DANIEL R. SCHRAMM, L.L.C.
Attorney at Law
121 Chesterfield Business Parkway
Chesterfield, Missouri 63005
Phone: (636) 532-2300
Fax: (636) 532-6002
Email: daniel@dschrammlaw.com
Web site: www.dschrammlaw.com

JUDICIAL REVIEW UNDER *MARBURY* IS "SETTLED LAW."

Most law students in this country are told that Chief Justice John Marshall established the doctrine of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Writing for a unanimous court, Marshall famously declared, ""It is emphatically the province and duty of the judicial department to say what the law is."[1] A recent incident has compelled me to re-examine my understanding of the role of *Marbury* in American jurisprudence.

This issue began with a lesson for me about the risks of social media. I posted a law professor's article on what I thought was an interesting question of First Amendment law. I was surprised that this article triggered an attack – not on the substantive issue under the First Amendment - but on the role of judges in supposedly abusing their power by interpreting the Constitution. In an exchange of comments, the discussion digressed – at least in my mind - into a personal attack on Chief Justice Marshall and his seminal decision in *Marbury*. During the exchange, I wrote what I thought was the unremarkable proposition that the power of judicial review under *Marbury* was "settled law." To my chagrin, this seemingly innocuous statement subjected me to an onslaught of criticism. Instead of engaging in more

[1] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)

debate, I went back and took a fresh look at *Marbury*. To my relief, I was able to find substantial support for my initial off-hand assessment.

It is true that Chief Justice Marshall's decision in *Marbury* has been subjected to many critiques. The revisionist views raise a number of questions. Some critics question the importance of *Marbury* in establishing judicial review. Others critique the originality of Marshall's work. And a third line of attack questions the scope of the powers Marshall was claiming.[2]

I personally have questioned why Marshall seemed to show more interest in protecting the institution of the Supreme Court than in dispensing justice in the particular case. Marshall made clear that William Marbury was entitled to the judicial commission he sought. And Marshall wrote forcefully about the power of the Supreme Court to invalidate laws that conflict with the Constitution. But then Marshall shrank from these declarations because he knew that his fledgling Court could not enforce its ruling if the Court granted a writ of mandamus against Secretary of State James Madison. He avoided the confrontation by concluding the Court did not have original jurisdiction. To the extent the Judiciary Act purported to give the Court jurisdiction, Marshall ruled the Act was unconstitutional. To me, it always seemed like Marshall took advantage of a procedural artifice to avoid doing justice.

By contrast, Justice Stephen Breyer has described this apparent contradiction in the *Marbury* ruling as a "judicial tour de force." [3] Like all opinions, Breyer admits

---

[2] K. Whittington and A. Rinderle, "Making a Mountain Out of a Molehill? *Marbury* and the Construction of Constitutional Canon." 39 Hastings Const. L.Q., p. 824 (2012).
[3] S. Breyer, Making Our Democracy Work, p. 12. (Alfred A. Knopf 2010).

that Marshall's strong legal reasoning is open to criticism.[4] But Breyer says, "Marshall wrote the Hamiltonian theory of judicial review into law."[5] And he did so in a way that "overcame major institutional and political obstacles."[6]

It is important to draw the distinction between the different scholarly critiques of *Marbury* – which remain open to legitimate debate – and the more practical question here of whether the power of judicial review under the decision is "settled law." Based on my analysis in this article, I believe this second question is no longer open for debate.

"There is no question that *Marbury* is part of the constitutional canon."[7] A recent study examined the rate at which *Marbury* was cited by the U.S. Supreme Court and other courts over the years. The study found that the judiciary's use of *Marbury* "exploded" beginning in the last half of the twentieth century.[8] In this modern era, courts often use *Marbury* as a rhetorical device when treading into controversial political subjects.

Three prime examples illustrate the point. The modern use of *Marbury* began with the Little Rock desegregation crisis in *Cooper v Aaron*, 358 U.S. 1, 17 (1958). Prefacing its discussion of *Marbury*, the Court felt compelled "to recall some basic constitutional propositions which are *settled* doctrine." [9] (emphasis supplied). The Court then quoted Chief Justice Marshall's declaration in *Marbury* that "[i]t is emphatically the province and duty of the judicial department to say what the law

[4] *Id.* at 20.
[5] *Id*. at p. 12.
[6] *Id.*
[7] 39 Hastings Const. L.Q., p. 830 (2012)
[8] *Id.* at 834
[9] *Cooper v Aaron*, 358 U.S. 1, 16 (1958).

is."[10] The Court went on to say that the *Marbury* decision "declared the basic principle that the federal judiciary is supreme in the exposition of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[11]

Some critics have complained that this second sentence in *Cooper* expanded *Marbury* beyond its original meaning. But Justice Breyer feels that the Supreme Court had to declare its supremacy to overcome the threat to *Brown* posed by Governor Faubus in Little Rock.[12] And the Court made no mistake in holding that the power of judicial review under *Marbury* was "settled doctrine."

More recently, the Court employed *Marbury* again to examine a controversy over the reach of the Commerce Clause in *United States v. Lopez*, 514 U.S. 549 (1995). This time, Chief Justice Renquist, speaking for the Court, held that Congress has operated under the constraint of legal certainty under the Commerce Clause since "this Court stated [in *Marbury*] that it was the Judiciary's duty 'to state what the law is.'"[13] Any possible benefit of removing this legal certainty requirement "would be at the expense of the Constitution's system of enumerated powers."[14] The Court thus expressed its unqualified support for the *Marbury* doctrine of judicial review.

Less than two years ago, Chief Justice Roberts again voiced the Court's unqualified approval of *Marbury* in ruling on the constitutionality of the Affordable

---

[10] *Id*. at 17.
[11] *Id*. at 17.
[12] See, S. Breyer, Making Our Democracy Work, p. 62. (Alfred A. Knopf 2010).
[13] *United States v. Lopez*, 514 U.S. 549, 567 (1995).
[14] *Id*.

Care Act.[15] The Court spoke of the defined limits imposed by the Constitution on the legislature. Then citing *Marbury*, the Court declared: "[T]here can be no question of the responsibility of this Court to strike down acts of Congress that transgress those limits." [16]

In sum, courts cite *Marbury* so often, especially in the modern era, that the power of judicial review in the decision is recognized as "constitutional canon." And in key court decisions of the modern era, the U.S. Supreme Court has called the *Marbury* principle "settled doctrine" that is beyond the realm of "possible removal" or "question." This analysis is not meant to be exhaustive. Yet it is more than sufficient to allow me to say, with some safety, that the power of judicial review in *Marbury* is indeed "settled law." This great case continues to be recognized by the Supreme Court as part of the bedrock of American constitutional jurisprudence.

[15] *National Federation of independent Business v. Sebelius*, 567 U.S.___ , 132 S. Ct. 2566, 183 L.Ed. 2d 450 (2012).
[16] *National Federation of independent Business v. Sebelius*, 132 S. Ct. at 2579-80, 183 L.Ed. 2d at 467.