Marbury v. Madison and Modern Judicial Review

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This Article compares the realist critique of Marbury with several revisionist defenses of that decision. Realists claim to see Marbury as essentially political and thus as the fountainhead of modern judicial review. Revisionists claim to see the decision as legalistically justified and thus inconsistent with current practices. Close examination, however, indicates that, despite sharp rhetorical differences, these two accounts are largely complementary rather than inconsistent. Each envisions Marbury as embodying elements of both political realism and legal formalism. Once the false argument about whether Marbury was either political or legal is put aside, it is possible to trace the influence of the decision on contemporary judicial behavior in a fuller way because that influence is the consequence of the interaction between these two aspects of the case.

I. INTRODUCTION

What is the relationship between Marbury v. Madison and the modern practice of judicial review? The dominant view, at least in academic circles, has rested upon a critical reading of the case. This view is skeptical of the more legalistic arguments in Marbury and emphasizes institutional or even political explanations for the decision. Perversely enough, this critique can actually work to legitimize the contemporary Court’s use of power. It is, so to speak, as if jurisprudential explorers had discovered that it is realism all
the way down. If even the talismanic Marbury v. Madison can be shown to be political, then the legalistic deficiencies of modern decisions may not seem so unacceptable. (There never was, you see, anything else but political interpretation.) Because the dominant view largely conceives of Marbury as an assertion of power, and because in this and other respects it does not depict Marbury as fundamentally different from modern decisions, the realist critique rests comfortably with the historical claim that contemporary practices grew directly out of Marbury itself.

In recent years, the dominant view has been challenged by a number of important writers who have, in different ways, claimed that the realistic criticisms of Marbury are overblown, that the decision is more limited and more justifiable (according to formalist criteria) than those criticisms acknowledge. The revisionist view can work to de-legitimize contemporary practices because it offers up the source of the doctrine of judicial review as proof of the possibility of the kind of legalistically disciplined use of judicial power that modern practices are thought to lack. Moreover, to the extent that Marbury stands as a kind of reproach to current practices, the claim that those practices are directly or fully traceable to Marbury is undermined. Consequently, revisionists search for intervening jurisprudential or historical factors that might explain how the tame institution that was created by Justice Marshall could have changed into the beast that roams the land today.

In this Article, I propose a third possibility, a possibility that may seem rather obvious but which has not (as far as I know) been developed very explicitly or systematically. The third possibility is that both the realists and the revisionists are partly right. It follows from this position that Marbury does not especially legitimize modern practices because, while aspects of the decision presaged the politicized role of the modern judiciary, as a whole, the case certainly does not demonstrate that significant legalistic discipline is impossible or undesirable. It also follows that Marbury does not especially de-legitimize modern practices because it does not demonstrate that the complete exclusion of personal or political considerations from constitutional interpretation is possible or desirable. More importantly for my purposes, the third view of Marbury suggests that it might be precisely the interaction between the realistic and formalistic elements of the decision that has resonated so powerfully with American political culture and is, therefore, at least indirectly responsible for the scope and nature of

3. See id. at 192-93.
4. See id. at 6-7.
modern judicial review.

II. THE REALIST CRITIQUE

The realist critique of *Marbury* is familiar; indeed, it is almost foundational to most courses in constitutional law. Originally developed and expounded by eminent legal writers such as Learned Hand, Robert G. McCloskey, and Alexander Bickel, important elements of the critique are passed on in widely used case books. Perhaps the most complete and influential single statement is William W. Van Alstyne's *A Critical Guide to Marbury v. Madison*, published in 1969 as a “compendium” of the existing scholarly criticism.⁵

Van Alstyne begins by explicitly connecting *Marbury* with two distinctly modernistic assumptions about judicial review—the claim of judicial supremacy and the claim that the Constitution “is” what judges say it is.⁶ He proceeds to put the case in historical and political context, noting, for example, Marshall’s political biases and his role in the events giving rise to the lawsuit itself.⁷ There follows a systematic criticism of virtually every aspect of Marshall’s opinion: the willingness to address politically sensitive issues over which (the opinion later acknowledges) the Court had no jurisdiction; the questionable conclusion that Marbury had a statutory right to the commission and the failure to address the constitutional question as to whether Congress had authority to limit the President’s removal authority over a non-Article III judge; the potentially expansive treatment of the issue of sovereign immunity; the Court’s dubious interpretation of Section 13 of the Judiciary Act of 1789 as conferring original jurisdiction on the Supreme Court; and every argument—whether based on the nature of written constitutions, generally or, on the structure or logic or text of this specific Constitution—for the power of judicial review.⁸ Van Alstyne does not specifically treat the question of original intent regarding judicial review because the Court itself did not rely on historical materials, but he does add a selection of excerpts from historical materials that tend to demonstrate, as do virtually all of his criticisms of the opinion itself, that the Constitution was, in fact, indeterminate on the issues decided in *Marbury*.⁹

Van Alstyne’s criticisms are sufficiently strong and complete

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6. Id. at 2.
7. Id. at 8.
8. Id. at 9-33.
9. Id. at 38-45.
that a reader might easily slide to the cynical conclusion, mentioned by Van Alstyne at the outset, that the Court has the power of judicial review only because the justices said so. And I suspect that generations of law students have in fact taken away the lesson that it is realism—politics and will—all the way down to the source of the modern practice of judicial review. But this extreme, modern understanding of *Marbury* is, in part, what Van Alstyne intended to debunk. His student editors, at least, understood his purpose to be to assist them to make judgments about the proper use of judicial power in current controversies by a "reexamination of the concept of judicial review at its source."\(^\text{10}\) This implies, of course, that there are better and worse understandings of *Marbury* and better and worse ways to exercise judicial review. And, indeed, Van Alstyne's analysis leads him to conclude that the reasoning in *Marbury* does not entail the modern doctrine of judicial supremacy\(^\text{11}\)—the other modern understanding of *Marbury* referred to at the outset of his article. Indeed, Van Alstyne appears to have hoped that his analysis would undermine not only the doctrine of judicial supremacy but also uncritical reliance on judicial review more generally. For instance, he advances the possibility that, given the facts of *Marbury* and given the principle of separation of powers, the decision should be understood to establish judicial review only for statutes impinging on the judicial power.\(^\text{12}\)

The difficulty with using *Marbury* as a benchmark for assessing the modern use of judicial power is that the bulk of Van Alstyne's argument tends to demonstrate that nothing legally authoritative required any of the Court's conclusions in *Marbury*. When combined with the historical background provided by Van Alstyne, this critique is easily misunderstood as an argument that the personal and the political are all that stand behind the Court's decision. But, of course, to say that legal arguments did not require the result in *Marbury* is not to say that none helped to support the result, just as recognizing that political context might have influenced the decision is not to insist that it was the only influence. It is quite plain that Van Alstyne intended to undermine not only the modern linkage between *Marbury* and judicial supremacy but also the cynical conclusion that *Marbury* demonstrates that the Constitution means only what the Court declares it to mean. While often depicted as a radical attack, his famous article, in fact, combines moderate realism with conventional legal argument in an effort to encourage continuing debate about what kind of judicial review is authorized.

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10. *Id.* at 1.
11. *Id.* at 34-37.
12. *Id.* at 34.
III. THE REVISIONIST DEFENSE

The revisionist defense of Marbury began in earnest in 1986 with the appearance of Christopher Wolfe's book, The Rise of Modern Judicial Review.\textsuperscript{13} For Wolfe, Marbury is not the primary source of modern judicial review.\textsuperscript{14} For one thing, that case was not a self-contained intellectual effort; it reflected widespread understandings about the nature of the judicial function and of constitutionalism as expressed in other cases and in non-judicial sources like The Federalist Number 78.\textsuperscript{15} For another, modern judicial review is a starkly different enterprise from what was authorized by Marbury. According to Wolfe, the former consists in self-conscious acts of judicial creativity ("will") while the latter, as practiced by Chief Justice Marshall, consisted in good-faith, conscientious efforts to interpret the Constitution as a legal document ("judgment").\textsuperscript{16} Consequently, the sources of modern judicial review must be sought in historical and intellectual trends quite extrinsic (and even antithetical) to Marbury. Thus, Wolfe suggests that the judicial function gradually changed because of a natural urge among judges to amass power and to express their idealism, because of a widening gulf between the values common in the legal profession and those common in the general population, and because of the triumph of legal realism.\textsuperscript{17}

Although Wolfe's distinction between traditional and modern forms of judicial review may sound naïve to some, it is not. Indeed, his account of Justice Marshall's understanding of the nature of legal interpretation is sophisticated. It is neither literalistic nor woodenly historicist. Instead, Wolfe claims that during the traditional period there was widespread agreement that specific words had to be understood in their context, including the purposes and nature of the whole instrument within which they appeared.\textsuperscript{18} Moreover, he repeatedly acknowledges that agreement about interpretive rules does not assure agreement about interpretive outcomes, even on fundamental issues.\textsuperscript{19} In Wolfe's view, the value of traditional legal interpretation is not that it produces determinate

\textsuperscript{14} Id. at 110-13.
\textsuperscript{15} Id. at 73-79.
\textsuperscript{16} Id. at 3-4, passim.
\textsuperscript{17} Id. at 8-10.
\textsuperscript{18} Id. at 41-44.
\textsuperscript{19} Id. at 25, 31, 61-62.
results, but that it "narrow[s] the range of differences . . . and provide[s] a common standard for deciding issues." In the end, Wolfe's contrast between traditional and modern interpretation has as much to do with attitude and effort as with constraint and determinacy. The traditional judge intended in good faith to interpret the document and believed this to be possible. The modern judge intends to "legislate" (to impose his or her own preferences), rather than to find the meaning of the document. Wolfe acknowledges, however, that this difference does not mean that the traditional judge's view of constitutional meaning was wholly independent of his political preferences. Judgments about the political theory embedded in the Constitution could, for instance, reflect both the personal philosophy of a traditional judge and actual constitutional principles. The traditional judge might, then, sometimes have given effect to his own views but (at least ideally) only when they coincided with correct constitutional meaning.

How certain, when personal preferences were confounded with abstract constitutional meaning, could a traditional judge be about having accurately identified that meaning? Wolfe's phrasing is careful. He says that "strong" arguments could be made about the correct content of constitutional principles and that knowledge of such principles was a "valuable aid" in interpretation. In short, for the traditional judge, law and politics were not entirely separate, but accurate constitutional interpretation was nevertheless possible because some legal arguments, while not altogether conclusive, were simply stronger than others. Thus, despite the sharp rhetorical divide that he draws between the modern practice of judicial legislation and the traditional practice of objective interpretation, Wolfe in fact provides an account of traditional judging that in significant measure is compatible with realistic accounts.

Therefore, when Wolfe turns to rehabilitating Marbury v. Madison, his claims are modest and in many ways not inconsistent with Van Alstyne's critique. For example, on the charge that Marshall should have recused himself from the case, Wolfe quotes Thayer to the effect that the Chief Justice "was sometimes curiously regardless of conventions." This, of course, is more a description than a defense, and Wolfe adds to it only some mild speculations about possible high-minded motivations that might, in fact, be fairly

20. Id. at 37.
21. Id. at 323-24.
22. Id. at 221, 240, 245, 325-26.
23. Id. at 61-62, 86-88.
24. Id. at 61-63.
25. Id. at 85.
described as involving political as much as legal considerations.

On Marshall’s interpretation of the Judiciary Act, as providing for original mandamus jurisdiction, Wolfe provides a textual defense but does not deny Van Alstyne’s contention that the text would allow the opposite conclusion. Indeed, Wolfe does not even deny that Marshall might have been motivated to construe the Judiciary Act as he did because this would allow him to “establish[ ] the power of judicial review” in a politically palatable circumstance. Indeed, Wolfe goes on to describe precisely the same political setting that the realist critique emphasizes and simply characterizes Marshall’s motivations in that setting as high-mindedly institutional (or, in Wolfe’s term, “constitutional”), rather than partisan. But Wolfe’s own analysis demonstrates that these high-minded purposes, such as avoiding presidential nonenforcement of a mandamus order, cannot be entirely separated from partisan purposes, since the order would have issued from a judiciary controlled by partisan Federalists and would have been resisted by a highly partisan Republican president. To say that an “opinion simply denying jurisdiction would . . . have detracted from the public position of a judicial branch that had not yet thoroughly established its respectability or power” is, as Wolfe comes close to acknowledging, to supplement, rather than to deny, the charges of institutional self-aggrandizement and partisanship.

On the issue of judicial review itself, Wolfe’s analysis is also surprisingly consistent with Van Alstyne’s. While Wolfe argues that a power of judicial review is “the most reasonable interpretation of the Constitution,” he does not think that any of the arguments against it can “be dismissed as wrong.” In fact, Wolfe is expanding on one of Van Alstyne’s basic arguments when he writes:

There is no necessary problem with judges giving effect to unconstitutional laws, any more than with presidents enforcing unconstitutional laws passed over their vetoes. In both cases, they are not responsible for the unconstitutionality per se—the blame for that belongs to the legislature. One can easily imagine a polity in which judges and executives were not permitted to consider whether laws violated the Constitution, but simply took the laws as they were given, and

26. Id. at 85-86.
27. Id. at 86-87.
28. Id. at 87.
29. Id.
30. See id. at 88.
31. Id. at 101.
32. Id. at 89.
enforced them.\textsuperscript{33}

Judicial review, then, is not a necessary logical inference from the nature of a written constitution. Indeed, for Wolfe, it is the best interpretation of our Constitution only if the practice is strictly limited in ways that are consistent with the larger institutional principles that animate his argument. Specifically, he (like Van Alstyne\textsuperscript{34}) rejects the doctrine of judicial supremacy and adds other limitations, like the political question doctrine, that arise from the principle of separation of powers that Wolfe argues reinforces fair inferences from the text of the Constitution.\textsuperscript{35}

It is, as I have argued, entirely consistent with the purpose and content of Van Alstyne's realist critique to believe that some limited form of judicial review is the best interpretation of the Constitution, at least if the arguments advanced in \textit{Marbury} are supplemented by arguments about the theory that underlies our form of government. On the other hand, it is entirely consistent with Wolfe's revisionist defense to believe that this interpretation is debatable rather than inevitable. And it seems to me to be consistent with both positions to believe that the members of Marshall's Court thought that conscientious legal interpretation was possible and that they were engaged in it. And, finally, this last belief is not incompatible with acknowledging that personal and partisan considerations may have had a part to play in how those justices conceived and evaluated the complicated issues before them.

This degree of overlap is rather striking, but is by no means limited to Wolfe's particular reply to the realist critique. Much of the same can be said of Robert Lowry Clinton's impressive, but sometimes elusive, \textit{Marbury v. Madison and Judicial Review},\textsuperscript{36} which appeared three years after \textit{The Rise of Modern Judicial Review}.\textsuperscript{37} Like Wolfe, Clinton depicts modern judicial review as radically different from what was affirmed by \textit{Marbury}. Under the modern practice, the Court lays the statute alongside the Constitution and, if there is a mismatch, "voids" the legislation. Under \textit{Marbury}, according to Clinton, the relevant constitutional provision is implied into the statute, and any inconsistency means that the Court cannot enforce both aspects of the statute.\textsuperscript{38} Thus, under the traditional understanding, the statute is simply not enforced rather than being (in some metaphysical sense) void. This

\begin{itemize}
  \item \textsuperscript{33} \textit{Id.} at 99.
  \item \textsuperscript{34} Van Alstyne, \textit{supra} note 5, at 36-37.
  \item \textsuperscript{35} WOLFE, \textit{supra} note 13, at 101-08, 116.
  \item \textsuperscript{36} CLINTON, \textit{supra} note 2.
  \item \textsuperscript{37} WOLFE, \textit{supra} note 13.
  \item \textsuperscript{38} CLINTON, \textit{supra} note 2, at 30.
\end{itemize}
means that the statute continues in force for other purposes (outside
the case at hand) and that the Court's judgment is not supreme over
the constitutional judgments of the other branches. Only in this
narrow circumstance of Marbury itself, that is, where a statute
violates constitutional restrictions on the judicial power, is there
judicial supremacy—and then only in the practical sense that such a
statute can never be effective in any way except through judicial
acquiescence. Furthermore, Clinton reads Marbury as being
restricted to cases of clear contradiction under the same sort of
"objective" interpretive standards that Wolfe describes. Modern
judicial review, in contrast, involves unmoored judicial
"policymaking."

Since modern judicial review is so much wider, more
authoritative, and less constrained than what Marbury contemplated, Clinton, like Wolfe, rejects the idea that the modern
practice can be traced back to that case. Instead, he argues that the
contemporary judicial role grew out of a mythical conception of the
Court's power. This myth was originally based on an intellectual
mistake, a misreading of Marbury first put forward late in the
nineteenth century. Borne along by such cultural and institutional
influences as the self-interest of lawyers and the political
aspirations of the legal academy, this mistake achieved the status
of orthodoxy in the writings of twentieth century realists like Van
Alstyne. As Clinton states the orthodoxy, "since judicial review
originated from a coup d'etat, engineered for political purposes,
Marbury is [thought to be] the primary antecedent for judicial
c policymaking in the modern era."

Notwithstanding the rhetorical force in the word "myth,"
Clinton begins his defense of Marbury by defining his objective
modestly: "to provide a more balanced view of the case." And
indeed, his arguments, like Wolfe's, are more a complement to, than
a displacement of, the realist critique. For example, against the
realists' point that the Court should not have reached the merits of
the case if it had no jurisdiction and that it had political reasons for
commenting on the merits as it did, Clinton argues that the Court
"might" have felt constrained to explain its refusal to employ
jurisdiction where it ordinarily could exercise discretion and where

39. Id. at 18.
40. Id. at 24.
41. Id. at 192.
42. Id. at 179-81.
43. Id. at 211.
44. Id. at 87.
45. Id. at 219.
46. Id. at 88.
it would be functioning as a trial court to determine the rights of the parties.\textsuperscript{47} This argument does not even claim to be legally conclusive and can easily coexist with political explanations. Thus, Clinton himself goes on to say that it would be "understandable" for the Court to have been "chagrined" at the Secretary of State's "brazen" resistance to the judiciary.\textsuperscript{48} Similarly, Clinton's refutation of the claim that the Judiciary Act could have been construed to provide for appellate mandamus jurisdiction concludes by calling this claim "questionable" and by insisting only that the Court's construction was not a "gross abuse of judicial authority."\textsuperscript{49}

Finally, Clinton's defense of Marbury's argument for judicial review consists largely in emphasizing those aspects of the opinion that imply a narrow version of the power. He does not deny the realists' point that it is part of the legislative function to interpret the Constitution. Nor, except in the circumstance where the provision is addressed to the Court itself, does he deny that it would not be logically inconsistent with the supremacy of the document for a court to accept legislative interpretations.\textsuperscript{50} And in that narrow circumstance, Clinton's contrary conclusion rests on his conception of the principle of separation of powers more than on the arguments made in Marbury.

A third recent defense of Marbury is William E. Nelson's Marbury v. Madison: The Origins and Legacy of Judicial Review, published in 2000. Nelson, like other revisionists, argues that Marbury can be justified as legally sound,\textsuperscript{52} and that there is a sharp contrast between modern judicial review and what was contemplated by Justice Marshall's decision.\textsuperscript{53} Modern review, according to Nelson, involves the Court asserting a supreme authority to settle contested policy disputes and is aimed primarily at protecting certain minority interests from majoritarian power.\textsuperscript{54} In contrast, Marbury was a legal, not a political, decision. Its rules of interpretation were based in the deeply imbedded notion that the arena of law consisted of unchanging, customary principles that enjoyed universal support and existed, of course, independently of judges' preferences.\textsuperscript{55} Nelson argues that Marbury's analysis of the

\begin{itemize}
  \item[47.] \textit{Id.}
  \item[48.] \textit{Id. at 88-89.}
  \item[49.] \textit{Id. at 100.}
  \item[50.] \textit{Id. at 98-99.}
  \item[52.] \textit{Id. at 118-19.}
  \item[53.] \textit{Id. at 119.}
  \item[54.] \textit{Id. at 95-103.}
  \item[55.] \textit{Id. at 63-67.}
\end{itemize}
right to the commission fell within this legal domain and that the
decision carefully avoided the arena of political disagreement and
conflict by declaring the Judiciary Act unconstitutional, thus
eliminating any need for enforcing a decree against the Republican
administration. 56

According to Nelson, the traditional version of judicial review
depended partly on the possibility of strategies for avoiding
confrontation, but even more fundamentally, on the existence of a
consensus concerning fixed principles of law. 57 It follows that the
modern version of judicial review grew not from Marbury but from a
breakdown of the social and intellectual homogeneity that allowed
for that consensus. 58 Because that homogeneity no longer exists and
because he is sympathetic to the Court’s campaigns on behalf of
various minority interests, Nelson, unlike Wolfe and Clinton, does
not present the legalistic Marbury as a continuing reproach to
modern practices. Instead, he suggests that modern America must
make an informed choice between fidelity to the traditional model
and contemporary egalitarian goals. 59

The suggestion that it is necessary to choose between a legally
justified Marbury and modern judicial practices might seem to imply
that Nelson’s defense of the decision is inconsistent with, rather
than complementary to, the realist critique. But even more plainly
than is the case with Wolfe and Clinton’s revisionist defenses, this is
not true. Indeed, Nelson’s defense, in significant measure, is the
realist critique. Thus, Nelson provides an arresting argument that
Marbury’s counsel thought that his action was pursuant to the
Court’s appellate jurisdiction because at the time the Court’s direct
review of an administrative action could have “plausibly” been
viewed as a kind of appeal from the executive branch decision—
which, according to Nelson, would have involved the Court in a less
constrained form of oversight than original jurisdiction. 60 So, the
argument goes, Marshall “had to” construe the Judiciary Act to
create original jurisdiction in order to avoid involving the Court in
the politics of unconstrained “review” of executive branch decision-
making. 61 In other words, the Marbury Court ignored a plain
reading of the Judiciary Act so that it could exercise the kind of
review over executive officials that it thought appropriate.

56. Id. at 67.
57. Id.
58. Id. at 83, 92.
59. Id. at 125.
60. Id. at 62.
61. Id.
Having tortured the Judiciary Act, however, the Court was still faced with the prospect of political confrontation because in the exercise of even the legalistic form of review available under original jurisdiction, the Court would have had to order the Secretary of State to deliver the commissions. So, as Nelson puts it again, "Marshall had to find a way to deny Marbury the writ of mandamus . . . ." Or, to put it more critically, the Marbury Court construed Article III as it did—not for (or, more charitably, not only for) the stated reason of giving full meaning to the words "in all other cases"—but for an unstated purpose of avoiding a political confrontation with the executive branch. Nelson depicts this sort of strategic decision-making as enforcing the fixed legal principle that courts should avoid politics. But it is indistinguishable from the modern realist argument, famously made by Alexander Bickel, that the Court should sometimes avoid providing otherwise legally-required relief in order to protect itself from unseemly confrontations with the other branches.

Given Nelson's claim that in 1803 the domain of law was understood to cover only immutable, consensual principles, he is, of course, committed to defending Marbury's announcement of the doctrine of judicial review as an example of that sort of principle. And, indeed, he is forthright in tossing out other types of legalistic bases for the doctrine: "At no point in the opinion did [Marshall] invoke the language of natural rights, nor did he rely on precedent or other prior judicial authority." Moreover, Nelson does, as one would expect, point to evidence in the opinion about an effective consensus on the content of the Constitution. He notes that the idea of judicial review was "not new" with Marbury—Hamilton and others had argued for the doctrine. But in the end, he has to acknowledge that "the propriety of exercising the power of judicial review was not without doubt prior to Marbury v. Madison."

So, if judicial review was not a fixed, consensual principle, how was its announcement justified under Nelson's account of the framers' understanding of lawfulness? Nelson's main answer is that "the Chief Justice gave adequate reassurance that . . . [in exercising the power] the Court would consider only legal and not political issues." This reply is, I think, fully compatible with—indeed, it is another way of stating—the realists' argument that Marshall
established the power of judicial review in circumstances where the self-restraint of the judiciary would seem most apparent. This can seem a good-faith appeal to fixed principle for those who, like Nelson, find the reassurance convincing, but it can seem to be a strategic power grab for those who do not. Marbury, of course, has provoked both types of reactions, and both characterizations hold some truth.

The writings of the three revisionists discussed so far form a kind of curve. Wolfe and Clinton both conceive of Marbury as an embodiment of traditional legal methods, but they begin to bend this line by describing those methods in terms that are, in considerable measure, compatible with modern realist understandings. Nelson bends the line further away from a purely legalistic defense by describing the traditional legal method embodied in Marbury as the articulation of fixed principles that gain their authority from social consensus. With the publication in the Harvard Law Review of Larry D. Kramer's Forward on the 2000 term, the revisionist line loops all the way back to the realist critique. In Forward: We the Court, Kramer argues that Marbury is justified precisely because it did not conceive of constitutional law as normal law. Instead, it conceived of constitutional law as fundamentally political, as expressing the sovereign will of the people. According to Kramer, then, the judicial role established by Marbury accurately reflected existing understandings and consisted in no more than subordinating the Court's decisions to the will of the people in the same way that the decisions of the other branches were subordinate to that supreme will. Marbury, that is, can be justified, but only if formal conceptualizations of law are supplemented. What the realists took to be the basis of critique, Kramer asserts as the beginning of justification.

Accordingly, Kramer argues that Marbury is limited by the understanding that judicial interpretations of the Constitution are ultimately subordinate to political expressions of the will of the people. Until modern times, this understanding has been carried forward by various doctrines and devices, like the deferential rationality standard or the political question doctrine, that have allowed for shared interpretative authority at least in defined areas. Like the other revisionists, Kramer thinks that modern judicial review is different from the practices that Marbury set in motion.

69. Id. at 87-89.
70. See id.
71. See id. at 89-90.
72. Id. at 89.
and is traceable to factors largely extrinsic to that decision.\(^{73}\) For him, however, modern judicial review does not consist of lawless policymaking or egalitarianism, but of a legal fundamentalism that conceives of all constitutional questions—from the reach of Congress’ commerce power to how the 2000 Florida vote count should be tallied—as ordinary questions of law and thus as intrinsically and solely within the province of judges.\(^{74}\) This judicial “sovereignty” over constitutional issues arose gradually and for complex historical reasons, including popular familiarization with judicial review, the growth of political parties, and anxiety over factionism.\(^{75}\)

Since, at its core, the realist critique of *Marbury* simply denies that there is any logical necessity for judicial—as opposed to political—enforcement of constitutional limitations, the question about Kramer’s argument for shared interpretive authority is not whether it is compatible with realist arguments, but whether it is compatible with the other revisionist defenses. True, like other revisionists, Kramer claims that *Marbury* was justified if taken to establish a limited authority over constitutional issues and that modern practices are incompatible with that original justification.\(^{76}\) But Wolfe, Clinton, and Nelson all insist that the role envisioned by *Marbury* was a traditionally legal one, while Kramer argues that the role established in *Marbury* was special to constitutional issues and different from the resolution of ordinary questions of law.\(^{77}\)

It is important to note, however, that while Kramer does claim that constitutional issues are not ordinary legal issues, he does not necessarily claim that courts should employ extra-legal methods or criteria in resolving them. Instead, his argument seems to be that ordinary legal analysis is useful to some extent and as to some kinds of constitutional issues. At least, those are the methods Kramer says the Court employed in the years immediately following *Marbury*, and those are the methods that he asserts brought a degree of popular acceptance for judicial review during that period.\(^{78}\) Thus, while Kramer’s defense is fully compatible with the realist critique, its major elements are supplemental to, rather than inconsistent with, the defenses mounted by the other revisionists.

Thus far, I have tried to indicate the extent to which the realist critique and the revisionist defense are (despite varying emphases

\(^{73}\) See id. at 12-15, 100-02.

\(^{74}\) Id. at 13-15, 99-100.

\(^{75}\) See id. at 100-10.

\(^{76}\) See id. at 14.

\(^{77}\) See generally id.

\(^{78}\) Id. at 100.
and combative rhetoric) complementary accounts of *Marbury v. Madison.* 79 These accounts tell us that the decision, as a whole, was simultaneously political and legal and that some limited form of judicial review is probably the best, though not the only, possible interpretation of the Constitution. To the extent that *Marbury* combined political realism and legal formalism in this way, the hypothesis that emerges is that the modern practice of judicial review is traceable, in part, to this combination. If both aspects of the opinion are taken into account, it is possible to consider something that, in isolation, the critique and the defense each tends to pass over—that is, how interaction between realism and legalism may have helped to create contemporary excesses.

IV. THE INTERACTION BETWEEN REALISM AND LEGALISM

In order to have a satisfactory account of the relationship between *Marbury* and the modern practice of judicial review, it is necessary to acknowledge not only the complexity of the decision but also the complexity of modern judicial behavior. Each of the writers considered here works from a simplified description of that behavior. Except for Kramer, both realists and revisionists depict contemporary judicial review as essentially political (in some sense). By criticizing recent constitutional decisions as excessively legalistic, Kramer demonstrates the limitations of this description. However, his criticism, while convincing as a supplement, is itself partial. To get a fuller picture of causation, it is necessary to admit that modern judicial review is, like *Marbury*, a complex mixture of both the political and the legalistic.

Recall that, according to Kramer, modern judicial review is characterized not merely by judicial claims of supremacy in interpreting the Constitution, but of what he calls “sovereignty.” 80 A

79. In noting areas of overlap, I do not mean to suggest that the two positions are in all respects consistent. Some traditionalists, perhaps Christopher Wolfe, believe that certain clauses are sufficiently specific that conclusive interpretation is possible, while some realists, perhaps Van Alstyne, believe that the nature of language is such that some indeterminacy is present even if language is highly specific. The two positions might also differ on the question, whether it is ever possible for the human mind to separate its assessment of constitutional considerations from personal or political commitments. Even assuming areas of real disagreement, the accounts have much in common. (In the two instances mentioned, that would include recognition that many important constitutional issues are not susceptible to conclusive resolution and that both legal and political considerations are often simultaneously present.) In any event, even ideas that can be shown to be ultimately inconsistent can be—and, of course, often are—held at the same time and, thus, may be interacting in the minds of modern judges.

80. Kramer, supra note 68, at 130-57.
claim of sovereignty differs from a claim to supremacy in that, as long as the Court has the final word, supremacy permits nonjudicial interpretations—and courts even sometimes defer to them—at least as to selected areas of constitutional law. Sovereignty, in contrast, means that the Court tends to see all interpretations of the Constitution done outside the courts as illegitimate. Kramer attributes the current regime of judicial sovereignty to what he provocatively terms “legal fundamentalism.” A fundamentalist is someone who has lost sight of the fact that constitutional issues are not ordinary questions of law. A pure fundamentalist would be someone who believed that all constitutional issues are entirely legal. To the extent that modern justices approach pure fundamentalism, they believe that the only institution that can legitimately interpret any part of the Constitution is the judiciary because only judges should resolve ordinary questions of law.

This is an arresting diagnosis. Without question, it is partly true. Moreover, the word “fundamentalism” connotes unthinking conservatism and, thus, for many academics it will dovetail nicely with Kramer’s main object of criticism, the Rehnquist Court and decisions like *Bush v. Gore.* Indeed, the word very effectively distances Kramer from some of the other, more conservative, revisionists because it colorfully emphasizes the fact that their formalistic defenses of *Marbury* may have contributed to the very fundamentalism that has created the judicial hubris that they decry.

As intellectually arresting and politically skillful as it is, Kramer’s diagnosis gains much of its plausibility because his description of modern judicial review is so narrow. Legalistic fundamentalism does not account for many of the characteristics of modern uses of judicial power, including those that the other revisionists criticize, and it does not even provide a full explanation for judicial sovereignty.

Consider, first of all, one of the most widely noted aspects of modern constitutional interpretation—its astonishing range. The modern Court not only sees most constitutional issues as legal, it also sees most social issues as constitutional. What accounts for the constitutionalizing of so many issues—from voting rights to gay rights to abortion rights? Fundamentalism does not seem to be an explanation. It is, of course, logically possible for all constitutional issues to be entirely legal but, nevertheless, for most policy disputes to lie outside the ambit of constitutional law. Moreover, a fundamentalist might well recognize that legalism is an inadequate or dangerous way to resolve the complicated social issues that do lie

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81. *Id.* at 129-30, 153, 169.
82. 531 U.S. 98 (2000).
outside those boundaries. One might have expected, therefore, that despite their constitutional fundamentalism, at least some justices—and perhaps all of them—should be attempting to interpret the document to apply only to those issues that its terms require, and then, only with that degree of detail that can be compellingly justified.

So, to account for modern practices, Kramer's diagnosis requires the assumption that a working majority of the justices believes that the terms of the Constitution apply to almost all issues of public policy—is convinced, that is, that ordinary legalistic methods must be used to resolve virtually all social issues. Such a belief is possible, of course, and may in fact be widespread, but it would seem inconsistent with the degree of institutional hubris that accompanies the Court's inclination to treat a wide range of issues as constitutional issues. Indeed, unless the justices not only believed that ordinary legal methods must be used to resolve constitutional questions, but also harbored the unlikely belief that those methods constitute a superior way to decide almost any moral or political question, they presumably would perform their tasks reluctantly, perhaps even sorrowfully. Reluctant fundamentalist justices would understand and even share public frustration over judicial resolution of policy issues. They would not, therefore, be likely to display the visceral and intense disapproval of non-judicial efforts at interpretation that is common today. Indeed, while fundamentalists might feel it their duty to monopolize constitutional determinations, at least some might sympathize with and respect those in the political arena who tried to influence the Court's decisions.

Finally, "fundamentalism" in Kramer's sense of the word should have produced a prosaic, if stiff, view of the Court's methods and role. After all, the reason a fundamentalist does not think that people in the political arena have any business doing constitutional interpretation is because that task is thought to involve ordinary legal issues. Why, then, does the modern Court utilize so many nontraditional forms of analysis? What accounts for the pervasiveness of instrumental calculation, interest balancing, and various forms of empiricism? Why has the fundamentalism that has gripped the modern Court led to very few unequivocal principles and to no absolutes at all? And why are justices who see constitutional interpretation as a form of ordinary legal work so drawn to grand conceptualizations of the role of the Court? How has fundamentalism led to the idea that it is the Court's business to discover the fundamental principles inherent in our political traditions, or to protect minority interests, or to prevent social disintegration?
In short, while Kramer demonstrates that some of the other revisionists are missing something when they depict modern excesses as arising from the absence of traditional legalism, he himself is missing something when he depicts those excesses as arising almost entirely from the presence of legalism. To understand contemporary practices, it is necessary to imagine the mind of a judge who is simultaneously a legalist and a realist, that is, a mind that conceives law and politics to be different but not separable and believes that an interpretation can be right while not conclusive. Such a mind, I submit, is not some bizarre concoction, but is a fairly accurate depiction of the way justices in the modern era approach constitutional interpretation. Indeed, it is the dominant American view of constitutional interpretation, the essentials of which are shared, as I have tried to show elsewhere, by theorists as disparate as Robert Bork and Ronald Dworkin and, as I have tried to demonstrate in this Article, Christopher Wolfe and William Van Alstyne.

Most jurists today do not believe that in interpreting the Constitution they are simply imposing their own personal or political agenda. Unless their long and arduous explanations are set aside as entirely dishonest, justices, for instance, believe that they are offering the best interpretations of the Constitution based on rigorous interpretive criteria. But, unless they are assumed to be ignorant of basic modern jurisprudence, they also suspect that it is impossible to formulate or apply these criteria independently of individual character or political philosophy. Constitutional law, that is, is thought not only to subsume the political, but also to transcend it.

Paradoxically, it is because constitutional interpretation is viewed as partly but inevitably political, that the modern judicial mind resists the conclusion that many issues are not appropriate for resolution in the courts. That conclusion must be resisted because if the presence of a practical or political component were to disqualify the judiciary, it would seem to follow that all constitutional issues are out of bounds. Moreover, as constitutional decisions accumulate, judges, of course, become more and more accustomed to resolving issues that might have once seemed political and, thus, the sense that the Constitution covers only a finite range of issues further recedes, and so does any sense of regret for being under the obligation to decide complex legislative or executive matters. The modern judge not only is accustomed to making such decisions, but

84. For an explicit argument to this effect, see Martin H. Redish, Judicial Review and the "Political Question," 79 NW. U. L. REV. 1031 (1985).
also knows that, since legal and practical criteria are inseparable, many of the same intellectual resources available in the political arena are also available to the judge. Judges down through the ages have been doing law, and in the process they must have also been doing some legislating too. The realistic side of the modern judge's mind unapologetically extracts these policymaking strands and uses them overtly and with increasing confidence. Motivations behind political movements are forthrightly assessed, empirical data is assessed, and the instrumental efficacy of various measures is evaluated.

Modern judges, however, do not simply appropriate these realistic methods; they recast them to suit judicial tastes and habits and institutional requirements. (Politics and law, remember, are inevitably mixed.) Thus, for example, political motivation is treated, not as an exceedingly complex empirical matter, but as a deductive proposition likely to yield the sort of singular conclusion that can justify a case outcome.\footnote{For an extreme example, see Romer v. Evans, 517 U.S. 620 (1996).} Similarly, empirical data that comes in highly systematic form with expert credentials is favored over the messier kinds of data that arise out of human experience and interaction. And instrumental efficacy is assessed on the possibly conclusive basis of objectives that pre-existed the policy rather than on the experimental and never-final basis of objectives discovered during policy implementation.\footnote{See Robert F. Nagel, Constitutional Cultures: The Mentality and Consequences of Judicial Review 106-55 (1989).} These refinements, being congenial to the relatively cerebral judge, only incline the justices to develop less respect for political decision-makers even as they increasingly invade their territory. As the range of constitutional issues widens, judges become more self-assured and see less reason to share interpretive authority.

This dismissiveness grows into outright intolerance (here is Kramer's point) because, at the same time as modern judges are increasingly convinced that courts can resolve practical problems, they are also convinced that there is a distinctly legal component to constitutional issues and they know that they have special expertise on that aspect. The formalistic frame of mind associated with this legal side imparts much besides a sense of expertise and entitlement. While the realist side of the modern judge's mind knows that the Court is deciding highly significant and controversial matters of morality, the formalistic side reassuringly recasts the issue into the manageable form of a single case, and one that must be decided at that. A duty to decide even a single case of great political significance, of course, might itself be daunting, but the
Court's policymaking methodology (folded into complex legalistic doctrines), provides powerful reassurance partly because decisions, while final and authoritative, are almost never determinative. If the data changes or if a more rational statutory strategy is utilized or if one of the interests in the balance should change, the political branches might well be permitted to pursue their policies.

Even if controversial decisions are reassuringly limited, modern judges know that a particular interpretation is not inevitable. This might be expected to generate some pressure for modesty, but modern judges also know that such decisions are good-faith attempts to arrive at the best available interpretation. Thus, modern judging is characterized by a sense of deep vulnerability (no interpretation can be conclusive) that coexists with a sense of great conviction (this is the best interpretation). Judges know that they cannot in the end overcome disagreement at the same moment that they know their interpretation to be the best one possible. Disagreement, under these circumstances, is a source of profound frustration and anger.

As the judiciary progressively displaces legislative and executive authority and, in the process, incorporates policymaking methods into its own decision-making, the fundamentalist claim that only courts can be trusted with ordinary legal issues becomes less and less plausible as a justification for the judiciary's role. Moreover, even as they incorporate the methods of political decision makers, judges, as I have explained, exhibit increasing intolerance and even arrogance towards political disagreement. Accordingly, the courts must develop new and grander ways to distinguish themselves from political institutions. Or, to put it another way, the purpose of ordinary law must be elevated. It may be, for instance, that in enforcing text-based rules the Court is also protecting abstract principles of democratic theory. Or, it may be that in the process of resolving cases the Court is also teaching fundamental constitutional values or even preventing political disintegration. In any event, as the conceptualization of the Court's role gets fancier, perceived threats to its authority seem not merely frustrating or even infuriating, but dangerous. The modern drive for judicial monopolization, then, derives not from legal fundamentalism but from an inflated sense of institutional mission. And that sense of mission grew gradually from the interaction between realism and formalism.

V. CONCLUSION

The revisionist defenders of Marbury are surely right that the causes of modern judicial review must be sought, not in that decision alone, but in complex historical, institutional, and social
considerations. While the realist critics may well be wrong in their contrasting assessment of the importance of *Marbury*, their claims do raise a question that the revisionists are in danger of overlooking: Why, at least in recent decades, when the judicial power has reached its zenith, has *Marbury* exercised such a mystic hold on the imagination of important segments of the American people? Or, to put the question differently: Is there something about *Marbury* that might tell us something about American fascination with, and dependence on, judicial power and, thus, something about the cultural roots of modern judicial behavior?

If the dispute between realists and revisionists about *Marbury* is deflated and their positions are recognized to be overlapping and complementary, it is possible to see why Chief Justice Marshall's decision has come to stand as the intellectual emblem of judicial supremacy over constitutional issues. The reason is that *Marbury* contains some of the same raw ingredients that have worked within the American political culture to produce the world's most powerful judiciary. It seamlessly combines legalism and political realism, as does our society's dominant view of law and of judging. The elements within this combination interact in such a way as to make it difficult to confine the reach of constitutional law, or to recognize as respectable any decision-making method different from that used by the judiciary, or, ultimately, to tolerate contention over the meaning of the Constitution.