Marbury Versus Madison
Documents and Commentary

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A Division of Congressional Quarterly Inc.
Washington, D.C.

3 The Strategic John Marshall (and Thomas Jefferson)

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Chief Justice John Marshall's decision in *Marbury v. Madison* (1803) has generated no shortage of commentary. Everyone from former presidents to current members of the Court to legal academics and social scientists has an opinion. Some reactions are highly critical, but many more are replete with accolades, deeming Marshall's writing "brilliant" (McCloskey 1960, 40–41), a "tour de force" (Urofsky 1988, 183), "shrewd" (Jackson 1941, 24), and "extraordinary" (Corwin 1911, 292).

We understand the lavish praise. By ruling against William Marbury, Marshall avoided a potentially devastating clash with President Thomas Jefferson. By exerting the power of judicial review, he sent a clear signal to the new president that the Court has a major role to play in American government.

Nonetheless, we disagree with the general characterization of *Marbury* as a "brilliant" strategic move by Marshall in the face of overwhelming political opposition. Marshall was able to write the opinion he did, to establish judicial review, because it was a politically viable step at the time. Jefferson favored the establishment of judicial review and Marshall realized this. The chief justice simply took the rational course of action. He denied Marbury his commission (ruling as Jefferson wanted) and justified judicial review (a move of which Jefferson also approved).

To develop our claim we invoke game theory. Game theory provides a potent set of tools for examining situations involving strategic behavior, situations in which the outcome is the product of the interdependent choices of at least two actors. In the case of *Marbury,* those key actors were a president, Thomas Jefferson, and a chief justice, Marshall, with the outcome of their interactions producing, among other norms, judicial review.

Jefferson Versus Marshall: A Chronology of Key Events

In the next section we have much more to say about our use of game theory to study *Marbury.* For now, though, we turn to an analysis

A grant from the National Science Foundation's Law and Social Sciences Program (SES-9024640) facilitated our research, which we adapt and adopt from Knight and Epstein 1996. We are also grateful to Robert Lowry Clinton, Carol Mershon, William M. O'Barr, George Tsebelis, and members of the Departments of Political Science at the University of Minnesota, SUNY Stony Brook, Texas A&M University, and the University of Virginia for providing useful suggestions.

of the key historical events unfolding during the early 1800s. We do so for two reasons. First, even though the story we tell may be familiar to sociolegal scholars (see Clinton 1994 for a brief review), various accounts often leave out events they do not deem critical. Many studies of *Marbury* fail to discuss *Stuart v. Laird* (1803), in which Marshall (on circuit) upheld the Repeal Act—a decision the full Court later affirmed. Second and even more important, without an appreciation of the key events that structured Jefferson's and Marshall's behavior, we would be unable to construct the games designed to explain those very behaviors. Readers would be unable to follow and assess our analyses.

Box 3-1 briefly lays out the chronology of those events. But the story requires some elaboration. 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 John Adams appointed his secretary of state,

Box 3-1 Chronology of Key Events

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

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),[1] 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 "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, he and his party clearly viewed the Federalists' attempts to pack the judiciary with disdain. To Jefferson and his colleagues, the bills passed in the waning days of the Adams administration 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 and Johnson 1981, 127; see also Warren 1926, 189). The Jeffersonians (especially the new president) had nothing but contempt for the new chief justice, whom 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). Marshall had no love lost for the Republicans and, in particular, for Jefferson. 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). Marshall and Jefferson "despised each other" (Dewey 1970, 29).

It is not wholly surprising that Republicans plotted 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). Jefferson's views on the impeachment strategy, at least initially, were ambiguous at best and contradictory at worst. Another plan favored by some Republicans involved repealing the Judiciary Act of 1801 to rid the judiciary of some Federalist appointees. Historical records provide mixed evidence on Jefferson's initial reaction to this suggestion.

In the end, the following steps were taken. First, Jefferson refused to deliver some 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." 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 [Marshall]" 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 Marbury—brought suit in the 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; see also Malone 1970). 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 saw repeal as inevitable. They have argued that Jefferson intimated the need for repeal in his inaugural address, delivered ten days before the Court's decision to grant Marbury's request (Haskins and Johnson 1981, 153–154). 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. 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" (Haskins 1981, 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 fourteen 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 before this point (indeed, some of the very same members of Congress who had wanted the Court to strike down the Alien and Sedition Acts) now argued that the Court did not have this power. These turnabouts were not missed by members of the Federalist congressional delegation. One 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 on 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. 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 authorizes, 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).

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, widely circulating 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.

Chief Justice Marshall was more than a bit concerned. Historical accounts of his reaction to the Repeal and Amendatory Acts are mixed. Garraty (1987, 13) claimed that repeal "made Marshall even more determined to use the *Marbury* case to attack Jefferson." Stites (1981, 87) wrote that "Marshall was less upset than many Federalists by the Repeal Act." Still, Marshall clearly 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.[2] 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 William Paterson, 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 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 and 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 of the associate justices (except Samuel Chase) thought the consequences too grave if they did not sit.

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 to the 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, Jefferson took yet another step against the judiciary. Whatever qualms Jefferson had about the impeachment strategy before his ascension to the presidency apparently had dissipated.[3] He now asked Congress to remove a Federal-

ist judge, John Pickering. Jefferson even supplied Congress with incriminating information against Pickering. The timing of his request was probably no coincidence. 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 (1919, 112) argued, because he was being used to "test the [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 Samuel] 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[4]—busied itself with *Marbury* and *Laird*. 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 (*Marbury* 1803, 148),[5] whereas in *Stuart* (1803, 303) Lee asserted that the Repeal Act violated the Constitution.[6] Lee lost both cases.

In *Marbury,* Marshall (and the Court) had two different, though related, sets of decisions to make: (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 wrote that "[p]olitics 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) provided 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) argued, 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.

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 maintained that a major reason why *Marbury* "did not evoke greater hostility" was because of the surprise ruling in *Stuart*. Many Jeffersonians thought the Court would strike down the Repeal Act and were overjoyed when the Court upheld it. Only later did Jefferson and his colleagues realize the magnitude of the *Marbury* ruling. Whether Jefferson objected to Marshall's assertion of judicial review is not clear. At the very least, he sorely resented Marshall's implication that, had the Court had jurisdiction, he would have been legally bound to deliver the commissions.[7]

Attempts to remove Federalist judges continued. On the same day that the Court handed down *Stuart,* the House impeached Pickering. Just two months later, the Jeffersonians turned their sights on Justice Chase. 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 proved unnecessary. 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 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

This brief description of the events during the early Jefferson administration highlights the emergence of a "game" pitting Jefferson against Marshall. We are not the first to depict the Marshall–Jefferson interaction in these terms. At least since Corwin (1910, 1911) and Beveridge (1919, 21), commentators have invoked the intuitions of game theory to describe these events. With one exception (Clinton 1994), these intuitions have never been put to the test. Even in the Clinton paper the researcher stopped short of examining all key decisional points.

Our historical review highlights 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 use game theory.

Two aspects of this statement require elaboration. The first centers on game theory and

its application to legal phenomena, such as the Marshall–Jefferson dispute. The second concerns the notion of using game-theoretic analysis to test historical answers to our question. We discuss these conceptual points and then turn to the steps necessary to set up the games.

Applying Game Theory to Legal Phenomena

A number of tools are available to address legal questions. Their appropriateness is 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. In these situations, the social outcome is the product of the interdependent choices of at least two actors (Elster 1986). "Politics" is in large part about such strategic interactions. 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 decision making when they interact with others to derive a solution to a political problem. *To the extent that some legal phenomena contain a political dimension, game theory provides an appropriate approach to explaining their strategic components.*

The use of game theory in legal studies remains controversial. 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. The use of such models has often produced inadequate explanations, but the weaknesses in these explanations are a product of how game theory was used rather than a function of inherent limitations in the approach.

Game-theoretic models are not sufficient to produce persuasive explanations of most political competitions. Strategic decision making is only one feature of most social situations; another is the social context in which they occur. Adequate explanations of legal events must locate strategic choice in its appropriate social context. To accomplish this, scholars must combine game-theoretic analysis with other theoretical and empirical approaches (see Johnson 1991; Knight 1992).[8]

Using Game Theory to "Test" Historical Answers

The value of any method or approach rests with its ability to clarify and to illuminate the mechanisms that affect social and political life. 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. 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.

We use the idea of "testing" loosely. Our study takes advantage of how game theory involves counterfactual analysis.[9] The solutions to these models entail claims about what actors will do under certain conditions and what they would have done differently had the conditions been 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.

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. Although replication alone does not definitively answer the question of why an event occurred, it can lend strong support to the explanation at hand.[10]

Setting Up the Games

Let us turn to the steps necessary 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 Box 3-1 were part of the same game or whether they were discrete decision points requiring separate analyses. We concluded that they were all part and parcel of one game, largely between Jefferson (the president) and Marshall (the Court).[11]

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 3-1 reflects these determinations: 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."[12] Although most of the key points displayed in the figure are obvious, such as Marshall's decision on whether or not 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 succeeded had he sought to have Marshall impeached. Indeed, as we detail later, our model explicitly takes into account the actors' beliefs about the probability of success and failure.

Third, we establish the actors' preferences over the various outcomes displayed in Figure 3-1. 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. 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 the successful establishment of the Repeal Act, the status quo,[13] and the 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.

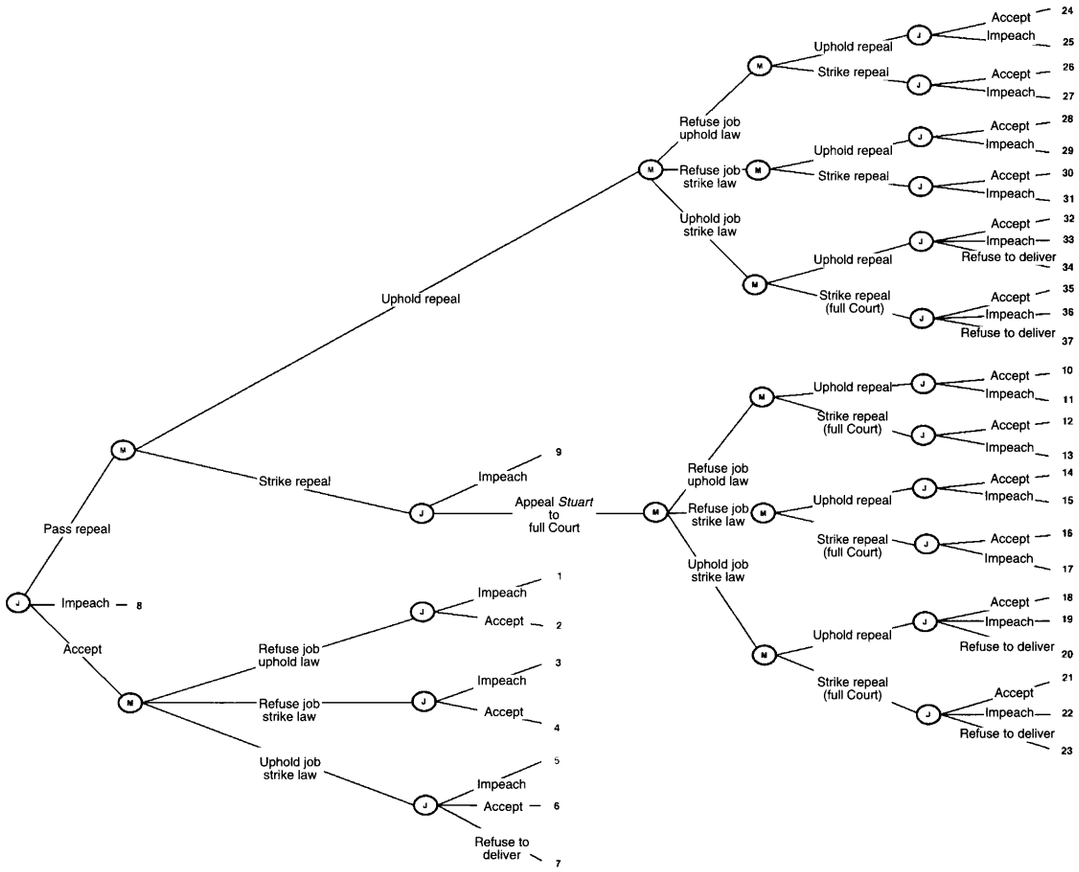

Figure 3-1 Possible Paths of Play with Terminal Nodes Numbered

Our extensive review of the historical record suggests that Marshall and Jefferson were differentially concerned about these things (see, for example, Beveridge 1919; Haskins and Johnson 1981; Malone 1970; Warren 1926). Marshall cared most about judicial supremacy, then judicial structure, and least about the political dimension. Jefferson was most concerned with structure, then the advancement of his party, and finally supremacy. These 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, mathematical representations of how the various goals of the actors combine to create an overall value for each of the possible outcomes of the game (Osbourne and Rubinstein 1994) for Jefferson and Marshall. We let U_m represent the value for Marshall and U_j the value for Jefferson. Because we analyze two separate games that differ in the assumed preferences for Jefferson (discussed in full later), we use superscripts A and B to distinguish Jefferson's utility value in the two games. The functions are as follows:

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

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, for example, Haskins and Johnson 1981).[14] Setting it up this way is sensible and has the additional benefit of allowing us to investigate Jefferson's preferences over judicial review.

The other feature of the functions in need of discussion is the method of weighting the dimensions. 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. 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), that gains an appointment (2), that 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. (A complete definition of the payoffs for the two games is available from the authors.)

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 his goals. Any node that ends with Jefferson choosing to impeach Marshall is characterized by a distribution of possible outcomes. Whether Jefferson will be successful in these attempts depends on the political actions of members of Congress. Neither Jefferson nor Marshall know 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 $1 - p$). The greater the value of p, the more favorable the political environment 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. The basic intuition is a simple one: Strategic actors will peer into the future to see the implications of their present actions. If the time horizon of the future is fairly short, they should be able to establish reasonably good expectations about how their present actions will affect their future choices. If they can do so, they will take account of those future implications in deciding what to do at earlier stages of the game. In analyzing the Jefferson–Marshall interaction, we assume that both the president and chief justice will choose to act at any point in the game in such a way as to maximize the value of their future choices.

Our discussion begins on the next page 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.

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, because equilibria are quite distinct under the various beliefs. Our answer is simple. Based on scholarly commentary, historical accounts, and empirical evidence, it seems clear that the actors thought the environment overwhelmingly favored Jefferson. Just as Marshall ascended to the chief justiceship, 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 political science literature. He believed (and rightly so) that many followers of Jefferson and, perhaps, Jefferson himself would seek to take control of the judiciary

Game A

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

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

(continued on next page)

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,	*Or*	Jefferson ACCEPTS Marshall's decision to hear the *Marbury* case,
Marshall REFUSES JOB and STRIKES LAW,		Jefferson UPHOLDS JOB and STRIKES LAW,
Jefferson ACCEPTS.		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,	*Or*	Jefferson PASSES REPEAL ACT,
Marshall (circuit) UPHOLDS REPEAL ACT,		Marshall (circuit) STRIKES REPEAL ACT,
Marshall REFUSES JOB and STRIKES LAW,		Jefferson APPEALS,
Marshall UPHOLDS REPEAL ACT,		Marshall REFUSES JOB and STRIKES LAW,
Jefferson ACCEPTS.		Marshall UPHOLDS REPEAL ACT,
		Jefferson ACCEPTS.

through impeachment. This so-called impeachment strategy had already taken hold in the states.[15] To Marshall, there was little reason to believe it would not succeed on a federal level.

Marshall 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 is to take a position well at odds with virtually all of 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*. These represent the beliefs most closely approximating those Marshall and Jefferson held: that the political environment so strongly favored Jefferson that the president 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.

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, whereas 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 readers, this conclusion is significant because it suggests a resolution to a long-standing debate about Jefferson's preferences. And it would be enough to reject game *A*, because it does not mirror history. Although 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. 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 ensured 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 relationships with the other institutions of government.

Game *B*, which induced behavior consistent with history, also reflects the importance of *Laird*. Marshall's decision 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. He would have attempted impeachment had Marshall struck down the Repeal Act in *Laird*. 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 his sincere desire. But—given the sequence of events—these were the courses of action Marshall 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 commission 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 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 (nor any rational actor) was willing to take. This is especially so because he perceived the consequences—the loss of his job—to be the gravest of all.

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 place. *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. That party would have ruled the circuits throughout the United States.

Implications of the Study

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 to study other interactions between courts and presidents, be they of historical moment (such as the struggle between Franklin Roosevelt and the Court in 1936 to 1937) or of future concern (such as those that may ensue in newly established democracies in Eastern Europe). First, our examination demonstrates that politicians—even those who lack an electoral connection—are strategic actors. Had Marshall not been a strategic actor, he simply would have voted his unconstrained preferred positions in *Marbury* (strike the law and provide the commission) and in *Laird* (strike the Repeal Act). He rejected these steps not because his unconstrained preferences over the outcomes changed. Given his beliefs about Jefferson and the political environment, he acted in a sophisticated manner to maximize his expected utility.

Our results lend support to the growing number of scholars (e.g., Epstein, Knight, and Martin 2001; Eskridge 1991a, 1991b; Spiller and Gely 1992) who argue that justices do not need an electoral connection to act strategically. Members of the Court know that 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 dealing with the Court. If they do not, as Jefferson knew, they can face severe political penalties.

A second implication of our study is that despite differences between legal and political actors, all politicians—be they presidents or justices—consider the environment under which they are operating. Rational responses depend not just on actors' preferences and their beliefs about those of their opponents but on the decision-making context. In our study, Jefferson and Marshall clearly 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. 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 may be costly. We think a reconsideration of other defining moments in judicial development would bear this out.

The general lesson is a simple one. In situations in which 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. 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.

Conclusion

We end where we started, with the question of the institutionalization of judicial review. At the time the Constitution was framed, the role of the judiciary in the three-branch structure of American democracy was underdeveloped. The major long-term consequence of the Jefferson–Marshall interaction was a restructuring of the institutional division of labor among the branches. 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, as we claimed at the onset and as we have now demonstrated, 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.

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Endnotes

1. 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, 135–138).
2. As O'Brien (1990, 138) noted, 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."
3. 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 and Johnson 1981, 208).
4. Even Malone (1970, 148), who is always quick to defend Jefferson, notes that although 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.
5. In Lee's words, "Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the Constitution" (*Marbury* 1803, 148).
6. 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).
7. 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* (1821), 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).
8. 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.
9. For an excellent and informative discussion of the role of counterfactual reasoning in game theoretic analysis, see McCloskey 1987.
10. 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 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.
11. 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 Box 3-1 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.
12. 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 the 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.
13. We use the term "status quo" to mean no change on the particular dimension.
14. Even within individual sources confusion abounds. For example, in his seminal biography of Jefferson, Malone (1970, 133) at one point asserted 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 wrote (1970, 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—are not known with certainty, though Clinton (1994) makes a good case for the position that the president supported judicial review.
15. 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) wrote, "contemplated even before the 1801 Act had been repealed."