housing, the second refers to the manner in which a person may legally evict another. Thus, it does not follow that an exemption based on Section 5 will necessarily lead to an exemption from the provisions of Section 28.

V. Outlook

As a general rule, urban poor laws which constitute the legal arsenal of urban dwellers who resist forced evictions have been given a restrictive interpretation by the Supreme Court and the Court of Appeals. All types of preconditions and legal requisites have been hurled in the way of upholding a so-called just and humane eviction. In injunction cases, for instance, entitlement of urban poor dwellers to a just and humane eviction and an eviction done in accordance with law has not carved a legal right *in esse* which demands protection from the courts. In some cases governmental inaction, such as the failure to constitute a committee or register beneficiaries, were enough to easily brush aside the right of first refusal or the requirements in Section 28.

Noted constitutionalist and erstwhile Chief Justice Enrique Fernando emphasized that social and economic rights as part of the judicial agenda are matters of urgency. During the 1934 Constitutional Convention, then Delegate Manuel Roxas distinguished between the political rights regime under the American constitution and the need to express a definite and well defined social and economic philosophy in the Philippine Constitution.[139] With regard to the changes in social and economic rights policy in the 1973 Constitution, Justice Fernando defined them as extensive.[140]

To expand the social and economic philosophy of the 1987 Constitution to encompass an entire Article on Social Justice and Human Rights multiplies the achievement of the 1934 Constitutional Convention and the 1973 Constitution ten-fold.

As for now, the restrictive interpretation of statutes emanating from the constitutional policy to observe evictions of urban dwellers in accordance with law and in a just and humane manner influences the scope and efficacy of social justice in the Philippine setting. Whether the judicial urgency in 1934 alluded to by Justice Fernando is directly proportional to an increasingly unequivocal social justice thrust in our Constitution in 1987 is a question the judiciary itself can ultimately resolve.

139. Enrique M. Fernando, *The American Constitutional Impact on the Philippine Legal System*, *in* Constitutionalism in Asia: Asian Views of the American Influence 144, 171 (Beer ed. 1979).

140. *Id.* at 172.

Making Sense of *Marbury*

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Introduction

It is the special fascination of history to reveal that hallowed doctrines and institutions, like judicial review and the American Supreme Court, are both dynamic and contingent.

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Cite as 46 Ateneo L.J. 107 (2001).

Although *Marbury v. Madison* [1] enjoys landmark status as the first pronouncement by the Federal Supreme Court of the doctrine of judicial review,[2] *Marbury* did not invent judicial review. The practice of either upholding or annulling statutes for complying or conflicting with a higher law deemed enforceable did exist in some form for the courts of the colonial era and in the early years of the Republic. Neither was the doctrine frozen by the *Marbury* decision. On the contrary, Supreme Court practice for nearly two centuries has developed the doctrine into something seemingly different from the *Marbury* version. Indeed, the Supreme Court itself has evolved into a powerful, independent, and politically active institution quite unlike the Court of which John Marshall assumed leadership in 1801. Nonetheless, the *Marbury* incarnation of judicial review is significant because it is a legal high watermark.

Marbury also represents a political high watermark. Doctrinal development alone will not fully explain why the Supreme Court crystallized judicial review at that particular time and in that particular manner. While the legal environment provided the Court with theoretical basis, *Marbury* was not the logical, unavoidable result of the development of judicial review in American law. If anything, *Marbury* must also be understood as a defensive and pragmatic response of a politically weak Supreme Court under siege from a Republican Executive and a Legislature resentful of Federalist abuse of power in the Federal Judiciary during the Adams administration.

This essay attempts to make sense of *Marbury v. Madison*. To better illustrate how history makes the doctrine and the Supreme Court alive, the essay will "digest" the case, extracting bare facts and ruling as a law student would. It will then add flesh to the decision by placing it in the context of the development of judicial review in American political theory and law, and by describing the political context and the actors that provided the catalysts for the decision. Finally, the essay will discuss the role played by John Marshall in the era's legal and political developments which prepared him for the *Marbury* case.

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), *reprinted in* 6 THE PAPERS OF JOHN MARSHALL 160-87 (Charles F. Hobson et al. eds., 1990).

2. 4 ROBERT F. CUSHMAN, CASES IN CONSTITUTIONAL LAW (5d ed. 1979), *in* P. Allan Dionospoulos and Paul Peterson, *Rediscovering the American Origins of Judicial Review: A Rebuttal to the Views Stated by Currie and Other Scholars*, 18 J. MARSHALL L. REV. 49, 51-52 (1984).

I. *MARBURY V. MADISON*: THROUGH THE EYES OF A LAW STUDENT

A. The Bare Facts

Stripped of political aspects, the facts of *Marbury v. Madison* seem straightforward. On March 2, 1801, Federalist President John Adams appointed the applicants William Marbury, Robert T. Hooe, and Dennis Ramsay, as new justices of the peace to fill new positions created by the Judiciary Act of 1801. On the same day, the Senate confirmed the appointments. Adams signed the commissions on March 3 and transmitted them to Secretary of State John Marshall for his official seal.

Some commissions, including those of the applicants, were never delivered. In the meantime, Republican President Thomas Jefferson assumed office and made his own appointments.

On December 17, 1801, Charles Lee filed a motion for *mandamus* in the US Supreme Court in behalf of Marbury, Hooe, and Ramsay, in order to compel delivery of the signed and sealed commissions to them by the new Secretary of State James Madison, who had assumed office on May 1801.

B. The Opinion

The opinion resolved three main issues: first, whether Marbury was entitled to the commission; second, whether the law provided any remedy; and third, whether the Court could provide that remedy.

1. Was Marbury entitled to the commission?

To answer this question, the Court distinguished among three stages of the appointment process: (1) *nomination*, which is a completely voluntary act of the President; (2) *appointment*, also a voluntary act of the President, but requiring the advice and consent of the Senate; and (3) *commission*, which could be deemed a legal duty enjoined by the Constitution. In deciding for Marbury, the Court ruled that the transmission of commissions was not required to complete the appointment: "It is more a practice directed by convenience rather than law." Consequently,

> Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country.[3]

3. *Marbury*, 5 U.S. (1 Cranch) at 171.

2. Did the Law Provide a Remedy?

To answer this question, the Court drew a distinction between political acts and ministerial acts. On the one hand, political acts are those acts performed by the President, either personally or through his appointees, pursuant to "important political powers" invested in his office by the Constitution, "in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience." The acts of officers in this capacity "can never be examinable by the courts."

Ministerial acts, on the other hand, are those imposed on an officer by the legislature, "when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion, sport away the vested rights of others." In this capacity, the officer acts as an officer of the law; hence, legal redress is available. The proper remedy to compel the performance of ministerial acts was the writ of mandamus, which Marbury sought directly from the Court by invoking Sec. 13 of the Federal Judiciary Act of 1789.

3. Could the Court issue the writ?

While Marbury was entitled to the delivery of the commission, the Court nonetheless ruled that it was powerless to issue the writ prayed for because Sec. 13 of the 1789 Act was unconstitutional. By expanding the Supreme Court's original jurisdiction defined by the Federal Constitution, Congress exceeded its legislative authority, which was constitutionally confined to defining the Supreme Court's appellate jurisdiction. This was the occasion in which Marshall wrote the classic formulation of the doctrine of judicial review:

> It 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.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules, governs the case. This is of the essence of judicial duty.[4]

4. *Id.* at 183.

II. Judicial Review and the Development of American Political Theory and Law

A. Something Lost in the Transmission

Marshall's assertion that "[i]t is emphatically the duty and the province of the judicial department to say what the law is" reflected what was a practical necessity for the courts of colonial America. The complexities of English law and its court system were not transmitted intact to the colonies, but were only approximated as far as practicable.

In England, the jurisdiction to hear cases was divided among several courts, namely: common law courts, courts of equity, ecclesiastical courts, merchant courts, and royal courts. Courts in the colonies were simpler and more rudimentary. In colonial Virginia, for instance, county courts and the General Court combined not only common law and equity jurisdiction, but also performed executive and legislative functions on top of their judicial duties.[5]

This simple and basic court system contrasted, however, with the complicated and confusing nature of American colonial law, which was drawn from "Two Fountains," and resulted in unwritten English common law, English statutes, and court precedents commingled with colonial law and unprinted local decisions. American courts thus exercised "a sovereign authority, in determining what parts of the common law and statute law ought to be extended."[6]

To complicate matters further, those acting as judges lacked the technical legal training that would have helped facilitate a more organized and consistent application of the law. Describing his nine-year experience as chief justice of the Massachusetts Superior Court, Governor Thomas Hutchinson wrote, "I never presumed to call myself a Lawyer....The most I could pretend to was when I heard the Law laid on both sides to judge what was right."[7]

Hence, American colonial law and practice were reduced to basic principles and common sense, with judges exercising vast discretion to pick and choose, to innovate and adapt, not only what law to apply but also how it

5. Charles F. Hobson, The Great Chief Justice 28 (1996).

6. Henry Hartwell, et al., The Present State of Virginia, and the College 40 (Hunter D. Farish ed., 1940); Charles Dickinson, *Letters from a Farmer*, *in* Writings of Dickinson 369-70 (Ford ed.); Gov. Henry Moore of N.Y. (Feb. 26, 1768), *in* Irving Mark, Agrarian Conflicts in Colonial New York, 1711-1775 (N.Y. 1940), *all cited in* Gordon S. Wood, 1771-1787 The Creation of the American Republic 296 (1969).

7. Thomas Hutchinson to John Sullivan (Mar. 29, 1771), *in* The Legal Papers of John Adams (L. Kinvin Wroth & Hiller B. Zobel eds., Cambridge, Mass.) *in* Gordon S. Wood, 1776-1787 The Creation of the American Republic 297 (1969).

was applied. Writing about the New York legal practice, Alexander Hamilton observed that the authority of American law was based not on its age or English-ness, "but as being founded in the nature and fitness of things."[8]

Thus was created the legal culture in the colonies.

Marshall studied law briefly at the College of William and Mary in Virginia during a lull in the American Revolution. His schooling in Virginia's legal culture accounts for his reliance on general principles, common sense, and logical reasoning, rather than on technical learning. In the words of Marshall's colleague on the Court, Associate Justice Joseph Story:

> The original bias, as well as the choice of his mind, was to general principles and comprehensive views, rather than to technical or recondite learning...He loved to expatiate upon the theory of equity; to gather up the doctrines of commercial jurisprudence; and to give a rational cast even the most subtle dogmas of the common law.[9]

B. Limiting Judicial Discretion

The unevenness of court-administered law naturally allowed for the arbitrary exercise of judicial discretion. Apart from its potential to be exercised arbitrarily, judicial power, together with executive power, represented the magisterial or monarchical elements of the colonial government and were exercised by the hated British. The popular element of the colonial government, in turn, was represented by the legislative power, which was exercised by the colonists through their respective colonial legislatures. Fearful and suspicious of judicial discretion as an exercise of British magisterial power over the colonies, colonists sought to limit it by resorting to written charters or by correcting or amending court-administered law through legislative intervention.[10]

The American Revolution promised to change this state of affairs. Distrust of the magisterial elements of Government led the drafters of the first state constitutions to vest tremendous powers in the state legislatures. In other words, the popular element of Government was strengthened at the expense of the monarchical elements, owing largely to the crucial role played by colonial legislatures in defending colonists from the abuses of magisterial power. Thomas Jefferson admitted that his goal was for the new Virginia legislature to eventually clarify and codify all the laws, so that judges would be reduced to

8. *Hamilton's Practice Manual*, in HAMILTON'S LAW PRACTICE, 59, 51 (Goebel ed.) *in* WOOD, *supra* note 7, at 299; INDEPENDENT CHRONICLE (Boston), Apr. 17, 1777.

9. Gustavus Schmidt, *Reminiscences of the Late Chief Justice*, 1 LA. L. J. 82 (1941), *in* HOBSON, *supra* note 5, at 16; STORY, DISCOURSE *in* 3 LIFE, CHARACTER AND JUDICIAL SERVICES (Dillon ed.), *in* HOBSON, *supra* note 5, at 377.

10. WOOD, *supra* note 7, at 298.

automatons whose only task would be to mechanically apply the strict letter of the law:

> Let mercy be the character of the law-giver...but let the judge be a mere machine...The mercies of the law will be dispensed equally and impartially to every description of men; those of the judge, or of the executive power, will be eccentric impulses of whimsical, capricious, designing man.[11]

Jefferson's statement implicitly assumes that the laws passed by the legislature would not only be founded on popular consent, but would also be rational and just. It is interesting how this assumption conflates two very different theories of law existing at that time: the newer conception of law as the command of the sovereign ("the people" in America) and the ancient conception of law as embodying reason and justice.[12] Unfortunately, the state legislatures ran riot in the early days of the Republic and passed a plethora of confusing, contradictory, and even unjust laws. What was to be done?

C. A Failed Experiment

The failure of the Republican experiment engendered a rethinking of American political theory, initially at the state level and eventually culminating in the reconstruction of the Federal Government at the Philadelphia Convention. To remedy the "political pathology," Jefferson proposed education as a cure, while the clergy offered up religion. Nonetheless, there were Americans who doubted the efficacy of combating vice with virtue and looked to what historian Gordon S. Wood described as "mechanical devices and institutional contrivances as the lasting solution for America's ills."[13]

In thinking about how to structure their institutional remedies, Americans came to realize that the danger lay not in *which branch* of government exercised power but in *how much power* was concentrated in any one of the branches of government. Thus, Jefferson expressed the belief that legislative, executive, and judicial powers "must be so divided and guarded as to prevent those given to one from being engrossed by the other; and if properly separated, the persons who officiate in the several departments become [s]entinels in behalf of the people, to guard against every possible usurpation."[14]

Constitutional reform then began at the state level. The New York Constitution of 1777, for example, created a Council of Revision, composed of an independently elected governor, chancellor, and Supreme Court judges

11. Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* 1 JEFFERSON PAPERS 505 (Boyd ed.) *in* HOBSON, *supra* note 5, at 38.

12. *Id.* at 39.

13. WOOD, *supra* note 7, at 425-9.

14. JEFFERSON, NOTES ON VIRGINIA 121 (Peden ed.) *in* WOOD, *supra* note 7, at 449.

who exercised an executive veto, and a strong Senate. The Massachusetts Convention of 1780, which was, for a while, regarded as "the perfect constitution," provided for a balanced legislature composed of a House of Representatives and a Senate, as well as an independently elected governor who alone exercised veto power. This Constitution was preceded by a bill of rights spelling out the principle of separation of powers which, in turn, influenced the efforts to redraft the New Hampshire Constitution.

The branch of government that benefited most from the new articulation of the principle of separation of powers, or the departmental theory of government, was the Judiciary. With the proliferation of unsound laws, it once again fell to the Judiciary to cure the defects in the law.

One way by which judges justified their exercise of judicial discretion was by drawing on the ancient conception that for law to be law, it had to be inherently just and reasonable. Hence, if the application of a general statute would have unreasonable effects in a case, then:

> [T]he Judges are in decency to conclude, that the consequences were not foreseen by the Legislature; and therefore they are at liberty to expound the statute by equity, and only quo ad hoc to disregard it. When the judiciary makes these distinctions, they do not control the Legislature; they endeavour to give their intention its proper effect.[15]

Developing alongside a strengthened belief in the ancient conception of law was the assertion of a more modern and positivist theory that created a hierarchy among written laws and that distinguished between fundamental law and ordinary statutory law. James Varnum, the defense attorney in the 1787 Rhode Island case *Trevett v. Weeden*, resorted to both theories in his arguments. Apart from arguing that laws contrary to common right and reason were not law, he also argued that the legislature could not enact laws contrary to the principles of the constitution because the latter "were ordained by the people anterior to and created the powers of the General Assembly."[16]

John Marshall began his 20-year law practice in Virginia in 1781, after the British capitulation at Yorktown. During this time, Chancellor George Wythe and Edmund Pendleton, prominent state judges who were described by Marshall biographer Charles F. Hobson as having "personified qualities of judicial dignity and integrity that Marshall sought to emulate,"[17] also made bold assertions in favor of the more modern justification for judicial review.

15. Arguments and Judgment of the Mayor's Court of N.Y. City, Rutgers v. Waddington, *in* I HAMILTON'S LAW PRACTICE 415 (Goebel ed.) *in* WOOD, *supra* note 7, at 458.

16. James M. Varnum before the Honorable S. C. in the County of Newport, Trevett v. Weeden (Sept. 1786 & Providence, 1787) *in* WOOD, *supra* note 7, at 459-60.

17. HOBSON, *supra* note 5, at 33.

In a 1782 case, Wythe stated that it was the judge's duty to "point to the constitution" and say to a Legislature exceeding its prerogatives, "Here is the limit of your authority; and hither, shall you go, but no further."[18] In 1788, Pendleton explained in an opinion why this power was a proper judicial function, in words echoed in *Marbury*'s discourse on the "province of the Judiciary:"

> To obviate a possible objection, that the court, while they are maintaining the independency of the judiciary, are countenancing encroachments of that branch upon the department of others, and assuming a right to control the legislature, it may be observed, that when they decide between an act of the people, and an act of the legislature, they are within the line of their duty, declaring what the law is, and not making a new law.[19]

The Shays Rebellion of 1787 and the subsequent victory of the rebels at the Massachusetts polls made citizens of the state with the model constitution realize that even with the most ideal state government, they would continue to experience evils should, as Thomas Dawes, Jr. stated in an oration delivered on July 4, 1787, "Our National Independence remain deprived of its proper federal authority."[20] Henceforth, reform efforts began to shift towards reconstructing the central government, strengthening it at the expense of the state governments.

Although John Marshall was devoted primarily to his private legal practice, he also served in the legislative and executive branches of the Virginia Government. He was a member of the Virginia House of Delegates in 1782 as well as of the Council of State from November 1782 to April 1784. While not a delegate to the Philadelphia Convention, Marshall participated in the ratification convention in Virginia from which Hobson describes him as having emerged "deeply convinced that the Federal Constitution represented a decisive break with the past."[21]

Although the Federal Constitution does not explicitly mention the power of judicial review, it does not preclude its existence either. Moreover, the state of American law at the time, and the Federal Constitution's grant to all three departments of a co-equal share in governance, argue strongly in favor judicial review. Defending the judiciary article before the ratification convention in Virginia, Marshall stated:

> [If Congress]...were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they

18. Commonwealth v. Caton, 4 Call 8 (Va. Ct. of App. 1782) *in* HOBSON, *supra* note 5, *at* 44.

19. Case of the Judges, 4 Call 142, 146 (Va. Ct. of App. 1788) *in* HOBSON, *supra* note 5, at 44.

20. Thomas Dawes, Jr., Oration delivered in Boston (July 4, 1787), *in* WOOD, *supra* note 7.

21. HOBSON, *supra* note 5, at 4.

are to guard: They would not consider such a law as coming under their jurisdiction. They would declare it void.[22]

III. The Political Catalyst to the *Marbury* Decision

The development of American legal doctrine and political theory, while providing the environment from which *Marbury* drew its theoretical justification, nonetheless fails to fully explain why the case was decided the way it was. Besides, despite the opinion's confident exposition and seemingly flawless reasoning, it is not obvious that Sec.13 of the 1789 Act was unconstitutional.

A number of legal scholars point out that the Supreme Court did issue the writ of *mandamus* under Sec. 13 in three previous cases.[23] Likewise, Marshall's approach goes against a well-known principle of statutory construction that "of two possible interpretations of a statute, the one harmonious with the Constitution, the other at variance with it, the former must be preferred."[24]

It could be argued that the wording of the Constitution in no way prohibits Congress from adding to the Supreme Court's original jurisdiction. Put differently, defining the Supreme Court's original jurisdiction is not the exclusive prerogative of the Constitution; hence, Congress can pass a law adding to the Court's original jurisdiction without risking a violation of the Constitution.

But to dwell solely on the theoretical consistency and intrinsic soundness of the decision is to miss the point and to fail to appreciate the full significance of the case. Legal scholars argue that the selective use of authorities provides evidence that the Court regarded the case "as a political, rather than a legal event."[25]

Indeed, understanding *Marbury* outside its political context is to see an incomplete picture. Even if the political background is hardly mentioned in the decision, politics provided the impetus for the decision.

22. 1 Papers of John Marshall 276-7 (Herbert A. Johnson et al. eds.), *in* Hobson, *supra* note 5, at 5.

23. Dean Alfange, Jr., *Marbury v. Madison and Original Understanding of Judicial Review: In Defense of Original Wisdom*, 329-446 Sup. Ct. Rev. 403 (1993). These cases were not cited in the text of the article, but footnote 330 notes that "Charles Lee, Marbury's counsel, identified three cases in which, prior to *Marbury*, the Supreme Court had accepted original jurisdiction to consider petitions for the writ of mandamus, and one case in which it granted a writ of prohibition - the issuance of which was also authorized by Sec. 13 of the 1789 Judiciary 1789. See 1 Cranch 148-49."

24. Edmund S. Corwin, The Doctrine of Judicial Review 9 (1963).

25. Alfange, Jr., *supra* note 23, at 404.

With the presidency and both Houses of Congress under their control, Federalists, who were threatened by growing opposition to their nationalist program from what they perceived to be a pernicious Republican-led democratic movement, passed desperate repressive measures in the twilight years of the eighteenth century. These laws aimed to strengthen the Union and curtail Republican efforts to exploit new immigrants and foment popular disenchantment with the government.

To curb Republican politicking, the Federalist government passed the Alien and Sedition Acts and, to the greater consternation of the Republicans, the Federalist-dominated judiciary vigorously enforced these unpopular laws against Republican newspaper editors. Worse, after losing the elections of 1800, the lame-duck Federalist Congress passed the Judiciary Act of 1801 creating new Federal judgeships.

On March 2, 1801, outgoing President John Adams promptly filled the expanded judiciary with loyal Federalists in a last-ditch effort to temper the Republican program long after he and the Federalists in Congress had vacated their seats. A Federalist Senate confirmed these appointments on the same day. Among the newly appointed judges were William Marbury as a new justice of the peace in the District of Columbia and John Marshall as the new Chief Justice of the Supreme Court.

Federalists distrusted Jefferson and the democratizing tendencies of their program. Jefferson, for his part, felt that the Federalists had "retired into the judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased."[26]

IV. The Role of John Marshall

Prior to assuming the post of Chief Justice in 1801, Marshall actively participated in the Federal government. In 1791, he was appointed to represent the United States in France during the XYZ Affair and came home a national hero for exposing the corruption of the French foreign minister.

Persuaded by George Washington, Marshall did not resume his law practice after returning from his diplomatic assignment, serving instead in the Sixth Congress from December 1799 to May 1800. Adams then appointed Marshall as Secretary of State in May 1800, and as Chief Justice in 1801. When Marshall became Chief Justice, the Supreme Court and the entire Federal Judiciary were in danger of being severely weakened by resentful Republicans in control of the Presidency and Congress.

26. 10 Writings of Jefferson 302 (Lipscomb ed.), *in* Alfange, Jr., *supra* note 23, at 358-9 (1993).

The Federal Judiciary was particularly vulnerable to Congress. The Federal Constitution had vested in Congress the power to impeach Federal judges.[27] The Republican Congress would soon use this power against abusive or incompetent Federalist-appointed judges, starting with the insane and alcoholic District Judge John Pickering of New Hampshire. This culminated in the Senate trial that failed to convict the overbearing Supreme Court Justice Samuel Chase in February 1805.

In addition, apart from creating one Supreme Court and enumerating the cases over which it exercised original jurisdiction, the Federal Constitution said little else about the Judiciary. Instead, it gave Congress the power to create and determine the jurisdiction of "such inferior courts as the Congress may from time to time ordain and establish,"[28] as well as the power to define the appellate jurisdiction of the Supreme Court.

The *Marbury* motion was filed on December 17, 1801, the same day the new Congress convened. On December 18 of the same year, Chief Justice Marshall scheduled hearings on the motion for the next term, which according to the Judiciary Act of 1801 would be on June 1802. The Republican Congress, however, repealed the 1801 Act and abolished the June term. As a result, hearings on the Marbury case were held thirteen months later, in February 1803. The repeal of the 1801 Act, which prevented the Supreme Court from meeting for over a year, was a powerful demonstration and reminder to the Court of what Congress could do to the Federal Judiciary.

The Marshall Court's task was a formidable one. While recognizing that the Federal Judiciary had exceeded its prerogatives under the Adams administration, they could not allow the political backlash to undermine and destroy judicial power and independence. Hobson stresses that the opinion had to be carefully calibrated "to strike a balance between deferring to the political branches and upholding the legitimate claims of judicial power."[29] Interestingly, the opinion omits mention of the political controversy surrounding the motion. Perhaps, the politics was deliberately downplayed in order to highlight the legal nature of the case, thus bolstering the Court's right to rule on the dispute.

It is argued that Marshall was precisely the man best equipped to steer the Supreme Court out of the most precarious phase of its existence. It was fortunate that the Court was under the leadership of someone who was both a republican[30] and a lawyer.

27. U.S. CONST. art I, §§ 2 and 3.

28. U.S. CONST. art III, § 1.

29. HOBSON, *supra* note 5, at 51.

30. Republican in this sense refers to the political ideology which the Founding Fathers shared, not to the political party which Thomas Jefferson formed to oppose the Federalist Party, which was in power throughout the Washington and Adams administrations. Marshall's political creed was republicanism, but his political affiliation was to the Federalist Party.

Marshall's political self-image was that of a classic republican. He believed in a natural aristocracy and in the stake in society theory. He also had a distaste for party politics.[31] His ideal Republican statesman was his friend and mentor George Washington, about whom he wrote a five-volume biography entitled *The Life of George Washington*. In Marshall's own self-portrait, Hobson wrote that Marshall described himself as

> a man whose reason controlled his passions and interests, who did not seek office but was called to public life, who entered public arena out of a sense of duty and at some personal sacrifice, who disdained popularity if it conflicted with principle, and whose conduct and principles were untainted by party motives.[32]

More important for the *Marbury* opinion, Marshall understood and was committed to the republican theory embodied in the Federal Constitution. He regarded himself not as a Federalist party man but as a "defender of the Constitution and established government against unjustified attacks by partisan factions bent on some selfish or sinister aim."[33]

Marshall, however, was no ordinary politician. He was a prominent lawyer immersed in American legal culture during his 20 years of law practice in Virginia and was intimately familiar with the workings of common law doctrine and equity jurisprudence. Thus, he was armed with the theoretical knowledge and legal tools that enabled him to use the case to articulate an emergent departmental theory of Government and define the Judiciary's role in that theory.

Finally, the force and charm of Marshall's personality enabled him to unify and strengthen the Court. He instituted the practice of rendering one opinion for the Court, rather than have each of the five justices pen their opinions *in seriatim*. He was said to have a common touch. No doubt it was more difficult for the other Justices to resist his influence given that the Justices roomed and boarded together during court terms "and professional and social life blended into one."[34] His esteemed colleague and close personal friend Justice Story summarized Marshall's personal qualities thus:

31. HOBSON, *supra* note 5, at 16-7.

32. *Id.* at 18.

33. *Id.* at 17.

34. *Id.* at 14.