READING 3
Judicial Power

Constitutional Law for a Changing America

Institutional Powers and Constraints

11th Edition

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CHAPTER TWO

THE JUDICIARY

BETWEEN 1932 AND 1983 Congress attached legislative veto provisions to more than two hundred laws. Although these provisions took different forms, they usually authorized one house of Congress to invalidate a decision of the executive branch. One provision in the Immigration and Nationality Act gave the U.S. attorney general power to suspend the deportation of aliens, but Congress reserved the authority to veto any such suspension by a majority vote in either house. In *Immigration and Naturalization Service v. Chadha* (1983), the U.S. Supreme Court held that this device violated specific clauses as well as general principles contained in the U.S. Constitution. In doing so, as Justice Byron White wrote in his dissent, the Court sounded the "death knell" for the legislative veto.

In many ways, the Court's action was less than startling. For over two centuries federal courts have exerted the power of judicial review—that is, the power to review acts of government to determine their compatibility with the U.S. Constitution. And even though the Constitution does not explicitly give them such power, the courts' authority to do so has been challenged only occasionally. Today we take for granted the notion that federal courts may review government actions and strike them down if they violate constitutional mandates.

Nevertheless, when courts exert this power, as the U.S. Supreme Court did in *Chadha*, they provoke controversy. Look at it from this perspective: Congress, composed of officials we *elect*, passed these legislative veto provisions, which were then rendered invalid by a Supreme Court of *unelected* justices. Such an occurrence strikes some people as quite odd, perhaps even antidemocratic. Why should we Americans allow a branch of government over which we have no electoral control to review and nullify the actions of the government officials we elect to represent us?

The alleged antidemocratic nature of judicial review is just one of many controversies surrounding the practice. In this chapter, we review others—both in theory and in practice. First, however, we explore Article III of the U.S. Constitution and the Judiciary Act of 1789, which serve as foundations of judicial power. explore the parameters of the judiciary's authority. (We'll discuss these in class.)

Next, we'll consider the development of judicial review. Judicial review is the primary check that the judiciary has on the other branches of government.

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JUDICIAL REVIEW

Judicial review is a powerful tool of federal courts and there is some evidence that the framers intended courts to have it, but, as we noted earlier, it is not mentioned in the Constitution. Yet, even before ratification of the Constitution, courts in seven states, in at least eight cases, held that a state law violated a state constitution (or some other fundamental charter). So, too, early in U.S. his-tory, federal courts claimed it for themselves. In ***Hylton v. United States*** (1796), Daniel Hylton challenged the constitutionality of a 1793 federal tax on carriages. According to Hylton, the act violated the constitutional mandate that direct taxes must be apportioned on the basis of population (i.e., the percentage of revenue gen-erated by taxpayers in a state needs to equal that state's share of the U.S. population). With only three justices participating, the Court upheld the act. But even by con-sidering the challenge, the Court in effect reviewed the constitutionality of an act of Congress.

Not until 1803, however, would the Court invoke judicial review to strike down legislation it deemed incompatible with the U.S. Constitution. That decision came in the landmark case *Marbury v. Madison*. How does Chief Justice Marshall justify the Court's power to strike down legislation in light of the failure of the newly framed Constitution to provide it?

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Marbury v. Madison

5 U.S. (1 Cranch) 137 (1803)
http://caselaw.findlaw.com/us-supreme-court/5/137.html
Vote: 4 (Chase, Marshall, Paterson, Washington)
0

OPINION OF THE COURT: *Marshall*

NOT PARTICIPATING: *Cushing, Moore*

FACTS:

When voting in the presidential election of 1800 was over, it was apparent that Federalist president John Adams had lost after a long and bitter campaign, but it was not known who had won.[14] The Electoral College voting resulted in a tie between the Republican candidate, Thomas Jefferson, and his running mate, Aaron Burr, and the election had to be settled in the House of Representatives. In February 1801 the House elected Jefferson. This meant that the Federalists no longer controlled the presidency; they also lost their majority in Congress. Prior to the election, the Federalists controlled more than 56 percent of the 106 seats in the House and nearly 70 percent of the 32 seats in the Senate. After the election, those percentages declined to 35 percent and 44 percent, respectively.[15]

With these losses in the elected branches, the Federalists took steps to maintain control of the third branch of government, the judiciary. The lame-duck Congress enacted the Circuit Court Act of 1801, which created six new circuit courts and several district courts to accommodate the new states of Kentucky, Tennessee, and Vermont. These new courts required judges and support staff such as attorneys, marshals, and clerks. During the last six months of his term in office Adams made more than two hundred nominations, with sixteen judgeships (called the "midnight appointments" because of the rush to complete them before Adams's term expired) approved by the Senate during his last two weeks in office.

An even more important opportunity had arisen in December 1800, when the third chief justice of the United States, Federalist Oliver Ellsworth, resigned so that Adams—not Jefferson—could name his replacement. Adams first offered the post to John Jay, who had served as the first chief justice before leaving the Court to take the then-more-prestigious office of governor of New York. When Jay refused, Adams turned to his secretary of state, John Marshall, an ardent Federalist. The Senate confirmed Marshall in January 1801, but he also continued to serve as secretary of state.

In addition, the Federalist Congress passed the Organic Act of 1801, which authorized Adams to appoint forty-two justices of the peace for the District of Columbia. It was this seemingly innocuous law that set the stage for the dramatic case of *Marbury v. Madison*. In the confusion of the Adams administration's last days in office, Marshall, the outgoing secretary of state, failed to deliver some of these commissions. When the new administration came into office, James Madison, the new secretary of state, acting under orders from Jefferson, refused to deliver at least five commissions.[16] Indeed, some years later, Jefferson explained the situation in this way:

> I found the commissions on the table of the Department of State, on my entrance into 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.[17]

As a result, in 1801 William Marbury and three others who were denied their commissions went directly to the Supreme Court and asked it to issue a writ of mandamus ordering Madison to deliver the commissions. Marbury thought he could take his case directly to the Court because Section 13 of the 1789 Judiciary Act gives the Court the power to issue writs of mandamus to anyone holding federal office. The relevant passage of Section 13 reads as follows:

> The Supreme Court shall . . . have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specifically provided for; and shall have power to issue . . . mandamus in cases warranted by the principles and usages of law, to any

[14]For analyses of the events surrounding *Marbury*, see Jack Knight and Lee Epstein, "On the Struggle for Judicial Supremacy," *Law and Society Review* 30 (1996): 87–120; and Dean Alfange Jr., "*Marbury v. Madison* and Original Understandings of Judicial Review: In Defense of Traditional Wisdom," *Supreme Court Review* (1994): 329–446.

[15]Data are from the House and Senate Web sites: http://history.house.gov/Institution/Party-Divisions/Party-Divisions/ and http://www.senate.gov/history/partydiv.htm.

[16]Historical accounts differ, but it seems that Jefferson decreased the number of Adams's appointments to justice of the peace positions to thirty from forty-two. Twenty-five of these thirty appointees received their commissions, but five, including William Marbury, did not. See Francis N. Stites, *John Marshall* (Boston, MA: Little, Brown, 1981), 84.

[17]Quoted in Charles Warren, *The Supreme Court in United States History*, vol. 1 (Boston, MA: Little, Brown, 1922), 244.

courts appointed, or persons holding office, under the authority of the United States.

In this volatile political climate, Marshall, now serving as chief justice, was perhaps in the most tenuous position of all. On one hand, he had been a supporter of the Federalist Party, which now looked to him to "scold" the Jefferson administration. On the other, Marshall wanted to avoid a confrontation between the Jefferson administration and the Supreme Court, which not only seemed imminent but also could end in disaster for the Court and the struggling nation. In fact, Jefferson and his party were so annoyed with the Court for agreeing to hear the *Marbury* dispute that they began to consider impeaching Federalist judges—with two justices (Samuel Chase and Marshall himself) high on their lists. Note, too, the year in which the Court handed down the decision in *Marbury*. The case was not decided until two years after Marbury filed suit because Congress and the Jefferson administration had abolished the 1802 term of the Court.

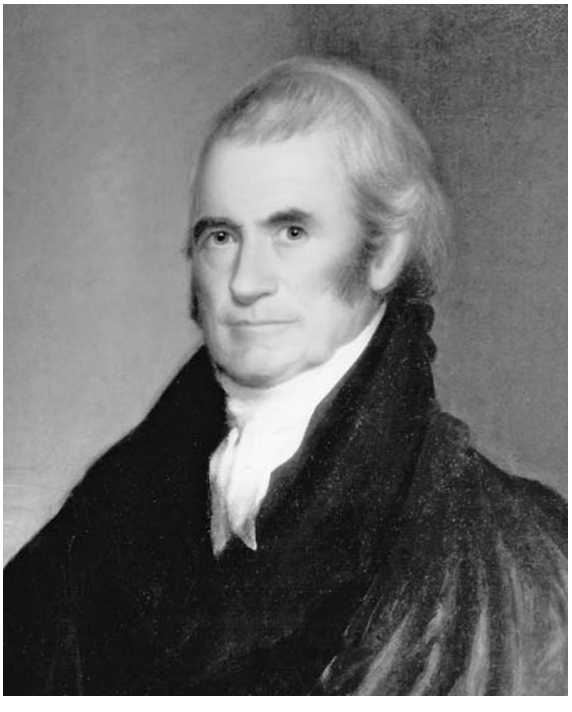
ARGUMENTS:

For the applicant, William Marbury:

- After the president has signed a commission for an office, it comes to the secretary of state. Nothing remains to be done except for the secretary to perform those ministerial acts that the law imposes upon him. His duty is to seal, record, and deliver the commission. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.
- Congress has expressly given the Supreme Court the power of issuing writs of mandamus.
- Congress can confer original jurisdiction in cases other than those mentioned in the Constitution. The Supreme Court has entertained jurisdiction on mandamus in several cases—*United States v. Lawrence*, 3 U.S. 42 (1795), for example. In this case and in others, the power of the Court to issue writs of mandamus was taken for granted in the arguments of counsel on both sides. It appears there has been a legislative construction of the Constitution upon this point, and a judicial practice under it, since the formation of the government.

For James Madison, secretary of state:

(Madison and Jefferson intentionally did not appear in court, to emphasize their position that the proceedings had no legitimacy. So it seems that Madison was unrepresented and no argument was made in his behalf.)



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John Marshall

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William Marbury

THE FOLLOWING OPINION OF THE COURT WAS DELIVERED BY THE CHIEF JUSTICE.

The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1st. Has the applicant a right to the commission he demands?

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of enquiry is,

1st. Has the applicant a right to the commission he demands? . . .

In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property. . . .

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

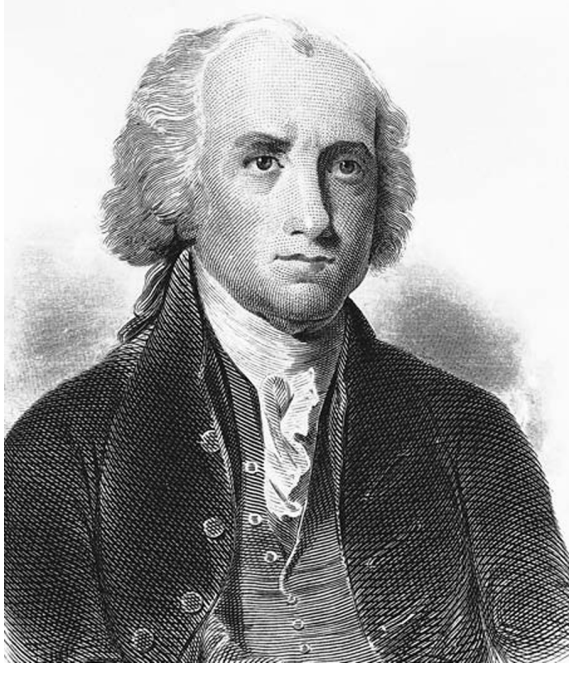
1st. The nomination. This is the sole act of the President, and is completely voluntary.

2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.

3d. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States." . . .

It is . . . decidedly the opinion of the Court that, when a commission has been signed by the President, the appointment is made, and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State . . .

The discretion of the Executive is to be exercised until the appointment has been made. But having once made the



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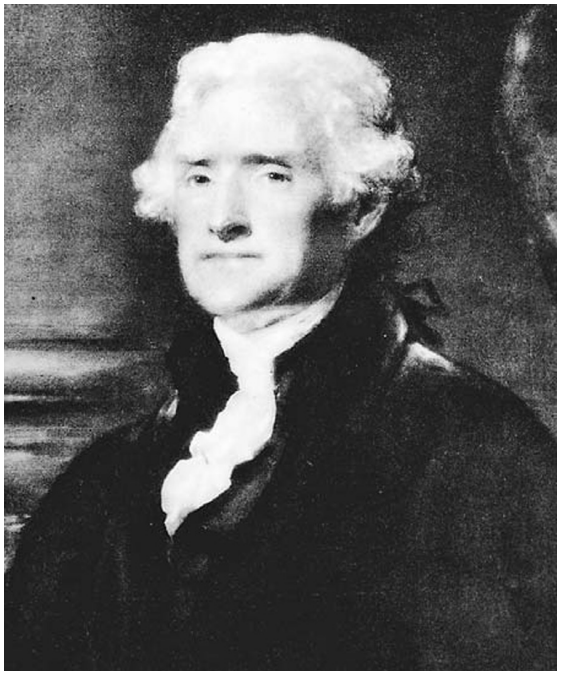
James Madison



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Thomas Jefferson

appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years independent of the Executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second enquiry; which is,

2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case. . . .

It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt from legal investigation or exclude the injured party from legal redress. . . .

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the Executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive, and for any misconduct respecting which the injured individual has no remedy?

That there may be such cases is not to be questioned. But that every act of duty to be performed in any of the great departments of government constitutes such a case is not to be admitted. . . .

It follows, then, that the question whether the legality of an act of the head of a department be examinable in a court of justice or not must always depend on the nature of that act.

If some acts be examinable and others not, there must be some rule of law to guide the Court in the exercise of its jurisdiction.

In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and, being entrusted to the Executive, the decision of the Executive is conclusive. . . .

But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law, is amenable to the laws for his conduct, and cannot at his discretion, sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the Executive, merely to execute the will of the President, or rather to act in cases in which the Executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. . . .

It is then the opinion of the court,

1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be enquired whether,

3dly. He is entitled to the remedy for which he applies. This depends on:

1. The nature of the writ applied for, and
2. The power of this court.

1. The nature of the writ . . . This writ, if awarded, would be directed to an officer of government, and its mandate to him would

be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty and which the Court has previously determined or at least supposes to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right. These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed must be one to whom, on legal principles, such writ may be directed . . .

With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate, and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that, in such a case as this, the assertion by an individual of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some as an attempt to intrude into the cabinet and to intermeddle with the prerogatives of the Executive.

It is scarcely necessary for the Court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the Court is solely to decide on the rights of individuals, not to inquire how the Executive or Executive officers perform duties in which they have a discretion. Questions, in their nature political or which are, by the Constitution and laws, submitted to the Executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the Executive can be considered as having exercised any control; what is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim or to issue a mandamus directing the performance of a duty not depending on Executive discretion, but on particular acts of Congress and the general principles of law? . . .

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which Executive discretion is to be exercised, in which he is the mere organ of Executive will, it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals . . . it is not perceived on what ground the Courts of the country are further excused from the duty of giving judgment that right to be done to an injured individual than if the same services were to be performed by a person not the head of a department.

This, then, is a plain case of a mandamus, either to deliver the commission or a copy of it from the record, and it only remains to be inquired:

Whether it can issue from this Court.

The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."

The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."

It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplussage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a mandamus, it must be shewn to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to enquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution—would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any state." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law?

The constitution declares that "no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

"No person," says the constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the Framers of the constitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to *the constitution*, and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Scholars differ about Marshall's opinion in *Marbury*, but supporters and critics alike acknowledge Marshall's shrewdness. As the great legal scholar Edward S. Corwin wrote,

> Regarded merely as a judicial decision, the decision of *Marbury v. Madison* must be considered as most extraordinary, but regarded as a political pamphlet designed to irritate an enemy [Jefferson] to the very limit of endurance, it must be regarded a huge success.[18]

To see Corwin's point, we only have to think about the way the chief justice dealt with a most delicate political situation. By ruling against Marbury—who never did receive his judicial appointment *(see Box 2-2)*—Marshall avoided a potentially devastating clash with Jefferson. But, by exerting the power of judicial review, Marshall sent the president a clear signal that the Court would be a major player in the American government. Other scholars, however, point out that judicial review emerged not because of some brilliant strategic move by Marshall in the face of intense political opposition, but because it was politically viable at the time. According to these scholars, Jefferson favored the establishment of judicial review and Marshall realized this. So Marshall simply took the rational course of action: deny Marbury his commission (which Jefferson desired) and articulate judicial review (a move that Jefferson also approved).[19]

Either way, the decision helped to establish Marshall's reputation as perhaps the greatest justice in Supreme Court history. *Marbury* was just the first in a long line of seminal Marshall decisions, including two you will have a chance to read later in the book, *McCulloch*

BOX 2-2

Aftermath . . . *Marbury v. Madison*

FROM MEAGER beginnings, William Marbury gained political and economic influence in his home state of Maryland and became a strong supporter of John Adams and the Federalist Party. Unlike others of his day who rose in wealth through agriculture or trade, Marbury's path to prominence was banking and finance. At age thirty-eight he saw his appointment to be a justice of the peace as a public validation of his rising economic status and social prestige. Marbury never received his judicial position; instead, he returned to his financial activities, ultimately becoming the president of a bank in Georgetown. He died in 1835, the same year as Chief Justice John Marshall.

Other participants in the famous decision played major roles in the early history of our nation. Thomas Jefferson, who refused to honor Marbury's appointment, served two terms as chief executive, leaving office in 1809 as one of the nation's most revered presidents. James Madison, the secretary of state who carried out Jefferson's order depriving Marbury of his judgeship, became the nation's fourth president, serving from 1809 to 1817. Following the *Marbury* decision, Chief Justice Marshall led the Court for an additional thirty-two years. His tenure was marked with fundamental rulings expanding the power of the judiciary and enhancing the position of the federal government relative to the states. He is rightfully regarded as history's most influential chief justice.

Although the *Marbury* decision established the power of judicial review, it is ironic that the Marshall Court never again used its authority to strike down a piece of congressional legislation. In fact, it was not until *Scott v. Sandford* (1857), more than two decades after Marshall's death, that the Court once again invalidated a congressional statute.

Sources: John A. Garraty, "The Case of the Missing Commissions," in *Quarrels That Have Shaped the Constitution,* rev. ed., ed. John A. Garraty (New York: Harper & Row, 1987); and David F. Forte, "Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace," *Catholic University Law Review* 45 (1996): 349–402.

[18]Edward S. Corwin, "The Establishment of Judicial Review—II," *Michigan Law Review* 9 (1911): 292.

[19]For more on this view, see Knight and Epstein, "On the Struggle for Judicial Supremacy."

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Although he never received his commission as a justice of the peace, William Marbury remained an affluent businessman. He lived in this home on what is today M Street in the Georgetown neighborhood of Washington, D.C. It currently serves as the Embassy of Ukraine.

v. Maryland (1819) and *Gibbons v. Ogden* (1824). Most important here, *Marbury* asserted the Court's authority to review and strike down government actions that were incompatible with the Constitution. In Marshall's view, such authority, while not explicit in the Constitution, was clearly embraced by the document. Was he correct? His opinion makes a plausible argument, but some judges and scholars have suggested otherwise. [We'll discuss their views in class.]