Much scholarship has been devoted to demonstrating that John Marshall in *Marbury* (1803), was an astute politician who pulled one over on Jeffersonian Republicans. Marshall engaged in the “delightful” activity of “calculated audacity,” namely, establishing the power of the Supreme Court by denying it had jurisdiction in the case. Also dominant is that Marshall “invented” judicial review in *Marbury* and thus established the judiciary as the sole interpreter of the Constitution. Accordingly, the dominant majority of scholars conclude that Marshall would invite future justices to reject the Framers as their guide to constitutional interpretation, and adopt, instead, the doctrine of a “living Constitution.” In short, Marshall invented the idea that we live under a Constitution, but the Constitution is what the Court says it is. In fact, it is no exaggeration to say that *Marbury* is the constitutional text and Marshall is the judicial framer in constitutional law texts.

There has been an influential minority of scholars, however, who portray this Marshallian foundation of creative living constitutional jurisprudence as mythological nonsense: If we let Marshall speak for himself, the minority say, then we will discover a Marshallian originalism grounded in the principles of the Constitution and the teachings of the Framers. *Marbury* is an attempt to establish Constitutional supremacy rather than judicial supremacy. According to this understanding, the Marshallian role for the judiciary is to 1) protect the rights of individuals against the abuse of governmental power and 2) control legislative, executive, and, yes, judicial excess. Rather than establishing the Court as the sole and supreme expositor of the Constitution, Marshall establishes the judiciary as the protector of the fundamental rule of individual law and institutional balance and responsibility.

Historians disagree as to what Marshall did and when and how he did it. We know that after the election of 1800, lame-duck President John Adams, with Senate approval, named several justices of the peace—known to us as “the midnight judges”—and that then Secretary of State, John Marshall, failed to deliver William Marbury’s commission before the new administration took office in March 1801. When the Jeffersonians came to power in Congress in 1801, they made several changes in the Judiciary Act, and President Jefferson and Secretary of State Madison did not deliver Marbury’s commission. Also clear, is that the defeated Federalists wanted to embarrass Jefferson on constitutional grounds and enlisted Chief Justice Marshall in their effort. But these arguments, at best, suggest that Marshall did what he had to do in order to secure the Federalist Party cause. Which, of course, he actually failed to do! So that does not make him a very astute politician in the larger party-oriented sense. But that still leaves open the claim that Marshall was interested in the judiciary, and he pulled a fast one in order to establish judicial review. By the way, Marbury never did receive his commission. This partisan ideological interpretation, in effect, solves the complications of *Marbury* by denying that anything principled was at stake.
Was Marbury, then, about the establishment of “judicial review”? After all, the phrase judicial review does not appear in Article III of the Constitution and we all know that is what the Supreme Court does. The problem with this repeatedly advanced and unsubstantiated claim is this: the phrase “judicial review” does not appear in Marbury. But on a substantive level, the right of the Court to review acts of the legislature was agreed to at the Constitutional Convention and understood to extend to judicial cases only.

The President alone was given the power to exercise a conditional veto over bills before they became laws since it was understood that judges were already given the authority to subsequently review an act of Congress and determine whether or not it was constitutional.

During ratification, the Antifederalist Brutus argued that the “equity” language of Article III not only established judicial review; it was an invitation to the judiciary to establish judicial supremacy. Alexander Hamilton responded in Federalist No. 78. He explicitly defended judicial review and denied it would lead to judicial supremacy: the Constitution required the judiciary to declare unconstitutional an act of the legislature that violated “the manifest tenor” of the Constitution and, moreover, the judges would never substitute their will for their judgment. Marshall himself, in the Virginia Ratifying Convention, stated that if the federal legislature passed a law “not warranted by any of the powers enumerated,” it would be considered by the judges to be an infringement of the Constitution, which they are to guard. Even Jefferson, in his private correspondence with Madison, accepted judicial review of the legislature if exercised with judicial restraint.

If partisan politics and judicial review are not the driving forces undergirding Marbury what then is going on? We have two choices: either Marbury is about establishing judicial supremacy or it is about establishing the rule of law. In the analysis, we need to consider whether Marshall’s decision proves Brutus or Hamilton correct.

Marshall relies exclusively, in the first part of his opinion, on the specific language of the Constitution. He states that Marbury was properly nominated and confirmed in accordance with Article II, Section 2 of the Constitution. Thus, Marbury was constitutionally “an officer of the United States.” According to Article II, Section 3, continues Marshall, the President “shall Commission all the officers of the United States.” Thus, says Marshall, the Secretary of State, shall deliver the commission. Even though the commission was not delivered by the then Secretary of State—namely Marshall—neither the newly elected President, nor the newly appointed Secretary of State, had “the executive discretion” to withhold the commission. In this matter, concluded the Chief Justice, Jefferson and Madison had merely a “magisterial,” and not a “political” status.

In the second part of his opinion, Marshall also appeals to the specific language of the Constitution. Although a mandamus indeed should be issued to order the delivery of Marbury’s commission, the

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Supreme Court is constitutionally unable to issue that order. Article III, Section 2 of the Constitution, says “the Supreme Court shall have original jurisdiction in all cases affecting [1] ambassadors, [2] other public ministers and consuls, and [3] those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction.” [Emphasis added.] To Marshall, the language of the Constitution imposes a maximum of three instances where the Supreme Court can exercise original jurisdiction. Since the authority to issue a mandamus is not specifically enumerated, the Supreme Court does not have the constitutional ability to issue one. That part of the Judiciary Act of 1789, which authorizes the Supreme Court “to issue writs of mandamus in cases warranted by principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States,” is unconstitutional.

Marshall’s message is clear: We live under a “written constitution,” and the language of that document places a written limitation not only on Congress, but also on the Executive and the Judiciary. Congress must conform to the language of the Constitution when passing laws, the Executive must conform when executing the law, and so too must the Judiciary. “The fundamental and paramount law of the nation,” limits the power of all three branches of the federal government to the language of the written constitution. In support, Marshall says his understanding of written constitutionalism conforms “to the solicitude of the convention,” and “all those who have formed written constitutions.”

Is the language of Article III as prohibitive as Marshall says it is and does it unambiguously support his interpretation? Article III bestows on Congress the authority to develop the structure of the courts and to install judicial procedures. Thus it was left to Congress to fill in the details. The First Congress did just that. It passed the Judiciary Act, one section of which dealt with the power of the Court to issue a writ of mandamus in certain specific situations. So the question becomes: What is the status of the First Congress in the creation of the originalist position?

Marshall observed in *Cohens v. Virginia* (1821) that the First Congress contained many members who had served in the Constitutional Convention, and we should take the First Congress seriously because they express the intent of the Constitutional Convention and the ratifying conventions. In *Marbury*, however, Marshall did not seek any assistance from the First Congress, the Constitutional Convention, *The Federalist* or ratifying conventions.

It is instructive that Madison, who as Representative Madison supported the mandamus provision in the 1789 Act, and who later failed to issue the commission in 1801, didn’t think that the Constitution he helped create, ratify, explain, and defend was being violated. Nor would *Marbury* even pass Hamilton’s *Federalist No. 78* “manifest tenor” test for judicial rejection of an Act of Congress: neither the First Congress nor the Jeffersonian Executive violated the “manifest tenor” of the Constitution when the Congress bestowed original jurisdiction to issue a mandamus and when the Executive refused to issue a commission to Marbury. The language of the Constitution does not make it manifestly clear that a newly elected President, and a newly appointed Secretary of State, should be compelled to deliver a judicial commission signed by a previous President and undelivered by a former Secretary of State. Doesn’t Article III state unambiguously that judicial appointments are matters to be dealt with by the Senate and the President? And it is troublesome that Marshall claims that it is the province of the judiciary, and not the Congress or the President, to make the distinction between what is judicial and what is political.
Toward the end of *Marbury*, Marshall announces, rather unexpectedly, “It is emphatically the province and duty of the judicial department to say what the law is.” This bold remark comes after the mandamus matter has been decided and the case put to rest. In the early part of the decision, Marshall called the Constitution, the “paramount law of the nation,” [emphasis added] which constrained every branch of government including the judiciary. Again, near the end, he says it is the duty of the judiciary “to say what the law is.” Marshall can’t possibly mean that the written constitution, the paramount law, is what the judiciary says it is. Or if he is not saying this, isn’t reasonable for future justices to claim this is what he is saying? Marshall concludes: “If two laws conflict with each other, the courts must decide on the operation of each,” because “this is of the very essence of judicial duty.”

Does Marshall introduce the idea of the rule of law in the first part of the decision, but conclude that the Supreme Court is the ultimate arbiter of the Constitution? In short, we may live under the language of the Constitution but the Court interprets the language of the Constitution. After all, to interpret the language of the Constitution, for Marshall, but not for Madison, is “emphatically the province and duty of the judicial department.” It is “too extravagant to be maintained,” he fumed, “that the intention of those who gave” the judicial power was that “the constitution should not be looked into.” How does he portray the “intention” of the Framers? What does looking into mean, and who does the looking?

Even one citation from the Founding debates would help, but Marshall offers none. Marshall says the Framers would support 1) the Supreme Court looking into the Constitution and 2) his decision in *Marbury*. We must take his word for it! But he also claims “the framers of the constitution contemplated that instrument [the Constitution], as a rule for the government of the courts, as well as of the legislature.” In short, according to the “influential minority” of scholars, no exclusive power to interpret the fundamental law is claimed for the Court in *Marbury*.

But when the First Congress looked into the Constitution, which it did when considering the Bill of Rights (and by the way this was a Congress overwhelming occupied by the Framers and ratifiers) the Congress saw nothing wrong in passing the mandamus provision of the Judiciary Act. Moreover, Marshall’s mentor, President George Washington, signed the bill into law. So we are left with the question: is the “dominant majority” or the “influential minority” correct concerning Marshall’s decision in *Marbury*?

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