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Marbury Moments

STEVEN ARRIGG KOH*

Every court has its Marbury moment. To support this argument, this Article reviews seminal cases from three types of courts: U.S. federal, regional, and international. This Article concludes that Marbury moments provide novel insights about both Marbury v. Madison itself and the nature of domestic and international courts.

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INTRODUCTION

Since the U.S. Supreme Court decided *Marbury v. Madison* in 1803, the Court's judicial review power has engendered legal and political debate. Thomas Jefferson famously decried as "a very dangerous doctrine indeed" the notion that judges are the ultimate arbiters of all constitutional questions, believing it threatened to "place us under the despotism of an oligarchy."¹ And in the twentieth century many scholars critiqued *Marbury* for its activist constitutional and statutory analysis. More recently, legal academics argue that authority for judicial review plausibly stems from the Supremacy Clause and Article III of the U.S. Constitution, so any controversy should be situated within the historical context of the election of 1800.

1. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in *THE WORKS OF THOMAS JEFFERSON, 1816–1826*, at 161, 162 (Paul Leicester Ford ed., 1905).

However, *Marbury* is not unique. In fact, as a comparative perspective valuably demonstrates: *every court has its Marbury moment*. Rigorous review of domestic and international courts reveals numerous seminal decision points in which a court (1) in its early history (2) rules on the nature of its own authority or an axiomatic principle of law (3) in a manner that is not textually transparent. Such *Marbury* moments invariably create controversy, but those that succeed do so when the judicial and political actors within the relevant jurisdiction ultimately accept the court's decision. Failed *Marbury* moments never transcend such controversy, leaving the court partially or entirely delegitimized. I conclude that *Marbury* moments provide novel insights about both *Marbury v. Madison* itself and the nature of domestic and international courts.

Previous scholars have occasionally described and defined “moments” of particular legal importance. For example, Professor Michael P. Scharf employed the term “Grotian moments” to explore rapid developments in the formation of customary international law.² Others have articulated “constitutional moments”³ or “international constitutional moment[s].”⁴

However, virtually no scholarship has looked across the judicial landscape to take a macroscopic-comparative or international perspective on the moments when courts achieve their political legitimacy.⁵ Instead, scholarly debates about seminal cases tend to occur within a particular legal sub-discipline, isolated from one another and at the expense of holistic consideration. For example, in the field of international criminal law (ICL), the July 1999 *Prosecutor v. Tadić* Appeals Chamber judgment of the U.N. International Criminal Tribunal for the former Yugoslavia (ICTY) notably held that joint criminal enterprise liability is “firmly established” in customary international law and also implicitly found

2. See generally MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS (2013).

3. See generally BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984); see also SCHARF, *supra* note 2, at 5.

4. SCHARF, *supra* note 2, at 5; see also Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 463 (2003); Leila Nadya Sadat, *Extraordinary Rendition, Torture, and Other Nightmares from the War on Terror*, 75 GEO. WASH. L. REV. 1200, 1206–07 (2007).

5. But see John Ferejohn, *Judicial Power: Getting It and Keeping It*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 349, 352 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013); Ran Hirschl, *Beyond the American Experience: The Global Expansion of Judicial Review*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 129 (Mark A. Graber & Michael Perhac eds., 2002). This scholarship is addressed *infra* Part II.

within the ICTY Statute.⁶ Though the decision was heavily criticized for stretching both custom and the Statute, it has become a foundational ICL doctrine. Furthermore, the European Court of Justice (ECJ) ruled in the 1964 *Costa v. ENEL* decision that European Union law had supremacy over member state law, despite the fact that the Treaty Establishing the European Economic Community never so explicitly articulates this.⁷ Despite pushback from certain European member states and scholars in the ensuing decades, such supremacy is now a fundamental part of European jurisprudence and explicitly incorporated into European treaty law.⁸

This is not to say that no one has drawn isolated comparisons to *Marbury*. Some have analogized the case to a particular moment in another court's history.⁹ And others have used the term "*Marbury* moment" in passing without fleshing out the term.¹⁰ Two years ago,

6. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶ 220 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), <http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

7. Case 6/64, Flaminio Costa v. ENEL, 1964 E.C.R. 587.

8. As another example, in *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, a slight majority of the Supreme Court of India established the doctrine of basic structure, i.e., that the parliament's power to change the constitution was structurally limited because it could not amend basic constitutional principles. In so doing, the court gave itself the power of judicial review over such parliamentary amendments despite any explicit textual limitation on the parliament to amend the constitution. *Kesavananda Bharati* has since been declared "crucial in upholding the supremacy of the Constitution and preventing authoritarian rule by a single party." Arvind P. Datar, Opinion, *The Case that Saved Indian Democracy*, HINDU (Apr. 24, 2013), <http://www.thehindu.com/opinion/op-ed/the-case-that-saved-indian-democracy/article4647800.ece>.

9. See, e.g., KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE 19 (2001) ("Copying US constitutional history, the [European Court of Justice] followed the strategy of Justice Marshall when he asserted the Supreme Court's power of judicial review in the landmark *Marbury v. Madison* case."); L. Riley Kern, Note & Comment, *Judicial Interpretation as a Discourse on Power: An Examination of Key Decisions from the United States Supreme Court and the European Court of Justice*, 49 TULSA L. REV. 211, 229–34 (2013) (analogizing *Marbury* to *Costa v. ENEL*, 1964 E.C.R. 585, and Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1); Markus G. Puder, *Supremacy of the Law and Judicial Review in the European Union: Celebrating Marbury v. Madison with Costa v. ENEL*, 36 GEO. WASH. INT'L L. REV. 567, 571 (2004) ("This Article . . . hopes to use the prism offered by *Marbury* for analyzing a particular theme—namely how the gates of judicial review are reached and opened in *Costa*.").

10. See Stephen M. Feldman, *Chief Justice Roberts's Marbury Moment: The Affordable Care Act Case* (NFIB v. Sebelius), 13 WYO. L. REV. 335 (2013); Natalie Prescott, Note, *Orange Revolution in Red, White, and Blue: U.S. Impact on the 2004 Ukrainian Election*, 16 DUKE J. COMP. & INT'L L. 219, 240 (2006) ("On December 3, 2004, the Court had its own *Marbury* moment when it considered and invalidated acts of the government.");

John Ferejohn described moments when “a high court asserts new jurisdiction or claims powers to control elected officials but does so in a subtle or strategic way that makes it hard for politicians to reject it.”¹¹ He briefly cites as examples other cases referenced in *Consequential Courts*, such as the Israeli *Bank Hamizrachi* case where the Supreme Court established the supremacy of the Basic Laws over ordinary legislation, or a ruling of the Constitutional Court of Korea relating to the impeachment of President Roh Moo-hyun.¹²

Ferejohn also describes a decision’s “stickiness,” i.e., whether the ruling will endure within the given jurisdiction.¹³ In some cases, he notes, U.S. courts suffered “unsuccessful assertions of judicial power either because the other branches ignored the [Supreme] Court’s decision . . . or stripped the Court’s jurisdiction . . . or forced the Court to change its approach to the Constitution.”¹⁴ He posits three variables necessary for judges to assert a court’s power: the nature of the society, the structural features of the political and legal regime, and the leadership ability of the leading judges.¹⁵ He also notes that a proper account of stickiness requires an understanding of the political characteristics of the given era, such as the election of 1800 and its immediate aftermath.¹⁶

Marko Milanovic, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT’L L. 69, 95–96 (2009) (“So far, the ICJ in particular has refrained from attempting such a *Marbury* moment. . . . Yet, *Tadić* did not provoke a *Marbury* moment.”); see also James Crawford, *Marbury v. Madison at the International Level*, 36 GEO. WASH. INT’L L. REV. 505, 508 (2004) (“But international law has not yet had its *Marbury v. Madison*.”); Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 111 (2015) (“*King [v. Burwell]* brings statutory interpretation back to this question more expressly than we have seen in a long time. In doing so, *King* realigns the most difficult questions of statutory interpretation with other basic questions the Court is facing about its institutional role in our changing legal landscape. There are likely more *Marbury* moments ahead.”).

11. Ferejohn, *supra* note 5, at 353.

12. *Id.* at 354.

13. *Id.* at 359.

14. *Id.* at 357.

15. *Id.* at 358.

16. *Id.* at 360; see also, Hirschl, *supra* note 5, at 129 (considering various international instances of *Marbury*-like cases). As part of this broader summary, Hirschl includes a section on “foundational cases” that involve “*Marbury v. Madison*-like manifestations of judicial activism.” *Id.* at 139. He surveys cases from postwar Western Europe, South Africa, Israel, Fiji, India, and Russia. He also rightly affirms the importance of placing any domestic expansion of judicial review “within a broader context of similar developments that have taken place in numerous other constitutional democracies.” *Id.* at 153.

How do we know a *Marbury* moment when we see one? This Article builds upon this valuable scholarship by reintroducing and specifying the concept of “*Marbury* moments.” In Parts I to III, I explore the defining elements of a *Marbury* moment, considering illustrative case examples from three types of courts: federal, regional, and international.¹⁷ In each instance, the analysis is two-fold. First, was the ruling a *Marbury* moment? And second, did the *Marbury* moment succeed? Part IV considers the factors that may contribute to a *Marbury* moment’s success or failure to attain legitimacy within its relevant jurisdiction, and considers another illustrative case example. Part V shows that the *Marbury* moments concept provides a framework for understanding how and when new courts attain legitimacy in an international judicial system.

I. THE ORIGINAL *MARBURY* MOMENT: *MARBURY V. MADISON* (U.S. SUPREME COURT)

The U.S. Supreme Court’s landmark *Marbury v. Madison* decision of 1803 is canonical for U.S. law students and constitutional scholars, but the details are less well known to international and comparative lawyers. This Article begins with the original *Marbury* moment—the case and its aftermath—to show how it defined the elements of a phenomenon that now spans the judicial landscape.

A. Background and Historical Context

The U.S. Constitution, which came into force in 1789, vests judicial power in the U.S. Supreme Court and in lower courts that Congress may establish.¹⁸ This judicial power extends to, *inter alia*, “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be

17. Of course, the Article could have used a wide variety of examples to illustrate the *Marbury* moments concept, such as *Bond v Commonwealth* (1903) 1 CLR 13 (Austl.); *New South Wales v Commonwealth* (1915) 20 CLR 54 (Austl.); *Dr. Bonham’s Case* (1610) 77 Eng. Rep. 638; 8 Co. Rep. 107a; *Anwar Hossain Chowdhury v. Bangladesh* (1989) 41 DLR (AD) 165 (Bangl.); *Liyanage v. The Queen* (1967) 1 AC 259 (Sri Lanka); *CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village* 49(4) PD 221 (1995) (Isr.); *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (Can.); Supreme Court [S. Ct.], 2010Do5986, Dec. 16, 2010 (S. Kor.). The cases described above were chosen as exemplars from the U.S. federal, regional, and international level.

18. U.S. CONST. art. III, § 1.

made, under their Authority.”¹⁹ In such matters, the Court has appellate jurisdiction.²⁰ It also provides for original jurisdiction in cases affecting, *inter alia*, ambassadors, other public ministers, and consuls.²¹ The Constitution never explicitly addresses the concept of judicial review, though the Supremacy Clause provides that the U.S. Constitution, federal laws, and treaties are “the supreme Law of the Land.”²²

The Judiciary Act of 1789, adopted during the First Session of the first U.S. Congress, established the lower federal courts. In Section 13, it provided that:

The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.²³

In 1800, John Adams’ Federalist Party lost the presidential election to Thomas Jefferson’s Republican Party. In December 1800, Adams nominated John Marshall to be Chief Justice, and by February 1801 Marshall began his tenure. That same month, the holdover Federalist Congress authorized the appointment of forty-two Justices of the Peace, all Federalists. Upon taking office, Jefferson’s Secretary of State, James Madison, refused to deliver the commissions to the newly appointed Justices of the Peace, including William Marbury.²⁴ Marbury filed an original action in the Supreme Court asserting jurisdiction under Section 13 of the Judiciary Act of 1789 and seeking an order of mandamus to compel Madison to deliver the commission.²⁵

19. U.S. CONST. art. III, § 2, cl. 1.

20. U.S. CONST. art. III, § 2, cl. 2.

21. U.S. CONST. art. III, § 2, cl. 2.

22. U.S. CONST. art. VI, cl. 2.

23. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80–81.

24. *See generally* CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT* (2009).

25. *See Marbury v. Madison*, 5 U.S. 137, 138 (1803).

B. The Case

Chief Justice Marshall's famous opinion, decided on February 24, 1803, divided the relevant issues into three. First, does Marbury have a right to the commission? Marshall said yes, given that the President signed the commission, and the Secretary of State sealed it.²⁶ Second, do the laws of the country establish a remedy for the deprivation of the right? Again, Marshall reasoned yes because the "essence of civil liberty" required a legal remedy for a legal wrong.²⁷ Third, can a writ of mandamus be issued in an original action before the Supreme Court? Marshall divided this into two further sub-issues. He ruled that because of the nature of the writ, there was judicial power to review the acts of the executive branch. However, the Court also reasoned that it lacked the power to do so, given that while Congress might have the power to alter the appellate jurisdiction of the Court, by contrast Article III intended to fix the Court's original jurisdiction.²⁸ Reasoning thus that the Constitution did not provide for the Judiciary Act's provision of authority to issue writs of mandamus to public officers, the Court concluded:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

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

If then the Courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.²⁹

The Court struck down Section 13, stating that the Constitution's "particular phraseology" supported the principle that

26. *Id.* at 154–62.

27. *Id.* at 162–68.

28. *Id.* at 168–80.

29. *Id.* at 177–78.

“law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”³⁰ Marbury was thus denied his commission; the Court could not entertain an original action for mandamus inconsistent with its jurisdiction under Article III.

C. Controversy and Acceptance

At the time it was decided, *Marbury* received some coverage in Federalist and Republican newspapers.³¹ Certain Republican newspapers criticized it mostly for ruling that the courts could issue a writ of mandamus to the Secretary of State when it was unnecessary to do so in light of the jurisdictional issues.³² Jefferson himself viewed the opinion as interfering with the executive branch and criticized Marshall for ruling on an issue not properly before him.³³ In correspondence with Abigail Adams, Jefferson declared that “the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves, in their own sphere of action, but for the legislature & executive also, in their spheres, would make the judiciary a despotic branch.”³⁴ However, contemporary critiques of the assertion of judicial review were relatively minimal.³⁵ In sum, “Later generations would find judicial review controversial, but Americans at the time of *Marbury* did not.”³⁶

Modern academic criticism of *Marbury* is vast, and to even wade into the field of *Marbury* scholarship requires a great deal of subtlety.³⁷ For purposes of this Article, however, it is important to

30. *Id.* at 180.

31. William Michael Treanor, *The Story of Marbury v. Madison: Judicial Authority and Political Struggle*, in *FEDERAL COURTS STORIES* 29, 54 (Vicki C. Jackson & Judith Resnik eds., 2010); SLOAN & MCKEAN, *supra* note 24, at 166–67.

32. Treanor, *supra* note 31, at 54; SLOAN & MCKEAN, *supra* note 24, at 166–67.

33. Treanor, *supra* note 31, at 54.

34. SLOAN & MCKEAN, *supra* note 24, at 168.

35. *Id.* at 166–67; WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 72 (2000) (“Both Federalist and Republican newspapers took note of the decisions and apprised readers of their significance. . . . The politically active segments of the American public fully understood John Marshall’s efforts at compromise.”).

36. NELSON, *supra* note 35, at 75.

37. See, e.g., Barry Friedman, *The Myths of Marbury*, in *ARGUING MARBURY V. MADISON* 65, 65–66 (Mark Tushnet ed., 2005) (“There are three types of stories told about *Marbury v. Madison* and the establishment and maintenance of judicial review. . . . It is often said that . . . Chief Justice John Marshall created the power of judicial review. . . .

capture the sense of controversy that the case has created.³⁸ For simplicity, the scholarship may be distilled into two schools: the Marshall School and the Historical School.

According to the Marshall School, *Marbury* was the sly Chief Justice's judicial masterpiece. It allowed Marshall to stay true to the law, castigate the Republicans without forcing them to comply with a writ of mandamus, and simultaneously establish the Supreme Court's power of judicial review—the authority of the Supreme Court to strike down laws it judges to be unconstitutional—a power not found in the Constitution.³⁹ According to this school of thought, *Marbury* represented a sort of “power grab” for Marshall and the Supreme Court because the U.S. Constitution does not grant the Court the power of judicial review.⁴⁰

Importantly, this school situates Chief Justice Marshall between a rock and a hard place. As noted by William Treanor in a chapter responding to the Marshall School:

Famously, Marshall confronted a situation that admitted of no apparent solution. If he issued a writ of mandamus, Madison, who neither appeared at the trial nor secured representation, would obviously

According to the modest story, all that happened in *Marbury* is that the Supreme Court (speaking through Marshall of course) recognized the obvious: that in deciding a case, judges—just like other government officials—must consult and follow the Constitution. Still, these *Marbury* minimalists acknowledge that today judicial constitutional pronouncements are supreme. This, we are told, occurred through a process of judicial ‘usurpation.’ . . . There is a third group who believes that . . . judicial review depends on the grace of the political branches, and especially the legislature. Judges have the power they do, it turns out, not because they took it, but because those in power gave it to them, or at least let them have it.”).

38. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, PRINCIPLES OF CONSTITUTIONAL LAW 5–6 (4th ed. 2010) (“First, there is disapproval of the way in which Marshall strove to reach the conclusion concerning the constitutional authority of the Court over the other branches of government. Second, there is criticism of Marshall’s arguments supporting judicial authority as merely bare assertions of authority rather than reasons justifying that authority.”).

39. WALTER M. FRANK, MAKING SENSE OF THE CONSTITUTION: A PRIMER ON THE SUPREME COURT AND ITS STRUGGLE TO APPLY OUR FUNDAMENTAL LAW 79 (2012) (“Judicial review, for our purposes, refers to the authority of the Supreme Court to void legislative acts it deems unconstitutional.”); NELSON, *supra* note 35, at 1 (“*Marbury v. Madison* was a truly seminal case, which ultimately conferred vast power on the Supreme Court of the United States and on other constitutional courts throughout the world. What makes the case even more important is the absence of any clear plan on the part of the Constitution’s framers to provide the Court with this power.”).

40. NOWAK & ROTUNDA, *supra* note 38, at 5–8 (analyzing various deficiencies in Marshall’s opinion).

ignore it. The Court would not be able to enforce the writ, and it would thus be revealed as powerless. . . . But, if he ruled against *Marbury*, the judiciary would also lose credibility. The Judiciary Act in a straightforward way empowered the Court to issue writs of mandamus. If the Court refused to exercise the power vested in it because of fear of confrontation with the Executive, it would also be revealed as powerless.⁴¹

Widespread scholarly criticism in the Marshall School holds that Marshall essentially manipulated the law, deliberately misreading “both the statute and the Constitution in order to fabricate a baseless conflict between them, a conflict that he then created judicial review to resolve.”⁴² This argument has been put forward “by progressive historians and legal scholars ranging from Albert Beveridge, Robert G. McCloskey, and J.M. Sosin to Felix Frankfurter and Charles Warren.”⁴³

By contrast, the Historical School situates *Marbury* and the Marshall Court in the context of eighteenth-century legal and political history and theory, as opposed to twentieth-century progressivism and legal realism.⁴⁴ In other words, instead of being a

41. Treanor, *supra* note 31, at 48.

42. *Id.* at 50; *see also id.* at 50–53 (defending *Marbury* from scholarly critiques).

43. NELSON, *supra* note 35, at 2.

44. Treanor, *supra* note 31, at 30 (“*Marbury* was decided at a time of bitter controversy between the parties and a Republican campaign to undermine the power of the Federalist-dominated judiciary.”); James M. O’Fallon, *The Politics of Marbury*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 17, 17–39 (Mark A. Graber & Michael Perhac eds., 2002) (arguing that *Marbury* is better understood from a historical and political vantage point); NELSON, *supra* note 35, at 3–4 (“It must be stated emphatically that few, if any, Americans in the decades before and after 1800 believed that policy choice was an inherent element in judicial decision making. . . . The framers of the Constitution and the justices who decided *Marbury* understood that only an entity possessing sovereignty—that is, the power to make the ultimate policy choices inherent in changing or creating law—could resolve policy questions. Courts, which did not possess sovereignty, could only find the law as it already existed.”); Lee Epstein & Jack Knight, *The Strategic John Marshall (and Thomas Jefferson)*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 41, 41–59 (Mark A. Graber & Michael Perhac eds., 2002) (“We disagree with the general characterization of *Marbury* as a ‘brilliant’ strategic move by Marshall in the face of overwhelming political opposition. Marshall was able to write the opinion he did, to establish judicial review, because it was a politically viable step at the time.”); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 116 (2004) (“The case of *Marbury v. Madison* played a supporting role in a bigger drama about the place of the judiciary in American government, and while only a minor player, its part turned out to be important in unexpected ways.”).

Marshall power grab, it was instead a “case . . . born of the bitter political battle of its time.”⁴⁵ This School thus renders Marshall’s opinion less dramatic, eroding support for the Marshall School in recent decades.⁴⁶ According to Treanor, for example, *Marbury* was a perfect vehicle not to establish judicial review, but “to establish a judicial power to direct Executive compliance with the law.”⁴⁷ Others point out that judicial review already existed by the time of *Marbury*, in both the United States and elsewhere.⁴⁸ Still others note that judicial review, though not explicitly provided for in the U.S. Constitution, may plausibly be inferred from a reading of Article III and the Supremacy Clause.⁴⁹

Despite such controversy, the judicial review power articulated in *Marbury* represents the core of the Supreme Court’s authority, one that all branches of the U.S. government now recognize unequivocally. The Supreme Court itself has since cited to *Marbury* over 200 times.⁵⁰ In 1958, notably, the Court affirmed in *Cooper v. Aaron* that:

Article VI of the Constitution makes the Constitution

45. O’Fallon, *supra* note 44, at 17.

46. See, e.g., ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 192–93 (1989) (critiquing the “cynicism” about *Marbury* that has emerged since the 1920s); KRAMER, *supra* note 44, at 114 (“It has recently become quite fashionable to dismiss *Marbury* as an altogether trivial case—a predictable reaction, perhaps, to the previous generation’s hyperventilated celebration of it.”).

47. Treanor, *supra* note 31, at 30.

48. See Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003); see also FRANK, *supra* note 39, at 79 (“There is, of course, considerable evidence to the contrary. Hamilton, for example, in *Federalist* No. 78, wrote that it is the ‘duty [of judges] . . . to declare all acts contrary to the manifest tenor of the Constitution void Without this, all the reservations of particular rights or privileges would amount to nothing.’ Less well known is John Marshall’s argument at the Virginia ratifying convention that federal justices could be relied upon to strike down laws that exceeded Congress’s delegated powers.”); KRAMER, *supra* note 44, at 115 (“To be sure, *Marbury* did not stake out new territory in the theory of judicial review. That most people thought the power existed, even as to federal laws, was already clear from the debates in Congress as well as from [Circuit court] cases like *Hylton v. United States* and *Hayburn’s Case*.”).

49. See, e.g., Treanor, *supra* note 31; see also Barry Friedman, *The Myths of Marbury*, in *ARGUING MARBURY V. MADISON* 65–87 (Mark Tushnet ed., 2005) (examining various critiques of *Marbury* and proposing that judicial supremacy arises as a function of “popular acquiescence”).

50. *Appendix B: Supreme Court Opinions Citing and Quoting Marbury v. Madison*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 383 (Mark A. Graber & Michael Perhac eds., 2002); see also SLOAN & MCKEAN, *supra* note 24, at 177.

the “supreme Law of the Land.” In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as “the fundamental and paramount law of the nation,” declared in the notable case of *Marbury v. Madison* . . . that “It is emphatically the province and duty of the judicial department to say what the law is.” This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.⁵¹

Indeed, though the propriety of *Marbury* continues to be debated,⁵² “the doctrine of judicial review is now firmly established.”⁵³

Members of the judiciary are not the only ones to have accepted judicial review: political actors have also done so. For example, President Eisenhower’s Attorney General, William Rogers, strongly opposed a bill that would have deprived the Supreme Court of the power to rule on the First Amendment rights of communists and their supporters despite previous Supreme Court rulings in their favor.⁵⁴ More recently, when in 2012 the Supreme Court was considering the constitutionality of the Affordable Care Act, President Obama stated that “the Supreme Court is the final say on our Constitution and our laws, and all of us have to respect it”⁵⁵ In sum, judicial review is an indisputable fact of U.S. government.

D. Analysis: The Seminal *Marbury* Moment

For purposes of the present analysis, what are the defining characteristics of the *Marbury* case?

51. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). The Court went on to hold that the Constitution and the Court’s decisions are thus binding on the states. The case remains one of the most famous of the Warren Court and of the desegregation cases.

52. See FRANK, *supra* note 39, at 79–83.

53. JOHN E. NOWAK & RONALD D. ROTUNDA, *PRINCIPLES OF CONSTITUTIONAL LAW* 5 (3d ed. 2007); accord NELSON, *supra* note 35, at 86 (“By the middle of the nineteenth century, in short, judicial review had become an accepted feature of American law.”).

54. FRANK, *supra* note 39, at 81. Though the bill passed in the House of Representatives, it failed in the Senate.

55. John H. Cushman Jr., *Administration Tells a Court It Doesn’t Deny Its Powers*, N.Y. TIMES, Apr. 6, 2012, at A11.

First, the case was handed down *early in the history of the Court*. It occurred just fourteen years into the life of the U.S. Supreme Court. Chief Justice Marshall was appointed by the second U.S. President, John Adams, and was only the fourth Chief Justice of the Court.

Second, the Court *ruled on the nature of its own authority and an axiomatic principle of law*. Though there is considerable debate about the existence of judicial review before *Marbury*, the case is clearly a landmark, articulating the Court's power to strike down legislation it deems incompatible with the U.S. Constitution.

Third, the opinion has an arguable *lack of textual support* in the U.S. Constitution for this judicial review authority. Though some in the Historical School have argued that such reading is plausible in light of Article III and the Supremacy Clause, the Marshall School has maintained that Chief Justice Marshall deserves credit for maneuvering the Court into gaining power the framers never intended.

And was this case a successful *Marbury* moment? Yes. The Court *transcended controversy, gaining acceptance by the judicial and political actors within the relevant jurisdiction*. The case was somewhat controversial at the time in certain political circles, and scholarly criticism truly took hold in the twentieth century. Such debate triggered a counter-movement arguing for a more political and historical emphasis. Regardless, with the ruling, the Court's judicial review power is firmly established, and all branches of the U.S. government recognize this jurisprudence.

In sum, *Marbury v. Madison* represents the seminal *Marbury* moment, involving a court in its early history ruling on the nature of its own authority or an axiomatic principle of law in a manner that engenders controversy but ultimately succeeds in gaining acceptance by the political actors within its jurisdiction.

II. THE REGIONAL *MARBURY* MOMENT: *COSTA V. ENEL* (EUROPEAN COURT OF JUSTICE)

Marbury marked the first, but hardly the last, *Marbury* moment. All non-elected courts face similar challenges: take, for example, the ECJ's pivotal 1964 case of *Costa v. ENEL*.⁵⁶

56. See Alec Stone Sweet, *Constitutional Dialogues in the European Community*, in THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 306 (Anne-Marie Slaughter, Alec Stone Sweet & J.H.H. Weiler eds., 1997); ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE

A. *Background and Historical Context*

In 1952, the Treaty of Paris established the ECJ as part of the European Coal and Steel Community. Just five years later, the Treaty Establishing the European Economic Community (EEC)—often called the Treaty of Rome or EEC Treaty—went into effect with the purpose of “promot[ing] throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States.”⁵⁷ It aimed to do so “by establishing a Common Market and progressively approximating the economic policies of Member States.”⁵⁸

The Treaty of Rome provided that the ECJ “shall ensure observance of law and justice in the interpretation and application of this Treaty,” with judges and two advocates-general hailing from each member state.⁵⁹ It also empowered member states to refer to the Court of Justice any matter in which it considered another member state to have failed to fulfill any of its obligations under the Treaty of Rome.⁶⁰

Pursuant to Article 177, the ECJ was competent to make a preliminary decision concerning the interpretation of the EEC Treaty; the validity and interpretation of acts of EEC institutions; and the interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provided.⁶¹ A domestic court or

181 (2d ed. 2006) (“*Costa v ENEL* concerned the compatibility with the EEC Treaty of a Law adopted after the entry into force of the Treaty and of a number of presidential decrees issued to give effect to that Law. The Court’s reasoning was much broader in scope, however, implying that Community law would take precedence regardless of the constitutional status under national law of the conflicting domestic norm and regardless of the date on which that norm was adopted, whether before or after the entry into force of the Treaty. That implication was confirmed in *Internationale Handelsgesellschaft* . . .”). This Article also could have examined *Van Gend en Loos v. Nederlandse Administratie der Belastingen*—which established the principle of direct effect of European law—as a *Marbury* moment from the ECJ.

57. Treaty Establishing the European Economic Community art. 2, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

58. *Id.*

59. *Id.* at arts. 165–66.

60. *Id.* at art. 170.

61. *Id.* at art. 177; ALTER, *supra* note 9, at 5 (“Member states created the European legal system to serve three functional roles: (1) to help ensure that the Community’s supranational institutions did not exceed their authority; (2) to help resolve interpretive questions about European treaties and secondary legislation; and (3) to work with the

tribunal could request a preliminary ruling when a question was raised before it and it considered that its judgment depended on a preliminary decision on this question.⁶² Article 177 also required such a court or tribunal to refer the matter to the Court when a question was raised in a case pending before it if there was no appeal from its decisions under municipal law.⁶³

Notably, the Treaty did not anywhere explicitly provide that EEC law is supreme over domestic law.

B. *The Case*

Italian national Flaminio Costa, a shareholder in an Italian electricity company, refused to pay an electricity bill for 1,925 lire (approximately three dollars), and claimed that the recent nationalization of the Italian electricity sector was contrary to the Treaty of Rome and Italian Constitution.⁶⁴ The Italian judge referred the case to the Italian Constitutional Court, which stayed the proceeding and applied for a preliminary ruling pursuant to Article 177.⁶⁵

Costa requested an interpretation of various articles of the EEC Treaty that he argued the Italian electricity nationalization law had infringed.⁶⁶ The Italian government maintained that the Article 177 application was “absolutely inadmissible” because the Italian Constitutional Court had asked the ECJ not only to interpret the Treaty of Rome, but also to declare whether the Italian law conformed to the Treaty.⁶⁷ In the Italian government’s submission, a national court could not avail itself of Article 177 when it only had to apply a domestic law and not a Treaty provision.⁶⁸

In upholding the admissibility of the Article 177 application, the Court distinguished the EEC Treaty from “ordinary international

Commission and member states to ensure compliance with European law.”).

62. EEC Treaty, *supra* note 57, at art. 177.

63. *Id.*; see also Richard M. Buxbaum, *Article 177 of the Rome Treaty as a Federalizing Device*, 21 STAN. L. REV. 1041, 1041 (1968) (“Article 177 permits, and in some instances requires, national courts to certify to the Court of Justice of the Communities questions involving the validity or interpretation of acts of Community institutions that arise in the course of pending litigation.”).

64. Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 585, 588.

65. *Id.* at 588–89.

66. *Id.* at 588.

67. *Id.* at 589 (internal quotation marks omitted).

68. *Id.*

treaties” given that the EEC Treaty created a unique legal system that integrated itself into those of the member states.⁶⁹ The Court also broadly reasoned:

By creating [the EEC] . . . the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, *and more generally the terms and the spirit of the Treaty*, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, *without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7*.⁷⁰

The Court further reasoned that member states’ treaty obligations would be compromised if states could pass conflicting subsequent legislation and that unilateral member state action is precisely prescribed in the Treaty.⁷¹ The Court thus held:

[T]he law stemming from the Treaty . . . could not, because of its special and original nature, be overridden by domestic legal provisions . . . without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible

69. *Id.* at 593.

70. *Id.* at 593–94 (emphasis added).

71. *Id.* at 594 (“The precedence of Community law is confirmed by Article 189, whereby a regulation ‘shall be binding’ and ‘directly applicable in all Member States.’ This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.”).

with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.⁷²

In essence, the Court held that Community law was supreme over domestic law. Having ruled on the admissibility of the application in light of the EEC legal supremacy, the ECJ went on to find that the nationalization did not in fact violate any provisions of the Treaty of Rome.⁷³

C. *Controversy and Acceptance*

At the time it was decided, *Costa* generated relatively little mainstream controversy within the member states. In France, for example, other than those specialized in European law, people were largely unaware of *Costa* up to the early 1980s.⁷⁴ However, certain legal scholars through the 1960s critiqued the ECJ for relying on the preamble of the Treaty—which includes reference to “the peoples of Europe”—even though the preamble was added at the end of the negotiations, when each country could add one statement regarding the goal of the Treaty.⁷⁵ Others questioned whether there was any sound legal basis for the ECJ’s decisions.⁷⁶ Controversy regarding the ECJ’s supremacy doctrine continued through the 1980s and 1990s.⁷⁷

More modern scholarship still criticizes *Costa*, largely on the ground that the ECJ engaged in judicial activism given the Treaty of Rome’s lack of any supremacy provision.⁷⁸ According to many, if

72. *Id.*

73. *Id.* at 599–600.

74. See Jens Plötner, *Report on France*, in *THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT* 72–73 (Anne-Marie Slaughter, Alec Stone Sweet & J.H.H. Weiler eds., 1997).

75. ALTER, *supra* note 9, at 20–21. But see Plötner, *supra* note 74, at 72–73 (observing that the case was virtually ignored in French legal literature).

76. ALTER, *supra* note 9, at 20–21.

77. See *id.* at 19.

78. Fabian Amtenbrink, *The European Court of Justice’s Approach to Primacy and European Constitutionalism—Preserving the European Constitutional Order?*, in *THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES* 53 (Hans-W. Micklitz & Bruno de Witte eds., 2012) (“Despite the absence of a clear definition of the source of primacy, the ECJ has maintained that European law ‘cannot be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.’”) (emphasis

member states had intended Community law to take primacy over conflicting domestic legislation, they would have explicitly provided for it in the Treaty.⁷⁹ One commentator, echoing this argument, notes:

Nowhere did [the Treaty of Rome] say that national courts were to enforce European law over national law. Few politicians or legal scholars saw the Rome Treaty as anything more than a traditional international treaty. Indeed, the whole idea that the Treaty of Rome created a “new legal order of international law” was really nothing more than an assertion of the European Court. The Court’s radical jurisprudence had to be accepted by national judiciaries and national governments in order for the “new legal order” to become a reality. Yet both had significant reasons to reject the Court’s edicts.⁸⁰

Some scholars have also taken aim at the teleological reasoning in the judgment.⁸¹ Indeed, the Court famously reasoned that “the terms and spirit of the Treaty” precluded the possibility that domestic legislation could trump EEC law, especially in a system “accepted by them on the basis of reciprocity.”⁸² Some see this approach—wherein the ECJ “interpreted lacunae in the Treaty as a license to fill in gaps”—as distinct from the traditional approach of interpreting a treaty narrowly based on a close adherence to its

omitted); accord ALTER, *supra* note 9, at 39 (“Nowhere does the Treaty [of Rome] actually state that European law creates direct effects and is supreme to national law.”); HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 28 (1986) (“[Costa and its progeny are] cases in which the Court probably pushed its gap-filling activities beyond the proper scope of judicial involvement in society’s law and policy making.”).

79. See, e.g., Anthony Arnall, *Judicial Activism and the European Court of Justice: How Should Academics Respond?*, in JUDICIAL ACTIVISM AND THE EUROPEAN COURT OF JUSTICE 224 (Mark Dawson, Bruno de Witte & Elise Muir eds., 2013).

80. ALTER, *supra* note 9, at 2.

81. See GUNNAR BECK, THE LEGAL REASONING OF THE COURT OF JUSTICE OF THE EU 261 (2012) (“As in *van Gend* and *Costa v ENEL* the Court appealed to a mixture of teleological and systemic considerations revolving around the principles of effectiveness and uniform application.”); see also ALTER, *supra* note 9, at 20 (“The ECJ’s goal was to further European integration, and to increase the effectiveness of the European legal system. At times this meant interpretation of the Treaty.”).

82. BECK, *supra* note 81, at 321 (internal quotation marks omitted) (“The ECJ has since continued invoking the spirit of the Treaties or of an individual measure in a large number of cases which included decisions of fundamental and lasting importance in the development of EU law.”).

wording.⁸³

Others are more ambivalent about the decision. Some have argued, for example, that the Treaty's silence on the supremacy issue implies that Community treaties were similar to ordinary treaties, namely, its effect within each member state would depend on a rule of domestic constitutional law.⁸⁴ Others have defended the ruling in light of the phrasing of the Treaty. According to this camp, the lack of any supremacy provision does not preclude the Treaty signatories' consensus regarding the matter.⁸⁵ For them, the issue was deliberately left obscure, implying a comfort with the ECJ eventually deciding the issue.⁸⁶

Despite the controversy surrounding *Costa*, the case became seminal for etching the supremacy principle into the legal framework of the European Union.⁸⁷ For example, in the *Simmenthal* case the Court held that national courts must apply Community law in its entirety and protect the rights that the law confers on individuals.⁸⁸

83. ALTER, *supra* note 9, at 20.

84. See ARNULL, *supra* note 56, at 159 ("Although it was inevitable that the Community Treaties—and the EC Treaty in particular—would in due course come into conflict with inconsistent provisions in the national laws of the Member States, they did not say anything about how such conflicts were to be resolved. This could have been taken to imply that the Community treaties were no different from ordinary treaties, whose effect within the legal order of the contracting parties will depend on a rule of domestic constitutional law.").

85. See *id.* at 180.

86. *Id.*

87. BECK, *supra* note 81, at 197 n.43; see also *id.* at 197 ("Uncertainty of application, however, arises as the question for the Court is often not whether EU law has primacy, but how far EU law and thus its primacy extends . . ."); accord ALTER, *supra* note 9, at 17 ("The most important of the ECJ's legal doctrines were the Doctrine of Direct Effect and the Supremacy Doctrine. . . . It was a well-accepted legal principle that by ratifying the Treaty of Rome previous national laws in areas covered by the Treaty were changed. But it was not clear what would happen if states passed new laws that violated European provisions. The Supremacy Doctrine made European law supreme even to subsequent changes of national law, so that states could not pass any law or make any new policy that contradicted European legal obligations."); BECK, *supra* note 81, at 406 n.211 ("In the *Internationale Handelsgesellschaft* case (Case 11/70) the Court confirmed that the supremacy principle also applied to the relationship between national constitutional law, whilst in *Simmenthal* (Case C-106/77 [17]–[21]) and *Factortame* (Case C-213/89) it subsequently stated specifically that every national court must disapply national legislation which contravened EU law within its own jurisdiction and that in the event of a potential conflict between EU and national law a national court must not be prevented from granting interim relief in the appropriate circumstances.").

88. See Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.P.A.*, 1978 E.C.R. 629.

This created an obligation for courts to set aside any provision of national law—whether enacted prior or subsequent to the Community rule—conflicting with EEC law.⁸⁹ The Court also held that any Community law entering into force “render[s] automatically inapplicable any conflicting provision of current national law.”⁹⁰

Recent codification of the supremacy principle in European treaty law further demonstrates its widespread acceptance. Annexed to the Final Act of the Intergovernmental Conference, which adopted the Treaty of Lisbon in 2007, the Conference made Declaration 17, called “Declaration concerning primacy.”⁹¹ This declaration codified the supremacy doctrine, stating in part that, “*in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law.*”⁹² It also cited an opinion from the Council Legal Service that:

[P]rimacy of EC law is a cornerstone principle of Community law. According to the [ECJ], this principle is inherent to the specific nature of the European Community. *At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641) there was no mention of primacy in the treaty. It is still the case today.* The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.⁹³

The declaration also cited *Costa* for the proposition that domestic legal provisions may not override Community law.⁹⁴

For their part, Europe’s political leaders have made the calculation to accept *Costa*. Though French president Charles de Gaulle suggested changing the ECJ’s jurisdictional authority after *Van Gend en Loos v. Nederlandse Administratie der Belastingen* and *Costa*, he later abandoned the project to focus on winning

89. *Id.*

90. *Id.*

91. Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326), Declarations, Declaration 17 (signed on Dec. 13, 2007).

92. *Id.* (emphasis added).

93. *Id.* (emphasis added).

94. *Id.*

concessions for other European initiatives.⁹⁵ Today's prospective E.U. members are well aware of the "unquestioned truth" of European legal supremacy.⁹⁶ Nowadays, European law students learn about *Van Gend en Loos* and *Costa* as foundational cases; while some may question the validity of the Court's supremacy doctrine, "few dare to challenge such a bedrock and widely accepted principle."⁹⁷

Some member states had little criticism of the decision and doctrine, given their constitutional and structural makeup. In the Netherlands, for example, European legal supremacy was unproblematic after the ruling on "direct effect," given that the Dutch constitution itself renders international law supreme to domestic law.⁹⁸ Other states, despite initial resistance, more readily accepted the doctrine of supremacy. German attitudes towards supremacy of EEC law began shifting in 1964, and "[b]y 1971 the German legal community had fully embraced the constitutionality of EC membership and the supremacy of European law over simple German law."⁹⁹ However, the trend of German court rulings has varied since that time.¹⁰⁰ In Italy—again, the country in which *Costa* originated—the ECJ's view eventually won over the Italian Constitutional Court as well.¹⁰¹

The judiciary in several member states initially resisted the doctrine; France proved to be the most intractable case.¹⁰² It was only in 1989 that all three of France's supreme courts—the Conseil Constitutionnel, Conseil d'État, and Cour de Cassation—accepted their role in enforcing European law supremacy, and even between these courts "significant and enduring" disagreements persisted.¹⁰³

95. ALTER, *supra* note 9, at 187.

96. *Id.* at 26–27.

97. *Id.*

98. *Id.* at 23.

99. *Id.* at 75, 87.

100. *See generally id.* at 64–123.

101. Bruno de Witte, *Sovereignty and European Integration: The Weight of Legal Tradition*, in THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT 288 (Anne-Marie Slaughter, Alec Stone Sweet & J.H.H. Weiler eds., 1997).

102. ALTER, *supra* note 9, at 124.

103. *Id.* (noting that during this twenty-five year period, the ECJ's jurisprudence was often challenged); *id.* at 178 ("It is now clear that the supremacy of European law will be enforced in France. Since this was the fundamental idea behind the EC's *Costa v. ENEL* decision, we can say that, as of 1989, the basic supremacy of European law over national law has been fully accepted in France.").

This was, however, the last national impediment to member-state-wide acceptance of the *Costa* doctrine, allowing for the widespread recognition that European law is supreme to national law, with member states held accountable to their obligations under European law.¹⁰⁴

D. Analysis: A Successful Regional Marbury Moment

In light of the discussion above, is *Costa* a *Marbury* moment at the regional level? It clearly meets the first two criteria. First, it was handed down twelve years into the history of the nascent ECJ. Second, it involved the Court ruling on its own authority and an axiomatic principle of law, namely, the relationship between European Community law and domestic law. Third, the Court arguably lacked a textual basis in the EEC Treaty for the ruling.

And did this *Marbury* moment succeed? Similar to *Marbury* itself, *Costa* generated relatively little controversy at the time but subsequently weathered criticism: both member states and legal academics have critiqued *Costa*'s reasoning, citing the lack of clear supremacy contemplated in the Treaty of Rome. However, by 1989, all European governments notably embraced the doctrine at both the judicial and political level. Though this recognition process took longer than in the United States with *Marbury*, the supremacy doctrine is now as deeply embedded in Europe as judicial review is in the United States.

III. THE INTERNATIONAL *MARBURY* MOMENT: *PROSECUTOR V. TADIĆ*
(INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER
YUGOSLAVIA)

But what about a tribunal created not by a national or regional polity, but by the international system? Does the ICTY's decision in *Prosecutor v. Tadić* constitute a *Marbury* moment?¹⁰⁵

104. *Id.* at 27.

105. A string of *Tadić* Trial and Appeals Chamber judgments, decisions, and orders have since become classics in the study and practice of international criminal law. *See, e.g.*, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). However, it is the Appeals Chamber's Judgment in July 1999 that may best represent a successful international *Marbury* moment.

A. *Background and Historical Context*

The armed conflicts in the former Yugoslavia during the 1990s were the deadliest in Europe since World War II.¹⁰⁶ The dissolution of the Socialist Federal Republic of Yugoslavia began on June 25, 1991, with the Slovenian and Croatian declarations of independence. By April 1992, Macedonia and Bosnia and Herzegovina (BiH) had also declared their independence, leaving only Serbia and Montenegro in the Federal Republic of Yugoslavia.¹⁰⁷ Of the many ensuing conflicts, the one in BiH beginning in April 1992 led to the deaths of more than 100,000 people, with approximately two million forced to flee their homes.¹⁰⁸

Under increasing pressure from the international community to act in the face of such atrocities, the U.N. Security Council created the first international war crimes tribunal since Nuremberg and Tokyo.¹⁰⁹ The Tribunal, with its seat in The Hague, would “prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”¹¹⁰ Pursuant to Article 7 of the ICTY Statute, an individual may be held individually criminally responsible pursuant to one or more of six modes of liability: planning, instigating, ordering, committing, aiding and abetting, and superior responsibility.¹¹¹

B. *The Case*

In May 1992, the Serb assault on Kozarac, a town in northwestern BiH, resulted in the killing of some 800 civilians. After the town was captured, Bosnian Serb forces drove the non-Serb

106. *The Former Yugoslavia*, INT’L CTR. FOR TRANSITIONAL JUST., <http://www.ictj.org/our-work/regions-and-countries/former-yugoslavia> (last visited Oct. 24, 2015).

107. *What is the Former Yugoslavia?*, ICTY, <http://www.icty.org/sid/321> (last visited Oct. 24, 2015).

108. *The Conflicts*, ICTY, <http://www.icty.org/sid/322> (last visited Oct. 24, 2015). A peace deal was ultimately brokered in Dayton, Ohio in November 1995. *Id.*

109. *About the ICTY*, ICTY, <http://www.icty.org/sections/AbouttheICTY> (last visited Oct. 24, 2015).

110. S.C. Res. 827, art. 1 (May 25, 1993). The official name of the ICTY is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. *See id.*

111. *Id.* at art. 7.

population out of the area on foot.¹¹² During the course of this ethnic cleansing, armed forces beat, robbed, and murdered more civilians.¹¹³ During the occupation of Kozarac, Duško Tadić was alleged to have participated in the collection and forced transfer of civilians.¹¹⁴ In August 1992, Tadić was elected President of the Local Board of the Serb Democratic Party in Kozarac.¹¹⁵

Tadić was subsequently arrested and transferred to The Hague, where the ICTY charged him with perpetrating various crimes, including persecutions on political, racial, or religious grounds as a crime against humanity and murder as a violation of the laws and customs of war.¹¹⁶ In May 1997, the Trial Chamber, *inter alia*, acquitted Tadić of involvement in the killing of five civilians in the town of Jaskići because there was no evidence of his direct involvement in the killings.¹¹⁷ In essence, Tadić was acquitted because no statutory mode of liability could link him to the killings.

In July 1999, however, the Appeals Chamber reversed the Trial Chamber on this ground, finding that Tadić could be held criminally responsible for having committed the killings pursuant to “joint criminal enterprise” (JCE) liability.¹¹⁸ The Appeals Chamber reasoned broadly from the Statute’s object and purpose that “all those ‘responsible for serious violations of international humanitarian law’ committed in the former Yugoslavia,” as well as other provisions which suggested that criminal responsibility is “not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders.”¹¹⁹ After noting the Secretary-General’s report, the Chamber stated:

Thus, all those who have engaged in serious violations

112. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgement, ¶ 565 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); *Case Information Sheet: Duško Tadić*, ICTY, http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf (last visited Oct. 24, 2015).

113. Tadić, Case No. IT-94-1-T, Judgement, ¶¶ 142–79; *Case Information Sheet: Duško Tadić*, ICTY, http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf (last visited Oct. 24, 2015).

114. Tadić, Case No. IT-94-1-T, Judgement, ¶ 378.

115. *Id.* ¶ 188; *Case Information Sheet: Duško Tadić*, ICTY, http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf (last visited Oct. 10, 2014).

116. Prosecutor v. Tadić, Case No. IT-94-1-I, First Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 1995).

117. Tadić, Case No. IT-94-1-T, Judgement, ¶ 373.

118. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement, ¶¶ 230–34 (Int’l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999).

119. *Id.* ¶ 189.

of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. *Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable . . .*¹²⁰

Recognizing that international crimes in wartime situations “are often carried out by groups of individuals acting in pursuance of a common criminal design,” the Chamber reasoned that holding criminally responsible only the person who materially performs the criminal act would disregard all others involved, while holding others liable for aiding and abetting “might understate the degree of their criminal responsibility.”¹²¹ Thus, the Chamber reasoned, “international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design.”¹²²

The Chamber turned to customary international law to identify the elements of this collective criminality.¹²³ In articulating the three categories of JCE, the Chamber held that all three elements of the actus reus were shared: (1) “a plurality of persons”; (2) “the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute”; and (3) “participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.”¹²⁴ With regard to mens rea, for the first category of JCE, the Chamber

120. *Id.* ¶ 190 (emphasis added).

121. *Id.*

122. *Id.* ¶ 193.

123. *Id.* ¶¶ 193–226.

124. *Id.* ¶ 227.

found that custom recognized a requirement of “the intent to perpetrate a certain crime” (“the shared intent on the part of all co-perpetrators”).¹²⁵ For the second category, of “concentration camp” cases, “personal knowledge of the system of ill-treatment” and “intent to further this common concerted system of ill-treatment” was required.¹²⁶ Finally, with regard to the third category, custom required “the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise” or group’s commission of a crime.¹²⁷ In addition, the Appeals Chamber held that criminal liability may arise if: (1) it was foreseeable that one or other members of the group might perpetrate such a crime, and (2) “the accused willingly took that risk.”¹²⁸ The Appeals Chamber thus found that Tadić participated in the killing of the five men and that the Trial Chamber should have found Tadić guilty.¹²⁹

C. *Controversy and Acceptance*

Since its inception, JCE has engendered a great deal of controversy.¹³⁰ Some scholars have declared it unacceptable for the Appeals Chamber to “come up *de novo* with a legal construction that is unfavorable to the accused, especially when it is not explicitly provided in its Statute,” and additionally unacceptable to “claim the validity of this legal construction on conspicuously declared customary law that itself is based on scattered post-Second World War case law that lay dormant during the Cold War.”¹³¹ Another has called the teleological reasoning leading to the articulation of JCE “exuberant” given that it “amalgamated all of the most sweeping features of various national laws into a single all-encompassing doctrine divorced from culpability and fair labeling.”¹³² Indeed, at

125. *Id.* ¶ 228.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* ¶ 233; *see also id.* ¶¶ 235–37.

130. INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES 386 (Göran Sluiter et al. eds., 2013) (“As a mode of criminal liability, both Tribunals have established criminal responsibility under the (not uncontroversial) theory of [JCE] . . .”).

131. ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 33 (3d ed. 2007).

132. Darryl Robinson, *The Two Liberalisms of International Criminal Law*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 115, 139 (Carsten Stahn & Larissa van den Herik eds., 2010).

the ICTY's own Legacy Conference in 2011, one critical law professor cuttingly joked "it is a remarkable achievement of custom in the distinction into three categories of joint criminal enterprise—never has custom been so finely grained" ¹³³

Another concern regards the scope of the JCE doctrine. Under this mode of liability, a negligible contribution could result in massive criminal liability for various atrocities, given that all JCE members have "committed" the crime. ¹³⁴ This critique has led to the scholarly joke that JCE stands for "just convict everybody." ¹³⁵ Another common critique is that the third category of JCE may circumvent the special intent requirements for particularly serious crimes such as genocide. ¹³⁶

Others have dissected and rejected the very logic of the Appeals Chamber's reasoning based on the object and purpose of the Statute. As Professor Jens Ohlin has noted:

This argument is clever but regrettable. The structure of the argument suggests that we can work backwards from the proposition that the defendants must be punished. Since the defendants must be punished, the statute must be read in such a way that it will yield the desired result. Of course, the argument is circular. We cannot help ourselves to the proposition that the defendants are guilty until the argument is concluded and we have determined, on some other basis, the level of culpability imposed by the ICTY Statute. It is true that the ICTY Statute was directed at the most egregious offenders. No one doubts that those who are charged and brought before international tribunals have fought in wars and engaged in dreadful conduct. But their level of legal liability for collective criminal

133. ICTY GLOBAL LEGACY 32 (Nerma Jelačić ed., 2012), http://www.icty.org/x/file/Outreach/conferences_pub/global_legacy_publication_en.pdf.

134. Robinson, *supra* note 132, at 120–21; *see also* Harmen van der Wilt, *Joint Criminal Enterprise and Functional Perpetration*, in SYSTEM CRIMINALITY IN INTERNATIONAL LAW 164 (André Nollkaemper & Harmen van der Wilt eds., 2009) ("In the case law of the ICTY and—to a lesser extent—the ICTR, the joint criminal enterprise has served as a vehicle to aggregate persons who are somehow related to international crimes, without much heed being paid to the question how they exactly contributed to the crimes or whether they had at least a silent understanding.").

135. Jens David Ohlin, *The Co-Perpetrator Model of Joint Criminal Enterprise*, in CORNELL LAW FACULTY PUBLICATIONS 739, 750 n.88 (2008) (quoting Göran Sluiter, *Guilt by Association: Joint Criminal Enterprise on Trial*, 5 J. INT'L CRIM. JUST. 67 (2007)).

136. Robinson, *supra* note 132, at 120–21.

conduct is precisely what is at issue. Are they guilty for the actions of their co-conspirators or merely guilty for their own actions? The fact that the framers of the ICTY Statute sought to end impunity for war crimes does not help us answer this fundamental question of criminal law theory.¹³⁷

In short, the doctrine of JCE has been judged as problematic by commentators and practitioners alike.

Notwithstanding this criticism, since the *Tadić* Appeals Chamber judgment, the ICTY Prosecutor has made heavy use of JCE in subsequent prosecutions,¹³⁸ and JCE has been the basis for conviction in several noteworthy trials.¹³⁹ It is also the primary mode of liability charged in the most high profile cases at the Tribunals, namely those of Slobodan Milošević,¹⁴⁰ Radovan Karadžić,¹⁴¹ and Ratko Mladić.¹⁴² JCE has also spread to the other international criminal tribunals; it is recognized by the International Criminal

137. Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 72 (2007).

138. Robert Cryer, Hakan Friman, Darryl Robinson & Elizabeth Wilmschurst, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 373 (2010); Jens David Ohlin, *Joint Criminal Confusion*, 12 NEW CRIM. L. REV. 406, 407 (2009) ("Since the ICTY Appeals Chamber issued its *Tadić* opinion in 1999, JCE has quickly emerged as the most important mode of liability in modern international criminal law. Indeed, it is charged in almost every indictment at the ICTY.").

139. See, e.g., Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004); Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009); Prosecutor v. Šainović et al., Case No. IT-05-87-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014).

140. See, e.g., Prosecutor v. Milošević, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia July 28, 2004) ("Slobodan Milošević participated in a joint criminal enterprise as set out in paragraphs 24 to 26. The purpose of this joint criminal enterprise was the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb-dominated state through the commission of crimes in violation of Articles 2, 3, and 5 of the Statute of the Tribunal.").

141. Prosecutor v. Karadžić, Case No. IT-95-5/18-PT, Third Amended Indictment, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2009) ("Radovan Karadžić committed each of the charged crimes in concert with others through his participation in several related joint criminal enterprises . . .").

142. Prosecutor v. Mladić, Case No. IT-09-92-PT, Fourth Amended Indictment, ¶ 5 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 16, 2011) ("Ratko Mladić committed each of the charged crimes in concert with others through his participation in several related joint criminal enterprises . . .").

Tribunal for Rwanda,¹⁴³ the Special Court for Sierra Leone,¹⁴⁴ the Extraordinary Chambers in the Courts of Cambodia,¹⁴⁵ and the Special Tribunal for Lebanon (STL).¹⁴⁶

Political actors have also recognized JCE as a mode of liability in international criminal law. The United States, for example, has approvingly cited JCE as a central feature of the ICTY's contribution to modern international criminal jurisprudence.¹⁴⁷ And recently the President-Elect of Croatia affirmed it as a basis for conviction in a letter to U.N. Secretary-General Ban Ki-moon.¹⁴⁸

D. Analysis: A Successful International Marbury Moment

In light of the above, is the *Tadić* JCE Appeals Chamber Judgment a *Marbury* moment? Yes. It occurred *within the first six years* of the ICTY's life, during one of its first two major cases, satisfying the first criterion. It fulfills the second criterion, given that it involved the Chamber *ruling on an axiomatic principle of law*: a mode of liability by which an individual may be convicted for an

143. See, e.g., Prosecutor v. Karemera et al., Case Nos. ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise (Int'l Crim. Trib. for Rwanda Apr. 12, 2006).

144. See generally Prosecutor v. Sesay et al., Case No. SCSL-04-15-A, Judgment (Spec. Ct. for Sierra Leone Oct. 26, 2009).

145. See generally Case File/Dossier No. 002/19-09-2007/ECCCITC, Decision on the Applicability of Joint Criminal Enterprise (Khmer Rouge Trib. Sep. 12, 2011); Case No. 002/19-09-2007-ECCC/OCIJ (PTC38), Decision on the Appeals Against the Co-Investigative Judges Order on Joint Criminal Enterprise (Khmer Rouge Trib. May 20, 2010).

146. See generally Case No. STL-11-01/I/AC/R176bis, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (Spec. Trib. for Lebanon Feb. 16, 2011).

147. See, e.g., Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, International Criminal Justice 5.0, Remarks (Nov. 8, 2012), <http://www.state.gov/s/l/releases/remarks/200957.htm> ("The ICTY . . . began developing a modern jurisprudence of criminal liability that was based on existing law as applied to a modern ethnic conflict. One of the ICTY's early accomplishments was the Dusko *Tadic* case, which . . . provided a reasoned basis for the seminal conclusion[] . . . *Tadic* could be convicted for his association with a small group of offenders, articulating the concept of *joint criminal enterprise*[,] a central feature of the ICTY's work.").

148. Letter from President Kolinda Grabar-Kitarović, President Elect of the Republic of Croatia, to U.N. Secretary-General Ban Ki-moon (Jan. 15, 2015), <http://www.scribd.com/doc/252974140/Letter-Ban-Ki-moon#scribd> (noting that Vojislav Šešelj has been indicted as being part of a JCE and has already been determined in a previous case to be a member of a JCE).

international crime. Third, the Judgment involved the court *interpreting the Statute in a manner not textually transparent*, given that it invoked a mode of criminal liability that was not explicitly enumerated in the Statute itself.

Did this *Marbury* moment succeed? Again, yes. As noted above, the ruling generated scholarly and practitioner criticism for its questionable interpretation of customary international law, its method of reasoning, and its scope. JCE has nonetheless become the primary basis by which individuals are convicted at the various ad hoc and hybrid tribunals, and political actors have recognized it as a legitimate basis for conviction in international criminal law. Notably, this also amplified the authority of the fledgling tribunal, which was still establishing itself as an arbiter of international criminal law capable of bringing accountability to the former Yugoslavia.

IV. WHY SOME *MARBURY* MOMENTS SUCCEED AND SOME FAIL

The previous sections of this Article have focused on successful *Marbury* moments at the federal, regional, and international level. However, some *Marbury* moments may fail to attain the necessary subsequent judicial and political recognition of its ruling. In other words, every court has its *Marbury* moment, but not every court gains *Marbury*-like acceptance.

What contextual factors determine the success or failure of a *Marbury* moment? This section reviews such factors and applies them to a recent decision by the STL.

A. *The Special Tribunal for Lebanon: A Case Example?*

In 2007, the U.N. Security Council established the STL, a hybrid international criminal tribunal, pursuant to U.N. Security Resolution 1757.¹⁴⁹ Its primary mandate is the prosecution of those responsible for the February 2005 attack in Beirut that killed twenty-two people, including the former Lebanese Prime Minister Rafiq Hariri, and injured many others.¹⁵⁰ The Tribunal also has jurisdiction over attacks in Lebanon between October 1, 2004, and December 12, 2005, which are connected with—and of a similar nature to—the

149. SPECIAL TRIBUNAL LEB., STL CLOSE UP, http://www.stl-tsl.org/images/stories/About/STL_Close-up_EN.pdf.

150. *Id.*

February 2005 attack.¹⁵¹ In contrast to other international criminal tribunals, which traditionally prosecute individuals for the “core crimes” of genocide, crimes against humanity, and war crimes, the STL applies provisions of the Lebanese Criminal Code relating to acts of terrorism and other crimes.¹⁵²

Terrorist acts are usually prosecuted for the underlying crime of the act itself,¹⁵³ not for terrorism in particular. Debate persists as to whether terrorism constitutes an international crime¹⁵⁴ and whether it ever may be defined at all.¹⁵⁵ And most scholars agree that the

151. *Id.* (“The Tribunal also has jurisdiction over . . . crimes carried out on any later date, decided by the parties and with the consent of the UN Security Council, if they are connected to the 14 February 2005 attack.”).

152. Statute of the Special Tribunal for Lebanon, S/RES/1757 (May 30, 2007) [hereinafter STL Statute]. Though the Security Council did initially consider codifying crimes against humanity in the STL Statute, then-Secretary-General Kofi Annan noted in a preliminary report that the Hariri assassination and other terrorist attacks were dissimilar in “scope and number of victims” to other crimes against humanity. *See* Kofi Annan, U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon*, ¶¶ 23–25, U.N. Doc. S/2006/893 (Nov. 15, 2006). Nor did they include genocide—likely because of a lack of specific intent to destroy a requisite group in whole or in part—or war crimes due to the lack of armed conflict. The attacks in Lebanon did not trigger “core crimes” charges and, thus, for this and other jurisdictional reasons, fell outside of the mandate of the International Criminal Court (ICC). Some commentators have noted that terrorist attacks *could* come under the ICC’s jurisdiction for their underlying offenses. *See, e.g.,* Daryl A. Mundis, *Prosecuting International Terrorists*, in *TERRORISM AND INTERNATIONAL LAW: CHALLENGES AND RESPONSES* 85–86 (Michael N. Schmitt & Gian Luca Beruto eds., 2003) (“The ICC does not have specific jurisdiction for crimes considered acts of terrorism. However, the underlying criminal act could provide the basis for one of the crimes for which the ICC *does* have subject matter jurisdiction, such as war crimes or crimes against humanity.”); Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, 20 MICH. ST. INT’L L. REV. 219, 220 (2012) (“With respect to the ICC, it is time to see the reality for what it is a viable option to help strengthen international combat against terrorism is not being used due to political impediments.”).

153. *See* BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 10 (2006).

154. Scott P. Sheeran, *Reconceptualizing States of Emergency Under International Human Rights Law: Theory, Legal Doctrine, and Politics*, 34 MICH. J. INT’L L. 491, 542 (2013) (“As is well known, the meaning of terrorism is controversial and it is not a clearly defined term under international law.”); Alexander K. A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT’L L. 969, 1035 n.217 (2014) (“Recent attention has focused on whether terrorism should be prosecuted as an international crime . . .”).

155. *See generally* Jacqueline S. Hodgson & Victor Tadros, *The Impossibility of Defining Terrorism*, 16 NEW CRIM. L. REV. 494 (2013); Upendra D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, 37 DENV. J. INT’L L. & POL’Y 653, 655 (2009) (“Terrorism remains a nebulous concept for the international legal system mainly because it has no acceptable definition.”).

international community has not reached consensus regarding the definition of terrorism under international law.¹⁵⁶ Particular challenges include the identification of types of conduct that may constitute a terrorist act, the relationship between the act and the ultimate terrorist purpose, the types of targets involved, the necessity of actual terrorizing and intimidation of people as an act, and who/what may act as a terrorist agent.¹⁵⁷ Indeed, as many scholars have maintained, “the definitional question is, by nature, a subjective one that eludes large-scale consensus.”¹⁵⁸

On January 17, 2011, the STL Prosecutor submitted a sealed indictment to the Pre-Trial Judge for confirmation.¹⁵⁹ During his deliberation, the Pre-Trial Judge, acting pursuant to Rule 68(G) of the Tribunal’s Rules of Procedure and Evidence, asked the Appeals Chamber to resolve certain legal issues in order for him to confirm the indictment. Among other things, the Judge asked the related questions of whether the Tribunal should apply international law in defining the crime of terrorism and, if so, how he should reconcile the international law of terrorism with any differences in the Lebanese Criminal Code. He also asked the Appeals Chamber about the objective and subjective elements of the crime of terrorism that the Tribunal must apply.¹⁶⁰ On February 16, 2011, the Appeals Chamber held, *inter alia*, that while the “clear language” of the STL Statute provided that the Tribunal must apply the provisions of the

156. TERRORISM AND INTERNATIONAL CRIMINAL LAW 46 (Sara Fiorentini ed., 2013) (“[T]he conventional view [is] that the international community has not yet reached consensus on a general definition of terrorism.”); Chiara Ragni, *The Contribution of the Special Tribunal for Lebanon to the Notion of Terrorism: Judicial Creativity or Progressive Development of International Law?*, in INTERNATIONAL COURTS AND THE DEVELOPMENT OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF TULLIO TREVES 671 (N. Boschiero et al. eds., 2013) (“The question of defining international terrorism has always been regarded . . . as a ‘stumbling-block’ in international law.”).

157. See Hodgson & Tadros, *supra* note 155, at 499.

158. Sudha Setty, *What’s in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT’L L. 1, 6–7 (2011).

159. The contents of the indictment were left confidential at the time. See Press Release, Special Tribunal for Lebanon, STL Prosecutor Submits an Indictment to the Pre-Trial Judge (Jan. 17, 2011), <https://www.stl-tsl.org/en/news-and-press/press-releases/210-stl-prosecutor-submits-an-indictment-to-the-pre-trial-judge>.

160. Prosecutor v. Ayyash, Case No. STL-11-01/I, Appeals Chamber, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶ 1 (Spec. Trib. for Lebanon Feb. 16, 2011) (“Whether the Tribunal should apply international law in defining the crime of terrorism; if so, how the international law of terrorism should be reconciled with any differences in the Lebanese domestic crime of terrorism; and in either case, what are the objective and subjective elements of the crime of terrorism to be applied by the Tribunal.”).

Lebanese Criminal Code,¹⁶¹ treaty and customary international law could give further guidance regarding interpretation of the definition.¹⁶²

Preliminarily, the Appeals Chamber reviewed the Lebanese definition of terrorism and reaffirmed that the Statute obligated it to apply this definition.¹⁶³ The Appeals Chamber then focused on the definition in the Arab Convention for the Suppression of Terrorism, the only treaty that Lebanon has ratified providing a definition of terrorism.¹⁶⁴ The Chamber reasoned that it could not apply the Convention directly as an independent source of law because the purpose of the Convention's definition of terrorism was to enable prosecution, not to change domestic criminal codes.¹⁶⁵ However, the Chamber held that the Arab Convention definition could still be relevant for purposes of interpreting the Lebanese Criminal Code.¹⁶⁶

The Chamber then turned to customary international law, which it noted also bound Lebanon and could be useful in interpreting the Lebanese definition of terrorism. Notably, the Chamber reasoned that, even though both the Prosecution and Defense had argued that no settled definition of terrorism existed, one had in fact "gradually emerged."¹⁶⁷ The Chamber drew on regional treaties, U.N. resolutions, and national legislation and case law to demonstrate the requisite *opinio juris* and state practice to constitute a customary rule of international law regarding terrorism as an international crime in times of peace.¹⁶⁸ According to the

161. *Id.* ¶ 44 ("The clear language of Article 2, which is unaffected by other contextual factors, therefore leads us to conclude that the Tribunal must apply the provisions of the Lebanese Criminal Code, and not those of international treaties ratified by Lebanon or customary international law to define the crime of terrorism.").

162. *Id.* ¶ 62. Notably, the Prosecutor had argued that the Tribunal could only rely on international law if there were gaps in Lebanese law, whereas the Defense argued primarily that international law may not be considered because Lebanese law is sufficiently clear.

163. *Id.* ¶ 43.

164. *Id.* ¶¶ 63–82.

165. *Id.* ¶ 80.

166. *Id.* ¶ 82.

167. *Id.* ¶ 83; *see also id.* ¶¶ 44–45.

168. *Id.* ¶¶ 85–123. The Appeals Chamber cited to, e.g., the Council of the European Union, Council Framework Decision 2002/475/JHA on Combating Terrorism, arts. 1–4, 2002 O.J. (L 164) 3, 4–5, G.A. Res. 64/118, ¶ 4 (Dec. 16, 2009), S.C. Res. 1566, ¶ 3 (Oct. 8, 2004), International Convention for the Suppression of the Financing of Terrorism arts. 2(1)(b), 3, Dec. 9, 1999, 2178 U.N.T.S. 197, as well as the laws and/or court decisions of countries such as Jordan, Tunisia, Belgium, Italy, Germany, Colombia, Chile, the United States, Uzbekistan, and the Seychelles. *Ayyash*, Case No. STL-11-01/I ¶¶ 85–123.

Appeals Chamber, the customary rule requires “three key elements”:

- (i) the perpetration of a criminal act . . . or threatening such an act; (ii) the intent to spread fear among the population . . . or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element.¹⁶⁹

The Appeals Chamber also ruled that terrorism was a criminal offense under international law¹⁷⁰ and that it may take such customary law into account when construing Lebanese criminal law.¹⁷¹

Does the STL Appeals Chamber decision constitute a *Marbury* moment? Of course, the ruling meets the first three criteria. The case was indeed handed down *early in the history of the Tribunal*, just a few years into the life of its first case. And the Tribunal ruled on an *axiomatic principle of law*, namely, the nexus between the Lebanese criminal code, the STL statute, and international law. And third, it did so in a *manner that is not textually* transparent, given that the STL statute restricts the tribunal to applying Lebanese criminal law and few had previously recognized terrorism as an international crime pursuant to customary international law.

However, the success of the decision—and of the STL generally—remains an open question. Indeed, myriad legal and political challenges may imperil the Tribunal’s international legal legacy. On the legal front, some academics hailed the Appeals Chamber’s decision, given it was the first international tribunal to recognize a customary international legal basis for terrorism as an international crime.¹⁷² Indeed, one commentator claimed that it would “likely serve as a cornerstone decision in setting the legal

169. *Ayyash*, Case No. STL-11-01/I, ¶ 85.

170. *Id.* ¶¶ 103–05. As noted above, the Appeals Chamber concluded by answering a variety of other questions from the Pre-Trial Chamber, including modes of responsibility and cumulative charging. *Id.* ¶¶ 89–149.

171. *Id.* ¶¶ 114–23.

172. Michael P. Scharf, *Special Tribunal for Lebanon Issues Landmark Ruling on Definition of Terrorism and Modes of Participation*, ASIL INSIGHTS (Am. Soc’y Int’l Law, Washington, D.C.), Mar. 4, 2011, <http://www.asil.org/insights/volume/15/issue/6/special-tribunal-lebanon-issues-landmark-ruling-definition-terrorism-and>; Cohen, *supra* note 152, at 220 (describing “a path-breaking decision by the Special Tribunal of Lebanon concerning the definition of terrorism”); Ragni, *supra* note 156, at 682–83 (“[T]he Appeals Chamber . . . made a very important and valuable contribution to the progressive development of the customary international law on terrorism . . .”).

constituencies of the crime of terrorism in international law.”¹⁷³ Though not explicitly mentioning the decision, at least one other has cited terrorism as an international crime, potentially in the same pantheon as genocide, crimes against humanity, and war crimes.¹⁷⁴ And another has explicitly contemplated whether the decision will enter the “international law’s hall of fame” alongside *Nicaragua v. United States*, *Prosecutor v. Tadić*, and *Prosecutor v. Akayesu*.¹⁷⁵ Others recognized the decision’s importance, believing that it could foster international consensus regarding the crime of terrorism.¹⁷⁶

But other scholars have criticized the ruling on various grounds.¹⁷⁷ One commentator, for example, argues that the “close analysis of relevant treaties, U.N. resolutions, national laws and national judicial decisions confirms the near-universal scholarly consensus that there does not yet exist a customary law crime of

173. Nidal Nabil Jurdi, *Falling Between the Cracks: The Special Tribunal for Lebanon’s Jurisdictional Gaps as Obstacles to Achieving Justice and Public Legitimacy*, 17 U.C. DAVIS J. INT’L L. & POL’Y 253, 257 (2011).

174. ANTONIO CASSESE & PAOLA GAETA, CASSESE’S INTERNATIONAL CRIMINAL LAW 146–58 (3d ed. 2013).

175. Manuel J. Ventura, *Terrorism According to the STL’s Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?*, 9 J. INT’L CRIM. JUST. 1021, 1042 (2011) (“Whether one agrees or disagrees with the STL’s conclusions on terrorism, one thing is undeniable: as the latest of the international tribunals, the ‘newest kid on the block’ has certainly started to make a name for itself with its decision. With the Hariri indictment and the identities of the suspects now in the public domain, together with the recent rulings by the Pre-Trial Judge on three connected cases and their deferral to the STL, things are likely to get more interesting far more quickly.”).

176. Harmen van der Wilt, *The Legacy of the Special Tribunal for Lebanon*, in THE SPECIAL TRIBUNAL FOR LEBANON: LAW AND PRACTICE 274 (Amal Alamuddin et al. eds., 2014) (“[T]he Tribunal may have made a huge contribution to the definition of terrorism under international law, and has perhaps succeeded in partially ending the exasperating stalemate which has resulted from quibbling states following their own political agendas and remaining unable to reach some kind of satisfactory consensus.”); Scharf, *supra* note 172 (“This decision will likely have a momentous effect on the decades-long effort of the international community to develop a broadly acceptable definition of terrorism.”).

177. See, e.g., Nidal Nabil Jurdi, *The Crime of Terrorism in Lebanese and International Law*, in THE SPECIAL TRIBUNAL FOR LEBANON: LAW AND PRACTICE 87 (Amal Alamuddin et al. eds., 2014) (“[T]he STL did not ‘find’ a crystallized definition for terrorism but likely engaged in a lot of creativity in order to push the law forward. This may be problematic for the upcoming trials at the STL, but it may ultimately be considered a positive step for the future of international criminal law.”); Stefan Kirsch & Anna Oehmichen, *Judges Gone Astray: The Fabrication of Terrorism as an International Crime by the Special Tribunal for Lebanon*, 1 DURHAM L. REV. 32 (arguing that the Appeals Chamber’s finding was unnecessary and that neither criteria for recognition of a customary international legal rule was satisfied).

terrorism as defined by the Tribunal.”¹⁷⁸ Others have noted that the definition is both over-inclusive and under-inclusive, lending itself to a potentially expansive interpretation and misuse by authorities seeking to repress dissent.¹⁷⁹ Yet another criticism holds that terrorism is a serious treaty-based crime, but does not rise to the level of being a “true” or core international crime.¹⁸⁰

Furthermore, the increasing perception of an institutionally isolated STL has weakened domestic and international acceptance of the Appeals Chamber’s decision. More than seven years into its existence, many perceive the STL as struggling on multiple fronts. First, the STL had to contend with the death of its legendary president, Antonio Cassese,¹⁸¹ and the resignation of the presiding judge of the Trial Chamber shortly before the main trial was to begin.¹⁸² It has also been forced to contend with the leaks of the names of protected witnesses.¹⁸³ Most notably, the accused in the

178. Ben Saul, *Civilizing the Exception: Universally Defining Terrorism*, 14 IUS GENTIUM 79, 80–81 (2012).

179. See, e.g., Matthew Gillett & Matthias Schuster, *Fast-Track Justice: The Special Tribunal for Lebanon Defines Terrorism*, 9 J. INT’L CRIM. JUST. 989, 991 (2011) (criticizing the decision in part for “its far-reaching interpretation of the crime under the STL’s jurisdiction, which conflicts with the unambiguous legislative intent to adhere to the Lebanese form of the crime of terrorism [and] its somewhat problematic approach to setting out the modes of individual criminal responsibility”).

180. Kai Ambos, *Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism Under International Law?*, 24 LEIDEN J. INT’L L. 655, 675 (2011) (“[A]t this juncture, one may consider terrorism, at best, as a particularly serious transnational, treaty-based crime that is—probably comparable to torture—on the brink of becoming a true international crime.”).

181. Press Release, Special Tribunal for Lebanon, Judge Antonio Cassese Dies (Oct. 22, 2011), <http://www.stl-tsl.org/en/media/press-releases/22-10-2011-judge-antonio-cassese-dies>.

182. Press Release, Special Tribunal for Lebanon, Trial Chamber Presiding Judge Resigns (Sep. 10, 2013), <http://www.stl-tsl.org/en/media/press-releases/10-09-2013-trial-chamber-presiding-judge-resigns>; Kareem Shaheen, *Head of Trial Chamber Latest STL Resignation*, DAILY STAR (Sep. 11, 2013), <http://www.dailystar.com.lb/News/Lebanon-News/2013/Sep-11/230816-head-of-trial-chamber-latest-stl-resignation.ashx> (“After a replacement for [Presiding Judge] Roth is selected, the STL will be on its third trial chamber chief, fourth registrar, second president and second prosecutor, in just four years of operation.”).

183. *Website Leaks Lebanon Tribunal Witness List*, AL-AKHBAR ENGLISH (Apr. 9, 2013), <http://english.al-akhbar.com/node/15485>; see also Meris Lutz, *Is Lebanon’s Special Tribunal a Turning Point in International Law?*, AL-JAZEERA AMERICA (Apr. 11, 2014), <http://america.aljazeera.com/articles/2014/4/11/lebanon-s-specialtribunalturningpointforinternationallaw.html> (“International tribunals are frequently criticized. But the STL faces more serious criticism: In politically fractious Lebanon, its narrow mandate and the fact that none of the five suspects is in custody has called into question whether the court can bring

primary case are still at large, and Hezbollah has publicly stated that they will never be arrested.¹⁸⁴ The Tribunal has thus engaged in the procedural option of trials in absentia, i.e., trials without the presence of the accused.¹⁸⁵ This type of proceeding, which Lebanese law provides for,¹⁸⁶ obviously weakens the STL's perceived legitimacy.

Meanwhile, perceptions of the Tribunal's political nature continue to dog the Tribunal. Many believe that the U.S. government and Sunni Muslim countries are funding the STL merely to prosecute members of Shia Muslim state and non-state actors such as Syria, Iran, and Hezbollah.¹⁸⁷ The Lebanese government has at times threatened to withhold its share of funds from the Tribunal,¹⁸⁸ while certain domestic parties have abandoned support for it altogether.¹⁸⁹

the perpetrators to justice and send a clear message to would-be terrorists. Meanwhile, Hezbollah, which maintains its innocence, has refused to hand them over, as it does not recognize the legitimacy of the court.”).

184. *Hezbollah Leader Nasrallah Rejects Hariri Indictments*, BBC NEWS (July 2, 2011), <http://www.bbc.com/news/world-middle-east-14004096>.

185. See generally Prosecutor v. Ayyash et al., Case No. STL-11-01, Decision on Defence Appeals Against Trial Chamber's Decision on Reconsideration of the Trial in Absentia Decision (Spec. Trib. for Lebanon Nov. 1, 2012); Press Release, Special Tribunal for Lebanon, Ayyash et al. Case Opens at the Special Tribunal for Lebanon (Jan. 16, 2014), <http://www.stl-tsl.org/en/media/press-releases/16-01-2014-ayyash-et-al-case-opens-at-the-special-tribunal-for-lebanon>.

186. STL Statute, *supra* note 152, at art. 22 (“The Special Tribunal shall conduct trial proceedings in the absence of the accused, if he or she: (a) Has expressly and in writing waived his or her right to be present; (b) Has not been handed over to the Tribunal by the State authorities concerned; (c) Has absconded or otherwise cannot be found and all reasonable steps have been taken to secure his or her appearance before the Tribunal and to inform him or her of the charges confirmed by the Pre-Trial Judge.”); Beth Van Schaak, *Trials in Absentia Under International, Domestic and Lebanese Law*, JUST SECURITY (Jan. 18, 2014), <http://justsecurity.org/5839/trials-absentia/>.

187. Q&A: *Hariri Tribunal*, BBC NEWS (Jan. 16, 2014), <http://www.bbc.com/news/world-middle-east-12182326> (“From the very start, the tribunal has been a political flashpoint in Lebanon, pitting pro-Western groups linked to then-Prime Minister Saad Hariri, who is Rafik Hariri's son, against Hezbollah and its allies, backed by Syria and Iran. Lebanon's largest political factions are generally split into Sunni and Shia camps that are closely allied to opposing Middle East powers. The backers of Lebanon's pro-Western camp, the US and Saudi Arabia, are engaged in a wider contest with the Shia power of Iran and its ally Syria, who support Hezbollah Many Sunni Muslims in Lebanon sympathise with the Syrian rebels, while the militant Shia movement Hezbollah and its supporters back President Bashar al-Assad.”); Jim Muir, *Lebanon Polarised as Hariri Tribunal Opens*, BBC NEWS (Jan. 16, 2014), <http://www.bbc.com/news/world-middle-east-25749185>.

188. See, e.g., U.S. Dep't of State, *U.S. Announces Additional \$10 Million Contribution to Special Tribunal for Lebanon*, DIPNOTE (Nov. 3, 2010), <https://blogs.state.gov/stories/2010/11/03/us-announces-additional-10-million-contribution-special-tribunal-lebanon>.

189. See, e.g., Michael Young, *Jumblatt Shifts with the Wind, But So Do Lebanese*

In 2011, controversy regarding the Tribunal triggered a collapse of the government.¹⁹⁰ Lebanese journalist Michael Young has summed up the situation thusly:

A Lebanese divorce [with regard to funding and staffing of judges] from the Special Tribunal would play against the initial intent underlying the tribunal's establishment: to bolster the rule of law in Lebanon, and more specifically to ensure that there would no longer be impunity for political assassination in the country. . . . This disconnect between Lebanon and the tribunal would be taken to its extreme if none of the individuals indicted is in the dock, so that the trial is conducted mostly or entirely in absentia. . . . But what would constitute "success" if no one is in court, if Lebanon proclaims that it will have nothing to do with the tribunal, and if the idealistic ambitions that accompanied the setting up of the institution have all evaporated? If success means the process moves forward to some intellectually stimulating climax, because the case embodies legal novelties, but with none of the guilty ever punished, then this seems a fairly low standard. The Lebanese surely deserve better.¹⁹¹

B. Success vs. Failure: Internal and External Factors

Given this perilous state of proceedings, will the STL decision constitute a successful *Marbury* moment? It is too soon to tell, but a multi-factor analysis shows cause for concern.

As noted previously, Professor Ferejohn has described the "stickiness" of *Marbury* moments that may or may not become binding law.¹⁹² Indeed, other branches of government may thwart a

Fortunes, NATIONAL (Jan. 27, 2011), <http://www.thenational.ae/thenationalconversation/comment/jumblatt-shifts-with-the-wind-but-so-do-lebanese-fortunes>.

190. Leila Fadel & Moe Ali Nayel, *Beirut Quiet a Day After Hezbollah Pullout Forces Collapse of Lebanon's Government*, WASH. POST (Jan. 13, 2011), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/12/AR2011011200588.html>.

191. Michael Young, *Can Lebanon Kill Its Own Tribunal?*, NOW (Apr. 2, 2011), https://now.mmedia.me/lb/en/commentary/can_lebanon_kill_its_own_tribunal.

192. John Ferejohn, *Judicial Power: Getting It and Keeping It*, in CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVE 359–61 (Diana Kapiszewski, Gordon Silverstein & Robert A. Kagan eds., 2013).

court's assertion of judicial power by ignoring the court's decision, stripping the court of jurisdiction, or forcing it to change its constitutional approach.¹⁹³ Ferejohn thus argues for the necessity of three contextual factors for judges to successfully assert power: the nature of the society, the structural features of the political and legal regime, and the leadership ability of the leading judges.¹⁹⁴ He also rightly notes that a proper account of "stickiness" requires an understanding of the political characteristics of that time.¹⁹⁵ Such *contextual factors* contributing to a successful *Marbury* moment are distinguishable from the *definitional elements*, analyzed above, that constitute a *Marbury* moment.

Upon closer analysis, the contextual factors essentially fall within two broad categories: *internal* factors related to the court and its ruling, and *external* factors related to the society. Internal factors may include the legal strength and persuasiveness of the opinion, the charisma of its author, and the court's leadership. External factors may include the demands that the opinion imposes on the political actors, the willingness of such actors to act in contravention of the ruling, the availability of legislative or other measures for political actors to override the court, and the manner in which the lower courts interpret and abide by the ruling.

Marbury and *Tadić* both exemplify courts creating their own acceptance. For example, *Marbury* may have succeeded due to the leadership ability of Chief Justice Marshall himself,¹⁹⁶ who authored the opinion and is seen, at least from the Marshall School vantage point, as having shepherded the court through a politically contentious era in the wake of the election of 1800. Indeed, Marshall arguably understood the external environment in the young United States and crafted a persuasive opinion requiring no affirmative action by Jefferson or others in his government. For its part, *Tadić* surely succeeded because of the leadership ability of the judges, including former Professor Antonio Cassese, who presided over the

193. *Id.* at 357. And of course, a *Marbury* moment need not only fail based on a lack of political recognition: the judiciary within a given jurisdiction may also reject or undermine the doctrine. Though it is unlikely within the U.S. federal framework, it is more conceivable in a country where a judiciary is being established and a lower court fails to rule in a manner consistent with that of a higher court. Or a member state's court may fail to comply with a regional court's judgment.

194. *Id.* at 358.

195. *Id.* at 360.

196. Of course, the Historical School might argue that *Marbury* reaffirmed a judicial review power that, to some degree, society already recognized by the time of the election of 1800.

Appeals Chamber in this particular case and was serving as President of the Tribunal at that time. Seen by many as the father of modern international criminal law, Cassese also had the scholarly credentials to generate a vast, almost-theoretical Appeals Chamber decision. In addition, the *Tadić* judges may have recognized that customary international law could be clearly articulated by international judges to fill out the gaps in the Statute. The judges may have also realized that *external* factors were also relevant: individuals from the former Yugoslavia had no power to override the JCE doctrine, and they were the only ones who could reasonably allege that the ICTY was unfairly manipulating customary international law to prosecute via JCE. Indeed, ICTY jurisdiction almost completely precluded the prosecution of Security Council member states' nationals pursuant to JCE or any other mode of criminal liability. These states—the only ones with the power to alter the underlying the Statute—were thus more likely to give the Tribunal a wide berth to fulfill its mandate.

By contrast, *Marbury* moments will fail when the internal and external factors balance against judicial and political acceptance. One such example is the Russian Constitutional Court of the 1990s, Russia's first experience with an independent judiciary of equal power to other branches of government.¹⁹⁷ As Shalev Roisman has noted, the Russian court pursued a different tack from the U.S. Supreme Court. Whereas the latter spent decades accumulating power by ruling in favor of the federal government on federalism issues, the Russian court picked its allies poorly in separation-of-power disputes between the executive and legislature.¹⁹⁸ Indeed, from 1991 to 1993, the court often ruled on the constitutionality of decrees made by then-President Boris Yeltsin regarding the Russian Communist Party and other contentious issues.¹⁹⁹ Such rulings prompted Yeltsin to ultimately suspend the court in 1993.²⁰⁰ A later, a restructured Constitutional Court was established upon the ratification of the new 1993 Constitution.²⁰¹

From this vantage point, the STL decision may lack the necessary external and internal factors to succeed as a *Marbury* moment. Internally, though the same judge, President Antonio

197. Elliot Stanton Berke, Recent Development, *The Chechnya Inquiry: Constitutional Commitment or Abandonment?*, 10 EMORY INT'L L. REV. 879, 905 (1996).

198. Lee Epstein, Jack Knight & Olga Shvetsova, *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117, 149–52 (2001).

199. *Id.*

200. *Id.* at 152 n.43.

201. Berke, *supra* note 197, at 907.

Cassese, presided over the writing of the Appeals Chamber's decision, his subsequent death and the loss of other judges within the Tribunal have affected its stature. The STL is also only conducting one major trial,²⁰² which is itself often criticized for conducting proceedings in absentia,²⁰³ thus meaning that it has had limited effect. By contrast, the ICTY has reaffirmed JCE in a majority of the seventy-four cases in which individuals have been sentenced and has elucidated a JCE doctrine accepted by several subsequent international criminal tribunals. At this time, terrorism is not a crime codified in the founding statutes of the International Criminal Court (ICC) or any of the other international criminal tribunals.

External factors also suggest that the STL is vulnerable. In contrast to a domestic court, which almost by definition has greater external legitimacy because it is rooted in a constitution, the STL's hybrid nature means that it is affiliated with, but not fully part of, the Lebanese criminal justice system and thus lacks perceived legitimacy amongst the Lebanese. Indeed, some within Lebanon contest the legality of the Tribunal's creation. Today the fragmented Lebanese political system—which still remains deeply divided and suffers from communal tensions—has rendered the Tribunal a polarizing issue, particularly for those in the population who view it as a political institution unfairly targeting Shia Muslims.²⁰⁴ It is thus unclear whether it will have an impact on any relevant judicial or political actors.²⁰⁵

202. See generally *The Cases*, SPECIAL TRIBUNAL FOR LEB., <http://www.stl-tsl.org/en/the-cases>.

203. See, e.g., Wayne Jordash & Tim Parker, *Trials in Absentia at the Special Tribunal for Lebanon: Incompatibility with International Human Rights Law*, 8 J. INT'L CRIM. JUST. 487 (2010).

204. Marieke Wierda et al., *Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon*, 5 J. INT'L CRIM. JUST. 1065, 1075 (2007) ("In an interview, on the subject of the tribunal with one of the authors, a representative from Hezbollah similarly expressed the view that 'the party opposes the setting up of any tribunal whose authority transcends the Lebanese law and state sovereignty.' At the same time, while Hezbollah made a public statement denouncing Security Council Resolution 1757 (2007), it seems not to be opposed to a trial per se, but would apparently like any trial to be a matter of Lebanese jurisdiction and sovereignty. Hezbollah has not communicated any of its objections to the tribunal in writing, nor has it engaged directly in terms of providing a critique of the legal aspects of the tribunal. In this sense its ultimate position remains very much to be seen. The March 14 alliance views Hezbollah's position as mainly intended to shield Syria, which it suspects of involvement in the Hariri assassination.").

205. In another sign of the Tribunal's weak deterrent effect, as recently as January 2015, there was a terrorist bombing in Tripoli, part of a cycle of violence that has developed since the Syrian civil war. *Lebanon Violence: Bomb Blast Hits Northern City of Tripoli*, BBC NEWS (Jan. 10, 2015), <http://www.bbc.com/news/world-middle-east-30765820>.

In sum, the three successful *Marbury* moments reviewed above succeeded because a mix of internal and external factors cut in their direction. The STL still has great potential to make a legal and historical impact, contributing to an end to impunity within Lebanon. However, if the Tribunal's weaknesses and Lebanese challenges persist as they have, the court may not achieve a successful *Marbury* moment.

V. *MARBURY* MOMENTS AS THRESHOLDS OF LEGITIMACY IN AN INTERNATIONAL JUDICIAL SYSTEM

As already discussed above, every court has its *Marbury* moment. But not every court gains or deserves *Marbury*-like acceptance; such traction must be earned. Some moments may endure and stick—and some may not. This turns on whether the court can win and sustain long term political legitimacy. Whether it succeeds or not involves a combination of internal and external factors. This Article concludes by situating these moments in the burgeoning international judicial system.

Adjudication is a prime mode of establishing the rule of law not only at the domestic, but also at the regional and international levels.²⁰⁶ As has become increasingly clear in recent decades, international law is no longer simply spreading and deepening across the world via bilateral and multilateral treaties; it is expanding and developing through a “community of courts” borrowing from each other's jurisprudence on a transnational level.²⁰⁷ Indeed, in the past two decades, judicial institutions have multiplied into “more than a

206. Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 225–26 (2012) (“The creation and operation of international judicial bodies that are capable of enforcing international commitments, interpreting international treaties, and settling international conflicts have facilitated the growth of international legal norms and cooperative regimes governing important areas of international law and politics, such as economic relations, human rights, and armed conflicts. International courts—understood in this article as independent judicial bodies created by international instruments and invested with the authority to apply international law to specific cases brought before them—have thus become important actors as well as policy instruments in the hands of international lawmakers. Such courts serve, in some respects, as the lynchpin of a new, rule-based international order, which increasingly displaces or purports to displace the previous power-based international order.”).

207. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192 (2003). See generally Shany, *supra* note 206; Cesare P. R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

dozen fully functioning international courts and several dozen quasi-judicial, implementation-control and sundry dispute-settlement bodies.”²⁰⁸ Such judicial bodies, as in any legal order, aim “to ensure that international law is observed and that disputes arising out of its implementation or interpretation are settled peacefully and in an orderly fashion.”²⁰⁹ They are called upon to promote compliance with governing international norms, resolve international disputes, contribute to the operation of related institutional and normative regimes, and legitimize associated international norms and institutions.²¹⁰

In this era of proliferation, scholars are increasingly recognizing the necessity of international adjudication and focusing attention on the interaction between courts.²¹¹ Indeed, given the emergence of an international judicial system in recent decades, national and international courts are interacting with greater frequency and immediacy.²¹² International courts have reached a state of maturity, capable of “convicting people of international crimes,” “exercising compulsory jurisdiction over trade disputes,” and safeguarding the “rights of individuals against [their own] governments.”²¹³ In other words, the authority of international and regional courts has hardened to the point where it increasingly shapes and influences domestic jurisdictions.

Looking to the future, courts will continue to proliferate and be proposed as solutions to various kinds of international problems. When will a court be effective in addressing such issues? A central consideration is whether a court possesses the right combination of

208. Cesare P. R. Romano, *Can You Hear Me Now? The Case for Extending the International Judicial Network*, 10 CHI. J. INT’L L. 233, 234 (2009).

209. *Id.*

210. Shany, *supra* note 206, at 244–47.

211. See John O. McGinnis, *Medellin and the Future of International Delegation*, 118 YALE L.J. 1712, 1717 (2009) (“In an interdependent world, regulatory matters may often be too complicated to resolve by international agreement without leaving to agents the job of working out their details and implementation. But nations will not trust other nations’ domestic agents to be faithful to the international scheme in implementation and enforcement for the same reason that they could not rely on national decisions to address the international problem in the first place. Thus, international agreements are likely to turn to international delegations for enforcement.”).

212. See generally Martinez, *supra* note 4, at 443 (“These phenomena—the proliferation of international courts, the interpenetration of domestic and international legal systems, the increase in the frequency and variety of interactions between and among national and international courts—have not escaped scholarly notice.”); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

213. Martinez, *supra* note 4, at 432.

internal composition and external legitimacy capable of achieving a *Marbury* moment. Once a court is established, it may seize authority through a combination of legal craft and political foresight. If it cannot do that, it is not worth having.

Marbury moments are a lens through which we enhance our understanding of this growing system of international adjudication. Such moments are important thresholds of legitimacy when something not textually transparent becomes relevant within a given jurisdiction. From this vantage point, *Marbury* moments represent the instant when international tribunals gain legitimacy in the eye of the beholder. Indeed, the case examples above reveal courts as institutional actors establishing themselves on a legal, political, and even geopolitical stage. For example, in *Costa* “[t]he ECJ’s goal was to further European integration, and to increase the effectiveness of the European legal system.”²¹⁴ The *Tadić* Appeals Chamber bolstered the effectiveness and strength of an intrepid war crimes tribunal, the first in the modern era.

It is thus all the more regrettable when courts cross this threshold but fail to earn the necessary recognition from others around the world. For example, in the 2006 case, *Sanchez-Llamas v. Oregon*, a divided U.S. Supreme Court accorded “respectful consideration”—as opposed to comity, which is traditionally conferred on foreign courts—to an International Court of Justice (ICJ) ruling on a nearly-identical issue regarding interpretation of Article 36 of the Vienna Convention on Consular Relations (VCCR).²¹⁵ However, the Court ultimately rejected the ICJ’s ruling that Article 36 could override domestic procedural default rules, instead holding that such rules still apply and suppression of evidence is not an appropriate remedy for VCCR violations.²¹⁶ Such a ruling was undesirable for several legal and policy reasons,²¹⁷ among them the fear that a more parochial disregard for other courts will undermine the stability of law in such areas as property rights, business relations, and human rights.²¹⁸ Indeed, the risk is that *Marbury* moments of legitimation occur, certain national and international actors recognize the courts’ legitimacy, but other national actors either reject the decisions of these courts or deal with

214. ALTER, *supra* note 9, at 20.

215. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006).

216. See *id.* at 353–57. See generally Steven Arrigg Koh, Note, “Respectful Consideration” After *Sanchez-Llamas v. Oregon*: Why the Supreme Court Owes More to the International Court of Justice, 93 CORNELL L. REV. 243 (2007).

217. Koh, *supra* note 216, at 264–73.

218. Martinez, *supra* note 4, at 444.

them opportunistically.

The *Marbury* moments concept reveals that the traditional trope of democratic deficit is incomplete in a transnational context. Though the democratic deficit critique of international institutions may manifest in various forms,²¹⁹ it frequently holds that international organizations wield too much power vis-à-vis citizens of individual nations and that the delegation of its powers are too attenuated to be democratic. International organizations are said to “dilute” the votes of a citizen, lacking procedural checks such as congressional oversight, and are created and approved in negotiations from members of the executive branch that are rarely elected.²²⁰ Thus, while international courts may be necessary to address international problems and adjudicate disputes arising under international law, their work is less transparent than that of domestic courts and less open to control by the U.S. democratic process.²²¹ Pursuant to this line of critique, international courts are said to be doubly susceptible to such attacks, given the counter-majoritarian difficulty inherent in all courts.²²²

219. Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance* (Paris, 1919), 10 IND. J. GLOBAL LEGAL STUD. 45, 48 (2003) (“What does it mean to say that there is a democratic deficit at the international level? Consider three possibilities: First, international organizations are not run in a democratic manner vis-à-vis participating states. Second, international law and treaties do not sufficiently mandate democracy within each state. Third, international organizations are not run in a democratic manner vis-à-vis the public.”); Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT’L L. 43, 45 (2012) (“The chorus of critiques that are levelled at the courts and tribunals with respect to their engagement with local populations can be grouped into three types of argument, ranging from a minor demand for more transparency to a radical demand for international criminal justice only by prior democratic consent.”).

220. Paul J. Valentine, *People in Glass Houses Shouldn’t Throw Stones: Why the Democracy Deficit Argument Against Intergovernmental International Organizations Carries Little Weight in the United States of America*, 2 PHOENIX L. REV. 83, 90–91 (2009). But see Glasius, *supra* note 219, at 63 (“One thing becomes abundantly clear from a survey of the gamut of theories on the basis for and functions of criminal justice: none suggests that the organization of punishment of crimes in a society does or should have democratic foundations in a direct, representative sense.”).

221. McGinnis, *supra* note 211, at 1714; Valentine, *supra* note 220, at 90 (“The democracy deficit controversy in intergovernmental international organizations hinges on . . . [the fact] that governments and not the electorate, select individuals who become the country’s legal representative in the international community. Thus, governments act by proxy, leaving the electorate to act by proxy of a proxy. Many commentators perceive that a state’s acceptance of international law and intergovernmental international organizations fundamentally shifts a critical aspect of sovereignty—the right to prescribe and determine the scope and meaning of legal obligations.”) (emphasis omitted).

222. Martinez, *supra* note 4, at 461–62.

And yet, as demonstrated above, courts may gain legitimacy despite being established outside of a domestic constitutional framework. Indeed, many international courts are not simply issuing advisory opinions: in the wake of a successful *Marbury* moment, stakeholders are obeying opinions by unelected judges on matters of life or death. Thus, whether someone voted cannot be the key criterion of whether a tribunal deserves legitimacy. Democratic input is, instead, one external factor among many of the internal and external factors articulated above when evaluating a court's effectiveness and authority in a system of international adjudication. Whether a court has effectively and enduringly asserted its authority is another central element in this evaluation. If it has done so, democratic legitimacy may become a self-fulfilling prophecy: something persuades the democratic political actors to get behind the rulings of an unelected court and the democratic deficit is cured.

In sum, the rule of law's core is political decision-makers recognizing the legitimacy of reasoned adjudication. *Marbury* moments show that when a tribunal crosses a legitimation threshold, their rulings should have the impact of law and the respect of the international law community. *Marbury* moments no longer only transpire within domestic settings, with clear lines of executive, legislative, and judiciary power; they occur at the regional and international level, thus impacting how courts around the world should view them.

CONCLUSION

This Article has introduced the *Marbury* moments concept; future scholarship may expand upon the definition, the external and internal factors, and the implications for such moments for regional and international courts created in the coming years and decades. It will provide a useful lens by which to interpret seminal moments in the lives of courts that seriously impact domestic justice systems. Indeed, the U.S. criminal justice system is adapting to international and foreign law in myriad statutory, jurisprudential, and procedural ways. Engagement with foreign and international courts will undoubtedly play a central role in forging future criminal legal adaptations. And even more broadly, the efficacy of international criminal tribunals will be a crucial test for the future of a nascent international system of criminal justice. Many State Parties to the Rome Statute, for example, are still waiting for the ICC to assert its legitimacy internationally through a *Marbury* moment that gains traction with political leaders and others around the world. If and

when it does, it will only add to the tapestry of international criminal justice, one that involves three tiers of prosecution: purely international, purely domestic, and hybrid.