

WHAT ARE THE FACTS OF *MARBURY V. MADISON*?<sup>1</sup>

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One of the most familiar features of the first year class in constitutional law, or indeed, in any first year subject, is the ritual practice of asking young law students to state the facts of cases. Not surprisingly, one of the first cases that students often encounter<sup>4</sup> in their study of constitutional law is *Marbury v. Madison*,<sup>5</sup> and so it is no surprise that *Marbury* is one of the first situations in which law students are asked to state the facts of the case.<sup>6</sup>

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<sup>1</sup> This article grows out of comments delivered by Sanford Levinson at the gathering convened at the University of Minnesota Law School by Michael Paulsen on February 24, 2003, to celebrate the 200<sup>th</sup> birthday of *Marbury v. Madison*. The definite outlier at this gathering, he explained his reluctance to “celebrate” *Marbury* and, indeed, why it should basically disappear from the canon of cases taught to first-year students, an argument elaborated in Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either*, 38 WAKE FOREST L. REV. 553 (2003). Conveying his views to Balkin, the two struck up a conversation about the “facts” of *Marbury*, and the present essay is the result..

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<sup>4</sup> Though not in Levinson’s course, see Levinson, *supra* n. 1.

<sup>5</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>6</sup> As a matter of fact, Balkin rarely asks students to state the facts in *Marbury* because he feels that having students work through the procedural history of the case is largely a waste of time, given that there are so many more pressing issues that students need to be exposed to in an introductory course on Constitutional Law. One need not be a devotee of Chicago economics to realize that both law professors and their students are trapped in an economy of scarcity that gets worse every year as the volume of constitutional opinions and other relevant materials increase. So, as a result, both Balkin and Levinson usually offer a brief synopsis of what they believe to be the relevant facts of a given case and then plunge straight into the discussion about their legal implications. With regard to *Marbury*, however, Levinson’s position is more complex. As indicated above, n. 1 *supra*,

This is both deeply appropriate and deeply ironic. It is appropriate because *Marbury* is not just any case. It is a veritable symbol of judicial independence and of commitment to the Rule of Law. Allowing first-year students to work through the procedural history of the case and to parse Marshall's complicated reading of both the Judiciary Act of 1789 and Article III of the U.S. Constitution is a professional rite of passage that allows students to feel that they are mastering important legal concepts and difficult legal texts in the way that "real" lawyers do.

Yet asking students to recite the facts of *Marbury* at the beginning of their legal careers is also deeply ironic. It is ironic because there is more than one way to state what happened in *Marbury*, and thus what constitute its "facts.". Depending on what one thinks the facts of *Marbury* are, the case is either, on the one hand, a symbol of judicial independence and the separation of law from politics, or, on the other, a revealing case study in the inevitable influence of politics on judicial decisionmaking demonstrating the inability of courts fully to separate law from politics even as they repeatedly attempt to disguise this fact in their own judicial rhetoric.

The "traditional" recitation of the facts of *Marbury* looks something like this: John Adams appointed William Marbury to be a Justice of the Peace in the District of Columbia, and his commission had been signed by the relevant federal official (in this instance, of course, John Marshall himself, acting in his capacity as Secretary of State in the outgoing Adams Administration). Nevertheless, the new Secretary of State, James Madison, refused to deliver the signed commission to Mr. Marbury. Marbury had

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he generally does not teach the case at all. When he has taught it at an American law school, he has interrogated students at some length about the facts, precisely in order to demonstrate the ambiguities that are the subject of this essay.

therefore filed suit before the Supreme Court invoking its original jurisdiction and asking for a writ of mandamus ordering that Madison convey to him what was rightfully his, the commission that would entitle him to take the office to which he had been appointed by the President of the United States.

This is a perfectly traditional accounting of the facts of *Marbury*, especially if one draws the facts from the official reports of the case itself. Alas, it tells us nothing about why *Marbury* was a significant case in its own time. Perhaps more to the point, it does not enable us to understand why the legal arguments that Marshall offers in the case are so strained and peculiar.

If a student in a law school class had articulated the facts set out above, we might ask her why Madison was withholding the commission, whether he was acting out of simple pettiness, personal dislike of William Marbury, or some other reason. If the student had majored in American history before entering law school, she might give a very different answer to the question of what the facts of *Marbury* are, an answer that might look something like this:

The case arose out of a dispute between two political parties in the United States, the Federalists, led primarily by Alexander Hamilton (though John Adams in fact succeeded to the presidency as the Federalist candidate following Washington), and the Republicans, led by Thomas Jefferson, Aaron Burr and James Madison. This dispute was particularly important in forming the conditions of democracy in the young republic. The Framers of the 1787 Constitution did not think there would or should be political parties. They identified political parties with factions, which were dangerous to the health of

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democratic institutions. They designed a Constitution that was supposed to work without the creation of such factions or, at worst, would prevent their growth and baleful influence. Nevertheless, within a few years of the ratification of the Constitution, political parties quickly appeared, and the contest between them quickly became quite bitter. Matters only got worse in 1796, when the Republican Thomas Jefferson became Vice President under the Federalist candidate, John Adams, because the electoral college awarded the Vice-presidency to the person who came in second in the balloting for the presidency (assuming that the winner received the majority of the electoral vote). The Republicans finally won control of the Presidency in 1800, when Jefferson defeated Adams, although the election was contested because Jefferson and his running mate Aaron Burr got equal numbers of electoral votes, and the election was thrown into the House of Representatives.

The election of 1800 posed a real crisis for the fledgling democracy. It was by no means clear that the transfer of power from the old revolutionary party, the Federalists, to the upstart Republicans would work or could be achieved peacefully. The Federalists did not trust the new Republican party at all. They believed that the Republicans would be a disaster for the United States. They wanted to do anything possible to stave off a Jeffersonian takeover of the country.

Because of a quirk in the way that the Constitution structured the timetable for elections, the incoming Republican-controlled Congress would not take office until almost half a year after the elections, and most importantly, after the lame duck House of Representatives had chosen the new President. This odd feature of the constitutional system also reflected the naïve notion that there would not be political parties, but rather

simply one selection of “the best men” following another. Thus, the Federalists continued to control Congress even though they had been repudiated in the polls. They were busy indeed; prior to breaking the Jefferson-Burr deadlock, they acted to stock the federal courts with as many of their allies as possible by passing the Judiciary Act of 1801, establishing a host of new judicial offices to which Federalists could be appointed. (Historians sympathetic to the Jeffersonian cause usually label these appointees the “midnight judges.”) The Federalist Secretary of State, John Marshall, was appointed Chief Justice, though he continued to act as Secretary of State up to the last minute before Jefferson’s inauguration (and Madison’s occupancy of the office). Thus Marshall himself signed William Marbury’s commission as a Justice of the Peace in the District of Columbia.

Marbury’s commission, however, was a mere sideshow to a much more crucial struggle. Far, far more important than the relatively trivial commissions for Justices of the Peace were the new federal appellate judges appointed by Adams under the authority of the Judiciary Act of 1801. The Act established an intermediate layer of courts (and judges) to complement the District and Supreme Court judges who had, prior to its passage, comprised the federal judiciary. The purported justification of the creation of circuit judges was to relieve the Supreme Court Justices of the onerous duty of riding circuit from place to place. But the Republicans felt that the real reason was to further entrench Federalist control over the judiciary.

The Republicans believed that the Midnight Judges Act was deeply unfair, not least because the Act had been passed-- and the new judges it authorized were appointed and confirmed-- during a lame duck session. All of this was done in open defiance of

the fact that the Republicans had just succeeded in securing popular approval for their new political party and in repudiating the leadership of Adams and his Federalist associates. Acting under the orders of President Jefferson, newly installed Republican Secretary of State James Madison refused to deliver Marbury's commission to him. But the new circuit judges had already taken office. So the members of the Republican-controlled Congress employed a different strategy: They engaged in a wholesale purge of these new Federalist judges by repealing the Judiciary Act of 1801 in 1802, and, therefore, eliminated the judicial offices occupied by the circuit judges. The Repeal Act was passed on March 8, 1802;<sup>7</sup> seven weeks later, on April 29, Congress passed the Judiciary Act of 1802,<sup>8</sup> which, among other things, reassigned the Supreme Court Justices to their previous role as circuit judges.

The Jeffersonians recognized that the Federalist-controlled Supreme Court might strike back at their purge by declaring the repeal of the Judiciary Act unconstitutional. So the Judiciary Act of 1802 included as one of its sections a preemptive strike by eliminating the Supreme Court's 1802 Term and staving off the next session of the Court until February of 1803. That is why *Marbury v. Madison* was decided in 1803 rather than 1802. The clear import of this shot across the bow was that if the Federalist Justices made decisions that the Republican Congress did not like, the Justices might be removed as well, perhaps through impeachment. Indeed, the Republicans did impeach the Federalist Justice Samuel Chase. Chase was later acquitted, but not before the *Marbury* case 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.

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<sup>7</sup> Act of March 8, 1802, 2 Stat. 132

In fact, a challenge to the repeal of the Judiciary Act was brewing in the federal courts at the very same time as *Marbury*. That case, *Stuart v. Laird*,<sup>9</sup> challenged the constitutionality of the Jeffersonian purge by challenging Congress's ability to require Supreme Court Justices to resume their duties as circuit judges.<sup>10</sup>

The petitioners in *Stuart* argued that the Justices of the Supreme Court held commissions to be Supreme Court Justices, but not circuit judges.<sup>11</sup> Hence they could not sit as circuit judges once the positions held by the new 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 abolish the courts undermined judicial independence.<sup>12</sup> 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.<sup>13</sup> 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.

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<sup>8</sup> 2 Stat. 156

<sup>9</sup> 5 U.S. (1 Cranch) 299 (1803).

<sup>10</sup> See *History of the Supreme Court of the United States, vol. 2, Foundations of Power: John Marshall, 1801-1815* at 180 (1981)

<sup>11</sup> *Id.* at 299.

<sup>12</sup> *Id.*

<sup>13</sup> See, e.g., Louise Weinberg, *Our Marbury*, 89 VA. L. REV. \_\_\_ (2003)

Chief Justice John Marshall, sitting as a circuit judge, had delivered the lower court opinion in *Stuart v. Laird*, rejecting the petitioners' arguments. For reasons that are unclear, he recused himself from sitting on the appeal to the Supreme Court.<sup>14</sup> (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.). The juxtaposition of Marshall's recusal in *Stuart v. Laird* with his notable failure to recuse himself in *Marbury v. Madison* is particularly striking, 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*. In any case, as a result of Marshall's recusal, *Stuart v. Laird* is the rare example of a major Supreme Court decision<sup>15</sup> that Marshall did not write during his tenure as Chief Justice; it was written instead by Justice Patterson.

Patterson made short work of the petitioners' claims in *Stuart v. Laird*. He did not in fact directly address the question whether the abolition of the circuit judgeships violated the life tenure provisions of Article III. (To this extent, it may be a misnomer to describe it as a "constitutional case," though, to put it mildly, it was treated as having "constitutive importance with regard to the ability of Congress to eliminate part of the federal judiciary.) Instead he merely held that the transfer of the case from a circuit court

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<sup>14</sup> 5 U.S. at 308.

<sup>15</sup> Though the word "major" is our assessment, not that of the current constitutional canon. *Stuart v. Laird* was a "major" case because of its crucial consequences for the political stability of the country in the early years of the Republic. It is distinctly "minor," however, if one measures it either by its length—it consists of four paragraphs that take up a scant page-and-a-half of text—or by the fact that Justice Patterson scarcely addresses the most profound issues raised by the repeal.



established by the now-repealed Judiciary Act of 1801, to a reconstructed circuit court, re-established by the 1802 Act, that included a Supreme Court justice riding circuit (in this case, John Marshall himself) presented no constitutional problems. The previous practice of having Supreme Court Justices sit on circuit, contemporaneous with the very beginnings of the federal judicial system, Patterson argued, had settled the question of constitutionality, “and ought not now to be disturbed.”<sup>16</sup>

In terms of its viability as an institution, what the Supreme Court did in *Stuart* was every bit as important as what it did in *Marbury*, and probably more so. A week after the decision in *Marbury*, holding that the Federalist William Marbury would not get his commission, the Court handed down its decision in *Stuart*, upholding de facto the constitutionality of the repeal of the Judiciary Act and allowing the Jeffersonians to purge the new Federalist circuit judges. As Bruce Ackerman has convincingly argued in an as yet unpublished manuscript,<sup>17</sup> *Stuart* is far more significant than *Marbury* inasmuch as it represents the full capitulation by the Supreme Court to the new political reality of Jeffersonian hegemony. Read in light of *Stuart v. Laird*, *Marbury* suggests that the Supreme Court clearly responded to the political pressure of the times. The Court stated in dicta that Marbury’s rights were violated by the Jeffersonians and that he was entitled to his commission. Nevertheless, it held as a matter of law that Marbury could not get his

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<sup>16</sup>Patterson argued:

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. *Id.* at 308.

commission because the Judiciary Act of 1789 was unconstitutional. Finally, it also suggested in *Stuart v. Laird* that the Jeffersonians could eliminate the circuit judgeships created by the Federalist Party. The upshot of the two opinions, taken together, is striking: While holding unconstitutional a relatively unimportant feature of the 1789 Judiciary Act through a strained and remarkably unpersuasive interpretation of both the Act and Article III of the Constitution, Chief Justice Marshall and his colleagues upheld the constitutionality of the far more important 1802 Repeal Act. In this way they gave the Jeffersonian purge the blessing of the law.

*Marbury* is often thought of-- and, indeed taught-- as representing the grand notion of an independent judiciary devoted to the declaration and protection of constitutional rights by courts. It symbolizes the importance of the separation of law from politics and the central principle that it is the duty of the Supreme Court “to say what the law is,” regardless of the political pressures of the moment. This view is reinforced by accepting the facts as stated in the official reports. But when the second set of “facts” of *Marbury* are stated, the case takes on a very different meaning. Instead, it becomes abundantly clear that the originary<sup>18</sup> and most famous exercise of judicial

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<sup>17</sup> Bruce Ackerman, AMERICA ON THE BRINK (unpublished manuscript, on file with authors).

<sup>18</sup> At least in terms of the standard narrative, which often describes *Marbury* as “establishing” judicial review. As Mark Graber convincingly argues in *Establishing Judicial Review, Marbury and the Judiciary Act of 1789*, 38 TULSA L. REV. \_\_\_ (forthcoming 2003), it was the Judiciary Act of 1789 that “established” judicial review, and not *Marbury*, which simply illustrated it. And, as David Currie has shown with equal force, a number of pre-*Marbury* cases can be understood only against the background assumption that the judiciary did in fact have the power to invalidate a federal law at least under some conditions. See David Currie, 1 THE CONSTITUTION IN THE SUPREME COURT 37-51 (1985). See, e.g., *Hylton v. U.S.*, 3 U.S.171 (1796), which can be understood only on the assumption that the Court in fact possessed the power that we call judicial review. Thus, wrote Justice Chase, “.... only one question is submitted to the

review in American history, *Marbury v. Madison*, was utterly shaped by partisan dispute 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, following the denial of William Marbury's commission in *Marbury v. Madison* and the Federalist Court's legitimation of the Repeal Act in *Stuart v. Laird*.

Finally, *Marbury* seems to portray the role of an independent judiciary in a particularly unsavory light. The Court separated right from remedy, symbolically affirming that William Marbury was entitled to his commission as Justice of the Peace, but refusing to enforce his rights because of the intervention of more powerful political forces not overtly mentioned in the opinion. Viewed from this perspective, *Marbury* is akin to *Giles v. Harris*,<sup>19</sup> in which the Supreme Court, per Justice Holmes, stated that whether or not blacks had effectively been disenfranchised in the State of Alabama, there was, as a practical matter, nothing that the Court could do to prevent it.

One might object that all of these latter facts come from "outside" the case and that a student who gave only the first set of facts should hardly be condemned for failing

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opinion of this court; whether the law of Congress, of the 5th of June, 1794, entitled, 'An act to lay duties upon carriages, for the conveyance of persons,' is unconstitutional and void?" The issue in *Hylton* concerned the arcane question of "direct taxes," as required by the Constitution, see Article I, Article 9 ("No capitation, or other direct Tax, shall be laid, except in Proportion to the Census or enumeration herein directed to be taken"). The Court rejected the attack and held the tax constitutional. The main point, though, is that the Court suggested, fully seven years before *Marbury* (and five years before Marshall's ascension to the Court, that it could have declared it "unconstitutional and void" had it been persuaded that the law violated the Constitution.

<sup>19</sup> 189 U.S. 475 (1903). For an excellent commentary on the importance of *Giles*, see Richard Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONSTITUTIONAL COMMENTARY 295 (2000).

to recite the second set. After all, the operative assumption in most law school courses is that the question “What are the facts of X v. Y?” is an attempt to determine whether the student has in fact read the case as reported in the casebook and can offer an account of the cause of action and relevant procedural history based on the four corners of the judicial opinion as the casebook presents it. But our point, of course, is that one cannot possibly understand *Marbury* by remaining within the four corners of John Marshall’s opinion. Indeed, that opinion is written precisely to create the illusion that nothing else that was happening at the time had anything at all to do with the decision reached in the case. Instead, the Court was merely adhering to its sacred duty “to say what the law is,” by carefully laying the text of the challenged statute—the Judiciary Act of 1789—next to the text of Article III of the Constitution and dispassionately considering whether the former text conflicts with the latter. That is the tone of Marshall’s rhetoric in *Marbury*, and only little features that poke out of the opinion—for example, that the case is decided in 1803 rather than 1802—signal that large political forces are at play, and that something else entirely besides a dispassionate hermeneutical exercise is occurring within the pages of this text.

In similar fashion, one cannot simply assert that the Jeffersonian-Federalist controversy is irrelevant to the legal import of *Marbury*, for that begs the question of what the legal import of *Marbury* is.<sup>20</sup> Does *Marbury* in fact establish that it is the duty of the courts “to say what the law is,” or does it rather establish something quite different about the role of courts in a democratic society? One can insist that the political dispute

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<sup>20</sup> See Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1 (2003), for an excellent

that gives rise to *Marbury* (and to *Stuart v. Laird*) is irrelevant to its legal import only by focusing doggedly and myopically on what the Legal Realists famously called "law on the books" as opposed to the "law in action."

The puzzle of what exactly, are "the facts" of *Marbury v. Madison*, is merely an example of a more general puzzle about what it means for a student to recite the facts of any legal case. It will not do, for example, to insist that the only proper facts of the case are those that can be gleaned from reading the text written by the court, while excluding "outside" facts, derived from one's knowledge of not only the immediate circumstances surrounding the case but also the history of the controversy that gives rise to it. Much legal pedagogy is directed at getting students to understand that there is more to understanding the facts relevant to decision than what judges reveal in their opinions.

It is well known, for example, that appellate opinions often hold certain facts to be true that are not true, either because of pleading rules that take certain facts as settled for purposes of deciding procedural motions, or, more troublingly, because jurists tend to "fudge" facts, spinning them in one way or another in order to make the reasoning that follows appear inevitable. It is also well known that jurists sometimes omit otherwise relevant facts that would prove embarrassing to the legal doctrines they favor,<sup>21</sup> while taking judicial notice of other facts not in the record that tend to make their arguments

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treatment of the potentially different (and contradictory) messages conveyed by *Marbury*.

<sup>21</sup> For example, one would never learn from Justice Holmes' opinion in *United States v. Debs*, 249 U.S. 211 (1919) who Eugene V. Debs was. Sentencing him to jail for interfering with the draft by speaking out against World War I seems particularly problematic when it is recognized that Debs was a former (and future) Presidential candidate who had won over a million votes in the 1912 election, for, among other things, opposing American militarism as a particularly egregious and unhealthy side effect of runaway capitalism.

appear more convincing.<sup>22</sup> Indeed, and perhaps of equal relevance, it is well known that litigating lawyers routinely redescribe the relevant facts to suit their client's interests in the "statement of the facts" that appears in lawyers' briefs.<sup>23</sup> Lawyers, whether as practicing attorneys or judges, have been post-modernists *avant le lettre* inasmuch as the "facts" they have offered to juries, judges, and other legal decisionmakers were always self-conscious constructions in the service of a particular agenda.

In fact, there is no natural dividing point that demarcates the "facts of the case" from what one might want to dismiss as factual "irrelevancies." Rather, the articulation of the "facts of the case" is always pragmatic and provisional. It is a way of dividing up social reality into the legally relevant and non-relevant that serves a particular set of purposes. In the case of the pedagogy of the legal academy, those purposes are the socialization of law students into the legal profession and the separation of law (and what lawyers do) from politics.

A basic feature of the socialization process in legal education-- particularly during the first year-- is to teach students what counts as a "correct" statement of the facts,

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<sup>22</sup> In *Marbury v. Madison* itself, Chief Justice Marshall takes judicial notice of the fact that Marbury's commission was signed and sealed by the Secretary of State. His brother James Marshall's affidavit in the case does not affirm that Marbury's was among the commissions scheduled for delivery, only that he believed it might have been. [cite] Of course, the reason why Marshall could take judicial notice of these crucial facts for Marbury's case was that he was the Secretary of State who personally affixed the Great Seal of the United States to Marbury's commission. Of course, this simply raises even more urgently the question why Marshall was not compelled to recuse himself in the case. His failure to do so speaks volumes about what we might mean by the "independent judiciary" that *Marbury v. Madison* is supposed to symbolize. Indeed, the more we learn about the facts of *Marbury*, the more we are likely to conclude that *Marbury* symbolizes precisely the opposite phenomenon.

<sup>23</sup> See, e.g., J.M. Balkin and Sanford Levinson, "Getting Serious About 'Taking Legal Reasoning Seriously,'" 74 CHI.-KENT L. REV. 543 at 545-46 (1999).

which forms part of teaching them “think like lawyers.” They learn to demarcate that which is of particularly “legal concern” from that which is not relevant in the eyes of the law, either because it is of merely historical interest, because it is normatively irrelevant, or, more importantly, because it is a question of politics that must be separated from the legal rule of the case. That is because the legal rule of the case is, by stipulation, separate from politics, ideology, policy goals and personal predilections and therefore must be able to be stated and applied without reference to such ends.

Thus, learning how to recite “the facts of a case” to the satisfaction of a law professor is an essential part of *disciplining* students, in the fullest sense of that word.<sup>24</sup> Identifying the legally relevant facts and spurning those that are not relevant to law and legal argument is a disciplinary method of separating law from politics, instilled from the first day of professional inculcation and imbibed like mother’s milk. In this way beginning law students learn to reorient their normative imaginations around the structure of the standard form appellate opinion and its implicit separation of the legally germane from that which is irrelevant in the eyes of the law, or to put it another way, that which the law must not see or at least pretend not to see in order to remain “the law.” Through this discipline one learns to know and not know what surrounds a case, to see and not to see the premises that give rise to the legal dispute. In this respect *Marbury v. Madison* is the perfect example of the appellate opinion, a decision framed and directed by circumstances it cannot admit to while retaining its authority as law, engaged in legal reasoning whose peculiar features are shaped by forces it cannot overtly mention to its audience.

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<sup>24</sup> See *id.* at 558. See also J.M. Balkin, *Interdisciplinarity as Colonization*, 53

Learning how to recite the facts of a case is crucial because it involves both the separation of law and politics and the honing of analytical skills, and equally important, because it leaves the lasting impression in the student's mind that the two enterprises are necessarily correlated. Nothing is more central to the ideological mission of the traditional American law school than to persuade students that "legal" analysis—including, of course, constitutional law—is indeed a fundamentally different enterprise from policy analysis and, therefore, that judicial (and other) decisions predicated on what the Constitution commands are notably different from the imposition of political preferences, whether "high" or "low."<sup>25</sup> Separating out the normatively relevant from the normatively irrelevant is the very definition of legal rigor, which distinguishes a finely honed legal mind from fuzzy, muddleheaded thinking. It also serves to define the sorts of considerations that lawyers and judges are permitted to consider in deciding cases in a legal fashion, rather than in some other way. Here too, *Marbury* is exquisitely appropriate as an introduction to the legal canon, for its formalist rhetoric repeatedly directs the student's attention away from the very features of politics that explain and determine its choice of formalisms.

The boundaries of the legally relevant and the legally non-relevant, however, are hardly fixed. They are always subject to further dispute even when one assumes a law that is relatively autonomous from politics. If a student begins a discussion of the facts of,

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Washington and Lee L. Rev. 949, 952-57 (1996).

<sup>25</sup> For the distinction between the "high" politics of larger political principles and the low" politics of partisan advantage, see J.M. Balkin and Sanford Levinson, *Understanding the Constitutional Revolution*, 87 U. VA. L. REV. 1045, 1060-1064 (2002).



say, the famous tort case of *Palsgraf v. Long Island Railroad*,<sup>26</sup> by pointing out that Helen Palsgraf had brown hair, or blonde, most professors will likely give the student the law school equivalent of a rap on the knuckles. That is because most people would agree that Mrs. Palsgraf's hair color is not normatively relevant to the rule of the case, the circumstances under which a duty of care is owed to people in causally complicated accidents. Nevertheless, if the student states that Mrs. Palsgraf was a poor woman with children to support,<sup>27</sup> the question then arises whether the poverty of a tort plaintiff should have any relevance to the rule of law that applies to her, or, more generally, whether tort rules should be adopted based on their likely distributive consequences. And even if we think that legal rules should not turn on the financial circumstances of individual plaintiffs like Mrs. Palsgraf, we still might still ask whether the sort of accident that she fell victim to is of a kind likely to happen to one or another class of persons. Our notion of what facts are legally salient will shift based on the sorts of legal rules we are willing to consider as properly applying to the case.

Even so, one might object, the inevitable flexibility that we will encounter in deciding what facts are legally relevant does not mean that “anything goes” and that the “facts” of *Marbury* must include the whole political history we have just outlined. All our example demonstrates is that the relevant “facts” of a case depend on their saliency to a proposed choice of legal rule and its application to those facts. That is to say, the “facts” of a case are those necessary for the law student to decide whether the legal rule is

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<sup>26</sup> 248 NY 339, 162 N.E. 99 (1928).

<sup>27</sup> See, e.g., John Noonan, *THE PERSONS AND MASKS OF THE LAW* 114, 125, 142 (1976)(references to Helen Palsgraf's income). Judge Noonan discusses Cardozo's excising of any references to Palsgraf's personal characteristics at 134-9 and the fact that she was a mother at 141.

fair and/or whether the case is correctly or incorrectly decided. So, in the case of *Marbury*, the “facts” of *Marbury* are those facts necessary to determine whether the case appeared before the Court in a procedurally correct fashion, the facts necessary to decide which rule is most appropriate, and the facts necessary to decide what the best application of that rule to the situation before the Court would be. In short, the facts of the case are those facts necessary to determine whether the legal decision the Court reached is lawful, fair and just.

But when we apply this criterion to constitutional cases, its boundaries quickly become quite complicated. Consider *Marbury* as an example. Assuming that one of the key questions involved in *Marbury* is the proper scope and extent of judicial review of Congressional action, why shouldn't all of the historical facts about the political milieu that we have just recited count? After all, in deciding the proper scope of judicial review, isn't it relevant how much we can expect the judiciary truly to be independent of politics, including both political pressures from outside the courts and the political values and allegiances of the Justices themselves? The facts of *Marbury* suggest that courts facing substantial political pressures and political temptations are likely to cloak political considerations in convoluted legal arguments, all the while announcing that their duty is solely to say what the law is. If so, wouldn't this be relevant in assessing both the merits of Marshall's arguments in *Marbury* and the general principles and justifications of judicial review offered therein?

Indeed, all theories of judicial review that focus on judicial prudence, ranging from Alex Bickel's embrace of the passive virtues<sup>28</sup> to Cass Sunstein's call for

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<sup>28</sup> Alexander M. Bickel, *The Passive Virtues*, 75 Harv. L. Rev. 40 (1961).

“minimalist” judging,<sup>29</sup> clearly must look beyond the four corners of the appellate opinion and into the political world in order to determine whether cases are properly or improperly decided. That is because, for a prudentialist, an important part of the work of courts is to achieve good consequences through a careful combination of judicial assertion and judicial restraint; through knowing when to intervene and when to stay aloof, when to goad the political branches into action and when to avoid creating unnecessary strife and risk backlash and reaction. Thus, for a prudentialist, at least, one cannot know whether either *Baker v. Carr*<sup>30</sup> or *Roe v. Wade*,<sup>31</sup> to take two notable examples, is correctly decided without a cool assessment of how the American political system would respond to the decision.<sup>32</sup>

There is perhaps no better example of this point than *Naim v. Naim*,<sup>33</sup> in which the Supreme Court dismissed as improvidently granted an appeal from the Virginia Supreme Court which had upheld Virginia’s anti-miscegenation law. What, precisely, are the facts of *Naim v. Naim* if they do not include (1) the history of massive resistance to *Brown v. Board of Education*; (2) the Virginia Supreme Court’s open defiance of at least one interpretation of *Brown* through its insistence that, whatever the Equal Protection Clause meant, it did not mean that interracial marriage would be permitted in the sovereign state

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<sup>29</sup> Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

<sup>30</sup> 369 US 186 (1962).

<sup>31</sup> 410 US 113 (1973).

<sup>32</sup> On *Baker*, see, e.g., Robert McCloskey, *The Reapportionment Case*, 76 HARV. L. REV. 54, \_\_\_ (1962), which expressed great fear that the Court had bitten off more than it could chew would suffer significant political opposition and a potential loss of public support. His concerns, of course, turned out to be exaggerated. On the consequences of *Roe*, see, e.g., Mark G. Graber, *RETHINKING ABORTION* (1996).

of Virginia; and (3) the belief by at least some Justices on the U.S. Supreme Court that even if the white South, would acquiesce in *Brown*, through the fig leaf of desegregation with “all deliberate speed,”<sup>34</sup> it would certainly be moved closer to outright rebellion if the Court invalidated something so psychologically sensitive as laws prohibiting interracial intimacy.<sup>35</sup> If one thinks that prudential considerations inevitably must play some role in the proper exercise of judicial review, then questions of political judgment—and the facts necessary to engage in such judgments-- are not something to be excluded from legal analysis, but move rather quickly to its center. That, of course, leads to a familiar criticism of prudential theories—that they blur the lines between political and legal considerations, and thus between politics and law.<sup>36</sup> But the problem persists if one thinks that prudentialism should play *any* role whatsoever in judicial decisionmaking.<sup>37</sup>

Similarly, if one is fond of structural arguments, which look to how the various branches of government should interact with each other, one can hardly avoid considering the political context of *Marbury v. Madison*. For if one wants to know how

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<sup>33</sup> *Naim v. Naim*, 197 Va. 80, 87 S. E. 2d 749, vacated and remanded, [350 U.S. 891](#) (1955), reinstated and aff'd, 197 Va. 734, 90 S. E. 2d 849, app. dism'd, [350 U.S. 985](#) (1956).

<sup>34</sup> See *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

<sup>35</sup> See Randall Kennedy, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 266-272 (2003). Kennedy writes that “[o]ne unidentified justice reportedly remarked, ‘One bombshell at a time is enough.’” *Id.* at 270. Even more interesting, perhaps, is Kennedy’s statement, “That sentiment was seconded by Thurgood Marshall, the chief lawyer for the NAACP, who notably declined to support Haim Say Naim’s appeal in the belief that its proximity to *Brown v. Board of Education* was a real detriment.” *Id.*

<sup>36</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1, 34 (1959). A similar objection was offered in Gerald Gunther’s classic critique of Bickelian prudentialism, *The Subtle Vices of the ‘Passive Virtues’—A Comment on Principle and Expediency in Judicial Review*, 64 *COL. L. REV.* 1, 10-13 (1964).

<sup>37</sup> See, e.g., Jan Deutsch’s classic article, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *STAN. L. REV.* 169 (1969).

the branches are likely to interact, one will not find that information in Marshall's opinion. Rather, one will find it in the political context that surrounds *Marbury* and *Stuart v. Laird*.

Or consider the "facts" of the *Steel Seizure Case*.<sup>38</sup> The reader of Justice Black's majority opinion will learn only of a labor dispute that threatened to shut down the steel industry and of President Truman's attempt to avoid this by seizing the mills. The reader of Chief Justice Vinson's dissenting opinion, on the other hand, will learn that the United States was involved in the first major battle of World War III on the Korean Peninsula, and that President Truman's action was precipitated by a belief that seizure was necessary in order to protect the very safety of American troops abroad. One cannot realistically decide the case without also deciding which of these sets of facts is relevant. But of course, which statement of the facts one finds more relevant, will, we strongly suspect, also allow us to predict which rendition of the Constitution's grant (or limits) of Executive power one will prefer.

But once we concede that the larger political context becomes part of the facts of *Marbury*, what is there left to exclude? For example, what about the political views of the Justices themselves? Is it one of the relevant facts of *Marbury* that John Marshall was a committed Federalist who loathed Thomas Jefferson and feared not only that Jefferson would defy any order that Marbury receive a commission but also that Jeffersonians in Congress would move to impeach him, as, indeed, had already happened with Samuel Chase?<sup>39</sup> And if that is a relevant fact of *Marbury v. Madison*, is it appropriate to state,

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<sup>38</sup> *Youngstown Steel v. Sawyer*, 343 U.S. 579 (1952).

<sup>39</sup> Marshall could not know, of course, that Chase would ultimately be acquitted and judicial "independence" ostensibly established.

as one of the “facts of the case” of *Bush v. Gore*,<sup>40</sup> that the majority of the Court were committed Republicans who might have preferred a Republican president in the White House, and also desired that their own successors be appointed by a Republican rather than a Democrat (especially when, as they reasonably believed on December 12, 2000, the Senate would also be under Republican control)?<sup>41</sup>

Finally, consider whether the facts in *Bowers v. Hardwick*,<sup>42</sup> properly include Justice Powell’s stated belief that he had never actually met a gay person (although his clerk during the Term that *Bowers* was decided was in fact a closeted gay).<sup>43</sup> Should we consider Justice Powell’s history, or equally importantly, his stated history of lack of familiarity with homosexuality as a relevant fact of the case?

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<sup>40</sup> 531 U.S. 98 (2000).

<sup>41</sup> See Sanford Levinson, *Bush v. Gore and the French Revolution*, 65 LAW & CONT. PROB. 7, 22 (2002)

<sup>42</sup> 478 US 186 (1986).

<sup>43</sup> Powell’s biographer describes the influences on his decisionmaking in *Bowers* this way:

Emblematic of Powell's difficulty with this case, and the most puzzling element in its history, was the remark that he had never known a homosexual. He said it at least twice, once to his clerk and once at the Conference of April 2. Blackmun later told his clerks that he thought of saying, 'of course you have. You've even had gay clerks. Instead, Blackmun said, 'But surely, Lewis, you were approached as a boy?' There is no record of a response."

Was Powell being honest.... Of course Powell knew homosexuals. The question was whether he acknowledged anyone he knew as a homosexual. The answer is that he did not, largely because he did not want to. In his upbringing, homosexuality was at least a failing, if not a sin. He later came to think of it as an abnormality, an affliction for which its bearers perhaps should not be blamed but which was nevertheless vaguely scandalous. He would not make assumptions. He would not infer such misfortune without direct knowledge. Powell would not have known someone was homosexual unless that person told him so.

John C. Jeffries, JUSTICE LEWIS F. POWELL, JR at 528.

Perhaps here, at last, we might be permitted to draw the line. The fact that judges or Justices might tend to decide a case one way or another because of their political affiliations or features of their personal histories may be relevant for purposes of historical or political study, but it is not *legally* relevant. It is not relevant to the question of whether the case appeared before the Court in a procedurally correct fashion, what the most appropriate rule of decision was, and what the best application of that rule to the situation before the Court should have been. The reason it is not relevant to these questions is because in answering them we are asked to put ourselves in the position of the judge. We take the facts that might (theoretically or hypothetically) be available to the judge as potentially relevant (with the caveat that in determining the best rule we might want to know facts about the future not available to the judge-- more about this later), but we do not take the judge's personal history, politics, or prejudices as part of those facts, because we replace the judge's decisionmaking with our own. Thus, the fact that a judge was motivated—either politically or personally-- to decide a case in one way or another is not a relevant fact in our determination of how the case should be decided.

Nevertheless, matters are not so simple as that. Although we substitute our own judgment for that of the judge, we still have to recognize that decisions like the one before us will be made by mortal human beings with their own predilections and prejudices. Thus, we want to know about Powell's background in part because we want to know what we are buying into when we allow or forbid judges to articulate the scope of fundamental rights in a constitutional system. That is to say, the question of the proper exercise of the judicial role—a central issue in *Marbury v. Madison* itself-- is very much bound up with the sorts of persons who become judges, the sorts of conflicts and

temptations that they face and sorts of limitations of experience and perspective that they possess.<sup>44</sup>

Moreover, we have to take into account the fact that other judges will be employing whatever we decide as a precedent in later cases, and still others will use the decision as an example of what judges are permitted and are not permitted to do. Finally, other actors in the political system-- like executive and administrative officials-- will have to carry out the decisions, and their degree of confidence in the judiciary may be quite important in determining the future success of the rule we announce. Put another way, the question of the proper conduct of judges, their strengths and limitations, and the proper institutional constraints that attend the judicial role are a potential issue in every constitutional case, and, indeed, we might suggest, in every legal case. So one reason that we might want to know about the conflict of interest that Marshall faced in *Marbury v. Madison*, and that the members of the Court faced in *Bush v. Gore*, is not because we ourselves face such a conflict, but because judges in general are constantly facing conflicts and temptations that stem from the fact that they have particular backgrounds and political views. Moreover, whether or not they succumb to them, other people in the

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<sup>44</sup> Interestingly, in his dissent in *Casteneda v. Partida*, 430 U.S. 482 (1977). Justice Powell argued that allegations of systematic bias against Mexican-Americans in jury selection were unfounded because “the judge who appointed the jury commissioners and later presided over respondents trial was Mexican American [and] three of the five jury commissioners were Mexican-American” *Id.* at 517 (Powell, J., dissenting). Indeed, Justice Powell described these facts about the judge and jury commissioners as “critical” to the proper resolution of the case. *Id.* at 501 (Powell, J., dissenting, joined by Chief Justice Burger and Justice Rehnquist). His argument, presumably, was that Mexican Americans would not discriminate against other Mexican Americans. Justice Marshall disagreed, arguing that Mexican-American officials might well hold invidious stereotypes about fellow Mexican-Americans. *Id.* at 507. If Powell is correct that the identity of judges can increase our confidence in their resolution of particular cases, there seems to



constitutional system will be aware of those conflicts and temptations and will respond accordingly.

In fact, one of the interesting consequences of this line of argument is that it might lead us to a more general skepticism about judicial review. The fact that Powell was clueless about homosexuality and that Marshall was a Federalist crony might be a reason to keep judges out of the business of judicial review altogether, and so, ironically, would suggest that *Bowers*, which rejected a constitutional challenge to sodomy laws, might have been rightly decided, and that *Marbury*, which asserted judicial power to strike down laws, was wrongly decided. In the alternative, this argument might lead us to think that structural and political restraints should be placed on how judges are selected and appointed in order to improve the quality of judicial decision. Finally, it might lead us to think to temper our views about judicial review without arguing that the practice should be completely abandoned or significantly curtailed.<sup>45</sup>

If the question of judicial role and its relationship to politics always lurks in the background of judicial decisionmaking, then it will not be possible easily to put an airtight boundary on the relevant "facts" of a case. Our decision as to what we will count as the relevant "facts" in studying the law will rest upon a set of pragmatic as well as pedagogical considerations. And one reason to supplement the facts as they are usually taught in law school courses with other facts about the political and social milieu in which decision occurs is precisely to disturb taken-for-granted assumptions about what cases mean and what legal reasoning consists in and should consist in. That is part of the

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be no good reason why such facts might not also diminish our confidence in their ability to judge cases fairly.

<sup>45</sup> See Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

reason why we have put the facts of *Marbury* into question, for doing so also helps put into question what *Marbury* really means or should really mean.

In short, questioning what are the "facts" of a particular case is yet another way of questioning the legal canon.<sup>46</sup> That is because, as we have seen, the unconscious categorization of which facts are suitable for the specifically *legal* study of cases is an important way that the discipline of law is constituted,<sup>47</sup> and distinguished from other forms of knowledge and other forms of reasoning.

The recitation of relevant facts requires decisions about what to leave in and what to leave out. It involves both a selective contraction and expansion of concern. We cannot list in this short essay all of the ways that lawyers and judges engage in selective appraisals of facts in order to establish the boundaries of legal reasoning and the perimeters of legal vision. But we can identify two large dimensions through which this selective attention occurs—the horizontal and the temporal.

The horizontal dimension concerns what roughly contemporaneous facts about the social world should count as the relevant milieu in which the case appears. The temporal dimension concerns how far back in time, and how far ahead in the future, we should look to understand the proper resolution of the case. Both dimensions are equally important in producing forms of legal reason that are understood to be separate from politics. And both dimensions lead to interesting puzzles and complications as soon as we begin to interrogate them.

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<sup>46</sup> See J.M. Balkin and Sanford Levinson, *The Canons of Constitutional Law*, 111 *Harv. L. Rev.* 963 (1998).

<sup>47</sup> *Id.* at 985-987.

The horizontal dimension is implicated when we ask whether the political milieu of *Marbury* should be counted as part of the facts of the case. As we have seen in the case of *Marbury*, expanding our vision to encompass that milieu often helps us understand what the legal controversy was really about and why people were so agitated about it. But another reason to expand the facts horizontally is that the political and social milieu surrounding a decision may help to legitimate or delegitimize the reasoning used in deciding the case. Consider as examples *Brown v. Board of Education*, and the companion case of *Bolling v. Sharpe*, which concerned segregation of public schools in Washington D.C..

Could the legal issues in *Brown* and *Bolling* really be understood in splendid isolation from the social structures of race relations in which the controversy over public schooling was embedded? Indeed, could the constitutionality of the segregation of the public schools be considered apart from the widespread practices of Jim Crow in areas ranging from hotels to funeral parlors, golf courses, theaters, bathrooms and water fountains? The great Columbia legal scholar Herbert Wechsler appeared to think so. As he told his audience at the Harvard Law School in 1959,<sup>48</sup> five years after *Brown* and well before any significant desegregation had occurred in the former Confederate states, the crucial question was the relatively abstract one of whether there was any neutral principle that could decide between claims for desegregation and the principle of freedom

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<sup>48</sup> See, Herbert Wechsler, *Toward Neutral Principles in Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959):

For me, assuming equal facilities, the question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie elsewhere, in the denial by the state of freedom to associate.... But if the freedom of association is denied by segregation, integration forces an

of association. For Wechsler, the long and pervasive practice of Jim Crow did not help decide this question. He pointed out, somewhat unconvincingly, that he was sure that his black colleague Charles Hamilton Houston "did not suffer more than I in knowing we had to go to Union Station to lunch together during the recess" of Supreme Court arguments because it was one of the few places that a black and a white man could eat in the pervasively segregated District of Columbia.<sup>49</sup> Yet, according to Wechsler, neither his sadness, nor that of his colleague Houston's, were at all germane to the facts relevant to deciding *Brown*. The daily humiliations visited upon Houston, who, after all, lived in Washington, were simply not something that a well-trained lawyer should regard as a relevant "fact" of the case.

By contrast, Charles Black argued that the social structure of America, and its pervasive practices of racial subordination, which touched almost every aspect of life in the deep South, were the central facts of the case in *Brown*, whether or not those facts appeared in the text of Chief Justice Warren's opinion.<sup>50</sup> As William Eskridge has pointed out, whether one regards these features of American society as part of the case depends on what one's conception of "law" is. Like many other legal scholars of his

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association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved....?

<sup>49</sup> Wechsler, *Toward Neutral Principles*, at 34.

<sup>50</sup> "Segregation in the South," Black explained, "comes down in apostolic succession from slavery and the *Dred Scott* case." Charles Black, *The Lawfulness of the Segregation Decisions*, 69 *YALE L. J.* 421, 421 (1960). Pretending that segregation was not about subordination was folly:

First, a certain group of people is "segregated." Secondly, at about the same time, the very same group of people, down to the last man and woman, is barred, or sought to be barred, from the common political life of the community -- from all political power. Then we are solemnly told the segregation is not intended to harm the segregated race, or to stamp it with the mark of inferiority. How long must we keep a straight face? Black, *supra* at 425.

generation, Wechsler could disregard these features of American society as legally irrelevant, indeed, had to disregard them, because he “had no vision of ‘law’ that could fully comprehend or incorporate this sort of argument.”<sup>51</sup>

Ironically, it is precisely the history of racial segregation in the South and the deep commitment of many of its white citizens to preserving an existing racial hierarchy that helps us understand why Chief Justice Warren’s opinion does such a remarkably poor job in setting out these facts. Warren’s refusal to state the facts of the case -- the pervasive history of racial discrimination in the United States from slavery onward -- was motivated by his desire to achieve a unanimous decision and, equally importantly, to avoid enflaming a white South that benefited from the very system of racial subordination that Warren did not dare mention and would have to acquiesce in the future dismantling of this subordination.<sup>52</sup>

In short, deciding what counts as “the facts of the case” in this sense helps determine what one thinks should legitimately form part of legal reasoning, and what features of social life legal argument should be permitted to criticize or interrogate. The construction of the facts of the case separates those facts that well-trained lawyers should regard as relevant to legal reason from those features of a situation that the well-trained lawyer must regard as legally inadmissible, or, even worse, actively confusing the issue

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<sup>51</sup> William N. Eskridge, *Public Law From the Bottom Up*, 97 W. Va L. Rev. 141, 147 (1994).

<sup>52</sup> See Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in Paul Gewirtz and Peter Brook, eds., *LAW'S STORIES* 187, 197-199 (1996). As E. Barrett Prettyman, who was clerking for Robert Jackson during the *Brown* term, wrote, “[Warren] had come from political life and had a keen sense of what you could say in this opinion without getting everybody’s back up. His opinion took the sting off the decision, it wasn’t accusatory, and it didn’t pretend that the Fourteenth Amendment was more helpful than the history suggested.” Quoted in *id.* at 198.

and distracting attention away from the unsullied application of law and legal reasoning. In this way, the construction of "the facts" is, yet again, another technique in the endless effort to separate law from politics and, therefore, to postulate and secure the relative autonomy of legal reasoning from political considerations.

The horizontal expansion of the facts of the case also affects our judgments as to how and why the Constitution changes. Taking the political milieu into account helps us see the evolution of judicial doctrine not as the isolated decisions of heroic individuals but as part of a larger process of changing values among elites and the general population. This helps us see that constitutional doctrine evolves both in response and in reaction to larger changes in beliefs and attitudes of the general public and policy elites, including those elites from whom members of the judiciary themselves are drawn.

Consider, for example, whether the Cold War should be treated as part of the facts of *Brown*,<sup>53</sup> or whether the second wave of American feminism is not an ineluctable part of the facts of *Roe v. Wade*<sup>54</sup> or *Frontiero v. Richardson*<sup>55</sup> or *Craig v. Boren*.<sup>56</sup> The history of a particular time frames a legal decision by helping us to understand why people came to believe that a legal argument was reasonable or unreasonable, even if it departed markedly from previous doctrine. The Cold War, as well as World War II, brought home to many people, and particularly foreign policy elites, the need to establish America's bona fides as a defender of freedom and equality at home.<sup>57</sup> The second wave

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<sup>53</sup> See Mary Dudziak, *Cold War Civil Rights* (2001).

<sup>54</sup> 410 U.S. 113 (1973).

<sup>55</sup> 411 U.S. 677 (1973).

<sup>56</sup> 429 U.S. 190 (1976).

<sup>57</sup> Dudziak, *supra* note 54, at 29-46 (discussion of foreign policy elites); 106-115 (impact of *Brown*).

of American feminism changed the minds of (mostly male) politicians and judges about what equal citizenship for women required.

Finally, to the extent that one believes in the descriptive reality of something called popular constitutionalism,<sup>58</sup> or constitutional protestantism<sup>59</sup>--i. e., the proclivity of ordinary Americans to come to their own conclusions about constitutional requirements and to associate with one another in mass movements to promote those beliefs—one's view of the "facts" of a case will yet again be likely to be very different from that of other analysts. For a constitutional protestant, the explanation of the Court's decision in a particular case like *Brown* or *Romer v. Evans*<sup>60</sup> might include the history of social movement contestation and political activism that produces a milieu in which courts take certain constitutional claims seriously when they did not take them seriously before.<sup>61</sup>

Returning once again to *Marbury*, any statement of the "facts" of *Marbury* must include the fact that the person writing the decision had been placed there by the leader of that particular social movement called the Federalist Party as a way of frustrating the aims of the newly victorious social movement of Jeffersonian Republicanism that would supplant it. That is so even though William Marbury did not get his commission, for John Marshall would sit on the Supreme Court for many years, promoting the nationalist policies of the party that had secured his appointment. *Marbury*, in this sense is an

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<sup>58</sup> See, e.g., Larry Kramer, *THE PEOPLE THEMSELVES* (forthcoming 2004).

<sup>59</sup> See Sanford Levinson, *CONSTITUTIONAL FAITH* 29 (1988).

<sup>60</sup> 517 US 620 (1996).

<sup>61</sup> Sometimes changes in doctrine reflect the appointment of new persons to the bench who signify the strength (and legitimacy) of these social and political movements. (Consider in this context Franklin Roosevelt's appointment of avid New Dealers like Hugo Black and William O. Douglas and Felix Frankfurter, the appointment of Thurgood Marshall to the Supreme Court in 1967, or the appointments of Sandra Day O'Connor—

excellent example of partisan entrenchment, in which members of a political party attempt to stock the courts with their allies as a means of promoting their constitutional and social policy goals.<sup>62</sup> But of course, when we say that even the personnel of the judiciary and how they got appointed to their positions could be part of the facts of a case, we have gone a long way to changing our expectations about what exactly we expect a law student to understand in studying the law. That is to say, we have significantly altered what the study of law is about.

The temporal dimension of factual selection is equally significant. Just as the law student learns to exclude what happened in politics and social life roughly contemporaneously with the decision of the case, so too does the student learn, when asked to state “the facts of the case,” to exclude many things that happened both before and after a court hands down its opinion, presumably because these earlier and later features of social life are not legally relevant. But it should be abundantly clear that understanding what a case means, and why it is decided the way it is decided often cannot be divorced from these facts.

This is clearest with regard to “facts of the past.” For example, what exactly are the facts of, *The Slaughterhouse Cases*,<sup>63</sup> the Supreme Court's initial construction of the Reconstruction Amendments? Do they include merely the fact that New Orleans required all butchers to work at a central slaughterhouse? Or does understanding the case require something much more? For example, should we chastise a student if he or she

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the first woman Supreme Court Justice, and Ruth Bader Ginsburg, who had been an activist lawyer in behalf of feminist causes.)

<sup>62</sup> . See Balkin & Levinson, *Understanding the Judicial Revolution*, at 1066-1083. See also Ran Hirschl, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2003).



begins by noting the fact that the territory of the United States had been convulsed in the previous decade by a catastrophic war that left two percent of the population dead, to be followed by a remarkable struggle at both national and state levels over changing the Constitution to recognize new juridical realities purchased by the blood of the slain Union soldiers?<sup>64</sup> And what if an unusually well-informed student began his or her recitation by questioning the validity of the Fourteenth Amendment itself—pointing to the fact that the Amendment passed Congress only because Southern representatives and Senators were excluded, and that it was ratified by the necessary three quarters of the states only because Southern states were denied readmission unless they agreed to ratify the document? Would, or should any of this be relevant in assessing the Court's initial construction of the Fourteenth Amendment in *Slaughterhouse*?

The problem posed by temporality is pervasive. Consider, for example, whether Branch Rickey's 1947 decision to bring Jackie Robinson to the Brooklyn Dodgers is not an important fact in understanding the Court's willingness to decide *Brown v. Board of Education* in 1954. Even more relevant might be President Truman's willingness to take on the Joint Chiefs of Staff by ordering the desegregation of the armed forces, his successful reelection in 1948 in a campaign in which civil rights was a major issue, and his Justice Department's request in the 1950 case of *Sweat v. Painter*<sup>65</sup> that the doctrine of separate but equal be overruled.

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<sup>63</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>64</sup> We might object to the recitation not because it was irrelevant to understanding the case, but because we assume that everyone who has been admitted to law school knows the basic facts of the Civil War (although confidence in the latter assumption is by no means assured.).

<sup>65</sup> 339 US 629 (1950).

But these are events quite close in time to 1954. Should we expect a student to place the policies of segregation challenged in *Brown* within the context of political events going back at least to the Civil War and, in the case of “bloody Kansas,” to the decade prior to the outbreak of hostilities? In fact, one might reasonably conclude that going back only 100 years is not enough. Arguably, a recitation of “the facts” in *Brown* or, for that matter, *Plessy v. Ferguson*,<sup>66</sup> should begin with the arrival of the first black slaves in Jamestown, Virginia in 1619.

Time’s arrow, though beginning in the past, flies forward into the future. So should we expect a student to be able to recite the facts of what happened *after* the Court’s decision in *Brown* or *Marbury*? Understanding what a case means often requires recognizing what happened after the decision was entered. This is so for two reasons. First, the consequences that the case sets in motion often help us understand the practical effect of the case, and whether the decision was wise or ill-advised. Second the meaning of the case to later generations is produced by the later uses and interpretations of it, which continuously reframe its meaning and significance in our eyes. Thus, *Brown v. Board of Education* has acquired a whole host of meanings in the fifty years following the decision: It has become an icon of equality as well as a symbol of both what courts can do and what they cannot do in promoting important public values.<sup>67</sup> Perhaps equally important, *Marbury v Madison* has also gained a wide array of different meanings, as it has been repeatedly invoked as a symbol of judicial authority, judicial supremacy, and the Rule of Law itself.

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<sup>66</sup> 163 US 537 (1896).

Sometimes events following a case put the decision in a very different light. When a student studies *Brown v. Board of Education*, should the facts of *Brown* be limited to what happened up to the point in which Chief Justice Warren begins his opinions in the case (*Brown I* and *Brown II*), or should they include the subsequent history of the attempt actually to desegregate the public schools, including, in particular, the Topeka, Kansas schools? By the end of the twentieth century, public schools in the United States were largely de facto segregated by race.<sup>68</sup> In Topeka itself, the controversy in *Brown v. Board of Education* arose again many years later when residents tried unsuccessfully to desegregate that city's public schools.<sup>69</sup>

The facts of a given case should, ideally, include both the case's beginning and its end. But when, exactly does a case end? It is much like Zhou en-Lai's famous comment about whether the French Revolution was a success: "It's too early to tell." In the same way, perhaps it's too early to know what the end of the facts of *Brown* are, and, we might think, too early to know the facts of *Marbury*—the case in which the Court pronounces its constitutional authority to review the constitutionality of federal legislation and launches a grand and continuing experiment in the use of judicial review in a constitutional democracy.

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<sup>67</sup> See Jack M. Balkin, "*Brown v. Board of Education: A Critical Introduction*," in *What Brown v. Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Famous Civil Rights Opinion* (2001).

<sup>68</sup> Jack M. Balkin, *Brown v. Board of Education: A Critical Introduction*, in *What Brown v. Board of Education Should Have Said* 6 (2001). See generally James T. Patterson, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

<sup>69</sup> *Brown v. Board of Educ.*, 671 F. Supp. 1290 (D.Kan. 1987), rev'd, 892 F.2d 851, (10th Cir 1989), vacated 503 U.S. 978 (1992), Reinstated by: *Brown v. Board of Educ.*, 978 F.2d 585, (10th Cir. Kan. 1992).

The attempt to cut off the facts of *Marbury* in 1803, like the attempt to cut off the facts of *Brown* in 1954, or even 1955, when *Brown II* is decided, is an attempt to cabin in legal discourse and fix those features of the social world that are legally relevant. It is not at all clear, however, that the legal meaning of *Marbury* or *Brown* can be so cabined by eliminating all reference to the events that occurred years later. This is especially true if one thinks that consequences matter in judicial decisionmaking.<sup>70</sup> If one reason why we think a legal decision is good or bad is its consequences, then, surely, one would think that what actually happened later on would be relevant to assessing the cogency of the court's analysis.<sup>71</sup>

These are only some of the issues at stake in the seemingly innocent question, "What are the facts of *Marbury*?" Indeed, there is *nothing* innocent either in the question or in its answer. For the question of what the facts of legal cases are is one of the most central -- if unacknowledged-- issues in shaping the legal canon, and thus, in shaping the very discipline of law itself.

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<sup>70</sup> See Philip Bobbitt, *CONSTITUTIONAL INTERPRETATION* \_\_ (1991), which sets out the place of "prudential" reasoning about consequences as among the other legitimate "modalities" of text, structure, history, doctrine, and "ethos."

<sup>71</sup> One might insist that what makes a decision good or bad is not what consequences actually ensue, but what consequences a court might reasonably have predicted at the time it handed down its decision. Nevertheless, what actually happens later on may change our attitudes about what it was reasonable to have predicted in the first place. Moreover, it also affects our views about judges' capacities to predict future consequences. If we think that judges are not particularly good at predicting the future consequences of their decisions, we might think twice about placing such confidence in their ability to exercise the powers of judicial review fairly and wisely.).