ESSAY

WHY I STILL TEACH *MARBURY* (AND SO SHOULD YOU): A RESPONSE TO PROFESSOR LEVINSON

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INTRODUCTION

In a recent essay in the *Wake Forest Law Review*,[1] Professor Sandy Levinson argued that the venerable *Marbury v. Madison*[2] should not be taught as part of the foundational constitutional law course required at most law schools. He even said that he spends "no class time on the opinion."[3] In light of *Marbury*'s central place in the constitutional law canon,[4] both in the classroom and the courtroom, this is a controversial position to espouse, perhaps even "heretical."

Professor Levinson is a nationally recognized legal scholar who has published numerous articles and books (including a well-respected and widely-used constitutional law casebook).[5] I am a huge fan and agree with much of what he has written in his long career. As to the teaching of *Marbury*, however, I believe he is mistaken.[6] John Marshall's decision is a classic that should be treated by courts and academics as an important building block for modern constitutional law. Not only should *Marbury* be taught to law students, it should be the first constitutional case to which they are exposed.

Part I provides a brief introduction to the issues discussed in *Marbury*, and some of the reasons students should read and analyze the

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[1] Sanford Levinson, *Why I Do Not Teach* Marbury *(Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003).

[2] 5 U.S. (1 Cranch) 137 (1803).

[3] Levinson, *supra* note 1, at 554.

[4] *Id.*; *see, e.g.*, KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 3-13 (14th ed. 2001) (discussing *Marbury* at the beginning of a casebook); cases cited *infra* notes 65-66 and accompanying text (citing and discussing cases that rely on *Marbury*).

[5] PAUL BREST, SANFORD LEVINSON, J.M. BALKIN, & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING (4th ed. 2000); *see also Legal Scholarship Symposium: The Scholarship of Sanford Levinson*, 38 TULSA L. REV. 553 (2003).

[6] Professor Levinson admitted in his article that he wanted to "convince" other professors to stop teaching *Marbury*. Levinson, *supra* note 1, at 554. I hope to show that teaching *Marbury* is more important than ever.

opinion. Part II sets forth and responds to Professor Levinson's specific arguments against using *Marbury* in class as well as his assessment that *Marbury*'s importance is overstated. Finally, Part III details why it is more important than ever to teach *Marbury* and includes a few observations about how *Marbury* fits in with the Realist critique of constitutional law.

I. *MARBURY*

The background, facts, rationales, and holdings of *Marbury* are extensively discussed and critiqued in the literature and will not be summarized here.[7] The purpose of this section is to establish a prima facie case for the teaching of *Marbury*, and to lay the foundation for responding to Professor Levinson's specific arguments.

In *Marbury*, Chief Justice Marshall asked and purported to answer some of the most fundamental questions about our form of government and our Constitution. Among the issues he addressed were whether the United States Supreme Court had the authority to order the Executive Branch to abide by the law; whether the Court should give effect to a statute that is inconsistent with the Constitution; and what was the relationship between the rule of law and our constitutional democracy.[8]

Professor Levinson argues that some or all of these questions were unnecessary to the decision in *Marbury*, and that Marshall's handling of these issues was far from persuasive.[9] Conceding those points for the sake of argument, it is still the case that *Marbury* was the Court's first extensive treatment of these difficult problems, and the analysis is excellent fodder for classroom discussion. For example, the following oft-cited paragraphs always resonate with my students:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . .
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> . . . .
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> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.[10]

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[7] For a good and recent collection of articles, see *Judicial Review: Blessing or Curse? Or Both? A Symposium in Commemoration of the Bicentennial of* Marbury v. Madison, 38 WAKE FOREST L. REV. 313 (2003).

[8] *See infra* notes 10-12 and accompanying text.

[9] *See infra* notes 46-50 and accompanying text.

[10] *Marbury*, 5 U.S. (1 Cranch) at 163.

Though Marshall's claims in the paragraph may be exaggerated, the rule of law does generally require remedies for violations of legal rights. Moreover, when students study the political question doctrine and the prudential aspects of the standing doctrine, and learn that sometimes the Court denies injured individuals any legal redress, this part of *Marbury* can be used to evaluate those decisions.[11]

As to judicial review of legislative acts, Marshall said the following in language that makes as much sense today as it did then:

> The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is 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. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act.[12]

After discussing this paragraph in class, I ask the students what important question Marshall left unanswered. Almost always, I get the answer I am looking for: "Who decides?" Then, we turn to Marshall's famous statement that, "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[13] As Daniel Farber pointed out in the same Symposium where Professor Levinson's essay appeared, the logic of this paragraph strongly supports the Court's exercise of judicial review.[14] It also prompts class discussions about the wisdom of appointed, life-tenured judges reviewing legislative and executive action, the judges' lack of accountability, and eventually a debate over how judges should perform their interpretive tasks. Those questions are a good place to begin a discussion of the appropriate relationships between the three branches of the federal government

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[11] *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993) (dismissing a case brought by a federal judge arguing that the Senate violated the Constitution by conducting an impeachment hearing before a Senate committee instead of the entire Senate); Warth v. Seldin, 422 U.S. 490 (1975) (finding that low-income plaintiffs did not have standing to challenge a local zoning ordinance).

[12] *Marbury*, 5 U.S. (1 Cranch) at 176-77.

[13] *Id.* at 177.

[14] *See* Daniel A. Farber, *Judicial Review and its Alternatives: An American Tale*, 38 WAKE FOREST L. REV. 415, 420-21 (2003).

and the Court's power to hold the government accountable under the law.[15]

II. PROFESSOR LEVINSON'S ARGUMENTS

Professor Levinson divided his essay into four arguments supporting his position that *Marbury* should not be taught and is not a particularly important case outside of the specific historical context in which it arose. I will quote each of his headings and discuss his arguments in turn.

A. "Understanding the Importance of Marbury *Requires a Depth of Historical Knowledge that Almost None of Our Students Possess and that We Do Not Have Time to Teach."*[16]

Professor Levinson argues that *Marbury*'s importance is mostly historical and "derives from its place in the remarkable four-year drama surrounding the election of Thomas Jefferson and his displacement of the Federalist hegemons who had viewed national leadership as simply their prerogative."[17] This drama included, among many other events, the deadlocked presidential election of 1801, the details of how the House of Representatives eventually selected Jefferson, the political battles between the federalists and the anti-federalists, the congressional cancellation of the 1802 Term of the Supreme Court, and the Louisiana Purchase.[18]

Professor Levinson also argues that *Marbury* cannot be understood without a detailed discussion of *Stuart v. Laird*,[19] which upheld the repeal of the hastily enacted Circuit Court Act which added numerous judges to the federal bench at the end of John Adams' presidency.[20] Without an understanding of these historical events, Professor Levinson argues, students cannot appreciate *Marbury* and see the opinion in its proper context. Because there isn't enough time to provide students with this history, *Marbury* should not be taught at all.

Professor Levinson's argument would seem to apply to most of the cases in the basic constitutional law course, and yet we, and Professor Levinson, still teach those cases. For example, a true appreciation of

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[15] I am on record as being hostile to judicial review in general, and *Marbury* in particular. *See* Eric J. Segall, *5 U.S. (1 Cranch) 137, 175*, 16 CONST. COMMENT. 569 (1999). Nevertheless, I believe that *Marbury*'s importance requires its teaching.

[16] Levinson, *supra* note 1, at 554.

[17] *Id.*

[18] *See id.* at 554-55.

[19] 5 U.S. (1 Cranch) 299 (1803).

[20] Levinson, *supra* note 1, at 557.

Youngstown Sheet & Tube Co. v. Sawyer[21] would require a lengthy grounding in the events of the Korean War, post-World War II politics, and President Truman's relationships with Congress and organized labor, among others. Few law professors have the time and probably the knowledge to present that background, yet *Steel Seizure* is included in virtually every constitutional law casebook, and is taught by most professors. Similarly, the early First Amendment cases such as *Schenck v. United States*,[22] and *Debs v. United States*,[23] are much better understood with a proper background in the American radicalism movements at the time and World War I politics, but it is simply not possible to cover that background in significant detail in class. Yet, these cases are still taught.

It is unclear why *Marbury* requires more historical attention than these cases.

The second problem with Professor Levinson's historical argument is that it is not too difficult to give *Marbury* a proper context in a reasonable amount of class time. Here is the story in a nutshell as I present it at the beginning of class (we get into more detail as we discuss the opinion):

> The Presidential election of 1801 ended up being between three men: the incumbent federalist John Adams, the anti-federalist Thomas Jefferson, and Aaron Burr. The federalists believed in a strong national government (according to the standards of the day), whereas the anti-federalists believed more in state autonomy. Adams was soundly defeated but there was an Electoral College gridlock between Jefferson and Burr so the fate of the presidency was thrown to the House of Representatives, who eventually chose Jefferson to be the next President. On February 27, 1801, less than a week before Jefferson was going to be sworn into office, the outgoing federalist Congress authorized the appointment of forty-two new judges for the District of Columbia. These were municipal, not federal judges. The Congress also passed legislation creating sixteen new federal judges. On March 2, 1801, the second to last day of his presidency, President Adams appointed the judges, most of whom, of course, were federalists. The federalist Senate confirmed them the next day. The person responsible for sealing and delivering the commissions was Secretary of State John Marshall who also happened to be the Chief Justice of the United States Supreme Court, and a strong federalist. Many of the commissions for the judgeships were delivered and finalized, but some were not. One of the commissions that did not get delivered was the one for William Marbury, who was to be a justice of the peace in the District of Columbia. When Jefferson was sworn into office as President, he directed his Secretary of State not to deliver the undelivered

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[21] 343 U.S. 579 (1952) ("*Steel Seizure*") (preventing President Truman from seizing steel mills during the Korean War).

[22] 249 U.S. 47 (1919) (upholding a conviction for distributing anti-war leaflets).

[23] 249 U.S. 211 (1919) (upholding a conviction for anti-war speech).

> commissions to the federalist judges, including Marbury. Eventually, Marbury sued in the Supreme Court arguing that once Congress authorized his judgeship and the President appointed him, he was entitled to become a judge and therefore James Madison (the current Secretary of State) should be ordered by the Court to deliver the commission. This lawsuit made Jefferson so angry that he ordered his attorneys not to say anything at the oral argument. Some people believe this made Marshall think that if he ruled against Jefferson, the President might refuse to obey the Court order, which could lead to a constitutional crisis. Moreover, although both Jefferson and Marshall were from Virginia, they did not get along and criticized each other openly. Also keep in mind that after Jefferson took office, he convinced the new anti-federalist Congress to abolish the terms of the Supreme Court that were to take place in June and December of that year, and Congress repealed the law passed by the previous Congress creating new federal judgeships. In addition, the anti-federalist Congress had begun impeachment proceedings against some federalist judges. It was against this backdrop of nasty, partisan politics, as acrimonious as anything we have today, that the case came before the Court in 1803.

It is unclear why students need a more detailed background than the above to appreciate the historical significance of *Marbury*. Of course the more context the better, but that is true for every constitutional case. Professor Levinson does suggest that *Marbury* is important more for its place in the historical events of the time than for its "portentous and quotable maxims . . . that are denied not only by the case at hand but also by much future constitutional history."[24] Whether a quote is "portentous" or compelling is a matter of subjective taste, but there is no denying that Marshall's comments about the rule of law, judicial review, and judicial authority over the Executive, have stood the test of time. In their constitutional law course, students will learn that the Court has prevented the President from seizing the steel mills during what he termed a national emergency,[25] overturned numerous federal laws aimed at making government more efficient,[26] and at times thwarted and at other times supported both Congressional and Executive attempts to deal with national economic problems.[27] Though all of this would probably have occurred with or without *Marbury*, John Marshall's opinion sets forth the basic rationales for a strong judiciary and provides students with an excellent foundation to analyze the Court's modern exercise of

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[24] Levinson, *supra* note 1, at 555.

[25] *See Steel Seizure*, 343 U.S. 579 (1952).

[26] *See, e.g.*, Clinton v. New York, 524 U.S. 417 (1998); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983).

[27] *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. E.C. Knight Co., 156 U.S. 1 (1895).

judicial review. There is no reason to lose that foundation simply because of the rich historical context in which the case arose.

B. "If One Is Going to Spend Class Time Teaching Students About American History, Do It About Something That Is Truly Important."[28]

Professor Levinson starts this part of his essay with what he believes to be a shared assumption about *Marbury*. He says that "I take it that everyone agrees that the substantive legal topic of *Marbury*—i.e., the ability of Congress to add to the original jurisdiction of the Supreme Court—is of no real significance . . . ."[29] He says it is "bizarre" that most casebooks begin with a case about such a "truly trivial subject."[30] Furthermore, whether Marbury actually received his commission, according to Professor Levinson, did not much interest Marbury (he never sought to refile his case) and certainly will not interest first year law students. Because "[m]any students look forward to taking constitutional law because of their belief that the subject actually involves important issues," teaching them *Marbury* right out of the gate might alienate some of those students.[31]

When I teach *Marbury*, it becomes clear that the real "topic" of the case has little to do with the original jurisdiction of the Supreme Court, or for that matter with whether Marbury would get his commission. Instead, the questions raised by *Marbury* include whether the Supreme Court has the power to order the President to perform a duty required by law and whether the Court must give effect to an act of Congress that is inconsistent with the Constitution.[32] John Marshall dealt with both of these questions thoroughly, and his oft-cited comments about the necessity of the rule of law and a government that abides by the law are fundamentally important. My students have little difficulty appreciating the importance of these discussions, even though the actual result in the case might not interest them. As Professor Weinberg writes, "[t]here can be little doubt that *Marbury* was intended first and foremost to establish judicial control over the *government*—over executive officials."[33]

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[28] Levinson, *supra* note 1, at 559.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *See* Farber, *supra* note 14, at 415-16.

[33] Louise Weinberg, *Our* Marbury, 89 VA. L. REV. 1235, 1404 (2003). In this brilliant new article, Professor Weinberg argues that the traditional critiques of *Marbury* are incorrect. For example, as to section 13 of the first Judiciary Act, she believes that Marshall was simply accepting as true for purposes of argument Marbury's lawyer's hypothesis that section 13 granted the Court original jurisdiction, and then Marshall said that, even so, the statute would be inconsistent with Article III. In other words, Marshall did not really believe that section 13 applied to the case but was willing to assume so consistent with the jurisdictional rules at the time. For this

Professor Levinson also suggests that *Marbury* is not worth teaching because "it promotes an unjustified optimism in students that the American constitutional system—including judicial decisions—has happy endings, that it never serves as a mechanism for legitimizing evil."[34] Though *Marbury* raises few moral questions, other early cases dealing with slavery, like *Prigg v. Pennsylvania*,[35] and *Dred Scott v. Sanford*,[36] give students a better perspective on the Supreme Court and its capacity for "rationalizing evil."[37] Professor Levinson concludes that the amount of time it would take to teach *Marbury* successfully is not justified because the case "teaches nothing at all about the capacity of the law to enhance either good *or* evil."[38]

Professor Levinson is right that students should be exposed to those many constitutional cases that arguably promote evil. But whether that means discussing cases upholding the internment of Japanese citizens,[39] "separate but equal" public accommodations,[40] or invalidating congressional efforts to end child labor,[41] there is plenty of time in the constitutional law course to expose students to constitutional evil. That is not, however, where the course should start. In fact, beginning with a case where the Court's relationships to the other branches is discussed but where the stakes of the specific case are not that important is pedagogically sound. *Marbury* is a good vehicle to discuss constitutional interpretation "[precisely because] students will rarely have a horse in any of *Marbury*'s doctrinal/interpretative races[.]"[42] *Marbury* gives students a chance to express their views on judicial review before they see where it has led, and those views may and usually do change over the course of the semester, all of which makes for interesting and fruitful classroom discussion.

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and numerous other original and interesting observations about *Marbury*, Professor Weinberg's article will be a "must read" for constitutional law scholars and teachers.

[34] Levinson, *supra* note 1, at 561.

[35] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (striking down a Pennslyvania criminal statute prohibiting the transportation or sale of slaves).

[36] 60 U.S. (19 How.) 393 (1857) (invalidating the Missouri Compromise).

[37] Levinson, *supra* note 1, at 562.

[38] *Id.*

[39] *See* Korematsu v. United States, 323 U.S. 214 (1944).

[40] *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

[41] *See* Hammer v. Dagenhart, 247 U.S. 251 (1918).

[42] *See* E-mail from Evan Caminker, Professor of Law, University of Michigan Law School, to Sanford Levinson, W. St. John Garwood & W. St. John Garwood, Jr. Centennial Chair in Law & Professor of Government, University of Texas School of Law (Sept. 8, 2002), *reprinted in* Levinson, *supra* note 1, at 576-77.

C. *"Why Teach a Case That Is So Shoddy in Its Reasoning Unless One Wants to Discredit the Enterprise of Legal Analysis? And Even if One Does Want to Discredit the Enterprise of Legal Analysis, [Are] There Not Better Cases than* Marbury *to Make the Point?"*[43]

Professor Levinson states that one of the reasons he stopped teaching *Marbury* was that he "got angry, every single year, when reading Marshall's mangling of section 13 of the Judiciary Act and then Article III of the Constitution."[44] These criticisms of *Marbury* are extensively discussed in the literature on *Marbury* and Professor Levinson's indignation may be justified.[45] Marshall appears to have misconstrued section 13 of the Judiciary Act to authorize original jurisdiction in the Supreme Court when the statute appears simply to provide a remedy, and then only in appellate cases.[46] His apparent reasons for doing so, to discuss the questions of judicial review of legislation and the Court's power to order the Executive to obey the law, are certainly strategic. As Professor Levinson points out, if a third-year law student engaged in this kind of analysis, she would receive a low grade.[47] Furthermore, there are other significant problems with Marshall's analysis, such as his incomplete theory as to Congress's power to alter the original and appellate jurisdiction of the Supreme Court, and, as Professor Levinson argues brilliantly, Marshall's independent interpretations of the statutory and constitutional question when the answers should inform each other.[48]

Given these problems with Marshall's opinion, Professor Levinson asks the following question: "Why should students' first experience with constitutional analysis be a case that can be fully understood only if one applies a fairly vulgar version of Legal Realism demonstrating that a judge will do *anything* necessary to achieve his or her policy goals?"[49] Interestingly, Professor Levinson answers that question himself. *Marbury* should be taught and emphasized because "vulgar Legal Realism is correct."[50] Although I would not put it quite that way, if we look just at the subset of all cases that are constitutional law cases decided by the Supreme Court, it should not be debatable that the Court is a political institution making political decisions. To cite just a few of many examples, the Court in *Bush v.*

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[43] Levinson, *supra* note 1, at 562.

[44] *Id.* at 562-63 (citation omitted).

[45] The seminal piece is, of course, William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1.

[46] But see Weinberg, *supra* note 33, for an attack on this traditional critique.

[47] *See* Levinson, *supra* note 1, at 564.

[48] *Id.*

[49] *Id.* at 566.

[50] *Id.*

Gore[51] engaged in an attempt to write a decision with no precedential value to achieve an overtly political result; the Court in *Romer v. Evans*[52] reached a decision arguably at odds with the only relevant precedent without once discussing the dissent's reliance on that very case; and in virtually all of the Court's Eleventh Amendment cases, both the majority opinions and the dissents ignore clear constitutional text to reach outcomes they prefer.[53] And the list goes on and on. In light of this reality, John Marshall's legal maneuverings in *Marbury* are actually rather tame.

Professor Levinson also argues that, even if one believes that constitutional law at the Supreme Court level is mostly politics, there are better cases than *Marbury* to make that point. He cites *Prigg v. Pennsylvania*,[54] *Baker v. Carr*,[55] and *Planned Parenthood v. Casey*,[56] among other cases, as examples of more significant decisions that demonstrate the connection between law and politics.[57] I agree that these and numerous other cases make the point, but the reason to use *Marbury* first is that in the *very* case where the Supreme Court first embraced the idea of judicial review, the Court's decision sounds in law and doctrine but is grounded in politics. Students should be exposed to that contradiction, not to make them cynical, but to understand the nature of the Court's decisionmaking in constitutional cases. The Court does act politically and will continue to do so, and students need to understand that reality. The beginning of that was *Marbury*, for better or worse, and that is why the case is so important.

Professor Levinson further suggests that, if one accepts the Realist critique, then one can do no more than express "simple political outrage concerning decisions they despise."[58] How a Realist should teach constitutional law is, indeed, a difficult question.[59] But even a teacher who truly accepts the Realist critique should teach students doctrine because that is the language the Court speaks, not to mention the

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[51] 531 U.S. 98 (2000); *see also* Levinson, *supra* note 1, at 566 (citing *Bush v. Gore* and the "zealotry of the current Supreme Court majority with regard to protecting states against the possibility of being sued by aggrieved citizens").

[52] 517 U.S. 620 (1996).

[53] *See, e.g.*, Eric J. Segall, *Twenty Questions (Or the Hardest Course in Law School)*, 18 GA. ST. U. L. REV. 497, 497 & n.3 (2001) (arguing that both the majority and dissenting opinions in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), ignore the clear text of the Eleventh Amendment).

[54] 41 U.S. (16 Pet.) 539 (1842) (striking down a Pennsylvania criminal statute prohibiting the transportation or sale of slaves).

[55] 396 U.S. 186 (1962) (allowing legislative apportionment suits).

[56] 505 U.S. 833 (1992) (reaffirming key aspects of *Roe v. Wade*, 411 U.S. 113 (1973)).

[57] Levinson, *supra* note 1, at 566-67.

[58] *Id.* at 568. He does not hold this view and believes there are opinions of the Court that are "genuinely inspiring." *Id.* I think that a true or even a "vulgar" Legal Realist (like me) can consistently believe that law is politics, *and* that there are cases that are truly inspiring.

[59] See *infra* notes 76-79 and accompanying text for further discussion.

need to prepare students for the bar examination. Lawyers in constitutional cases have to argue in both the language of doctrine *and* the reality of politics. *Marbury* was the first important constitutional law case to use both vocabularies.

D. "Teaching Marbury *Reinforces the Notion of Judicial Supremacy Instead of Constitutional Supremacy."*[60]

Professor Levinson believes that "emphasizing *Marbury* reinforces the single most pernicious aspect of American legal education," which is to identify the Constitution "with what the 'judges say it is.'"[61] This view is not normatively acceptable, according to Professor Levinson, because it turns the Constitution into "the preserve of a remarkably narrow professional elite."[62] It is not descriptively correct because a "far more plausible form of [legal] realism" is that the Constitution is what a number of different institutional actors say it is, including the other branches of government, bureaucrats, and local police.[63]

Professor Levinson's critique of judicial supremacy raises a variety of difficult issues that are beyond the scope of this essay. His reliance on that critique as a reason for not teaching *Marbury*, however, is not persuasive because, as he concedes, "adherence to judicial—and not merely constitutional—supremacy may not be the result of intrinsic features of *Marbury*."[64] In fact, there is little in *Marbury* about judicial supremacy, though later cases such as *Cooper v. Aaron*[65] and *United States v. Nixon*[66] rely on *Marbury* for that proposition.[67] A careful teaching of the case will show how later Supreme Courts came to use *Marbury*'s language to stand for a proposition (judicial supremacy)

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[60] Levinson, *supra* note 1, at 569.

[61] *Id.* at 569-70 (quoting THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 216 (Fred R. Shapiro ed., 1993) (quoting Charles Evans Hughes, Speech Before the Elmira Chamber of Commerce (May 3, 1903), *in* ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES: GOVERNOR OF NEW YORK 1906-1908, at 133, 139 (1908))).

[62] *Id.* at 570.

[63] *Id.*

[64] *Id.*

[65] 358 U.S. 1 (1958) (finding that Arkansas was bound by the Court's decision in *Brown v. Board of Education* because the "federal judiciary is supreme in the exposition of the Constitution."); *id.* at 18 (relying on *Marbury*).

[66] 418 U.S. 683, 703 (1974) (holding that President Nixon's claim of Executive Privilege was reviewable by the Court because "'it is emphatically the province and duty of the judicial department to say what the law is'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 177)).

[67] *See* Davison M. Douglas, *The Rhetorical Uses of* Marbury v. Madison: *The Emergence of a "Great Case,"* 38 WAKE FOREST L. REV. 375, 409 (2003) ("In a number of cases, the Court has used *Marbury* to justify the Court's assertion that its interpretations of the Constitution are supreme over those of other governmental actors, a claim that Marshall did not make in his *Marbury* decision.").

which it did not articulate. In fact, I cannot imagine how to fully discuss the question of judicial supremacy without giving students a working knowledge of the case relied upon by the Court for that claim. Additionally, to the extent there is some tension between the existence of judicial review and the idea that the judiciary is *not* supreme, *Marbury* is an excellent, perhaps the best, vehicle for getting at that problem. If it is the function of the "judiciary to say what the law is" (and it is hard to see how an effective limited, constitutional government could operate otherwise), then absent constitutional amendment, it is arguable that the Court does have the final say. Nonetheless, whether one accepts that or not, the terms of the debate are in *Marbury*; it was the first judicial articulation of the problem, and it is still relied on by the Court in many of the highest stake cases. For all of those reasons, students need a strong foundation in *Marbury* to appreciate the debate over who has and/or should have the final say on what the Constitution means.

Professor Levinson concludes his argument by suggesting that beginning the constitutional law course with the history of the debate over the constitutionality of the National Bank and then teaching *McCulloch v. Maryland*[68] is preferable to starting with *Marbury*. He says the following:

> I am confident that every major issue of constitutional interpretation and institutional power is instantiated in the forty-year-long debate about the constitutionality of the Bank. Insofar as one of these issues is the role to be played by the Court itself as constitutional interpreter, *McCulloch* offers more than enough grist for whatever is one's particular mill. *Marbury* adds nothing of genuine importance.[69]

McCulloch is undeniably an important case that needs to be taught to students comprehensively and with great care. But in that decision Marshall assumes without discussion the Court's power to invalidate state laws and there is little in the opinion about the Court's relationship to the other branches of the national government.[70] It is in *Marbury* that Marshall talks about presidential powers and discretion, judicial review over acts of Congress, and the Supreme Court's role in relation to the other branches.[71] It is logical to start with the Court's granting itself the power of judicial review in *Marbury*, followed by a

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[68] 17 U.S. (4 Wheat.) 316 (1819).

[69] Levinson, *supra* note 1, at 571-72.

[70] *See* Weinberg, *supra* note 33, at 1347. Weinberg argues:

> [McCulloch] tells us nothing about our constitutional rights or how to assert them. It does not set up what courts do, and what the Supreme Court does. It does not establish that the government must conform its conduct to the rule of law in American courts. It is not part of what differentiates America from failed or oppressive countries. It is just not *Marbury*.

Id.

[71] *See supra* notes 10-15 and accompanying text (discussing Marshall's opinion in *Marbury*).

discussion of how the power also applies to the states by teaching *Martin v. Hunter's Lessee*,[72] and finally turning to *McCulloch* for an excellent discussion of how the Court should perform its interpretative tasks. Moreover, by teaching both *Marbury* and *McCulloch* in detail, as well as *Gibbons v. Ogden*[73] and *Willson v. Black Bird Creek Marsh Co.*,[74] the students can critique Marshall's decisions over time and also appreciate his importance to the early development of constitutional law. Nothing in this manner of teaching necessarily leads students to believe in judicial supremacy, and it is unfair to lay that charge at *Marbury*'s doorstep.

III. *MARBURY*, JUDICIAL REVIEW, AND LEGAL REALISM

One of the most difficult aspects of teaching *Marbury* is exploring with students the troubling aspects of the opinion without turning them into constitutional law cynics at the very outset of the course. Notice that I use the word "cynic," not "Realist." *Marbury* contains important legal analysis which does not necessarily support the result in the case, and the logic of which is not necessarily apparent. But that is an accurate reflection of the semester (or two) to come. Although it is beyond the scope of this Essay to support a full-fledged Realist critique of constitutional law, it should now be well accepted that the Court's constitutional cases are often decided with legal reasoning that is at best unpersuasive, and that in most cases prior doctrine could lead to either result. This is not necessarily *bad*, it is just true. As Professor Balkin has eloquently said:

> I must also confess that I find a certain kind of poetic justice in the fact that at the very moment when the Supreme Court first announces the doctrine of judicial review, at the very moment that . . . symbolizes the virtues of an independent judiciary devoted to the Rule of Law, the Court does so in a political context that demonstrates the Court's lack of independence from politics. . . . To borrow a phrase from Freud, *Marbury v. Madison*, the primal scene of American judicial review, is that tawdry mixture of politics and law which dare not speak its name, and which must always be denied by judges, but which has ever shaped the practice of judicial constitutional interpretation in our country.[75]

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[72] 14 U.S. (1 Wheat.) 304 (1816) (holding that the Court has the power to review state court determinations of federal law).

[73] 22 U.S. (9 Wheat.) 1 (1824) (discussing Congress's commerce power and the dormant Commerce Clause).

[74] 27 U.S. (2 Pet.) 245 (1829) (discussing the dormant Commerce Clause).

[75] E-mail from Jack Balkin, Professor of Law, Yale Law School, to Sanford Levinson, W. St. John Garwood & W. St. John Garwood, Jr. Centennial Chair in Law & Professor of Government, University of Texas School of Law (Aug. 24, 2002), *reprinted in* Levinson, *supra* note 1, at 575-76.

In order for the Constitution to actually limit the elected branches and the states, there must be some kind of enforcement mechanism. Even assuming the most "vulgar" form of Legal Realism in the sense that the Court simply expresses political views for political reasons, there are sound justifications for having a third governmental institution keep other institutional actors from violating our fundamental law. And, this kind of system will work best when the enforcers are politically independent and do not have to worry about being fired or otherwise punished for unpopular decisions.[76] The reason *Marbury* is so important is that it was the first and most important step in this evolution. Congress could not be the ultimate interpreter "given a written constitution dividing power among independent branches of government."[77] The President's law-execution function, which has turned into a lawmaking function, eliminates the Presidency for the same reason.[78] Furthermore, the idea of constitutional supremacy without "some authoritative method of dispute resolution, would wreak havoc."[79] Accordingly, almost by default, but definitely starting with *Marbury*, the Court has assumed that function.

Contrary to Professor Levinson's statements, even if one accepts the most extreme Realist critique, that acceptance should not lead to the failure to teach legal doctrine because doctrine plays an important role in how lawyers argue cases and how judges explain their results. The hardest part of teaching constitutional law (perhaps any law) is to give students a realistic account of the interplay between political preferences, political realities, and legal doctrine. *Marbury* serves as an excellent example of those relationships. The political context of the case is important (and interesting to students), Marshall's political preferences are fairly easy to identify and explain (secure a strong role for the Court while assuaging those who did not want Marbury to get his commission), and his articulation of doctrine is replete with unstated premises and obvious contradictions. All three of those statements are also true of most of the cases students are exposed to in constitutional law, and it is well worth emphasizing that the way the modern Supreme Court handles issues of federalism, due process, separation of powers, and individual rights, and just about every other area of constitutional law, harkens back to the structure and method of the Court's first real constitutional law case—*Marbury v. Madison.*

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[76] Whether they should be appointed for life (rather than limited terms), however, is a very different question.

[77] Farber, *supra* note 14, at 415.

[78] *See id.*

[79] *Id.* at 415-16.

CONCLUSION

There are two separate aspects to *Marbury v. Madison.* Professor Levinson is correct that nothing very important hinged on whether Marbury actually received his commission, and the issue of Congress's power over the Court's original jurisdiction is unlikely to inspire our students. The second aspect of *Marbury*, however, is that it analyzes the circumstances under which the President is subservient to the law, and justifies the Court's power of judicial review. For the first time, the United States Supreme Court announced that the constitutional and legal limitations on the elected branches would be enforced. This is government under law. We should not forget that, in the end, John Marshall was correct. The Court did not have jurisdiction over the case, judicial review of legislative acts is an indispensable part of our system of checks and balances, and the President should be amenable to suit when he violates vested legal rights. For these contributions, *Marbury* deserves its status as a constitutional law classic, and its place at the beginning of any constitutional law syllabus.