On the Struggle for Judicial Supremacy

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Given that democratization is an ongoing, dynamic process, what explains the emergence and maintenance of some types of political institutions and the decline of others? The answer, we argue, lies not in the intentional design of long-run constitutional principles but rather in the short-run strategic choices of political actors. While many would agree with this vision as applied to legislative or executive institutions, we claim that it is equally applicable to courts. After laying out our argument—a theory of institutional emergence and maintenance—in some detail, we test it by applying game theory to a critical moment in American history: the defining sequence of events for American presidential-court relations that played out between President Thomas Jefferson and Chief Justice John Marshall in the early 1800s. Our analysis allows us to assess factors fundamental to most explanations of the Jefferson-Marshall conflict: the political and institutional preferences of the actors (especially Jefferson's preferences over judicial review) and the larger political environment in which the conflict took place. It also provides important insights into how we might study other interinstitutional interactions, be they of historical moment or of future concern.

In the fall of 1993, when Boris Yeltsin found himself at odds with his nation's Constitutional Court, he took dramatic steps to rectify the matter. Yeltsin's situation, of course, was one with which many former presidents of the United States—including Thomas Jefferson, Abraham Lincoln, and Richard Nixon—would have sympathized. They too faced Courts occasionally hostile to their political interests; and they too pursued strategies designed to change the institution that is the U.S. Supreme Court. Unlike Yeltsin, though, American presidents were largely unsuccessful in their attempts to alter dramatically (or, as in Yeltsin's case, suspend) the Supreme Court.

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Why did Yeltsin succeed and U.S. presidents fail on this score? To some observers the answer is straightforward enough: The U.S. Constitution, implicitly and explicitly, precludes the possibility. But this response is too simple. Would any commentator argue that Yeltsin will never again suspend his country's Constitutional Court just because the new constitution forbids it? Such an assertion would be foolhardy at best. Even more to the point, there have been several periods in American political history in which battles for judicial supremacy—battles that pitted the Court against presidents and Congresses—were the stuff of high drama, with the outcomes unknown. In *The Struggle for Judicial Supremacy,* Justice Robert Jackson (1941) makes this point about the constitutional crisis that ensued between President Franklin Roosevelt and the Supreme Court, where the future of that legal institution was far more in doubt than we may remember (see also Caldeira 1987). In a moment, we discuss what was perhaps an even greater battle: the struggle between President Thomas Jefferson and Chief Justice John Marshall—a struggle that quite realistically could have resulted in the impeachment of an entire Supreme Court or, at the very least, in a considerably weakened and deflated institution, with a murky future.

This is all a rather long way of saying that the American Constitution, or its adaptation by other nations, does not necessarily mean that the work is over. The ratification of a constitution marks only the beginning of a long process by which political institutions take shape; the real work begins *after* political actors agree on appropriate governing charters. This is one of the many lessons we learn from the struggles in Russia and throughout Eastern Europe. And it is the lesson of the United States's political history. Indeed, if the American experience indicates anything, it is that the construction of our political institutions has occurred through defining sequences of events, events either unanticipated by the framers or unspecified in the document itself.

This brings us to the core concern of this article: Given that democratization is an ongoing, dynamic process, what explains the emergence and maintenance of some types of democratic political institutions and the decline of others? This kind of question is at the heart of sociolegal research (Caldeira & Gibson 1995; O'Donnell & Schmitter 1986; Przeworski 1991). And its answer, we argue, lies not primarily in the intentional design of long-run constitutional principles but rather in the short-run strategic choices of political actors. While many would agree with this vision as applied to legislative or executive institutions, we argue that it is equally applicable to courts.

In what follows we lay out our argument—a theory of institutional emergence and maintenance—in more detail. We then test it by applying game theory to a critical moment in American history: the defining sequence of events for American presiden-

tial-court relations that played out between President Thomas Jefferson and Chief Justice John Marshall in the early 1800s and that led to the enunciation (in *Marbury v. Madison* 1803) of the Supreme Court's primary weapon in that relationship, the power (or "norm") of judicial review. Our analysis allows us to assess factors fundamental to most explanations of the Jefferson-Marshall conflict: the political and institutional preferences of the actors (especially Jefferson's preferences over judicial review) and the larger political environment in which the conflict took place. In other words, we know what happened (as summarized later in the article); the key question is why it happened. The answer, we argue, provides important insights into how we might study other interinstitutional interactions, be they of historical moment or of future concern.

Why Jefferson and Marshall?

To some readers, our emphasis on the early 1800s may seem curious or, worse yet, unnecessary because there is no shortage of historical, political, and legal treatments of this era. One might even go so far as to argue that this is the most thoroughly examined period of court-presidential relations. So why study this period? First, and foremost, the bulk of scholarly literature treats the events leading up to *Marbury v. Madison* as idiopathic, as unique phenomena. We take a somewhat different tack. While the battle between Jefferson and Marshall is unique in its importance in American political history, it is, after all, just that: a conflict between two strategic actors who had divergent political and institutional preferences; a conflict similar to various political interactions between actors with competing interests, be those actors the president of Russia and the high Court, a member of U.S. Congress and the chief executive, and so forth. By framing the dispute between Jefferson and Marshall this way, we can invoke game-theoretic models to study their decisionmaking process and to reach some general conclusions about how short-run strategic decisions shape political institutions.

Second, while we do not treat the actions surrounding *Marbury* as unique, we do submit that—among "defining moments" of the development of the Court and of its relations with other institutions—this moment was the first and, perhaps, most important in the sequence. To be sure, some miniature version of *Marbury* has played out in many other periods (such as the battle between Roosevelt and the Court). However, scholars agree that the Jefferson-Marshall dispute set the tone for these subsequent interactions (see, e.g., McCloskey 1960). In particular, and this is a point to which we return, it initiated the process which resulted in the establishment of the norm of (or as Justice Robert Jackson put it, the doctrine of) judicial supremacy. During this period,

there was a distinct possibility that Jefferson could have taken steps approximating Yeltsin's: disarm the Supreme Court—not by proclamation but through impeachment and replacement. Jefferson quite clearly viewed this as a viable option. Had he chosen it and succeeded, he might have changed the course of all future executive-judicial interactions, not to mention the very nature of the Court itself (see Rehnquist 1992).

Third, we explore conventional wisdom about the *Marbury* decision. As it is taught in American government, judicial politics, and constitutional law courses and as it is treated in scholarly accounts and textbooks, Chief Justice Marshall emerges the victor. Yet, scholars posit a range of reasons for Marshall's "huge success";[1] they also disagree over why Marshall (and Jefferson) took the strategic paths they did. Our use of a game-theoretic framework permits us to disentangle competing claims and explanations in a highly systematic way.

A Theory of Institutional Emergence and Maintenance

These are some of the reasons we choose to focus our study of political and institutional development on the early 1800s. Before we describe the events of that period in some detail, though, we think it very important to flesh out our argument concerning the development and maintenance of political institutions. For, while we use the Jefferson-Marshall struggle as our empirical reference point, our theory of institutionalization is applicable to many other interinstitutional interactions—past, present, and future.

On our account, political institutions are a byproduct of strategic conflict over substantive political outcomes. By this we mean that political actors produce political institutions in the process of seeking advantage in the conflict over substantive political benefits. In some circumstances, they will create political institutions consciously; in others, the political rules will emerge as unintended consequences of the pursuit of strategic advantage. In either case, the main focus of the actors is on the substantive outcome; the development of political institutions is merely a means to that substantive end.

Accordingly, we view institutional development as a contest among actors to establish rules which structure political competition to those outcomes most favorable for them. If judicial supremacy (in terms of judicial review) had been explicitly estab-

[1] For example, the great legal scholar Corwin (1911:292) writes: "Regarded merely as a judicial decision, the decision of *Marbury v. Madison* must be considered as most extraordinary, but regarded as a political pamphlet designed to irritate an enemy to the very limit of endurance, it must be considered a huge success." The well-known historian Urofsky (1988:183), though, suggests: "The solution [Marshall] chose has properly been termed a tour de force, in that he managed to establish the power of the Court as the ultimate arbiter of the Constitution . . ."

lished by formal provision in the 1787 Constitutional Convention, then we would seek to explain it—as we would the creation of any formal political institution—as a conscious bargaining process. But judicial supremacy in the United States is not a formal provision established by intentional design. It is rather an informal norm, like many political institutions, that achieves its force to structure constitutional politics primarily through the willingness of political actors to continue to submit to its proscriptions. But how do such norms emerge? More specifically, how might we explain the initial introduction of the norm of judicial supremacy?

To address these questions, we turn to Knight's (1992) theory of the emergence of informal political institutions, which highlights the role of bargaining power. Under this theory, bargaining demands become claims about commitments to particular forms of behavior. For example, an initial assertion of judicial review can be seen as a commitment to a particular approach to resolving questions of the constitutionality of statutes. The general explanatory question, then, is this: What will cause a political actor to accept the commitment of another actor to a particular course of action and, thus, to a particular political outcome? The answer to this question, on our account of institutional emergence, lies in the asymmetries of bargaining power that exist in political competition. Successful commitments are the product of political competition in which the resulting norms are those which satisfy the political preferences of those actors with a bargaining advantage.

Translating this argument into the context of our study leads to this question: What caused certain political actors (the president and Congress) initially to accept the commitment of the Supreme Court to the practice of judicial review? And we can derive the answer, as our framework suggests, from an analysis of the following factors: the political and institutional preferences of the relevant political actors, the strategic structure of the political interaction in which the constitutional dispute arose, and—in order to assess the relative bargaining power of the actors—the political context in which the controversy took shape.[2]

[2] We stress that a complete explanation of the emergence of political norms should include an explanation of (1) how a possible norm was initially introduced and (2) how that norm came to be identified and accepted by the political community as a whole. Thus, invoking this framework to answer the question of how the norm of judicial review was initially established will produce only a partial explanation of how judicial supremacy was institutionalized. It will not be a complete explanation because informal norms do not become established in a single political interaction. To put it another way, a complete account of the emergence of the norm of judicial supremacy requires an explanation of why the informal rule of judicial review, initially asserted in the early 19th century, continued to garner the respect and compliance of future generations of political actors.

Courts as Strategic Actors

Our account of institutional emergence and maintenance is one with which many students of legislative and executive politics would readily agree (see, e.g., Weingast & Marshall 1988). But is it applicable to courts, particularly to the U.S. Supreme Court whose members are unelected and, thus, *appear* unconstrained by the political environment? We argue that it is, for if justices wish to see their policy preferences etched into law—the primary goal scholars ascribe to members of the Supreme Court (see, e.g., Baum 1994)—then they must make calculations about their political clout relative to that of the other institutions. To put it simply, we assume that jurists are strategic actors.

This assumption is not new or radical; indeed, it finds its grounding in the works of C. Herman Pritchett (1961) and Walter J. Murphy (1962, 1964), two leading scholars of judicial politics. And more contemporary studies of interinstitutional decisionmaking—ones that incorporate the courts—have adopted it as well. By conceptualizing policymaking as a sequential game and by invoking spatial models of voting,[3] this new wave of research demonstrates formally and verifies empirically the strategic nature of institutional decisionmaking (see, e.g., Epstein & Walker 1995; Eskridge 1991a, 1991b, 1994; Farber & Frickey 1991; Ferejohn & Weingast 1992a, 1992b; Rodriguez 1994; Spiller & Gely 1992; Zorn 1995). Even U.S. Supreme Court justices, these games show beyond any reasonable doubt, may make sophisticated choices fearing that—if they act sincerely—the other actors will significantly alter their decisions, take away their jurisdiction, and otherwise impair their ability to function effectively. To put it another way, if justices are truly single-minded seekers of legal policy, then they must act strategically.

Jefferson versus Marshall: A Chronology of Key Events

With this argument in mind, we now turn to the key concern of this article, interinstitutional decisionmaking as played out between a president, Thomas Jefferson, and a Chief Justice, John Marshall. The games we develop to explain the actors' behavior are structured around the key historical events unfolding during the early 1800s.

[3] The moves (as well as the alternatives at each move and even the players) in this game can vary but quite typically policy is assumed to emerge in the following way (e.g., Eskridge 1991a, 1991b): The Court interprets a congressional statute; congressional gatekeepers (e.g., majority party leaders, key committee chairs) then decide whether they want to override the Court's decision; if they do, Congress determines what steps to take; and if it acts, the president decides whether to veto the legislation. Finally, should the president veto the law, Congress chooses whether to override the president's veto. All of this action typically takes place over a one-dimensional policy space. So the moves in the sequential game amount to choosing policy (i.e., picking or moving a point) on the line (see Cameron 1994).

Table 1 briefly lays out the chronology of those events. But the story itself requires some elaboration.[4] The saga began with the 1800 election, a watershed as the Federalist party lost control of the executive and the legislature. To retain some presence in government, the Federalists sought to pack the judiciary: President Adams appointed his Secretary of State, John Marshall, as Chief Justice; Congress passed the 1801 Judiciary Act, which restructured the court system by creating independent circuit courts (justices no longer would ride circuit),[5] along with other legislation, which provided the lame-duck Senate and president with many new positions to fill. And so they did (or, at least, they thought they did), with the "midnight" appointments—judicial commissions filled in the waning days of the Adams administration.

Enter the Jefferson administration. Although Jefferson's preferences about judicial supremacy remain ambiguous, it is clear that he and his party viewed the Federalists' attempts to pack the judiciary with disdain. To Jefferson and his colleagues, they were "iniquitous party measures designed by the defeated Federalists to entrench themselves and their discredited political doctrines in the judiciary—a measure 'as good to the party as an election' " (Haskins & Johnson 1981:127; see also Warren 1926:189). The Jeffersonians (and especially the new president) also had nothing but contempt for the new Chief Justice, who they viewed as a "subtly calculating enemy of the people" (Brown 1966:185), a man "of strong political ambitions, capable of bending others to his will, determined to mobilize the power of the court by craftiness, by sophisticating the law to his own prepossessions, and by making its opinion those of a conclave which he would dominate" (Boyd 1971:158).[6]

It is not wholly surprising, thus, to find the Republicans plotting to undermine the Federalist judiciary even before Jefferson took office. Some partisans argued for wholesale impeachments of Federalist judges and justices (Beveridge 1919:20; Stites 1981:82), though Jefferson's views on the impeachment strategy, at least initially, were ambiguous at best and contradictory at

[4] Even though this story may be familiar to sociolegal scholars (see Clinton 1994 for a brief review), we retell it because accounts often leave out events they do not deem critical. For example, many studies of *Marbury v. Madison* (1803) fail to discuss *Stuart v. Laird* (1803) (for an outstanding and recent exception, see Alfange 1994), in which Chief Justice Marshall (on circuit) upheld the Repeal Act—a decision the full Court later affirmed.

[5] The 1789 Judiciary Act required the justices to perform circuit duty. This involved traveling long distances by horseback or carriage—which they loathed—to hear appeals (along with district court judges) from trial courts (see O'Brien 1990:135-38).

[6] For his part, Marshall lost no love on the Republicans and Jefferson, in particular. He refused a request by Alexander Hamilton to support Jefferson over Aaron Burr in the 1800 election, writing that because Jefferson would "sap the fundamental principles of the government," he could not "bring [himself] to aid Mr. Jefferson" (Dewey 1970:41-42). To put it succinctly, Marshall and Jefferson "despised each other" (ibid., p. 29).

Table 1. Chronology of Key Events

Date	Event
3 December 1800	Presidential election of 1800
20 January 1801	Adams (a Federalist) nominates Secretary of State Marshall for Chief Justice
11 February 1801	Tie in election between two Democratic-Republican candidates, Burr and Jefferson
13 February 1801	Adams signs Judiciary Act of 1801
17 February 1801	House chooses Jefferson as president; Federalists lose control of Congress and Executive
27 February 1801	Federalist Congress passes an Act concerning the District of Columbia
3 March 1801	Adams makes "midnight appointments" to ensure a Federalist presence in the courts
March 1801	Jefferson inaugurated president; refuses to deliver five commissions of some Adams' appointees
7 December 1801	New Congress meets
18 December 1801	Marbury asks Court to hear his case; Court agrees (*Marbury v. Madison*)
8 January 1802	Jefferson asks Congress to repeal the 1801 Judiciary Act
31 March 1802	Congress passes the Repeal Act, negating the 1801 Judiciary Act
29 April 1802	Congress passes the Amendatory Act
2 December 1802	Marshall—on circuit—dismisses challenge to the Repeal Act (*Stuart v. Laird*)
February 1803	Jefferson initiates impeachment against Federalist Judge Pickering
9–12 February 1803	Oral arguments in *Marbury v. Madison* (orals in *Stuart v. Laird* about the same time)
24 February 1803	Marshall delivers the opinion of the Court in *Marbury v. Madison*
2 March 1803	House impeaches Pickering
2 March 1803	Full Court upholds the Repeal Act in *Stuart v. Laird*
2 May 1803	Justice Chase condemns the Democratic-Republican party in a grand jury charge
4 January 1804	Senate begins Pickering trial
5 January 1804	At Jefferson's request, House begins an investigation of Chase
12 March 1804	Senate impeaches Pickering
12 March 1804	House impeaches Chase
February 1805	Senate begins Chase trial
1 March 1805	Senate dismisses charges against Chase

worst (see note 9). Another plan favored by some Republicans involved repeal of the Judiciary Act of 1801 as a way to rid the judiciary of some Federalist appointees. Again, historical records provide mixed evidence on Jefferson's initial reaction to this suggestion.

In the end, as Table 1 shows, the following steps were taken. First, Jefferson refused to deliver some of the judicial commissions. As Jefferson told the story: "I found the commissions on the table of the Department of State, on my entrance into the office, and I forbade their delivery. Whatever is in the Executive offices is certainly deemed to be in the hands of the President, and in this case, was actually in my hands, because when I countermanded them, there was as yet no Secretary of State" (Warren 1926:244). This was a move over which Marshall immediately expressed "infinite chagrin" because he believed that once the commissions had been sealed, Jefferson lacked discretion over

their delivery. He also thought that "some blame may be imputed to [him]" as he was Secretary of State at the time the commissions should have been delivered (Stites 1981:84). Marshall's reaction aside, Jefferson's failure was challenged when some of those who were owed their commissions—including William Marbury—brought suit in the U.S. Supreme Court under section 13 of the Judiciary Act of 1789; in December 1801 the justices granted Marbury's motion for a ruling on whether the Executive Branch must deliver his commission.

The Court's decision to hear *Marbury* received attention in the partisan presses of the day and generated a good deal of speculation about the Court's motives. It also may have precipitated the administration's second step: Jefferson's initiation of legislation designed to repeal the 1801 Judiciary Act. Although this idea had been considered earlier, some historical accounts indicate that the Court's decision to hear *Marbury* "excited widespread indignation and was the immediate cause for the repeal of the 1801 Judiciary Act" (Stites 1981:86; Malone 1970). In fact, Marshall's action was cited in the debate over repeal; as one Jeffersonian representative put it: "Think, too, of what Marshall and the Supreme Court have done! They have sent a . . . process leading to a mandamus, into the Executive cabinet to examine its concerns" (Beveridge 1919:78). Other historians, though, saw repeal as inevitable: they argue that Jefferson intimated the need for repeal in his inaugural address, delivered 10 days before the Court's decision to grant Marbury's request (Haskins & Johnson 1981:153–54). In that address, Jefferson presented "statistics," indicating that the extra judges and circuits were not necessary. This money-saving approach was a strategy that Jefferson continued to pursue as Congress debated (and eventually passed) repeal of the 1801 Judiciary Act. Regardless, almost all analysts agree that Jefferson's "political motives are too palpable to require elaboration, for proof is clearly laid out in the debates recorded in the *Annals of Congress*" (Haskins 1981:11). He was "obsessed with the idea that federal judges should fall in line with Republican views, and a prime objective of his policies . . . was to remove or replace Federalist judges" (ibid., p. 22).

Another step taken by Jefferson and his party was passage of the Amendatory Act, which had the effect of prohibiting the Court from meeting for 14 months (December 1801 to February 1803). The president viewed this as necessary because he (and his party) worried that the Court might strike down the Repeal Act as a violation of the Constitution. His concern reflected congressional debates over repeal in which the question of judicial power arose on several occasions. Some Republicans who had supported judicial review prior to this point (indeed, some of the very same members of Congress who had wanted the Court to strike down the Alien and Sedition Acts) were now arguing that

the Court did not have this power. These turnabouts were not missed by members of the Federalist congressional delegation, one of whom pointed out that "it was once thought by gentlemen who now deny the principle, that the safety of the citizen and of the States rested upon the power of the Judges to declare an unconstitutional law void" (Warren 1926:218). Whatever position the president took over the subject of judicial review, he was concerned enough that the Court might strike down the Repeal Act that he pushed for passage of the Amendatory Act, despite cautions from members of his own party that the Amendatory Act was itself unconstitutional.[7]

Federalist leaders were in an uproar. One asked: "May it not lead to the virtual abolition of a Court, the existence of which is required by the Constitution? If the function of the Court can be extended by law for fourteen months, what time will arrest us before we arrive at ten or twenty years?" (Warren 1926:223). The Federalist press concurred: It widely circulated reports that the "abolition of the Supreme Court [would] soon follow" (Dewey 1970:69). Not surprisingly (and just as the Jeffersonians had predicted), Federalists immediately initiated several lawsuits challenging the Repeal Act's constitutionality.

In all this, Chief Justice Marshall was more than a bit concerned. Although historical accounts of his reaction to the Repeal and Amendatory Acts are mixed—Garraty (1987:13), for example, claims that they "made Marshall even more determined to use the *Marbury* case to attack Jefferson," while Stites (1981:87) writes that "Marshall was less upset than many Federalists by the Repeal Act"—it is reasonably clear that he was worried about the "survival of the institution" (Haskins 1981:5). As a secondary matter, he did not want to resume circuit court duty, which the Repeal Act mandated.[8] Yet, Marshall would not take this step "without a consultation of the Judges." Accordingly, he corresponded with the Associate Justices to see if they should ignore the Act and refuse to sit on circuit, while meeting as a Supreme Court. In a letter to Justice Paterson, for example, he wrote:

> I confess I have some strong constitutional scruples. I cannot well perceive how the performance of circuit duties by the Judges of the supreme court can be supported. If the question was new I should be willing to act in this character without a

[7] In a letter to Jefferson (dated five days before passage of the Amendatory Act), Monroe wrote: "If repeal was right, we should not shrink from the discussion in any course which the Constitution authorises, or take any step which argues a distrust of what is done or apprehension of the consequences." He added that the Amendatory Act may be "considered an unconstitutional oppression of the judiciary by the legislature, adopted to carry a preceding measure which was also unconstitutional" (Malone 1970:132).

[8] As O'Brien (1990:138) notes, riding circuit was "not merely burdensome; it also diminished the Court's prestige, for a decision by a justice on circuit court could afterward be reversed by the whole Court."

> consultation of the Judges; but I consider it as decided & that whatever my own scruples may be I am bound by the decision. I cannot however but regret the loss of the next June term. I could have wished the Judges had convened before they proceeded to execute the new system. (Haskins & Johnson 1981:169)

How to interpret this and other letters has been a matter for scholarly debate. Some analysts (e.g., Malone 1970:134) think that Marshall wanted the justices to perform circuit duty and that "he favored peaceful acceptance of the situation"; others (e.g., Dewey 1970:71) assert that the letters represented an attempt "to persuade his brethren . . . to risk a show of force against the Jeffersonians by refusing to resume their circuit duties." What we do know is that all the associate justices (except Chase) thought the consequences too grave if they did not sit.

Hence, in 1802 the justices rode circuit, with three hearing Federalist challenges to the constitutionality of the Repeal Act. When all three justices, including Marshall, dismissed these challenges, the Federalist attorney (Charles Lee), who had argued the case Marshall heard (*Stuart v. Laird*), appealed it to the U.S. Supreme Court. This was not Lee's only pending suit; he also was the attorney who represented Marbury and colleagues.

While these cases awaited Court action (indeed, several days before oral arguments), Jefferson took yet another step against the judiciary. Whatever qualms Jefferson had about the impeachment strategy prior to his ascension to the presidency had apparently dissipated.[9] He was now asking Congress to remove a Federalist judge, Pickering; he even supplied Congress with incriminating information against him. And the timing of his request was probably no coincidence. As Beveridge (1919:112) noted:

> Everybody . . . thought the case would be decided in Marbury's favor and that Madison would be ordered to deliver the withheld commissions. It was upon this supposition that the Republican threats of impeachment were made. The Republicans considered Marbury's suit as a Federalist partisan maneuver and believed that the court's decision and Marshall's opinion would be inspired by motives of Federalist partisanship.

But whether Pickering was targeted because he was an easy mark (he was aged, mentally incompetent, and an alcoholic) or, as Beveridge (p. 112) argues, because he was being used to "test the

[9] After the midnight appointments, Jefferson was "determined that this 'outrage on decency should not have this effect, except in life appointment [judges] which are irremovable' " (Stites 1981:84). This position is consistent with the general tenor of letters he wrote in 1788 and 1789 criticizing the impeachment of judges. But by 1803, "[p]olitical expediency and accession to power helped to bring about a change in Jefferson's early views on the independence of the judiciary. Now, and throughout the remainder of his life, the idea that judges were irremovable became progressively more abhorrent to him" (Haskins & Johnson 1981:208).

[impeachment] waters" is an open question. What is clear is that the Federalists believed Jefferson was out to "destroy the judiciary by removing all Federalist judges" (Turner 1949:487). They thought "definite plans were . . . afoot to impeach . . . [Justice] Chase, as a prelude to impeaching Marshall himself" (Haskins 1981:7).

As the House considered the Pickering case, the Court—all too aware of the doings in Congress[10]—busied itself with *Marbury* and *Stuart*. In both cases, counsel asked the justices to exert the power of judicial review and strike down or uphold acts of Congress. Attorney Lee, who represented Marbury, specifically argued that section 13 of the Judiciary Act of 1789, under which his client had brought suit, was constitutional,[11] while, in *Stuart*, he asserted that the Repeal Act violated the Constitution.[12] Lee lost both his cases.

In *Marbury*, Marshall (and the Court) had two different, though related, sets of decisions to make (see Clinton 1994 and supporting citations): (1) whether to uphold section 13 of the Judiciary Act of 1789 and (2) whether to give Marbury and his colleagues their commissions. In the end, Marshall denied the commissions, while striking the law—a move contemporary scholars regard as tactically brilliant.

But "why the Court decided the case as it did . . . [is a] question to which there can be no certain answer, only reasoned conjecture" (Hobson 1990:164). A standard response comes from Dewey (1970:117), who writes: "Politics were not far from Marshall's mind as he composed the *Marbury v. Madison* decision. The most frequently borrowed description of the opinion is . . . Corwin's judgment that this was a 'deliberate partisan coup.' " Haskins (1981:10) provides yet another answer: Marshall was "genuinely fearful that Jefferson, with the firm 1800 electoral mandate behind him, would declare himself and his officers to be above the law." For this reason, as Haskins and Johnson (1981:195) argue, Marshall chose to "echo . . . certain positions taken in the Federalist Papers, including those of Madison himself."

Whatever the explanation for the *Marbury* decision, we do know that the Court handed down *Stuart* just six days later, and that this was a much clearer ruling. The Court merely affirmed Marshall's decision on circuit and upheld the Repeal Act.

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[10] Even Malone (1970:148), who is always quick to defend Jefferson, notes that while there was much "loose" talk about impeachments and "there is no way of proving that [Marshall] was in actual danger," the Chief Justice clearly thought he was.

[11] In Lee's words, "Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the Constitution" (*Marbury* 1803:148).

[12] Lee argued that the act "is unconstitutional, inasmuch as it goes to deprive the courts of all their power and jurisdiction, and to displace judges who have been guilty of no misbehavior in their offices" (*Stuart* 1803:303).

According to some historical accounts, the Republican press (at least initially) was "delighted by the Jeffersonian victories in these two cases" (Dewey 1970:100). Haskins and Johnson (1981:217) even maintain that a major reason why *Marbury* "did not evoke greater hostility" was because of the surprise ruling in *Stuart:* Many Jeffersonians apparently thought the Court would strike down the Repeal Act and were overjoyed when the Court upheld it. (It was only later that Jefferson and his colleagues realized the magnitude of the *Marbury* ruling. Whether Jefferson objected to Marshall's assertion of judicial review, again, is not clear. At the very least, he sorely resented Marshall's implication that, had the Court had jurisdiction, it would have forced him to deliver the commissions.[13])

Still, attempts to remove Federalist judges continued. On the same day that the Court handed down *Stuart*, the House impeached Pickering. And just two months later, the Jeffersonians turned their sights on Justice Chase. At this point, Marshall was so concerned about his (and the Court's) political survival that he suggested that Congress should have appellate jurisdiction over Supreme Court decisions—a suggestion that might have effectively gutted *Marbury*. In a letter to Chase, he wrote, "I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than (would) a removal of the Judge who has rendered them unknowing of his fault" (Jackson 1941:28). But this was not necessary, for the Senate acquitted Chase.

Why Jefferson was able to prevail in the Pickering impeachment only to lose in Chase's has been the subject of scholarly inquiry. One answer is that Jefferson's "managers" did a poor job in handling the case (Murphy 1962:14). Another comes from McCloskey (1960:47):

> Mismanagement by the impeachment leaders undoubtedly contributed to this result. But the essential explanation is that many members of the Senate, including some Republicans, were not yet incensed enough with the judiciary to vote to destroy its independence. And their wrath was moderate or nonexistent because the Court under Marshall had really done so little to incite it. The charge that the judiciary was tyrannically imposing a Federalist will on a Republican-minded nation did

[13] Indeed, throughout his lifetime, Jefferson took every opportunity to criticize Marshall and his ruling in *Marbury*. As late as June 1822, after the Supreme Court decided *Cohens v. Virginia*, Jefferson wrote: "There was another case I recollect, more particularly as it bore upon me." He then described *Marbury* and wrote: "But the chief justice went on to lay down what the law would be had they jurisdiction of the case, to wit: they should command the delivery. Besides the impropriety of this gratuitous interference, could any thing exceed the perversion of the law. Yet this case of Marbury v. Madison is continually cited by bench and bar as if it were settled law, without any animadversion of its being merely an obiter dissertation of the chief justice" (Proctor 1891:343).

> not square with the immediate facts of judicial behavior, whatever suspicions might be entertained about Marshall's long-term aspirations.

In other words, the decisions in *Marbury* and *Stuart* indicated to some Jeffersonians that the Court was not the enemy they had anticipated. Those decisions failed to provide sufficient grounds to take aim at Marshall, who was—in some scholars' estimation—the real target. With diminishing reasons to remove Marshall, enthusiasm for Chase's impeachment also waned.

A Game-theoretic Analysis of the Jefferson-Marshall Conflict

From even this brief description of the events transpiring in the early days of the Jefferson administration, we can see the emergence of a "game"—one pitting Jefferson against Marshall. We, of course, are not the first to depict the Marshall-Jefferson interaction in these terms; indeed, at least since Corwin (1910, 1911) and Beveridge (1919:21), commentators have invoked the intuitions of game theory to describe these events. But with one exception (Clinton 1994), these intuitions have never been put to the test, and even there the researcher stopped well short of examining all the key decisional points (see note 17).

Our historical review also serves to highlight this point: We know what happened, but we do not know why—why did the actors take the strategic paths that they did? To "test" various historical answers to this question, we employ game theory.

Two aspects of this statement require elaboration. The first centers on game theory and its application to sociolegal phenomena, such as the Marshall-Jefferson dispute; the second concerns the notion of using game-theoretic analysis to test historical answers to our question. In what follows, we discuss these conceptual points and then turn to the steps we took to set up the games.

Applying Game Theory to Sociolegal Phenomena

There are a number of tools available to address sociolegal questions, with their appropriateness largely dependent on the nature of the phenomena under investigation. Game theory provides a potent set of tools to examine a particular kind of phenomena—social situations involving strategic behavior, that is, situations in which the social outcome is the product of the interdependent choices of at least two actors (Elster 1986). Of course, "politics" is in large part about such strategic interactions. For regardless of whether they are motivated by self-interest, the public good, impartial principle, or some combination of these or other motivations, political actors usually engage in strategic

decisionmaking when they interact with others in order to derive a solution to a political problem. *To the extent that some sociolegal phenomena contain a political dimension, game theory provides an appropriate approach to explaining their strategic components.*

This is not to say that the use of game theory in sociolegal studies remains an uncontroversial notion. Some scholars argue that game theory involves a reductionist research program that extracts out much of what is essential to understanding social and political events; others believe that rational choice models inherently mischaracterize the fundamental motivations on which political behavior is based. To these charges, we offer a simple response: We recognize that the use of such models has often produced inadequate explanations, but we contend that the weaknesses in these explanations are a product of how they were employed, rather than being a function of inherent limitations in the approach.

Along the same lines, readers should not take our italicized statement to mean that game-theoretic models are sufficient to produce persuasive explanations of most political competitions. Strategic decisionmaking is only one feature of many social situations; another is the social context in which the they occur. Indeed, we would go so far as to argue that adequate explanations of sociolegal events must locate strategic choice in its appropriate social context; and that to accomplish this, scholars must combine game-theoretic analysis with other theoretical and empirical approaches.[14] As readers will soon see, that is just what we attempt to do in this article: We invoke the tools of the game theorist and the sources of the historian to study the Marshall-Jefferson interaction.

Using Game Theory to "Test" Historical Answers

In the end, the value of any method or approach rests with its ability to clarify and to illuminate the mechanisms that affect social and political life. Our claim is that game theory provides the appropriate tools to shed light on the political conflict between Marshall and Jefferson over the nature and structure of the American judicial system. More specifically, through the use of game-theoretic models, we can "test" the plausibility of different historical claims about why the Marshall-Jefferson conflict produced the outcome that it did.

But, it is worth stressing, we use the idea of "testing" loosely. What our study attempts to do is take advantage of the fact that

[14] Increasingly, scholars are offering ways to bring context into strategic explanations. See Johnson (1991) and Knight (1992) for discussions of efforts to incorporate factors such as institutions and culture into rational choice explanations.

game theory involves counterfactual analysis.[15] That is, the solutions to these models entail claims about what actors will do under certain conditions and what they would have done differently if the conditions were different. By varying the relevant conditions in the game, we can assess the relative merits of the historical counterfactuals that underlie the different explanations of this period.

In making such assessments, our primary focus is on those conditions inducing equilibrium behavior that replicate historical events. If a model induces behavior similar to the historical choices we observe, then it highlights the importance of the conditions that produced the behavior. If a model fails to reconstruct previously observed events, then it calls into question explanations based on the conditions embedded in it. While replication alone does not definitively answer the question of why an event occurred, it can lend strong support to the explanation at hand.[16]

Setting Up the Games

This noted, let us turn to the steps we took to set up the games. We started with historical materials, reading case records, secondary accounts, letters of the key participants, newspaper articles, and congressional hearings. In so doing, we had four goals in mind. First, we wanted to determine whether the events depicted in Table 1 were part of the same game or whether they were discrete decision points requiring separate analyses. For reasons that follow from our discussion of the events, we concluded that they were all part and parcel of one game, largely between Jefferson (The President) and Marshall (The Court).[17]

[15] For an excellent and informative discussion of the role of counterfactual reasoning in game-theoretic analysis, see McCloskey 1987.

[16] It is important to note that when we use game theory to assess the merits of historical explanations, the key to the analysis is the way in which we define the conditions of the game (including the definition of the actors' preferences). From the very logic of this form of analysis, it follows that the solutions to games will be sensitive to changes in the conditions that are posited in the particular model. Thus, a valid criticism of the kind of analysis we present here would not rest on the fact that the solution of any model is sensitive to changes in the parameters. Rather, an appropriate criticism would focus on weaknesses in the historical claims that we incorporate in the definitions of the conditions of the game.

[17] Most scholars (e.g., Clinton 1994) consider only three moves as crucial: Jefferson's failure to deliver the commissions, Marshall's decision in *Marbury*, and Jefferson's response. Our review of the relevant historical materials, particularly the letters and the biographies of the key players, shows that this reading is too simple and that it does not fully encapsulate the concerns of the day. In any case, the assumption that Marshall and Jefferson viewed all the events detailed in Table 1 as part of a long chain of closely related occurrences is one our analysis allows us to test.

Also embedded in this statement is the notion that Jefferson and Marshall were actors who represented their respective institutions. This is an assumption under which Clinton (1994) worked and one we think is reasonable to make.

Second, we needed to identify the alternative courses of action the actors *thought* they had at the time (not just those we now know in retrospect) at each key decisional point. Figure 1 reflects these determinations. In particular, it shows all the major decision points as part of one game, and it lays out the possible courses of action or "paths of play."[18] While most of the key points displayed in the figure are obvious, such as Marshall's decision on whether to strike the Repeal Act, one deserves a bit of elaboration. By *impeachment,* we mean that Jefferson sought to have Marshall removed from office. But, in demarcating the points at which history reveals the possibility of this occurring, we do not suggest that Jefferson would have always succeeded had he sought to have Marshall impeached. Indeed, as we detail below, our model explicitly takes into account the actors' beliefs about the probability of success and failure.

Third, our study required us to establish the actors' preferences over the various outcomes displayed in Figure 1. We posit two classes of motivations—the political and the institutional. By *political,* we mean that the actors care about the advancement of their partisan causes and their parties. In this context, there are two relevant political factors. The first involves the resolution of the problem of the appointments and presents two alternatives: appointments going to the Democratic-Republicans (as desired by Jefferson) or to the Federalists (as desired by Marshall). The second—involving the consequence of Jefferson's use of the impeachment strategy—also presents two alternatives: success or failure on Jefferson's part if he tried to invoke it. By institutional, we mean that the actors are concerned with the relative power and authority of the political branches of government. In this context, two aspects of the judiciary were at issue: its structure (the Repeal and Amendatory Acts) and its supremacy (judicial review). On the structural dimension, the alternatives were successful establishment of the Repeal Act, status quo,[19] and unsuccessful attempt to establish the Repeal Act. On the judicial review dimension, the alternatives were establishment of judicial review, status quo, and failure to establish judicial review. However, as our extensive review of the historical record suggests, Marshall and Jefferson were differentially concerned about these things (see, e.g., Beveridge 1919; Haskins & Johnson 1981; Malone 1970; Warren 1926). For Marshall, it seems that he cared most about judicial supremacy, then judicial structure, and least about the political dimension. Jefferson was most concerned with struc-

[18] We begin the games with Jefferson having to decide what to do after the Supreme Court agreed to hear the *Marbury* case. Previous attempts to solve the games show that President would always fail to deliver the commissions and that the Justices would always agree to hear the *Marbury* case, regardless of their beliefs about the political environment.

[19] We use the term "status quo" here and elsewhere to mean no change on the particular dimension.

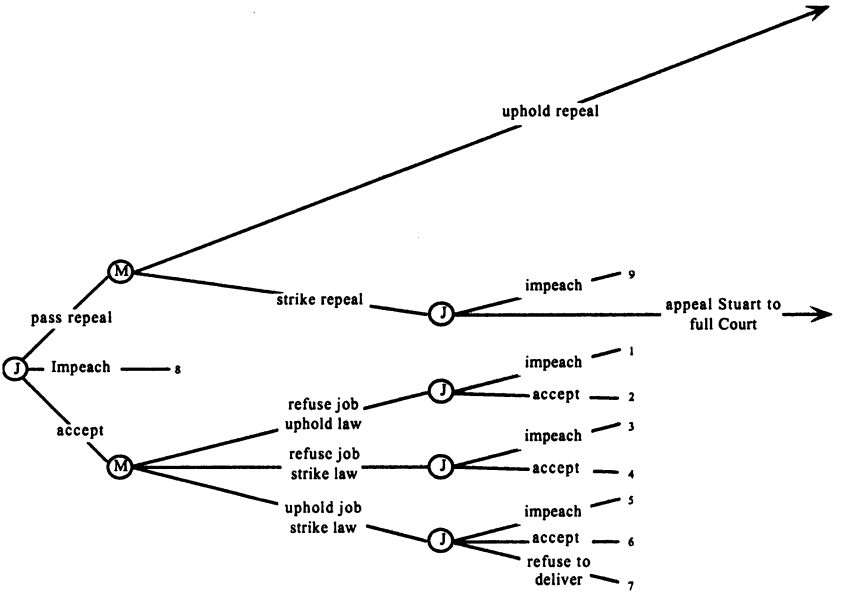
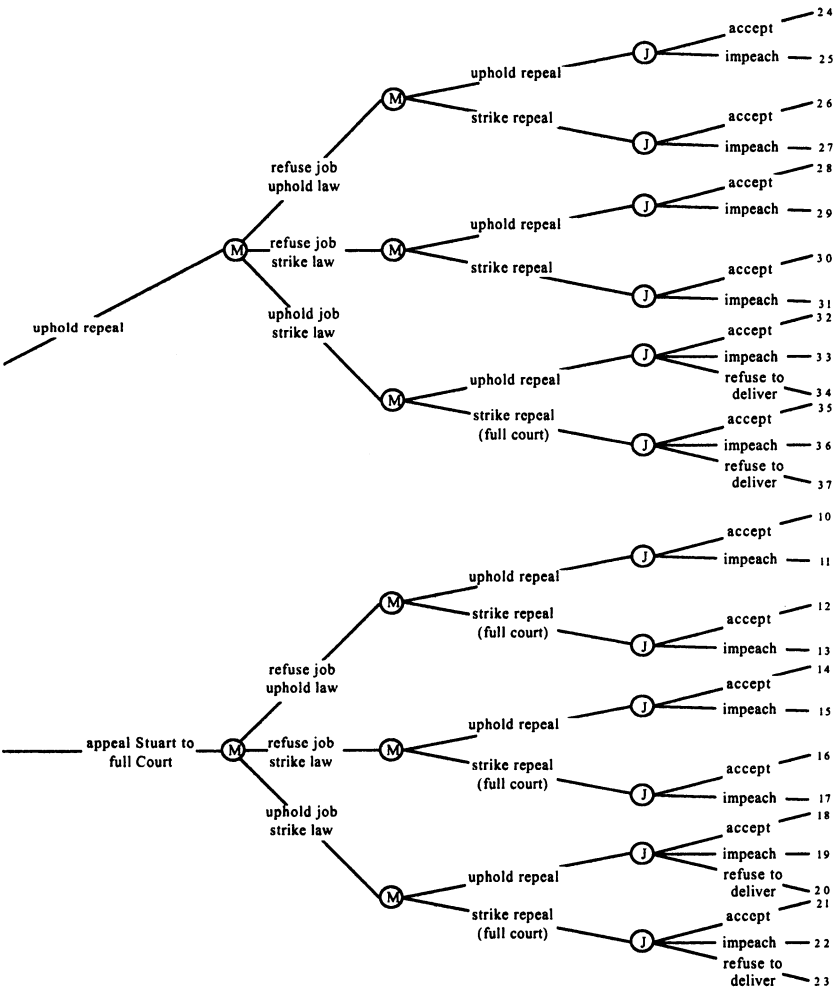


Figure 1. Possible paths of play with terminal nodes numbered

LEGEND:

pass repeal: Jefferson asks Congress to pass Repeal Act
refuse job: Marshall refuses to give Marbury his commission
strike law: Marshall strikes down sec. 13 of 1789 Judiciary Act
strike repeal: Marshall strikes down Repeal Act
uphold job: Marshall gives Marbury his commission
uphold law: Marshall upholds sec. 13 of 1789 Judiciary Act
uphold repeal: Marshall upholds Repeal Act



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ture, then the advancement of his party, and finally supremacy. (These, of course, form assumptions under which we operate. Their reasonableness can be assessed, in part, by working through the games.)

With these assumptions in mind, we constructed utility functions for Jefferson and Marshall. We let U_m represent the value for Marshall and U_j the value for Jefferson. Since we analyze two separate games that differ in the assumed preferences for Jefferson (discussed in full below), we use superscripts A and B to distinguish Jefferson's utility value in the two games. Thus, the functions are:

$$U_m = 2I_1 + 3I_2 + I_3 + I_4$$
$$U_j^A = -3I_1 - I_2 - 2I_3 - I_4$$

and

$$U_j^B = -3I_1 + I_2 - 2I_3 - I_4,$$

where

$$I_1 = \begin{cases} -1 \text{ if Repeal Act Established} \\ 0 \text{ if Status Quo} \\ 1 \text{ if No Repeal Act Established} \end{cases}$$

$$I_2 = \begin{cases} -1 \text{ if No Judicial Review Established} \\ 0 \text{ if Status Quo} \\ 1 \text{ if Judicial Review Established} \end{cases}$$

$$I_3 = \begin{cases} -1 \text{ if Appointment for Democratic-Republican Party} \\ 0 \text{ if Status Quo} \\ 1 \text{ if Appointment for Federalist Party} \end{cases}$$

$$I_4 = \begin{cases} -1 \text{ if Impeachment Succeeds} \\ 0 \text{ if Status Quo} \\ 1 \text{ if Impeachment Fails} \end{cases}$$

Two features of these functions require explanation. The first involves the differences in the functions for games A and B: They are the same for Marshall but not Jefferson. In game A, we assume that Jefferson has opposing preferences from Marshall on the judicial review dimension; in game B, we assume that he shares Marshall's preferences on this dimension. The reason for this seeming discrepancy is that analysts claim genuine uncertainty about how Jefferson felt about judicial review: The historical evidence, particularly Jefferson's writings and letters, is quite mixed (see, e.g., Haskins & Johnson 1981).[20] Setting it up this

[20] Even within individual sources confusion abounds. For example, in his seminal biography of Jefferson, Malone (1970:133) at one point asserts that Jefferson's "general attitude toward the judiciary can be described with confidence. Unquestionably he wanted to keep it within what he regarded as proper bounds, and the doctrine of absolute judiciary supremacy was to him another name for tyranny." Later, Malone writes (p. 151) that "Jefferson's fears of judicial power varied with circumstances." Today, prevailing sentiment seems to be that Jefferson's views—like those of the framers of the Constitution—

way, thus, is sensible, and it has the additional benefit of allowing us to investigate Jefferson's preferences over judicial review.

The other feature of the functions needing discussion is the method of weighting the dimensions. As noted, for each actor we weighted his most important dimension by a factor of 3, his next most important dimension with a 2, and his least important dimension with a factor of 1. Hence, for Marshall, an outcome that establishes judicial review (3), eradicates the Repeal Act (2), gains an appointment (1), and results in no impeachment attempt (0) receives a value of 6 in both games. For Jefferson, the outcomes differ. In game A, an outcome that upholds repeal (3), gains an appointment (2), does not establish judicial review (1), and results in no impeachment attempt (0) yields a value of 6. In game B, a value of 6 is achieved if judicial review is established. Appendix A presents a complete definition of the payoffs for the two games.

Finally, we wanted to incorporate the fact that the Jefferson-Marshall conflict takes place in a political context in which the actions of Congress affect the likelihood that either actor will successfully achieve their goals. More specifically, any node that ends with Jefferson choosing to impeach Marshall is characterized by a distribution of possible outcomes. Whether or not Jefferson will be successful in these attempts depends on the political actions of members of Congress, and neither Jefferson nor Marshall knows with certainty what Congress will do if Jefferson attempts impeachment. Rather, they have a belief that there is a particular probability that Jefferson would be successful.

To capture these probabilities, we distinguished two states of the world at these nodes: a political environment in which Jefferson will be successful in his impeachment effort (probability p) and a political environment in which he will fail (probability $1 - p$). Thus, the greater the value of p, the more favorable the political environment is for Jefferson. (To put it somewhat differently, we can interpret the value of p as a measure of the relative bargaining power of the actors.) In assessing the relative merits of various strategies available to them, both Jefferson and Marshall must base their decisions on assessments of these probabilities.

Solving the Games

To solve the games we used the subgame perfect equilibrium solution concept. Invoking the logic of backward induction, we identified the equilibrium behavior that would be induced by different beliefs about the political context in which the Jefferson-Marshall interaction takes place.

are not known with certainty, though Clinton (1994) makes a good case for the position that the president supported judicial review.

Our discussion begins with game A, which assumes that Marshall and Jefferson have different preferences over judicial review; we then turn to game B, which has the actors agreeing over judicial review. In both cases, we characterize equilibrium behavior based on the actors' beliefs about the probability of Jefferson winning and losing. Here we present the various possible subgame perfect equilibria outcomes of the two games. Given the complexity of the games we do not present all of the out-of-equilibria choices that would be part of a complete characterization of these equilibria. We restrict our characterizations to the equilibrium paths of play that are induced by the different range of beliefs about the state of the political environment in which the executive-judiciary game takes place.

Game A

As one might anticipate, the equilibrium paths of play differ depending on the actors' beliefs about the state of the political environment. They are as follows.

1. If $0 < p < .25$, meaning that the actors believe that the political environment strongly favors Marshall, then the following are equilibrium paths of play:

   Jefferson ACCEPTS Marshall's decision to hear the *Marbury* case, Marshall REFUSES JOB and STRIKES LAW, Jefferson ACCEPTS

   Or

   Jefferson ACCEPTS Marshall's decision to hear the *Marbury* case Marshall UPHOLDS JOB and STRIKES LAW, Jefferson REFUSES TO DELIVER

2. If $.25 < p < .50$, meaning that the actors believe that the political environment generally favors Marshall, then the following are equilibrium paths of play:

   Jefferson ACCEPTS Marshall's decision to hear the *Marbury* case Marshall UPHOLDS JOB and STRIKES LAW, Jefferson REFUSES TO DELIVER

3. If $.50 < p < .70$, meaning that the actors believe that the political environment generally favors Jefferson, then the following are equilibrium paths of play:

   Jefferson PASSES REPEAL ACT, Marshall (circuit) STRIKES REPEAL ACT

   Or

   Jefferson PASSES REPEAL ACT, Marshall (circuit) UPHOLDS REPEAL ACT,

Jefferson APPEALS,
Marshall REFUSES JOB and STRIKES LAW,
Marshall STRIKES REPEAL ACT,
Jefferson IMPEACHES

Marshall REFUSES JOB and STRIKES LAW,
Marshall STRIKES REPEAL ACT,
Jefferson IMPEACHES

4. If $.70 < p < 1$, meaning that the actors believe that the political environment strongly favors Jefferson, then the following are equilibrium paths of play:

Jefferson PASSES REPEAL ACT,
Marshall (circuit) STRIKES REPEAL ACT,
Jefferson APPEALS,
Marshall REFUSES JOB and UPHOLDS LAW,
Marshall UPHOLDS REPEAL ACT,
Jefferson IMPEACHES

Or

Jefferson PASSES REPEAL ACT,
Marshall (circuit) UPHOLDS REPEAL ACT,
Marshall REFUSES JOB and UPHOLDS LAW,
Marshall UPHOLDS REPEAL ACT,
Jefferson IMPEACHES

Game B

Again, equilibrium paths of play differ depending on the actors' beliefs about the state of the political environment.

1. If $0 < p < .5$, meaning that the actors believe that the environment favors Marshall, then the following are equilibrium paths of play:

Jefferson ACCEPTS Marshall's decision to hear the *Marbury* case,
Marshall REFUSES JOB and STRIKES LAW,
Jefferson ACCEPTS

Or

Jefferson ACCEPTS Marshall's decision to hear the *Marbury* case,
Jefferson UPHOLDS JOB and STRIKES LAW,
Jefferson REFUSES TO DELIVER

2. If $.5 < p < 1$, meaning that the actors believe that the environment favors Jefferson, then the following are equilibrium paths of play:

Jefferson PASSES REPEAL ACT,
Marshall (circuit) UPHOLDS REPEAL ACT,
Marshall REFUSES JOB and STRIKES LAW,

Or

Jefferson PASSES REPEAL ACT,
Marshall (circuit) STRIKES REPEAL ACT,
Jefferson APPEALS,

Marshall UPHOLDS
REPEAL ACT,
Jefferson ACCEPTS

Marshall REFUSES JOB
and STRIKES LAW,
Marshall UPHOLDS
REPEAL ACT,
Jefferson ACCEPTS

Discussion of the Results

What do we learn from these games? Before addressing that core question, we must make some determination about whether the actors believed that the political environment substantially favored Jefferson over Marshall. The story we tell about these games depends on our response to that question, for equilibria are quite distinct under the various beliefs. Our answer is simple. Based on scholarly commentary, historical accounts, and empirical evidence, it seems all too clear that the actors thought the environment overwhelmingly favored Jefferson. Just as Marshall ascended to the Chief Justiceship, the Jeffersonians had taken control of the government (except for the judiciary). Their impressive victory in the elections of 1800 posed a threat to Marshall that is sometimes obscured in the social science literature. He believed (and rightly so) that many followers of Jefferson and, perhaps, Jefferson himself would seek to take control of the judiciary through impeachment. This so-called impeachment strategy had already taken hold in the states,[21] and Marshall had little reason to believe it would not succeed on a federal level.

Marshall, of course, cared deeply about judicial supremacy and power. But he knew he could not achieve critical institutional goals if Jefferson impeached him. Indeed, he was so concerned about that possibility (and Jefferson's probability of success) that during the impeachment proceedings of his colleague, the ardent Federalist Justice Chase, he offered to repudiate the doctrine of judicial review (Jackson 1941:27–28). To argue that the actors did not believe the environment overwhelmingly favored Jefferson, thus, is to take a position well at odds with virtually all the evidence.

If this is so, then we ought to give our closest attention to the equilibrium paths supported by belief 4 in game A and belief 2 in game B (see above). These represent the beliefs most closely approximating those Marshall and Jefferson held: Jefferson would succeed in any decision he made, be it impeachment, acceptance, or so forth. From this representation of beliefs, we can analyze the strategic choices of the actors to see what we can learn about the executive-judicial conflict over the courts.

[21] By a straight party vote the Pennsylvania legislature impeached Federalist judge Alexander Addison in 1803. Apparently, though, talk of impeachment of federal judges and justices was, as Haskins (1981:213) writes, "contemplated even before the 1801 Act had been repealed."

The most obvious lesson is that the behavior induced by the preferences attributed to Jefferson and Marshall in game A are at odds with the historical record, while the behavior induced in game B (at least under belief 2) replicates history. This has an important implication for Jefferson's preferences over judicial review: If we treat them as the same as Marshall's, at least in this game we obtain an outcome that is more in line with the historical events. In other words, our results indicate that Jefferson *favored* judicial review and that Marshall knew this.

For some scholars, this conclusion is significant per se for it suggests a resolution to a longstanding debate about Jefferson's preferences. And it would be enough to reject game A, as it does not mirror history. While we agree on both scores, game A—alone and juxtaposed with game B—carries important information that we should not neglect. In general, it shows us the outcome that would have resulted had Jefferson not preferred the doctrine of judicial review: *Marbury* would not have established the doctrine; Jefferson would have obtained repeal of the 1801 Judiciary Act; and Marshall would have been removed from office. For, in both games, *Stuart v. Laird* was the more important of the decisions to Jefferson, as evidenced by the fact that Marshall's impeachment was all but assured regardless of what he did in *Marbury*. The reason is simple: As long as he obtained repeal, Jefferson—wanting to attain the payoff with the highest value and viewing the political environment in his favor—would almost certainly have sought impeachment. Had this occurred, a norm of impeachment might have been established—a norm that could have indelibly altered the nature of the Court and its relations with the other institutions of government (for speculation on this point, see Rehnquist 1992).

Game B, which induced behavior consistent with history, also reflects the importance of *Stuart*. It was Marshall's decision here that saved him from impeachment, not the ruling in *Marbury*. Jefferson could cope with *Marbury* because he shared Marshall's preference for the establishment of judicial review. But for the reasons mentioned, he would have attempted impeachment had Marshall struck down the Repeal Act in *Stuart*. Marshall, apparently believing that Jefferson would have been successful in this attempt, opted out by upholding the law.

Taking this step, that is, upholding the Repeal Act, was *not* Marshall's preferred position. (He probably would have been devastated to learn that decades would pass before Congress relieved the justices of "riding" circuit.) Nor, to a lesser extent, was denying Marbury his commission. But—given the sequence of events—these were the courses of action he thought he had to take to avoid impeachment. To put it differently, Marshall acted in a sophisticated fashion. Had his unconstrained preferences driven his behavior, he would have given Marbury his commis-

sion and struck down section 13 and the Repeal Act. But as a strategic actor, he could not—given his beliefs about the political environment—vote naively.

Game B also suggests the importance of the relative bargaining power as reflected in the social context in which the conflict occurred. In this game, after the Court issued its decision in *Marbury*, Marshall might have struck down the Repeal Act had he perceived Jefferson's position to have been only slightly weaker. But given his beliefs about the state of the political environment, this was not a step Marshall (or any rational actor) was willing to take. This is especially so since he perceived the consequences—the loss of his job—to be the gravest of all.

But Marshall was not the only actor in this drama to consider context; Jefferson did so too. Game B suggests that had Jefferson perceived the strength of his political clout as more uncertain, he would not have proposed the Repeal Act in the first instance. *Marbury* would have been decided as it was and the game would have ended. Historically, this would have meant that the 1801 Judiciary Act would have gone into effect; politically, it would have led to the (almost) successful culmination of the Federalist plan to stack the judiciary, as that party would have ruled the circuits throughout the United States.

Implications of the Study

On that note, we could end our analysis of the struggle between Jefferson and Marshall. But the story tells us much more; it provides us with important insights into how we might study other interinstitutional interactions, be they of historical moment (such as the struggle between Franklin Roosevelt and the Court) or of future concern (those that may ensue in Eastern Europe). First and foremost, our examination confirms that politicians—even those who lack an electoral connection—are strategic actors. Had this not been the case for Marshall, for example, he simply would have voted his unconstrained preferred positions in *Marbury* (strike the law and provide the commission) and in *Stuart* (strike the Repeal Act). That he did not take these steps is not to say that his unconstrained preferences over the outcomes changed; it is just that—given his beliefs about Jefferson and the political environment—he acted in a sophisticated manner in order to maximize his expected utility.

Hence, our results lend support to those scholars—from Pritchett (1961) to the more contemporary analysts (e.g., Eskridge 1991a)—who argue that justices do not need an electoral connection to act strategically. Members of the Court know that the other institutions wield an impressive array of weapons, weapons that can at minimum move the state of the law away from their preferred position and at maximum can jeopardize their

political survival. By the same token, our study shows that presidents (and, we suspect, Congress) must act strategically when it comes to the Court. If they do not, as Jefferson knew, they can face severe political penalties.

We have little hesitation, thus, in suggesting that research on the judicial process make room for strategic considerations. Doing so not only would shed light on other critical struggles between the judiciary and presidents, but it would also provide an apt theoretical context in which to consider why justices reach the decisions they do. One only has to think about the Roosevelt-Court battle to see the plausibility of this sentiment (Caldeira 1987).

A second implication of our study is this: Despite this difference between legal and political actors, it is nevertheless true that all politicians—again be they presidents or justices—consider the environment under which they are operating. This tells us that rational responses depend not just on actors' preferences and their beliefs about those of their opponents but on the decisionmaking context. In our study, it is clear that Jefferson and Marshall believed that the political environment of the day favored Jefferson's interests. Had this not been the case, Jefferson would never have sought repeal of the 1801 Judiciary Act and the Federalists would have remained firmly entrenched in the nation's judiciary. Seen in this way, justices may not follow the election returns as carefully as, say, Members of Congress, but they must make calculations about their political clout relative to that of the other institutions. If they do not, as the Marshall-Jefferson games indicate, the results can be costly. Again, we think a reconsideration of other defining moments in judicial development would bear this out.

The general lesson, then, is a simple one: In situations where uncertainty over outcomes abounds—that is, in most political situations—we ought to incorporate considerations about the actors' beliefs about the possible states of the world in which they interact. Certainly, this is something that the actors do and we would be remiss to ignore. So, too, it helps us to make sense of seemingly incomprehensible political events. For example, based on our study, we might hypothesize that both Boris Yeltsin and his Constitutional Court believed that he had a high probability of success when he suspended the institution. Had this not characterized their beliefs about the state of the world, then the outcome may have been a very different one.

We thus end where we started, with the question of institutional development and constitutional design. The political conflict between Jefferson and Marshall exemplifies the dynamic and incremental nature of the process of institutionalizing democracy. At the time of the framing of the U.S. Constitution, the role of the judiciary in the three-branch structure of American de-

mocracy was underdeveloped. The major long-term consequence of the Jefferson-Marshall interaction was a restructuring of the institutional division of labor among the branches. And this was, in large part, a result of the short-term political interests of the two major political parties. The Supreme Court's authority for judicial review emerged, not because of some complex intentional design and not because of some brilliant strategic move by Marshall in the face of overwhelming political opposition, but merely because it was politically viable at the time. The lesson for contemporary efforts to institutionalize democracy through constitutional design is that such efforts are merely the first, and tentative, steps in an ongoing political game.

Appendix A

Payoffs and Characterization of Outcomes

Terminal Node[a]	Payoff Game A[b]	Payoff Game B[b]	Characterization of Outcome[c]
1a	3,–2	3, –2	AD, SQ, SQ
1b	1, 0	1, 0	AD, SQ, SQ
2	2, –1	2, –1	AD, SQ, SQ
3a	4, –5	2, –5	AD, JNE, SQ
3b	0, 3	2, 3	AD, JE, SQ
4	1, 2	3, 2	AD, JE, SQ
5a	4, –5	2, –5	AD, JNE, SQ
5b	–4, 5	–2, 5	AF, JE, SQ
6	–3, 4	–1, 4	AF, JE, SQ
7	1, 2	3, 2	AD, JE, SQ
8a	1, –1	1, –1	SQ, SQ, SQ
8b	–1, 1	–1, 1	SQ, SQ, SQ
9a	4, –3	4, –3	SQ, SQ, RAE
9b	–4, 3	–4, 3	SQ, SQ, RANE
10	5, –3	5, –3	AD, SQ, RAE
11a	6, –4	6, –4	AD, SQ, RAE
11b	4, –2	4, –2	AD, SQ, RAE
12	–2, 4	0, 4	AD, JE, RANE
13a	7, –7	5, –7	AD, JNE, RAE
13b	–3, 5	–1, 5	AD, JE, RANE
14	4, 0	6, 0	AD, JE, RAE
15a	7, –7	5, –7	AD, JNE, RAE
15b	3, 1	5, 1	AD, JE, RAE
16	–2, 4	0, 4	AD, JE, RANE
17a	7, –7	5, –7	AD, JNE, RAE
17b	–3, 5	–1, 5	AD, JE, RANE
18	0, 2	2, 2	AF, JE, RAE
19a	7, –7	5, –7	AD, JNE, RAE
19b	–1, 3	1, 3	AF, JE, RAE
20	4, 0	6, 0	AD, JE, RAE
21	–6, 6	–4, 6	AF, JE, RANE
22a	7, –7	5, –7	AD, JNE, RAE
22b	–7, 7	–5, 7	AF, JE, RANE
23	–2, 4	0, 4	AD, JE, RANE
24	5, –3	5, –3	AD, SQ, RAE
25a	6, –4	6, –4	AD, SQ, RAE
25b	4, –2	4, –2	AD, SQ, RAE
26	–2, 4	0, 4	AD, JE, RANE
27a	7, –7	5, –7	AD, JNE, RAE
27b	–3, 5	–1, 5	AD, JE, RANE
28	4, 0	6, 0	AD, JE, RAE
29a	7, –7	5, –7	AD, JNE, RAE
29b	3, 1	5, 1	AD, JE, RAE
30	–2, 4	0, 4	AD, JE, RANE
31a	7, –7	5, –7	AD, JNE, RAE
31b	–3, 5	–1, 5	AD, JE, RANE
32	0, 2	2, 2	AF, JE, RAE
33a	7, –7	5, –7	AD, JNE, RAE
33b	–1, 3	1, 3	AF, JE, RAE
34	4, 0	6, 0	AD, JE, RAE
35	–6, 6	–4, 6	AF, JE, RANE
36a	7, –7	5, –7	AD, JNE, RAE
36b	–7, 7	–5, 7	AF, JE, RANE
37	–2, 4	0, 4	AD, JE, RANE

[a] Terminal nodes with the letter a = p; Terminal nodes with the letter b = $1 - p$.
[b] Payoff vectors are ordered Jefferson, Marshall.
[c] AD = Appointments for the Democratic-Republican Party
AF = Appointments for the Federalist Party
JE = Judicial review established
JNE = Judicial review not established
RAE = Repeal Act established
RANE = Repeal Act not established
SQ = Status quo

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Appendix B
Proof of Game Solutions

The solutions to Games A and B presented in the text (which we treat here as Propositions A and B) are equilibrium paths of play for subgame perfect equilibria solutions to these games. The games were solved by backward induction. Given the complexity of the games and thus the number of possible strategy combinations that would constitute equilibria, we focus here on demonstrating the proof of one of the equilibrium paths of play: Proposition A.4. The logic of backward induction as applied to Proposition A.4 is the basis for the determination of all of the equilibrium paths of play in the two Propositions. The detailed information about the proofs of these other paths are available from the authors.

Proof of Proposition A.4

Solution by backward induction requires that we start at the end of the game, determine what an actor would do at the final decision node and then work our way back up the game tree determining what the actors would choose at each decision node given the previously determined choices. In games, like the ones in this analysis, that include an exogenous move at the end of the game (in this case an act of Congress either to support or oppose Jefferson's attempt to impeach Marshall), the choices of the actors are contingent on their beliefs about the likelihood, designated by the value of p, that the exogenous event (in this case Congress supporting Jefferson's impeachment effort) will occur. Thus, the equilibrium solution to the game is contingent on the actor's beliefs about the value of p.

Let us say that Jefferson and Marshall believe that $p = .8$, representing a situation in which the political environment strongly favors Jefferson. To determine what the equilibrium path of play would be in this game when $p = .8$, we start at the end of the game and analyze Jefferson's last move. For clarity of presentation we begin at the top of Figure 1, at Jefferson's decision relevant to terminal nodes 24 and 25. Jefferson's choice is between ACCEPT and IMPEACH. ACCEPT will provide a payoff of 5, while IMPEACH will provide a payoff of (.8) (6) + (.2) (4) = 5.6, given that $p = .8$. Thus, Jefferson chooses IMPEACH at this decision node. Working back, we then analyze Marshall's move given the fact that Jefferson would have chosen IMPEACH at the subsequent node. Marshall's choice is between UPHOLD REPEAL and STRIKE REPEAL. UPHOLD REPEAL will give Marshall a payoff of (.8) (−4) + (.2) (−2) = −3.6, while the payoff for STRIKE REPEAL depends on Jefferson's choice at the final node relevant to terminal nodes 26 and 27. Using the same logic as before, Jefferson chooses IMPEACH (payoff = 5) over ACCEPT (payoff = −2). Thus, Marshall's payoff for STRIKE REPEAL is (.8) (−7) + (.2) (5) = −4.6 and his choice is UPHOLD REPEAL.

The next decision node that we need to analyze is Marshall's choice among three alternatives along the top path of the game: REFUSE JOB, UPHOLD LAW; REFUSE JOB, STRIKE LAW; and UPHOLD JOB, STRIKE LAW. Based on the same backward induction logic we can determine the payoffs to Marshall of these three choices as follows:

REFUSE, UPHOLD: −3.6 (given the fact that he chose UPHOLD REPEAL above)

REFUSE, STRIKE: −4.6 (based on the following choices:

[1] At decision node related to terminal nodes 28 and 29 Jefferson chooses IMPEACH (payoff = 6.2) over ACCEPT (payoff = 4)

[2] At decision node related to terminal nodes 30 and 31 Jefferson chooses IMPEACH (payoff = 5) over ACCEPT (payoff = −2)

[3] At the prior decision node Marshall chooses STRIKE REPEAL (payoff = −4.6) over UPHOLD REPEAL (payoff = −5.4))

UPHOLD, STRIKE: −4.2 (based on the following choices:

[1] At decision node related to terminal nodes 32–34 Jefferson chooses IMPEACH (payoff = 5.4) over ACCEPT (payoff= 0) and REFUSE TO DELIVER (payoff = 4)

[2] At decision node related to terminal nodes 35–37 Jefferson chooses IMPEACH (payoff = 4.2) over ACCEPT (payoff= −6) and REFUSE TO DELIVER (payoff = −2)

[3] At the prior decision node Marshall chooses STRIKE REPEAL (payoff = −4.2) over UPHOLD REPEAL (payoff = −5))

Given these possible payoffs, Marshall chooses REFUSE JOB, UPHOLD LAW.

Moving back up the game path, the next decision node to be analyzed is Marshall's decision whether to UPHOLD REPEAL or STRIKE REPEAL at the circuit level. From the previous analysis we know that the payoff for UPHOLD REPEAL is −3.6. To determine the payoff for STRIKE REPEAL, we need first to analyze Jefferson's decision whether to IMPEACH or APPEAL STUART if Marshall were to strike Stuart at the circuit level. If Jefferson chooses IMPEACH, he will derive a payoff of (.8) (4)+(.2) (−4) = 2.4. Jefferson's payoff for APPEAL STUART is based on the subsequent choices made on the paths following this decision. We can simplify the analysis by pointing out that the subgame that begins at the Marshall decision node following APPEAL STUART and encompassing terminal nodes 10–23 is exactly the same as the subgame that begins at the Marshall node after Marshall UPHOLDS REPEAL and encompasses terminal nodes 24–37. Since we have already used backward induction to analyze the equilibrium path of play for this subgame, we can use that analysis to determine the payoff for Jefferson for this new subgame. The equilibrium path for this subgame, given a p =.8, is Marshall chooses REFUSE JOB, UPHOLD LAW, Marshall chooses UPHOLD REPEAL, and then Jefferson chooses IMPEACH. This produces a payoff to Jefferson for APPEAL STUART of (.8) (6) + (.2) (4) = 5.6. Thus, in the choice between IMPEACH (payoff = 2.4) and APPEAL STUART (payoff = 5.6), Jefferson will choose APPEAL STUART, producing a payoff to Marshall for a choice of STRIKE REPEAL at the circuit level of −3.6. Coming back now to the choice facing Marshall at the circuit level, he will be indifferent between UPHOLD REPEAL and STRIKE REPEAL because both choices will give him a payoff of −3.6.

Before analyzing the next decision node back up this path of the game, Jefferson's original decision at the start of the game, we need to analyze the subgame encompassing terminal nodes 1–7 in order to determine Jefferson's payoff if he were to chose ACCEPT at the first move. It is easy to show that given a p =.8, Jefferson will choose IMPEACH at each of the three decision nodes at which he might be required to make a choice in this subgame. At the node relevant to terminal nodes 1 and 2, he prefers IMPEACH (payoff = 2.6) to ACCEPT (payoff = 2). At the node relevant to terminal nodes 3 and 4, he prefers IMPEACH (payoff = 3.2) to ACCEPT (payoff = 1). And at the node relevant to terminal nodes 5–7, he prefers IMPEACH (payoff = 2.4) to either ACCEPT (payoff = −3) or REFUSE TO DELIVER (payoff = 1). Moving back up the tree, we can now analyze Marshall's choice among REFUSE JOB, UPHOLD LAW; REFUSE JOB, STRIKE LAW; and UPHOLD JOB, STRIKE LAW. The payoff for REFUSE JOB, UPHOLD LAW is (.8) (−2) + (.2) (0) =

−1.6, for REFUSE JOB, STRIKE LAW (.8) (−5) + (.2) (3) = −3.4 and for UPHOLD JOB, STRIKE LAW (.8) (−5) + (.2) (5) = −3. Thus, Marshall will choose REFUSE JOB, UPHOLD LAW at this decision node, producing a payoff to Jefferson for ACCEPT at the initial node of 2.6.

Now we can complete the proof by analyzing the decision facing Jefferson at the start of the game. The alternatives facing Jefferson are PASS REPEAL (payoff= 5.6), IMPEACH (payoff = (.8) (1) + (.2) (−1) = .6) and ACCEPT (payoff = 2.6). Thus, Jefferson will select PASS REPEAL to begin the game.

By backward induction we have determined the subgame perfect equilibrium paths of play for p =.8:

Jefferson PASSES REPEAL ACT	Or	Jefferson PASSES REPEAL ACT
Marshall UPHOLDS REPEAL ACT		Marshall STRIKES REPEAL ACT
Marshall REFUSES JOB, UPHOLDS LAW		Jefferson APPEALS
Marshall UPHOLDS REPEAL ACT		Marshall REFUSES JOB, UPHOLDS LAW
Jefferson IMPEACHES.		Marshall UPHOLDS REPEAL ACT
		Jefferson IMPEACHES.

Note that these paths replicate the paths defined in Proposition A.4. A similar analysis of alternative values of p can be offered in support of the other paths denoted in the two propositions.

References

Alfange, Dean, Jr. (1994) "*Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom," 1993 *Supreme Court Rev.* 329.

Baum, Lawrence (1994) "What Judges Want: Judges' Goals and Judicial Behavior." 47 *Political Research Q.* 749.

Beveridge, Albert J. (1919) 3 *The Life of John Marshall.* Boston: Houghton Mifflin Co.

Boyd, Julian P. (1971) "The Chasm that Separated Thomas Jefferson and John Marshall," in A. Koch, ed.. *Jefferson.* Englewood Cliffs, NJ: Prentice-Hall.

Brown, Stuart Gerry (1966) *Thomas Jefferson.* New York: Washington Square Press.

Caldeira, Gregory A. (1987) "Public Opinion and the U.S. Supreme Court: FDR's Court Packing Plan," 81 *American Political Science Rev.* 1139.

Caldeira, Gregory A., & James L. Gibson (1995) "The Legitimacy of the Court of Justice in the European Union: Models of Institutional Support," 89 *American Political Science Rev.* 356.

Cameron, Charles M. (1994) "Decision-Making and Positive Political Theory (Or, Using Game Theory to Study Judicial Politics)," in L. Epstein & G. A. Caldeira, eds., *Position Papers* for the Columbus Conference, Columbus, OH.

Clinton, Robert Lowry (1994) "Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison," 38 *American J. of Political Science* 285.

Corwin, Edward S. (1910) "The Establishment of Judicial Review—I," 9 *Michigan Law Rev.* 102.

——— (1911) "The Establishment of Judicial Review—II," 9 *Michigan Law Rev.* 283.

Dewey, Donald O. (1970) *Marshall versus Jefferson: The Political Background of Marbury v. Madison.* New York: Knopf.

Elster, Jon (1986) *Rational Choice.* New York Univ. Press.

Epstein, Lee, & Thomas G. Walker (1995) "Playing the Reconstruction Game," in L. Epstein, ed., *Contemplating Courts*. Washington: CQ Press.
Eskridge, William N., Jr. (1991a) "Reneging on History? Playing the Court/Congress/President Civil Rights Game," 79 *California Law Rev.* 613.
——— (1991b) "Overriding Supreme Court Statutory Interpretation Decisions," 101 Yale Law J. 331.
——— (1994) *Dynamic Statutory Interpretation*. Cambridge: Harvard Univ. Press.
Farber, Daniel A., & Philip P. Frickey (1991) *Law and Public Choice*. Chicago: Univ. of Chicago Press.
Ferejohn, John, & Barry Weingast (1992a) "Limitation on Statutes: Strategic Statutory Interpretation," 80 *Georgetown Law J.* 565.
——— (1992b) "A Positive Theory of Statutory Interpretation," 12 *International Rev. of Law & Economics* 263.
Garraty, John A. (1987) "The Case of the Missing Commissions," in J. A. Garraty, ed., *Quarrels that Have Shaped the Constitution*. Rev. ed. New York: Harper & Row.
Haskins, George L. (1981) "Law versus Politics in the Early Years of the Marshall Court," 130 *Univ. of Pennsylvania Law Rev.* 1.
Haskins, George Lee, & Herbert A. Johnson (1981) *Foundations of Power: John Marshall, 1801–15*. History of the Supreme Court of the United States, vol. 2. New York: Macmillan Publishing Co.
Hobson, Charles F., ed. (1990) 6 *The Papers of John Marshall*. Chapel Hill: Univ. of North Carolina Press.
Jackson, Robert H. (1941) *The Struggle for Judicial Supremacy*. New York: Vintage Books.
Johnson, James (1991) "Symbol and Strategy." Ph.D. diss., Univ. of Chicago.
Knight, Jack (1992) *Institutions and Social Conflict*. New York: Cambridge Univ. Press.
Malone, Dumas (1970) *Jefferson the President: First Term, 1801–1805*. Boston: Little, Brown.
McCloskey, Donald (1987) "Counterfactuals," in J. Eatwell, M. Milgate, & P. Newman, *The New Palgrave: A Dictionary of Economics*. New York: Stockton.
McCloskey, Robert G. (1960) *The American Supreme Court*. Chicago: Univ. of Chicago Press.
Murphy, Walter F. (1962) *Congress and the Supreme Court*. Chicago: Univ. of Chicago Press.
——— (1964) *Elements of Judicial Strategy*. Chicago: Univ. of Chicago Press.
O'Brien, David M. (1990) *Storm Center: The Supreme Court in American Politics*. New York: Norton.
O'Donnell, Guillermo, & Phillippe Schmitter (1986) *Transitions from Authoritarian Rule*. Baltimore: Johns Hopkins Univ. Press.
Pritchett, C. Herman (1961) *Congress versus the Supreme Court, 1957–1960*. Minneapolis: Univ. of Minnesota Press.
Proctor, L. B. (1891) "Jefferson Contempt of Chief Justice Marshall's Opinions," 44 *Albany Law J.* 342.
Przeworski, Adam (1991) *Democracy and the Market*. New York: Cambridge Univ. Press.
Rehnquist, William H. (1992) *Grand Inquests*. New York: Morrow.
Rodriguez, Daniel B. (1994) "The Positive Political Dimensions of Regulatory Reform," 72 *Washington Univ. Law Q.* 1.
Spiller, Pablo T., & Rafael Gely (1992) "Congressional Control of Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949–1988," 23 *RAND J. of Economics* 463.
Stites, Francis N. (1981) *John Marshall—Defender of the Constitution*. Boston: Little, Brown.
Turner, Lynn W. (1949) "The Impeachment of John Pickering," 54 *American Historical Rev.* 485.

Urofsky, Melvin I. (1988) *A March of Liberty.* New York: Knopf.
Warren, Charles (1926) 1 *The Supreme Court in United States History.* Boston: Little, Brown.
Weingast, Barry R., & William J. Marshall (1988) "The Industrial Organization of Congress; Or, Why Legislatures, like Firms, Are not Organized as Markets," 96 *J. of Political Economy* 132.
Zorn, Christopher J. (1995) "Congress and the Supreme Court: Reevaluating the 'Interest Group Perspective.' " Presented at Midwest Political Science Association annual meeting, Chicago.

Cases

Cohens v. Virginia, 6 Wheat. (19 U.S.) 264 (1821).
Marbury v. Madison, 1 Cranch (5 U.S.) 137 (1803).
Stuart v. Laird, 1 Cranch (5 U.S.) 299 (1803).

Statutes

Amendatory Act of 1802, Act of 29 April 1802, 2 Stat. 156.
Alienation and Sedition Acts, Act of 18 June 1798, 1 Stat. 566; Act of 25 June 1798, 1 Stat. 570; Act of 6 July 1798, 1 Stat. 577; Act of 14 July 1798, 1 Stat. 596.
Judiciary Act of 1789, Act of 24 Sept. 1789, 1 Stat. 73.
Judiciary Act of 1801, Act of 13 Feb. 1801, 2 Stat. 89.
Repeal Act of 1802, Act of 8 March 1802, 2 Stat. 132.