CHAPTER 1

THE SUPREME COURT'S AUTHORITY AND ROLE

It is traditional to begin the examination of American constitutional law with opinions from the Supreme Court presided over by Chief Justice John Marshall early in the nineteenth century. Attention to Marshall Court cases is more than a ritualistic bow to historical landmarks; key cases of this early period remain important today. Marbury v. Madison represents the Court's first and still most elaborate justification of its power of judicial review. Marbury remains subject to multiple interpretations. On one view, the decision is simply an incidental byproduct of the ordinary judicial function in deciding lawsuits: to look to the governing law, to consider the Constitution as one relevant source of law, and, in cases of conflicting legal statements, to give priority to the Constitution and to refuse enforcement of any contravening legal norm. On another view, the decision reads the Constitution as endowing the Court with the power to police the other branches, acting as the central guardian of constitutional principles and the special enforcer of constitutional norms.

Assertion of the power of judicial review did not spring fullblown in 1803: it reflected a variety of earlier justifications. The purpose of the materials that follow is to develop this history and to explore the nature and scope of the Supreme Court's authority. Section 1 discusses Marbury v. Madison, its antecedents and its meaning. Section 2 examines Supreme Court review of state court judgments. Section 3 asks whether the Court's interpretive authority is exclusive or shared with the other branches. And section 4 sets forth the limits on constitutional adjudication under the various "case or controversy" requirements.

SECTION 1. THE POWER OF JUDICIAL REVIEW

The Supreme Court's foundational assertion of judicial review arose in a case about an undelivered commission. Before ceding power to the incoming Jefferson administration in March 1801, the outgoing Federalist administration of President John Adams made a rash of last-minute judicial appointments. William Marbury was one of those named a justice of the peace for the District of Columbia. Although he had received the nomination of the President and the advice and consent of the Senate, and although his commission had been signed by the President and sealed by outgoing Secretary of State John Marshall, his commission, like that of several others, was not delivered before the end of Adams's term. The Jefferson Administration chose to disregard the undelivered commissions.

Marbury and some disappointed colleagues decided to go directly to the Supreme Court to seek a writ of mandamus to compel Jefferson's Secretary of

State, James Madison, to deliver their commissions. (For background on their choice of this forum, rather than the new Circuit Court for the District of Columbia, see Bloch, "The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?," 18 Const. Comm. 607 (2001).) Their motion was supported by affidavits including one by John Marshall's brother, James, attesting to the circumstances under which the commissions had been signed and sealed but not timely delivered. Because the new Republican government cancelled two Supreme Court sittings, the Court did not announce a decision on this 1801 request until February 1803:

Marbury v. Madison

1 Cranch (5 U.S.) 137, 2 L.Ed. 60 (1803).

The opinion of the Court was delivered by Chief Justice [MARSHALL]:

At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to show cause why a mandamus should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a mandamus. 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].

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?

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

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

The first object of inquiry is—1st. Has the applicant a right to the commission he demands?

[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].

[To] withhold [Marbury's] 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 inquiry; which is: 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. [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 enquire whether there be in its composition any ingredient which shall exempt it 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].

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. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. 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 [that Marbury has a] 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 inquired whether [he] is entitled to the remedy for which he applies. This depends on—1st. The nature of the writ applied for; and 2d. The power of this court.

1st. 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; and the person applying for it must be without any other specific and legal remedy.

1st. 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 enquire 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?

[Where the head of a department] 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].

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

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."[1]

1. The full text of Section 13 of the Judiciary Act of 1789, 1 Stat. 73, reads: "And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusive-

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 surplusage, 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].

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

ly all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and 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."

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 shown 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 recognize 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 endeavors 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 BACKGROUND AND MEANING OF MARBURY v. MADISON

1. *The political and historical setting*. The Marbury case represented just one clash between the Jeffersonian Republicans and the Marshall Court over the power of the federal judiciary. John Marshall, Secretary of State in the Cabinet of lame-duck Federalist President John Adams, was nominated as Chief Justice in January 1801 and took his oath of office on February 4, 1801. On February 17, the House of Representatives elected Thomas Jefferson President. Marshall continued to act as Secretary of State through March 3, 1801, the end of Adams's term. Indeed, on March 4, 1801—the day Marshall as Chief Justice administered the oath of office to new President Jefferson—he agreed to comply with Jefferson's request "to perform the duties of Secretary of State until a successor be appointed." James Madison, the defendant in Marbury, became Marshall's successor.

Four days before Jefferson's election, the Federalist Congress began efforts to maintain control of the federal judiciary. The Circuit Court Act of February 13, 1801, created sixteen Circuit Court judgeships that went to Federalists nominated during the last two weeks of Adams's term (the so-called "midnight judges"). Marbury and his co-petitioners were nominated to positions as justices of the peace created under the Organic Act of the District of Columbia passed February 27, 1801, less than a week before the end of Adams's term. Adams named 42 justices on March 2, 1801, and the Senate confirmed them on March 3, Adams's last day in office. The commissions of the petitioners in the Marbury case had been signed by Adams—as well as signed and sealed by Secretary of State Marshall—but not all of them had been delivered by the end of the day, and new President Jefferson chose to treat them as a "nullity." As Marshall wrote two weeks later, "I should [have] sent out the commissions which had been signed & sealed but for the extreme hurry of the time."

The Jeffersonians soon demonstrated that they would not complacently accept Federalist entrenchment in the judiciary: they made repeal of the Circuit Court Act of 1801 an early item of business in the new Congress. The 1801 Act was repealed on March 31, 1802, while the Marbury case was pending in the Supreme Court. During these congressional debates, a few Jeffersonians questioned the Court's authority to consider the constitutionality of congressional acts. In still another sign of mounting hostility to the Court, Congress abolished the June and December Terms of the Supreme Court created by the 1801 Act and provided that there would be only one Term, in February. Accordingly, there was no Court session in 1802; the Court that had received Marbury's petition in December 1801 could not reconvene until February 1803.

Wielding a still more potent weapon early in 1802, the Jeffersonian House voted to impeach Federalist District Judge John Pickering of New Hampshire, and many feared that impeachment of Supreme Court Justices would follow. The choice of Pickering as the first target, however, was a tragic blunder. Pickering, both mentally ill and alcoholic, was plainly incompetent to serve as a judge, but it took some stretching to convert this into "Treason, Bribery, or other high Crimes and Misdemeanors" as required by Art. II, § 4, of the Constitution. Nevertheless, the Senate voted to remove Pickering from office in March 1804.

On the day after Pickering's removal, Congress moved on to bigger game: the House impeached Supreme Court Justice Samuel Chase. To the Jeffersonians, Chase was a glaring example of Federalist abuse of judicial office: he had made electioneering statements from the bench in 1800, and he had conducted several vindictive sedition trials. A few months after the Marbury decision, he provided the immediate provocation for his impeachment: in May 1803, in a partisan charge to the federal grand jury in Baltimore, he criticized the Jeffersonians' repeal of the 1801 Circuit Court Act. The Senate tried Chase early in 1805. Were judges impeachable for conduct that did not constitute an indictable offense? The debate was lengthy and important: if the case against Chase succeeded, it was widely expected, Marshall and other federal judges would be next. But the Senate vote did not produce the constitutional majority necessary to convict Chase. The impeachment weapon was deflated—it was a "farce," "not even a scare-crow," as Jefferson reluctantly concluded. The Jefferson–Marshall dispute continued, but the Court had survived the most critical stage.

2. *Was the question of judicial review avoidable?* Could Marshall have decided Marbury's case in a way that obviated any need for its final pages establishing the power of judicial review of congressional enactments? Consider the following alternative routes by which Marshall might have avoided reaching the opinion's influential conclusion:

a. *Recusal*. Marshall was intimately acquainted with the facts of the Marbury controversy. An affidavit by his own brother James was introduced to prove the existence of some of the commissions. (James Marshall stated that he was to deliver a number of the commissions but that, "finding he could not conveniently carry the whole," he returned "several of them" to his brother's office.) In view of his involvement in the controversy, Marshall might have disqualified himself from participation in the decision.

b. *Common law*. The commission was a form of property, and Marshall determined that it vested when signed and sealed. He might have decided, however, that a commission does not vest as a matter of law until its delivery. In that case, Marbury would not have been entitled to the benefit of the commission despite the previous administration's signature and seal.

c. *Political question*. Marshall determined that Marbury's right to his commission was a legal, not political question, and thus a writ of mandamus would ordinarily be appropriate. He instead might have ruled the question whether Marbury's commission must be delivered a political question committed to the unreviewable discretion of the executive branch. He might also have ruled that, as a matter of prudence, cabinet officers should not be made subject to writs of mandamus.

d. *Statutory construction*. Marshall construed § 13 of the Judiciary Act of 1789 as expanding the original jurisdiction of the Supreme Court by authorizing it to issue writs of mandamus to executive officers. He might have found instead that the Act conferred mandamus power only apposite to appellate jurisdiction, and dismissed for lack of jurisdiction since this was not an appeal. Alternatively, he might have found that the Act conferred mandamus power apposite to one of the constitutionally authorized categories of original jurisdiction, and again dismissed for lack of jurisdiction since this case did not fall into any of those categories.

e. *Constitutional interpretation*. Marshall interpreted Art. III, § 2, cl.2, as setting forth an exhaustive list of the categories of possible Supreme Court original jurisdiction. He might have interpreted the list instead as illustrative but not exhaustive, as setting a floor but not a ceiling. In this case, the statute

would not have been unconstitutional even if it were interpreted as an expansion of the Court's original jurisdiction because Art. III would not have precluded such expansion.

3. *Marshall's handiwork in Marbury*. Marshall's conspicuous avoidance of all the above escape hatches led Jefferson to belittle the decision as a mere "*obiter* dissertation" that was unnecessary to the ultimate holding of the case. Letter from Thomas Jefferson to Benjamin Rush (Mar. 24, 1801), 16 The Writings of Thomas Jefferson 241 (Lipscomb ed., 1903). One influential account holds that "[t]he decision is a masterwork of indirection, a brilliant example of Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another." McCloskey, The American Supreme Court 25 (1960; 2d ed., Levinson, 1994). On this view, the denial of mandamus shrewdly avoided an immediate confrontation with the executive while providing a shield for the Court's assertion and exercise of the power of judicial review.

Scholars have debated just how intentional this subterfuge was, with some insisting that Marshall's interpretations of § 13 and Art. III were simply incorrect, see Van Alstyne, "A Critical Guide to Marbury v. Madison," 1969 Duke L.J. 1, while others find them "a good deal closer to certain features of his contemporaries' understanding of section 13 and Article III than the traditional account assumes," see Pfander, "Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers," 101 Colum. L. Rev. 1515 (2001). Some have argued that any technical flaws in the opinion were aimed at accomplishing Marshall's larger goals. See Eskridge, "All About Words: Early Understandings of the 'Judicial Power' in Statutory Interpretation, 1776–1806," 101 Colum. L. Rev. 990 (2001) ("Although Marbury [is] counter-textual, [its] statutory sleight of hand was not a result of carelessness or inability, for the author was the most astute statutory analyst of the founding and consolidating periods.").

One interpretation of Marbury locates the opinion within the larger contemporaneous debate between Jeffersonian Republicans and Federalists over the role of the federal judiciary: "The Republicans insisted that a judiciary armed with the authority to nullify acts of Congress, and both insulated and isolated from political responsibility, would become the tyrant, bending the nation to its will. [In] the Federalist lexicon, [by contrast,] the people were 'their own worst enemies.' They would be driven by their passions to the election of demagogues (such as Jefferson) who would lead an assault on the rights of the stable and virtuous members of the community (by undermining a national judiciary that was the best guarantor of these rights). Marshall's opinion in Marbury was loyal to this vision." O'Fallon, "Marbury," 44 Stan. L. Rev. 219 (1992).

A recent, comprehensive study of the pre-Marbury case law in both state and federal courts concludes that judicial invalidation of statutes for unconstitutionality was in fact surprisingly frequent, which "not only belies the notion that the institution of judicial review was created by Chief Justice Marshall in Marbury," but "also makes [Marshall's] often-criticized reasoning in the case understandable: what appears to be a puzzling, unconvincing and uniquely aggressive exercise of judicial review was fully consistent with prior judicial decisions in which courts had invalidated statutes that trenched on judicial authority and autonomy." Treanor, "Judicial Review Before Marbury," 58 Stan. L. Rev. 455 (2005).

4. *Pre-constitutional antecedents of the power of judicial review*. Lord Coke famously stated in Dr. Bonham's Case, 8 Rep. 118a (C.P. 1610), that "the

common law will controul acts of Parliament, [and] adjudge them to be utterly void" when the acts are "against common right and reason." But that was not truly descriptive of British practice in the seventeenth and eighteenth centuries. While the Privy Council had appellate jurisdiction over colonial courts, invalidation of legislation through that route was rare and unpopular.

A number of state court decisions in the years between independence and the federal constitutional convention involved judicial invalidation of state legislation. Scholars have debated the significance of these cases. While some have minimized their significance, see Crosskey, Politics and the Constitution In The History Of the United States (1953), more recent scholarship has increasingly found them to provide significant evidence of pre-constitutional acceptance of the power of courts to invalidate statutes on both written and unwritten constitutional grounds, see Sherry, "The Founders' Unwritten Constitution," 54 U. Chi. L. Rev. 1127 (1987); Treanor, "The Case of the Prisoners and the Origins of Judicial Review," 143 U. Pa. L. Rev. 491 (1994).

The spread of general ideas conducive to the acceptance of judicial review was perhaps more important than the existence of specific precedents. See Bailyn, The Ideological Origins of the American Revolution (1967), and Wood, The Creation of the American Republic, 1776–1787 (1969). Wood finds an especially hospitable climate for the development of judicial review in the evolving theories of the 1780s, particularly the replacement of traditional notions of legislative sovereignty by emphasis on popular sovereignty. For example, future Supreme Court Justice James Iredell developed, in the 1780s, the view that the will of the people as expressed in a constitution was superior to any legislative enactment. See Casto, "James Iredell and the American Origins of Judicial Review," 27 Conn. L. Rev. 329 (1995).

Marshall's reasoning emphasized the development of written constitutions as one assurance of limited government. Constitutionalism was hardly an American invention, but Americans had an unusually extensive experience with basic documents of government, from royal charters to state constitutions and the Articles of Confederation. But to say that a government may not exceed its constitutional powers does not necessarily demonstrate *who* is to decide whether a law conflicts with the constitution: "The premise of a written Constitution would not be disserved, and legislative power would not necessarily be unbounded, if Congress itself judged the constitutionality of its enactments. Under such a system, courts would not ignore the Constitution; rather, they would simply treat the legislative interpretation as definitive, and thus leave to Congress the task of resolving apparent conflicts between statute and Constitution." Tribe, 1 American Constitutional Law § 3–2 (3rd ed., 2000).

5. *The Framers' understanding of judicial review*. Did the Framers intend to grant the Court the power of judicial review? Some scholars argue that they did. See Prakash & Yoo, "The Origins of Judicial Review," 70 U. Chi. L. Rev. 887 (2003). Others find little evidence of the framing generation's belief in judicial invalidation of statutes, especially of federal statutes. See Kramer, "The Supreme Court, 2000 Term—Foreword: We the Court," 115 Harv. L. Rev. 5 (2001). One recent historical study finds a well-developed tradition in which British and colonial courts invalidated *corporate* by-laws for "repugnancy" to law, and concludes that "the court's ability to void repugnant legislation was simply assumed" by the framing generation "because of past corporate and colonial practices that limited legislation by the laws of the nation." Bilder, "The Corporate Origins of Judicial Review," 116 Yale L.J. 502 (2006).

In the Convention debates themselves, the most important statements regarding judicial power were made in discussion of a Council of Revision

proposal that the Justices join with the President in the veto process. See generally Farrand, The Records of the Federal Convention of 1787 (1911). That provision was rejected, partly on grounds that assumed the existence of judicial review. Anti–Federalist Luther Martin, for example, thought "the association of the Judges with the Executive" a "dangerous innovation": "[The] Constitutionality of laws [will] come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating [against] popular measures of the Legislature."

The Federalist Papers provide more explicit support for judicial review. These essays, which have become classic commentaries on the Constitution, were written by Alexander Hamilton, John Jay and James Madison, under the pseudonym Publius, and published in newspapers as campaign documents in defense of the proposed Constitution during the ratification proceedings in New York. The Federalist essays most directly concerned with the judiciary were five written by Alexander Hamilton, Nos. 78 through 82. The most famous is THE FEDERALIST, NO. 78, in which Hamilton wrote: "[Whoever] attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The judiciary [has] no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment.

"[Some] perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void, must necessarily be superior to the one whose acts may be declared [void]. There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorise, but what they forbid.

"If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the constitution. It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable

variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

"Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental. [It] can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body."

6. *Bicentennial perspectives on Marbury*. Two centuries after the Marbury decision was handed down, legal scholars were still debating the importance of Chief Justice Marshall's opinion. Some accounts suggest that the historical importance of the opinion has been overstated: "Marbury, it turns out, is a great deal less important than is commonly supposed. [Marbury] cannot have established the power of judicial review, since that power already was widely accepted before the Supreme Court's ruling. [If] judicial review had not already been well-established by the time of Marbury, that decision would not have convinced skeptics that the Constitution authorized the practice [because] Marbury's arguments in defense of judicial review are so thoroughly unpersuasive. [Marbury] declared the power of judicial review, but the early Marshall Court generally was too weak to exercise it." Klarman, "How Great were the 'Great' Marshall Court Decisions?," 87 Va. L. Rev. 1111 (2001).

Other critics suggest that the historical importance of the case was trumped up by late nineteenth-century proponents of activist judicial review: "[Proponents] of judicial review during the late nineteenth century [elevated] the Marbury decision—and Chief Justice John Marshall—to icon status to fend off attacks that the Court had acted in an unwarranted fashion. In the process, Marbury became, for the first time, a 'great case'—as measured by its treatment in judicial opinions, legal treatises, and casebooks—a moniker that would have been ill applied to the decision for most of the nineteenth century." Douglas, "The Rhetorical Uses of Marbury v. Madison: The Emergence of a 'Great Case,' " 38 Wake Forest L. Rev. 375 (2003).

And some critics deplore Marbury's iconic status because they think it accords too great a role to elite actors on the Court: "I do not generally teach Marbury v. Madison. [I] also hope to convince readers that they [should] stop teaching it as well. [I] believe that emphasizing Marbury reinforces the single most pernicious aspect of American legal education, which is to instill in hapless students the most vulgar of all notions of Legal Realism, summarized in Charles Evans Hughes' identification of 'the Constitution' with what the 'judges say it is.' This is unacceptable either as a normative or a descriptive view of American constitutionalism. ['The] Constitution' is [what] a variety of institutional actors say it is, including legislators, presidents, bureaucrats, and local police." Levinson, "Why I Do Not Teach Marbury (Except to Eastern

Europeans) and Why You Shouldn't Either," 38 Wake Forest L. Rev. 553 (2003).

By contrast, other commentators express continued admiration for Marshall's institutional accomplishment in Marbury: "A reading of Marbury that cannot see its heroism is an obtuse reading. It was in the teeth of [a] massive assault on the judiciary that in Marbury, after all, Marshall took all the power for the courts that there was to take—power over the executive, the legislature, the works. And Marshall was not afraid to let Jefferson know what he thought of him. [In] Marbury, a great father of our country bequeathed to us his greatest legacy and our most precious inheritance—the inestimable treasure of an enforceable Constitution. [Perhaps] it is time to forgive ourselves for saying, ['This] is our greatest case.' " Weinberg, "Our Marbury," 89 Va. L. Rev. 1235 (2003).

At a minimum, say some commentators, Marbury is essential to understanding the Court's subsequent institutional role: "To understand Marbury is to understand the practice of constitutional law, or at least the judicial role; and to understand our constitutional practice is to understand Marbury. The two are too much interconnected in the constitutional mind for a perception of one not to color, or indeed sometimes determine, an understanding of the other." Fallon, "Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension," 91 Calif. L. Rev. 1 (2003). "Marbury matters more as a cultural artifact than as a legal precedent. [It was] one piece of a more general campaign by Chief Justice John Marshall to define and legitimate a distinctly judicial form of politics. By 'distinctly judicial,' I mean that Marshall's practice was sensitive to the institutional position of the Court—its limitations, strengths, responsibilities, and resources. By calling this practice a 'form of politics,' I mean that it requires controversial judgments about publicly contested questions of justice and the common good." Eisgruber, "Marbury, Marshall, and the Politics of Constitutional Judgment," 89 Va. L. Rev. 1203 (2003).

Finally, some suggest that critique is futile, as judicial review has become irreversibly embedded in the American psyche as a practical matter: "[A]ny organized attack on judicial review will encounter almost inevitable resistance, since Marbury is so firmly established in the constitutional system of a nation that is so profoundly conservative in preserving the continuity of its political institutions." Ross, "The Resilience of Marbury v. Madison: Why Judicial Review Has Survived So Many Attacks," 38 Wake Forest L. Rev. 733 (2003).

SECTION 2. SUPREME COURT AUTHORITY TO REVIEW STATE COURT JUDGMENTS

While Marbury established Supreme Court review of the constitutionality of actions of a coordinate branch of the federal government, a second major Marshall Court decision, Martin v. Hunter's Lessee, legitimated Supreme Court authority to review judgments of the state courts. As Justice Oliver Wendell Holmes famously observed, Supreme Court review of cases challenging state laws may in the long run have been the more important power: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make