REPLY

WHY I STILL WON'T TEACH *MARBURY* (EXCEPT IN A SEMINAR)

Sanford Levinson[*]

Professor Segall[1] has done me the high compliment of taking seriously my attack on the teaching of *Marbury v. Madison*.[2] I am extremely grateful to him. He makes a number of good arguments, and I will try to respond to them. But I think it is important to preface our debate, such as it is, with two comments.

First, my principal aim when writing the article was precisely to engender just such a conversation that Professor Segall has entered into: pointed but courteous. There can be little doubt that *Marbury*, as a truly "canonical" case and object of pedagogy, has one characteristic that is often, perhaps by definition, present in all "canonical" materials: It is presented, year after year, without much thought going into *why* exactly it is important to do so. It simply becomes a "truth" that one begins a course (or a casebook) with *Marbury*. Just as, according to Socrates, the unexamined life is not worth living, so, too, is the unexamined course syllabus (perhaps) not worth teaching. Perhaps most readers of our debate will end up agreeing with Professor Segall, or, for that matter, with my friend and colleague Jack Balkin, who wrote a "dissent" appended to my original article explaining that is the very protean nature of *Marbury*, that it can be made to stand for practically anything one wants, that makes it worth teaching.[3] But even if I lose the debate, at least the decision to stick with *Marbury* will be made only after careful thought, which for me would count as at least a partial victory. This being said, I am not persuaded by Professor Segall to change my own mind.

My second point is associated with, but analytically separable from, the first. As Jack Balkin and I have argued, canons are not

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[1] Eric J. Segall, *Why I Still Teach* Marbury *(And So Should You): A Response to Professor Levinson*, 6 U. PA. J. CONST. L. 573 (2004) (responding to 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] E-mail from Jack Balkin, Knight Professor of Law and the Constitution, Yale Law School, to Sanford Levinson (Aug. 24, 2002), *reprinted in* Sanford Levinson, *supra* note 1, at 575-76.

natural objects; they are socially constructed and instantiate a certain consciousness, which is maintained across time precisely inasmuch as they are taught as canonical.[4] One function of canons is, in a sense, to "congeal" consciousness and thus defer asking not only why the canon is as it is, but also why other materials may not have better claim to occupying the space now taken up by canonical works.

That is, canons are—must be—hierarchical, putting noncanonical works, as it were, "in their place." It is literally unimaginable that a canon could include everything that has been written. Given the movement of history and the grim reality of an economy of scarce time and intellectual energies, we are always in the process of creating and recreating canons, partly in order to honor those works assigned canonical status, partly to feel comfortable ignoring the many more works that are excluded.

It is always valuable to ask why certain materials emerge—or vanish—as "canonical classics" within a pedagogical enterprise. I would be surprised if Professor Segall objected to the fact that intergovernmental tax immunities, a much-discussed topic in constitutional law courses in, say, 1940, are now almost wholly absent from the first-year curriculum. Or consider the fact that constitutional criminal procedure has been hived off to a course of its own, so that first-year students are rarely, if ever, introduced to the controversies surrounding the Fourth or Fifth Amendments. Indeed, courses on those amendments are often taught by professors who do not consider themselves "constitutional lawyers," if one defines such lawyers, in the contemporary legal academy, as persons interested in high theory instead of the painstaking elaboration of doctrinal case law.

In any event, let me happily acknowledge that it would be remarkably stupid of me to proclaim that I would not teach *Marbury* even if my course were endless (or even, say, twelve hours instead of four). Of course I would. The case raises many fascinating questions, of all kinds. Indeed, even as I took part in *Marbury* symposia during 2003 by trying to explain why I ignored the case in my course, I readily admitted that I could easily (and happily) conceive teaching a full-semester seminar on the case and its context. I cannot overemphasize the fact that, at bottom, most of my case against teaching *Marbury* is an "economic" one, focusing on what I believe to be the serious (indeed, overwhelming) "opportunity costs" that must be paid in order to teach *Marbury* well. But I readily admit that one cannot discuss such costs and benefits without engaging in a highly value-laden discussion of why we think it important for students to study constitutional law in the first place and, therefore, what especially within that

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

field is worth thinking about. It is almost certainly the case that any disagreement between Professor Segall and myself is, ultimately, far more one of values, perhaps even "politics" or "ideology," than it is of what might be called "pedagogical science."

Let me turn now to Professor Segall's specific rejoinders. He lays down the gauntlet near the beginning of his article: "Not only should *Marbury* be taught to law students, it should be the *first constitutional case* to which they are exposed."[5] I disagree with the first clause, though, frankly, I do not feel adamant about this. Nonetheless, I do indeed completely and unequivocally disagree with the second clause. Perhaps *Marbury* should be taught; I am not dogmatic on that point, though I always want to know what one is *not* teaching, such as the "normalization" of slavery in American constitutional doctrine, in order to cover *Marbury* at suitable length. I am, however, becoming increasingly dogmatic with regard to *Marbury* being the first case that students read. It is probably most efficient simply to quote from the initial article:[6]

> As I have said on a number of previous occasions, the single most important feature of the casebook with which I am associated is that it functionally begins, following a short introductory chapter, with James Madison's speech before the 1791 Congress on why the proposed bill to charter the Bank of the United States is unconstitutional;[7] and this is followed by the memoranda sent to George Washington by the three members of his cabinet, Thomas Jefferson, Alexander Hamilton, and Edmund Randolph;[8] which is followed in turn by Marshall's opinion in *McCulloch v. Maryland*;[9] and then Andrew Jackson's 1832 veto of the Bank's renewal.[10]

Why do I believe this? The answer is simple: It is absolutely essential that students realize, as soon as possible in the course that constitutional interpretation is not the exclusive province of courts and, indeed, that there may be good reason not even to believe that courts have automatic supremacy when they do get around to engaging in constitutional interpretation. One of the most important scholarly projects in the contemporary legal academy is that of University of Chicago Law Professor David Currie, who, by the end of 2004, will

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[5] Segall, *supra* note 1, at 573 (emphasis added).

[6] The following passage, including footnotes, is from Levinson, *supra* note 1, at 571 & nn.68-71.

[7] *See* PAUL BREST, SANFORD LEVINSON, J.M. BALKIN & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 8 (4th ed. 2000).

[8] *Id.* at 11-16.

[9] *Id.* at 17-30, 44-49.

[10] *Id.* at 51-55. Indeed, Jackson's veto is followed by a memorandum from Walter Dellinger, then the head of the Office of Legal Counsel in the Department of Justice, to Abner Mikva, Counsel to President Clinton, on "Presidential Authority to Decline to Execute Unconstitutional Statutes." *Id.* at 56-58.

have published four volumes of his invaluable survey, *The Constitution in Congress.*[11] The most important early constitutional debates took place within Congress; most students (like too many of their professors) are simply ignorant of this, and our obsession with *Marbury* does nothing to cure—indeed, it only contributes to—this intellectual illness.

Professor Segall is surely correct that a gifted teacher can tease out the many questions from *Marbury,* including examination of whether the Court is indeed "supreme." But why *begin* a course with that question? Why not, instead, begin by asking how it is that members of the very first generation did not await judicial pronouncements in order to have fundamental debates about the meaning of the Constitution?

One need not denigrate the Supreme Court and suggest that it has *no* role in constitutional interpretation, which would be foolish indeed, to suggest that the first "cases"—except in the question-begging sense that this term is used by law professors—arose in Congress or, for that matter, within George Washington's cabinet, inasmuch as he asked Jefferson, Hamilton, and Randolph to write opinions advising him of the constitutionality of the Bank. Even if one does define "case" only as a judicial event, and even if one rejects my own advice that the first case, in that sense, be *McCulloch v. Maryland,*[12] which obviously built on—and responds to—the great debate over the Bank, then let me suggest two other cases that are at least as good to begin with.

The first is *Hylton v. United States.*[13] As Professor Currie has demonstrated, *Hylton* is only one of a number of pre-*Marbury* cases that can be understood only against the background assumption that the judiciary did in fact have the power to invalidate a federal law at least under some conditions.[14] Thus, wrote Justice Chase, "only one question is submitted to the opinion of this court—whether the law of congress, of the 5th of June, 1794, entitled, 'An act to lay duties upon carriages, for the conveyance of persons,' is unconstitutional and void?"[15] The issue in *Hylton* concerned the arcane question of "direct taxes," as required by the Constitution.[16] The Court rejected the

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[11] He has published two thus far. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829 (2001); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801 (1997).

[12] 17 U.S. (4 Wheat.) 316 (1819).

[13] 3 U.S. (3 Dall.) 171 (1796).

[14] *See* DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 31-49 (1985) (discussing *Hylton,* 3 U.S. (3 Dall.) at 199, and *Calder v. Bull,* 3 U.S. (3 Dall.) 386 (1798)).

[15] *Hylton,* 3 U.S. (3 Dall.) at 172.

[16] *See* U.S. CONST. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.").

attack and held the tax constitutional. The main point, though, is that the Court suggested, fully seven years before *Marbury* (and five years before Marshall's ascension to the Court) that it could have declared it "unconstitutional and void" had it been persuaded that the law violated the Constitution. I can do no better than quote Mark Graber's brilliant article, *Establishing Judicial Review:* Marbury *and the Judicial Act of 1789*:

> Whether judicial review was stare decisis only after Marbury [sic] is contestable. Several Justices in [*Cooper v.*] *Telfair* asserted that judicial review was already settled law. Justice William Cushing wrote, "this Court has the . . . power . . . to declare the law void." Justice Patterson concurred. Justice Chase previously declared federal judicial review the law of the land when riding circuit. . . . During the 1790s, the Supreme Court appears to have declared laws unconstitutional in two cases, *United States v. Yale Todd* and *Hollingsworth v. Virginia*, [which, however, because of the lack of an official court reporter at the time, were not printed]. Federal justices when riding circuit during the Washington and Adams administrations frequently asserted and occasionally exercised the power to declare federal and state laws unconstitutional. . . . These relatively frequent exercises of judicial power suggest that *Marbury* is best interpreted as justifying a previously existing judicial practice rather than as announcing a hithertofore judicially unrecognized proposition of constitutional law.[17]

Should one reject beginning with *Hylton* because it is just too obscure, then let me offer a second candidate, *Chisholm v. Georgia*,[18] especially in the context of Professor Segall's description, toward the end of his response, of *Marbury* as "the Court's first real constitutional law case."[19] Two things are well-known about this case. First, it (correctly) read Article III, which assigned federal "judicial Power" to "all Cases . . . between a State and Citizens of another State,"[20] to authorize a suit "brought against the State of Georgia by two South Carolina citizens to collect a debt owed an estate."[21] The second thing that every constitutional law professor knows is that *Chisholm* was overruled by the proposal and ratification of the Eleventh Amendment.[22]

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[17] Mark A. Graber, *Establishing Judicial Review:* Marbury *and the Judicial Act of 1789*, 38 TULSA L. REV. 609, 626-27 (2003) (citations omitted).

[18] 2 U.S. (2 Dall.) 419 (1793).

[19] Segall, *supra* note 1, at 586.

[20] U.S. CONST. art. III, § 2, cl. 1.

[21] LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 521 (3d ed. 2000).

[22] The Supreme Court, in *Seminole Tribe v. Florida*, 517 U.S. 44, 69 (1996), wrote that "[t]he dissent's conclusion that the decision in *Chisholm* was 'reasonable' certainly would have struck the Framers of the Eleventh Amendment as quite odd: That decision created 'such a shock of surprise that the Eleventh Amendment was at once proposed and adopted.'" One problem with this sentence is its gratuitous insult to its predecessors as being presumptive lunatics for believing their decision in *Chisholm* to be a "reasonable" reading of the Constitution. But the ever confident majority also patently disregards a scholarly difference of opinion about the

But there is yet a third thing that every law professor knows about the Eleventh Amendment, which is that, at least since *Hans v. Louisiana*,[23] and extending unto this very day,[24] it has been "interpreted"—if this is not too generous a concession to the validity of the Supreme Court's handiwork—in a way that goes well beyond the bare words of its text: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by *Citizens of another State, or by Citizens or Subjects of any Foreign State.*"[25] No untutored reader of the English language would "construe" these words to prevent lawsuits commenced against a state by one of its own citizens (*Hans*) or by a "Foreign State" itself (rather than by one of its "Citizens or Subjects"),[26] but every constitutional lawyer knows that one cannot possibly understand the reach of the Eleventh Amendment simply by reading its text (as is the case, incidentally, with much of the Constitution). So why wouldn't *Chisholm* and its aftermath teach a young student, who by stipulation is being exposed to the wonders of American constitutional law for the first time, a great deal about interpretive methodology and the "dialogue" between the Court, Congress, and the states?

Indeed, there is even a third advantage of teaching *Chisholm*, for each of the five members of the Supreme Court delivered a *seriatim* opinion, as was the custom in England. In some ways, the most significant single feature of *Marbury* is that it represents one of

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degree of "shock and surprise" at the decision and, therefore, what the Amendment was designed to do. *See, e.g.*, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983). Judge Gibbons writes:

> The amendment was the product of a unique set of political circumstances, and reflects more the foreign policy concerns and political compromises of the Federalist era than it does any broad desire to constitutionalize a doctrine of state sovereign immunity. What we now uncritically accept as the 'correct' interpretation of the amendment was itself a product of the highly charged politics of the post-Reconstruction era.

Id. at 1894.

[23] 134 U.S. 1 (1890) (extending the Eleventh Amendment's language to bar suits in federal court brought by citizens against their own state). As to *Hans*, see Edward A. Purcell, Jr., *The Particularly Dubious Case of* Hans v. Louisiana*: An Essay on Law, Race, History, and "Federal Courts,"* 81 N.C. L. REV. 1927 (2003), which establishes that *Hans* must be understood in the context of the restoration of "white rule" in the old Confederacy and the concomitant repudiation by these states of debt. The current Court's veneration of *Hans* is just one more example of the extent to which their jurisprudence of federalism has, to a significant extent, "been established through a process that filters, purifies, redesigns, and largely erases decisive historical phenomena—social conflict, politics, racism, sexism, and, of course, change itself." *Id.* at 1929. Perhaps judges (and their clerks) would write more intelligent opinions had they been better educated in their elite law schools about such matters as the shameful constitutional adjustment to the end of reconstruction following The Compromise of 1877, instead of wasting their time on the exegisis of *Marbury*. (I am grateful to Judith Resnick for informing me of the Purcell article.)

[24] *See, e.g., Seminole Tribe*, 517 U.S. at 54 (following *Hans*).

[25] U.S. CONST. amend. XI (emphasis added).

[26] *But see* Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) (finding a suit by a principality, but not its citizens or subjects, against a state barred by the Eleventh Amendment).

Marshall's truly signal achievements as Chief Justice—the institution of the "Opinion of the Court"—not to mention his discouraging any dissent from that (usually *his*) opinion. Students should be encouraged to reflect about the difference such institutional practices make. Consider the fact that unless one teaches the debate about the constitutionality of the Bank of the United States, students would have literally no idea that there was anything truly controversial about *McCulloch*, given not only the rhetorical brilliance of Marshall's opinion, but, just as importantly, the fact that there was not the slightest hint of any disagreement among the justices themselves.

As it happens, I do not teach *Chisholm* for reasons of time, but I can certainly imagine doing so with pleasure. Indeed, as I write these words, I am strongly tempted to suggest to my co-editors that we include *Chisholm* and the reaction to it in the next edition of our casebook, precisely because it does illuminate the way that our constitutional system operates. In any event, students should certainly be aware that constitutional cases—as well, of course, as crucially important and hard-fought constitutional controversies—preceded the relatively trivial case of *Marbury v. Madison*.

Let me turn now to some of Professor Segall's more specific criticisms, set out in Part II of his piece. Just as he divides that part into sections organized around various quotations from my initial article, I will do the same in this response.

I. "LEVINSON'S ARGUMENT [ABOUT THE DIFFICULTY OF PLACING *MARBURY* IN ITS HISTORICAL CONTEXT] WOULD SEEM TO APPLY TO MOST OF THE CASES IN THE BASIC CONSTITUTIONAL LAW COURSE . . . ."[27]

I am estopped to deny that there is a large element of truth in this, and he picks an especially good example in citing *Youngstown Sheet & Tube Co. v. Sawyer*.[28] As a matter of fact, our presentation of *Youngstown*—the "Steel Seizure Case"—in the casebook that I co-edit, is considerably different from that of any other casebook in that it includes larger portions of Chief Justice Vinson's dissent that places the case within the context of the Korean War—in Vinson's view, I think it is fair to say, the first battle of World War III.[29] One would not really learn anything at all about the War from reading any of the opinions striking down the seizure, and students must be made aware of the War if they are to understand why there was vigorous dissent.

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[27] Segall, *supra* note 1, at 576.

[28] 343 U.S. 579 (1952).

[29] *See* BREST ET AL., *supra* note 7, at 707-24 (presenting and discussing *Youngstown*).

I can also offer as evidence for Professor Segall's point our presentation of *Korematsu v. United States*,[30] where (we hope) students learn at least a bit of the remarkable history of anti-Asian and, more specifically, anti-Japanese prejudice in late nineteenth- and early twentieth-century America. It is, ironically enough, precisely the existence of this virulent prejudice that helps to justify the "rationality" of the Roosevelt administration, at least as of the time of the issuance of Executive Order 9066[31] when Pearl Harbor was still an especially vivid memory. It is indeed almost miraculous that Japanese resident aliens—who were barred from becoming American citizens—and even their American-citizen children, because born in the United States, were so loyal to a country in which they had been so mistreated. This should not be taken as a defense of the Executive Order or of *Korematsu*, but it does help to demonstrate, when one teaches the case, the difference between "minimum rationality," which easily justifies the Order, and imposing some significantly higher burden of justification, which means, among other things, that one is willing to bear certain risks in order to instantiate the value, say, of nondiscrimination on national origin grounds.

It is probably worth mentioning that a survey of constitutional law casebooks some years ago found that our casebook had significantly fewer cases than most of our competitors, not least because we make a reasonably conscientious effort to embed some significant portion of our cases within their historical contexts.[32] This obviously means spending precious pages and, concomitantly, excluding cases (or subject matters) that can be found in other, less historically-oriented, casebooks. We have decided, for example, to cut down almost to the vanishing point discussion of the dormant Commerce Clause or the "state action" doctrine, and we relegated what I believe to be an excellent presentation of cases and materials on racial gerrymandering to our internet Website in order to meet the publisher's desire to keep the book to a reasonable length.[33] So I do indeed take Professor Segall's point very seriously and will even concede that my own *cri de coeur* against teaching *Marbury* would be weakened, perhaps fatally, if my only complaint was the time it takes to bring students up to speed on the complex events of 1800 to 1803.

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[30] 319 U.S. 432 (1943).

[31] Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943) (authorizing "the Secretary of War to Prescribe Military Areas" for the internment of Japanese-Americans and Japanese resident aliens).

[32] *See generally* BREST ET AL., *supra* note 7.

[33] *See* Conlaw.net Supplemental Materials, *at* http://www.yale.edu/lawweb/conlaw/suppl.htm.

II. "MARSHALL'S COMMENTS ABOUT THE RULE OF LAW, JUDICIAL REVIEW, AND JUDICIAL AUTHORITY OVER THE EXECUTIVE, HAVE STOOD THE TEST OF TIME."[34]

I must confess to some mystification at what this means. The Court has been all over the place, in our two-century history, with regard to "the rule of law, judicial review, and judicial authority over the Executive."[35] The aforementioned *Korematsu* case, whatever else it might teach, is scarcely inspiring about any of these three concepts. *Brown v. Board of Education*,[36] another canonical case, is significant at least in part because Linda Brown, the presumptive winner of that case, was in fact given no effective remedy, either in 1954, when the case was decided, or even the following year, when *Brown II*[37] condemned her and the class she represented to the vagaries of "all deliberate speed."[38] The endless deliberation turned to speed primarily because of the courage of the Civil Rights Movement and, lest we forget, of Lyndon B. Johnson's willingness to sacrifice the Democratic Party that he had grown up in because of his recognition that it was indeed time to "overcome" the legacy of segregation. The Supreme Court played a marginal role in the actual demise of segregation (to the extent, of course, that segregation is not alive and well in this new millennium).[39]

It is not even clear that "John Marshall's opinion sets forth the basic rationales for a strong judiciary,"[40] since there is, quite obviously, a substantial scholarly debate about the "real" meaning of *Marbury*. One can as easily read *Marbury* as an early version of James Bradley Thayer's "clear mistake" theory of judicial review[41]—just look at the rhetorical use that Marshall makes, for example, of the two-witness-for-treason rule and the obvious unconstitutionality of any law allowing only one witness to suffice in a treason case—as a "rationale for a strong judiciary" in the sense that we mean today, when liberals

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[34] Segall, *supra* note 1, at 578.

[35] *Id.*

[36] 347 U.S. 483 (1954).

[37] Brown v. Bd. of Educ., 349 U.S. 294 (1955) ("*Brown II*").

[38] *Id.* at 301.

[39] See, for example, GERALD N. ROSENBERG, THE HOLLOW HOPE (1991), for the canonical argument about the limited impact of *Brown*. See also ROBERT J. COTTROL ET AL., *BROWN V. BOARD OF EDUCATION*: CASTE, CULTURE, AND THE CONSTITUTION (2003), and JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION*: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (2001), for two chastening analyses of the survival of "separate" schools, even if they are not mandated de jure, into the twenty-first century.

[40] Segall, *supra* note 1, at 578.

[41] *See, e.g.*, James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, *in* LEGAL ESSAYS 1 (Chipman Law Publishing Co. 1923) (1908) (arguing that law should not be held unconstitutional unless it represents a "clear" mistake by the legislature).

celebrate *Brown* and conservatives embrace *United States v. Morrison*[42] or *Gratz v. Bollinger*.[43] (And most conservatives at least apologize for, even if they are embarrassed to embrace, *Bush v. Gore*.)[44] The best that one can say, I believe, is that Marshall's opinion sets forth the basic rationale for treating the Constitution as law, with the judiciary having some role to play in enunciating and enforcing the law, but this says precious little about the "strength" of the judiciary.

III. "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."[45]

But why isn't the "real topic" of the case whether the Supreme Court will *in fact* order the President to perform an act that the President has given every indication of refusing to perform, even if ordered to by the Supreme Court? John Marshall's assertion that the Court might in fact issue a writ of mandamus against the President (or, at least, his Secretary of State, who was clearly acting on order of the President), if only it had the jurisdictional authority to do so, is nothing more than dicta. The point, of course, is that Marshall carefully refrained, through his dazzling hermeneutic maneuvers, from doing so.

Incidentally, one thing that Professor Segall and I absolutely agree on is the brilliance of my colleague Louise Weinberg's reexamination of *Marbury*.[46] It is, indeed, essential reading for anyone interested in the case and presents by far the best "internalist" defense of *Marbury* that has ever been or, likely, ever will be, written. She writes, and Professor Segall agrees, that "[t]here can be little doubt that *Marbury* was intended first and foremost to establish

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[42] 529 U.S. 598 (2000) (striking down as exceeding Congress's Commerce Clause power an act providing civil remedies for victims of gender-motivated violence).

[43] 539 U.S. 244 (2003) (holding the University of Michigan's affirmative action admissions policies to be in violation of the Equal Protection Clause of the Fourteenth Amendment).

[44] 531 U.S. 98 (2000) (concluding that the lower court's decision to enforce a manual recount violated the Equal Protection Clause because the lower court failed to identify and require standards for accepting or rejecting contested ballots).

[45] Segall, *supra* note 1, at 579.

[46] Louise Weinberg, *Our* Marbury, 89 VA. L. REV. 1235 (2003); *see also* Segall, *supra* note 1, at 579 n.33 (praising Weinberg's article).

judicial control over the *government*—over executive officials."[47] Perhaps that was Marshall's intention; he was certainly ambitious enough to have that as his goal. But the bottom line reality of *Marbury* is that, for all of his spectacular moves and portentous utterances, Marshall did *not* throw down the gauntlet to Jefferson. The man was no fool, since he surely realized that issuing such an order to Madison or Jefferson would provoke a constitutional crisis and, perhaps, his own impeachment. A disembodied legal-academic version of *Marbury* may stand for the proposition that executive officials, including presidents, are meaningfully controlled by the judiciary, but the concrete reality of the 1803 case does no such thing.

IV. "*MARBURY* GIVES STUDENTS A CHANCE TO EXPRESS THEIR VIEWS ON JUDICIAL REVIEW BEFORE THEY SEE WHERE IT HAS LED . . . ."[48]

But why, precisely, is this kind of abstract expressionism of any great value? Perhaps I am simply a vulgar pragmatist, but it seems to me that the only worthwhile discussions of judicial review are those that are based on knowing how courts (and other institutions) have in fact behaved over time. This is, incidentally, one reason why, before I decided to simply eliminate *Marbury* from my syllabus at the University of Texas Law School, I taught it as the *conclusion* of the course, when students were reasonably prepared to discuss judicial review as part of our history.

V. "[T]HE 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."[49]

Needless to say, I have no problem with these sentences as such, though they seem in obvious tension with the sentence quoted at the head of Section I above.[50] This may simply be an illustration of *Marbury*'s protean nature. My principal problem concerns the kind of "politics" in which *Marbury* is "grounded." In a critique/harangue

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[47] Weinberg, *supra* note 46, at 1404; Segall, *supra* note 1, at 579 (quoting same).

[48] Segall, *supra* note 1, at 580.

[49] *Id.* at 582.

[50] *See supra* Part I ("Levinson's argument [about the difficulty of placing *Marbury* in its historical context] would seem to apply to most of the cases in the basic constitutional law course . . . ." (quoting Segall, *supra* note 1, at 582)).

against *Bush v. Gore*[51] published in *The Nation*,[52] I proffered a distinction between "low" and "high" politics. The former is deciding cases in terms of short-term benefits to one's favorite political party or political benefactor. The latter involves the role that overall conceptions of the polity—of political ideology—play in resolving what are, especially at the level of the United States Supreme Court, highly indeterminate issues of law. One cannot, for example, begin to understand the Court's recent ventures into protecting states against lawsuits without understanding the majority's commitment to a basically antebellum view of state sovereignty (which is not to concede that their view captures the dominant understanding even in 1788). But no one seriously believes that they are thinking of the short-run interests of the Republican Party—or even of the Supreme Court itself—in making such decisions. This is even clearer with regard to the decisions by the Massachusetts Supreme Judicial Court in December and January interpreting the Massachusetts state constitution to require the issuance of marriage licenses to gays and lesbians.[53] No reasonable person could interpret this as an effort by the four justices in the majority, at least one of whom is almost certainly a liberal Democrat eager to see the political demise of George W. Bush, to enhance the presidential prospect of Massachusetts Senator John Kerry, who was, by the time of the second decision, already tabbed by many observers as the "front-runner" for the Democratic nomination.[54] Kerry almost certainly did not appreciate the February 4, 2004, announcement by the Court that "civil unions" did not constitute a safe haven short of full-scale marriage.[55] Indeed, within several weeks, he announced his support for efforts being made in Massachusetts to amend the state constitution and specify that that civil unions constituted all that gays and lesbians could hope for, with the status of "marriage" being reserved, as at present, for heterosexuals.[56]

It would be equally beside the point to suggest that the three dissenters are Democrats eager to help their party. What is most

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[51] 531 U.S. 98 (2000).

[52] Sanford Levinson, *Return of Legal Realism*, NATION, Jan. 8, 2001, at 8.

[53] Opinions of the Justices to the Senate, 802 N.E. 2d 565 (Mass. 2004) (finding same-sex civil unions inadequate under the Massachusetts constitution); Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941 (Mass. 2003) (striking down Massachusetts's marriage scheme, which was available only to opposite-sex couples, under the Massachusetts constitution).

[54] *See, e.g.*, Pam Belluck, *Massachusetts Gives New Push to Gay Marriage*, N.Y. TIMES, Feb. 5, 2004, at A1 (noting Massachusetts Senator John Kerry as the "democratic front-runner" in the nearing presidential election).

[55] Opinions of the Justices to the Senate, 802 N.E. 2d 565 (Mass. 2004).

[56] *See, e.g.*, Patrick Healy & Frank Phillips, *Kerry Backs State Ban on Gay Marriage*, BOSTON GLOBE, Feb. 26, 2004, at A1 ("Presidential candidate John F. Kerry said yesterday that he supports amending the Massachusetts Constitution to ban gay marriage and provide for civil unions for gay couples.").

plausible is that all seven of the justices are interpreting the state constitution in terms of different visions of how society is best organized with regard to recognizing the diversity of sexual orientation and the social/constitutional meaning of "marriage." This is what I mean by "high politics."

It is not that "low politics" never rears its head even at the level of the United States Supreme Court (let alone state trial courts). Rather, it is my own belief that "low politics" relatively rarely explains the decisions that Supreme Court justices make, even as "high politics" very often do. For all of my loathing of the Supreme Court's recent federalism decisions, I put them in a different category than *Bush v. Gore*, which I remain inclined to view as little more than a judicial *putsch* in behalf of the majority's candidate for President. I can loathe both, but for decidedly different reasons.

Returning to *Marbury*, then, I think that the politics of that decision are decidedly "low," concerned very much with the very particular realities of the Jefferson administration and the possibility of attacks on the judiciary should it order Madison to deliver the commission. After all, part of the background to the case is the abolition of the 1802 Term of Court and the repeal of the 1801 Act establishing an intermediate tier of federal circuit judges, who were, of course, all Federalists appointed literally in the waning days of the repudiated Adams presidency and confirmed by a lame-duck, equally repudiated Federalist Congress. And there is also the specter of the Chase impeachment that might have haunted Marshall. Professor Weinberg, of course, challenges this "low politics" account,[57] and any fair assessment of the controversy would have to spend quite a bit of time on her supple, often highly technical, arguments. I would happily do so in a seminar on *Marbury*; however, as I have already made clear, I do not think it is worth taking the time in an introductory course.

VI. "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) WHICH IT DID NOT ARTICULATE."[58]

One can teach students the important truth that Supreme Court justices regularly mangle precedents "to stand for a proposition . . . which [they] did not articulate"[59] through many, many sequences of opinions. My own favorite for making this point is the

[57] *See generally* Weinberg, *supra* note 46.

[58] Segall, *supra* note 1, at 583.

[59] *Id.*

attempt that Justice Story makes in his dissent in *Mayor of New York v. Miln*[60] to distort Chief Justice Marshall's opinion in *Gibbons v. Ogden*.[61] According to the esteemed Justice (and professor of constitutional law at Harvard), his predecessor had, for the Court, held that the power to regulate interstate commerce is possessed exclusively by Congress.[62] For better or worse, this is not so, or else Justice Johnson would have had no need to write his concurring opinion making precisely this argument.[63] Instead, Marshall, though "tempted" to hold what Story would have preferred, ultimately relied on the preemption of the New York steamboat monopoly by a congressional statute licensing coasting along the Hudson River. I ask my students what grade I should give Justice Story if he were a student in my course answering the question, "What did *Gibbons v. Ogden* hold?" I answer my own question by suggesting that I would give him no higher than a D+.

Yet Professor Segall is of course correct that *Marbury* is a useful case to demonstrate the proposition that he suggests. If one decides to teach the case, one should certainly follow his advice on this (as on other matters). But the reason offered scarcely has much weight in the initial decision whether to teach the case at all.

VII. "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."[64]

I suppose the disagreement between us, assuming there is one, is the weight placed on the word "necessarily." Surely he is correct. Many of us who criticize judicial supremacy undoubtedly took constitutional law courses that began with *Marbury*, and, therefore, we stand as refutations of the argument that he attributes to me. The more moderate—and I think sustainable—version of my argument would be simply that to begin a course (or casebook) with *Marbury* tends to reinforce students' preexisting views that the Supreme Court is indeed supreme over constitutional interpretation; that they do possess what the Court has labeled the "ultimate authority" to give meaning to the controversial words of the Constitution.[65] Students learn this

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[60] 36 U.S. (11 Pet.) 102 (1837).

[61] 22 U.S. (9 Wheat.) 1 (1824).

[62] *Miln*, 36 U.S. (11 Pet.) at 154-56 (Story, J., dissenting) (arguing, on the basis of Marshall's opinion in *Gibbons*, that Congress possessed the exclusive power to regulate interstate commerce).

[63] *Gibbons*, 22 U.S. (9 Wheat.) at 222 (Johnson, J., concurring).

[64] Segall, *supra* note 1, at 585.

[65] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (cabining Congress's remedial powers under Section 5 of the Fourteenth Amendment and noting that "Congress does not

far before they ever show up in law school. No doubt most civics courses teach such a view. It is part of the unexamined background assumptions that students bring with them.

A digression with regard to this last point about the power of unexamined assumptions and the difficulty of challenging, let alone overcoming them: I personally believe that life tenure for the federal judiciary, particularly the Supreme Court, is a mistaken, perhaps even "stupid" feature of our Constitution.[66] I make no bones about this in the course I teach. I point out, for example, that almost no constitutional court around the world has lifetime tenure. Judicial independence is handily protected by, say, twelve- or fourteen-year terms. I have, once at the New York University Law School ("NYU") and once at my home University of Texas Law School ("UT"), given final exam questions that invited students to reflect on the cogency of life tenure in a jurisprudential universe that accepts one or another version of the Legal Realist doctrine that the identity of judges matter and that "high politics" is an important part of the judicial role. Cynics would predict that students would pander to their professor's viewpoints and feed back to them what they presumably want to hear. Yet 102 out of 108 students at NYU and a similar percentage at UT solemnly argued that life tenure was essential to preserving what is valuable in American constitutionalism. Since I do not believe that my own point of view is simply inane, I can only conclude that most students have been successfully socialized in elementary and high school to believe that life tenure is as important as they suggest and that they are basically impervious to any suggestions otherwise.

Similarly, I believe that anyone seriously desiring to call into question what I have called, in other writings, our national acceptance of a "papalist" Supreme Court,[67] must do so by demonstrating, as early

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enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."); Nixon v. United States, 506 U.S. 224, 238 (1993) (noting that "whether the action of [either the Legislative or Executive Branch] exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution" (alteration in original) (quoting Baker v. Carr, 369 U.S. 186, 210 (1962)); Powell v. McCormack, 395 U.S. 486, 549 (1969) (citing *Marbury* for the proposition that "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution"); Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.").

[66] *See, e.g.*, L.H. LaRue, *"Neither Force Nor Will," in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 57 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); L.A. Powe, Jr., *Old People and Good Behavior, in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 77 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

[67] *See, e.g.*, SANFORD LEVINSON, CONSTITUTIONAL FAITH 9-54 (1990) (comparing views on judicial supremacy in interpreting the Constitution with various schools of religious thought).

and as often as possible, the extent to which other institutional actors and noninstitutional actors such as mass movements, have felt altogether free to engage in constitutional interpretation themselves. To begin a course with *Marbury*, whatever the professor says, is to feed the monster that it is courts to which we should naturally (and, indeed, exclusively) turn when we want to know "what the law is."