Court as a whole could not have ruled on the case. The remaining justices might have ended up doing just what Marshall did. On the other hand, *Marbury v. Madison* is full of John Marshall's distinctive cleverness and occasional brilliance. Maybe the Court would have come out the same way, but maybe

27. Article I, section 6 of the Constitution (the "Incompatibility Clause") specifically prohibits individuals from serving simultaneously in the Legislative and the Executive branches—which is why John Goodman, playing the role of Speaker of the House in the 2003 season finale of "The West Wing," is told he has to resign his seat in Congress before being sworn in as Acting President pursuant to the Twenty-fifth Amendment, when the President's daughter has been kidnapped by terrorists and the Vice President had previously resigned. (I'm not sure that this is right, under the Twenty-fifth Amendment either, but that's a story for another day.) But there is no similar prohibition on dual office-holding with respect to judicial officers. See generally Steven G. Calabresi, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1122-30.

not. Isn't that the whole reason Marshall should have disqualified himself?

5. I'm not sure how bad this next error really is. *Marbury v. Madison*, with its disavowal of judicial authority to interfere with "questions in their nature political" over which the executive is considered to have discretion,²⁸ is sometimes said to be the origin of the "political question" doctrine. But it surely is not a legitimate source of authority for the modern, goofy version of the doctrine which asserts that federal courts should (sometimes) not decide constitutional cases within their assigned jurisdiction because (a) the answer to the constitutional question is that the Constitution specifies some actor (or actors) possessed of the sole authority to determine the matter in question; (b) the answer to the constitutional question is that the Constitution does not supply a rule of law or standard that governs the issue; or (c) it would be a bad thing as a policy matter for the judiciary to enforce the meaning of the Constitution. This is a slight caricature of the modern doctrine, but only very slight.²⁹ The first two aspects of the doctrine are false advertising. They are indirect merits holdings about the meaning of the Constitution. (Thus, much of the modern "political question" corpus of cases really just consists of convoluted merits holdings about what the Constitution says or fails to say. First-year law students seem to recognize this, intuitively, and convey it with either their bewilderment or their cynicism about the doctrine. Judges and professors forge on as if there really were some independent constitutional content to the doctrine and the students just don't get it.)

The third group of grab-bag policy reasons for not enforcing the Constitution is entirely illegitimate. It basically says that a court should refuse to enforce the law (or, in practical effect, *may* in its discretion refuse to enforce the law), in a case properly before it, because it thinks that doing so would be a bad idea for any of a variety of prudential or policy reasons. Imagine it: a court may, on its own motion, decline to grant relief in a case where the Constitution (by hypothesis) *does* supply a rule and that rule does *not* assign plenary discretion to some other

28. *Marbury*, 5 U.S. at 170. ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court").

29. For the classic, sanitized (and deceptive) formulation of the doctrine, see Baker v. Carr, 369 U.S. 186, 217 (1962). I have parsed the political question doctrine at somewhat greater length in a very short section of a very long article. Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677, 713 (1993) (discussing the doctrine as applied to the constitutional amendment process).

branch. And the reason for doing so is that it would be embarrassing, or produce interbranch conflict, for the courts to enforce the Constitution! Justice Brennan in all his glory was not (much) more judicial activist than this.³⁰

But this folly cannot fairly be laid at the feet of John Marshall. His point is simple: unless the Constitution (or statute) specifies a legal rule that governs the executive branch's conduct, courts cannot order executive officials around. To otherwise "intermeddle with the prerogatives of the executive" would be plainly improper. In Marshall's words:

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.³¹

That much is clearly right. If the executive has acted unlawfully, it is emphatically the province *and duty* of the judiciary to say so, in a case properly within its jurisdiction. (That does not mean that the executive is necessarily bound by the judiciary's determination in this regard, but that is a hobby horse I have ridden elsewhere.)³² The power of the judiciary to issue legal judgments against the executive parallels the power of the judiciary to issue legal judgments holding an act of Congress unconstitutional. The judiciary can so act when, and only when, the executive has acted unlawfully. It may not act to interfere with the lawful exercise of executive branch political discretion.

Marbury's case was not one of political discretion, Marshall asserted, because delivery of a commission was not a discretionary duty, but a mandatory one properly imposed by law.³³ But that of course was the question of the merits of the claim for relief. Marshall got the merits wrong, as noted above. But at least he did not pretend that he was declining to decide the merits on the ground that it was a "political question." Instead, he offered a different bogus excuse for supposedly not being able to decide the merits of the case: Marshall's pretense was that he was de-

30. In fact, wasn't Brennan the guy who wrote *Baker v. Carr*?

31. *Marbury*, 5 U.S. at 170.

32. Paulsen, *supra* note 7; Paulsen, *supra* note 14, at 1340 (arguing that "neither [the judicial branch nor the executive] branch may bind the other with, or demand acceptance from the other of, its assertions concerning the scope of their respective constitutional powers.") (emphasis deleted).

33. *Marbury*, 5 U.S. at 170-71.

clining to decide the merits because the Court lacked constitutionally proper jurisdiction.

6. Which leads me to the next flagrant error of *Marbury v. Madison*—the actual holding of the case, that the Court lacked jurisdiction. This aspect of the case is famously convoluted, and confuses first-year law students to no end. It also furnishes the set-up for articulation of the idea of judicial review. Let me try to put it succinctly, in the vain hope that some casebook editor will quote me to generations of future law students. First, *Marbury* holds that Section 13 of the Judiciary Act of 1789 gave the Supreme Court original jurisdiction to issue writs of mandamus to executive branch officers. Next, *Marbury* holds that this enlarges the original jurisdiction of the Supreme Court beyond what Article III of the Constitution allows. Finally, in just about the only part of the opinion that is soundly reasoned and clearly correct, the Court holds that what the Constitution says always trumps what a statute says, in cases where they conflict.

At this point, my quarrel is more with academic critics of *Marbury* than with *Marbury* itself. The standard critique of *Marbury*'s statutory holding is that John Marshall read Section 13 of the Judiciary Act incorrectly, creating a conflict with the Constitution where none necessarily existed. The contention is (in slightly varying forms) that section 13 merely authorized mandamus as an available *remedy* for the Court to employ, in cases where the Court properly had original or appellate jurisdiction, but did not itself purport to *assign jurisdiction* by virtue of authorizing mandamus remedies.³⁴

The critics have a point, and I fear that I have embraced the point, in passing, in other academic articles—though I suppose I could blame my co-author for forcing this view upon me.³⁵ But recent scholarship has suggested that Marshall's reading of the statute may well have been correct; that mandamus jurisdiction to order executive officers was probably thought by the First Congress—whether correctly or out of a habit of thinking about

34. See, e.g., William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 15 (1969); Amar, *supra* note 15, 453-64. See generally Hartnett, *supra* note 18, at 286-89 (collecting and discussing scholarship critical of *Marbury* on this ground).

35. Vasan Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CAL. L. REV. 291, 381 n. 315 (2001) (making the correct point that, just because the First Congress did something, that does not mean that what they did was constitutional, but using the arguably incorrect illustration of section 13 of the Judiciary Act, deemed unconstitutional in *Marbury*, but partially excusing the First Congress on the ground that *Marbury* misread the statute by running past an obviously controlling semi-colon).

courts improperly transposed from the English King's Bench to the American Supreme Court—a proper function of a supreme court of general jurisdiction, and thus an independent ground for judicial authority.³⁶

Sometimes the critics of Marshall's statutory interpretation give their argument a slight boost by invoking the interpretive canon that statutes should be construed to avoid unconstitutionality, or even constitutional doubts. But these are themselves doubtful interpretive canons, as many have noted.³⁷ In any event, for reasons explained in a minute, I doubt that the alleged constitutional infirmity to be avoided is a real one, adding doubts about the constitutional doubts to be avoided to doubts about the correctness of the "doubts" canon. Better, I think, simply to ask whether section 13 is properly read as giving the Supreme Court jurisdiction to issue a writ of mandamus in a case like *Marbury's*, and then separately asking whether such jurisdiction, if conferred by statute, is foreclosed by Article III.

Thus, though the interpretive point may not be entirely free of doubt, the relevant clause of section 13 seems to read most naturally as a legislative grant to the Supreme Court of a free-standing "*power*" to issue "writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under authority of the United States."³⁸

Does such a grant of power violate Article III? Marshall's contention was that, at least where invoked in a case brought in the original jurisdiction of the Supreme Court, such a grant of power constituted an enlargement of the Court's original jurisdiction beyond Article III's specific requirement that the Court have original jurisdiction "in all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."³⁹ I will not quibble with Marshall here, for it is sufficient for me that there is nothing at all wrong with enlarging the Court's original jurisdiction beyond the ambassadors-ministers-state-party baseline, as long as what is granted falls

36. James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1524-25, 1539-46 (2001); see Hartnett, *supra* note 18, at 288 (discussing this view).

37. See, e.g., John Copeland Nagle, *Delaware & Hudson Revisited*, 72 NOTRE DAME L. REV. 1495 (1997) (collecting and discussing all the relevant objections to the doctrine); see also William K. Kelley, *Avoiding Constitutional Questions as a Three-Branch Problem*, 86 CORNELL L. REV. 831 (2001).

38. Judiciary Act of 1789, 1 Stat. 73 section 13.

39. U.S. CONST. art. III, sec. 2, cl. 2.

somewhere on Article III's menu of cases to which the judicial power of the United States extends. Right after the Original Jurisdiction Clause, Article III says that "[i]n all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."⁴⁰ It strikes me that the clause defining the original jurisdiction of the Supreme Court, when read in light of the "exceptions and regulations" clause that immediately follows it, is more fairly read as saying either that the Supreme Court must have original jurisdiction *at least* in the categories of cases specified by Article III (a view that would create some further problems)⁴¹ or, more plausibly yet, that this allocation of original jurisdiction is the *default rule* in the absence of congressional change. In either event, it would not follow that Congress may not *add* to the Court's original jurisdiction, as long as the addition comes from the Article III menu.⁴²

Thus, the Court's *actual holding* in *Marbury*—that the Court lacked jurisdiction, because Article III prohibited the authority Congress granted—is wrong. The most natural reading of the statute was that it indeed vested the Court with authority to issue a writ of mandamus directed to Secretary Madison; and the most natural reading of Article III is that this is not unconstitutional. It follows that the Supreme Court had jurisdiction to decide the case. *Marbury v. Madison*, the foundational case of American constitutional law, was wrongly decided.

* * * * *

All in all, *Marbury* is rife with wrongness. It wrongly held that the Court lacked jurisdiction. It wrongly asserted that Mr. Marbury's appointment had been completed. It wrongly ignored Jefferson's power to remove Marbury, even had he been validly appointed. It wrongly proclaimed that mandamus to compel the executive to deliver the commission was the appropriate remedy

40. U.S. CONST. art. III, sec. 2, cl. 2.

41. Which I will pass over here. Mostly those problems concern the inconsistency of such a reading with longstanding practice. That isn't necessarily a deal killer, but it seems like too much effort for an article like this one, where my chief point is that Section 13 was not unconstitutional—under either of two perfectly good alternative readings of Article III of the Constitution.

42. Professor Akhil Amar has offered some good arguments against these possibilities, but concedes that his conclusion is not required by "the brute force of the words themselves," Amar, *supra* note 16, at 469, but depends on interpretive canons and statements in ratification debates that could be interpreted as reading the Original Jurisdiction Clause as a maximum and not a minimum.

to right the wrong that was wrongly found. And John Marshall was wrong to have sat as a judge on the case.

None of this is to suggest that the theorem of judicial review—the proposition that the Constitution must trump actions of subordinate government agencies inconsistent with the Constitution, and that the judiciary has an independent power of judgment in this regard—is wrong. As I have written for a different 200th anniversary symposium, *Marbury* is magnificently right on this important point—the point for which it is celebrated (but, alas, often misunderstood and misapplied).⁴³ But there was nothing particularly novel or earthshattering about this proposition by the time *Marbury* rolled around, a decade and a half after Alexander Hamilton's very similar argument for judicial review in *The Federalist No. 78*.⁴⁴

So why not just go ahead and order President Jefferson's Secretary of State to deliver the commission? The obvious answer, which I alluded to above, is that James Madison would have obeyed Jefferson's order not to deliver the commission rather than Marshall's order to deliver it. President Jefferson would have been within his rights in refusing to abide by a judicial decision that was wrong for all the reasons noted. Chief Justice John Marshall thus would have made his judgment and not had anyone to enforce it, and the case would have come to symbolize not independent judicial authority but independent executive authority to act contrary to judicial decrees.

This suggests a possible seventh way in which *Marbury* is wrong. If, as is so widely believed today, John Marshall's opinion was an ingenious, brilliant "masterwork of indirection"⁴⁵ that artfully avoided head-on collision with Jefferson while advancing a series of claims to judicial authority, *that too* is deeply wrong—wronger, surely, than a tendentious reading of appointments requirements, forgetting removal authority, leaping to a wrong remedy, or misconstruing the original jurisdiction clause of Article III. It is flat-out wrong knowingly to misuse judicial authority in a specific case in order to advance judicial power generally. It is likewise wrong knowingly to *refrain* from the proper and obligatory exercise of judicial authority in a specific case in order

43. Paulsen, *supra* note 3.

44. Indeed, Larry Kramer sees *Marbury* as something of a *retreat* from earlier, more aggressive conceptions of judicial review. Kramer, *supra* note 4 at 228-29.

45. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 40 (1960). For a discussion of whether Marshall was sincere or mischievous, see Paulsen, *supra*, note 7, at 242 n.79 and sources cited.

to defend judicial power generally. (That is part of the problem with the "political question" doctrine in some of its modern variants.) For a judge to withhold relief from William Marbury, if he were genuinely entitled to it, in order to advance judicial authority, would be to trade away an individual litigant's legal rights for the judge's own personal power—surely a violation of the judicial oath (and the obligation of the oath forms a prominent part of Marshall's argument for independent judicial review).⁴⁶

I noted earlier that many of the celebrants at this 200th anniversary symposium noted that Marbury "had to lose." But if one believes that Marshall *deliberately* misinterpreted either section 13 or Article III, then *Marbury's* wrongness is not just technical, but rotten to the core. For the "brilliant but disingenuous" proposition amounts to nothing less than a contention that a judge properly may refuse to do justice under the law in order to advance his own personal power and that of other judges. How could we possibly celebrate such a despicable opinion as the cornerstone of American constitutional law?!

I for one have difficulty imputing such a motive to John Marshall.⁴⁷ I would prefer to believe, perhaps against the evidence, that John Marshall simply announced in good faith a lot of legal propositions that I, in my superior wisdom (and vantage point) two hundred years later, happen to think are mistaken. The bulk of the case against Marshall rests on inference, not evidence of deliberate mischief-making. Some of those inferences may be unwarranted, and might say more about the character of scholars who cheer what they see as devious cleverness than about Marshall himself. Marshall may simply have been wrong on the law. But whether out of pure or impure motives, there are an awful lot of things wrong with *Marbury v. Madison*. The case is worthy of close study, important to the nation's history, and magnificently right in its most famous (if misunderstood) proposition. But deserving of *reverence*? That is "an absurdity to gross to be insisted on."⁴⁸

46. See generally Patrick O. Gudridge, *The Office of the Oath*, 20 CONST. COMMENT. 387 (2003); see also Paulsen, *supra* note 7, at 257-62.

47. See David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 DUKE L.J. 279, 324 & n.146, 328 & nn.162-164 (1992) (arguing that Marshall's analysis is subject to criticism but that his character was straightforward and honest).

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