

**Insert the following before Section C on p. 96**

***Note: The Political Aftermath of Marbury*<sup>1</sup>**

The fate of William Marbury's commission was a mere sideshow to a far larger struggle between the two major political parties of the era, the Federalists, who had controlled the government since 1789, and the new Republican Party which had taken control of both the Presidency and Congress in 1800. A central bone of contention between the two parties was the judiciary, and, in particular, the circuit judgeships created by the Judiciary Act of February 13, 1801 and the new federal judges appointed by John Adams to staff them.

The Republicans believed that this so-called Midnight Judges Act was deeply unfair because it had been passed by a lame duck Congress controlled by a party that had just been repudiated in the polls. The new Republican President, Thomas Jefferson, could simply refuse to deliver Marbury's commission. But the circuit judges, who had far more power, had already taken office. Hence the new Republican-controlled Congress repealed the Judiciary Act of 1801 on March 8, 1802, eliminating the circuit judge positions. Seven weeks later, on April 29, Congress passed the Judiciary Act of 1802, which reassigned the Supreme Court Justices to their previous role as circuit judges.

Concerned that the Federalist-controlled judiciary might strike back at their purge of the circuit courts by declaring the repeal of the Judiciary Act unconstitutional, the Republican-controlled Congress eliminated the Supreme Court's 1802 Term. That is why *Marbury* is decided in 1803 rather than 1802. The point of this shot across the bow was that if the Federalist Justices on the Supreme Court did not behave in ways the Republicans liked, Congress might take further steps, including removing the Justices through impeachment. In fact, the Republicans actually did impeach the Federalist Justice Samuel Chase. Chase was later acquitted, but not before *Marbury* was heard and decided in 1803. At the point that Marshall and his colleagues heard the case, the threat against them was real and palpable.

Perhaps equally important, a challenge to the repeal of the Judiciary Act was brewing in the federal courts at the very same time as *Marbury*. It attacked the constitutionality of the Jeffersonian purge by challenging Congress's ability to require Supreme Court Justices to resume their duties as circuit judges.

STUART v. LAIRD, 5 U.S. (1 Cranch) 299 (1803). The petitioners in *Stuart* sought to overturn a ruling by a circuit court in a land dispute. They argued that the Justices of the Supreme Court held commissions to be Supreme Court Justices, but not circuit judges. Hence they could not return to sit as circuit judges once the positions held by the Federalist circuit judges were abolished. In addition, the repeal of the circuit judgeships was unconstitutional because according to Article III of the Constitution, once they had received their commissions, the circuit judges had life tenure. Allowing Congress to

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<sup>1</sup>The following discussion is adapted from Sanford Levinson and Jack M. Balkin, "What are the Facts of *Marbury v. Madison*?", \_\_ Const. Commentary \_\_ (forthcoming 2004).

abolish the courts undermined judicial independence. A third argument seemed to follow from the structural aspects of Marshall's own decision in *Marbury v. Madison*, which argued that Congress could not add to the original jurisdiction of the Supreme Court because, by piling on added duties, Congress could swamp the Court and prevent it from playing its central role as constitutional adjudicator. In like fashion, petitioners argued that Congress could not bestow upon the Supreme Court Justices additional duties as circuit justices in nisi prius courts (courts of first instance) because this was in fact—and not merely in theory—a major burden on members of the Supreme Court.

The lower court decision in *Stuart*, rejecting the petitioners' arguments, was written by Chief Justice John Marshall riding on circuit. He recused himself from sitting on the appeal to the Supreme Court<sup>2</sup>

Justice Paterson delivered the opinion of the Court. He did not directly address the question whether the abolition of the circuit judgeships violated the life tenure provisions of Article III. Instead he merely held that the transfer of the case from a circuit court established by the now-repealed Judiciary Act of 1801, to a reconstructed circuit court that included a Supreme Court justice riding circuit (in this case, John Marshall himself) presented no constitutional problems:

Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, afford an irresistible answer, and have indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.

### *Discussion*

1. *Discretion is the better part of valor.* In terms of its long term viability as an institution, the Supreme Court's decision in *Stuart* was probably more important than its decision in *Marbury*. A week after its decision in *Marbury*, holding that the Federalist William Marbury would not get his commission, the Court in *Stuart* upheld, in essence, the constitutionality of the repeal of the Judiciary Act and allowed the Jeffersonians to purge the new Federalist circuit judges.

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<sup>2</sup>The reasons are unclear. In the early days of the Republic when Justices rode circuit, it was common for them to sit in on appeals of their own decisions, just as members of circuit courts today normally do not recuse themselves when a decision they participated in is appealed to the full court en banc. It is perhaps even more mysterious why Marshall would recuse himself in *Stuart v. Laird* but fail to recuse himself in *Marbury v. Madison*, given that Marshall was the Secretary of State whose failure to deliver Marbury's commission in a timely fashion in the first place gave rise to the litigation in *Marbury*.

As Bruce Ackerman has convincingly argued in an as yet unpublished manuscript,<sup>3</sup> *Stuart* is far more significant than *Marbury* inasmuch as it represents the complete capitulation by the Supreme Court to the new political reality of Republican hegemony. Indeed, read in light of *Stuart v. Laird*, *Marbury* takes on a very different cast. Although *Marbury* is often thought to symbolize the independence of the judiciary from politics and its devotion to the Rule of Law, viewing *Stuart* and *Marbury* together suggests that the Supreme Court clearly responded to the political pressure of the times: In *Marbury* the Court engaged in rather creative readings of both the Judiciary Act of 1789 and Article III to avoid giving Marbury his commission. And in *Stuart*, it dodged the most difficult constitutional questions about judicial independence in order to uphold the elimination of the circuit judgeships created by the Federalist Party. In this way Marshall and his colleagues gave the Jeffersonian purge the blessing of law.

Ironically, then, one of the earliest and most famous exercises of judicial review in American history, *Marbury v. Madison*, was itself strongly shaped by partisan dispute over the ideological composition of the courts and by the federal judiciary's felt lack of independence from politics. Indeed, the independence of the federal judiciary was not established until after the Jeffersonians decided not to remove Justice Chase, which followed the Court's capitulation in *Marbury* and *Stuart v. Laird*.

One possible interpretation of *Marbury* and *Stuart* is that they are merely examples of "transitions to democracy," in which courts in fledgling republics must accept the influence of politics to remain viable until judicial independence can be established as an ongoing custom. Another interpretation of the two cases is that they set the tone for everything that would come later on: What happened at the beginnings of American judicial review still characterizes that practice today—courts are only relatively independent from political struggle, and, in the long run, cannot resist the demands of a dominant national political majority.

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<sup>3</sup> Bruce Ackerman, AMERICA ON THE BRINK (unpublished manuscript, on file with authors).