

MAKING A MOUNTAIN OUT OF A MOLEHILL?
MARBURY AND THE CONSTRUCTION OF THE CONSTITUTIONAL CANON

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How important was *Marbury v. Madison* in American constitutional history? This article examines judicial, legislative and executive citations and legal commentary to show that *Marbury* did not enter the constitutional canon as the fountainhead of judicial review until the turn of the twentieth century. In doing so, it reveals the process by which historical memories are constructed and adds to our understanding about the diverse sources of judicial review in the early republic and the rhetoric of judicial authority.

Everybody “knows” that Chief Justice John Marshall and the U.S. Supreme Court “established” or “created” the power of judicial review in the case of *Marbury v. Madison* in 1803.¹ The *Marbury* case is now one of the foundation stones of Marshall’s historical legacy. It stands near the center of what makes Marshall the great chief justice. As the power of constitutional review has spread and courts have struggled to win their independence and gain respect from other political actors, *Marbury* has taken on a global stature.²

Marbury’s place in the constitutional canon is secure. Scholars at the turn of the twentieth century heatedly debated whether John Marshall had used the case to foist judicial review on an unsuspecting nation or whether he merely followed the logic of the law and laid bare the constitutional foundations of the new republic.³ The debate was seemingly premised on the self-evident importance of *Marbury* itself. There is perhaps no greater declaration of *Marbury*’s importance than the U.S. Supreme Court’s invocation of the case in the middle of the twentieth century, at the tail end of the Little Rock desegregation crisis. In responding to the Arkansas governor and legislature, the unanimous Supreme Court thought it “necessary only to recall some basic constitutional propositions which are settled doctrine.” Quoting *Marbury* to the effect that “It is emphatically the province and duty of the judicial department to say what the law is,” the Court added its gloss “that the federal judiciary is supreme in the exposition of the law of the Constitution.”⁴ This was a contentious reading of *Marbury* to be sure, but scholars at mid-century shared the Court’s view that *Marbury* was fundamental.⁵ Civics and history textbooks, including those written by Supreme Court justices, have followed along, declaring that *Marbury* “established”⁶ the Court’s “role as guardian of the Constitution.”⁷

¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

² JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW* 99 (2001).

³ See, e.g., EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 1-80 (1914); LOUIS B. BOUDIN, *GOVERNMENT BY JUDICIARY* 220-24 (1932).

⁴ *Cooper v. Aaron*, 358 U.S. 1, 17-18 (1958).

⁵ See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1964); William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 *DUKE L. J.* 1 (1969).

⁶ WILLIAM H. REHNQUIST, *THE SUPREME COURT* 99 (1987).

A recent revisionist literature on *Marbury* has challenged that received wisdom, however. Revisionists have questioned the importance of *Marbury* in establishing judicial review, the originality of its arguments, and the scope of the power that Marshall was claiming for the Court. Such work has led the constitutional historian Michael Klarman “to prompt other scholars to reconsider prevalent assumptions about the importance of canonical Supreme Court rulings generally and the ‘great’ Marshall Court decisions specifically.”⁸

This study contributes to the *Marbury* revisionism by examining how and when the case entered the constitutional canon. In particular, this study takes up Robert Lowry Clinton’s influential claim that *Marbury* was “little noticed during the first century of our national existence.”⁹ The key evidence that Clinton marshals for this startling conclusion is data on citations to *Marbury* in subsequent U.S. Supreme Court opinions. Clinton’s initial finding helped launch a great deal of the revisionist literature on *Marbury*, but the basic empirical claim itself has been taken as a given and has not been subject to much additional scrutiny, analysis or extension.¹⁰

This article reconsiders the reception and influence of *Marbury* by dramatically expanding the evidentiary base. We reconsider the quantity and quality of citation data to *Marbury* in the U.S. Supreme Court. More importantly, we examine the reception of *Marbury* in the lower federal courts and the state supreme courts across American history. It is quite possible that *Marbury* was recognized in nineteenth century legal culture as having “established” the power of judicial review even if it was rarely cited for that proposition by the U.S. Supreme Court in its own opinions. We likewise examine references to *Marbury* in legislative and executive documents. Finally, we examine the treatment of *Marbury* in legal treatises and commentaries in the nineteenth century to gauge both the reception of the case and the beginning of its transition into the constitutional canon.

Our analysis gives a much more complete picture of when and how *Marbury* entered into the constitutional canon and how the case has been deployed by the courts. Our findings modify the view that *Marbury* was “little noticed” by the courts for most of the nineteenth century. The legal commentary of the period show that *Marbury* was not widely regarded as a special case that “won for the Supreme Court the power to construe the Constitution with finality . . . [and] made the Court’s interpretation binding on all others.”¹¹ More accurate is the phrasing of a recent textbook, which characterizes *Marbury* as simply “enunciate[ing] the doctrine of judicial review.”¹² Nonetheless, a Federalist narrative of a herculean Chief Justice Marshall in *Marbury* was being laid down in the early republic that would eventually become integrated into a standard narrative of the case. The rhetorical use of *Marbury* to bolster the authority of the judiciary as a constitutional interpreter is a distinctly twentieth century phenomenon and follows clear patterns of legal and political conflict in the various levels of American courts. Judging by the use of the case by the courts, one might well say that it was *Brown v. Board of Education*¹³

⁷ Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L. J. 100, 134 (2009).

⁸ Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?* 87 VA. L. REV. 1111, 1113 (2001).

⁹ ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 125 (1989).

¹⁰ See *infra* notes __ and accompanying text.

¹¹ ALPHEUS THOMAS MASON AND WILLIAM M. BEANEY, *THE SUPREME COURT IN A FREE SOCIETY* 11 (1968).

¹² JEFFREY A. SEGAL, HAROLD J. SPAETH, AND SARA C. BENESH, *THE SUPREME COURT IN THE AMERICAN LEGAL SYSTEM* 14 (2005).

¹³ *Brown v. Board of Education*, 347 U.S. 483 (1954).

and its aftermath that truly brought *Marbury* into the constitutional canon in its modern form.¹⁴ *Cooper v. Aaron*¹⁵ transformed *Marbury* into the modern symbol of judicial power, and elevated a different dimension of John Marshall's argument into the standard judicial and legal rhetoric of the late twentieth century.

Marbury has a particular meaning and significance for us in the early twenty-first century, and the case occupies an especially prominent place in the modern constitutional canon. *Marbury* did not always have the same resonance that it does today. It took time to convert *Marbury* into a case primarily about judicial review, to elevate *Marbury* above a variety of other sources from the early republic as the standard citation for the authority of courts to interpret and enforce constitutional limits, and to suggest that *Marbury* was not merely a case in which the Supreme Court exercised or explained the power of judicial review but somehow created or established the power of judicial review. As the power of judicial review became more salient to the constitutional and political system and more contested, judges and commentators turned to the powerful rhetoric of John Marshall to help legitimate the institution to new generations.

The first section of the article reviews the revisionist case regarding *Marbury*. The second steps back to consider the broader idea of the constitutional canon. The third section examines citation data on *Marbury* in the U.S. Supreme Court, the U.S. circuit courts, and the state supreme courts. The fourth section reviews congressional and executive references to *Marbury*, and the fifth section examines nineteenth century legal commentary on the *Marbury* case.

I. *Marbury* Revisionism

II. The Rhetoric of Judicial Authority and Constitutional Canons

III. Judicial Citations to *Marbury*

In order to gain a more complete picture of when and how *Marbury* entered into the constitutional canon and how the case has been deployed by the courts, an examination of the quantity and quality of citations to *Marbury* is necessary. The sheer quantity of citations to *Marbury* can serve as one indicator for when the case became historically important and entered the constitutional canon. It can also serve to illustrate the way in which the judiciary has employed *Marbury* over time. The quality of the *Marbury* citations and the degree to which they are used for judicial review rather than for jurisdictional holdings or for the implications of the mandamus power can also tell the story of when *Marbury* was transformed from being a case that made a variety of substantively important holdings about constitutional law and statutory interpretation to a case that made judicial review possible.

In the following discussion, we give particular attention to three distinct time periods where the literature suggests different patterns in the judiciary's level of citation and qualitative use of *Marbury*. The first time period encompasses the first century after *Marbury* was handed down. As noted above, Clinton and others have argued that *Marbury* was "little noticed" during

¹⁴ Stephen M. Griffin, *The Age of Marbury: Judicial Review in a Democracy of Rights*, in *ARGUING MARBURY V. MADISON* (Mark Tushnet ed., 2005).

¹⁵ *Cooper v. Aaron*, 358 U.S. 1 (1958).

this period and therefore we would expect few citations to the case.¹⁶ Furthermore, we do not expect these citations to be for the judiciary's authority to exercise a power of judicial review, but instead for such matters as jurisdiction and the use of the writ of mandamus. The second time period extends from the centennial anniversary of *Marbury* in 1903 which was designed to draw increased attention to both the case and Chief Justice John Marshall until *Cooper v. Aaron* was handed down in 1958. *Marbury* revisionists have suggested that it was the efforts of the conservative bar to celebrate *Marbury* in the midst of *Lochner* era controversies that spurred a transformation in the historical importance of the case, which would suggest a rise of citations and shift in the nature of citations at the turn of the century. Finally, the third time period runs from the year *Cooper v. Aaron* was handed down in 1958 to the present. It is appropriate that the Court's strong exposition of judicial authority in *Cooper v. Aaron*, famously pointing back to Marshall's declaration in *Marbury* that "It is emphatically the province and duty of the judicial department to say what the law is" while declaring that the Court's decisions were supreme and binding on the other branches of government, marks the beginning of this period. The Court's powerful declaration of judicial supremacy in *Cooper v. Aaron* as well as the judiciary's increasingly frequent exercise of judicial authority during this time period might itself be expected to mark a distinct break in the judicial rhetoric regarding *Marbury* and judicial review.

In order to study the judiciary's changing tendency to cite *Marbury*, we created an original dataset of federal and state cases citing *Marbury*. This comprehensive approach of looking at all *Marbury* citations has important advantages over previous scholarship. Previous analyses have relied heavily on evidence from the U.S. Supreme Court to draw conclusions about *Marbury*'s prominence, but the Court is only one source of evidence for juridical perceptions of the case and its citation patterns in the nineteenth century may well have been idiosyncratic (Chief Justice John Marshall himself often neglected to cite relevant precedents).¹⁷ A broader analysis of the Court's entire history and of the lower federal courts and the state courts provides a more comprehensive basis for drawing conclusions about the reception and use of *Marbury* in the legal community and its significance as a source of authority in judicial argument. Evidence from state courts and lower federal courts might be expected to cut against Clinton's findings, since states often needed to initiate and justify judicial review in their own constitutional systems (and thus might be expected to cite *Marbury* if it were thought to be a significant authority for such a power) and lower federal courts might be expected to cite a prominent, authoritative case of their own superior court. We can better gauge *Marbury*'s importance over time by assembling a comprehensive, systematic portrait of when and how it was used.

The original dataset was constructed using both Westlaw Campus and Lexis Nexis. A "KeyCite" or "Shepardization" search as well as a keyword search for "Marbury w/2 Madison" was used to construct a comprehensive list of citations in the Supreme Court, federal circuit courts, and state courts. Any citation, including those in majority, concurring, and dissenting opinions as well as references by counsel in the case were included.

¹⁶ Clinton, *supra* note __, at 125. See also, *supra* notes __.

¹⁷ Susan Low Bloch and Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WISC. L. REV. 301 (1986); Christopher L. Eisgruber, *John Marshall's Judicial Rhetoric*, 1996 SUPREME COURT REVIEW 439 (1996). The average number of citations in each U.S. Supreme Court opinion has gradually increased across time, but the average number of precedents cited from any given year has been fairly constant over the course of the Court's history. See James H. Fowler, Timothy R. Johnson, James F. Spriggs II, Sangick Jeon, and Paul J. Wahlbeck, *Network Analysis and the Law: Measuring the Legal Importance of Precedents at the U.S. Supreme Court*, 15 POL. ANAL. 324, 333 (2007).

[Insert Figure 1 about here]

The first step in the analysis focuses on any case that makes a specific reference to *Marbury v. Madison*, regardless of the nature of the case making the citation. The results are shown in Figure 1 (using a centered, five-year moving average to smooth the year-to-year fluctuations). The judicial citation data partly reinforce and partly modify expectations from the existing literature. As expected, the citation pattern shows a marked increase in the rate of citation to *Marbury* in the Supreme Court, circuit courts, and state courts over time, with the number of citations being relatively low and sporadic until the twentieth century.

The citation behavior of the state and federal circuit courts reinforce the evidence from the U.S. Supreme Court and indicate that *Marbury* took on a new significance in the twentieth century. From 1803-1901, before *Marbury* came to prominence as a judicial review case, citations to *Marbury* were relatively infrequent but not rare with the Supreme Court citing *Marbury* an average of only .88 times a year while the federal circuit courts and state courts cited *Marbury* .52 and 4.56 average times a year, respectively. During the second time period, from 1903-1957, the judiciary was slightly more likely to cite *Marbury*. The Supreme Court cited *Marbury* an average of 1.05 times a year and the federal circuit courts and states courts cited *Marbury* on average 1.89 and 7.00 times a year from 1902 to 1957. These averages obscure a noticeable but short-lived wave of *Marbury* citations at the turn of the twentieth century, especially in the U.S. Supreme Court. The increased salience of *Marbury* at the turn of the century is consistent with the current literature, which has taken note of both the newfound significance of judicial review during the *Lochner* era and the self-conscious celebration of the centennial of *Marbury* by conservative lawyers.¹⁸ Such efforts may have helped transform the perception of *Marbury*, but their direct influence on the judiciary was not so enduring and by the New Deal citations to *Marbury* dropped to nineteenth-century levels.¹⁹

The rate that the judiciary cited *Marbury* exploded during the third time period from 1958-2008, with the Supreme Court leading the way and the state supreme courts and federal circuit courts following after a brief lag. The average number of citations per year to *Marbury* during this time period was 3.04 in the Supreme Court, 22.51 in the federal circuit courts, and 18.98 in the state courts. While the increase was very significant in all of the courts, it was the most dramatic in the circuit courts. The percent increase in average citations per year from period 2 to period 3 was 190% in the Supreme Court, 1091% in the federal circuit courts, and 171% in the state courts.

If Figure 1 reveals that *Marbury* became increasingly prominent in the twentieth century, it also reveals the fact that *Marbury* was a notable case in the nineteenth century as well. *Marbury* was frequently cited in both the U.S. Supreme Court and the state courts in nineteenth century, though not at the levels it would reach in the twentieth century. *Marbury* did not sit in obscurity over the course of the nineteenth century, but rather made an appearance in dozens of cases. The revisionists too often underplay the extent to which *Marbury* was a well-known case

¹⁸ See Clinton, *supra* note __; Douglas, *supra* note __.

¹⁹ In a sense, there were more “opportunities” to cite *Marbury* in later years as the number of cases and the number of courts increased, but what is of interest here is the salience and utility of *Marbury* as part of the constitutional rhetoric. Notably, *Marbury* citations do not correlate with the timing of the entry of states into the union and the creation of their own judiciaries. Likewise, *Marbury* citations are not correlated with the overall number of signed decisions issued by the U.S. Supreme Court or the state supreme courts. Total *Marbury* citations and the caseload of the federal circuit courts do follow a similar pattern.

in the nineteenth century. The question that Figure 1 raises is how *Marbury* was used by the courts, in the nineteenth century and beyond.

As a second step, we supplement the citation analysis with a content analysis of the cases citing *Marbury*. Crucial to Clinton's argument is that Supreme Court rarely cited *Marbury* in the nineteenth century, and those few cites did not reference the power of judicial review or use the case as an authority for the power of judicial review.²⁰ Figures 2 and 3 report the results of a comparable but broader content analysis of cases citing *Marbury*.

[Insert Figure 2 & Figure 3 about here]

In order to understand when *Marbury* became important for its judicial review component, we conduct a content analysis of these citations in the Supreme Court, federal circuit courts, and state courts. All U.S. Supreme Court opinions and a stratified, random sample of state supreme court and federal circuit court opinions citing *Marbury* were coded as providing authority for the power of judicial review or for some other proposition. In Figure 2, we show that the rate at which *Marbury* was cited specifically for judicial review in the Supreme Court, federal circuit courts, and states courts over time.

Figure 2 shows that *Marbury* was regularly cited as authority for judicial review in the nineteenth century, but at relatively low levels. This use of *Marbury* is easily missed unless the analysis is expanded beyond the U.S. Supreme Court. Comparing Figure 1 to Figure 2 shows a sharp reduction in number of cases citing *Marbury*, but a generally similar pattern across time between overall citations and judicial review-specific citations. Figure 2 does show a distinct flattening of judicial review citations in the nineteenth century compared to Figure 1, however, and highlights the temporary surge in *Marbury* citations at the turn of the century not only in the U.S. Supreme Court but also in the state supreme courts. It also suggests the significance of the centennial activities and the *Lochner*-style controversies in increasing the salience of *Marbury* as an authority for judicial review. The justices on the Vinson Court make scattered and modest use of *Marbury*, often in dissent, but the turning point in *Marbury*'s prominence in judicial rhetoric in the postwar period came in *Cooper*.

Figure 3 further illuminates these relationships. In Figure 3 we show the percentage of citations to *Marbury* that are for judicial review, organized by type of court and by time period. Most notably, Figure 3 reveals what Figure 2 can only suggest – the proportion of *Marbury*-citing cases that cite it as an authority for judicial review, and how that proportion has changed over time. In the Supreme Court, we found that only 8% of *Marbury* citations during the first time period were for judicial review. This doubled to 16% during the second time period and rose again to 43% during the period after *Cooper v. Aaron*. The federal circuit courts followed a broadly similar pattern. They started from higher base, with 16% of *Marbury* citations in the nineteenth century using the case as support for the power of judicial review, with a comparable citation pattern in the first half of the twentieth century. In the post-*Cooper* period, however, the proportion of judicial review citations increased to more than a third of all *Marbury* citations (a statistically significant difference at the .05 level). The pattern in the state courts borrows from both the circuit courts and the U.S. Supreme Court. The baseline in the nineteenth century is relatively high, but the proportion of judicial review citations increases in a step-wise fashion across the twentieth century. *Marbury* citations for judicial review made up 15% of citations during the first time period, 27% during the second time period, and 46% during the final time

²⁰ Clinton, *supra* note _.

period (both differences are statistically significant at the .05 level). A comparison of Figure 2 and Figure 3 reveals that, though each type of court does cite *Marbury* as an authority for judicial review in the nineteenth century in a non-trivial percentage of its cases citing *Marbury*, most of those judicial review references come decades after the case was handed down, in the latter part of the nineteenth century.

One issue worth considering is the relationship between the exercise of judicial review and citations to *Marbury*. As the literature of judicial displays of authority suggest, we might expect judges to be more likely to make reference to a case like *Marbury* when the political stakes are high and the legitimacy of the court's action is likely to be questioned.²¹ This might suggest that the Court will cite *Marbury* more when it strikes down statutes and is otherwise at risk of being labeled "activist." More fundamentally, cases involving questions of the constitutionality of statutes may create opportunities for the Court to cite *Marbury* as an authority for the doctrine of judicial review. If the Court is not exercising the power of judicial review, there may be little opportunity or reason to cite *Marbury*. These relationships are harder to test for the lower federal courts and the state courts, due to data limitations, so we focus on the U.S. Supreme Court.²² As expected, there is a small but positive relationship between citations to *Marbury* by the Court and the number of times that the Court strikes down federal laws in that year (at the .05 level).²³ Moreover, there is a substantively small but similarly positive relationship between citations and total number of cases reviewing federal statutes (at the .05 level).²⁴ These relationships are not stable across history, however. The correlation between citations to *Marbury* and cases striking down federal laws is stronger in the twentieth century,²⁵ but loses statistical significance in the nineteenth century.²⁶ A reverse pattern occurs with cases upholding federal legislation against constitutional challenge. *Marbury* citations are correlated with such cases in the nineteenth century,²⁷ but not across the period as a whole.²⁸ On the whole, there is not a strong correlation between the exercise of judicial review and citations to *Marbury* by the Supreme Court, and the Court frequently exercises the power of judicial review without citing *Marbury*. The presence of judicial review cases on the Court's agenda may create opportunities (and incentives) for the Court to cite *Marbury*, but the effect is a weak one.

IV. Congressional and Executive References to *Marbury*

V. Early Commentary on *Marbury*

Both judicial citation patterns and evidence from congressional and executive documents support the notion that *Marbury* was known within the political and legal community in the nineteenth century but was not exclusively or even primarily known as a case about judicial review. *Marbury*'s importance and identity changed over time, however. *Marbury* became a

²¹ See supra notes _

²² The data on Supreme Court review of federal statutes derives for the Judicial Review of Congress database. See Whittington, supra note _, at 1261-66. The period analyzed includes U.S. Supreme Court cases from 1804-2005.

²³ $b=.173$, $SE=.04$.

²⁴ $b=.039$, $SE=.015$.

²⁵ $b=.19$, $SE=.058$.

²⁶ $b=.201$, $SE=.115$.

²⁷ $b=.105$, $SE=.046$.

²⁸ $b=.024$, $SE=.019$.

more prominent, more frequently cited case in judicial and political debates in the twentieth century, particularly in the late twentieth century, and those references increasingly focused on *Marbury*'s relevance to the power of judicial review.

Although judges may have particular reason to look for authorities to support their exercises of judicial review, they are not the only representatives of the legal culture who could recognize or construct the significance of *Marbury*. If judges did not cite *Marbury* on judicial review to any great degree until well into the twentieth century, it remains to be determined how the case was substantively discussed. It is through these substantive discussions that the path of canonization can be traced.

This section incorporates a variety of authors who discussed *Marbury*, primarily treatise writers but also judges, memorialists, and legislators, in order to further unpack the meaning of Figures 1 and 2.²⁹ The focus is on the nineteenth century, for that is where the qualitative transformation takes place in the understanding of *Marbury*. It is clear that by the early twentieth century, *Marbury* is a much discussed part of the constitutional canon and at the heart of debates about the power of judicial review.³⁰ The question raised by Clinton and other revisionists is whether *Marbury* had this status from the beginning. In order to investigate the revisionist claims, we should examine how *Marbury* was discussed and used in the nineteenth century and when the characterization of *Marbury* as a case about establishment of judicial review begins take on its familiar, modern form.

Marbury was immediately recognized as a case that was relevant to the power of judicial review. It was not, however, generally held up as being a foundational case that uniquely or critically established the power of judicial review. For many nineteenth century commentators, *Marbury* was simply part of the general constitutional landscape. There were early exceptions such as Joseph Story who did highlight *Marbury* and John Marshall's role in empowering the courts,³¹ and they developed a narrative that would become commonplace by the end of the century.

There was little contemporaneous reaction to John Marshall's assertion of the power of judicial review in *Marbury*. As the Supreme Court historian Charles Warren thoroughly documented, *Marbury* was a high-profile case and generated substantial public discussion and controversy.³² Public comment at the time revolved around other questions raised by the case, most notably the chief justice's assertion that the courts could monitor and correct how cabinet members conducted their duties. The near silence surrounding the discussion of judicial review in *Marbury* is in sharp contrast to the public notice taken of the power during earlier controversies and after earlier decisions, including the determination by the federal circuit courts in the 1790s that provisions of the Invalid Pensions Act was unconstitutional.

The opinion had high prestige and salience in the nineteenth century from the political and administrative law context. As Figure 1 illustrates, *Marbury* was routinely discussed in the courts in the nineteenth century, but for the substantive content that is frequently ignored today. It was in this context that Justice Joseph Story extolled the case in a circuit court opinion as "the great case of *Marbury v. Madison* . . . great, not only from the authority which pronounced it, but

²⁹ The following discussion builds on a comprehensive survey of cases and commentaries citing *Marbury* in the nineteenth century. Particular examples in the text are illustrative of broader tendencies.

³⁰ See, e.g., EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 1 (1914); CHARLES GROVE HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* 168 (1914).

³¹ JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1833).

³² CHARLES WARREN, *1 THE SUPREME COURT IN UNITED STATES HISTORY* 245-62 (1926).

also from the importance of the topics which it discussed.”³³ Similarly, when state judges wrote paeans to the “celebrated case”³⁴ of *Marbury* and talked about it as “one of the ablest arguments of Chief Justice Marshall,” it was not for his establishment of the power of judicial review but for his substantive defense of the constitutional jurisdiction of the courts and the prohibition on legislatures “imposing on those Courts a succession of new duties.”³⁵ In 1860, Republican Representative James Hale sought to deflate judicial prestige a bit and so reminded his colleagues of the “famous case” of *Marbury* because it represented a great clash between the chief justice and the president over the mandamus power and the completion of commissions.³⁶ *Marbury* revisionists have had a tendency to downplay the nineteenth-century significance of the case, but such casual references by judges and legislators to the “great case” of *Marbury* should temper that inclination. *Marbury* was memorable for many things, and many nineteenth-century commentators focused on the politics surrounding the case or the substantive matters of law discussed in Marshall’s opinion when recalling the case and tracing its lessons. Those traits made it an attractive candidate for transmission and canonization when interest did eventually turn to judicial review.³⁷

As the revisionists would expect, the earliest cases that took note of *Marbury* at all as a precedent for judicial review did not tend to give inordinate attention to it. U.S. District Court judge John Davis, for example, treated *Marbury* in a two-sentence footnote in his opinion upholding the constitutionality of the Jeffersonian embargo in *United States v. The William* (1808).³⁸ Davis did not seem to think there was any question to be raised about “the duty of the court” to make a “comparison of the law with the constitution.” But the question of whether the courts could properly invalidate legislation “without repugnancy to express provisions of the constitution” was more difficult, and Davis canvassed a range of authorities to illuminate that issue. He gave sustained attention to various circuit court and Supreme Court decisions from the 1790s that had evaluated the constitutionality of state and federal laws. *Marbury* simply was in “affirmance of the general doctrine, exhibited in the cases cited in the text.”³⁹ Similarly, the South Carolina Constitutional Court of Appeals included *Marbury* as part of a string cite along with other state and federal cases and St. George Tucker’s *Commentaries*⁴⁰ in support of the proposition that each “department of the government, is the constitutional judge of its own powers; each within its own sphere” and that judges are bound to “refuse to execute” statutes “contrary to the manifest tenor of the constitution.”⁴¹ Pennsylvania’s court similarly emphasized

³³ Johnson et al. v. United States, 13 F. Cas. 868 (1830).

³⁴ G. & D. Taylor & Co. v. Place, 4 R.I. 324 (R.I. 1856).

³⁵ Caulfield v. Hudson and Hudson, 3 Cal. 389 (Ca. 1853).

³⁶ Cong. Globe, 36th Cong., 1st Sess., 762 (1860).

³⁷ The California Supreme Court discussed *Marbury* and the mandamus power in language eerily similar to the famous line in *Cooper v. Aaron* and suggests that the gap between two sorts of powers was not vast. “The power of the Courts to interfere in this behalf is resisted on the ground that the power of the Legislature is political in its character, and cannot be controlled, and that the duties devolved upon the officers are also political, and cannot be interfered with by the judiciary. . . . The act of drawing a warrant, or paying money out of the treasury, is, in most cases, merely ministerial, and in such case the officer is amenable to the Courts and bound by their orders. This proposition was determined in the case of *Marbury v. Madison*, by the Supreme Court of the United States, as early as 1803, and has ever since been regarded as the settled law of the country.” *Nougues v. Douglass*, 7 Cal. 65, 80 (Ca. 1857).

³⁸ *United States v. The William*, 28 F. Cas. 614 (1808).

³⁹ *Ibid.*, at 618.

⁴⁰ ST. GEORGE TUCKER, *BLACKSTONE’S COMMENTARIES* (1803).

⁴¹ *White v. Kendrick*, 1 Brev. 469 (S.C. 1805).

Tucker's treatise and Justice Patterson's circuit court opinion in *Vanhorne's Lessee v. Dorrance*⁴² before adding that Marshall's opinion in *Marbury* "strengthened and confirmed the sentiments I have ever entertained" (the defense counsel had noted that the power of judicial review "had been repeatedly affirmed by judicial decisions" but did not include *Marbury* in his list of authorities).⁴³

As time passed, both lawyers and judges included *Marbury* in a fluctuating list of state and federal cases and extrajudicial materials that provided authority for the proposition that unconstitutional acts were null and void. Often, *Marbury* was simply part of a lengthy string cite as in the New Hampshire case of *Merrill v. Sheburne* (1818)⁴⁴ or the Louisiana case of *Louisiana Ice Co. v. State National Bank* (1880).⁴⁵ Sometimes, *Marbury* was named as part of a shorter list of examples of courts exercising the power of judicial review or even allowed to stand on its own, but unadorned with any description of its particular importance in establishing judicial review. For example, the Indiana case *Dawson v. Shaver* (1822) matter of factly cited *Emerick* and *Marbury* to support its point that "the duty of the Court is imperative, and its authority is unquestionable" to declare unconstitutional statutory provisions null and void.⁴⁶ U.S. District Judge Robert Wells included *Marbury* along with *Vanhorne's Lessee* and the *Federalist Papers* to lend support for "the principles intended to be established by the framers of the constitution; and . . . established judicial principles" when writing one of the few antebellum lower court opinions declaring a federal law unconstitutional and making one of the very few nineteenth century references to *Marbury* for the power of judicial review in a federal court opinion.⁴⁷ Legislators showed a similar tendency through first decades of the nineteenth-century, when they referenced *Marbury* in relation to judicial review. During the South Carolina nullification debate, for example, Senator Miles Poindexter asserted that "[a]ll parties agreed" at the time of the founding that unconstitutional laws were "absolutely null and void," and he pointed out that this "principle has often been recognized by judicial decisions, both in the federal and the State courts." *Marbury* was simply one of several cases "on this point."⁴⁸ During the Reconstruction debates, Senator Reverdy Johnson leaped to correct the suggestion that there had been doubts at the time of the founding about the power of judicial review and similarly emphasized the myriad statements and decisions in support of such a power. Marshall's careful exposition of the power in *Marbury* was "for the purpose, not of satisfying the minds of the court that they had the power to declare an act of Congress unconstitutional, but to satisfy the public mind" that they had done "their duty" while exercising such a power.⁴⁹ By the mid-nineteenth century, however, some judges had already found Marshall's language to be particularly quotable, and *Marbury* was cited not for its importance but for its eloquence. Thus, the Iowa Supreme Court provides an extended excerpt from the case with the preface, "Chief Justice Marshall lays down the doctrine in the following clear, pointed and forcible language."⁵⁰

But there were isolated exceptions in the state courts in the early nineteenth century that seemed to attribute greater significance to *Marbury*. Judge John D. Cook, a short-tenured Whig

⁴² *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304 (1795).

⁴³ *Emerick v. Harris*, 1 Binn. 416 (Pa. 1808).

⁴⁴ *Merrill v. Sheburne*, 1 N.H. 199 (NH 1818).

⁴⁵ *Louisiana Ice Co. v. State National Bank*, 1 McGloin 181 (La. 1880).

⁴⁶ *Dawson v. Shaver and Another*, 1 Blackf. 204 (Ind. 1822).

⁴⁷ *In re Klein*, 14 F. Cas. 719 (1843).

⁴⁸ 9 *Reg. Debates* 630 (1833).

⁴⁹ *Cong. Globe*, 40th Cong., 2nd Sess., 772 (1868).

⁵⁰ *Reed v. Wright*, 2 Greene 15 (Ia 1849).

on the Missouri Supreme Court, sounded an exceptionally modern note at the conclusion of his opinion in *Baily v. Gentry* (1822), “Since the case of *Marbury v. Madison* . . . this question [of the judicial authority to decide “on the validity of the acts of the Legislature”] has been generally looked upon as settled.”⁵¹ Somewhat more ambiguously, in an early alcohol prohibition case the Indiana Supreme Court rebutted the suggestion of the state’s attorneys that the safety of the people was the supreme law by observing that there were constitutional barriers to legislative power that the judiciary was obliged to enforce and that “[t]his duty of the judicial department, in this country, was demonstrated by chief justice Marshall, in *Marbury v. Madison* . . . and has since been recognized as settled American law.”⁵² This sort of “since *Marbury*” rhetoric is familiar to modern ears, especially after *Cooper*, but such characterizations of *Marbury* were uncommon in the early nineteenth century. Somewhat differently, Pennsylvania’s Judge John Gibson famously singled out *Marbury* for special criticism in his opinion in *Eakin v. Raub* (1825), contending that “although the right in question [“to declare all unconstitutional acts void”] has long been claimed by the judiciary, no judge has ventured to discuss it, except Chief Justice Marshall.”⁵³ But Gibson’s idiosyncratic dissent had little influence with his contemporaries until it was recovered and given new attention and status by James Bradley Thayer and other scholars concerned with *Marbury* and the history of judicial review at the turn of the twentieth century.⁵⁴ Even these ambiguous statements of *Marbury*’s significance were highly unusual in the nineteenth century judiciary. These three references were very much the exceptions to the more common pattern noted above, and collectively they were hardly clear in indicating a belief that John Marshall had created or established a power of judicial review.

[Insert Figures 5 and 6 about here]

Marbury was a common example of the judicial review power, but it had not been generally elevated by nineteenth-century judges to canonical status for that point. Figures 5 and 6 shed additional light on the process by which *Marbury* gained new significance in the courts. Figure 5 traces the fate of some of the competing candidates for canonization as the preferred cite for the power of judicial review. The figure includes all citations in state and federal courts to several federal cases that were commonly included in early string cites on the power for judicial review, including *Hylton*,⁵⁵ *Vanhorne’s*,⁵⁶ *Hayburn’s*,⁵⁷ *Calder*,⁵⁸ and *Marbury*. The early importance of *Marbury* as “the mandamus case” gave it a salience and staying power that carried it through the nineteenth century. Meanwhile, other cases that had been routinely paired with *Marbury* or overshadowed it relative to the power of judicial review were less cited for other points of law and gradually dropped from judicial opinions as leading precedents for the power of courts to nullify unconstitutional laws. No single state case ever achieved the same universality of reference as the federal cases, and extrajudicial sources passed in and out of favor over time.

⁵¹ *Baily v. Gentry and Wife*, 1 Mo. 164 (Mo. 1822).

⁵² *Beebe v. State*, 6 Ind. 501 (Ind. 1855).

⁵³ *Eakin v. Raub*, 12 Serg. & Rawle 330 (Pa. 1825).

⁵⁴ *Clinton*, *supra* note __, at 128.

⁵⁵ *Hylton v. United States*, 3 U.S. 171 (1796).

⁵⁶ *Vanhorne’s Lessee v. Dorrance*, 2 U.S. 304 (1795).

⁵⁷ *Hayburn’s Case*, 2 U.S. 409 (1792).

⁵⁸ *Calder v. Bull*, 3 U.S. 386 (1798).

Part of the explanation for the rise of *Marbury* appears to be its quotability. As string cites on the authority of courts to exercise the power of judicial review declined, favored quotes from *Marbury* took over. Here too, however, Marshall proved to be a man for all seasons. As Figure 6 illustrates, judges up until the New Deal favored Marshall's bold language on unchanging constitutional limits on legislative power. This was the John Marshall featured in *In re Jacobs* (1885), the landmark New York labor regulation case that helped launch the *Lochner* era.⁵⁹ In recent decades, by contrast, judges have overwhelmingly favored Marshall's sentence singled out in *Cooper* on the judicial authority to say what the law is. A post-1980s resurgence in Marshallian language on constitutional limitations is visible in Figure 6 as well, reflecting renewed interest in the courts in the possibility of enforcing enumerated powers. Marshall's line about the Constitution being a "superior, paramount law, unchangeable by ordinary means" sits comfortably with both an emphasis on constitutional limits and on judicial supremacy, and it has been a less prominent but steady presence in judicial opinions since the *Lochner* era.

The treatise literature of the nineteenth century dealt with *Marbury* in a comparable manner.⁶⁰ A review of the major works of the period reveals that *Marbury* was not generally treated with the special reverence that it gets in the twentieth century. In his influential digest of all federal court decisions, Richard Peters included twenty-four numbered paragraphs on "general principles" relating to the constitutionality of statutes and judicial review.⁶¹ Only three of those paragraphs were drawn from *Marbury*, and he led the section with excerpts from *Vanhorne's Lessee*. Likewise, Nathan Dane's earlier digest of American law included *Marbury* in a string cite on the judicial duty to declare unconstitutional statutes void.⁶² By contrast, in his digest limited to Supreme Court decisions, Justice Benjamin Curtis simply cited *Marbury* for the first proposition under his constitutional law heading: "An act of congress repugnant to the constitution is not law."⁶³

Early constitutional commentaries were matter of fact about the judicial authority to interpret the Constitution and set aside unconstitutional statutory requirements. *Marbury* was not generally identified as playing a pivotal or foundational role in the creation or development of the power of judicial review in the major treatises of the first decades of the nineteenth century (with two significant exceptions to be discussed below). In his law lectures, Henry St. George Tucker observed that the "power to pronounce a law unconstitutional has been ably and successfully maintained on some memorable occasions," and listed several examples but provided an extended quote from *Marbury* since in "that case the argument is condensed by Judge Marshall with his usual force."⁶⁴ In the second published edition of his constitutional law lectures at Columbia, William Duer added an extended footnote with precedents for courts declaring acts of legislatures "void as against the Constitution."⁶⁵ He did not include *Marbury* in his list, and the authority that he chose to discuss in the body of his original lecture was Federalist No. 78. William Rawle listed without particular reliance on authority the judicial power to enforce the Constitution as one of the checks on legislative power.⁶⁶ John Norton

⁵⁹ *In re Jacobs*, 98 NY 98 (NY 1885).

⁶⁰ Douglas, *supra* note __; Clinton, *supra* note __.

⁶¹ RICHARD PETERS, 2 DIGEST OF THE DECISIONS OF THE COURTS OF THE UNITED STATES 618-19 (1860).

⁶² NATHAN DANE, 6 A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 614 (1824).

⁶³ BENJAMIN R. CURTIS, DIGEST OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES 101 (1856).

⁶⁴ HENRY ST. GEORGE TUCKER, 1 COMMENTARIES ON THE LAWS OF VIRGINIA 14 (1831).

⁶⁵ WILLIAM ALEXANDER DUER, A COURSE OF LECTURES ON THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 126 (2nd ed., 1856).

⁶⁶ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 277 (1825).

Pomeroy defended the role of the judiciary as the “final arbiter as to the meaning of the Constitution,” but did not rely on specific precedents to make the point. “In fact, the whole history of the Supreme Court is an authority.” For “important and leading cases,” in which the issue was examined with “a cogency of argument which never has been, and never can be, answered,” Pomeroy pointed the reader to several opinions, *not* including *Marbury*.⁶⁷ Thomas Cooley feared “wearying the patience of the reader in quoting from the very numerous authorities upon the subject,” and pointed the reader to a number of judicial and extrajudicial sources, including *Marbury*, but provided in that text an extended quotation from a speech by Daniel Webster.⁶⁸ Rawle and other treatise writers did take note of the substantive significance of *Marbury* as a statement about the constitutional jurisdiction of the courts and the mandamus power.⁶⁹

Published obituaries and eulogies at the time of Marshall’s death largely avoided detailed discussions of his work on the Court or references to individual cases, but they did not portray *Marbury* as among his significant accomplishments or the power of judicial review as an unsettled question at the time of his ascension to the Court. Horace Binney’s (1835) eulogy may have been the most popular, however, and it alludes to a variety of important decisions that settled disputed constitutional questions and that were “not to be shaken so long as the law has any portion of our regard.”⁷⁰ *Marbury* was not among them. Binney did not suggest that judicial review was an open question when Marshall assumed the position of chief justice, or that establishing the power of judicial review was among his accomplishments. Instead, Binney more modestly observes that at the time of Marshall’s appointment “in many parts of the greatest difficulty and delicacy, [the Constitution] had not then received a judicial interpretation.”⁷¹ The judicial “rules of interpretation were still to be settled, and the meaning of its doubtful clauses to be fixed.”⁷² Similarly, in his eulogy for Marshall, James Bryant took it for granted that it was the “prerogative and duty” of the Court to “test” statutes against the requirements of the Constitution.⁷³ The praise owed to Marshall was not in creating or establishing such a power but in how he exercised the responsibility with which he had been entrusted. *Marbury* was observed only for the purposes of illuminating Marshall’s self-restraint, in “refusing to exercise a prerogative” granted to him by Congress but unauthorized by the Constitution.⁷⁴

⁶⁷ JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 95 (1868).

⁶⁸ THOMAS M. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 45-6 (3rd ed., 1874). The relative insignificance of *Marbury* to Cooley can be seen in his comparable and more extensive discussion of the power of judicial review of statutes in a later treatise. In his *General Principles of Constitutional Law*, Cooley (1880, 144-55) illustrated his discussion with numerous cites to judicial decisions, primarily by state courts, but did not cite or mention *Marbury* at all. THOMAS M. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 144-55 (1880). *Marbury* was treated as a case about judicial oversight of the executive; *Ibid.*, 157. Henry Wade Rogers, dean of the Michigan Law School, later made the point even more explicit, when introducing a set of lectures by Cooley and others: “Before the Federal Constitution was framed the constitutions of the several States had established supreme courts within their States, and those courts exercised the power of declaring legislative acts void, when in conflict with their respective constitutions, before ever the Supreme Court of the United States asserted a similar power in 1803, in the great case of *Marbury v. Madison*.” Henry Wade Rogers, *Introduction, in CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW* 10 (1889).

⁶⁹ Rawle, *supra* note __, at 216.

⁷⁰ HORACE BINNEY, AN EULOGY ON THE LIFE AND CHARACTER OF JOHN MARSHALL 61 (1835).

⁷¹ *Ibid.*, 57.

⁷² *Ibid.*, 64.

⁷³ JAMES R.M. BRYANT, EULOGIUM ON CHIEF JUSTICE MARSHALL 12 (1835).

⁷⁴ *Ibid.*, 13.

James Kent and Joseph Story were two notable exceptions in laying the groundwork for the canonization of *Marbury*. Personal friends and ideological allies, they both wrote highly influential treatises that appeared near the end of Marshall's tenure on the Court, whom they held in great admiration. In his *Commentaries on American Law*, Kent provides a lengthy discourse on judicial review. Not only did the "courts of justice have a right, and are in duty bound, to bring every law to the test of the constitution" but the "judicial department is the proper power in the government to determine whether the statute be or be not constitutional."⁷⁵ Only by exercising "the exalted duty of expounding the constitution, and trying the validity of statutes by that standard" will the courts be able to protect the people from "undue and destructive innovations upon their chartered rights."⁷⁶ Kent thought this to be "a settled principle in the legal polity of this country," and he traced its "progress" from *The Federalist Papers* through judicial decisions in the federal circuit and state courts.⁷⁷ His narrative culminates in *Marbury*. Until 1803, "this question . . . was confined to one or two of the state courts, and to the subordinate, or circuit courts of the United States." Only in *Marbury* did the question receive "clear and elaborate discussion" by the "Supreme Court of the United States" and only then was the power "declared in an argument approaching to the precision and certainty of a mathematical demonstration." After that, Kent concluded, the "great question may be regarded as now finally settled."⁷⁸ Kent importantly introduces the notion that *Marbury* "settled" the question of judicial review. Kent does not, however, give any indication that the power of judicial review was particularly contested prior to *Marbury* or that John Marshall exercised some creative force in establishing it. His key point of contrast is between "the English government" and "this country," and the primary virtue attributed to Marshall's opinion is to its "clear and elaborate discussion" of the important subject.⁷⁹ Kent concludes his discussion of the power of judicial review by emphasizing that there had never been "any doubt or difficulty in this state, in respect to the competency of the courts to declare a statute unconstitutional."⁸⁰ Kent did not indicate whether there had ever been "any doubt or difficulty" in any other state.

In his *Commentaries on the Constitution*, Joseph Story took a similar view of the judicial power. "The universal sense of America has decided, that in the last resort the judiciary must decide upon the constitutionality of the acts and laws of the general and state governments."⁸¹ By firmly and independently doing so, the courts could "subdue the oppression of the other branches of the government."⁸² To support his point, Story offered an extended excerpt from Federalist No. 78 and *Marbury*, observing that the "reasoning of the Supreme Court . . . on this subject is so clear and convincing, that it is deemed advisable to cite it in this place, as a corrective to those loose and extraordinary doctrines, which sometimes find their way into opinions possessing official influence."⁸³ Even more than Kent, however, Story was writing

⁷⁵ JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 421 (1826)

⁷⁶ *Ibid.*, 422.

⁷⁷ *Ibid.*, 422.

⁷⁸ *Ibid.*, 424. Theodore Sedgwick repeats the Kent narrative in his treatise on interpretation, concluding that, [f]inally, the whole subject was elaborately examined and discussed by the Supreme Court of the United States, and the principle deliberately and definitively settled." THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 479 (1857).

⁷⁹ Kent, *supra* note __, at 420, 422, 424.

⁸⁰ *Ibid.*, 425.

⁸¹ Story, *supra* note __, at 3:429.

⁸² *Ibid.*, 3:434.

⁸³ *Ibid.*, 3:431.

with the Jacksonians and specifically the threat of state nullification in mind. Neither Kent nor Story were content to merely observe the existence of the power of judicial review, they wanted to celebrate it and emphasize it. For Kent, the power was crucial to “constitutional liberty, and of the security of property in this country,” and thus worth an extended discussion.⁸⁴ For Story, the authority of the Supreme Court to interpret the Constitution was under threat from other institutions, and so the basis of judicial review needed emphasis to combat those “extraordinary doctrines.” As a justice of the U.S. Supreme Court writing specifically on the U.S. Constitution, Story was perhaps more inclined to quote from his friend John Marshall’s opinion in *Marbury* and to leave out references to state cases of the sort that Chancellor Kent included in his more general treatise.

Some legislators in the Civil War era went even further in suggesting that *Marbury* was a special case in the history of judicial review, but they did not always seek to praise the work that Marshall had done. Fueled by lingering concerns over *Dred Scott* and the constitutionality of war and Reconstruction measures, Republican Charles Drake used his brief time in the U.S. Senate to propose eliminating the power of judicial review. He singled out *Marbury* as the “leading case” that gave “authoritative exposition of the grounds upon which the dogma rests.” This “judicial claim . . . rests wholly upon an interpretation of its own power by the judiciary, coupled with the unobjecting silence of the legislative department,” but Congress had slept during “this first attempt by the judiciary to disregard its laws” given the insignificance of the statutory provision at issue.⁸⁵ Drake was an anti-judicial review gadfly, and he had good reason to minimize Court’s authority to exercise the power of judicial review. He anticipated later progressive critics of the Court in singling out *Marbury* as unique and as the illegitimate wellspring of the power of judicial review. But he was not completely alone among congressmen in highlighting *Marbury*. In the previous Congress, Democratic Representative James Beck had pointed to *Marbury* as the case in which “the Supreme Court had defined its own powers and announced what its duties, privileges, and rights are whenever Congress attempts to pass any unconstitutional act,” and read an extended excerpt from Marshall’s opinion as part of his warning that a Reconstruction measure was unconstitutional.⁸⁶ Unlike Drake, Beck had no objection to the Court playing its role, but he agreed with Drake in characterizing *Marbury* as the source of its power.⁸⁷ Such claims for the uniqueness or foundational quality of *Marbury* were still not common among legislators during the period, but it is striking that they had begun to emerge at all.

In the late nineteenth century, the significance of *Marbury* in establishing the power of judicial review became a more prominent theme. As the power of judicial review became more salient and more contested in the second half of the century, commentators began to suggest that the question of whether the courts had such a power had once been open but had been

⁸⁴ Kent, *supra* note __, at 425.

⁸⁵ *Cong. Globe* 41st Cong., 2nd Sess. 89 (1870).

⁸⁶ *Cong. Globe*, 40th Cong., 2nd Sess. 546 (1868). Unionist Senator Garrett Davis provided a somewhat more conventional formulation to the same effect when observing that the “great constitutional principle, that an act of Congress in conflict with the Constitution must yield to it, and is of no validity whatever, was first enunciated by the Supreme Court, Chief Justice Marshall being the organ, in the case of *Marbury vs. Madison* . . . since which it has never been questioned.” *Cong. Globe*, 39th Cong., 1st Sess., 935 (1866).

⁸⁷ By contrast, during the impeachment trial of President Andrew Johnson, Republican Representative Ben Butler went so far as to deny that *Marbury* was even among the precedents for judicial review in his bid to counter the claim that other branches could realistically question the constitutionality of congressional statutes. *Cong. Globe*, 40th Cong., 2nd Sess. Supp. 36 (1868).

permanently closed by Marshall's decisive action.⁸⁸ George van Santvoord's popular *Sketches of Lives of the Chief Justices* was initially published just before the Civil War, but republished in a highly successful new edition in the decades after. He praised *Marbury* as "[o]ne of the most important of these cases of constitutional construction, as it is the earliest in point of time," and containing an argument that "has ever since been regarded as the fundamental principle, the very sheet anchor of the Constitution, namely, that it is the right and the duty of the judicial department to determine the constitutionality of a legislative act." Although van Santvoord admitted that "this principle had, indeed, been asserted at an earlier period" by other judges, he offered what would become an influential claim about the importance of *Marbury*. Van Santvoord asserted that despite *Dorrance, et al.*, "it does not appear to have been considered by the professional mind as settled."⁸⁹ As evidence, he pointed to Justice Samuel Chase to suggest that the power of judicial review was an open question in 1803. Chase had hedged in *Calder v. Bull* (1798), a case involving a challenge to a state law under a state constitution, "Without giving an opinion, at this time, whether the Court has jurisdiction to decide that any law made by Congress is void, I am fully satisfied that this Court has no jurisdiction to determine that any law of any State Legislature contrary to any Constitution of such State is void."⁹⁰ He had likewise said in a circuit court opinion of *Cooper v. Telfair* that "all acts of the Legislature in direct opposition to the provisions of the Constitution would be void; yet it still remains a question *where the power resides to declare them void*" (emphasis added by van Santvoord). Van Santvoord carefully neglected to quote Chase's next sentence in that opinion, in which he observed that although "there is no adjudication of the Supreme Court itself upon this point" as of 1800 (the court reporter would later add a footnote taking account of *Marbury*), the existence of the power of judicial review was "expressly admitted by all this bar," had been individually ruled on by Supreme Court justices sitting in circuit, and was not thought to be in doubt by Chase himself. Chase agreed "in the general sentiment" of "the period, when the existing constitution came into operation" that the judiciary could declare unconstitutional acts void.⁹¹ Nonetheless, van Santvoord leveraged Chase's words in cases that had frequently been cited as authorities for the power of judicial review to build up the importance of *Marbury* as "the first authoritative exposition of the Court on the subject" and a "final decision" that "put the question at rest then and for ever."⁹² Van Santvoord's biographical account of Marshall and his rendition of *Marbury*'s significance became a standard reference in the latter nineteenth century, being cited and quoted on this proposition by publications ranging from the *Albany Law Journal*⁹³ to *Appleton's Cyclopaedia of American Biography*⁹⁴ to Edward Elliott's *Biographical Story of the Constitution*.⁹⁵ This led Hampton Carson in his official centennial history of the Court to

⁸⁸ On challenges to the courts in the late nineteenth century, see generally WILLIAM G. ROSS, *A MUTED FURY* (1994).

⁸⁹ GEORGE VAN SANTVOORD, *SKETCHES OF THE LIVES AND JUDICIAL SERVICES OF THE CHIEF JUSTICES* 353 (1856). By contrast, the competing work of Henry Flanders made only the more modest claim that *Marbury* was the "first case involving constitutional question of any importance." HENRY FLANDERS, *2 THE LIVES AND TIMES OF THE CHIEF JUSTICES OF THE UNITED STATES* 437 (1858).

⁹⁰ *Calder v. Bull*, 3 U.S. 386 (1798).

⁹¹ *Cooper v. Telfair*, 4 U.S. 14, 19 (1800).

⁹² Santvoord, *supra* note __, at 354.

⁹³ *John Marshall*, 13 *ALBANY L. J.* 443 (1876).

⁹⁴ *John Marshall*, in 4 *APPLETON'S CYCLOPEDIA OF AMERICAN BIOGRAPHY* 224 (1888).

⁹⁵ EDWARD C. ELLIOTT, *BIOGRAPHICAL STORY OF THE CONSTITUTION* 130-33 (1910).

characterize *Marbury* as “subjecting, once and forever, all executive and ministerial officers as well as Congress itself to the control of the Court.”⁹⁶

The clarity and source of *Marbury* was now thought to take on particular significance. Whereas earlier commentators had grouped a wide range of sources as offering support for the power of courts to give binding interpretations of constitutions and declare statutes void, Carson characterized all earlier decisions as “slow, timid, and halting footsteps” that would culminate in the authoritative pronouncement by John Marshall in *Marbury*.⁹⁷ The pioneering political scientist W.W. Willoughby took note of earlier cases declaring laws unconstitutional, but what was important was that “in 1803 . . . the principle was first definitely and clearly applied by the Supreme Court.” By becoming “involved in a consideration of the fundamental question whether the constitution was to be regarded as an absolute limit to the legislative power,” Willoughby suggested, the Court was able to decide the issue “if possible, once for all” and having set it forth the power “has never been seriously questioned since.”⁹⁸ Other textbooks did the same, such as Clark Hare’s, which called *Marbury* “noteworthy not only for the point directly involved, but as having authoritatively established that the judicial branch of the United States is paramount, and may virtually annul every act or ordinance.”⁹⁹ As casebooks became the dominant pedagogical tool for legal training at the turn of the twentieth century, *Marbury* entered the teaching canon.¹⁰⁰ Other cases receded in significance or disappeared altogether.¹⁰¹

By the end of the nineteenth century, celebrations of John Marshall’s contribution to judicial review in *Marbury* were in full swing. Chief Justice Waite added to the myth of *Marbury* with his address during the unveiling of the statue of John Marshall on the fiftieth anniversary of his death. As Waite characterized it, by the time of Marshall’s ascension to the bench, “nothing had been done judicially to define the powers or develop the resources of the Constitution.”¹⁰² Waite simply stated that it was in *Marbury* that “for the first time, it was announced by the Supreme Court that it was the duty of the judiciary to declare an act of the legislative department of the Government invalid if clearly repugnant to the Constitution.”¹⁰³ This was the only decision of Marshall’s that Waite singled out in his speech, and it was also singled out in similar terms by representative of the Philadelphia bar who helped fund the statue. James Bryce singled out *Marbury* as the “famous judgment” that “laid down” the doctrine that courts gave binding interpretations of the Constitution.¹⁰⁴

By the end of the Gilded Age, the authority of courts to control legislatures was increasingly contested but was also now being held up as essential to the constitutional enterprise. *Marbury* became the symbol of this feature of American constitutionalism. Other features of *Marbury* that had made the case of great importance to judges and lawyers earlier in the nineteenth century were deemphasized. *Marbury* was repositioned as a case centrally about judicial review, which in turn was regarded as essential “constitutional liberty” and “security of

⁹⁶ HAMPTON L. CARSON, 1 THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 9 (1891).

⁹⁷ Carson, *supra* note __, at 1:180.

⁹⁸ W.W. WILLOUGHBY, THE SUPREME COURT OF THE UNITED STATES 39-40 (1890).

⁹⁹ J. I. CLARK HARE, 2 AMERICAN CONSTITUTIONAL LAW 1169 (1889).

¹⁰⁰ EMLIN MCCLAIN, A SELECTION OF CASES ON CONSTITUTIONAL LAW (1900); JAMES BRADLEY THAYER, CASES ON CONSTITUTIONAL LAW (1894).

¹⁰¹ Clinton, *supra* note __, at 164.

¹⁰² MORRISON R. WAITE, EXERCISES AT THE CEREMONY OF UNVEILING THE STATUE OF JOHN MARSHALL 16 (1884).

¹⁰³ *Ibid.*, 19-20.

¹⁰⁴ JAMES BRYCE, 1 THE AMERICAN COMMONWEALTH 366 (1888).

property,” as Kent had argued a half century before.¹⁰⁵ Henry Hitchcock, a co-founder and eighteenth president of the American Bar Association, declared that the “power of the court to declare void an Act of Congress repugnant to the Constitution” was “determined” and “establish[ed]” in *Marbury*. Hitchcock took note of the fact that others had tended to dwell on the “immense importance” of the decision for subjecting executive branch officers “to the control of the courts,” but he believed that it was Marshall’s “demonstration” of the power of courts to void legislation that “lies at the very root of our system of government.”¹⁰⁶ Hitchcock’s emphasis on the importance of judicial review was echoed by others at the turn of the century. Justice David Brewer told the New York bar association that the “salvation of the nation” depended on the “independence and vigor of the judiciary” that would not “yield to the pressure of numbers, that so-called demand of the majority.”¹⁰⁷ Similarly, Justice Stephen Field warned during the centennial celebration of the Supreme Court that only with the support of the people and the bar could the judges be expected to act with the necessary “fearlessness” and guard against “unrestrained legislative will . . . [and] arbitrary power.”¹⁰⁸ In his presidential address to the American Bar Association, John F. Dillon warned his colleagues of the “despotism of the many – of the majority” and called on them to “defend, protect and preserve” the constitutional provisions and the power of judicial review that had been put in place as “the only breakwater against the haste and the passions of the people.”¹⁰⁹ It was Dillon who organized a national celebration of “Marshall Day” in honor of the appointment of the great chief justice, and who helped mobilize the memory of John Marshall and the canonization of *Marbury* as supports for the maintenance and exercise of judicial review at the turn of the twentieth century.¹¹⁰

Ironically, the supporters of judicial review at the end of the nineteenth century preferred to rest their case on the historical reputation of a single individual – John Marshall – and in doing so downplayed the other authorities for judicial review that predated the mandamus case. Where earlier judges and commentators had tended to emphasize, like Justice Chase, the “general sentiment”¹¹¹ of the period as expressed in extrajudicial sources, state cases, federal circuit court cases, and Supreme Court cases, late nineteenth century commentators and judges tended to give exclusive emphasis to *Marbury* as an authoritative statement on the power of the courts to enforce constitutional limits on legislatures. On the one hand, this focused attention on the “clear” and “forcible”¹¹² language of John Marshall and on the prestige of the author and institution, and traded on the already established importance of *Marbury* as a case about executive power and court jurisdiction. On the other hand, this emphasis opened up the argument to the vulnerability that Marshall might have usurped authority and invented the power of judicial review out of whole cloth at the late date of 1803. In either case, both sides of the Progressive era debates agreed on *Marbury*’s importance to the doctrine of judicial review, and

¹⁰⁵ Kent, *supra* note __, at 454.

¹⁰⁶ Henry Hitchcock, *Constitutional Development in the United States as Influenced by Chief-Justice Marshall*, in CONSTITUTIONAL HISTORY OF THE UNITED STATES AS SEEN IN THE DEVELOPMENT OF AMERICAN LAW 76-77 (1889).

¹⁰⁷ DAVID J. BREWER, PROCEEDINGS OF THE NEW YORK STATE BAR ASSOCIATION, SIXTEENTH ANNUAL MEETING 47 (1893).

¹⁰⁸ Stephen J. Field, *The Centenary of the Supreme Court of the United States*, 24 AM. L. REV. 351, 359 (1890).

¹⁰⁹ JOHN F. DILLON, REPORT OF THE FIFTEENTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION 206, 211 (1892).

¹¹⁰ See Douglas, *supra* note __, at 398-403; MICHAEL G. KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 209-11 (1987); Clinton, *supra* note __, at 182-3.

¹¹¹ *Cooper v. Telfair*, 4 U.S. 14, 19 (1800).

¹¹² *Reed v. Wright*, 2 Greene 15 (Ia 1849).

variations of the claim the Chief Justice John Marshall and the Supreme Court had done something special in 1803 to establish a power of judicial review were common by the early twentieth century in a way that they had not been through most of the nineteenth century.

VI. Conclusion

Marbury is now firmly entrenched in the constitutional canon, and it stands most preeminently for the power of courts to authoritatively interpret constitutions and nullify laws that they regard as in violation of constitutional requirements. The U.S. Supreme Court itself now readily points to *Marbury* as “establish[ing] beyond question” the power of judicial review.¹¹³ Nothing is more basic to modern cultural literacy about American constitutionalism than to attribute the creation of the power of judicial review to John Marshall and *Marbury v. Madison*.

This construction of *Marbury* is of modern origin. *Marbury* became the flashpoint for debates over the legitimacy of judicial review of legislation during the *Lochner* era. Revisionist scholarship on *Marbury* has suggested that the case was not that important to establishing judicial review in the early republic and that it was not seen as an especially important case in the early republic. This article replicates and extends the existing work on the reception and use of *Marbury*, shedding light on its meaning over time and the process of constitutional canonization and the transmission and transformation of precedents.

Our findings reinforce and modify the lessons of the existing literature on *Marbury* and on the theory of the constitutional canon. Our extended citation analysis from federal and state courts and legislative and executive documents and our qualitative analysis of judicial opinions and legal commentators support the view that *Marbury* did not carry the meaning and significance relative to the power of judicial review in the early nineteenth century that it carries now. At the same time, we believe earlier scholars have gone too far in concluding that *Marbury* was of little significance in the nineteenth century. Although the U.S. Supreme Court rarely cited the case in support of its authority to exercise the power of judicial review in its opinions until the twentieth century, it routinely cited *Marbury* for other purposes. Other courts and commentators likewise recognized *Marbury* as being a “great case” from early in the nineteenth century because of its substantive statements about the constitutional jurisdiction of courts and the judicial authority to oversee the executive branch. As a high-profile case standing firmly for the view that the American constitutional system was one of “a government of laws, and not of men,” it was a short step to borrow its authority when judicial review of legislation became more salient in the late nineteenth century.¹¹⁴ Moreover, *Marbury* was routinely included as part of a set of authorities that were cited to support or demonstrate the power of judicial review in the nineteenth century. *Marbury* was a ready candidate for canonization.

Early commentators varied on the extent to which they treated *Marbury* as a notable case relative to judicial review. Some ignored it entirely. Others highlighted it. Most simply included it in a long list of relevant authorities on the subject. What distinguished most early discussions of *Marbury* and judicial review from later discussions is context and significance. Early commentators recognized *Marbury* as one of many authorities on the subject, and (for the most part) they gave no particular pride of place to *Marbury* and did not attribute any causal significance for constitutional development relative to judicial review to the Marshall Court’s

¹¹³ *United States v. Lopez*, 514 U.S. 549, 575 (1995).

¹¹⁴ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

decision in the case. By the turn of the twentieth century, however, *Marbury* was increasingly allowed to stand on its own as an authority for the power of judicial review and commentators were increasingly attributing special significance to Marshall's opinion. It was no longer merely a quotable summary of a common sentiment of the founding era. Through force of reasoning and will, it was now thought to have somehow decisively "settled" an "open question."

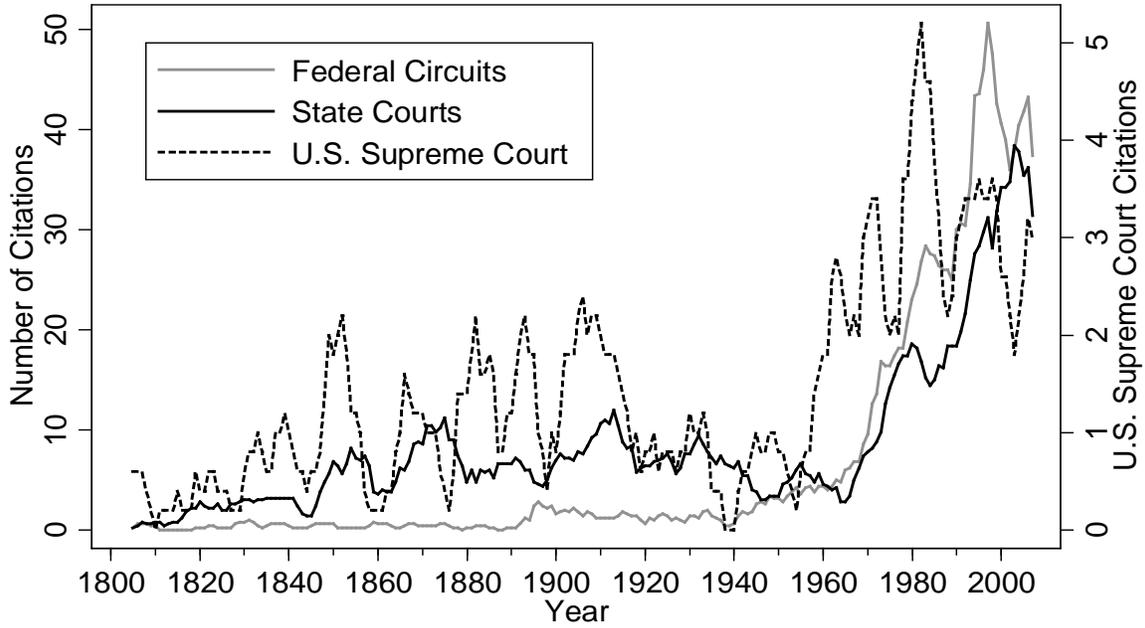


Figure 1: Number of Federal and State Cases Citing *Marbury v. Madison*, 1803-2008

Note: Centered, five-year moving average. U.S. Supreme Court citations on the right axis.

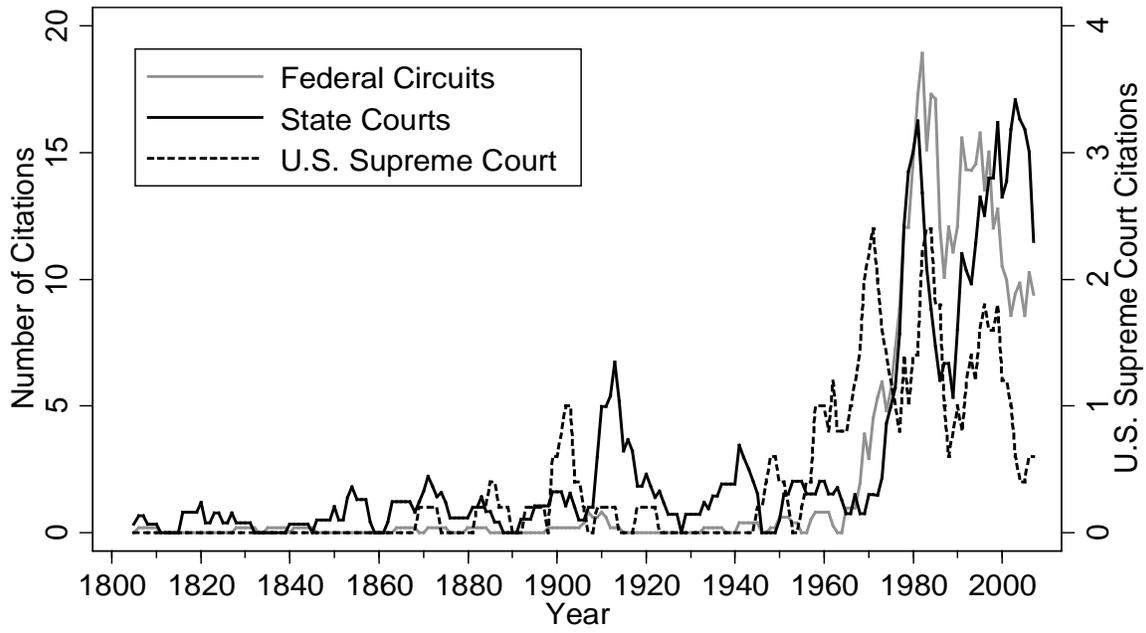


Figure 2: Number of Federal and State Cases Citing *Marbury v. Madison* for the Power of Judicial Review, 1803-2008

Note: Centered, five-year moving average. U.S. Supreme Court citations on the right axis. Figure based on a content analysis of decisions citing *Marbury v. Madison*. Figure includes all U.S. Supreme Court cases and estimate of state and circuit court cases based on content analysis of stratified, random sample of *Marbury*-citing cases.

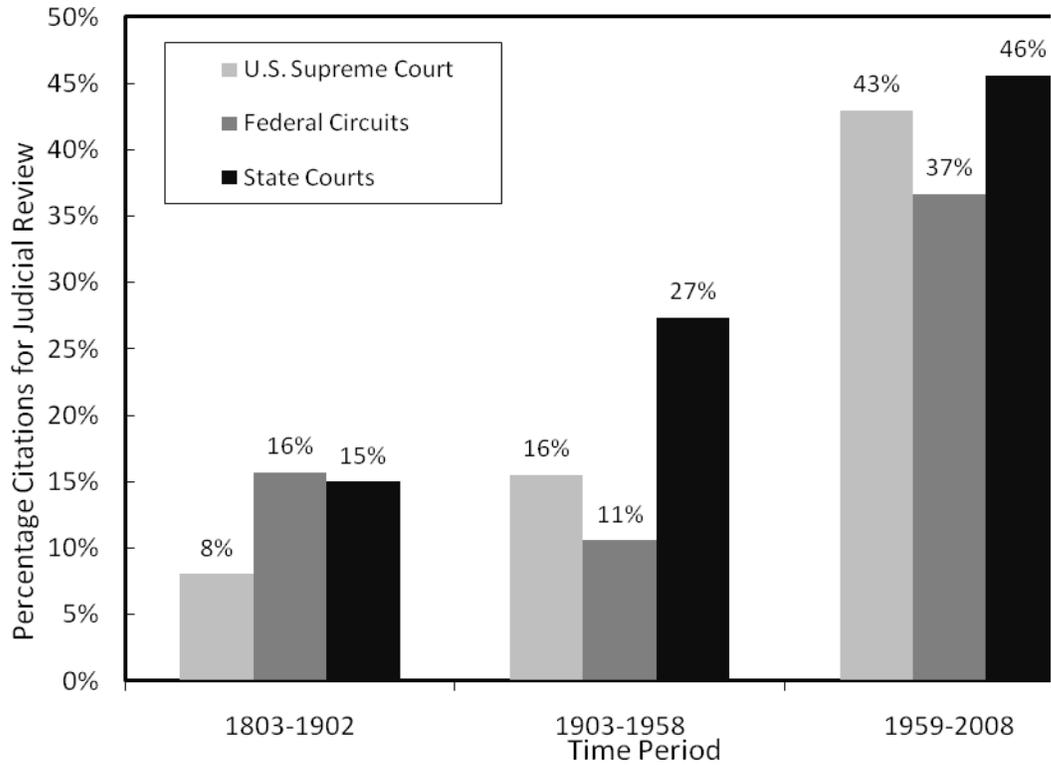


Figure 3: Proportion of Cases Citing *Marbury* for the Power of Judicial Review by Type of Court and Time Period

Note: Figure based on a content analysis of decisions citing *Marbury v. Madison*. Figure includes all U.S. Supreme Court cases and estimate of state and circuit court cases based on content analysis of stratified, random sample of *Marbury*-citing cases.

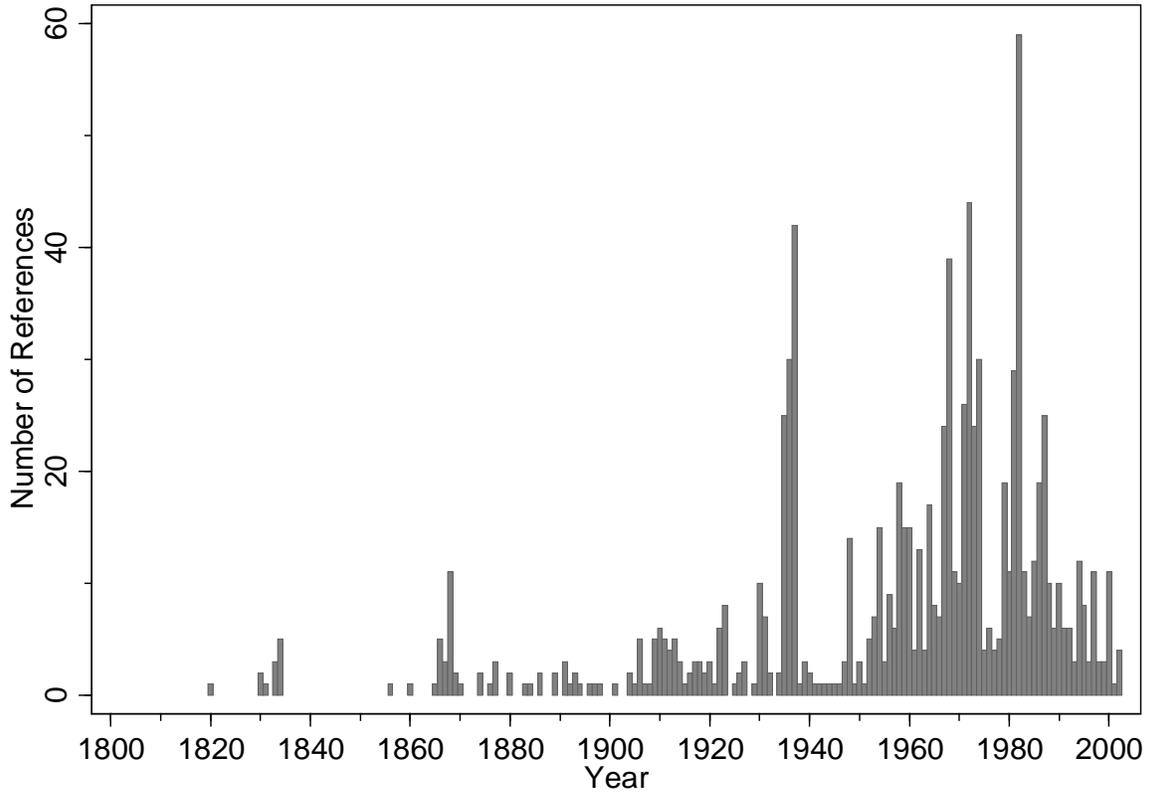


Figure 4: Annual Number of References to *Marbury* in Congressional Debates, 1803-2002.

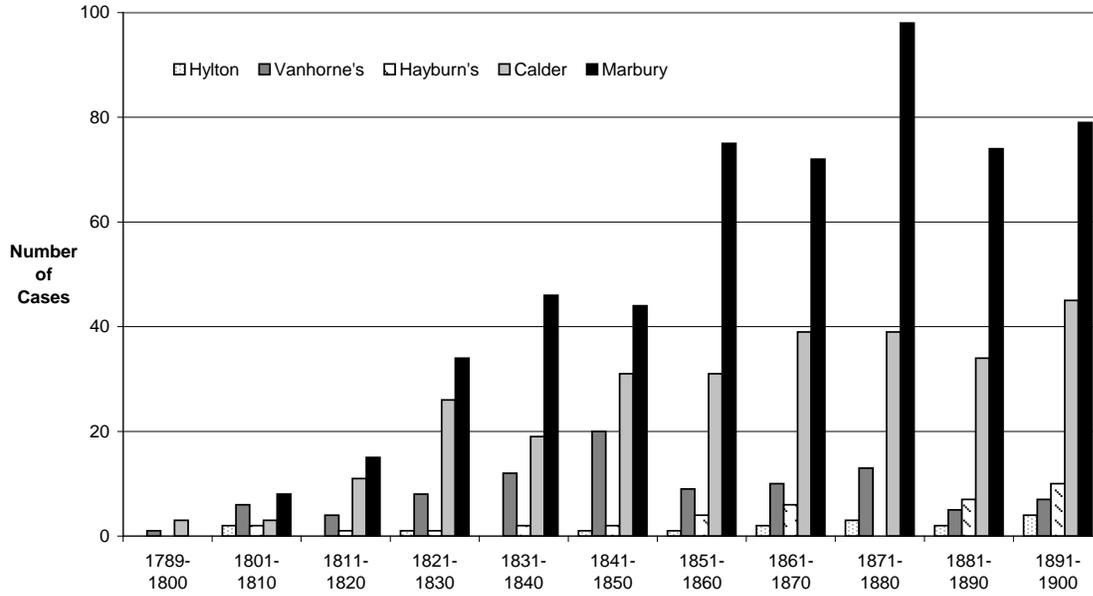


Figure 5: Number of Federal and State Cases Citing Early Federal Judicial Review Cases, 1789-1900.

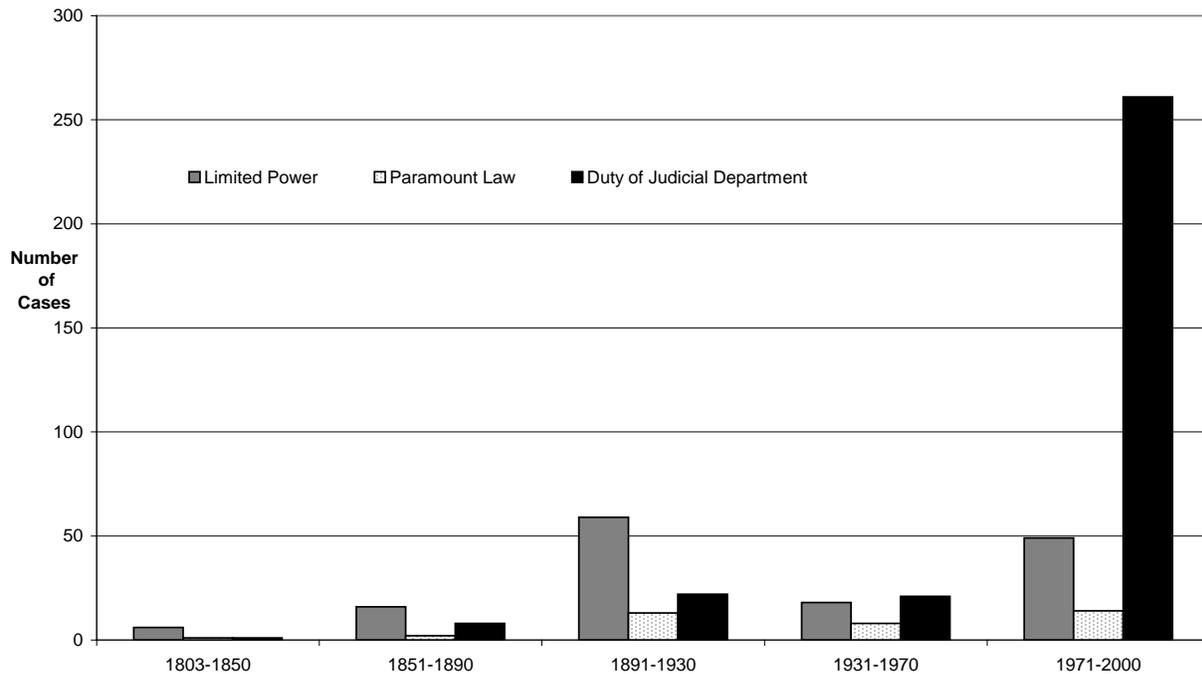


Figure 6: Number of Federal and State Cases Quoting from *Marbury v. Madison*, 1803-2000

Note: Includes all state and federal cases quoting from select lines from *Marbury* opinion from

1803-2000, found using Westlaw. “Duty of Judicial Department” category includes cases quoting from “emphatically the duty and province of the judicial department to say what the law is.” “Paramount Law” category includes cases quoting from “constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts.” “Limited Power” category is a composite including cases quoting from any of the following: “giving to the legislature a practical and real omnipotence”; “the powers of the legislature are defined, and limited”; “distinction, between a government with limited and unlimited powers, is abolished”; “to what purpose are powers limited.”