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Marbury and Judicial Deference: The Shadow of *Whittington v. Polk* and the Maryland Judiciary Battle

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**MARBURY AND JUDICIAL DEFERENCE:
THE SHADOW OF WHITTINGTON V. POLK AND THE
MARYLAND JUDICIARY BATTLE**

*Jed Handelsman Shugerman**

Legal historians have searched for state law antecedents to *Marbury v. Madison*,¹ and have pinpointed the Maryland decision *Whittington v. Polk*² for its bold dicta about judicial supremacy.³ The facts of *Whittington* are strikingly similar to those of *Marbury*: when the Republicans seized the Maryland legislature in 1801, they stripped Federalist judges of their offices, and an aggrieved Federalist judge, William Whittington, sued to reclaim his position. Only a few months before *Marbury*, the Maryland General Court proclaimed in *Whittington*:

It is the office and province of the court . . . to determine whether an act of the legislature, which assumes the appearance of a law, and is clothed with the garb of authority, is made pursuant to the power vested by the constitution in the legislature; for if it is not the result or emanation of authority derived from the constitution, it is not law, and cannot influence the judgment of the court in the decision of the question before them.⁴

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¹ 5 U.S. (1 Cranch) 137 (1803).

² 1 H. & J. 236 (Md. 1802).

³ PAUL S. CLARKSON & R. SAMUEL JETT, LUTHER MARTIN OF MARYLAND 200 (1970); ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* 76-77 & 76 n.95 (1989); CHARLES G. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 106-08 (1914); William M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 175, 185 (1885); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 140 (1893). For court decisions crediting *Whittington* as a foundation for the doctrine of judicial review, see, for example, *Attorney General of Maryland v. Waldron*, 426 A.2d 929 (Md. 1981); *Perkins v. Eskridge*, 366 A.2d 21 (Md. 1976); *Murphy v. Yates*, 348 A.2d 837, 848 & n.9 (Md. 1975); *Jones v. Freeman*, 146 P.2d 564 (Okla. 1943). But see RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 244 (1971) (offering a more balanced view of *Whittington*, but very briefly, and without much detail).

⁴ *Whittington*, 1 H. & J. at 244.

The author was Judge Jeremiah Townley Chase, the cousin and close friend of Justice Samuel Chase, who joined Chief Justice John Marshall's opinion in *Marbury*.

Judge Jeremiah Chase's decision laid a foundation for *Marbury*, but in a way unrecognized by other historians. Rather than establishing the power of judicial review, *Whittington v. Polk* more clearly announced the weakness of the courts and the retreat of the Federalist judges from confrontation with the Republicans. More important than its dicta, *Whittington* rejected the Federalist judge William Whittington's claims, despite the fact that his case was stronger than the Republicans', and despite the fact that the Maryland General Court had a partisan Federalist majority that would have sympathized with the plaintiff.

On the 200th anniversary of *Whittington* and approaching the 200th anniversary of *Marbury*, this article revisits these two decisions and challenges legal scholars' assumptions that they were such strong precedents for judicial review.⁵ When one takes into account the

⁵ This paper questions the premise that *Marbury* was itself the robust origin of judicial review. *Marbury* was certainly a brilliant political maneuver. By striking down the original jurisdiction provisions of the Judiciary Act of 1789—the provisions that would have enabled the Court to return *Marbury* to his office—Marshall sacrificed one power of the federal judiciary to battle back against Jefferson, while signaling the future use of an even broader power. Some scholars also revere Marshall's opinion for establishing the fully-formed power of judicial review. Emblematic of this consensus, Alexander Bickel credited Marshall's opinion with spontaneously creating the American judiciary, replete with judicial review:

[T]he institution of the judiciary needed to be summoned up out of the constitutional vapors, shaped, and maintained; and the Great Chief Justice, John Marshall—not single-handed, but first and foremost—was there to do it and did. If any social process can be said to have been “done” at a given time and by a given act, it is Marshall's achievement.

The time was 1803; the act was the decision in the case of *Marbury v. Madison*.

ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 1 (1962). Robert McCloskey observed that *Marbury* was a “masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another.” ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 40 (1960). Indeed, Marshall sidestepped danger with indirection, but just how far did Marshall advance in that other direction?

However, the most fundamental question is whether *Marbury* so carefully dodged direct political confrontation that it significantly diminished the power of its announcement of judicial review. After all, if the Court was willing to talk about judicial review mostly in dicta and only use it for the benefit of the new Jeffersonian regime against the Federalists, how potent was this threat of judicial supremacy?

Recently, scholars have begun questioning *Marbury*'s force as the foundation for judicial review by placing the decision in its historical context. See generally BRUCE ACKERMAN, *THE ROOTS OF PRESIDENTIALISM* (forthcoming 2003); CLINTON, *supra* note 3; James M. O'Fallon, *Marbury*, 44 STAN. L. REV. 219 (1992). These studies provide several angles on this question. First, Marshall's writings indicate that he personally believed that the Republican Repeal of the Judiciary Act of 1801 (the Midnight Judge's Act) was unconstitutional. O'Fallon, *supra*, at 240. However, when most of the other Justices wanted to capitulate to the Republicans, Marshall acquiesced, and eventually, the Court ruled that Congress had the power to repeal the Act in *Stuart v. Laird* a few weeks before the decision in *Marbury* was announced. *Id.* Because control over the life-

broader contexts, both decisions were in fact judicial capitulations to aggressive legislatures and executives. The Maryland General Court asserted its judicial supremacy only in dicta, and the court failed to enforce judicial supremacy when it was legally justified. This article picks apart the court's reasoning step by step, using *Whittington* to illuminate *Marbury* and *Marbury* to illuminate *Whittington*. This re-interpretation offers new historical evidence from contemporaneous discussions by politicians, judges, and newspaper editorials to demonstrate that the Maryland court departed from the Federalists', and some Republicans', understanding of the legal issues.

In addition to revising our understanding of *Whittington* itself, the most important point of this historical inquiry is that it questions *Marbury* as the basis for activist judicial review. The interpretation of *Whittington* offered in this article helps clarify that *Marbury* was truly a survival strategy of deference. The Maryland General Court, similar to the Marshall Court, essentially used the threat of judicial review as a fig leaf, while the nakedness of their acquiescence was apparent to all observers. The judges in both courts opted to live to fight another day, leaving behind dicta or sidestepping holdings that could be unearthed by future judges once the American judiciary solidified its status. This paper concludes that the development of judicial review ought to be understood in terms of institutional history, rather than culled from the language of these decisions. Marshall laid the foundations for judicial power less in *Marbury*, and more in leading the Court to its revered "golden age" from 1812 to 1825, which established the Court's power on the national stage.⁶ The Marshall Court never again struck down an act of Congress after 1803, but this later period of the Marshall Court garnered enough prestige to be passed on to future Courts. Then, in the second half of the nineteenth century, the Court directly challenged Congress essentially the first time. Marshall's strategy in *Marbury* allowed him to survive to achieve this stature later, but *Marbury* did not get the Court to that doctrinal end itself.

tenured federal courts was far more important than a few minor offices as justice of the peace, the issue in *Stuart v. Laird* was of greater political significance than *Marbury*, and that decision established a stronger text and context of judicial weakness. Furthermore, the Court decided *Stuart* on the basis of "acquiescence" to established practice, and the privileged role of the First Congress, as a kind of extended Constitutional Convention, to explain the Constitution's meaning. However, just weeks later, when reliance on the First Congress and its Judiciary Act would have given the Supreme Court the power over original jurisdiction, they conveniently overturned that power to avoid confrontation.

⁶ 1 HAMPTON CARSON, *THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 242 (1902); R. NEWMYER, *THE SUPREME COURT UNDER MARSHALL AND TANEY* 83-88 (1968). *But see* G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE* 191 (1988) (questioning the value of naming phases of the Court).

The Rehnquist Court, in an unprecedented wave of judicial activism, has struck down acts of Congress in thirty-three cases since 1995.⁷ One sixth of the Supreme Court's decisions invalidating federal statutes in the nation's history have come down in the last seven years.⁸ During a time of such unprecedented judicial activism, reflecting about *Marbury* and the history of judicial review is all the more important. Because *Marbury* embodies judicial caution as much as judicial power (if not more so), the current Court should not rely on *Marbury* as precedent to support its activism.⁹ Judges and scholars ought to be looking elsewhere (perhaps the late nineteenth and early twentieth century) for the foundation of judicial review of Congress, and should adopt a more incrementalist approach to the development of judicial power.¹⁰ This article suggests that the story about *Marbury*

⁷ See Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 80 nn.3-5 (2001). In addition to the twenty-nine cases they list, the Court also struck down federal laws in *Feltner v. Columbia Pictures*, 523 U.S. 340 (1998); *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002); *Thompson v. Western State Medical Center*, 122 S. Ct. 1497 (2002); and *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S. Ct. 1864 (2002).

⁸ From 1789 to 1986, the Supreme Court struck down federal laws in 120 cases. For a complete list, see THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 2001-31 (Johnny H. Killian & George A. Costello eds., 1996). See also Jed Handelsman Shugerman, *A Six-Three Rule: A Solution to the Supreme Court's Five-Four Problem*, 37 GA. L. REV. (forthcoming Spring 2003).

⁹ For an example of the Rehnquist Court's reliance on *Marbury* for the assertion of judicial supremacy, see *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) ("[E]ver since *Marbury* this Court has remained the ultimate expositor of the constitutional text.").

¹⁰ After *Marbury*, the Supreme Court did not strike down another act of Congress until *Dred Scott v. Sandford* in 1857, certainly not the most attractive precedent for judicial review. *Scott v. Sandford*, 60 U.S. 393 (1856). The first series of Court decisions against Congress was during Reconstruction, when, *inter alia*, the Court overturned Congress's civil rights acts and other legislation. See, e.g., *United States v. Harris*, 106 U.S. 629 (1883) (striking down federal law penalizing private conspiracies to violate equal protection of law); The Civil Rights Cases, 109 U.S. 3 (1883) (striking down federal law granting equal access to public accommodations); *United States v. Reese*, 92 U.S. 214 (1876) (striking down federal law protecting voting rights). The next wave was during the laissez-faire *Lochner* era decisions from 1895 to 1937. See, e.g., *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (striking down the National Industrial Recovery Act); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (striking down minimum wage law for women); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (striking down federal child labor legislation); *Adair v. United States*, 208 U.S. 161 (1908) (striking down federal law protecting employees from dismissal because of membership in a labor union); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 429 (1895) (striking down the federal income tax). One might also turn to the Warren Court and the Burger Court for a more modern phase of judicial review of Congress. While these Courts issued many controversial decisions, their review of federal laws is relatively less contested. The Warren Court's most controversial decisions were its desegregation, criminal procedure, and First Amendment decisions invalidating state laws or regulating police conduct. Its federal desegregation decision, *Bolling v. Sharpe*, 347 U.S. 497 (1954), was overshadowed by *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955), and of its decisions striking down federal laws, only a handful provoked a national reaction. See *United States v. Brown*, 381 U.S. 437 (1965) (declaring unconstitutional § 504 of the Labor Management Reporting and Disclosure Act of 1959 which made it a crime for a member of the Communist Party to serve on the executive board of a labor organization); *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964) (striking

that Americans have woven together is, more or less, a founding myth of judicial review.¹¹ Of course, *Marbury* and *Whittington* were pivotal cases, but their key contribution was less their doctrine, and more their success in withstanding the Jeffersonian challenge to judicial independence. If judges continue to base judicial review upon *Marbury*, then this examination of *Whittington* and *Marbury* together suggests that these judges ought to consider a much more deferential and cautious approach to overturning legislation. The Rehnquist Court would also be wise to heed the cautious approach of *Whittington*, in which Chief Justice Chase urged courts to intervene only when the importance of the rights in question outweighs the undemocratic problem of judicial review.¹²

This new research also helps to answer some persistent historical questions about *Marbury*: Why didn't the media report on *Marbury*'s declaration of judicial review powers? Why didn't the Federalist plaintiffs continue their suit in lower courts with original jurisdiction, which the Court's decision seemed to have encouraged? Did the Justices pass the buck to the lower courts in *Marbury*, knowing that those courts were even less likely to offer a remedy? How did *Whittington* affect the subsequent events in the fall of 1802 and in 1803, and if the Maryland court had ruled in *Whittington*'s favor, how might this history have changed?

Part I offers the background of the Maryland Republicans' attack on the state's Federalist judges, when Maryland emerged a battleground state shifting to Republican control. This Part traces the close parallels of *Marbury* and *Whittington*, and demonstrates that the Maryland repeal of a judiciary act and *Whittington v. Polk* drew the attention of the nation's newspapers, Congressmen, and most importantly, the Supreme Court Justices themselves. Part II presents the Maryland General Court's decision in *Whittington*, and Part III uses historical research to challenge the court's reasoning and then offers

ing down portions of the Subversive Activities Control Act of 1950, which prohibited members of any communist organization from obtaining passports); *Trop v. Dulles*, 356 U.S. 86 (1958) (declaring unconstitutional the Nationality Act of 1940, which stripped away citizenship from those who deserted the military). The Burger Court is similar: even its most controversial invalidations of federal laws were not as controversial as *Roe v. Wade*, 410 U.S. 13 (1972), or its Establishment Clause rulings. See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976) (upholding states' rights under Tenth Amendment); *Buckley v. Valeo*, 424 U.S. 1 (1976) (striking down parts of campaign finance laws under First Amendment); *Frontiero v. Richardson* 411 U.S. 677 (1973) (establishing sex as a suspect classification); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (holding that voting age legislation exceeded Congress's power under the Fifteenth Amendment).

¹¹ Robert Lowry Clinton has also described *Marbury* as "mythical" in questioning its modern interpretation as judicial supremacy. See CLINTON, *supra* note 3, at 139-41.

¹² *Whittington v. Polk*, 1 H. & J. 236, 243 (Md. 1802).

three legally more persuasive rulings that would have sided with Whittington and the Federalists.

Part IV considers the effect of *Whittington* on the various actors in the judicial struggle: Thomas Jefferson and Gabriel Duvall, the lone Republican judge on the Maryland General Court; Judge Jeremiah Townley Chase of the Maryland General Court and Justice Samuel Chase, Chief Justice Marshall and the other justices in their turn towards accommodation; and the key midnight appointees, including Maryland's William Marbury. *Whittington* helps explain why the Federalist Justices of the Peace and the Midnight Judges did not press on with their legal claims in lower federal or in state court after *Marbury* gave these litigants an apparent green light to do so. For those who perceive *Marbury* as a sign of strength by the Federalist judiciary, this surrender by the Federalist plaintiffs is a nagging question. The Maryland General Court's capitulation in *Whittington* sent a signal that the lower courts would dodge these challenges, so these Federalist appointees may have abandoned the fight. This signal from the Maryland General Court helps explain why the media's reaction to *Marbury* generally ignored its use of judicial review and focused more on its rejection of the Federalists' claims.¹³ This Part also speculates about how a different decision by the Maryland Court may have dramatically changed the course of events leading to *Marbury*. In short, the Maryland court might have escalated the conflict, pushing the Supreme Court on a more confrontational path with the Jeffersonians. Instead, *Whittington* provided a model to the U.S. Supreme Court of strong dicta cloaking deferential holdings.

I. MARBURY AND WHITTINGTON: PARALLEL CASES

A. *Marbury*

All first-year law students quickly learn the facts of *Marbury*. In the 1800 election, the Republicans swept Congress and Jefferson edged Adams in the electoral college, but due to poor foresight, Jefferson and his running mate Aaron Burr received an equal number of electors, and the election was thrown to the outgoing Congress in February 1801.¹⁴ In the midst of the Federalist-orchestrated deadlock between Jefferson and Burr, the lame duck Federalist Congress passed the Judiciary Act of 1801 on February 13, reorganizing the courts into

¹³ CLINTON, *supra* note 3, at 102-03.

¹⁴ For a good summary of the events leading to *Marbury v. Madison*, see CLINTON, *supra* note 3 and O'Fallon, *supra* note 5. These works, as well as the *Marbury* opinion itself, are the sources for the information that follows unless otherwise noted.

six circuits and creating sixteen new life-term judicial appointments.¹⁵ After Jefferson prevailed in the Congressional vote, Adams and the Federalists appointed a series of judges and other officials, including William Marbury as justice of the peace for Washington, D.C., in the last moments of their terms, resulting in the moniker “the Midnight Judges.”

Once Jefferson was inaugurated in March, he and Secretary of State James Madison began carving away these appointments. William Marbury and justices of the peace, confirmed for a five-year term to be held “in good behavior,” never received their commissions from John Marshall while he was Adams’s Secretary of State. Given a golden opportunity to strike a handful of midnight appointments, Madison refused to grant Marbury and several other appointees their commissions, and these appointees sued. In December 1801, the Supreme Court required the new Secretary of State, James Madison, to show cause for the failure to issue their commissions. In the meantime, the Republican Congress repealed the Judiciary Act of 1801 in March 1802, terminating the Midnight Judges’ offices and the new circuit system, and it reinstated the Judiciary Act of 1789, with some slight revisions, in April.¹⁶ Fearing that the Supreme Court might intervene as soon as it had a chance, the Republicans rammed through Congress a bill on April 29, 1802 (the same month in which *Whittington* was argued) that suspended the next two sessions of the Supreme Court, postponing the next session to February 1803.

The repeal went into effect without a chance for the Court to strike it down, and the Justices were expected to return to riding circuit in the fall, despite the legal claims to these offices by the Midnight Judges. In the spring of 1802, Federalist leaders pressured the Justices to take a stand, and the Justices considered boycotting the circuits and going on strike. However, the Justices reluctantly decided to ride their circuits in the fall. The Midnight Judges drafted a protest memorial to Congress and unsuccessfully challenged the Justice’s jurisdiction in the circuit courts in the fall of 1802. In Virginia, lawyers in *Laird v. Stuart* directly challenged Chief Justice Marshall’s jurisdiction as a circuit judge for the Fourth Circuit. Marshall dismissed the argument without issuing an opinion. In February 1803, the Supreme Court rejected Marbury’s claim, striking down provisions of the Judiciary Act of 1789 as unconstitutional for granting the

¹⁵ An Act To Provide for the More Convenient Organization of the Courts of the United States, ch. 4, 2 Stat. 89 (1801) [hereinafter the Judiciary Act of 1801].

¹⁶ An Act To Repeal Certain Acts Respecting the Organization of the Courts of the United States; and for Other Purposes, ch. 8, 2 Stat. 132 (1802) [hereinafter the Repeal Act]; An Act To Amend the Judicial System of the United States, ch. 31, 2 Stat. 156 (1802).

Court original jurisdiction.¹⁷ A few days later, in *Stuart v. Laird*,¹⁸ the Court rejected the jurisdictional challenge, reasoning that the Justices had acquiesced to riding circuit in the past, and therefore they did not require specific commissions to ride circuit again. They avoided the question about whether the Midnight Judges were entitled to those offices themselves.

B. *Whittington*

Whittington and *Marbury* are remarkably intertwined. The battle over the Maryland judiciary closely paralleled the battle over the federal judiciary in chronology and in legal issues. The central characters in *Whittington* had national political significance or were closely linked to the main characters in *Marbury*. Most significantly, *Whittington* received national attention in congressional debates, the nation's newspapers, and in the letters of the Supreme Court Justices, thus shaping the debate over the federal controversy.

1. *The Maryland Judiciary and Reforms of 1796*

Maryland's Declaration of Rights, drafted in 1776, declared "[t]hat the independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the people"¹⁹ To this end, both the Maryland Constitution and the Declaration of Rights guaranteed that "the Chancellor [and] all Judges shall hold their commissions during good behavior"²⁰ The Maryland Constitution elaborated on the meaning of "good behavior" by specifying that the judges could be "removable *only* for misbehaviour, or conviction in a Court of Law."²¹ The Declaration of Rights required that the Governor and two thirds of each House must concur in order to remove the offending or convicted judge.²² For other offices, the governor and the council could "suspend or remove any civil officer who has not a commission, during good behaviour," (*i.e.*, offices guaranteed to the holder "during good behaviour").²³ This key distinction of "during good behaviour"

¹⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

¹⁸ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

¹⁹ MD. CONST. OF 1776, *The Constitution or Form of Government*, art. XXX.

²⁰ *Id.* art. XL.

²¹ *Id.* (emphasis added).

²² *Id.* art. XXX. Joseph H. Smith mentions that this removal process was additional to the process of conviction for misbehavior, but that interpretation is inconsistent with Article XL's use of the word "only." See Joseph H. Smith, *An Independent Judiciary*, 124 U. PA. L. REV. 1104, 1154 (1976). Article XXX therefore is more intelligible as describing two stages of one process: first conviction, then removal by the governor and two thirds of each House.

²³ MD. CONST. OF 1776, art. XLVIII.

evolved over centuries of judicial struggles in England, and the words "during good behaviour," rather than "during pleasure," signified judicial independence.²⁴ Most of the new states created judicial commissions that were guaranteed to the judges "during good behaviour,"²⁵ and that practice was adopted in the U.S. Constitution.²⁶

In the 1790s and the first few years of the 1800s, Maryland's political shifts closely followed the nation's. As the party divisions emerged in 1792, the Federalists solidly controlled Maryland, and retained power until 1800.²⁷ In 1796, the Federalists revised the state's outdated judicial system. Maryland's court structure had been a continuation of the colonial courts, with county courts that were too dispersed, and a remote General Court sitting only in the eastern part of the state, in Annapolis and Easton. This arrangement was inefficient and quite inconvenient for the commerce interests in Baltimore. Furthermore, the county justices had to be reappointed on an annual basis, which provided too little job security to attract qualified candidates. The Federalist legislature supplemented the General Court with a local court system of five districts, with a chief justice for each district and two associate justices for each county. Each chief justice rode circuit and met with each county's associate justices several times a year to hear appeals from the county courts.²⁸

The Act of 1796 designated that each justice "shall hold their commission during good behaviour, and may be removed for misbehaviour in the same manner as the chancellor and the judges may be removed agreeably to the constitution of this state, and not otherwise."²⁹ Whereas the previous system offered no job security, the new

²⁴ See Smith, *supra* note 22. See also *infra* Section II.B.

²⁵ See Smith, *supra* note 22, at 1153-56.

²⁶ U.S. CONST. art. III, § 1.

²⁷ The Federalists held a two-to-one majority of the state House from the mid-1790s to 1800, and they also dominated the Maryland Senate. See L. MARX RENZULLI, JR., MARYLAND: THE FEDERALIST YEARS 187 (1972); NORMAN K. RISJORD, CHESAPEAKE POLITICS, 1781-1800, at 517-19 (1978). In 1796, Federalists won six of Maryland's eight congressional districts. Despite some gains by the Republicans in the U.S. Congressional elections in 1798, the Federalists still retained their two-to-one majority in the House of Delegates. RISJORD, *supra*, at 544-45 (noting that the Federalists held a majority of 49 to 24 in 1798, a margin consistent with previous years).

²⁸ ELLIS, *supra* note 3, at 243-44; An Act for the Better Administration of Justice in the Several Counties of the State, §§ II, V (1796), in 2 THE LAWS OF MARYLAND (William Kilty ed., Frederick Green 1800).

²⁹ *Id.* § IV, ch. XLIII. Section XVIII limits the way justices may be replaced:

That the chief justice of any court, appointed and commissioned in virtue of this act, shall refuse to act, or after acceptance shall resign, die, remove out of his district, or be rendered incapable to act, or if any associate justice, appointed and commissioned in virtue of this act, shall refuse to act, or after acceptance shall resign, die, be rendered incapable to act, or remove out of the county, the governor for the time being, with the advice and consent of the council, is hereby authorised to appoint and commission another fit and proper person to fill such a vacancy.

legislation sought to guarantee security. Nothing in the statute suggested that the reform or the offices were temporary or required renewal. By choosing the language of "good behaviour" and assigning no time limit to the office, the legislature created a freehold property interest for each justice.³⁰ In 1797, the legislature reaffirmed these basic guidelines of "good behaviour."³¹ Firmly in control of the executive and legislative branches, the Federalists began installing their partisans in these new life-term positions. In February 1799, the Federalist governor appointed William Whittington chief justice of the state's fourth district.³² The Republicans attacked this Federalist loading of the judiciary, and complained that the bill increased the power of the General Court to the detriment of popular control.

2. *The General Court Judges and the Republican Victory in 1800*

The three judges of the General Court were Federalist Jeremiah Townley Chase, Federalist John Done, and Republican Gabriel Duvall. While they were judges on the General Court, Judge Chase and Judge Duvall actually ran against one another as electors in the 1800 Presidential election, a degree of partisan campaigning by judges that shocks the modern reader.³³ That election was the political turning point both in the nation and in Maryland, and Duvall's victory over Chase was decisive.

Jeremiah Chase was Justice Samuel Chase's cousin, and the two were very close.³⁴ When Jeremiah lost his father at age nine, Samuel's father Thomas took him in, and Samuel, then age sixteen, "assumed the role of Jeremiah's older brother."³⁵ Thomas educated them together, and both ventured on to parallel legal and judicial careers. Samuel and Jeremiah married sisters Ann and Hester Baldwin, and the Chases invested in the same large land deals from 1780 until

Id. § XVIII. In 1797, the legislature increased the chief justices' salaries, which was the only reform of the bill before 1801. A Supplement to the Act for the Better Administration of Justice in the Several Counties of the State Increases the Chief Justices' Yearly Salaries to \$1300 (in the Third District \$1400), § II, ch. LXIX, in KILTY, *supra* note 28.

³⁰ KILTY, *supra* note 28, at ch. XLIII. There was no time limit on the term of office held during good behavior, so the office was for life, and thus, a freehold. In *An Act for the Better Administration of Justice in the Several Counties of the State*, Section II redistricts the state into five judicial districts. Section IV continues Chapter 33 section 4 of the Act of 1790 by the same title, which provides that the chief justices and associate justices of the county. Section V designates one chief justice and two associate justices for each county.

³¹ Whittington v. Polk, 2 H. & J. 236, 238 (Md. 1802).

³² *Id.* at 239.

³³ See *infra* text accompanying notes 52-54.

³⁴ JAMES HAW ET AL., *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 6 (1980).

³⁵ *Id.*

Samuel's death in 1811.³⁶ Jeremiah served on the five-member executive Council that appointed Samuel Chase as Maryland's agent and negotiator with Britain in 1783, and then appointed Samuel to his first judicial position in 1788.³⁷ Samuel and Jeremiah led the Antifederalist campaign in the state's convention on ratifying the U.S. Constitution, staging an upset victory in their county.³⁸ In 1791, Samuel was appointed Chief Judge and Jeremiah Associate Judge of the General Court, and they served together until 1796, when Samuel became a Supreme Court Justice.³⁹ The two taught law students together in the 1790s,⁴⁰ and together campaigned for John Adams in 1800, in part to position Jeremiah for an appointment to the federal judiciary if Adams won.⁴¹ When Congress impeached Samuel in 1804, Jeremiah assisted in his defense.⁴² Undoubtedly, Jeremiah and Samuel Chase stayed in close contact throughout these years.

When Samuel Chase was elevated to the U.S. Supreme Court in 1796, Duvall was his replacement, after serving in Congress as a Republican.⁴³ In that same year, Duvall served as a presidential elector for Thomas Jefferson.⁴⁴ Duvall and Jeremiah Chase served on the General Court together for more than six years. In November 1802, just five months after Duvall wrote his concurrence in *Whittington*, Jefferson elevated Duvall to Comptroller of the U.S. Treasury, a sign that Jefferson approved of the court's decision.⁴⁵ Duvall would later replace Samuel Chase on the U.S. Supreme Court in 1811.⁴⁶

The 1800 election was the decisive political turn in the nation and in Maryland, and Jeremiah Chase and Duvall were on the frontlines. Both Federalists and Republicans had predicted that the state would deliver a majority of its electors to John Adams, but to their surprise, Maryland voters split the electoral vote, five to five.⁴⁷ During the Burr-Jefferson deadlock in the House, the state delegation again split

³⁶ EDWARD C. PAPANFUSE ET AL., *BIOGRAPHICAL DICTIONARY OF THE MARYLAND LEGISLATURE, 1635-1789* 213-16 (1985).

³⁷ JANE S. ELSMERE, *JUSTICE SAMUEL CHASE* 36 (1980); PAPANFUSE, *supra* note 36, at 213.

³⁸ HAW, *supra* note 34, at 149-50.

³⁹ ELSMERE, *supra* note 37, at 44.

⁴⁰ HAW, *supra* note 34, at 121.

⁴¹ ELSMERE *supra* note 37, at 128; HAW, *supra* note 34, at 207-08.

⁴² ELSMERE, *supra* note 37, at 233.

⁴³ Irving Dilliard, *Gabriel Duvall*, in 1 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1978*, at 422 (Leon Friedman & Fred L. Israel eds., 1980).

⁴⁴ *BALT. AM.*, July 1, 1800.

⁴⁵ Dilliard, *supra* note 43, at 423. *See also infra* note 214.

⁴⁶ Some historians have judged Duvall's tenure to be "utterly mediocre," and one considered him "the most insignificant of all Supreme Court judges." E. BATES, *STORY OF THE SUPREME COURT* 109-10 (1936). *See also* David P. Currie, *The Most Insignificant Justice: A Preliminary Inquiry*, 50 *U. CHI. L. REV.* 466 (1983) (arguing that Duvall was insignificant); *but see* Dilliard, *supra* note 43.

⁴⁷ RISJORD, *supra* note 27, at 559.

its vote, four to four, until the Federalists relented in the final rounds by abstaining.⁴⁸ The electoral race in Baltimore pitted Chase, Chief Judge of the General Court, as an elector for Adams and Pinckney, against Duvall, Associate Judge of the General Court, as an elector for Jefferson and Burr. Duvall played a pivotal role in defending Jefferson against Federalist charges that he prematurely fled Richmond before a British advance in the Revolutionary War. Jefferson appreciatively praised Duvall as a “Friend of the People” during the election.⁴⁹ Duvall also published a series of campaign articles in favor of Jefferson and his own candidacy as a Republican elector, in which he primarily attacked the Alien and Sedition Acts.⁵⁰ Jeremiah Chase responded with a series of hard-line articles that took a zealous pro-Federalist stance on those acts and defended Adams unquestioningly.⁵¹

The dramatic political shift toward the Republicans was most obvious in this electoral race. After years of oscillation, Baltimore decisively returned to the Republican column. One historian recounts that Duvall “swept every ward in the city,” winning in many areas by five-to-one or ten-to-one.⁵² A tally from the newspapers reveals that Duvall defeated Chase by a margin of more than three to one.⁵³ These lopsided returns suggest that Jefferson probably would have won Maryland’s popular vote outright, and if the districts had not been skewed to benefit the Federalists, he might have won a majority of Maryland’s electors rather than splitting them five-to-five. Before Congress broke the Jefferson-Burr deadlock, Marylanders were already nominating Duvall for Secretary of the Treasury, and hailing him as one who “has done more in the cause of Republicanism than any man whatever.”⁵⁴

3. *The Federalists’ Midnight Appointment and the Republican “Ripper Bill”*

The 1800 election demonstrated that the Maryland Republicans were pulling ahead of the Federalists. The Republicans had a slight edge in the House of Delegates in the 1800-01 session. The Federal-

⁴⁸ *Id.*

⁴⁹ PAPPENFUSE, *supra* note 36, at 291. See also *Judge Gabriel Duvall*, MARLBOROUGH GAZETTE (Gabriel Duvall Papers, Manuscript Division, Library of Congress).

⁵⁰ BALT. AM., July 1, 8, 9, 15, 16, Aug. 19, 20, 1800; MD. GAZETTE, Aug. 14, 1800.

⁵¹ RENZULLI, *supra* note 27, at 216. MD. GAZETTE, Sept. 11, 1800.

⁵² RISJORD, *supra* note 27, at 559. Risjord also reports, “Chase made a showing (losing by 285 to 148) only in the first central ward, where most of the city’s merchants resided. The Republicans did best in the remote wards (winning by margins of five or ten to one) where the mechanics and artisans lived.” *Id.*

⁵³ Duvall amassed 2,379 votes to Chase’s 774 votes (approximately). MD. GAZETTE, Nov. 20, 1800.

⁵⁴ BALT. AM. & COM. DAILY ADVERTISER, Feb. 2, 1801.

ists clung to the state Senate, which was elected every fifth year, and the voters would be choosing a new slate of Senate electors in September 1801. Aware that they could be losing control very soon, the Federalists tried to shore up their control of the judiciary. When a vacancy opened in the state's fifth judicial district, the Federalist governor Benjamin Ogle appointed Congressman William Craik, which one Federalist writer conceded in the midst of the repeal debate, "this was among the last acts of that executive, and in analogy to the last acts of Mr. Adams's administration has been called the 'midnight appointment.'"⁵⁵ This writer granted that Craik was "a firm federal character, and that his appointment would excite the [Republican] opposition . . . more than any other federal man the executive could have selected."⁵⁶ As the Federalists split between the Adams camp and the Hamilton camp, Craik became a leader of the Maryland Adams camp—along with Samuel Chase and Jeremiah Chase.⁵⁷ Craik was a devoted Federalist, although he cast blank ballots in the Jefferson-Burr split when his wife threatened to divorce him if he voted against Jefferson.⁵⁸ Despite Craik's act of independence (or co-dependence) in that electoral crisis, his selection created a "great and distinguishing opposition," and "the irritation of the democrats burst forth."⁵⁹ As soon as Craik was commissioned, Republican leader Montgomery vowed to "lay a resolution on the table of the House of Representatives to repeal the law, to get rid of the judge—That he would present a precedent to the general [Federal] government, which he trusted they would imitate."⁶⁰ From this Federalist account, both the "midnight" appointment of Craik and the Republican response were partisan maneuvers. This account also suggests that, from the beginning, the Maryland Republicans were fighting this battle as a precedent for the unfolding national struggle over the Midnight Judges and the Federal judiciary.

As the Federalists had feared, the fall of 1801 brought a very different slate of Senate electors, and they delivered a two-to-one Republican majority in the Senate.⁶¹ In that same election, the Republicans strengthened their grip on the House of Delegates, with a strong

⁵⁵ "Fellow Citizen," *To Mr. Wright of the Senate of the United States*, WASH. FEDERALIST, Feb. 9, 1802.

⁵⁶ *Id.*

⁵⁷ RENZULLI, *supra* note 27, at 220.

⁵⁸ *Id.* at 226-27.

⁵⁹ "Fellow Citizen," *To Mr. Wright of the Senate of the United States*, WASH. FEDERALIST, Feb. 9, 1802.

⁶⁰ *Id.* In the summer of 1801, a Federalist sympathizer observed that the Federalists had made the judiciary a polarizing partisan issue, which was foolish, considering how the party balance was shifting. Letter from William Pinkney to Ninian Pinkney (July 21, 1801), in *THE LIFE OF WILLIAM PINKNEY* 38-39 (Rev. William Pinkney ed., DeCapo Press 1969).

⁶¹ RISJORD, *supra* note 27, at 563-65.

margin of 45 to 28.⁶² When the assembly met in November, the Republicans were determined to extend their revolution from the legislature to all the branches of government.⁶³ They selected Republican John Francis Mercer as Governor by more than a two-to-one majority over the Federalist James Murray.⁶⁴ The next order of business was filling the state's open Senate seat in Congress. The Federalists had attempted to fill the seat in the previous session of 1800-01, but the Republicans blocked their moves, confident that they would control the next legislature. By a vote of 60 to 26 in November 1801, the Republicans gave the seat to their candidate Robert Wright.⁶⁵ After increasing funding for their press and enacting electoral reform, the Republicans then turned to the judiciary. Political scientist Norman Risjord concluded that the Maryland Republican's orchestrated agenda and uniform voting discipline "marks the ultimate maturity of the first party system."⁶⁶

The Republicans drafted a repeal of the 1796 Act that reformed the judiciary and created offices for Federalist appointees.⁶⁷ Then they immediately recreated the exact same judicial system, but with a clean slate ready to be filled in with Republican appointees. Section 1 of the 1801 Maryland Act recreated the same five districts found in Section II of the 1796 Act,⁶⁸ and other sections repeated the repealed act verbatim, including the clauses guaranteeing the commissions "during good behaviour."⁶⁹ This legislation was known as a "ripper bill," stripping judges from office simply to create vacancies for new appointments.⁷⁰ In Congress, the Republicans offered a rationale that the Judiciary Act of 1801 needed to be scrapped because it was unnecessary and expensive, and they followed through by scrapping it. In Maryland there was little such pretense. The Maryland Republicans proved in reenacting the same system that their motives were

⁶² *Id.* at 565 (Risjord classifies five other delegates as independents).

⁶³ *Id.* at 563.

⁶⁴ BALT. AM., Nov. 9, 1801 (reporting the vote as 59 to 27). The next day, the legislature appointed only Republicans to the Governor's Council, with more than a two-to-one margin in each case. BALT. AM., Nov. 13, 1801.

⁶⁵ RISJORD, *supra* note 27, 564.

⁶⁶ *Id.* at 572.

⁶⁷ ELLIS, *supra* note 3, at 243-44.

⁶⁸ MD. GAZETTE, Jan. 14, 1802.

⁶⁹ Section 3 of the 1801 Act provides, verbatim from Section IV of the 1796 Act, that the chief justices and associate justices "shall hold their commission during good behaviour, and may be removed for misbehaviour in the same manner as the chancellor and the judges may be removed agreeably to the constitution of this state, and not otherwise." Section 4 repeats the same designation from Section V of the 1796 Act, which designated one chief justice and two associate justices for each county. And similarly, Section 15 copies from Section XVIII of the 1796 Act, limiting the circumstances of replacement of the justices. MD. GAZETTE, Jan. 14, 1802; KILTY, *supra* note 28, at ch. XLIII.

⁷⁰ CLARKSON & JETT, *supra* note 3, at 198.

purely partisan.⁷¹ Perhaps because of its legally dubious design, the repeal passed by only six votes, which was much closer than the votes on other partisan issues of the session.⁷²

According to several Federalist news stories, Montgomery of Harford, a Republican leader in the state House and the primary sponsor of the repeal, aimed to dismiss particular Federalist justices, but understood that the “good behaviour” clause made this task open to legal challenges. According to a Federalist newspaper report, Montgomery declared that he sought to “vacate a very unpopular appointment [of Craik] made in the expiring moments of the late executive,” and he introduced a resolution condemning the appointment.⁷³ The paper noted that the Maryland constitution permitted the removal only of officers without a “during good behaviour” commission, and that Craik’s office was protected from repeal because the 1796 act created a valid “good behaviour” commission.⁷⁴ A Federalist writer claimed that Montgomery understood that “the constitution of Maryland had no provision that would embrace the facts influencing the wish of removal, [and] that therefore the law of 1796 must be repealed, for that purpose.”⁷⁵ Montgomery emphasized the parallels between Maryland’s midnight Justices and Adams’s Midnight Judges. Montgomery explained that the legislature’s repeal had a popular mandate from the state election, and that the state was sending a message to the federal government and the nation about Adams’ Judiciary Act of 1801.⁷⁶

In the midst of the Maryland legislative debate, President Jefferson, who had already indicated that he intended to remove the Midnight Judges, delivered a Congressional address in December 1801 suggesting a revision or repeal of the Judiciary Act.⁷⁷ When the bill took effect on January 26, 1802, Republican Governor Mercer appointed William Polk and two other Republicans⁷⁸ to replace the old

⁷¹ A clerk in the Maryland legislature reported that some delegates felt that the judicial system was “inconvenient, productive of delay, and very expensive.” NAT’L INTELLIGENCER, Dec. 30, 1801. These arguments appear to be a pretense, especially after the legislature recreated the same court structure.

⁷² On December 17, the Maryland House of Delegates voted 39 to 33 for the bill. BALT. REPUBLICAN, Mar. 8, 1802.

⁷³ “Fellow Citizen,” *To Mr. Wright of the Senate of the United States*, WASH. FEDERALIST, Feb. 9, 1802.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *From Annapolis*, BALT. AM., Nov. 13, 1801.

⁷⁷ ELLIS, *supra* note 3, at 41 (emphasizing the moderation of Jefferson’s message); BALT. AM., Dec. 10, 1801.

⁷⁸ The two other Republican appointees were William Clagett and Richard Sprigg. Sprigg had served in the U.S. House of Representatives as a Republican in the 1790s. RENZULLI, *supra* note 27, at 188. As an interesting side note, Governor John Mercer married the daughter of

Federalist justices, including William Whittington and William Craik.⁷⁹ On February 8, 1802, Polk assumed the office of chief justice of the fourth district—and according to Whittington’s lawyers, he “disseised” Whittington “of his freehold.”⁸⁰ On March 24, 1802, Whittington brought a writ of assize of novel disseisin, and the General Court held the trial on April 7, 1802.⁸¹ One indication of the importance of this trial was the prominence of Whittington’s counsel. He was represented by two Federalist congressmen: Luther Martin, one of the framers of the Constitution, and Robert Goodloe Harper, one of the leaders of the Federalist Party.⁸² The significance of Whittington’s counsel was not lost on the media, who reported the names of William Whittington’s counsel to convey the case’s national importance.⁸³ According to a Republican paper, Harper “ascrib[ed] the worst of views to have actuated the authors of the law,” and he sought to “impress on the minds of the weak, that they had arrived at the precipice of destruction, and that the ruling faction were hurling them in ruin, in a style truly picturesque of Sam Chase.”⁸⁴ After the General Court judges found a way to avert political trouble at this precipice of their destruction, Justice Samuel Chase would later seize his own forum to attack the “ruling faction” and their judicial reforms, putting himself on the precipice of impeachment and conviction.

C. Politicians and the Media Respond

1. Congress and the Media

Maryland’s repeal and the subsequent litigation drew national attention from politicians, the media, and the Supreme Court Justices. Observers understood that this was the first round of the country-wide judiciary fight, setting the stage for the national repeal. Congress scrutinized Maryland’s actions in January 1801 during the debate over the repeal of the Federal Judiciary Act. Senator James Hillhouse, a Federalist from Connecticut and an opponent of the repeal,

Richard Sprigg, Sr. FRANK F. WHITE, JR., *THE GOVERNORS OF MARYLAND, 1777-1970*, at 47 (1970)

⁷⁹ “Fellow Citizen,” *To Mr. Wright of the Senate of the United States*, WASH. FEDERALIST, Feb. 9, 1802.

⁸⁰ *Whittington v. Polk*, 1 H. & J. 236, 239 (Md. 1802). The term “disseised” is used in the context of the assize of novel disseisin, referring to the seizing of another’s property.

⁸¹ *Id.* at 236.

⁸² CLARKSON & JETT, *supra* note 3, at 200-01.

⁸³ PITTSFIELD SUN (Mass.), *reprinted in* INDEP. CHRON. (Boston), Sept. 6, 1802.

⁸⁴ *Read! Assize of Novel Disseisin*, BALT. DEMOCRATIC REPUBLICAN, June 24, 1802. Luther Martin, it reported, was more moderate, while the defendant’s counsel, Thomas James Bullitt and Josiah Bailey were “pertinent and pointed” and more convincing to the jury. *Id.*

observed that legislatures may alter their court systems, but “no judge [holding office ‘in good behavior’] shall be deprived of his office or salary.”⁸⁵ He then condemned Maryland’s revisions from the previous month:

To abolish a court, without destroying the office or salary of the judge, has not in practice been found difficult. Most of the States, where judges hold their offices during good behaviour, have been in the habit of doing it; . . . but in no instance has a judge been deprived of his office or salary, unless in that stated to have recently . . . reported, ought not to be respected, much less imitated by the Senate. By the law of Maryland, courts had been established, and judges appointed, who, by the Constitution, hold their offices during good behaviour. This law was repealed, and, during the same session of the Legislature, a new law was passed establishing the same courts, and almost in the same words of the former law. What could be the object of this repeal? Surely none other than the turning the judges out of office. Could that be less a violation of their Constitution than the passing of a law directly removing from office the same judges? It is too absurd to say that indirect means may be used to effect what might not be done by a direct and positive law, or is absolutely forbidden by the Constitution to be done at all.⁸⁶

Senator Robert Wright of Maryland responded on the Senate floor “to defend the State he had an honor to represent from the unkind imputation of a ‘violation of her Constitution.’”⁸⁷ Wright had just been appointed by the state legislature to the U.S. Senate, and, according to a Federalist account, he had been present during the legislature’s repeal.⁸⁸ Wright then offered many of the stock arguments for the Federal repeal, which also applied to Maryland’s repeal.⁸⁹ Four days later, Senator Wright returned to the floor to defend the Maryland Republicans. He explained that his state initially appointed justices of the peace annually, but this system was impractical and failed to attract enough qualified candidates.⁹⁰ In response, the legislature created a new system of justices for county courts appointed by the law during good behavior.⁹¹ Senator Wright portrayed this reform as limited and impermanent: “[B]ut this law being like all new laws, a measure of experiment, was limited to a short duration, and has been from time to time continued. At the last session . . . the law was repealed, and a new law passed embracing the proposed amendments.”⁹² However, the 1796 reform law contained no indica-

⁸⁵ 11 ANNALS OF CONG. 108 (1802).

⁸⁶ *Id.* at 108-09.

⁸⁷ *Id.* at 110.

⁸⁸ “Fellow Citizen,” WASH. FEDERALIST, Feb. 15, 1801.

⁸⁹ 11 ANNALS OF CONG. 110-11 (1802).

⁹⁰ 11 ANNALS OF CONG. 137 (1802).

⁹¹ *Id.*

⁹² *Id.*

tion that it was considered temporary. Wright also claimed that the repeal was not motivated by partisanship, because the Republicans appointed two judges under the new law:

[B]oth of them were judges under the old law, and both were Federalists—Mr. Ridgely, formerly a Republican, latterly a Federalist; Mr. Tilghman, always a Federalist From this view it must appear, that our Government, which is truly Republican, was not impelled by the unworthy motives that have been ascribed to her, and that Federalists of merit where they can be found are treated there with respect.⁹³

Wright also pointed out that the Maryland Federalists had set a precedent for the repeal in 1791 when they sought to oust Samuel Chase, of all people.⁹⁴ At that time, Chase had been a zealous anti-Federalist, but he switched a few years later—what stayed consistent was his zeal. Chase had been appointed to the criminal court, and held a commission “during good behaviour” as established by the state legislature. After the Federalists failed in their attempt to impeach Chase, they “repealed the law, and renewed it ‘*totidem verbis*.’”⁹⁵ However, the governor simply renewed Samuel Chase’s commission, “but, at the next session, so fixed were the Federalists on their purpose, that they repealed that section of the law that related to the judges, and amended it, that ‘the district judge should be the judge of the criminal court,’ and thus dismissed Mr. Chase, the obnoxious judge.”⁹⁶ He believed that the Federalists’ revocation of a “good behaviour” commission in 1791 was a precedent for the constitutionality of the Republican repeal in 1801.⁹⁷

The Maryland controversy gained a national audience that winter, as newspapers around the country covered the state’s repeal.⁹⁸ The *National Intelligencer* printed Senator Wright’s defense of the repeal, and the Federalist press soon rebutted Wright’s arguments.⁹⁹ Federalist newspapers in Philadelphia and Providence compared the Maryland repeal to the Federal debate over repeal, and angrily objected to the Republicans’ brazenness. These reports noted that the Congressional Republicans “expressly acknowledged that the Constitution denies to the Legislature the power of changing a system of Judicature, merely for the purpose of getting rid of obnoxious

⁹³ *Id.*

⁹⁴ *Id.* at 137-38.

⁹⁵ *Id.* at 138.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., GAZETTE OF THE U.S. (Philadelphia), Jan. 25, 1802; U.S. CHRON. (Providence), Feb. 11, 1802; “A Marylander,” WASH. FEDERALIST, Dec. 31, 1801; NAT’L INTELLIGENCER (Washington), Dec. 30, 1801.

⁹⁹ “Fellow Citizen,” WASH. FEDERALIST, Feb. 9 & Feb. 15, 1801.

Judges,” and at least offered policy arguments to justify their repeal.¹⁰⁰ But these papers noted that the Maryland Republicans had broken this rule:

They do not even attempt to improve the system, but have repealed the law which established the system, and having thereby . . . turned out those judges which the Constitution declared independent, have *re-enacted the same law!* Such is the security afforded by written Constitutions, when Jacobins are to legislate under them!¹⁰¹

The Washington Federalist also reported that the 1801 bill “was the copy, verbatim of the law of 1796, except the clause repealing that law.”¹⁰² This commentator continued, “[t]he repeal and immediate restitution of the law must have been predic[a]ted on the removal of the judges.”¹⁰³ According to these writers, Maryland’s repeal showed the true partisan motivations behind all of the judiciary revisions, and served as a warning about the Jeffersonians’ danger to the Constitution. “A Marylander,” writing in the *Washington Federalist*, which has been linked by some to John Marshall, also protested against the bill’s unconstitutionality, but he offered an optimistic prediction. Relying on the “during good behaviour” clauses in the 1796 law, “A Marylander” believed the Federalist case was clear and posed “no difficulty,” and warned that “this encroachment [was] of most dangerous tendency” of Republican abuses.¹⁰⁴ After noting that the “old judges compose the only legal courts” (i.e., only Federalist judges), he concluded, “I am confident that the courts of Maryland will have firmness and independence” to overturn the repeal and restore the Federalist justices.¹⁰⁵

Meanwhile, the Republicans were equally sanguine. One Republican in Maryland wrote to a Maryland Congressman, “You have no doubt heard that Mr. Whittington has sued Judge Polk + that the trial was likely to come this term of the General Court. The Federalists seem determined to die in the last ditch, rather than submit . . .”¹⁰⁶ Expectations were high, and the stakes were high, for the case was a potential springboard for the Justices to launch their counterstrike—or a potential setback before a national audience.

¹⁰⁰ GAZETTE OF THE U.S. (Philadelphia), Jan. 25, 1802; U.S. CHRON. (Providence), Feb. 11, 1802.

¹⁰¹ U.S. CHRON. (Providence), Feb. 11, 1802 (emphasis in original).

¹⁰² “Fellow Citizen,” WASH. FEDERALIST, Feb. 15, 1802.

¹⁰³ *Id.*

¹⁰⁴ “A Marylander,” WASH. FEDERALIST, Dec. 31, 1801.

¹⁰⁵ *Id.*

¹⁰⁶ Letter from Edward Hopper to Joseph Nicholson (Apr. 17, 1802), in 2 JOSEPH NICHOLSON PAPERS (on file with the Library of Congress). Joseph Nicholson was the legendary Republican who, despite being severely ill, traveled through a snowstorm to Congress in order to block Maryland’s delegation from supporting Aaron Burr. RENZULLI, *supra* note 27, at 226.

2. *The Supreme Court Justices*

In March 1802, around the time that William Whittington filed his petition to the General Court, the Republican Congress repealed the Judiciary Act of 1801, terminating the Midnight Judges' offices and the new circuit system, and then reinstated the old system, in which the Justices rode the circuits themselves.¹⁰⁷ Because Congress had also suspended the next two Supreme Court terms, the Justices would not be able to hear a challenge to the repeal until February 1803, and they faced a difficult decision about whether to ride circuit or to boycott, in deference to Adams' appointments of January 1801. Just when the General Court held its trial in *Whittington v. Polk* in April, the Supreme Court justices were in the middle of their tense discussions about a boycott.

The Federalist Congressional leaders began organizing an aggressive resistance to the repeal of the Judiciary Act. In late March, the Federalists learned some exciting news: Marshall would cooperate fully with their plans. One Congressman visited John Marshall in Richmond and reported "that the firmness of the Supreme Court may be depended on should the business be brought before 'em."¹⁰⁸ This report spread quickly among the Federalist leadership, and they grew more emboldened.¹⁰⁹ On April 6, Marshall wrote to Justice Paterson that he personally opposed riding circuit and wished that the Court would have an opportunity to hear a challenge to the repeal:

I confess I have some strong constitutional scruples. I cannot well perceive how the performance of circuit duty by the Judges of the supreme court can be supported. If the question was new I should be unwilling to act in this character without a consultation of the Judges; but I consider it as decided & that whatever my own scruples may be I am bound by the decision. I cannot however but regret the loss of the next June term. I could have wished the Judges had convened before they proceeded to execute the new system.¹¹⁰

¹⁰⁷ Repeal Act, ch. 8, 2 Stat. 132 (1802); An Act To Amend the Judicial System of the United States, ch. 31, 2 Stat. 156 (1802).

¹⁰⁸ Letter from John Rutledge to James A. Bayard (March 26, 1802), in COLLERY COLLECTION (on file with the Historical Society of Delaware).

¹⁰⁹ Probably hearing this same message from Ross, Gouverneur Morris noted in his diary on April 5 that "Mr. Ross calls to tell me he is advised that the Chief Justice is disposed to go quite as far as we could wish." Diary of Gouverneur Morris (Apr. 5, 1802), in GOUVERNEUR MORRIS PAPERS (on file with the Library of Congress). Holt mistakenly cites this passage to April 6 of the diary. See Wythe Holt, "[I]f the Courts have firmness enough to render the decision": Egbert Benson and the Protest of the "Midnight Judges" Against Repeal of the Judiciary Act of 1801, in WYTHE HOLT & DAVID A. NOURSE, EGBERT BENSON, FIRST CHIEF JUDGE OF THE SECOND CIRCUIT (1801-1802) 10 (1987) (describing the Federalist plans as "buoyed by the report from Richmond").

¹¹⁰ Letter from Chief Justice John Marshall to Justice William Paterson (Apr. 5, 1802), in 6 THE PAPERS OF JOHN MARSHALL 106 (Charles F. Hobson ed., 1990).

True to his leadership as Chief Justice, Marshall valued judicial consensus for Court decisions, but his personal feelings about the boycott and about the law are very revealing. These letters began a series of exchanges about the boycott plans. Justices Cushing, Paterson, and Washington preferred to ride circuit and avoid confrontation, while Justice Chase argued strongly for the boycott.

In his own letter to Justice Paterson on April 6, Chase argued that the Justices should stand by their principles, despite the consequences. He then explicitly mentioned *Whittington v. Polk*, which was to be argued the very next day:

I expect we shall hear from our Chief Justice in about a fortnight. I hope we shall meet and consult. I believe a Day of severe trial is fast approaching for the friends of the Constitution, and we I fear must be principle actors, and may be sufferers therein. In this State an assize of office is brought by Judge Whittington vs. Judge Polk to try the constitutionality of the act of our Legislature repealing our District Law. I would write to you fully my Sentiments, as far as I have formed an opinion, but I fear some accident. I will only say, if the office of the Circuit Judge is full, and it is so if not taken away by the repealing act, We are to be made the instruments to destroy the independence of the Judiciary.¹¹¹

Chase regarded *Whittington* as an important test case that would influence the course of events. Despite his cryptic concerns about “some accident,” he was quite certain that the Supreme Court Justices had no legal right to ride circuit. Chase was invoking *Whittington* because first, he was optimistic that the case would be decided for the Federalists, and second, he saw it as a strong precedent against their riding circuit. At that point in the Justices’ discussions, he was trying to influence the more reluctant associates, and he thought *Whittington* would soon be strong ammunition for his case.

In an even more adamant letter to Chief Justice Marshall two weeks later, Chase again mentioned an “assize of office”—the same writ he referred to in his letter to Paterson in discussing *Whittington*’s case—as the key to the Court’s chance to void the repeal.

If the constitutionality of this Act could be brought before the Supreme Court, by an action of assize of office, or by action to recover the Salary, I should decide (as at present advised) that the Act is void; and I would by the first action restore the Judge to his Office, and by the latter, adjudge him his Salary.¹¹²

¹¹¹ Letter from Justice Samuel Chase to Justice William Paterson (Apr. 6, 1802), in WILLIAM PATERSON PAPERS (on file in the MSS Room (Lenox), New York Public Library).

¹¹² Letter from Justice Samuel Chase to Chief Justice John Marshall (April 24, 1802), reprinted in GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 174-75 (1981):

[B]ut by neither of these modes, nor by any other (as Mandamus or Quo Warranto) could remedy be obtained. [The ultimate holding of *Marbury*]. This defect of remedy to obtain a *Right* (which Justice abhors) will induce every Judge of the Supreme Court to act

At about the same time, Chief Justice Marshall informed the Federalist leadership, much to their disappointment, that the Justices had decided to ride circuit.¹¹³ From this setback, the Federalist leaders in Congress and the Midnight Judges formulated a plan to contest the Justices' jurisdiction in riding circuit that autumn.¹¹⁴ The Justices did not stop debating their decision, and even expressed some regrets about the situation.¹¹⁵ As of June 8, Chase was still willing to fight.¹¹⁶

On June 14, the Maryland General Court announced its decision. Considering the court's Federalist majority and William Whittington's apparently strong legal case, one would expect the two Federalist judges, Chase and Done, to vote to strike down the 1801 repeal, and one, the Republican Duvall, to dissent. As discussed in Subsection I.B.2, Jeremiah Townley Chase and Gabriel Duvall were extremely active campaigners for the Federalists and Republicans, respectively.¹¹⁷ The third judge, John Done, established his commitment to the Federalists as an elector for John Adams in the 1796 presidential election,¹¹⁸ and his continuing allegiance to the Federalists was publicly known.¹¹⁹ Instead, the court unanimously rejected the Federalist challenges. Was this an act of impartiality and fair judging? Moderation? Or calculated capitulation?

II. WHITTINGTON V. POLK

A. The Decision

As the opening salvo in the judicial battle over Federalist appointments, *Whittington* paralleled the facts of *Marbury* and *Stuart v.*

with the greatest caution; and he must, in my judgement, decline to execute the office of a Circuit Judge, if he apprehends, that he shall, thereby, violate the Constitutional Rights of the Circuit Judges.

Id.

¹¹³ Letter from James A. Bayard to Richard Bassett (Apr. 24, 1802), in BAYARD PAPERS (on file with the Maryland Historical Society, Baltimore, MD); Letter from James A. Bayard to Alexander Hamilton (Apr. 25, 1802), in 25 PAPERS OF ALEXANDER HAMILTON 613-14 (Harold C. Syrett ed., 1977); Diary of Gouverneur Morris (Apr. 24, 1805) in GOUVERNEUR MORRIS PAPERS (on file with the Library of Congress).

¹¹⁴ Holt, *supra* note 109, at 110-11.

¹¹⁵ HASKINS & JOHNSON, *supra* note 112, at 177 (citing a letter from William Cushing to William Paterson (May 29, 1802), in MISCELLANEOUS MANUSCRIPTS, WILLIAM CUSHING (on file with the New York Historical Society, New York City)).

¹¹⁶ *Id.*

¹¹⁷ See *supra* text accompanying notes 52-54. The conflicts were not just political. Jeremiah Chase held mortgages on the property of Luther Martin, the Federalist lawyer representing William Whittington. PAPANFUSE, *supra* note 36, at 213.

¹¹⁸ PAPANFUSE, *supra* note 36, at 273-74. John Done married William Polk's niece Patience Bayly. *Id.*

¹¹⁹ PITTSFIELD SUN (Mass.), reprinted in INDEP. CHRON. (Boston), Sept. 6, 1802.

Laird very closely on the state level, except for the fact that the Maryland Federalists had an even stronger claim. Unlike Marbury and President Adams's other midnight appointments, William Whittington received a judicial appointment in 1799, in the midst of a Federalist mandate, and thus, his office was untainted by "lame duck" illegitimacy. Unlike Marbury's five-year limited term as a Justice of the Peace, William Whittington's office was held during good behavior without any term limit, and thus it was a freehold property interest. Like the U.S. Supreme Court, the Maryland General Court was controlled by Federalist judges, but unlike the Supreme Court, the Maryland General Court had the original jurisdictional power to return offices to their rightful owners. The only major legal or political issue for which Whittington had a weaker claim than Adams's "midnight appointments" was that his office had been created by the legislature, not the state constitution. At the same time, Marbury's commission was also legislative, and yet the Marshall Court was willing to recognize that this commission was irrevocable vested property.

Despite these advantages for the Federalists, the Maryland court rebuffed their arguments in June 1802, and cloaked its judicial surrender to the Republicans with mere dicta about judicial review. Judge Jeremiah Chase held, "1st. That an act of assembly repugnant to the constitution is void. 2d. That the court have [sic] a right to determine an act of assembly void, which is repugnant to the constitution."¹²⁰ Then for four pages of dicta, he touted the power of judicial review. His strongest statements:

The legislature, being the creature of the constitution, and acting within a circumscribed sphere, is not omnipotent, and cannot rightfully exercise any power, but that which is derived from that instrument.¹²¹

The power of determining finally on the validity of the acts of the legislature cannot reside with the legislature, because such power would defeat and render nugatory, all the limitations and restrictions on the authority of the legislature, contained in the bill of rights and form of government, and they would become judges of the validity of their own acts, which would establish a despotism, and subvert that great principle of the constitution, which declares that the powers of making, judging,¹²² and executing the law, shall be separate and distinct from each other.

It is the office and province of the court to decide all questions of law which are judicially brought before them, . . . and to determine whether an act of the legislature, which assumes the appearance of a law, and is clothed with the garb of authority, is made pursuant to the power vested by the constitution in the legislature; for if it is not the result or emana-

¹²⁰ Whittington v. Polk, 1 H. & J. 236, 241-42 (Md. 1802).

¹²¹ *Id.* at 242.

¹²² *Id.* at 243.

tion of authority derived from the constitution, it is not law, and cannot influence the judgment of the court in the decision of the question before them.¹²³

These passages are the reason that *Whittington* is cited as a foundation for American judicial supremacy. Chase wrote, “[W]henever it does become necessary [to decide the constitutionality of legislation, the people] trust they [the judges] will not seek any evasion, or shrink from the determination of it, but act with caution and circumspection, and give it that consideration which the importance of it, and their duty, demand.”¹²⁴ In fact, the General Court erred considerably on the side of caution—and indeed, they did evade and shrink from their judicial duty. Sharply qualifying his bold pronouncements of judicial supremacy, Judge Chase pointed out that this power of review was limited by political interests and a responsibility not to disrupt or undermine the government without sufficient cause:

It is true the people may assume the powers of government whenever the ends of it are perverted, when public liberty is manifestly endangered, and all other means of redress are ineffectual; but surely every act of the legislature repugnant to, or in violation of the constitution, cannot be held a sufficient cause for the interposition of the people in a way which subverts the government and reduces the people to a state of nature, and therefore cannot be the proper mode of redress to remedy the evils resulting from an act passed in violation of the constitution.¹²⁵

Thus, even if a law is unconstitutional, the rights at stake may not be significant enough to warrant judicial intervention. The court feared that judicial review carries the risk of “subvert[ing]” the government—and in this case, the judges avoided that risk.

After his lengthy disquisition on judicial review, Judge Chase then turned to the more direct questions of the case: whether the repeal of 1801 was constitutional, and whether the assize of novel disseisin was the proper remedy. Chase began by dodging the question of motives of the repeal: The motives “cannot be inquired into by the court in a question as to its constitutionality.”¹²⁶ But Judge Chase never mentioned that the legislature reinstated the same court system immediately after the repeal, which was clear evidence of the Republicans’ unacceptable partisan motive. Chase first focused on the weakest of the plaintiff arguments: that “justices” qualified as judges under the Maryland Constitution, and therefore could be commissioned during good behaviour. Chase reviewed the provisions of the Maryland Constitution that guaranteed all judges commissions “during good behav-

¹²³ *Id.* at 244.

¹²⁴ *Id.* at 246.

¹²⁵ *Id.* at 243.

¹²⁶ *Id.* at 246.

our,” and noted that all other civil officers who “do not hold commissions during good behaviour” shall be appointed annually.¹²⁷ Jeremiah Chase then pointed out that from 1777 until the reform act, justices of the peace were annually appointed, and could be duly discharged.

[T]he plain and obvious meaning of that instrument [the state Constitution], [is] that the justices of the county courts were not entitled to commissions during good behaviour. A plain distinction is kept up between the justices of the county courts and the judges of the other courts, and a studied uniformity of language has been observed throughout to preserve the distinction.¹²⁸

Judge Jeremiah Chase granted that the general assembly had the power to “modify” the county courts, but they could not create a life tenure office that endured beyond the life of the legislation. Though Whittington had “a right vested” in the office, that right lasted only “for the term of years limited for the continuance of the law.” Curiously, Chase blasted the repeal as “an infraction of his right,” as well as “incompatible with the principles of justice, and does not accord with sound legislation.”¹²⁹ Nevertheless, the repeal was constitutional:

[T]he said office, and the right to hold it, being created by act of assembly, and not vested in the plaintiff by the constitution, and there being no clause or article in the bill of rights or form of government prohibiting or restricting the legislature in passing the said repealing act, the court are of the opinion that the said act is not void.¹³⁰

Chase’s implicit theory is that “good behaviour” meant one thing in a constitutional context: life tenure, with removal solely for misbehaviour. It meant another thing in a legislative context: tenure for the term of the legislation, with removal for misbehaviour or by repeal of the legislative act itself. But if the legislature could simply repeal a bill and reinstate the exact same bill in order to remove certain justices, how was the term “good behaviour” meaningful in any legal or practical sense? If the repeal indeed was an “infraction” of Whittington’s rights, as Chase granted in his opinion, why was there no remedy? Was Chase intentionally writing imprecisely to offer some sympathy for the plaintiff? Or was he revealing his own feelings of conflict, or even of regret?

Finally, Judge Chase briefly turned to the question of remedy, the writ of *assize of novel disseisin*. He concluded that the writ did not lie, because Whittington’s office was “only an interest for a term of years in the said office, determinable on the contingency of his being con-

¹²⁷ *Id.* at 247 (citing sections XL and XLIX of the MD. CONST. of 1776).

¹²⁸ *Id.* at 248.

¹²⁹ *Id.* at 249.

¹³⁰ *Id.*

victed of misbehaviour in a court of law; and that writ is not adapted to the recovery of any estate or interest . . . in an office less than a freehold”¹³¹ Chase noted only one exception to this rule, but explained that it bore no similarity to Whittington’s case, and thus there was no way for the court to extend the writ by equity.¹³² Essentially, this question of remedy begs the question of constitutionality. If the legislature had the power to create offices “during good behaviour” as life tenure, not subject to repeal or removal (except for misbehavior), then the repeal would be unconstitutional, and the justice would have a freehold right to the office. But as Judge Chase ruled, the legislature did not have the power to create such offices that would survive beyond the acts that created them. As a result, the office was not a freehold, and not subject to the assize, and thus, the repeal was constitutional.

Judge Duvall concurred in the opinion, except the passage in which Judge Chase decried the repeal as an “infraction” of the plaintiff’s right and as “incompatible with the principles of justice.” Duvall complained that these observations were “partly erroneous and partly extrajudicial.”¹³³ While Duvall primarily objected to recognizing Whittington’s legal right to the office, his dissent implicitly flagged the inconsistency between recognizing such a right and then declining to remedy an infraction of that right.

This fully articulated argument for judicial supremacy so soon before *Marbury* has been cited by state courts as a major precedent for judicial supremacy and as a forerunner to *Marbury*.¹³⁴ Whittington has also caught the attention of several legal historians in several eras. In 1885, an article in the *American Law Review*, the most important legal periodical at the time, credited *Whittington* as one of the foundational cases “assert[ing] and enforc[ing]” judicial review.¹³⁵ James Bradley Thayer’s widely influential article in 1893, which established the “clear mistake” rule for judicial review, cited *Whittington* as one of the origins of American judicial review.¹³⁶ In one of the most important books on judicial power in America, Charles Grove Haines emphasized the dicta of judicial supremacy in *Whittington*, and he placed it in the context of being a forerunner for *Marbury*.¹³⁷ A more recent

¹³¹ *Id.* at 249-50.

¹³² *Id.* The exception is the case of *elegit* (a judgment of debt, damages or forfeiture).

¹³³ *Id.* at 251.

¹³⁴ See, e.g., *Att’y Gen. of Md. v. Waldron*, 426 A.2d 929 (Md. 1981); *Perkins v. Eskridge*, 366 A.2d 21 (Md. 1976); *Murphy v. Yates*, 348 A.2d 837, 848 & n.9 (Md. 1975); *Jones v. Freeman*, 146 P.2d 564 (Okla. 1943).

¹³⁵ Meigs, *supra* note 3, at 185.

¹³⁶ Thayer, *supra* note 3, at 140.

¹³⁷ HAINES, *supra* note 3, at 106-08.

study by Robert Clinton Lowry adopted the same perspective.¹³⁸ Perhaps the most sweeping statement of *Whittington's* influence appeared in a biography on Luther Martin, one of the Federalist lawyers in the case: "The importance of this decision lies in the fact that Martin's arguments persuaded the [Supreme] Court to write an opinion which was followed in detail a year later in *Marbury v. Madison*."¹³⁹

B. The Response

Soon after the decision, politicians on both sides discussed the opinion and its political significance. The zealous Virginia Congressman John Randolph gleefully mocked the Federalist argument that the county "justices" created by the legislature were the same as the "judges" established by the state constitution. Randolph then remarked that it was fitting that these judges on the General Court had "disclaim[ed] all connection with Justice," and that they deserved impeachment for the "usurpation of sovereignty to pronounce on the constitutionality of law."¹⁴⁰ This extreme reaction foreshadowed Randolph's hard-line leadership in the impeachment and conviction of Judge Pickering, and then in the impeachment of Justice Chase. On the other side of the aisle, Federalists grumbled about the *Whittington* opinion. Charles Carroll, writing to Robert Goodloe Harper, a Federalist Congressman who was one of *Whittington's* lawyers, regretted the court's decision that the law was constitutional, but also expressed some satisfaction that the judges had "so forcibly expressed their disapprobation of the motives in which it originated."¹⁴¹

The press immediately publicized the opinion, with prominent area papers (including the *Baltimore Democratic Republican*, the *Maryland Gazette*, and the *Washington Federalist*) covering their front page with the entire text of the decision.¹⁴² The *Baltimore Democratic Republican* added in its editorial section, "We crave the particular attention of our readers to the important law document which we this day publish—*Whittington versus Polk*."¹⁴³ The *National Intelligencer*, a moder-

¹³⁸ CLINTON, *supra* note 3, at 76-77 & 76 n.95 (1989).

¹³⁹ CLARKSON & JETT, *supra* note 3, at 200. Richard Ellis had a more balanced view of *Whittington*: "[T]he General Court, desirous of avoiding direct confrontation with the Republican controlled legislature, declared the law constitutional." However, Ellis discussed the case for only four paragraphs, without delving into more of the background of the case and without questioning the legal basis for the decision. ELLIS, *supra* note 3, at 244.

¹⁴⁰ Letter from John Randolph to Joseph Nicholson (July 25, 1802), in SHIPPEN PAPERS (on file in the Manuscript Division, Library of Congress).

¹⁴¹ Letter from Charles Carroll to Robert Goodloe Harper (June 15, 1802), in ROBERT GOODLOE HARPER PAPERS (on file with the Maryland Historical Society).

¹⁴² BALT. DEMOCRATIC REPUBLICAN, June 22, 1802; *id.*, June 24, 1802; MD. GAZETTE, June 24, 1802; WASH. FEDERALIST, June 30, 1802.

¹⁴³ BALT. DEMOCRATIC REPUBLICAN, June 22, 1802.

ate Republican newspaper in Washington, reported only the pro-Republican holding, and not the pro-judicial review dicta. The judges, it reported, “were unanimously of the opinion that the law of the last session was not unconstitutional; they were further of the opinion, that the office of Mr. Whittington, the ex-judge, was not for life, and that therefore an assize of novel disseisin . . . did not lie.”¹⁴⁴

Two days later, the *Baltimore Democratic Republican* ran two articles on the decision. The first recalled the arguments and the demeanor of the attorneys before the General Court in April 1802.¹⁴⁵ The second celebrated the *Whittington* decision as a triumph by the Republicans in the national judiciary battle. This article, titled “Judiciary,” pointed out more than once that a majority of the General Court judges were Federalists, and therefore, the Federalists expected to prevail and “swelled with confident certainty that the law would be pronounced unconstitutional.”¹⁴⁶ However, the Federalists’ hopes, “delusive and visionary, [were] of short duration. The court, a majority of federalists, stern to the principles of our government, and pure in wisdom and integrity, *unanimously* declared the law to be constitutional.”¹⁴⁷ The writer celebrated this victory as decisive in the struggle over the constitution and the courts, and he reveled in the news that the Federalists’ attacks were even alienating New England voters. *Whittington*, in the eyes of this writer, was one important step not only in securing a Republican judiciary, but also in extending their political power.

The two parties showed that “spin” is a time-honored American tradition. Republicans around the country claimed victory immediately and used the case to support the national repeal in Congress. The Federalists deployed their editorialists to contest this interpretation: “The democrats have pretended to exult very much on this decision, and have endeavored to make the people believe, that it is a sanction of the repealing law of congress. This opinion can only gain credit with those who will not read and judge for themselves.”¹⁴⁸ This writer in the *Washington Federalist* mainly attempted to distinguish *Whittington* from the federal case, by focusing on peculiarities of the Maryland constitution and portraying Whittington’s reliance on state legislation as weaker than the federal judges’ reliance on Article III of the Constitution for their offices.¹⁴⁹ Then the writer noted that the Maryland court had at least recognized “the power of the court to de-

¹⁴⁴ NAT’L INTELLIGENCER (Washington), June 14, 1802.

¹⁴⁵ BALT. DEMOCRATIC REPUBLICAN, June 24, 1802.

¹⁴⁶ *Judiciary*, BALT. DEMOCRATIC REPUBLICAN, June 24, 1802.

¹⁴⁷ *Id.* (emphasis in original).

¹⁴⁸ WASH. FEDERALIST, June 30, 1802.

¹⁴⁹ *Id.*

clare a law unconstitutional."¹⁵⁰ This article exaggerated the weakness of Justice Whittington's case in order to distinguish it from the federal controversy. The author portrayed the legislative act as "temporary," but nothing in the law itself made the county courts temporary—no sunset provision, no term limits, etc—and nothing in the legislation suggested that it was creating anything less than a life-term freehold office.

A second writer in the same issue of the *Washington Federalist* opted against the strategy of distinguishing the federal judicial battle from the facts in *Whittington*.¹⁵¹ Despite the holding "that the repealing act is not *literally* unconstitutional," this Federalist found legal support in the dicta that the repeal was unconstitutional in spirit.¹⁵² He noted that even the Republican judge, Gabriel Duvall, declared the repeal "inexpedient."¹⁵³ He also cited the opinion's conclusion that the repeal, "in depriving the judge of his office, is an infraction of his right, and incompatible with the principles of justice, and does not accord with sound legislation (which is virtually acknowledging it to be unconstitutional)."¹⁵⁴ The writer used this dicta to condemn both the Maryland and the federal repeals, but found it "unaccountable" that the Maryland General Court would not reach the logical conclusion that these infractions made the repeal literally unconstitutional.¹⁵⁵ "The spirit of the constitution was to bind the legislature as far as possible from doing injustice and violating [the public's] faith. The circumstance demonstrates the perpetual tendency of legislative powers to overstep its legitimate boundaries."¹⁵⁶ With the federal clash looming, the writer was simultaneously embracing *Whittington's* dicta and rejecting its ruling. If the General Court had indeed ruled in favor of the Federalists, the Federalists obviously would have been even more united and vocal about the decision.

Several months later, in the midst of the circuit-by-circuit challenges by the unseated Federalist judges, the Republican press continued to invoke *Whittington* as precedent. A Republican paper in western Massachusetts published an editorial in September on *Whittington* that was printed widely in other Republican papers.¹⁵⁷ The editorial drew comparisons between *Whittington* and the federal repeal. The Federalists had attacked the Maryland repeal as unconsti-

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ PITTSFIELD SUN (Mass.), reprinted in INDEP. CHRON. (Boston), Sept. 6, 1802.

tutional “on the same grounds as the late Repeal in Congress.”¹⁵⁸ After summarizing the case, the editorial pointed out that the court had a Federalist majority and even disapproved of the repeal, but still upheld it because the offices were not explicitly vested by the state constitution. The editorial reported that this decision had deflated the Federalists’ challenge to Congress’s repeal, and the Federalists, “after all their brags and threats, do not seem inclined to hazard another defeat.”¹⁵⁹

III. AN ALTERNATIVE *WHITTINGTON*

After the ruling came down, it certainly was understandable for the Federalists to have lost a great deal of hope. Judge Jeremiah Chase’s opinion, despite its lofty dicta about judicial supremacy, heralded a retreat from the battle over the judiciary. But the Federalists could have, and should have, prevailed in *Whittington*. I suggest three rulings that would have restored Whittington to office that would have been more consistent with the concept of “during good behavior” and the rights that Judge Chase conceded.

A. “Good Behaviour” and Contemporary Arguments

The three alternative rulings I suggest begin with a discussion of the significance of the wording “during good behaviour,” as the key to judicial independence in America. The term arose in fifteenth-century England, in response to the problem that kings could dismiss officeholders from offices held “at pleasure.” The wording “during good behaviour” insulated these offices from such royal caprice, and it was one of the significant judicial reforms after the Glorious Revolution.¹⁶⁰ By these statutes, judges holding their office during “good behaviour” could be removed only by the procedures explicitly stated

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Smith, *supra* note 22, at 1105-10. Before the fifteenth century, all English officials served “during pleasure” (*quam diu nobis placuerit*), and the king could dismiss them at any time. *Id.* at 1105. Henry VI then began the practice of appointing officers “during good behaviour,” in order “to protect the patent holders against arbitrary removal from office and loss of emoluments.” *Id.* at 1106. During the Stuart Restoration, the crown returned to “during pleasure” commissions and removed a high number of judges. *Id.* at 1108-09. Apparently in reaction to these incursions and abuses, England returned to “good behaviour” appointments after the Glorious Revolution. The Act of Settlement in 1701 provided that judicial commissions serve “during good behaviour,” containing explicit and limited provisions for removing these judges as both Houses of Parliament had to pass an address for removal. *Id.* Initially, these commissions expired when the king or queen expired, but in 1760, an act announced that judges would continue in office during good behaviour even after the monarch’s death, and deaths of any of his or her successors. *Id.* at 1110. The construction of “good behaviour” offices with explicit removal provisions continued in Jamaica. *Id.* at 1117-18.

in the statute; otherwise, they could not be removed. In Maryland's constitution and in its 1796 act, the procedures are limited to two scenarios: conviction of misbehaviour, or failure to reside in the specific district.

The colonial period was marked by a struggle for judicial independence, and the victory on this issue was signified by the use of "good behaviour" commissions. In the struggle over judicial independence in the 1750s, some colonial leaders declared that the common law mandated that judicial commissions were held during good behaviour, and could be removed only for misbehaviour in office.¹⁶¹ These pro-independence leaders kept pressing their case, arguing that "good behaviour" was the "ancient and indubitable" common law, "by the usage and custom of ages; . . . by the rules of reason; . . . by covenant with the first founder of your government; . . . by the united consent of Kings, Lords, and Commons; . . . by birthright and as Englishmen."¹⁶² In the years leading up to the Revolution, the independence of the judiciary from the Crown was a key issue in a majority of the colonies, including Maryland, and this debate focused on offices held during "good behaviour."¹⁶³

Once the colonies won their independence, ten of the states adopted constitutions that guaranteed at least some the judicial commissions during good behaviour.¹⁶⁴ Some states limited the term of office,¹⁶⁵ but most states, including Maryland, chose life-terms.¹⁶⁶ This choice is critical to understanding the framing of Maryland's judicial system as life term (and freehold), as defined against the practice of a few states to adopt explicit term limits. These ideas were also included in *Federalist* No. 78 by Alexander Hamilton. He defended Article III's guarantee of judicial offices during good behavior as

¹⁶¹ *Id.* at 1121 (noting that Pennsylvania had such a schema).

¹⁶² *Id.* at 1122 (citing 1 PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776, at 256-72 (B. Bailyn ed., 1965)).

¹⁶³ In 1759, pro-judicial independence colonists in the New Jersey assembly battled the crown over a "good behaviour" judicial commission for Robert Hunter Morris. *Id.* at 1125-28. A judge ruled that the commission was valid, and moreover, it was a freehold property—the critical distinction for the writ of assize of novel disseisin. *Id.* at 1128. The pro-British governors continued to oppose Morris, and the confrontation escalated with the assembly. *Id.* New York, Pennsylvania, the Carolinas, and Massachusetts had similarly bitter confrontations, with assemblies passing acts establishing good behaviour commissions, and pro-royal governors rejecting them. *Id.* at 1122. Benjamin Franklin took up the fight in the 1760s. In his "Causes of the American Discontents Before 1768," Franklin called for good behaviour judicial commissions, with permanent and ample salaries. *Id.* at 1125. The Crown won the battle after years of struggle, but the war for judicial independence and "good behaviour" commissions continued. *Id.*

¹⁶⁴ *Id.* at 1153-55.

¹⁶⁵ Pennsylvania and New Jersey adopted term limited by years, and New York adopted an age limit. *Id.*

¹⁶⁶ The other states were South Carolina, North Carolina, Virginia, Massachusetts, New Hampshire, and Delaware. *Id.*

“certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body.”¹⁶⁷ This explanation marks the transition of “good behaviour” from the colonial period to the early republic. The legal language protected judges not only against governors and their power to dismiss officials, but also against legislative abuses. Hamilton argued generally for the “permanent tenure of judicial offices,” so that the courts could fulfill their role as the “bulwarks of a limited Constitution against legislative encroachments.”¹⁶⁸ He noted that the “good behavior” provision promoted the “impartial administration of the laws”¹⁶⁹ and that temporary appointments would “be fatal to their necessary independence.”¹⁷⁰ Presaging the arguments in favor of Maryland’s judicial reforms of 1796, he also contended that permanent tenure would attract those few individuals with the “integrity” and “sufficient skill in the laws to qualify them for the stations of judges.”¹⁷¹ *The Federalist* was widely recognized by the central players of the judiciary crisis, from Jefferson¹⁷² to Samuel Chase,¹⁷³ and it was quoted in the newspapers by Federalists against the proposed repeal of the Judiciary Act.¹⁷⁴ Cousin Jeremiah Chase and other Maryland leaders were surely familiar with it.

Jefferson also recognized the legal significance of the term “during good behaviour.” Jefferson’s earliest anxiety about the 1801 Judiciary Bill arose from his understanding that judges appointed under it would have a freehold interest in their offices: “I dread this above all the measures meditated, because appointments in the nature of freehold render it difficult to undo what is done.”¹⁷⁵ Jefferson eventually concluded that all appointments made after December 12, 1800, when the Jefferson-Burr run-off began, were invalid “nullities,”

¹⁶⁷ THE FEDERALIST NO. 78, at 437 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

¹⁶⁸ *Id.* at 440.

¹⁶⁹ *Id.* at 437.

¹⁷⁰ *Id.* at 441.

¹⁷¹ *Id.* at 442.

¹⁷² Jefferson referred to the Federalist Papers with high praise soon after its publication. Letter from Thomas Jefferson to James Madison (Nov. 18, 1788), in 14 THE PAPERS OF THOMAS JEFFERSON 188 (Julian P. Boyd et al. eds., 1958) (calling *The Federalist* “the best commentary on the principles of government which was ever written”); Letter from Thomas Jefferson to Thomas Mann Randolph, Jr. (May 30, 1790), in 16 *id.* at 449 (“there is no better book than *The Federalist*”).

¹⁷³ In *Calder v. Bull*, 3 U.S. 386, 391 (1798), Chief Justice Samuel Chase praised Publius, the pseudonym for Alexander Hamilton, James Madison, and John Jay as authors of *The Federalist Papers*, “for his extensive and accurate knowledge of the true principles of Government.”

¹⁷⁴ *Balance*, WASH. FEDERALIST, Mar. 4, 1802.

¹⁷⁵ Letter from Thomas Jefferson to James Madison (Dec. 26, 1800), in 6 DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 663 (Maeva Marcus ed., 1985).

but he did not arrive at this conclusion immediately. During the electoral deadlock, Jefferson vacillated between sweeping out all of Federalist appointees and, more moderately, targeting only the corrupt.¹⁷⁶ By the end of March, Jefferson settled into his position on removing only the post-December 12 “lame duck” appointees, but he conceded that their judicial appointments were a formidable “strong hold, the tenure of which renders it difficult to dislodge them.”¹⁷⁷ Jefferson identified five categories of Federalist office holders, some to be removed and some to be left untouched. “Lame duck” non-judicial appointees, and officers guilty of “mal-conduct,” would have to go. “Good men,” however, would not be removed, and life-term judges were “irremovable.”¹⁷⁸ Jefferson repeatedly mentioned that he would target the Federalist appointees who held their offices only “during pleasure,”¹⁷⁹ but the life appointments were beyond the Republicans’ power.¹⁸⁰ By 1802, when Congressional Republicans took the lead in attacking the judiciary, Jefferson followed their position that the circuit courts could be disassembled.

Of course, these perspectives, from Hamilton to Jefferson, were based upon constitutional judicial offices. Could the same case be made for legislatively created offices? One argument can be derived from legislative intent and a search for consistency in legal terms. When the legislature used the same language of “good behaviour” without term limits, it was drawing from the same understanding of the term from the Maryland Constitution, the colonial experience and the other state constitutions, and the *Federalist Papers*. Judges Chase and Done might have concluded rather easily that the legislature in 1796 intended to create permanent offices beyond the control of future legislatures. The General Court judges could have decided that the term “good behaviour” must have a consistent legal meaning as establishing a freehold tenure in an office, whether the constitution or the legislature adopts that wording.

But did legislatures have the power to create such offices? Contemporary Federalist leaders were making that very argument. In the *Washington Federalist*, “Lucius Junius Brutus,” who has been identified as William Cranch, the chief judge of the D.C. Circuit and the very influential Supreme Court reporter beginning in 1801, wrote a series opposing Congress’s repeal in early 1802, just as the bill was being

¹⁷⁶ Letter from Thomas Jefferson to Governor McKean (Feb. 2, 1801), in 4 THE WRITINGS OF THOMAS JEFFERSON 350 (H.A. Washington ed., Taylor and Murray 1854); Letter from Thomas Jefferson to Dr. B. S. Barton (Feb. 14, 1801), in *id.* at 353-54; Letter from Thomas Jefferson to James Monroe (Mar. 7, 1801), in *id.* at 367-68.

¹⁷⁷ Letter from Thomas Jefferson to Joel Barlow (Mar. 14, 1801), in *id.* at 369-70.

¹⁷⁸ Letter from Thomas Jefferson to William Branch Giles (Mar. 23, 1800), in *id.* at 380-81.

¹⁷⁹ Letter from Thomas Jefferson to Doctor Benjamin Rush (Mar. 24, 1801), in *id.* at 382-384.

¹⁸⁰ Letter from Thomas Jefferson to General Knox (Mar. 27, 1801), in *id.* at 386.

debated.¹⁸¹ He noted that the commission “*durante bene placito* [during pleasure] has been known in the English law for centuries,” long before the appearance of written constitutions.¹⁸² He cited Lord Coke’s commentaries that explained that any grant “*quamdiu se bene gesserit* [during good behavior], &c. or for any like incertain time” is “an estate for life.”¹⁸³ Cranch explains that this property interest is the same as an “estate of freehold in the office.”¹⁸⁴ One of his most important arguments was that federal judges in America held a sacrosanct freehold property interest in their offices for life. While many of Cranch’s arguments involved American precedents based on constitutionally created offices, such as the *Case of the Judges* in Virginia,¹⁸⁵ he also turned to English life tenure offices created by legislation.

Lucius Junius Brutus (Cranch) discussed several English decisions recognizing that Parliament creates estates for life when it uses the phrase “during good behaviour” for judicial offices. The first case was *Harcourt v. Fox*, decided by the King’s Bench in 1693.¹⁸⁶ By an act in 1546, Parliament created a clerk of the peace who was selected by a county official, and who held his office so long as this official held his and so long as he behaved well. In 1689, the first year of the reign of William and Mary after the Glorious Revolution, Parliament passed a new act that granted the clerk his office “*for so long time only as such Clerk shall well demean himself in his said office.*”¹⁸⁷ The plaintiff Harcourt was appointed clerk of the peace in 1689 with a seal using the wording of the earlier, non-life estate act. Then, in 1691, a new official appointed the defendant Fox to replace Harcourt. In 1691, the King’s Bench ruled unanimously in favor of Harcourt, holding that the act of 1689 established an estate for life in the office. Cranch offered selections from the concurring opinions. Justice Eyres held that “*once the clerk is in his estate in the office, he is SETTLED BY THE STATUTES, and not by the limitation of the grant,*” and that the estate by the statute was “*an estate for life.*”¹⁸⁸ Justice Dolbert commented that the dispute “was a plain case, and truly I do not find any difficulty at

¹⁸¹ See WASH. FEDERALIST, Dec. 21, 22, 29, 1801; Jan. 7, 9, 12, 19, 28; Feb. 4, 10, 20; and March 19, 22, 31, 1802. For the identification of Lucius Junius Brutus as Cranch, see WILLIAM CUSHING, INITIALS AND PSEUDONYMS 42 (1885).

¹⁸² Lucius Junius Brutus, No. 10, WASH. FEDERALIST, Feb. 4, 1802.

¹⁸³ *Id.*

¹⁸⁴ Lucius Junius Brutus, No. 12, WASH. FEDERALIST, March 19, 1802.

¹⁸⁵ Lucius Junius Brutus, No. 10, WASH. FEDERALIST, Feb. 4, 1802 (discussing the *Cases of the Judges of the Court of Appeals*, 8 Va. (4 Call) 135, 150-51 (1793)). This discussion continued in the eleventh installment of the series.

¹⁸⁶ Lucius Junius Brutus, No. 12, WASH. FEDERALIST, Mar. 19, 1802 (citing *Harcourt v. Fox*, 1 Shower’s Parliamentary Cases 516 (1693)). The following information in the paragraph is from this *Washington Federalist* article, unless otherwise noted.

¹⁸⁷ *Id.* (emphasis in original).

¹⁸⁸ *Id.* (emphasis in original).

all in it,” and then asked rhetorically, “for if any one hath an office granted to him to hold *quandiu tantam se bene gesserit*, *would that make it not to be an estate for life?*”¹⁸⁹ The answer for the court was obvious. Lord Chief Justice Holt similarly believed that the conclusion was clear: “for my own part I should not have made *the least question . . . but that it was an estate for life.*”¹⁹⁰ Turning to legislative intent, Chief Justice Holt wrote:

I am more incline to be of this opinion, because I knew the temper and inclination of Parliament at the time when this act was made; their design was, that men should have places not to hold precariously or determinable upon will and pleasure, but to have a certain, durable estate, that they might act in them without fear of loosing them.¹⁹¹

This observation combines the parallel aspects of Maryland’s intent in creating freehold judicial offices. With the same attention to legislative intent, the Maryland General Court would have observed that the 1796 reform act established life estate offices in order to create the same stability and to attract better talent, while the 1802 repeal was a blatant ripper bill designed to strip Federalists of their offices, and recreate the exact same offices for Republican appointees.

Parliament affirmed *Harcourt v. Fox* in 1700, and concluded, according to Cranch:

That this [office] is an estate for life appears from the *words of the Act* It is an *estate for life*, determinable upon misbehaviour, *For during good behaviour is during life*, it is so long as he doth behave himself well in it so long as he lives, he is to have it as long as he lives; *during life* and during *good behaviour* are therefore synonymous phrases.¹⁹²

Parliament did not qualify the estate as existing only for the duration of the statute, but for the duration of the officeholder’s life.

William Cranch then cited *Owen v. Sanders*, decided by Parliament in 1699. Parliament declared “that the words *quamdiu se bene gesserit* constitute an estate for life,” one year before it passed the act of 1700, which established that judges’ commissions would be *quamdiu se bene gesserit*.¹⁹³ Cranch also described a case in 1706 in which the King’s Bench recognized that such offices are freeholds and can only be lost by forfeit due to misbehaviour.¹⁹⁴ Cranch reaches a logical conclusion from the freehold designation:

If an office be granted to a man so long as he shall behave himself well in it, the grantee hath an estate of freehold in the office; for since nothing but his misbehaviour can determine his interest, no man can prefix a

¹⁸⁹ *Id.* (emphasis in original).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* (emphasis in original).

¹⁹³ *Id.* (emphasis in original).

¹⁹⁴ *Id.* (emphasis in original) (case name was not mentioned).

shorter time than his life; since it must be his own act (which the law does not presume to foresee)¹⁹⁵ which can only make his estate of shorter continuance than his life.

Cranch concludes his series by addressing the question of whether Congress can abolish an office, even if the officeholder has a freehold life interest in the office. Cranch argues that the term “good behaviour” is not merely a restriction of power against executive power to replace at will, but that it is a conveyance of a right to the officeholder against all encroachments: “*the judge gains a title against all the world.*”¹⁹⁶ At times in this article, the author argues that the judge holds his office not by the will of the legislature, but by the power of the constitution, and by extension, the will of the people. This constitutional argument does not apply in *Whittington*, but Cranch raises other strong property arguments that do not depend on the constitution creating the office. Cranch draws a parallel to other property interests:

[The office is an] estate for life, for years, at will, or in fee simple. . . . Has not a man as good a title to an office granted to him for life, as he has to an acre of land which he holds by the same tenure? . . . Having granted a toll or a rent to a man for life, can the legislature revoke the grant during the life of the grantee? Can they abolish the toll by repealing the act which created it, before the life estate is ended?¹⁹⁷

Cranch’s arguments in this passage are consistent with fundamental notions of property law, and rely solely upon the legislature’s power to create property interests. He offers a hypothetical about Congress leasing Harper’s Ferry to an individual for life, and later repealing the law and suing to eject the individual. Cranch protests that any court would reject such a repeal, for it would “violate the faith of the nation,” and Congress has “no power to repeal the law during the life of the lessee.”¹⁹⁸ Just as one legislature can create a binding lease and a secure property claim for an individual which future legislatures may not destroy, so too may a legislature create a secure office that future legislature may not destroy. According to Cranch, whether the life-term office is created by the constitution or by the legislature, the holder may not be removed, except by death or his own forfeiture by misbehavior. The historical context of this argument about legislatures granting freehold property interests is particularly significant. One of the most significant political and social developments of this era was the settlement of the western frontier. From the Northwest Ordinance to the Louisiana Purchase, and for the rest of the century,

¹⁹⁵ *Id.*

¹⁹⁶ Lucius Junius Brutus, *No. 14*, WASH. FEDERALIST, Mar. 31, 1802.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

Congress focused on western expansion, not only in terms of real estate, but also in terms of settlement. In the early republic, state legislatures focused on the sale of the frontier to private citizens and the active encouragement of its development. In this context, legislatures were regularly creating freehold property interests. It would not have been such a logical leap for the Maryland General Court to extend this power over the development of landed property and physical infrastructure to the development of government offices and political infrastructure.

Marbury v. Madison also touches upon the question of property interests in offices. Marbury was appointed Justice of the Peace for Washington, D.C. by President Adams and Congress in 1801. Similar to Whittington's office of county justice, Marbury's office was not established explicitly by the constitution, but by the legislature. In addition, Marbury's office was a weaker property interest because it was a five-year position, not life-tenure. Nevertheless, Chief Justice Marshall concluded, "as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country."¹⁹⁹ Neither this passage nor this opinion directly address the question of whether Congress could repeal the law creating the office, but Chief Justice Marshall's use of the terms "not revocable" and "vested property" throughout the opinion suggest that, at least in terms of property law, Marbury's rights were secure. However, Marshall found a way to avoid securing those rights through his maneuvers in constitutional law. In *Stuart v. Laird*,²⁰⁰ the Court recognized Congress's power over jurisdiction, to create courts and to transfer causes of action, which provided another constitutional path to acquiescence. However, in the realm of property law, *Marbury* suggests that the Midnight Judges had a property right to their offices, and *Laird* did nothing to undercut that implication.

B. *The Alternative Rulings*

The Maryland General Court used both property law and constitutional law to avoid confrontation, but it easily could have relied on both to return Whittington to his office and to secure the rights of all freehold office holders. Judge Chase was correct that the Maryland constitution designated that judges "shall hold their commissions during good behavior" and that "all civil officers . . . who do not hold [their] commissions during good behaviour, shall be appointed an-

¹⁹⁹ *Marbury v. Madison*, 5 U.S. 137, 162 (1803).

²⁰⁰ 5 U.S. 299 (1803).

nually.”²⁰¹ Nevertheless, there is a large gap between these two categories; Chase exaggerates the dichotomy between the two offices. According to English precedent, the legislature could create civil offices that held their commissions during good behaviour, and the Maryland constitution did not deny this power to the legislature. Thus, Whittington’s office would not have fallen into the category of “civil officers who do not hold their commission during good behaviour,” and his office accordingly would be protected. This interpretation and analysis applies to all three alternative rulings.

The most hard-line opinion would have been completely consistent with Cranch’s arguments and his citations to English precedent. Just as Parliament had the power to create freehold “good behaviour” offices that could not be taken away (except by the procedures laid out in the statute), so too could the Maryland legislature create freehold offices when it used the term “good behaviour.” No future legislature could remove him from office as long as he maintained good behavior and resided in his district. The assize of novel disseisin was the appropriate writ for such a freehold office.

The General Court might have conceded that the legislature could alter jurisdiction and transfer causes of action, which would have given the Maryland legislature an alternate path in diverting power away from the Federalist county justices. However, it would have at least preserved the judicial offices and some judicial power—both of the county justices like Whittington and of the General Court itself—and it would have checked the power of the legislature.

A second alternative is slightly more moderate. Judges Chase and Done might have found a middle ground between Cranch’s arguments and the decision in *Whittington*. Beginning with the same cases cited by Cranch (*Harcourt v. Fox* and *Owen v. Sanders*), the General Court could have introduced the principle that legislatures do have the power to create long-term offices that bind future governments. The General Court might have distinguished the English constitutional system, in which Parliament is the final and supreme authority, from the new American system in which the Constitution has that privileged role. In *Harcourt* and *Owen*, Parliament created offices in the same way the Constitution creates offices. In Maryland, and throughout the United States, the power that had been Parliament’s became divided between the Constitution as the higher law and ultimate authority, and the legislature as the statutory and spending authority bound by the Constitution. The state constitution inherits the supreme power to create permanent offices, but that division does not end the legislature’s power to create protected offices.

²⁰¹ *Whittington*, 1 H. & J. at 247.

In order to give meaning to the 1796 act's use of the term "during good behaviour," the General Court could construct a meaning parallel to the constitutional use of the phrase, but without quite as much protection against repeal. Citing *Harcourt*, the Maryland court could have inquired about the intent of the past legislature that created these offices, and the intent of the present legislature that abolished these offices. The court would have found that the 1796 Maryland legislature established these offices for "good behaviour" in order to make them more permanent and to attract better judges, to keep them in office, to promote judicial independence, and to create a more efficient system of appointment. Balancing the property rights of the judges against the power of the present legislature, the General Court might have inquired into the intent and purposes of the present legislature in revising the judiciary's structure, and it would have found that the Republicans' intent violated the original purposes of the statute. In order to abolish non-constitutional offices held "during good behaviour," the Maryland court might have required that the legislature demonstrate some non-partisan interest in altering these courts, and to alter these courts only in accordance with these goals, while retaining the same offices and office-holders when possible. The bottom line is that the court could have chosen some limited ruling that would hold, at minimum, that such ripper bills were invalid if applied to offices held during good behavior. Such a decision would have given some meaning to the 1796 act's wording. Most importantly, it would have established judicial review in reality and robustly, not just in empty dicta.

A third option, still more moderate than the others, would have vindicated Whittington's claim with a simple rule: If the legislature repeals an office or system of offices, and then recreates the same office (or a substantially similar office), then that new office is not vacant, but rather, it is automatically possessed by the previous office holder. As long as the office exists in any statutory manifestation, then the original officeholder still possesses a freehold claim on that office. The legislature may strip that freeholder from the office only by completely abolishing that office and not creating a similar entity thereafter.

If the legislature repeals an office and then recreates that same office as vacant, such an action is evidence (at least *prima facie*) of political motivation to replace the office holder. In order to preserve the historical and legislative meaning of "good behaviour" as a degree of protection against political control of such offices, the court should preserve the office holder's freehold property right. When the *Whittington* court refused to ask about motives about the repeal, they were specifically avoiding these issues in order to simplify the case and avoid a dangerous and controversial ruling.

Once the question of rights is resolved, next comes the question of remedy. The General Court held that the assize of novel disseisin applies only to freehold offices, not to offices held for terms of years. The Court implied that the term of years, though not stated in the law creating the office, is the duration of the law itself. The Court also implied, in its distinction between constitutional “judges” and legislatively created “justices,” that the judges do have a freehold interest in their offices. Both Cranch and Jefferson used the term freehold to describe these offices.²⁰² In his *Commentaries*, written almost four decades before the Maryland Court decided *Whittington*, William Blackstone defines freehold as “an estate for life,” and not inheritable to descendants.²⁰³ A grant of property can be a freehold even if it does not state expressly that it is an “estate for life,” but also “by a general grant, without defining or limiting any specific date.”²⁰⁴ This definition fits the office of county justice as created by the Maryland legislature in 1796. The renowned work by Pollock and Maitland defines freehold by negation: a freeholder “does not hold merely at the will of another, and that he does not hold for some definite space of time: a tenant at will is not a freeholder, a tenant for years is not a freeholder.”²⁰⁵ The General Court could easily have ruled that the county justice was not a tenant by anyone else’s will, and his office was not limited by years. Hence, it was a freehold. Pollock and Maitland also extend these property rules to offices. Legislation in 1285 specified that the assize of novel disseisin applied to “offices in fee.”²⁰⁶ Pollock and Maitland continued, “the assize [of novel disseisin] which protects the possessor of land seems the natural defence for the possession of an office”²⁰⁷

Underscoring the significance of this assize, Maryland’s Bill of Rights demonstrates that the assize of novel disseisin was probably in current use. The Bill of Rights barred the “disseising of property” and the loss of property unless by due process and the law. If the court had adopted the first decision I suggested above, that the legislature has the power to create freehold offices, this conclusion that the assize applies is simple. If the court adopted the second decision, that the legislature may revoke these offices, but only after articulating general non-partisan purposes and narrowly tailoring its revisions, or the third alternative decisions, that the legislature could not recreate the same office and consider it vacant, the conclusion is more dif-

²⁰² See *supra* text accompanying notes 181 and 190.

²⁰³ 2 WILLIAM BLACKSTONE, COMMENTARIES 120-21.

²⁰⁴ *Id.* at 121.

²⁰⁵ 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 357 (2d ed. 1968).

²⁰⁶ 2 *id.* at 135.

²⁰⁷ *Id.*

ficult. However, the court could analogize these offices to the constitutionally created offices. Constitutional offices are life-tenure, but they are also contingent upon the continuance of the constitution and upon the amendment process. Whittington's office is similarly contingent on legislative action, but such contingencies are not "a term of years," and are indefinite in a parallel way. Thus, the court could hold that both offices are freehold estates with certain restrictions and contingencies.

These arguments have a solid basis in property law and in constitutional law. In the abstract, Cranch's arguments are legally more persuasive than the highly formalistic and evasive ones offered by the *Whittington* Court. Considering the consensus about offices held "during good behaviour" among Federalists and many Republicans, and considering that Judge Chase and Judge Done shared the same partisan interests as Cranch, it is stunning that the General Court chose such a feeble escape. The fact that two Federalist judges ignored the strong arguments from their Federalist colleagues spoke volumes about the weakness of these judges and the institutional power of the judiciary in general. Other Federalists were calling for a direct confrontation in the courts over the independence of the judiciary to test these issues and win on the merits.²⁰⁸ It was also a chance to bring the legal issues to the public, demonstrating the Republicans' radicalism and disregard for law and order, and winning back political ground.

There are problems with the moderate second and third strategies that I suggested. First, they would have allowed the Republican legislature to repeal the state's 1796 Judiciary Act again in the next session (beginning in November 1802), but then completely revising the judicial system, rather than recreating the same system. This legislation would be more difficult to challenge, and the confrontation would escalate. Second, the court's effort to appease both the Federalists and the Republicans might have angered both sides, and it was politically safer simply to please the ascendant Republicans. But this is precisely the point: The General Court was more concerned with its

²⁰⁸ Roger Griswold embraced the idea of escalating judicial conflict, as a direct confrontation between the branches:

The only hope of correcting their usurpation remains with the Judges themselves, who may perhaps, still pronounce the Act to be void—If a case should be brought up, & the Courts should pronounce such a decision, the consequence must be that the Legislature must recede from its claims, or a collision of the most serious nature must take place between the departments—My own opinion is; that the Legislature will give way, because there is not nerve enough to persevere, & because many of those who have voted for the present bill, still admit that the Courts may pronounce on the Constitutionality of Laws.

Letter from Roger Griswold to Oliver Wolcott (Mar. 5, 1801), in OLIVER WOLCOTT PAPERS (on file with the Connecticut Historical Society).

own political safety than with supporting the Federalists or with upholding the law.

By ruling in favor of Whittington and by protecting “good behaviour” offices against the legislature, Judge Jeremiah Chase and Done would have pleased their Federalist allies, and by ruling that the legislature has the power to repeal “good behaviour” offices, the court could have mollified the Republicans. The court also would have recognized the freehold property right of constitutional judges against the power of legislatures, which would have been a major boost to the Federalists mobilizing against Congress’s repeal. Even if one disagrees with the foregoing suggestions of alternatives, I contend that if the Federalist judges on the General Court had the courage and the will to defend the rights of fellow Federalist judges, they had several strong legal arguments at their disposal. These judges of the General Court were effectively creating constitutional law in 1802, and that fluidity offered an opportunity to go in many different directions. The General Court judges chose a path of acquiescence.

IV. IMPACT

A. *The Context and Course of Events*

This Part examines how *Whittington v. Polk* affected the events that followed, and speculates about how those events might have been different had the Federalists won. Most of this Part is speculative and lacks direct evidence. But by piecing together what we know of the actors and the significance of *Whittington*, this Part offers an interpretation that helps answer some major questions about *Marbury* and the battle over the judiciary.

First, several historians have wondered why the public and the media failed to appreciate the Supreme Court’s use of judicial review and its statements of judicial supremacy in *Marbury*.²⁰⁹ Donald Dewey suggests that the media failed to understand the complexities of the decision.²¹⁰ This answer might apply to most newspapers, but it does not explain why the legally savvy newspapers in Washington did not weigh in, especially considering that they had vocal partisan legal experts such as William Cranch. Robert Lowry Clinton argues that the doctrine of judicial review had already been established in other

²⁰⁹ 3 ALBERT BEVERIDGE, LIFE OF JOHN MARSHALL 153; CLINTON, *supra* note 3, at 102-03; DONALD DEWEY, MARSHALL VERSUS JEFFERSON: THE POLITICAL BACKGROUND OF *MARBURY V. MADISON* 135-36 (1970); HAINES, *supra* note 3, at 232; HASKINS & JOHNSON, *supra* note 112, at 215-17; MCCLOSKEY, *supra* note 5, at 43-44; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 231-32 (1922).

²¹⁰ DEWEY, *supra* note 209, at 135.

courts (such as the Maryland General Court in *Whittington*), so *Marbury* was no big news.²¹¹ However, if the media understood that the Supreme Court was now adopting this doctrine as a direct and powerful challenge to the Republicans, then this would have been very big news. Perhaps the media understood that the Court left the Federalists without any options, and thus this decision was not such a direct confrontation.

Haskins and Johnson have the best answer: the Court's opinion in *Stuart v. Laird*, issued six days after *Marbury*, indicated more forcefully that the Supreme Court had capitulated to the Republicans on the judiciary.²¹² But why was there so little response to *Marbury* in the week before *Laird* came down? Perhaps the newspapers and politicians understood that *Laird* was the main event, and they were not going to trumpet *Marbury* until they knew the result in *Laird*. Nevertheless, the Federalists and Republicans had already demonstrated that they were masters of spin on the judiciary question. Why did the Federalists choose not to spin *Marbury* as a victory, before and after *Laird*? I suggest that the Federalists were getting all too familiar with defeats on this issue, most notably in *Whittington*. After the Federalist-controlled lower courts refused to stand up to the Republicans, they hoped that the Supreme Court, the home of the least vulnerable judges and the most reliable pro-Federalists, might finally take a stand. Once the Supreme Court announced that it was passing the buck back to those same lower courts, the Federalists knew that the legal fight was over. This interpretation explains why the Federalist and Republican media ignored *Marbury*'s pronouncements about judicial power—because they were empty threats that could not be enforced in other venues.

This interpretation also helps explain why the Federalist plaintiffs also failed to pursue their claims in the lower courts. If the Supreme Court had recognized that the Justices of the Peace, and by extension, the Midnight Judges, had a vested property right, why did they not pursue some kind of remedy, even if it was limited solely to their salary or other damages? Surely there were Federalist district court judges and Federalist state judges who might have been more sympathetic to these claims. Nevertheless, *Whittington* might have made *Marbury*, a Marylander, and Philip Barton Key, a Midnight Judge from Maryland, give up on Maryland state courts, and it might have sent a broader signal to all of these litigants that they should quit while they were ahead, even if being "ahead" was simply the empty threat of judicial review in *Marbury*.

²¹¹ CLINTON, *supra* note 3, at 102-03.

²¹² HASKINS & JOHNSON, *supra* note 112, at 215-17.

The events following the Maryland General Court ruling indicate that Jefferson was perfectly happy with the dicta of judicial review, as long as the holdings were pro-Republican. Jefferson offered Gabriel Duvall, who concurred in *Whittington*, the office of Comptroller of the Treasury in November 1802.²¹³ Jefferson fawned over Duvall in a letter asking him to accept the appointment.²¹⁴ Presumably, Jefferson was pleased with Duvall's opinion in *Whittington* just five months before. This appointment occurred just weeks before oral argument in *Marbury*, so it is possible that Duvall's appointment soon after *Whittington* was Jefferson's subtle signal to the Supreme Court that Jefferson could accept the dicta of judicial review, as long as the holding came out in his favor.

The Justices then followed through with their decision to ride circuit in autumn 1802, and ignored the Federalists' challenges to their jurisdiction. While riding the Fourth Circuit in December, Marshall, together with District Judge Cyrus Griffin, ruled against such a challenge in *Laird*, but without a published opinion.²¹⁵ Perhaps Marshall began picking up on the theme of balancing weak holdings with bold dicta about judicial review, because days after *Laird*, he asserted judicial power in *Ogden v. Witherspoon*²¹⁶ on the same circuit run. *Ogden*, along with *Whittington*, is considered an immediate precursor to *Marbury* and judicial review,²¹⁷ and it is intriguing that Chief Justice Marshall wrote the circuit opinion, and that the ruling occurred at the same time as Marshall's ruling in *Laird v. Stuart*. While Marshall was willing to give up the fight over the Midnight Judges in the politically controversial case, he was able to establish both a ruling and strong dicta for judicial supremacy in *Ogden*, a politically neutral case. In *Ogden*, the North Carolina legislature enacted a bill in 1789 on creditor-debtor statute of limitations, which conflicted with an Act of 1715.²¹⁸ Then, in 1799, the state legislature enacted a bill continuing the Act of 1715. Marshall ruled that the Act of 1789 repealed the Act

²¹³ Duvall became comptroller of the U.S. Treasury on December 15, 1802. Dillard, *supra* note 43, at 423.

²¹⁴ Letter from Thomas Jefferson to Gabriel Duvall (Nov. 5, 1802), in DUVALL PAPERS (on file with the Library of Congress):

I shall be very happy if it shall appear acceptable to you, and shall think I have well performed my duty if I can get the office placed in hands who enjoys and who has so much merited the public confidence. As soon as you can satisfactorily to yourself decide on this proposition, I will thank you for an answer. I only observe that the sooner it is obtained the more convenient it will be to the department, which suffers while wanting so important an officer in it's [sic] organisation. I pray you to accept assurances of my sincere esteem & high consideration.

²¹⁵ ELSMERE, *supra* note 37, at 147.

²¹⁶ 3 N.C. (2 Hayw.) 227 (1802) (this case is also known as *Ogden v. Blackledge*, due to confusion about captions).

²¹⁷ See HAINES, *supra* note 3.

²¹⁸ *Ogden*, 3 N.C. at 227.

of 1715, so the legislature's Act of 1799 was void. This holding established an important precedent for judicial review, and Marshall added a strong statement in favor of judicial supremacy:

And the question here is, does it belong to the judiciary to decide upon laws when made, and the extent and operation of them; or to the legislature? If it belongs to the judiciary, then the matter decided by this act . . . is a judicial matter, and not a legislative one.²¹⁹

Marshall answered this question by voiding the state law as impairing the obligation of contracts in violation of Article I, Section 10 of the U.S. Constitution.

In *Ogden*, Marshall accomplished several significant goals. He established judicial supremacy over state legislatures in interpreting law (and conflict of laws), based upon constitutional separation of powers. Marshall also elevated the force of the Federal Constitution's contract clause. Finally, he was able to balance out the judicial weakness in *Laird v. Stuart* at the same time as a case strongly establishing judicial supremacy—and thereby strengthening Federalist power. In February, the Supreme Court then adopted the same balance in *Marbury*, and then upheld *Laird*, while carefully not surrendering too much in Justice Paterson's careful, narrow opinion. Paterson merely granted Congress the power to alter jurisdiction, and held that the Supreme Court Justices did not require specific commissions in order to ride circuit, because the Justices had acquiesced to this system for thirteen years. The language of the opinion again masked the retreat from confrontation in the decision—again similar to *Whittington*.

Even though *Marbury* clearly established the rights of the Justices of the Peace, and implied that they (and the Midnight Judges) could turn to lower courts with the proper original jurisdiction, none of them did so. One reason, among others, is that these Federalists expected little to come from these efforts, as the Maryland General Court first demonstrated in *Whittington*. Marylander Philip Barton Key, one of the Midnight Judges who remained active in the cause for a while, and several Justices of the Peace (including Marylander *Marbury*) conceivably might have tried to seek damages in state court, but *Whittington* suggested that such efforts would be futile and potentially counterproductive. These potential plaintiffs probably understood that *Whittington* represented a general reluctance of lower court judges to intervene and risk their own job security. This signal also suggests that the U.S. Supreme Court was well aware that there probably would be no relief in these lower courts, so that they were truly passing the buck into oblivion in *Marbury*, rather than establishing the next stage of the battle.

²¹⁹ *Id.* at 228-29.

Rather than being mollified by acquiescence, the Maryland legislature proposed an even more radical revision of the state judiciary. In the fall of 1802, the legislature passed a bill eliminating the General Court entirely, vesting all original jurisdiction in the county courts and all appellate jurisdiction in the Court of Appeals.²²⁰ The bill had to be passed in two consecutive sessions in order to become law, so the stakes were raised for the fall of 1803.²²¹ During this ongoing campaign, Justice Samuel Chase, while speaking to a grand jury as he rode circuit, flew into a tirade against these attacks on the judiciary, which was the ostensible grounds for his impeachment.²²² Chase complained bitterly to the grand jury about the Republican repeal of the Judiciary Act of 1801 and the proposed changes in the Maryland judicial system. Chase warned that these revisions would:

[T]ake away all security for property, and personal Liberty. The independence of the National Judiciary is already shaken to its foundation; and the virtue of the people alone can restore it. The independence of the Judges of this State will be entirely destroyed, if the Bill for the abolishing the two Supreme Courts, should be ratified by the next General Assembly.²²³

The reform of 1801 had been merely the opening assault by the Republicans, and Chase decided that he would put his career on the line to prevent further losses. The Republican House cited this tirade prominently in their impeachment of Justice Chase in 1804.²²⁴

Despite the efforts of the General Court Judges to pacify the Republicans, *Whittington* did not avert the confrontation. In fact, it first emboldened the Republicans to press on. Ultimately, moderate Republicans in Maryland broke away from the reform efforts and united with Federalists to defeat the final passage of the bill in the fall of 1803.²²⁵ Maryland's moderate Republicans and moderate Federalists formed an "open alliance" that guided state politics in the following years.²²⁶ Maryland again mirrored the national trend, as moderate Republican Congressman ceased their attacks on the judiciary and refused to convict Samuel Chase in his impeachment trial.²²⁷

²²⁰ ELLIS, *supra* note 3, at 244.

²²¹ *Id.*

²²² *Id.*

²²³ HAW, *supra* note 34, at 215.

²²⁴ *Id.*

²²⁵ ELLIS, *supra* note 3, at 244.

²²⁶ *Id.* at 245.

²²⁷ *Id.* at 102-07.

B. A Parallel Universe of Judicial Intervention

What if the Maryland General Court overturned the ripper bill and returned William Whittington to office? The Federalists would have been energized, gaining legal and political momentum, as well as an influential precedent. The Supreme Court Justices would have been forced to reconsider a boycott of riding circuit. After a pro-Federalist decision, it would have been much more difficult for the Justices to ignore the decision and its legal arguments, and to ignore the building political pressure to boycott the circuits. In the wake of the General Court's decision against the Federalists, the Justices' decision to ride circuit was less surprising, and the Federalists could still hope for vindication once the Supreme Court regrouped to hear the arguments in 1803. But if the Maryland General Court had held in favor of Whittington and the Federalists, the decision to ride circuit would have been seen more clearly as a capitulation and as a sudden setback. In June 1802, the Justices were still debating whether or not to ride circuit, and the decision had not yet been finalized.²²⁸ Recall that Justice Chase had been focusing on *Whittington v. Polk* in his letters to the other Justices in April 1802, and in those same letters, he strongly urged the Justices not to ride circuit by using the same kinds of property arguments at stake in *Whittington*.²²⁹

If *Whittington* had come out the other way, the Justices faced a decision about riding circuit with more immediate significance. A pro-Federalist decision in Maryland would have raised the Federalists' expectations that the Supreme Court would carry on the fight. If the Justices decided to ride circuit at that point, they would have revealed more clearly that they were retreating from the Republicans, and many would have interpreted such a decision as a repudiation of the Maryland General Court and its assertion of judicial review. Riding circuit at that point might have triggered a more angry Federalist response against the Court. This pressure might have encouraged the Justices to reconsider their decision to ride circuit, which would have dramatically altered the course of events leading to *Marbury*. In *Marbury*, the Justices were able to frame their decision as delegating responsibility to the lower courts. If the Maryland court had blocked the legislature's repeal of 1801, the Justices similarly could decide not to ride circuit and claim to be passing the responsibility to lower courts. The Justices could be passive-aggressive, citing *Whittington*

²²⁸ See Letter from William Cushing to Samuel Chase (June 11, 1802), in CUSHING PAPERS (on file with the Massachusetts Historical Society).

²²⁹ Letter from Justice Samuel Chase to Chief Justice Marshall (Apr. 24, 1802), in HASKINS & JOHNSON, *supra* note 115, at 172-77 n.182.

and announcing that they could not ride circuit until these legal issues were fully sorted out.

Perhaps the more reluctant justices (Cushing, Paterson and Washington) would have continued to argue against riding circuit. However, Samuel Chase might have insisted that he could not ride circuit in Maryland if his cousin Jeremiah Chase had made a clear statement against such repeals in *Whittington*. Samuel Chase may have been particularly emboldened by his cousin and close friend, and he would have been very reluctant to embarrass Jeremiah by riding circuit. Samuel Chase, a hothead, might have announced to the other Justices that, if they were not going to join him, he would boycott his circuit on his own. Then, perhaps, Marshall may have intervened to encourage the Court not to fracture, and to support Chase's boycott. This emphasis on a unified court was a core principle of Marshall's entire tenure as Chief Justice. Marshall may have pushed harder for a boycott than he did in April 1802, and the combination of Chase's brinkmanship and more strident arguments from Marshall might have won over a few of the other Justices. But a lone boycott by Chase would have been enough to escalate the confrontation and provoke a Republican reprisal.

And even if all the Justices still decided to ride circuit, perhaps the Maryland General Court would have become the source for an injunction against Samuel Chase on behalf of Philip Barton Key's property interest in his office. In this alternative universe of a confrontational decision in *Whittington*, Judge Jeremiah Chase and Judge Done would be hard-liners, rather than cautious. The judges in this scenario would have felt more pressure to defend their decision and their turf, and Justice Chase would have been more than happy to accept this legal order. On the other hand, if the General Court had intervened on behalf of *Whittington*, the judicial battle in Maryland would have escalated even more. There may have been a new repeal challenge in November 1802, and the legislature's more confrontational 1802-03 changes would have been more likely to pass.

If just one Justice decided to boycott the circuits, the calls for impeachment would have been even more immediate. Then the Justices would have been forced to back down even more obviously, crippling their independence, or they would have stared down Jefferson and perhaps jeopardized their offices and the entire judiciary. Perhaps the moderate Republicans would have continued to support the radicals, finding Chase and other Justices guilty of misbehavior.

The decision not to ride circuit would have prevented Marshall from hearing *Laird* and *Ogden*. Instead, the Republicans would have had to create their own *Stuart v. Laird* in one of the circuits, to contest the jurisdiction of the Midnight Judges. With the issues framed differently, and with an opposite decision in *Whittington* as precedent, perhaps this new *Laird* decision comes out differently. In December

1802, Federalists speculated that there would be two dissents in *Laird*—presumably Marshall and Chase.²⁸⁰ Given a few changes of events, it is possible that they might at least have followed through with dissents, especially if they were emboldened by the Maryland court.

Even if the Justices did not boycott the circuits, an interventionist Maryland court would have shaped the drafting of *Marbury* itself. When the Supreme Court wrote *Marbury*, it could appear to pass the buck to the lower courts with original jurisdiction, knowing from *Whittington* that lower courts were even less enthusiastic about intervening against the Republicans. *Whittington* allowed the Supreme Court to write with confrontational grandeur about judicial supremacy without actually being confrontational; Marshall could bark, knowing that there was no bite. But if the Maryland General Court had interposed against the Republicans in *Whittington*, Marshall would have had to think twice about barking so loudly, for the Jeffersonians would have understood that there might be some bite, and they might have been far less tolerant of such an opinion. Thus, the majority of the Justices, who worried about appearing too obstructionist, might have written a much more meek opinion for *Marbury* without any of the hallmarks of judicial review and without any threats to the Republicans. That opinion might have been the majority opinion, leaving Marshall and Chase to wrestle with signing onto that opinion or writing a concurrence about the power of judicial review. Given such a turn of events, such a weak *Marbury*, perhaps with a fractured Court, would look much different to contemporaries and to future readers.

CONCLUSION

There is no way of knowing how a different *Whittington* might have changed the course of events and altered the shape of the early Marshall Court and Jefferson's presidency. It is certainly possible that most of the final results in *Marbury* would not have changed so significantly. Even if nothing changed in practice, a strong Maryland decision would have at least raised expectations for the Supreme Court, and the public would have been even more aware that the Justices were dodging the fight. But it is certainly likely that a Maryland decision in favor of the Federalists would have mobilized the Federal-

²⁸⁰ Letter from Sen. William Plumer to Livermore (Dec. 12, 1802), in PLUMER PAPERS (on file with the Library of Congress):

It is said Chief Justice Marshall has over-ruled a plea to the jurisdiction of the Circuit Court in Virginia, without deciding whether the repeal of the Judiciary law was constitutional. A writ of [original illegible] is bro't [brought] & it is said the Supreme Court will, with two dissenting votes, confirm the decision.

ist hard-liners to raise the stakes, and the Justices would have faced a more difficult decision about riding circuit and about challenging the Republican Congress. With Justice Chase following *Whittington* closely and using it as a precedent for boycotting the circuits, the debate would have shifted after June 1802. Considering Justice Chase's connection to Judge Jeremiah Chase, and considering how explosive and confrontational he was, there is no telling how he may have begun a domino effect leading to a very different series of events. If the Maryland General Court had blocked the Republicans, perhaps there would have been no survival of the Marshall Court. Some of the Justices may have changed their strategies, and the Court might have fractured. The judiciary fight might have escalated, and the Jeffersonians might have fought back with impeachments and convictions.

At the very least, it is important to get the interpretation of the decision right, and to recognize the contingency and the unpredictability of the struggle over the judiciary. The bottom line is that the Maryland General Court chose capitulation and not power, which other scholars have failed to recognize. These Federalist judges ignored the more persuasive arguments of other Federalists and decided the case wrongly. This was not simply a mistake, but a choice out of fear more than reason. Because *Whittington* truly stands for the weakness of the Federalist judges, it also illuminates *Marbury* as a lot less than meets the eye.

Marbury did not appear *ex nihilo*. It was shaped by particular circumstances and precedents. But once *Marbury* is identified more clearly as an act of judicial weakness, we should not dismiss the role of the Marshall Court in establishing judicial supremacy; rather, we should shift our emphasis on how and when it established judicial supremacy. Chief Justice Marshall's clever retreat in 1803 was a wise survival strategy, and it allowed him to live to fight another day. Other historians have identified the Marshall Court's golden age as 1812 to 1825, and during this period Marshall built the Supreme Court's power—but at the price of state power, not congressional power. From this foundation of prestige, future Justices could launch judicial review of Congress without the smoke and mirrors employed in *Marbury*. Lawyers, historians and judges should recognize how judicial review developed in stages through American history—from *Dred Scott* to *The Civil Rights Cases*, to the *Lochner* Court, to the clash over the New Deal, to *Brown* and the Warren Court to *Roe v. Wade*, and now to the Rehnquist Court. We now live in a time of unprecedented judicial activism against Congress, most notably in federalism cases. Perhaps the most relevant language in *Whittington* was not its dicta about judicial supremacy, but its dicta about judicial caution. Judge Jeremiah Chase warned that the judiciary should not intervene every time a legislative act violated the Constitution, because such aggressive judicial review "subverts the government and reduces the

people to a state of nature, and therefore cannot be the proper mode of redress to remedy the evils resulting from an act passed in violation of the constitution."²³¹ He suggested that the courts should weigh the interests on each side and then decide if its power is properly used case by case. The Marshall Court followed this thinking in practice by not recognizing a remedy for Marbury's right. Today's Justices, on the left and the right, demonstrate too little attention to balancing their use of judicial review according to the rights involved.²³²

Marbury was a time capsule: the Marshall Court buried the threat of judicial review of Congress within a decision of capitulation, so that this power could hide underground for several decades. A later generation unearthed *Marbury*, detached from its historical context of weakness. In a time when the Court had gained enough stature, in part because of Marshall's later accomplishments, this new generation wielded *Marbury* in a starkly different way. *Marbury* was an important antecedent, but citing *Marbury* is not enough to explain the Supreme Court's power of judicial review. Certainly, a new account of some obscure case from 1802 should not tear down the temple of judicial review. However, it should cause us to reconsider how this temple was built, how this temple might never have been built at all, and how this temple should be respected and not exploited today.

²³¹ *Whittington v. Polk*, 1 H. & J. 236, 243 (Md. 1802).

²³² Most questionable are the decisions striking down federal antidiscrimination laws, labor laws and gun control laws because of federalism concerns. See, e.g., *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that the Eleventh Amendment bars individuals' suits against states under the Americans with Disabilities Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the Eleventh Amendment bars individuals' suits against states under the Age Discrimination in Employment Act); *United States v. Morrison*, 529 U.S. 598 (2000) (striking down § 13981 of the Violence Against Women Act as exceeding Congress's Commerce Clause and Fourteenth Amendment powers); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that the Eleventh Amendment bars suits by individuals against states in any federal judicial forum); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as exceeding Congress's Fourteenth Amendment powers); *United States v. Lopez*, 514 U.S. 549 (1995) (striking down parts of Gun Free School Zones Act for exceeding the Commerce Clause). From the other side of aisle, the Court's recent pornography decisions also raise questions about the proper use of judicial review, because obscenity is not protected speech. *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002) (holding that sections of the Child Pornography Act were unconstitutional in prohibiting computer graphics that depicted child pornography); *United States v. Playboy Entm't Group Inc.*, 529 U.S. 803 (2000) (finding that the First Amendment did not allow § 505 of the Telecommunications Act, which limited access to adult channels); *Reno v. ACLU*, 521 U.S. 844 (1997) (holding that "indecent" and "patently offensive" material on the internet is protected under the First Amendment).