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Abortion and Affirmative Action: The Fragility of Supreme Court Political Decision-Making

William E. Nelson*

This Article shows, on the basis of new evidence, that the canonical case of Marbury v. Madison has been grossly misinterpreted and that as a result of the misinterpretation we cannot understand what is wrong with contemporary cases such as Dobbs v. Jackson Women’s Health Organization and Students for Fair Admissions, Inc. v. President and Fellows of Harvard College. For many judges and professors of constitutional law, it remains received wisdom that Marbury v. Madison first established the doctrine of judicial review in the United States. The Supreme Court, for one, articulated this classic understanding over six decades ago in Cooper v. Aaron, when it wrote that “Marbury v. Madison . . . [first] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution.” Twenty-four years later, David Currie, a well-respected constitutional scholar and student of the Court’s history, described Marbury as “establishing the power of judicial review.” Only three years ago, Akhil Amar, another highly respected student of the Constitution and its history, wrote, although he disagrees, that “law students ‘continue to all [be] taught that Marbury . . . invented the concept of judicial review . . .’ [and] made clear that the Supreme Court is the ‘ultimate interpreter’ of the Constitution.”

This received understanding is wrong. New evidence, to be presented below, that was discovered and synthesized in the past decade shows that the doctrine of judicial review was part of American law before Marbury. Marbury did not adopt judicial review; instead, it placed an important limitation on the Supreme Court’s use of the doctrine. The Court did not grab power in Marbury; on the contrary, it surrendered power. While it is correct to understand Marbury v. Madison as the Supreme Court’s initial statement of its role in American government, it is wrong to understand that role as Cooper v. Aaron and most later commentators have described it.

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1 5 U.S. (1 Cranch) 137 (1803).
4 358 U.S. 1. 18 (1958).
When *Marbury* is properly understood in the context of the new evidence presented below, it becomes clear that its key holding is not that courts have power to hold statutes unconstitutional. Its key holding is that courts will decide cases on the basis of established law and will avoid political decision-making. That holding is important because it constituted an important early step in the establishment of the rule of law—the principle that courts govern the American nation by law, always subject, however, to the power of the political process, through established democratic procedures, to make or change law in whatever fashion the people wish. *Marbury* was not the first step nor the only step toward establishing the rule of law, but it was important in establishing something that did not exist in colonial America.

Having a correct understanding of *Marbury* matters because in the past two terms the Supreme Court ignored *Marbury* and issued two political decisions. In *Dobbs v. Jackson Women’s Health Organization*, the Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* and thereby terminated the constitutional right to an abortion. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the Court effectively overruled *Regents of University of California v. Bakke* and *Grutter v. Bollinger*, and thereby sought to end affirmative action in college and university admissions. In both instances, the Court ignored *Marbury’s* commitment to the rule of law.

Chief Justice John Marshall promised in *Marbury* that the Court would avoid deciding political issues, but the Court in *Dobbs* and *Students for Fair Admissions* decided issues that were profoundly political in respects that will be discussed below. The Court, however, is not without power to make political decisions. It has made them frequently in the past and hence much precedent exists for its doing so today. Nonetheless, *Marbury’s* distinction between legal and political decision-making remains relevant: Marshall’s commitment to avoid political decision-making ought to be honored. While legal decisions tend to endure, political decisions, as will be shown below, are fragile; most get overturned within several decades of their issuance.

What is it about political decision-making that contributes to this fragility? Might whatever it is result in the two decisions of the past two terms being overturned? How long will the two decisions endure? This Article will offer a theory

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10  410 U.S. 113 (1973).
13  See 600 U.S. 181.
16  See 600 U.S. at 230; id. at 287 (Thomas, J., concurring) (“The Court’s opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled.”).
17  5 U.S. (1 Cranch) 137, 170 (1803).
about when and why political decisions get overturned and about what conditions are required for them to endure. It will conclude by examining *Dobbs* and *Students for Fair Admissions* in light of the theory.

It is essential to state at the outset that the conclusions to which this Article comes are extremely limited. I mean to persuade readers only that Chief Justice John Marshall sought in *Marbury* to initiate a distinction between legal and political decision-making and that when we inquire about the proper political role of the Supreme Court today, we need to understand correctly what Marshall wrote and should keep what he wrote in mind. I also discuss how subsequent case law modified *Marbury*’s meaning. But I draw no conclusion about whether a distinction between law and politics should exist today or about what the boundaries of the Supreme Court’s political role, if any, ought to be. I offer no definition of what constitutes political as distinguished from legal decision-making. I am not arguing that Marshall’s analysis in *Marbury* was either coherent or correct. I am striving only to articulate the meaning of what Marshall wrote in the context in which he wrote it and to suggest that what he wrote, although not dispositive, still matters today. History subtly but inevitably affects how we understand and cope with the present.

The Article will proceed as follows. Because *Marbury* cannot be properly understood without understanding the eighteenth-century background against which it was decided, Part I will examine legal practices in colonial and post-Revolutionary America, focusing on cases in which judicial review emerged in the 1760s—cases about the constitutionality of Parliament’s 1765 Stamp Act. It will begin with a portrayal of mid-century practices that were a prerequisite to this emergence of judicial review. Part II will discuss *Marbury* itself and its companion case, *Stuart v. Laird*. Part III will compare political decisions in the past that have been overturned with those that have endured in order to formulate a theory about fragility. Part IV will turn to the political nature of the two recent decisions. Part V will inquire, in light of the theory from Part III, into the likelihood that the recent decisions will endure.

I.

A.

Eighteenth-century colonial law witnessed numerous cases in which judges or juries nullified English law, including acts of Parliament as well as common law rules. This habit of nullifying English law was an important prerequisite to holding Parliament’s 1765 Stamp Act unconstitutional.

As early as 1735 in the widely publicized, highly political *Zenger* case, the

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18 5 U.S. (1 Cranch) 299 (1803).
Chief Justice of New York ignored a rule laid down by English courts. The *Zenger* case arose when Governor William Cosby instituted a prosecution for seditious libel against John Peter Zenger, the printer of an opposition newspaper. Zenger’s defense was that the material he had printed about Cosby was true. English courts held, however, that truth was not a valid defense in prosecutions for criminal libel.

The controlling issue in the case was whether the court or the jury would determine whether truth constituted a defense. It was on this issue that the Chief Justice implicitly rejected English law by instructing the jury that whether “the words as set forth in the information make a libel . . . [was] a matter of law, no doubt which you may leave to the court,” thereby implying that the jury also could decide the issue itself. The jury decided to do so and thereby nullified English law when it returned a general verdict that Zenger was not guilty: a verdict implicitly accepting his claim of truth as a defense.

Meanwhile, in Pennsylvania, the colony’s Supreme Court was, on occasion, refusing to follow common law precedent or to obey Parliamentary statutes. When a defendant sought to prove lack of consideration as a defense to a suit on a bond, for instance, the court allowed him to do so despite the common law rule barring such proof; the court explained that, since there was no chancery court in Pennsylvania able to entertain such a defense, “there was a necessity, in order to prevent a failure of Justice, to let the Defendants in under the plea of payment to prove mistake or want of consideration.”

The court also held that the Statute of Frauds was not applicable in Pennsylvania because it was enacted in 1677, after Charles II granted what later became Pennsylvania to his brother, the Duke of York, as part of the province of New York, even though Pennsylvania itself was only granted to William Penn in 1681. In an important 1742 case, it held that an act of Parliament prohibiting the use of arrest as mesne process to commence civil suits against members of the British military did not apply when the plaintiff’s “cause of action [was] just & [could] not be determined in th[e] summary way” that would be required if the defendant soldier could not be kept in jail. Fifteen years later, between 1757 and

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20 See id. at 68–69.

21 See JOHN H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 476 (5th ed. 1979).

22 See ALEXANDER, supra note 19, at 96, 220–21 nn. 63–64.

23 JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664–1776), at 666 (Commonwealth Fund 1944) (emphasis added) (quoting the Chief Justice’s instruction).

24 See ALEXANDER, supra note 19, at 227 n. 34, 228 n. 48.

25 Swift v. Hawkins, 1 U.S. 17, 1 Dall. 17 (Pa. 1768).

26 See Boehm v. Engle, 1 U.S. (1 Dall.) 15 (Pa.1767); see also Anonymous, 1 U.S. (1 Dall.) 1 (Pa. 1754) (the basic rule was that a statute enacted before the founding of a colony was binding in the colony, but that one enacted afterwards was not binding).

1759, in the midst of the French and Indian War, the court ignored Parliamentary legislation providing for the enlistment of prisoners in civil jail, typically for nonpayment of debts.\footnote{See Cochrane v. Sheriff of Philadelphia, (Pa. 1757–59) (microfilm in possession of Pennsylvania State Archives), \textit{discussed in} 4 \textsc{Nelson}, \textit{supra} note 7, at 111.}

In South Carolina, in the leading 1760 case of \textit{Watson v. Williams}, the Court of Common Pleas, the colony’s highest court for civil cases, did not hold an act of Parliament invalid, but did, in effect, nullify a provision in the colony’s royal charter prohibiting the enactment of statutes repugnant to the common law.\footnote{Watson v. Williams (S.C. C.P. Ct. Jan. 1759) (typescript in possession of South Carolina State Archives), \textit{reprinted in} \textsc{Cases and Materials on the Development of Legal Institutions} 285 (Julius Goebel, Jr., ed., vt. Printing 1946).} At issue was a colonial statute requiring executors and administrators of insolvent estates to pay creditors equally; a statute contrary to the common law rule permitting executors and administrators to give preferences to favored creditors.\footnote{Id. at 287–88.} The South Carolina court sustained the legislation, however, by holding that it was not repugnant to the common law, but merely modified it, thereby effectively invalidating a provision of the South Carolina charter.\footnote{Id. at 287–88.}

Prior to 1760, the Massachusetts Superior Court did not explicitly nullify or refuse to obey any element of English law. But it took two sorts of action that had the practical effect of rendering Parliament’s Navigation Acts unenforceable and thus null and void. One action was to issue writs of prohibition to the Court of Vice Admiralty in cases involving enforcement of the Navigation Acts. It issued the writs, for example, in a case of a local man being prosecuted in Vice Admiralty for interfering with a customs official searching for unlawfully imported goods,\footnote{See Basset v. Hiller (Suffolk Co. Super. Ct. May 1, 1722) (microfilm in possession of Utah Genealogical Society), \textit{discussed in} 3 \textsc{William E. Nelson}, \textit{The Common Law in Colonial America: The Chesapeake and New England}, 1660–1750, at 89 (Oxford Univ. Press 2018).} in a case brought in admiralty by the customs collector against a ship captain,\footnote{See Perry v. Robinson (Middlesex Co. Super. Ct. Jan. 5, 1725–26) (microfilm in possession of Utah Genealogical Society), \textit{discussed in} 3 \textsc{Nelson}, \textit{supra} note 32, at 89.} and in a case in which the admiralty judge was planning to sell property condemned in his court.\footnote{See Glen v. Menzies (Middlesex Co. Super. Ct. July 30, 1723) (microfilm in possession of Utah Genealogical Society), \textit{discussed in} 3 \textsc{Nelson}, \textit{supra} note 32, at 89–90.}

The other sort of action taken by the Massachusetts courts was to entertain common lawsuits against customs officials in connection with proceedings they had brought in Vice Admiralty. In one case, for instance, the Suffolk County Court of Common Pleas entertained an action of trover pursuant to which a merchant...
recovered what he claimed to be Moroccan skins that had been condemned in an admiralty proceeding as Spanish skins.\(^{35}\) The leading case, however, was *Erving v. Cradock* in 1761.\(^{36}\) It was an action of trespass by a local shipowner against a revenue officer who had seized his vessel and had it condemned in Vice Admiralty for smuggling. In the county Court of Common Pleas that first heard the action, two of the judges told the jury that it “must put a stop to these proceedings of the custom house officers; if they did not there would be tumults and bloodshed; for the people would bear with them no longer.”\(^{37}\) The jury, in fact, returned a substantial verdict in favor of the shipowner.\(^{38}\) On appeal, the judges of the Superior Court instructed a new jury that it was bound by the judgment in Vice Admiralty and should return a verdict for defendant, but the jury ignored its instructions and again returned a substantial damage judgment against the revenue officer.\(^{39}\) Although the judges recognized that the verdict’s effect would be to nullify enforcement of the Navigation Acts, they also agreed that under Massachusetts law the verdict was final and binding, and thus they did not set it aside and grant a new trial.\(^{40}\)

The above cases likely are not the only colonial cases nullifying English law. What is reported in colonial court records is sparse, often amounting to no more than identification of the parties and the judgment. The facts and the reasoning of the court are often left unreported. As a result, it is impossible to know what many cases decided. Other cases thus may exist in which English law was nullified with nothing to that effect being reported.

**B.**

In 1761—the same year that it decided *Erving v. Cradock*—the Massachusetts Superior Court also decided *Paxton’s Case*. Because of the argument of James Otis, one of co-counsel, the case today represents something that in 1761 may have been new to American law.

The case arose when Charles Paxton, the surveyor of customs in Boston, requested the superior court to issue writs of assistance that would enable him and other officials to enter any premises during the daytime to search for smuggled


\(^{37}\) Id. at 555–56.

\(^{38}\) Id. at 554.

\(^{39}\) See id. at 556.

\(^{40}\) See id. at 557.
goods.41 With the death of George II in 1760, old writs had expired, and an act of Parliament entitled Paxton to the issuance of new writs.42 Otis argued, however, that the act of Parliament was void and thus ought not be given effect. John Adams reported Otis’s argument in a single paragraph:

As to acts of Parliament, an act against the constitution is void; an act against natural equity is void; and if an act of Parliament should be made, in the very words of this petition, it would be void. The executive courts must pass such acts into disuse—8. Rep. 118. from Viner—Reason of the common law to control an act of Parliament.43

The citation is to Sir Edward Coke’s opinion in Dr. Bonham’s Case,44 which scholars today understand as a case not of unconstitutionality, but of statutory interpretation, in which a court can interpret a statute narrowly so as not to apply it to a case but in which Parliament can then reenact it explicitly to apply. As the preeminent historian of American constitutionalism in the founding era and the early republic wrote in 2021, Otis’s argument in Paxton’s Case “was not [a plea for] modern judicial review.”45

It seems unlikely, however, that Otis understood Bonham’s Case as modern scholars do. He declared acts of Parliament contrary to the Constitution void; he did not say they could be reenacted.46 He probably knew of some of the colonial cases discussed above that had passed unwanted acts of Parliament into disuse and was urging the superior court to do in Paxton’s Case what colonial courts had, in effect, done in earlier cases. What may have been new was his explicit statement that the reason to treat an act as void was its being against the Constitution. It is possible that language of unconstitutionality may have appeared in earlier cases, but that scholars today may be unaware of those cases because colonial records, as noted above, often recorded only the parties to a case and the outcome of the case without identifying any reason for the results.

42 Id. at 1005 & n.47.
43 QUINCY, supra note 38, at 474 (internal citation omitted).
46 See QUINCY, supra note 38 at 474.
In any event, whatever ambiguity may have existed in John Adams’s brief summary of Otis’s argument in Paxton’s Case was eliminated in an appendix to a pamphlet Otis published three years later, *The Rights of the British Colonies Asserted and Proved*. There he declared that the power of Parliament was subject to limitations and that any act beyond those limitations was void; he did not write that courts could construe legislation narrowly, but with power in legislatures to reenact them broadly. What Otis did write is worth quotation in full:

[T]he power of the British Parliament is held as sacred and as uncontrollable in the colonies as in England. The question is not upon the general power or right of Parliament, but whether it is not circumscribed within some equitable and reasonable bounds. Tis hoped it will not be considered as a new doctrine that even the authority of the Parliament of Great Britain is circumscribed by certain bounds which if exceeded their acts become those of mere power without right, and consequently void. The judges of England have declared in favor of these sentiments when they expressly declare that acts of Parliament against natural equity are void. That acts against the fundamental principles of the British constitution are void. This doctrine is agreeable to the law of nature and nations, and to the divine dictates of natural and revealed religion. It is contrary to reason that the supreme power should have the right to alter the constitution. This would imply . . . that those who are invested with power to protect the people and support their rights and liberties have a right to make slaves of them. This is not very remote from a flat contradiction.

The year after the 1764 publication of Otis’s pamphlet, Parliament passed the Stamp Act, which imposed a tax on the colonies by requiring the use of paper containing tax stamps on many documents circulated in the colonies. Papers filed in courts constituted one category of documents requiring stamps. Paper containing tax stamps became unavailable, however, when colonial mobs forced Crown officials who were selling the stamped paper either to resign or to flee from their posts.

The unavailability of stamped paper raised an issue for the judiciary. Should judges ignore the act of Parliament and adjudicate cases filed on unstamped paper? Or should judges obey the act of Parliament and hear only cases in which all

48 Id. at 476–77 (emphasis added).
50 Id.
documents had been filed on stamped paper (and, if documents had not been so filed, hear nothing and effectively close down)? On this issue, Otis’s pamphlet became highly relevant, as several courts concluded that the Stamp Act was unconstitutional and therefore proceeded to ignore it and to continue adjudicating cases.

One of the earliest arguments about the unconstitutionality of the Stamp Act occurred in Massachusetts, when John Adams argued to the Governor’s Council that the Stamp Act was utterly void, and of no binding force upon us and James Otis argued that there are limits, beyond which if Parliaments go, their acts bind not.52 Following the arguments, the Council left the decision whether to remain open to individual courts, and both the Court of Common Pleas and the Probate Court of Suffolk County, which met in Boston, decided in consultation with the Boston Town meeting to remain open in January 1766 and process cases on unstamped paper.53 In the same month, the Massachusetts House of Representatives voted 81-5 that all courts in the colony, especially the Superior Court, should remain open, and the Superior Court did hold its March 1766 term, although it postponed all new cases since it had received news that Parliament was likely to repeal the Stamp Act.54

A second colony that kept all its courts open was Rhode Island, after the colonial legislature enacted a resolution promising to indemnify all judges or other officials if they suffered damages in consequence of keeping the courts open.55 To the north, in New Hampshire, the clerk of the Superior Court refused at the February 1766 session to accept documents not containing stamps.56 The judges responded by issuing the following order:

The Justices considering the necessity and expediency for the preservation of the peace and good order of the Province of holding this court and ... having business done as usual and no stamped paper to be had in this Province, do order and command the clerk of this court to issue all writs, processes and copies as usual, without stamped paper.57

The court then proceeded to remain open and conduct business as usual, as did the

53 Id. at 184.
54 See id.
55 See id. at 226–27.
56 Id. at 227.
57 Id.
colony’s lower courts.\textsuperscript{58}

A major conflict over the constitutionality of the Stamp Act occurred in the Court of Common Pleas, the only court in South Carolina for hearing civil cases. When the court met in November 1765 with Chief Justice Charles Shinner presiding and no other justices present, Shinner was of opinion that “no business can [be] proceeded upon without stamped paper” and accordingly adjourned the court until its February 1766 term.\textsuperscript{59} At the February term, in the case of \textit{Jordan v. Law}, the plaintiff’s attorney told the court that he had served a rule to plead on unstamped paper on the defendant’s attorney, who had not pleaded, and accordingly moved for judgment. In view of the steps then being taken to obtain repeal of the Stamp Act, the court postponed consideration of the motion until the April 1766 term.\textsuperscript{60}

At the April 1766 term, the plaintiff’s attorney again moved for judgment and argued that it was unconstitutional to delay or deny justice to the subject and that the Stamp Act was having that effect.\textsuperscript{61} The Court of Common Pleas, by a vote of 4-1, accepted counsel’s argument and entered judgment.\textsuperscript{62} Chief Justice Shinner wrote in dissent that the same people who were urging the court to hold the Stamp Act unconstitutional because of the lack of stamps had conspired with others to make stamps unavailable and that such an unlawful conspiracy could not be tolerated.\textsuperscript{63}

The majority hoped that Shinner would withdraw his dissent, but, when he did not, the majority published an opinion of its own.\textsuperscript{64} The majority, in effect, held the Stamp Act unconstitutional. After refusing to accept Shinner’s judgment about a conspiracy it declared that:

[I]f no business is to be done without stamp paper, and it is absolutely impossible for the Court to procure stamp paper, the inference is, that the Stamp Act in such an exigency would oblige the Courts of Law to be shut up, all business to be remitted and the administration of law and justice to be suspended. . . . [That would] unhinge the constitution of the colonies, . . . unloose the hands of violence and oppression, . . . introduce anarchy and confusion among us, . . . and reduce us to a state of outlawry[.] For to be without law, and to want the means of

\textsuperscript{58} Id. at 227–28.

\textsuperscript{59} Order Adjourning Court, (S.C. C.P. Ct. Nov. 1765) (typescript in possession of South Carolina State Archives), \textit{discussed in} 4 NELSON, \textit{supra} note 7, at 123.

\textsuperscript{60} \textit{Jordan v. Law}, (S.C. C.P. Ct. Feb. 1766) (typescript in possession of South Carolina State Archives), \textit{discussed in} 4 NELSON, \textit{supra} note 7, at 123.

\textsuperscript{61} \textit{Jordan v. Law}, (S.C. C.P. Ct. April 1766) (typescript in possession of South Carolina State Archives), \textit{discussed in} 4 NELSON, \textit{supra} note 7, at 123.

\textsuperscript{62} Id.

\textsuperscript{63} See id.

\textsuperscript{64} See id. at 124.
dispensing the law is one and the same thing.\textsuperscript{65} The majority, with reference to \textit{Bonham’s Case} and by implication to James Otis’s pamphlet, accordingly held the Stamp Act “repugnant and against reason and common right, [and] my Lord Coke says is void.”\textsuperscript{66}

The highest court of Virginia, the General Court, did not rule on the constitutionality of the Stamp Act, but some county courts did. One county court directed that any attorney who refused to carry out his business because of the lack of stamped paper would have his suits dismissed.\textsuperscript{67} Another, much more explicitly, “unanimously declared it to be their opinion that the said act did not bind, affect, or concern the inhabitants of this colony, inasmuch as they conceive the same to be unconstitutional.”\textsuperscript{68}

Delaware was another colony in which the courts remained open.\textsuperscript{69} But elsewhere the pattern was more mixed. In Maryland, county courts remained open, but the central courts closed until April 1766.\textsuperscript{70} In New Jersey, North Carolina, and Pennsylvania, the highest courts remained closed, but some county courts remained open.\textsuperscript{71}

The Stamp Act cases, which are largely unknown to judges and constitutional scholars today, are enormously significant. In the context of the most important political controversy of their time, those cases introduced into American law and adopted the doctrine of judicial review of the constitutionality of legislation. Lawyers and politically active individuals, including future leaders of American government, most likely never forgot the role the cases played in the Stamp Act controversy.

Thomas Jefferson, for example, was studying law at the time of the Stamp Act, under the tutelage of Virginia’s attorney general, George Wythe.\textsuperscript{72} As a protégé of Wythe, Jefferson almost certainly knew of at least some of the cases holding the Act unconstitutional. Indeed, the Northampton County decision, discussed above, was published in Williamsburg’s newspaper, the \textit{Virginia Gazette}, in the month

\begin{itemize}
  \item \textsuperscript{65} Jordan v. Law, (S.C. C.P. Ct. May 1766) (typescript in possession of South Carolina State Archives), \textit{discussed in} 4 NELSON, supra note 7, at 123.
  \item \textsuperscript{66} Id.
  \item \textsuperscript{67} See MORGAN & MORGAN, supra note 52, at 222.
  \item \textsuperscript{68} Motion of Clerk and Other Officers, Northampton County Va. Ct., Feb. 11, 1766 (microfilm in possession of Utah Genealogical Society), \textit{discussed in} 4 NELSON, supra note 7, at 127.
  \item \textsuperscript{69} MORGAN & MORGAN, supra note 52, at 227.
  \item \textsuperscript{70} See 4 NELSON, supra note 7, at 126.
  \item \textsuperscript{71} Id.
  \item \textsuperscript{72} See MERRILL D. PETERSON, THOMAS JEFFERSON AND THE NEW NATION: A BIOGRAPHY 13–14 (Oxford Univ. Press 1970).
\end{itemize}
after it was handed down. Wythe, who lived in Williamsburg, almost certainly read that newspaper, Jefferson probably did, and both likely appreciated the political motivations behind the Stamp Act cases and how the decisions got swept up in politics. Although he was only ten years old at the time, John Marshall was a son of a prominent local Virginia political leader who, like Jefferson, probably knew of at least some of the Stamp Act cases and likely discussed them with his family. Thus, Jefferson, Marshall, and others of their generation could not avoid understanding judicial review as part of the political process and likely brought that understanding with them to the years around 1800 when *Marbury v. Madison* came before the Supreme Court.

Accordingly, *Marbury* can be understood properly only in light of the Stamp Act cases and post-Revolutionary judicial review cases, to be discussed below, that followed them. When *Marbury* is read as the first national case of judicial review deciding a major political issue in the context of a small number of state cases deciding mostly insignificant state-wide issues, as students unaware of the Stamp Act cases have long read it, it appears to be the case that established judicial review in American law. But when it is seen in the context of a group of cases addressing a major political issue of imperial tax policy and holding that policy unconstitutional, it suddenly looks different. What then matters is not whether in the early 1800s judicial review should have existed; it already did exist. What matters is what its scope should be, and then Chief Justice Marshall's promise to limit its scope to legal issues and avoid political questions becomes central to the case.

C.

Independence did not wean judges either from the doctrine of judicial review or from political decision-making in judicial review cases. In a small number of state cases over the remaining decades of the eighteenth century they continued to hold legislation unconstitutional. Scholars have been studying these cases since as early as 1893, and thus it is not necessary to analyze all of them in detail. Many of the early cases dealt with issues of interest primarily to the litigants and not to broad public issues, such as the power of the City of Philadelphia to enact a building code or the liability of delinquent clerks to specific statutory penalties. Four of

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73 See *Williamsburg*, VA. GAZETTE, March 21, 1766, at 3, col. 3.
74 See *Hobson*, supra note 45, at 2.
78 See *Caldwell v. Commonwealth*, 2 Ky. (Myers) 129 (1802).
the cases, however, merit extended discussion.

Three of them involved Loyalists (Americans who had supported Britain during the Revolutionary War) and about what penalties or loss of rights, if any, those Loyalists should face as a result. This was a hot political issue for many Americans in the 1780s, with some seeking to restore peaceful and profitable relations with Britain and others wanting revenge.79

The first case, Commonwealth v. Caton, came before Virginia’s highest court in 1782.80 Three Loyalists who had been convicted of treason had subsequently received pardons from the lower house of the legislature.81 At issue was the validity of the pardons.82 Virginia’s constitution provided that, in cases which had been prosecuted by the lower house, that house had power to grant pardons without the concurrence of the upper house; conflictingly, the Commonwealth’s treason act provided that pardons were effective only if both houses concurred in them.83 Was the treason act unconstitutional?84

Two of the judges, Edmund Pendleton and George Wythe, discussed the issue of constitutionality at length. Pendleton wrote that he would not hesitate to hold legislation unconstitutional if it ever became his duty to do so.85 But he concluded that he did not need to reach the issue in this case, because the constitutional provision giving the lower house jurisdiction to issue pardons by itself was not applicable on the facts of this case.86 Wythe, who it will be recalled, knew of the Stamp Act cases, agreed in a lengthy opinion that he would hold unconstitutional legislation void. But he held that the treason act as applied to the facts of the case was not unconstitutional,87 and at least four other judges voted with Pendleton and Wythe without writing extensive opinions.88 As a result, the pardons were held invalid for failure to conform to the requirement of the treason act that both houses concur in them.89

80  Commonwealth v. Caton, 8 Va. (4 Call.) 5 (1782).
81  Id. at 5.
82  Id. at 5–7.
83  Id. at 6.
84  See id. at 20.
85  Id. at 20.
86  Id. at 13–15.
87  Id. at 13.
88  William Michael Treanor, The Case of the Prisoners and the Origins of Judicial Review, 143 U. PENN. L. REV. 491, 529–530 (1994) (noting that there is dispute amongst the primary sources whether the vote was unanimous or split 6-2).
89  Id.
The second case, *Rutgers v. Waddington*, occurred in the New York City Mayor’s Court in 1784. Under the State’s 1783 trespass act, property owners in the city who had fled from the British occupation of 1776 to 1783 were granted a cause of action against those who had used their property during the occupation. Waddington, a British merchant, had used Rutgers’s brewery under the authority of the British Commissary General from 1778 to 1780 and under British military authority from 1780 to 1783. Alexander Hamilton, who represented Waddington, argued that the trespass act was unconstitutional because it violated terms of the 1783 treaty of peace with Britain, which the Continental Congress had plenary power to adopt and which constituted the supreme law of the land that no state could disobey.

Mayor James Duane did not hold the trespass act unconstitutional, but he did find it vague and construed it to avoid constitutional difficulty by holding that the 1783 treaty did give Waddington some protection under common law and the law of nations from Rutgers’ suit. Duane was clear, however, that if the legislature clearly and explicitly reenacted the provisions of the original act, a new act would be constitutional, and his court would uphold it. Nonetheless, Duane’s opinion effectively invalidated the trespass act and, despite its anger and unhappiness, the legislature lacked the votes to reenact it.

*Bayard v. Singleton* in North Carolina in 1787 was the third highly political Loyalist case. It was a suit by a plaintiff who claimed title from a Loyalist to land that had been seized from the Loyalist during the Revolution by the state. The defendant moved to dismiss on the basis of state legislation providing that no trial was needed to confirm the validity of a title derived from a state seizure of Loyalist property, such as that of the defendant. The court denied the motion, holding the statute unconstitutional as denying the constitutionally protected right to trial by jury. Such a trial ultimately took place, with a verdict for the defendant.

The fourth political case, ultimately the most political of all, was *Trevett v.*

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91 *Id.* at 308.
92 *Id.* at 304–05.
93 *See id.* at 306.
94 *See id.* at 323 325–27.
95 *Id.* at 324–25.
98 *Id.* at 5.
99 *Id.*
100 *Id.* at 7.
101 *Id.* at 10.
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Weeden in Rhode Island, also decided in 1787. At issue was the validity of legislation making depreciated Rhode Island paper money legal tender for the payment of debts. The court held the legislation invalid, with three of the five judges resting their opinions on constitutional grounds. The legislature summoned all five judges to appear before it and ended up forcing four of them off the bench.

A fifth case, Hayburn’s Case, and two companion cases also merit mention. Although they did not involve a high-profile political issue, they occurred in federal circuit courts, where a total of five of the seven justices of the Supreme Court addressed the issue of constitutionality. The three cases are reported as a footnote to Hayburn’s Case in the Supreme Court, in which a motion was made to issue a writ of mandamus to one of the circuit courts. The motion was never decided because the case became moot.

The issue in the three cases was whether Congress could task circuit courts with a duty to hear applications for pensions for soldiers wounded in the Revolutionary War or for widows and orphans of those who were killed, subject to review by the Secretary of War. All three cases and all five Supreme Court justices who heard them concluded that the task assigned by Congress was administrative rather than judicial and that it was unconstitutional for Congress to assign administrative tasks to the judiciary. All three cases, including the one seeking mandamus in the Supreme Court, became moot when Congress enacted new legislation requiring officials other than judges to hear pension applications.

The cases just discussed demonstrate that independence from Britain did not put an end to the doctrine of judicial review or to the pattern of political behavior on the part of judges that had been prevalent in colonial cases of judicial review and became especially noteworthy in cases in 1765–1766 holding the Stamp Act unconstitutional. Judges continued to understand their job, as other officials understood theirs, to require them both to follow the law when the law required that it be followed and to make political decisions about issues of policy when such

103  See NELSON, supra note 96, at 59, 61.
104  2 U.S. (2 Dall.) 408 (1792).
105  See id. at 410 n.† The Court first cited an unnamed case from the circuit court for the district of New York involving Chief Justice Jay and Associate Justice Cushing, id., a second unnamed case from the circuit court for the district of Pennsylvania involving Associate Justices Wilson and Blair, id, at 411, and a third unnamed case from the circuit court for the district of North Carolina involving Justice Iredell. Id. at 412.
106  Id.
107  See id. at 409–10.
108  Id. at 410 n.†
109  Id.
110  Id. (citing Act of Feb. 28, 1793, ch. 17, 2 Stat. 324).
issues required decision. During the second half of the eighteenth century, a number of men, most notably Thomas Hutchinson, John Jay, and John Rutledge, moved back and forth between legal and political jobs, apparently without any clear understanding that the nature of decision-making in the jobs differed. Thus, as late as the time of the Constitutional Convention of 1787, no clear distinction between law and politics had yet developed.

At the convention itself, a debate occurred that confirmed how understandings of law and politics overlapped. The issue in the debate was how to ensure that legislation enacted by the states did not violate federal law or the federal constitution. James Madison proposed to have the states submit their legislation to Congress, which would have power to override laws inconsistent with federal law. Madison’s proposal was rejected, however, and the convention adopted a plan pursuant to the Supremacy Clause to have state legislation reviewed by federal courts in cases coming before them. What matters here is that during the debate, no delegate to the convention suggested that Congress would pass on the validity of state law any differently than the Court would. Indeed, in discussing the Madison proposal, John Lansing, building upon arguments made by Alexander Hamilton, referred to the congressmen who would determine the consistency of state and federal law as “judges”; he articulated no difference between Congressmen as political actors and judges as divorced from politics.

Although the Constitutional Convention explicitly adopted a system of judicial review for determining whether state law was consistent with federal law and the federal constitution, it did not explicitly provide for judicial review of Congressional legislation. But it did so by implication. Once the Framers decided to turn to courts to ensure the consistency of state law with federal law, they inevitably delegated to courts jurisdiction to determine the substance of federal law, including whether federal legislation is consistent with the federal constitution. A hypothetical might be useful. Assume that the constitution of a particular state currently gives defendants in felony cases a right to trial by jury. But Congress, with a goal of increasing the rate of felony convictions, enacts a statute prohibiting jury trials in that state. Of course, federal law trumps state law. But what constitutes federal law? The congressional statute? Or the federal constitution, which may not permit Congress to enact a law that applies only to one state, and which may also guarantee a right to trial by jury? Isn’t it always necessary for a court, before holding that federal law overrides state law, to determine what federal law is? And when a federal statute is alleged to be in conflict with the federal

111 See AMAR, supra note 6, at 470–71.
113 Id.; see also id. at 300–301.
114 Id. at 293; see also id. at 119–27.
115 Id. at 337.
constitution, doesn’t the court have to give effect to the Constitution rather than the statute if a conflict does exist?116

In short, as the end of the eighteenth century approached, several facts were clear. Judicial review of the constitutionality of legislation was well established in American law, having been practiced in numerous cases for over four decades. Federal courts possessed constitutionally granted jurisdiction to pass on the validity of both state and federal law under the federal constitution—the power, that is, of judicial review. And this power of judicial review had often been exercised in its four decades of practice in a political fashion.

II.

When he became president in March 1801, Thomas Jefferson and many fellow Democratic Republicans were understandably concerned that judges would behave politically,117 as they had during the Stamp Act controversy and in other eighteenth-century cases. As noted earlier, Jefferson himself was studying law under the tutelage of then-Virginia Attorney General George Wythe at the time of the Stamp Act cases, and there is every reason to assume that Wythe told Jefferson about the cases or that Jefferson read about them.118 In 1801, Jefferson could not have forgotten what he once knew and, in retrospect, he undoubtedly approved of the political behavior of judges in holding the Stamp Act unconstitutional.

John Adams, Jefferson’s predecessor as president, likewise was aware of the Stamp Act judicial review cases and understood that eighteenth-century judges at times behaved politically. After all, Adams had been an active player in the Stamp Act controversy as the lawyer who, along with James Otis, had argued the matter that kept the Massachusetts courts open and functioning without stamps in violation of the act of Parliament.119 Moreover, Adams had signed the Judiciary Act of 1801, which significantly increased the size of the federal judiciary, and had appointed Federalist partisans to the newly created judgeships during the final two months of his presidency.120 He also appointed his secretary of state, John Marshall, another Federalist, to be chief justice of the United States.121

Jefferson and the Democratic Republican majority elected to Congress along

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118 See Peterson, supra note 72, at 13–14.
119 See Nelson, supra note 96, at 46.
121 Id. at 508.
with him thus had every reason to anticipate that these last-minute Federalist appointees would behave politically. Accordingly, in 1802, Congress repealed the Judiciary Act of 1801, leaving Adams’s Federalist appointees without their seats.\(^\text{122}\) Was that 1802 repeal constitutional? *Stuart v. Laird*,\(^\text{123}\) the companion case to *Marbury v. Madison*,\(^\text{124}\) challenged the 1802 repeal on the ground that it unconstitutionally deprived the Adams judges of office in violation of the provision of Article III, Section 1 granting them tenure during good behavior.\(^\text{125}\) The *Stuart* case accordingly gave John Marshall, the newly appointed chief justice, and the Supreme Court, every opportunity to behave politically by invalidating the Democratic Republicans’ 1802 act and reinstating the Federalists’ 1801 Judiciary Act.

*Marbury v. Madison* was a more mundane case brought by William Marbury and several others whom John Adams, in the closing days of his administration, had appointed to be justices of the peace in the District of Columbia.\(^\text{126}\) The Senate had confirmed them to be justices and their commissions had been properly executed but John Marshall, who had remained on as acting secretary of state after he became chief justice, had failed to deliver the commissions.\(^\text{127}\) His successor James Madison refused to deliver them, and Marbury and the other justices brought an action in the Supreme Court for a writ of mandamus to compel their delivery.\(^\text{128}\)

In his opinion in the *Marbury* case, Chief Justice Marshall declared in dictum that William Marbury had a right to his seat but appreciated that he could not compel Secretary of State Madison to deliver Marbury’s commission and place him in that seat. He therefore avoided entering into a political battle with Madison, promising that the Supreme Court would avoid involvement in political issues and decide only matters of law.\(^\text{129}\) In Marshall’s own words, political subjects “respect[ed] the nation, not individual rights” and were governed by a political branch whose decisions were “never . . . examinable by the courts” but “only politically examinable.”\(^\text{130}\) In contrast, there were cases where “a specific duty [was] assigned by law, and individual rights depend[ed] upon the performance of that duty.”\(^\text{131}\) In such cases involving the rights of individuals, every officer of

\(^{122}\) See George Lee Haskins & Herbert A. Johnson, 2 The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States 146 (Macmillan 1981).

\(^{123}\) 5 U.S. (1 Cranch) 299 (1803).

\(^{124}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{125}\) 5 U.S. at 303.

\(^{126}\) 5 U.S. at 137.

\(^{127}\) Id.

\(^{128}\) Id.

\(^{129}\) Id. at 166.

\(^{130}\) Id.

\(^{131}\) Id.
government was “amenable to the laws for his conduct; and [could not] at his discretion sport away . . . vested rights.” Marshall continued that “the very essence of civil liberty certainly consist[ed] in the right of every individual to claim the protection of the laws, whenever he receives an injury.”

But how could Marshall convert this political battle with Madison that he was certain to lose into an issue of law? He did it by focusing not on Marbury’s right but on the remedy, Marbury was seeking. Counsel for Marbury argued that a writ of mandamus was an instrument for taking an appeal from James Madison’s political decision not to deliver his client’s commission. It was an argument based on Federalist No. 81 that “the word ‘appellate’ [was] not to be taken in its technical sense, . . . but in its broadest sense, in which it denotes nothing more than the power of one tribunal” to have “by reason of its supremacy . . . the superintendence of . . . inferior tribunals and officers, whether judicial or ministerial.” Chief Justice Marshall, however, could not accept power to superintend officers in the executive branch because that would have empowered the Supreme Court to review the political considerations underlying the officers’ decisions. The exercise of such power would have violated Marshall’s commitment to consider only issues of law, not politics. Accordingly, the Chief Justice had to hold that a mandamus issued to compel action by an executive officer was an original, not an appellate writ.

That holding enabled Marshall to dispose of the case. Although the Judiciary Act of 1789 had authorized the Supreme Court to issue all writs of mandamus, Article III of the Constitution presented a problem, in that it limited the original jurisdiction of the Supreme Court to specific narrow categories of cases, of which mandamus was not one. The Constitution did not give the Supreme Court jurisdiction to issue original writs of mandamus, and Marshall concluded it would be unconstitutional for the Court to do so. Although William Marbury was entitled to his commission, he was seeking a remedy that the Supreme Court could not give him, and thus his case had to be dismissed.

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132 Id.
133 Id. at 163.
134 Id. at 137.
136 Marbury, 5 U.S. at 146–47.
137 See id. at 166.
138 Id. at 174–76.
139 Id. at 179–80.
140 Id. at 173.
141 Id. at 179–80.
**Marbury v. Madison** did not, however, dispose of **Stuart v. Laird**. Indeed, the dictum of Chief Justice Marshall that William Marbury had a right to delivery of his commission suggested that the judges appointed by President John Adams to serve under the 1801 Judiciary Act had a right to their seats and potentially placed the Court in a direct confrontation with President Thomas Jefferson and Congress. The Court avoided that confrontation by relying on the principle that parties to a lawsuit can raise only issues personal to themselves, not issues that someone not in court might raise if they were before the court. Thus, in an opinion by Associate Justice William Paterson, the Supreme Court held that since none of the judges appointed by President Adams were parties in **Stuart v. Laird**, the Court could not consider any claim they might make that it was unconstitutional for Congress as a consequence of the Judiciary Act of 1802 to deprive them of their seats. The party in **Stuart** raising a claim of unconstitutionality, whose case had been transferred from a court created under the 1801 act back to a court created by the 1789 Judiciary Act, could only object to that transfer, and the Supreme Court concluded that it was well within the power of Congress to create and abolish courts and to transfer cases among them. Accordingly, the Court did not declare the 1802 act unconstitutional.

**Marbury v. Madison** and **Stuart v. Laird** came before the Supreme Court in 1803 against an eighteenth-century background in which judges had frequently decided cases before their courts on a political basis. President Thomas Jefferson and many of his Democratic-Republican allies expected that John Marshall and other Federalist judges would continue to behave politically. John Marshall disappointed them. He did not grab power as they feared he would; he agreed to limit his power. In **Marbury**, John Marshall made a commitment to the American people that the Supreme Court would not behave politically, would avoid making political decisions, and would pass only upon issues of law. In **Marbury** and in **Stuart**, the Court lived up to that promise by deciding the one case on the basis of its lack of jurisdiction and the other on the basis of the litigation principle that parties can argue only issues that are personal to them.

It is unclear whether many Americans, in fact, believe that the Supreme Court should never address political issues and never make political decisions.

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142 See id. at 173.
144 Id. at 308–09.
145 Id. at 308–09.
146 Id. at 308.
147 See Positive Views of Supreme Court Decline Sharply Following Abortion Ruling, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ (stating that only 22% of Americans believe that Justices should bring their own views into their decision-making process whereas 32% of Americans believe the Justices are doing a “poor” job of keeping personal politics out of the decision-making process). Support for stripping the Court of
What is clear, however, is that when the Court engages in politics, people who disagree with the result it reaches will criticize the Court for reaching it even if they have supported political decisions by the Court in the past. That is the legacy of Marbury v. Madison.

III.

A.

If Marbury v. Madison alone stated the law, the law would be clear: the Supreme Court could not address political issues or make political decisions. But Marbury is not alone. In the two centuries since Marbury, the Court has made many political decisions, demonstrating that the Court has the institutional power and will to issue political decisions regardless of Marbury’s dictates.

Nonetheless, Marbury v. Madison remains relevant. Marbury no longer effectively bars the Court from making political decisions. But the commitment of John Marshall that the Supreme Court would steer clear of politics, which contributed to the rise of the rule of law, still retains force, with the result that litigants continue to argue the Court should not address political issues or make political decisions. Part III will examine why this is so.

The problem with political decisions is that they are fragile. Fragility stems from the fact that most Supreme Court political decisions are efforts to resolve fundamental issues, typically of a divisive nature. There is no reason to think, however, that the Court has power to change how people think about divisive, fundamental issues. Why should people change their views simply because five or six Supreme Court justices urge them to? They may obey the law, but they will not agree with it.

As a result, losers will continue to oppose a decision after it is made. They will also argue that because the Court’s decision was political and unsupported by

jurisdiction to hear certain kinds of cases varies dramatically by party affiliation. Over Half of Americans Disapprove of Supreme Court as Trust Plummets, U. Penn. Annenberg Pub. Pol'y Ctr. (Oct. 10, 2022), https://www.asc.upenn.edu/news-events/news/over-half-americans-disapprove-supreme-court-trust-plummets (51% of Democrats support jurisdiction stripping, whereas only 38% of Independents and 21% of Republicans felt the same).

law, the Court lacked authority to issue it. Even though they may have supported political decisions that they liked in the past, they will resurrect the promise first put into circulation by Marshall in *Marbury* that the Supreme Court should not make political decisions. The resurrection will strengthen the losers’ argument but also make it more divisive. Nevertheless, arguments of this sort often succeed. Many political decisions are overturned by Congress or the Court within decades of their issuance or sooner when enough people become convinced that the Court did not have the power or the wisdom to make them, with the result that political leaders take notice and add to the Court justices prepared to reverse them.

Thus, political decisions by the Court often do not resolve an issue. Many decisions support this point, but a few should suffice to illustrate it. The *Dred Scott* case immediately comes to mind. In 1857, Chief Justice Taney issued two rulings in *Scott v. Sandford:* first, that persons of African descent could not be citizens and therefore could not bring federal litigation on the basis of diversity of citizenship; and second, that Congress had no power to exclude slavery from territories of the United States. Antislavery advocates in the Republican party vehemently opposed both rulings, and the party won the 1860 election. The second ruling in the *Dred Scott* case was first overturned by legislation and then definitively with the ratification of the Thirteenth Amendment in 1865, abolishing slavery. The first ruling also was overturned by legislation and then finalized in the Fourteenth Amendment in 1868, declaring all persons born in the United States, black as well as white, to be citizens.

An eight-member Court decided *Hepburn v. Griswold* by a 5-3 vote in 1870. It held an act of 1862 making federal paper money legal tender for the payment of all debts, public and private, even if contracted before passage of the act, unconstitutional. The case produced an outcry among debtors, and President Grant responded by replacing one of the five justices in the majority, who had retired, and adding one new justice, both of whom were committed to overruling *Hepburn.* The following year, 1871, the Court overruled *Hepburn* by a 5-4 vote in the *Legal Tender Cases.*

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149 60 U.S. (19 How.) 393 (1857).
150 *Id.* at 426–27, 452.
154 75 U.S. (8 Wall.) 603 (1870).
155 *Id.* at 625.
157 79 U.S. (12 Wall.) 457 (1871).
In *Pollock v. Farmers’ Loan & Trust Co.*, just over two decades after the *Legal Tender Cases*, the Court held a federal income tax unconstitutional. In a highly political concurring rant, Justice Stephen J. Field objected to the progressive elements of the tax that made wealthy people pay higher taxes than poor ones. Political progressives, however, continued to campaign for an income tax, and the federal government badly needed the revenue it would raise. In 1913, the Sixteenth Amendment gave Congress power to enact an income tax, even one with progressive rates.

One year after *Pollock*, the Court handed down what is in retrospect one of the most reprehensible cases in the Supreme Court’s entire history. *Plessy v. Ferguson* held that state laws requiring railroads to furnish separate cars for African American passengers did not violate the Equal Protection Clause of the Fourteenth Amendment. Separate could be equal. Black people and their allies never accepted *Plessy* and fifty-eight years later *Brown v. Board of Education*, in effect, overruled *Plessy* by holding separate schools inherently unequal.

The next problematic case was *Lochner v. New York*, which, in 1905, held that states and by implication the federal government lacked power to regulate wages and hours of workers. Together with numerous other analogous cases over the course of the next three decades, *Lochner* came to stand for the proposition, always under challenge, that the power of government to regulate the economy was strictly limited. That proposition, which political progressives never accepted,
was, in effect, overruled when in 1937 in *NRLB v. Jones & Laughlin Steel Corp.*\(^{170}\) the Court sustained the constitutionality of the National Labor Relations Act.\(^{171}\) When President Franklin D. Roosevelt, over the five years after *Jones & Laughlin*, filled all but two of the nine seats on the Supreme Court with loyal supporters of the New Deal’s regulatory policies, *Jones & Laughlin* became settled law.\(^{172}\)

The New Deal takeover of the Supreme Court did not put an end, however, to political decision-making by the Court. In 1940, the Supreme Court decided *Minersville School District v. Gobitis*\(^{173}\) by an 8-1 vote with only Justice Harlan Fiske Stone in dissent. In the interest of national unity but without any basis in precedent, *Gobitis* required children who identified themselves as Jehovah’s Witnesses to salute the flag at the outset of each school day.\(^{174}\) Jehovah’s Witnesses, however, did not so salute, and Justice Stone did not give up his fight for their freedom not to do so, with the result that three years later the Court reversed itself in *West Virginia State Board of Education v. Barnette*.\(^{175}\)

Political decision-making has continued. I will only note two cases that are subjects of this article—*Roe v. Wade*\(^{176}\) and *Regents of University of California v. Bakke*.\(^{177}\) What characterizes them and the other cases so far discussed, as well as numerous others, is that those who opposed the decisions did not give up their fight, typically claiming not only that the decisions were wrong but that they were beyond the legal power of the Court and politically motivated.\(^{178}\)

**B.**

Not every political decision by the Supreme Court gets overturned, however. Some endure. Three cases offer examples, and those examples will help clarify the conditions that lead to overruling and those that lead to endurance.

The *Legal Tender Cases*\(^{179}\) were as political as cases ever get, having been made possible by President Grant packing the Court with two justices committed to overturning *Hepburn v. Griswold*.\(^{180}\) Yet the *Legal Tender Cases* were never overturned. The reason was that the constituency that might have been organized

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\(^{170}\) 301 U.S. 1 (1937).

\(^{171}\) *Id.* at 49.


\(^{173}\) 310 U.S. 586 (1940).

\(^{174}\) *Id.* at 598–600.

\(^{175}\) 319 U.S. 624 (1943).

\(^{176}\) 410 U.S. 113 (1973).


\(^{178}\) *See* discussion *infra* Part IV.

\(^{179}\) 75 U.S. (8 Wall.) 603 (1871).

\(^{180}\) 79 U.S. (12 Wall.) 457 (1871); *see* Dietz, *supra* note 156.
for overturning them kept diminishing. The *Hepburn* case had singled out for full payment in specie, or its equivalent debts contracted before 1862. Thus as years progressed, statutes of limitation barred more and more suits to collect such debts, with the result that fewer creditors existed to demand that the *Legal Tender Cases* be overruled and the *Hepburn* rule restored.

Another politically motivated case that has never been overruled is *Jones & Laughlin.* Again, the reason is a lack of a constituency to organize against it. Although businessmen had formed the Liberty League to oppose what they viewed as anti-business regulatory programs of the New Deal, the League closed down in 1940 as the prosperity of World War II and the years after demonstrated that businesses could profit by passing the costs of regulation on to consumers. Although talk against the regulatory state has persisted, no organization of the sort needed to end it has come into existence.

The most intriguing case is *Brown v. Board of Education.* Initially, the South did organize its massive resistance. But the Supreme Court stood firm, and in a matter of years the executive branch came to its assistance, first in Little Rock and then in the Deep South. Only a decade after *Brown,* Congress joined in with the Civil Rights Act and a year later with the Voting Rights Act. Decades of struggle have ensued about how much the government should do to promote racial equality. Nonetheless, the vast majority of Americans today agree that statutorily imposed segregation is unconstitutional and wrong.

C.

What conclusions can be drawn from these cases? The first and the main

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181 See id. at 547–48.
182 301 U.S. 1 (1937).
184 See id. at 247–49.
conclusion is that political decisions by the Supreme Court, in part because they were made by the Court rather than the political process, generally lack the public acceptance needed to endure and that those who have lost cases usually continue to fight their losses and often overturn them. A second conclusion is that occasionally Congress and the executive branch will enter an ongoing fight and resolve it definitively, and the losers will accept the resolution, at least in part. Third, if losers are a small group and especially if they constitute a group diminishing in size, there will be little they can do. Fourth—and this may be the most intriguing conclusion—if the Court leaves options for the losers to achieve their objectives under the new rules, as it did in *Jones & Laughlin*, the losers may accept the new options and obtain what both they and the winners want.

IV.

Before turning to whether the Supreme Court’s decisions in *Dobbs v. Jackson Women’s Health Organization*\(^{192}\) and *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*\(^{193}\) are likely to endure or are fragile and likely to be overturned, it is necessary to document their political character.

A.

As an initial matter, judges seeking to base their decisions on law rather than politics are obligated to follow precedent. By definition, in the common law system, past judicial decisions are law. A judge in a matter pending before her is thus bound to search for past decisions in her jurisdiction relating to the matter at hand and to resolve the matter in accordance with an analytic synthesis of those decisions.

Of course, a clear constitutional or statutory text can overrule a line of precedent. But constitutional and statutory texts typically require judicial interpretation, and those interpretations become law just as common law decisions do. Statutes and constitutional provisions thus come to mean what judges have said they mean in the cases interpreting them.

The opinion of the Court in *Dobbs* contains an extended analysis of when the Supreme Court need not follow precedent.\(^{194}\) Sometimes, precedents may be conflicting, requiring the Court to follow one and reject another.\(^{195}\) At times, following precedent can lead to bad societal results.\(^{196}\) Other precedents may

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\(^{193}\) 600 U.S. 181 (2023).

\(^{194}\) 597 U.S. at 263–92.

\(^{195}\) See id. at 283–85.

\(^{196}\) See id. at 268–69.
contain weak or faulty reasoning. At other times, precedents may have grown out of line with emerging societal conditions. I do not disagree that in these, and perhaps other circumstances as well, the Court need not follow precedent. I am addressing a different issue here. Namely, I do not doubt that sometimes the Court should ignore precedent and even disobey clear statutory or constitutional text. My claim is only that when the Court so behaves, it is not mechanically following the law; it is making a judgment of social policy that one precedent is better than another, that a precedent is weak or out of line with society’s needs, or that applying an applicable text will be socially harmful. The Court in such cases is making a policy judgment—that is, the Court is engaging in politics rather than engaging in straightforward legal analysis.

In his opinion for the Court in Dobbs, Justice Alito accuses the majority in Roe v. Wade of weak and faulty reasoning and offers that as a reason to overrule the case. Although he never explicitly so states, Alito seems to view the opinion in Roe as a fig leaf covering the Justices’ “unrestrained imposition of [their] own extraconstitutional value preferences.” For Justice Alito, Roe was a political opinion and for that reason can be overruled. Nonetheless, the opinion in Roe v. Wade was a precedent, and as a precedent was law. The fact that new Justices with different extraconstitutional value preferences vote to overrule it does not make their decision less political than a decision to overrule any other case. In any event, although he criticized the plurality opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey, for failing to address what he deemed the faulty reasoning of Roe v. Wade, Justice Alito did not question the plurality’s main holding, that, at least with some modifications, Roe had to be followed. Thus, his reason for overruling Casey as well as Roe must be a plainly political one—that Casey along with Roe reached a result that he and other members of the majority in Dobbs find politically unacceptable.

When he wrote the opinion of the Court in Students for Fair Admissions,
Chief Justice John Roberts, in contrast to Justice Alito, largely declined to admit that the Court was overruling any earlier cases. Roberts’s discussion of *Bakke* instead focused on how the one-man opinion of Justice Lewis Powell that recognized diversity as a legitimate reason for considering race in college admissions, rather than the four-man opinion of Justices Brennan, White, Marshall, and Blackmun that recognized remediation of discrimination as the legitimating reason, came to be regarded as the Court’s holding.207 His analysis of *Grutter* focused on its holding that consideration of race in admissions had to have an end point in time.208 But without explanation he changed the end point from twenty-five to twenty years—apparently a political judgment that the end of affirmative action should occur immediately rather than be phased in gradually over a five-year period.209 In short, the Chief Justice’s opinion in *Students for Fair Admissions* did nothing to dispel the political character of overruling precedent.

**B.**

The political character of the majority opinions in *Dobbs v. Jackson Women’s Health Organization*210 and in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*211 is confirmed by the political processes by which the Court that decided the cases came into being. Since the election of 1980, the Republican Party has made the overturning of *Roe v. Wade*212 and *Regents of University of California v. Bakke*213 significant elements of its political program. In every presidential election year between 1980 and 2016, the Republican National Convention adopted a party platform containing a plank condemning abortion and supporting the right to life of unborn children.214 Every Republican president

208  Id. at 212–13.
209  See id. at 213, 231.
212  410 U.S. 113 (1973).
elected during those years—Ronald Reagan, George H. W. Bush, George W. Bush, and Donald Trump—expressed his support for the pro-life position. A similar pattern emerged related to affirmative action. Ronald Reagan campaigned vehemently against affirmative action in 1980, and his administration strongly opposed it, especially during his second term. One author has observed that Reagan made opposition to affirmative action “one of the central features of . . . Republican platform[s],” and another has noted that Republican moderates such as Senator Robert Dole, the party’s 1996 candidate, gradually adopted the position in the years following Reagan’s administration.

But it was Mitch McConnell, the Republican majority leader of the Republican-controlled United States Senate between 2015 and 2021, who put the Republican program into practice. McConnell brought about the packing of the Supreme Court by politically conservative justices committed to overruling Roe and Bakke. When Supreme Court Justice Antonin Scalia died in February 2016, nearly nine months before the upcoming presidential election, President Barack Obama nominated Merrick Garland, a distinguished moderate, centrist judge on the court of appeals to replace him. Even before Garland was nominated, the Republicans on the Senate Judiciary Committee chaired by Senator Chuck Grassley signed a letter addressed to McConnell declaring their intention not to provide a hearing to


whomever President Obama nominated.\textsuperscript{223} They took the position that the next presidential election was so close to occurring that the decision on who should serve on the Court should be left at the ballot box to the American people.\textsuperscript{224} McConnell promptly accepted their argument,\textsuperscript{225} Garland never received a hearing, and the vacancy on the Supreme Court remained unfilled until after Donald Trump assumed the presidency in January 2017.\textsuperscript{226}

Trump then nominated Neil Gorsuch to fill the vacancy.\textsuperscript{227} McConnell knew that he did not have the necessary sixty Republican votes to overcome a likely Democratic filibuster, and he therefore, procured a change in the Senate’s rules, eliminating the filibuster in instances of Supreme Court nominations\textsuperscript{228} and thereby allowing Gorsuch to be confirmed with only fifty-four votes.\textsuperscript{229} Trump’s next appointee, Brett Kavanaugh, was likewise confirmed by a narrow margin, fifty to forty-eight, despite plausible allegations of sexual improprieties in his youth.\textsuperscript{230} Then, when Justice Ruth Bader Ginsburg died in September 2020, less than two months before the presidential election, and President Trump nominated Amy Coney Barrett to fill the Ginsburg vacancy,\textsuperscript{231} Senator McConnell totally changed his position on how long before an election a president could fill a vacancy. He quickly pushed Barrett’s nomination through the Senate, which confirmed her less than two weeks before the election.\textsuperscript{232} McConnell explained his flip-flop by observing that the “Republican Senate” had merely “exercise[d] the power that was given to us by the American people in a manner that is entirely within the rules of

\begin{footnotesize}
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\item \textsuperscript{224} Id.
\item \textsuperscript{227} Liptak & Stolberg, supra note 225.
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the Senate and the Constitution of the United States.”

If Mitch McConnell had followed Senate custom and given Merrick Garland a hearing, Garland would likely have been confirmed as a justice of the Supreme Court. If McConnell had not rushed through the Barrett nomination, President Biden rather than President Trump would have appointed a replacement for Justice Ruth Bader Ginsburg. The result would have been a majority of justices who favored upholding Roe v. Wade and Regents of University of California v. Bakke rather than a majority seeking to overrule them.

Perhaps some cases overruling precedents such as Roe and Bakke, which arguably were originally decided on political rather than legal grounds, can themselves be understood as legal rather than political in character. Given the processes, however, by which four decades of Republican political leaders assembled the Dobbs and Students for Fair Admissions majorities that overruled Roe and Bakke, it is difficult to see Dobbs and Students for Fair Admissions in such a nonpolitical light. And, in any event, Dobbs overruled not only Roe but also Casey, and Students for Fair Admission overruled not only Bakke but Grutter, both solid legal decisions about the importance of the Supreme Court adhering to precedent in its decision-making. Accordingly, it is difficult to avoid concluding that Dobbs and Students for Fair Admissions were political decisions, not decisions based in law.

C.

Arguably the third reason for concluding that the majority opinions in Dobbs and Students for Fair Admissions were political rather than legal is the strongest one. This third reason rests on the differing nature of what the legal system and the political process do. The legal system resolves disputes between individuals on the basis of existing law. The political process resolves broad, societal issues about which organized interest groups typically disagree. At times, a dispute between individuals cannot be resolved without resolving an inevitably overlapping societal issue as well; that was true, for example, in Brown v. Board of Education. But no such inevitable overlap existed in Dobbs or in Students for Fair Admissions. The dispute between the parties could have been resolved in Dobbs in favor of Mississippi on the basis of the narrow, concurring legalistic opinion written by Chief Justice John Roberts. Roberts proposed that the existing rule in Planned

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233 Id.
Parenthood of Southeastern Pennsylvania v. Casey\textsuperscript{238} allowing states to regulate abortion if a regulation did not impose an undue burden on a woman seeking an abortion permitted Mississippi to enact its ban on abortions after the fifteenth week of pregnancy.\textsuperscript{239} But the five-justice majority rejected this narrow, legal resolution of Dobbs and opted instead to address the broad societal issue of the constitutional legitimacy of abortion.\textsuperscript{240} And it decided to turn from law to politics at the request of twenty-six state attorneys general, all of them elected political officials.\textsuperscript{241} In turn, Students for Fair Admissions was not brought by an individual that had been hurt but a corporation dedicated to overturning affirmative action.\textsuperscript{242}

V.

A.

If the theory propounded in Part III is correct about when it is likely for political opinions of the Supreme Court to endure and when it is likely for them to be overturned, then it is not likely that Dobbs\textsuperscript{243} will endure as the final resolution of the abortion controversy. Instead, it appears probable that the Catholic Church and the evangelical right will continue to regard abortion as morally wrong,\textsuperscript{244} and that most women will continue to fight against them for the right to control their own bodies and abort unwanted pregnancies.\textsuperscript{245}

If Republicans were to win an election giving them control of the presidency and of both houses of Congress, they might enact legislation declaring abortion a crime throughout the United States.\textsuperscript{246} But enforcing that legislation would make efforts to enforce the Volstead Act during the 1920s look easy.\textsuperscript{247} The legislation would have to be repealed, but the abortion controversy would continue.

President Biden has urged Congress to enact legislation protecting a

\textsuperscript{238} 505 U.S. 833, 874, 876 (1992).
\textsuperscript{239} Dobbs, 597 U.S. at 353–56 (Roberts, C.J., concurring).
\textsuperscript{240} Id. at 292.
\textsuperscript{241} See id.
\textsuperscript{242} 600 U.S. 181, 197 (2023).
\textsuperscript{243} 597 U.S. 215.
\textsuperscript{245} See id. at 109, 277.
nationwide right to abortion,248 and it appears likely that, if the Democrats gain full control of the presidency and both houses of Congress, they will enact such legislation.249 It would be easy for the Supreme Court to rely on existing precedent to strike that legislation down,250 but perhaps the Court would respect the will of the people and decline to do so. But neither approach would resolve anything. Nothing the Court or the government does will likely change peoples’ views about whether abortion is a sin or a constitutional right, and hence the abortion controversy appears likely to continue. From the current perspective, it is impossible to see how it could end. Thus, we may need to look forward to a case that will overrule Dobbs and a case that will then overrule that case.

B.

Unlike Dobbs v. Jackson Women’s Health Organization,251 the opinion in Students for Fair Admissions, Inc v. President and Fellows of Harvard College.252 is written in a fashion that it might endure. Writing for the majority, Chief Justice John Roberts left ambiguity in the opinion. He held clearly that achieving a diverse student body did not constitute justification for considering race in the admissions process, a holding that could significantly reduce the number of minority applicants admitted to colleges and universities.253 If this holding is read to represent the totality of the opinion, however, the opinion is unlikely to endure. Conservatives committed to overruling affirmative action will support this reading of the opinion and will urge schools to end special admissions programs. Some schools will do so.

Minorities, however, will continue to demand a fair share in the admissions process. As long as pro-bono representation is available, minority applicants who are denied admission to the colleges and universities of their choice will bring suits claiming that they are the intellectual equals of those who were admitted, that standardized tests and grade-point averages do not fairly and accurately measure

their skills, and that the white applicants who were admitted instead of them were chosen on an unlawful basis of race. Over time, if the past is a guide, new research and continuing litigation will add strength to their claims, the demand of minorities for fair admission will be met, and *Students for Fair Admissions* will be overturned.

But, as noted, the Chief Justice left ambiguity in his opinion. He did not hold that race could never be considered in the admissions process. Indeed, after elaborating at length why, in the majority’s view, achieving diversity did not justify considering race, he ended the Court’s majority opinion with the statement that “nothing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.”254 Earlier in the opinion he had conceded that “race-based government action” was appropriate in “remediating specific, identified instances of past discrimination that violated the Constitution or a statute.”255 Nonetheless, the Chief Justice concluded that “universities may not simply establish through application essays or other means the regime we hold unlawful today.”256

In an important concurring opinion Justice Clarence Thomas, joined by Justice Neil Gorsuch, examined the original intent of the framers of the Fourteenth Amendment, which Justice Thomas found dispositive of the amendment’s meaning and of the legitimacy of race-based programs.257 Justice Thomas concluded that the amendment authorizes the government to adopt race-based programs to remedy the effects of racial discrimination.258 In particular, he noted that Congress in the 1860s—containing the same Congressmen who had adopted the Fourteenth Amendment—had enacted several such programs of remediation.259 Justice Thomas’s reference to this early Congressional legislation is intriguing: it raises an issue about the power of Congress today to legislate reparations for past and ongoing racial discrimination. That, however, is not the subject of this article.

The final paragraph of the Chief Justice’s opinion and Justice Thomas’s concurrence create ambiguity that makes an alternative reading of *Students for Fair Admissions* possible. That reading is that *Students for Fair Admissions* is a first step toward placing affirmative action on a solid doctrinal footing of remedying discrimination rather than achieving student diversity. That reading would give *Students for Fair Admissions* enduring importance, but it will require enduring effort to get there.

Colleges and universities will need to rewrite their admissions literature to
deemphasize diversity and focus on remediation of discrimination. They will need to encourage minority applicants to submit applications explaining how discrimination affected their ability to study and learn. The Court has made it clear, however, that the above is not enough. More is required, but the Court has failed to indicate what that more may be. What should colleges and universities do? The best option, in my view, is for colleges and universities to modify their admissions processes in the fashion indicated above, add some additional element to their process, and await future litigation to receive direction about what else they must do. The downside to this option, of course, is that litigation is time-consuming and expensive, and most colleges and universities will need to raise new funding to pay for it. But, as was suggested above, they are also likely to face expensive litigation if they end affirmative action. Moreover, there is an upside to continuing existing programs with slight modification. So far, the Supreme Court has permitted colleges and universities to continue existing admissions practices during the years litigation is pending. It is quite unlikely that the Court and the lower federal courts will change that practice by issuing the broad preliminary injunctions that would be required to change it. Thus, if colleges and universities follow this approach, something resembling the current admissions process may endure for years as the Supreme Court, perhaps with a few different members, works out the details of what the then-enduring case of *Students for Fair Admissions* requires.

In conclusion, colleges and universities need to make a choice. They can respond to *Students for Fair Admissions* by ceasing to accept minority applicants with lower aptitude scores and grade-point averages than those of the white applicants they accept. Or they can continue to accept such minority applicants. With either response they will face costly litigation that will require them to raise new funding, could drive some of them into bankruptcy, or otherwise divert money from their academic missions. There is no middle ground or compromise; if, for example, a school decided not to eliminate but to reduce minority admissions, it might be sued both by minority applicants and by white applicants who had been rejected. Similarly, Princeton University has adopted a special admissions program for first-generation applicants, but that leaves applicants, at least one of whose parents attended college, without any special program and thus available as a plaintiff.

In the end the choice for colleges and universities is about the American future they want to embrace. Do they foresee a future in which, by virtue of superior educations, white people maintain their supremacy? Or do they imagine a future in which America is led by people of all races and ethnicities? In my view

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demography will dictate that future, and it would be wise now to prepare all people for it.

C.

For my final words, I want to reemphasize why political opinions of the Supreme Court are today so fragile. John Marshall appears to have recognized the reason back in 1803. Eighteenth-century judges sat on courts that served small, local communities. Judges were members of those communities who knew the political choices the communities favored, and, if the judges decided any political matter to the contrary, the judges could speak personally to their neighbors to urge them to accept what they had done. John Marshall, in contrast, presided over a court that served more than three million people, with nearly all of whom he had no personal contact. He had no personal knowledge of the political choices his fellow citizens favored, and no mechanisms for persuading them to favor something different.

Multiply the society that John Marshall faced by one hundred, and the inability of the Court by itself to change the nation’s values becomes obvious. People have beliefs—sometimes competing beliefs—and opinions of five or six justices are unlikely to change them. Thus, when the Court confronts a set of competing beliefs and rules in favor of one, the losers are unlikely to change their beliefs. Indeed, the Court’s political rather than legal decision is likely to anger them and solidify their beliefs. Thus, they will keep fighting for their beliefs, which over time may become politically dominant. Hence the fragility of the Supreme Court’s political opinions.