Chapter 2
The Marshall Court and the Early Republic

I. The Supreme Court in Its Initial Years: 1789-1801[1]

The Supreme Court of the United States was a relatively insignificant institution during the first decade of the new Republic. Presidents Washington and Adams had some difficulty attracting people to serve, and the rate of turnover was high. Three men were appointed chief justice during the first 12 years. John Jay resigned after six years to serve as New York's governor, which he presumably deemed the more important office (and during his tenure he sailed to England to serve as the principal negotiator of what became known as the Jay Treaty with Great Britain, which, together with his co-authorship of the Federalist Papers, remains his primary claim to fame for most historians). His successor, John Rutledge, had been appointed as an Associate in 1789 but had resigned in 1791, without ever sitting, to go to the more prestigious South Carolina Supreme Court. He was nominated to become Chief Justice of the U.S. Supreme Court in 1795 but failed to receive Senate confirmation. Thereafter, Oliver Ellsworth was nominated and confirmed in 1796; he served until 1800, when he resigned while overseas on a diplomatic mission to France.

One source of discontent was the onerous duty of "riding circuit," which required each Justice to travel twice a year to sit in the federal circuit court districts. (There were no "circuit courts" in the modern sense; instead, they consisted of district judges sitting together with a Supreme Court justice as a "circuit court.") The trips were strenuous and time-consuming. In refusing President Adams's offer of reappointment as Chief Justice in 1801, Jay commented that "under a system so defective" the Court would never "obtain the energy, weight and dignity which were essential to its affording due support to the National Government, nor [would it] acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess."

The Court was not completely passive, though. Without much fanfare, it had simply assumed a power both to review the validity of state legislation that conflicted with federal treaties and statutes and to construe federal legislation in light of presumably binding constitutional requirements. Professor Currie, for example, writes that "in [Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796)], the Court for the first time struck down a state law under the supremacy clause, establishing for all time its power of judicial review of state laws."[2] Moreover, Justice Chase began his opinion in

1. See generally Julius Goebel, Jr., 1 History of the Supreme Court of the United States, Antecedents and Beginnings to 1801 (1971); 1 Charles Warren, The Supreme Court in United States History, chs. 1-3 (rev. ed. 1932); William R. Casto, The Supreme Court in the Early Republic (1995).

2. See David Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789-1888, at 41 (1985).

Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), by writing that "by the case stated, only one question is submitted to the opinion of this court, whether the law of Congress [at issue] is unconstitutional and void?" Interestingly enough, after determining that the statute in question was constitutionally unproblematic, he concluded by stating that "it is unnecessary, at this time, for me to determine, whether this court, constitutionally possesses the power to declare an act of Congress void, on the ground of its being made contrary to, and in violation of, the Constitution; but if the court have such power, I am free to declare, that I will never exercise it, but in a very clear case." One might think, of course, that Chase had already answered this last question in the affirmative by his very formulation of "the one question . . . submitted to the opinion of the court." All of the other Justices who participated in the decision agreed that the statute was constitutionally legitimate; none challenged the abstract power of the Court to determine otherwise and, presumably, invalidate it. The first instance of such invalidation came with Marbury v. Madison, infra, but the basic assumption underlying *Marbury* seems to have been relatively well established by 1796. One might note, incidentally, that the opinions in these cases were "seriatim"; that is, each Justice prepared a separate opinion, as was (and remains) the custom in the United Kingdom. One of Marshall's signal achievements as Chief Justice was to establish a very different practice, by which, ideally (in his view), a single opinion joined in by all the justices would be published as the "Opinion of the Court."

The only decision of this period to attract much publicity — most of it negative — was Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). This was a suit by two citizens of South Carolina, who were the executors of a British creditor, against the State of Georgia to recover on bonds confiscated by the state. Given the language of Article III, which explicitly states that "The Judicial Power shall extend to . . . Controversies . . . between a State and Citizens of another State," the Court had little trouble in holding that Georgia was indeed liable to suit by private individuals, even though it had not waived sovereign immunity. The notion of sovereign immunity developed in Great Britain, which, of course, was ruled by monarchs who claimed the mantle of sovereignty. The United States had obviously rejected any such claims, thus triggering the debate that we saw at the very heart of Marshall's opinion in *McCulloch:* who possesses "sovereignty" within the United States. If, like Marshall, one emphasizes so-called "popular sovereignty," then it is difficult to understand why any American government would be immune to suit by a member of the sovereign people. Suffice it to say that this position has never been widely accepted within U.S. law. Indeed states were sufficiently upset by *Chisholm* that they successfully pressed for the adoption of the Eleventh Amendment: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Discussion

Read the text of the Eleventh Amendment carefully. It appears clear that it was drafted as a specific response to *Chisholm.* Does this mean that it should be read to bar *only* suits against a state "by Citizens of another State, or by Citizens or Subjects of any Foreign State," because, after all, that is what the text says very clearly? Should one assume, for example, that the drafters of the Amendment were certainly capable of writing a much stronger prohibition on suits against states, and that their failure to

do so is evidence of the quite limited purpose of the Amendment? Such an argument is made by John Manning.[3] In fact, though, courts have read the Eleventh Amendment far more broadly to limit a variety of other suits against states. The most important decision is Hans v. Louisiana, 134 U.S. 1 (1890), which held that the Amendment also prohibited suits against a state by one of its own citizens. Justice Bradley dismissed the appeal to the letter of the text as "an attempt to strain the Constitution and the law to a construction never imagined or dreamed of"; he denounced as basically unthinkable that the state could be brought into a federal court without its consent by any person. The scope of so-called sovereign immunity continues to be a subject of extraordinarily passionate debate within the contemporary Supreme Court and among commentators; a host of 5-4 decisions in the late 1990s and early twenty-first century offer particularly striking contrasts (and particularly bitter disagreements) concerning the doctrines of state sovereignty and federalism. Although the general subject of "federal jurisdiction" is well beyond the scope of this casebook, the debate over the Eleventh Amendment (and sovereign immunity) nevertheless emerges at various points in this course, especially in Chapter 5, infra.

II. The Election of 1800

The members of the founding generation were generally suspicious of, and hostile to, the idea of political parties. James Madison, for example, in the Federalist No. 10, had explicitly warned against the presence of "factions" in American politics. "By a faction," Madison wrote, "I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse or of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." The very point of Madisonian representative democracy was to select sufficiently "virtuous" citizens who would focus on only "the permanent and aggregate interests of the community" rather than, say, the strategic interests of their political party. The Electoral College as a system for electing presidents reflected a similar sensibility. The Electors would presumably pick the "best man" as president, with the "second best man," as it were, filling the office of vice president.[4] George Washington, of

3. John Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L.J. 1663 (2004).

4. This is, of course, a simplification. It does not explain the fact that the Constitution prohibits electors from voting for two persons from their own state. The reason is that it was assumed that there would be pressure to vote for local notables and favorite sons (it was inconceivable at the time that there might be "favorite daughters"). The limitation to one such vote therefore assured that the electors would be forced to transcend their parochialism and look outside their states, where they would presumably dispassionately reflect on who would indeed be the best man for the job. As one aggregated the collective votes, merely local notables would presumably fall to the bottom of the list, and the first and second choices (and, perhaps even the first five choices among whom the House of Representatives would choose if no one in fact received a majority of the electoral vote) would be truly national figures possessing the requisite civic virtue. As suggested in the text, this theory of the Electoral College did not survive, in practice, even for a decade, and by the election of 1800 it made no sense at all. See Akhil Reed Amar, America's Constitution: A Biography 167-168 (2005). As to contemporary implications of the "two-state" voting rule, which survives in the Twelfth Amendment that in effect recognized the legitimacy of the American party system, see Sanford Levinson and Ernest A. Young, Who's Afraid of the Twelfth Amendment? 29 Florida St. U. L. Rev. 925 (2001) (discussing whether Dick Cheney was in fact a Texan and therefore ineligible to receive the votes of Texas electors if they had also voted for George W. Bush).

course, was unanimously viewed as the best man to be the first president, and his initial cabinet was truly nonpartisan, consisting of Thomas Jefferson, Alexander Hamilton, and Edmund Randolph. (John Adams was the first vice president.)

By the election of 1796, Madison's initial vision was in shambles, and two parties began to emerge: the Federalists, led by John Adams and Alexander Hamilton, and the Democratic-Republicans, led by Thomas Jefferson. The debate over the Bank of the United States (and the construction of federal power generally) presaged one of the key bones of contention between the two parties. Other disputes involved such issues as the Jay Treaty, which attempted to settle outstanding disputes between the United States and the United Kingdom, and the direction of American foreign policy with respect to the great powers of the United Kingdom and France.

Because the Electoral College had been designed with the assumption that there would be no political parties, the election of 1796 concluded with the Federalist John Adams receiving 71 electoral votes and the Presidency, and his political opponent, Thomas Jefferson, receiving 68 electoral votes and becoming vice president in the new Adams Administration. Jefferson, of course, helped to draft the Kentucky Resolutions, Chapter 1, supra, that bitterly castigated the Alien and Sedition Acts, which were passed during the Adams Administration and reflected Federalist political views.

The election of 1800 turned into a bitter struggle between the two emergent political parties that threatened the political stability of the Union. Consistent with the original constitutional scheme, Democratic-Republican electors not only did not differentiate in their votes between president and vice president, but also (unlike their Federalist counterparts) did not have the wit to hold back at least one vote for Thomas Jefferson's de facto running mate, the New Yorker Aaron Burr. This resulted in a tie, with Jefferson and Burr receiving 73 votes each, whereas Adams received only 65 votes (and his running mate Charles Pinckney of South Carolina, received 64).[5] The ineptitude of the Jeffersonian electors meant that

5. One of the other anomalies of the election process is that under the Constitution the electoral votes are counted and announced before the Senate by the President of the Senate, whose other job, of course, is vice president of the United States. This meant that Thomas Jefferson, vice president in the Adams Administration and Adams' political opponent, got to count the electoral votes for his own election. This was no small boon; Bruce Ackerman and David Fontana have argued that Jefferson played fast and loose with the Georgia electoral votes, which appeared to contain some technical irregularities. See Ackerman and Fontana, Thomas Jefferson Counts Himself into the Presidency, 90 Virginia L. Rev. 551 (2004). Had Georgia's four electoral votes not been counted, Jefferson and Burr would have received only 69, one less than the 70 votes required to achieve a majority of the 138 total electoral votes. In that case, the House of Representatives, under the rules of the 1787 Constitution (subsequently altered by the Twelfth Amendment) would have been able to choose among the top five finishers, including John Adams and, perhaps more important, the Federalist de facto vice presidential candidate, Charles Coatesworth Pinckney, who, as a South Carolinian, might well have peeled off a sufficient number of Southern states to make a majority with the Federalist states (the House voted on a one-state/one-vote system). That would have made Pinckney president instead of Jefferson. Jefferson's willingness to overlook the technical irregularities and to count Georgia's votes foreclosed this possibility, and limited the final candidates to only himself and Burr.

Ackerman is highly critical of the 1787 Constitution inasmuch as it proved remarkably dysfunctional in handling the reality of a party system. "Only one thing is clear," he writes. "If America managed to survive its first great crisis, the written constitution wasn't going to save it — to the contrary, it was only making things worse. If there was going to be a successful transition of power, lots more would be required than following the rules laid down by the Founders. Only creative statesmanship had a chance of preventing the constitutional text from unraveling into civil war. The first act of statesmanship involved Thomas Jefferson counting his rivals out of the run-off." Bruce A. Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy 76 (2005).

there was no single winner, so the election was thrown, as required by the Constitution, into the House of Representatives, where each state delegation received one vote. Although Jefferson's Republicans had also won control of Congress, that new Congress would not convene until March. Thus the House of Representatives that would resolve the contested presidential election was a "lame-duck" House that was still controlled by a political party, the Federalists, that had just been repudiated in the 1800 election. (The length of the lame-duck session was shortened, and the date of the president's inaugural was moved forward by the Twentieth Amendment).

Many Federalists were outraged at the thought of Jefferson becoming president, not least because of his enthusiastic support for the French Revolution. Some so-called "irreconcilables" were particularly incensed at the fact that Jefferson's margin of victory over Adams was entirely the result of the Constitution's three-fifths clause, which gave Southern states especially an electoral bonus in the House of Representatives and the Electoral College based on their slave populations, even though these slaves had no role in the polity.[6] Many Federalists hoped to engineer an agreement by which the antislavery Burr would become president.[7] Burr explicitly disclaimed any part in such an arrangement, although, crucially, he never withdrew and therefore extended the controversy. One obstacle in Burr's path, besides the obvious political fact that he was selected to be Jefferson's vice president rather than a presidential candidate himself, was the enmity of the Federalist Alexander Hamilton (who would ultimately be killed by Burr in 1804 in the most famous duel in U.S. history). Because two state delegations were evenly divided, it took 36 ballots until, on February 17, 1801, two of the Federalist "irreconcilables" gave up the fight and allowed their states to cast their ballots for Jefferson.[8] In the meantime, the two Republican governors of Pennsylvania and Virginia had put their state militias "on alert" in case the party was denied the presidency. One result of the political crisis produced by the tie vote between the ostensible allies Jefferson and Burr was the 1803 proposal and rapid ratification in 1804 of the Twelfth Amendment, which in effect recognized the rise of political parties as part of the constitutional system by explicitly holding separate ballots for the candidates for the presidency and vice presidency, with the presumption that partisan electors would vote for the "ticket" of their party.

The fact that the Federalists acquiesced, however reluctantly, in Jefferson's election did not mean that they did not try to retain such power as they could. Having lost the presidency and Congress to Jefferson and the Republicans, this made the judiciary an especially inviting target of opportunity, and the Federalists moved to consolidate control over that branch of the national government. The Chief Justiceship was open because of Oliver Ellsworth's resignation in the autumn of

6. See Garry Wills, Negro President: President Jefferson and the Slave Power (2003); Akhil Reed Amar, America's Constitution, supra n.4. Northern states like New York, which still had some 20,000 slaves in 1800, benefitted as well. See Ira Berlin and Leslie Harris, Slavery in New York (2005).

7. Indeed, as Ackerman demonstrates, see The Failure of the Founding Fathers, supra n.5, some Federalists flirted with the idea of passing a "succession in office act" that would in effect have allowed John Marshall, then serving as both Secretary of State and Chief Justice, to become president if the House had been unable to break the tie by the Inauguration Day of March 4, 1801. He persuasively argues that any such attempt would have resulted in civil war.

8. See generally Bernard A.Weisberger, America Afire: Jefferson, Adams, and the Revolutionary Election of 1800 (2000); Joanne B. Freeman, The Election of 1800: A Study in the Logic of Political Change 108 Yale L.J. (1999).

1800. After John Jay declined to return to the Supreme Court because of advancing age and the rigors of circuit riding, Adams nominated his secretary of state, John Marshall, who was quickly confirmed by the lame-duck Federalist Congress, which remained in power until Jefferson's inauguration on March 4, 1801. On February 4, 1801, Marshall assumed the Chief Justiceship (while also retaining his position as secretary of state for the last month of Adams's term).

On February 13, 1801, just three weeks before Inauguration Day and the cessation of Federalist domination, Congress passed the Judiciary Act of 1801. It established a new set of circuit courts (and circuit judges) to complement the district and Supreme Court judges who had, prior to its passage, comprised the federal judiciary. The purported justification of the Act was to relieve Supreme Court Justices of the onerous and unpopular duty of riding circuit. (Perhaps Jay would have accepted Adams's call to return to the Supreme Court had he been offered the position *after* the passage of the Judiciary Act.) Given the timing of the legislation — and the fact that virtually all the new vacancies were filled by Federalists quickly nominated by Adams and confirmed by the lame-duck Senate — Republicans could be excused for believing that the more basic purpose was to entrench Federalist control over the judiciary. A Federalist judiciary could then be used (as Hylton v. U.S. had hinted) to declare Jeffersonian legislation unconstitutional or otherwise make life difficult for the new government. This was, after all, the first time in world history that an existing set of political leaders had been voted out of office by their opponents in a popular election. There was no precedent for a peaceful transfer of power, and such a transition was made all the harder by the fact that political parties — who held fundamentally different views about political issues — had not yet been truly accepted as legitimate.

Jeffersonians — and many subsequent historians — referred to the beneficiaries of the Federalist legislation as "midnight judges," suggesting a foul deed done in darkness. Although the circuit judges had been confirmed, taken their oaths of office, and were beginning to hear cases, the Republicans did not take things lying down. Instead, the now Republican-controlled Congress in effect purged these Federalist judges by repealing the Judiciary Act of 1801; this eliminated the new circuit courts, and thus left the circuit judges with no judicial positions to occupy. The Repeal Act was passed on March 8, 1802; seven weeks later, on April 29, Congress passed the Judiciary Act of 1802, which, among other things, reassigned the Supreme Court Justices to their previous role as circuit-riding circuit judges.

The Federalists raised at least two important constitutional issues to this course of action. The first focused on the legitimacy of eliminating the judgeships — after all, judges are presumably guaranteed their seats so long as they exhibit requisite "good behaviour," which has been interpreted as requiring life tenure.[9] The second involved the constitutional propriety of assigning members of the Supreme Court to auxiliary duty as members of "inferior" courts (and requiring them to ride circuit to reach these courts). The Republicans were fully aware that the displaced judges might try to challenge the constitutionality of the Repeal Act before the Federalist-controlled U.S. Supreme Court, so, as part of the Act, the Republicans eliminated

9. You might ask yourself if "life tenure" is in fact a necessary (as distinguished from a possible) inference of the "good Behaviour" clause. Could Congress, for example, have limited (or, in 2005, limit) the term of office to, say, 18 years and assert that the Good Behaviour clause stands only for the proposition that justices are protected against impeachment for ideological reasons?

the Supreme Court's 1802 term. As a result, the case attacking the Repeal Act, Stuart v. Laird, and the now-famous (and related) case of Marbury v. Madison, were not decided until 1803. The elimination of the 1802 term was a warning shot across the bow that signaled to the Federalist judiciary, including the members of the Supreme Court, that they should quickly adjust to the new political order of things. If they failed to acquiesce in what many historians have termed "the Jeffersonian Revolution," their Republican adversaries might well move to impeach and remove them from office.

Marbury v. Madison, too, can be understood only as part of the epic political struggles connected with the transition of power from the hitherto dominant Federalists to their Jeffersonian successors.[10] Thomas Jefferson ordered Secretary of State James Madison (who had succeeded John Marshall in office) not to deliver a commission of office to William Marbury, appointed by President Adams as a justice of the peace in the District of Columbia. Although Adams had signed Marbury's commission, John Marshall, who had served as both Secretary of State and Chief Justice until literally the last moment of the Adams Administration, had failed to deliver the commission to Marbury.

Marbury's actual position as justice of the peace was relatively trivial, and his term would have been limited to five years in any instance, a rather spectacular difference from the presumptive life tenure attached to being an "Article III judge." Still, he seemed to symbolize Federalist overreaching, and there was a widespread perception that Jefferson would in fact refuse to accept the legitimacy of any decision ordering Madison to deliver the commission.[11] Moreover, Republicans in Congress were already speaking of impeaching Federalist judges on the grounds that they were political partisans rather than impartial jurists. Indeed, the Republican-controlled House of Representatives would vote in 1804 to impeach the Federalist Justice Samuel Chase, although ultimately Chase's prosecutors failed to garner the necessary two-thirds majority in the Senate to convict and remove Chase from office.[12]

In hindsight, the failure to remove Chase signaled that Congress would not use the impeachment power simply to remove political adversaries; thus the episode helped establish a convention of judicial independence. In 1803, however, none of this was clear. Given the highly charged political atmosphere of the day, the central issue in both Stuart v. Laird and Marbury v. Madison was whether the Court would directly challenge the combined weight of executive and congressional authority, by carrying out the implications of earlier decisions and actually invalidating a federal statute, thereby potentially provoking a full-scale constitutional crisis. We turn now to the two cases. Although *Marbury* was decided a week earlier, we take up *Stuart* first because in political terms it was in fact the far more important of the two cases.

10. There is a copious literature on the political circumstances that generated Marbury. In addition to Ackerman, see generally Donald Dewey, Marshall Versus Jefferson: The Political Background of Marbury v. Madison (1970); Jean Edward Smith, John Marshall: Defender of a Nation 309-326 (1996); James O'Fallon, Marbury, 44 Stan. L. Rev. 219 (1992).

11. See, however, Louise Weinberg, Our Marbury, 89 Va. L. Rev. 1235 (2003) for an argument that the likelihood of Jefferson's potential disobedience is exaggerated (and that Marshall therefore assumed that Jefferson would in fact comply with such an order). Must one have a view about Jefferson's (and Marshall's) states of mind with regard to the consequences of a writ's being issued not only to understand the circumstances of the case, but also to decide whether his decision is defensible on the merits?

12. See, e.g., Keith Whittington, Constitutional Construction 20 (1999).

III. The Cases of 1803

A. Stuart v. Laird and the Elimination of the Intermediate Appellate Judiciary

STUART v. LAIRD 5 U.S. (1 Cranch) 299 (1803): *Stuart* involved a petition by private parties seeking to overturn a ruling by a circuit court in a land dispute. The petitioners argued that the Justices of the Supreme Court held commissions to be Supreme Court Justices, but not circuit judges. Hence they could not return to sit as circuit judges once the positions held by the Federalist circuit judges were abolished. In addition, the petitioners argued, repeal of the circuit judgeships was unconstitutional because according to Article III of the Constitution, once they had received their commissions, the circuit judges had life tenure (and the judicial independence that is the purpose of granting life tenure). Allowing Congress to abolish the courts undermined judicial independence. Finally, the petitioners argued that Congress could not require the Justices to ride circuit in courts of first instance because this would be a major burden on the Justices and would in effect hinder the Court from performing its constitutionally assigned duties.

The lower court decision in *Stuart,* written by Chief Justice Marshall himself, riding circuit, rejected the petitioner's arguments.[13] Marshall recused himself from sitting on the appeal to the Supreme Court.[14] Justice Paterson wrote the decision

13. Note that Marshall in fact engaged in what might be termed "behavioral acquiescence" to the Jeffersonian Repeal Act, in spite of what were privately expressed reservations about its constitutionality. Indeed, Ackerman suggests that Marshall flirted with the idea of a de facto "strike," in which the Supreme Court Justices would simply refuse to ride circuit. But perhaps a "strike" would have been unnecessary if the Republicans not also abolished the 1802 term of the Supreme Court, for it might have been the case that the Supreme Court Justices would not yet have had to decide, as a practical matter, whether to ride circuit. That possibility was foreclosed by putting off the next term until 1803. That forced Marshall and others to decide what they would do (and not merely what they thought), and they in fact followed the new law.

See Ackerman, supra, at 164-165 for correspondence expressing Marshall's doubts in 1802 about the constitutionality of the Repeal Act, doubts that apparently were never overcome. An 1823 letter from Marshall to Henry Clay suggests that Marshall continued to harbor reservations about the constitutionality of the 1802 Act. Marshall raises the possibility that Congress might "say explicitly that the courts of the union should never enter into the enquiry concerning the constitutionality of a law" or, alternatively, that courts "should dismiss for want of jurisdiction, every case depending on a law respecting such an act." Either, of course, would end the practice of judicial review. "What substantial difference is there between withdrawing a question from a court, and disabling a court from deciding that question? Those only, I should think, who were capable of drawing the memorable distinction as to tenure of office, between removing the Judge from the office [i.e., impeachment], and removing the office from the Judge [as in the 1802 Act], can take this distinction." Letter from Marshall to Clay (Dec. 22, 1823), reprinted in Ruth Wedgwood, Cousin Humphrey, 14 Const. Comment. 247, 267-268 (1997). If one assumes that Marshall believed it would be unconstitutional to order the federal judiciary in effect to ignore the Constitution, then is he not suggesting that is equally dubious to "remove the office from the Judge" as an alternative to following the quite difficult procedures of impeachment necessary to remove judges from office? Professor Powe offers this letter as evidence that "Marshall knew better" than to believe that the 1802 Act was constitutional, but that he "also knew [the justices] were in no position to successfully challenge Jefferson." See Lucas A. Powe, The Politics of American Judicial Review: Reflections on the Marshall, Warren, and Rehnquist Courts, 38 Wake Forest L. Rev. 704 (2003).

14. The reasons are unclear. There was certainly no norm that Supreme Court Justices could not sit on appeals from cases they had decided while riding circuit. (It is worth noting that members of federal

for the Supreme Court. He did not directly address the question whether the abolition of the circuit judgeships violated the life tenure provisions of Article III. Instead he merely held that the transfer of the case from a circuit court established by the now-repealed 1801 Judiciary Act to a reconstructed circuit court staffed by a Supreme Court Justice riding circuit (none other than Marshall himself) posed no constitutional problems: "Congress have constitutional authority to establish from time to time such inferior tribunals as they may think proper; and to transfer a cause from one such tribunal to another. In this last particular, there are no words in the constitution to prohibit or restrain the exercise of legislative power." Patterson then addressed the objection that the members of the Supreme Court did not have authority to ride circuit without specific commissions as circuit judges:

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

Discussion

1. *Discretion is the better part of valor.* The Court in *Stuart* in effect upheld the constitutionality of the repeal of the Judiciary Act and therefore acquiesced in the Jeffersonian purge of the Federalist circuit judges. In this respect *Stuart* is far more significant than the far more famous *Marbury:* It signifies the complete capitulation by the Supreme Court to the new political reality of Republican hegemony. Indeed, read in light of Stuart v. Laird, *Marbury* takes on a very different cast. It is often thought to symbolize the independence of the judiciary from politics and its devotion to the Rule of Law. As you will presently see, however, Marshall's opinion in *Marbury* offers several "imaginative" readings of the Judiciary Act of 1789 and Article III to avoid giving Marbury his commission and upsetting the Republicans, just as Patterson's opinion in *Stuart* dodged the most difficult constitutional questions about judicial independence to uphold the Republicans' elimination of the circuit judgeships created by the Federalist Party. What unites both decisions is that Marshall and his colleagues, however reluctant they might personally have been to resume riding circuit, backed off from a very serious confrontation and were willing to provide the Jeffersonian purge with the blessing of law.

2. Justice Patterson emphasizes the "practice and acquiescence under . . . for a period of several years" as justification for accepting the reinstatement of circuit

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circuit courts today normally do not recuse themselves when a decision they participated in is appealed to the full court en banc.) It is perhaps even more mysterious why Marshall would recuse himself in Stuart v. Laird but not in Marbury v. Madison, given that Marshall was the Secretary of State whose failure to deliver Marbury's commission in a timely fashion in the first place gave rise to the litigation in Marbury. Moreover, as if this did not demonstrate a sufficient conflict of interest, there was a delicate evidentiary question at the heart of Marbury: Had his commission in fact been signed? The key witness would have been Marshall himself!

riding. Recall earlier discussions of precedent in Chapter 1, supra. Under what circumstances can "practice and acquiescence" be sufficient conditions for adherence to previous decisions (or practices)? Would this not in effect insulate any long-tolerated practice from later invalidation as unconstitutional?

3. How relevant, if at all, is it that the Jeffersonians did not, after abolishing the circuit courts, try to reestablish them shortly thereafter and fill them with Republican loyalists? If they had reestablished the circuit courts, would they have been required by the Constitution to fill any new positions with the Federalist judges who had already been confirmed and who had been deprived of their judicial office as a result of the Repeal Act?

Consider the following editorial that appeared in the Washington Federalist on March 3, 1802, as the Repeal Act was being debated in Congress:

> Should Mr. Breckenridge [the Republican leader in the Senate] now bring forward a resolution to repeal the law establishing the Supreme Court of the United States, we should only consider it a part of the system intended to be pursued. It can as well be done, as consistently with the constitution, as what has been done. It may seem too bold for this session, but the democrats have established the principle that there is no such thing as breaking the constitution, do what you will, we sincerely expect it will be done next session. . . . They can then repeal the law establishing [the Supreme Court], having caution not to have the repeal operate till the new law commences: then the old judges cease of course with the old law, the executive appoints new judges for the new law; & still they will comply with the constitution which says there shall be one supreme court.[15]

If one believes that the Repeal Act was constitutional, then does the logic of the Federalist follow? If not, why not?

4. *Internal and external perspectives.* One can analyze judicial decisions in one of two ways: internally, asking whether the results courts reach make sense based on the logic of the legal arguments that judges offer; or externally, attempting to explaining the results in terms of historical, political, social, economic, or other factors. The foregoing analysis of *Stuart* and *Marbury* is externalist inasmuch as it explains both *Stuart* and *Marbury* by reference to external historical and political factors. By contrast, Louise Weinberg, Our Marbury, 89 Va. L. Rev. 1235 (2003) offers the most sustained and legally sophisticated attempt to defend both opinions as motivated entirely by the duty of fidelity to law. You will encounter the alternation between internal and external perspectives repeatedly throughout this course. One possibility is that these perspectives are inherently in conflict, because the external perspective undermines the distinction between politics and law. Another possibility asserts, that, to the contrary, the external perspective is actually necessary to the rule of law. What makes judicial decisions legitimate (or illegitimate) is the particular way they respond to the social, political, and historical circumstances in which they are decided, even if judges do not always advert to these factors directly.

5. *The United States as a developing democracy.* Consider the possibility that *Stuart* and *Marbury* are best understood as examples of transitions to democracy, in which courts in fledgling republics that have only recently thrown off the yoke of colonial domination or dictatorship must accept the influence of political pressures — including threats of impeachment or refusal to comply with judicial decisions — to

15. Quoted in Ackerman, op. cit., at 199-200.

remain viable until respect for the rule of law and practical judicial independence can be established as an ongoing custom. One view might be that such "transitions" are exceptional and that the far more important reality, in U.S. history, is a sturdy tradition of judicial independence that has made it possible for the Supreme Court (and other courts) to invoke the impersonal commands of the law as shields against an overreaching president or Congress. On the other hand, consider the possibility that courts are only relatively independent from political struggle, even in nontransitional contexts, with the consequence that, especially in the long run, they cannot (and, more controversially, *should* not) resist the demands of a dominant national political majority.

6. *Are courts easy to push around?* Think about Alexander Hamilton's arguments for life tenure in Federalist 78 in this context:

> 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 Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, 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; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
>
> This simple view of the matter suggests several important consequences. It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and the Executive. For I agree, that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have every thing to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its co-ordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security.

Do *Stuart* (and *Marbury*) help make Hamilton's case? Consider Hamilton's argument that all that have courts have working for them is "judgment," by which he means that courts make reasoned arguments about what the law is. If he is right about this, does this suggest that courts should be particularly scrupulous in paying attention only to the law and not to any "extrinsic" features of the political or social situation in deciding cases, so as to shore up their legitimacy? Or, on the contrary, does it suggest that courts must always speak publicly in terms of rule of law values and what the law requires while simultaneously paying close attention to how far

they can push the political branches? Keep this possibility in mind as you read Marshall's legal arguments in *Marbury*.

7. *Just the facts, ma'am.* Imagine that you were asked to "state the facts" of Stuart v. Laird or of Marbury v. Madison, to which we turn next. Are the relevant facts, for example, found (only) within the four corners of a given case, or should an analyst of any given decision be aware of the broader context of the decision, including the general political circumstances of the time? What are the consequences of accepting one or another view of how to ascertain the facts of a case?[16]

B. Marbury and Judicial Review of Legislation

MARBURY v. MADISON[17]
5 U.S. (1 Cranch) 137 (1803)

[1] ¶1At the last term, viz. December term, 1801, William Marbury [and others] . . . moved the court for a rule to James Madison, Secretary of State of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the District of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to show cause on the 4th day of this term. . . . Afterwards, on the 24th of February, the following opinion of the court was delivered by the Chief Justice.

16. See generally Sanford Levinson and Jack M. Balkin, What Are the Facts of Marbury v. Madison?, 20 Constitutional Commentary 255 (2004).

17. A useful overview of Marbury can be found in William Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1. See also Weinberg, supra; Akhil Reed Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U. Chi. L. Rev. 443 (1989); William Nelson, Marbury v. Madison and the Rise of Judicial Review (2000); Mark Graber and Micahel Perhac eds., Marbury Versus Madison: Documents and Commentary (2002).

¶1. Compare Marshall's statement of the facts with those presented in our own introduction to the case. It is, incidentally, a considerable understatement to say only that Madison did not supply "explicit and satisfactory information" to the hapless Marbury. He also failed to defend the suit before the Court, which itself may signify what Marshall called in ¶3 the "peculiar delicacy" of the case.

[2] ¶12At 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.

[3] 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. . . .

[4] ¶14In 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?

[5] The first object of inquiry is, 1st. Has the applicant a right to the commission he demands?

¶12. A writ of mandamus is an order issued by a court to a government officer or lower court commanding the performance of a ministerial (i.e., nondiscretionary) duty pertaining to the office.

¶14. In the course of the opinion, the court holds (first) that on the facts and law Marbury is entitled to the commission; (second) that a judicial remedy will not interfere improperly with the executive's constitutional discretion; and (third) that mandamus is the appropriate remedy; that respondent Madison cannot assert sovereign immunity; that §13 of the Judiciary Act of 1789 authorizes the issuance of mandamus in this case; but that §13 is unconstitutional.

This is an extraordinary way to order the issues. Courts customarily determine initially whether they have jurisdiction to decide the case and only then, if the answer is affirmative, proceed to other issues. See, e.g., Ex parte McCardle, 74 U.S. (7 Wall.) 506, 512, 514 (1869):

> The first question necessarily is that of jurisdiction; for if the act . . . takes away the jurisdiction [of this Court], it is useless, if not improper, to enter into any discussion of other questions. . . . Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Professor William Van Alstyne notes that Marshall has been criticized for deciding unnecessary questions in *Marbury:* "If the Court determined that it had no jurisdiction, it would have no occasion to reach the matter of 'peculiar delicacy' [i.e., the amenability of a cabinet officer to suit]. . . . It was therefore improper for Marshall to begin as he did" (supra n.17, at 7). But Van Alstyne comes to Marshall's defense:

> Of at least equal delicacy was the question of the Court's . . . capacity to second guess the constitutionality of acts of Congress. Since the Court might avoid the necessity of confronting the constitutionality of the Judiciary Act by disposing of the case on other grounds (assuming that it were to find Marbury not entitled to his commission), it should seek to do so where possible, as here. . . . Under this view, perhaps Marshall cannot be faulted for postponing consideration of judicial review and the constitutionality of the Judiciary Act until he had first exhausted other possible bases for disposing of the case.

How valid is this defense? Granting that it is desirable to avoid unnecessary constitutional questions, Marshall did not in fact avoid *any* constitutional question. Is Van Alstyne suggesting that it was important that Marshall demonstrate that he *could not* avoid the constitutional question? Of course, Marshall nowhere says that he is striving to avoid a constitutional question, and in fact, his opinion ends up discussing a vast number of constitutional questions — and difficult ones at that, see Amar, Marbury, supra n.17.

Note Van Alstyne's suggestion that there was "clearly an 'issue' of sorts which preceded any of those touched upon in the opinion. Specifically, it would appear that Marshall should have recused himself in view of his substantial involvement in the background of this controversy" (supra n.17, at 8). See Note, Disqualification of Judges and Justices in the Federal Courts, 86 Harv. L. Rev. 736 (1973).

[6] His right originates in an act of congress passed in February 1801, concerning the district of Columbia . . . [which] enacts, "that there shall be appointed . . . such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time think expedient, to continue in office for five years.

[7] It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out. . . .

[8] Some point of time must be taken, when the power of the executive over an officer, not removable at his will, must cease. That point of time must be, when the constitutional power of appointment has been exercised. And this power has been exercised, when the last act, required from the person possessing the power has been performed: this last act is the signature of the commission. . . .

[9] The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it. This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. . . .

[10] It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff. The transmission of the commission is a practice, directed by convenience, but not by law. It cannot, therefore, be necessary to constitute the appointment. . . . The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person appointed or not, as the letter inclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry. . . .

[11] If the transmission of a commission be not considered as necessary to give validity to an appointment, still less is its acceptance. The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one nor the other is capable of rendering the appointment a nonentity. . . .

[12] It is, therefore, 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.

[13] Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled: it has conferred legal rights which cannot be resumed. The discretion of the executive is to be exercised, until the appointment has been made. But having once made the 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.

[14] ¶14Mr. 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.

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

[16] This brings us to the second inquiry; which is, 2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

[17] 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. . . .

[18] 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.

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

[20] 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. [Marshall then discusses and rejects the claim that Madison is entitled to sovereign immunity merely because he is sued in his official capacity as secretary of state.] 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.

[21] 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 office, as his duties were prescribed by that act, is to conform

¶14. Marshall's assumption that Congress generally can prevent the president from revoking executive appointments was disapproved in Myers v. United States, 272 U.S. 52 (1926).

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. . . .

[22] The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumeable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

[23] The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

[24] So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment. That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

[25] 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.

[26] 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.

[27] It remains to be inquired whether, 3dly. He is entitled to the remedy for which he applies. This depends on,

1st. The nature of the writ applied for, and,

2dly. The power of this court. . . .

[Marshall discusses the circumstances under which mandamus is appropriate at common law, to conclude:]

[28] 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 inquired, Whether it can issue from this court.

[29] ¶¶29-30The 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."

[30] 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.

[31] ¶¶31-41The 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,

¶¶29-30. The relevant provision is §13 of the Judiciary Act of 1789:

> [T]he 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 exclusively 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 in 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.

Note that the first portion of §13, following Article III, §2, of the Constitution, grants the Supreme Court original jurisdiction in cases affecting, inter alia, "public ministers." Read in isolation, the term might be thought to include the secretary of state of the United States, but the context and history of Article III make quite clear that "this refers to diplomatic and consular representatives accredited to the United States by foreign powers. . . ." Ex parte Gruber, 269 U.S. 302 (1925). See also The Federalist, No. 81 (Hamilton). Why does Article III put those cases that it does within the Court's original jurisdiction? For the suggestion that the original jurisdiction clause was largely a venue provision linked to issues of geography and litigation convenience, see Amar, Marbury, supra n.17.

Marshall asserts, virtually without discussion, that §13 grants the Court jurisdiction to issue a writ of mandamus in this case. Is this the most plausible interpretation of §13? Consider the location of the "mandamus" sentence in the provision and the relevant punctuation. Cf. 28 U.S.C. §1651: "Writs: The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Should Marshall have been influenced by the fact that many of the same persons who drafted Article III also drafted the Judiciary Act of 1789 and by the canon (long established in England) that ambiguous statutes should be construed, where possible, in a manner consistent with fundamental law (in this case the fundamental written law of the Constitution)?

¶¶31-41. *Marbury*'s holding that the original jurisdiction of the Supreme Court cannot be enlarged remains the law, but the dictum that Congress cannot confer appellate jurisdiction in the enumerated cases within the Court's original jurisdiction has not been followed. See, e.g., Ames v. Kansas, 111 U.S. 449 (1884).

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.

[32] 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."

[33] 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.

[34] 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.

[35] 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.

[36] 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.

[37] 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.

[38] 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.

[39] 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.

[40] 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.

[41] 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.

[42] 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 inquire whether a jurisdiction, so conferred, can be exercised.

[43] 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.

[44] 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.

[45] 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.

[46] 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.

[47] 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.

[48] 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.

[49] 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.

[50] 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.

[51] ¶¶51-54If 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.

[52] 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.

[53] 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

¶¶51-54. What is Marshall's argument based on the "province and duty of the judicial department"? If one concedes that the Constitution is "law" and that it is paramount to legislative enactments, does it necessarily follow that the *judiciary* has authority to decide whether a congressional enactment violates the Constitution? Is the Constitution a law, just like other laws that come within a court's purview? Consider Judge Learned Hand's response:

> It is of course true that, when a court decides whether a constitution authorizes a statute, it must first decide what each means, and that, so far, is the kind of duty that courts often exercise, just as they decide conflicts between earlier and later precedents. But if a court, having concluded that a constitution did not authorize the statute, goes on to annul it, its power to do so depends upon an authority that is not involved when only statutes or precedents are involved. For a later statute will prevail over an earlier, if they conflict, because a legislature confessedly has authority to change the law as it exists. So too when a court finds two precedents in conflict, it must follow the later one, if that be a decision of a higher court, and it is free to do so if it be one of its own, because, again, confessedly it has authority to change its mind. But when a court declares that a constitution does not authorize a statute, it reviews and reverses an earlier decision of the legislature: and however well based its authority to do so may be, it does not follow from what it does in other instances in which the same question does not arise. . . .

The Bill of Rights, 9-10 (1958).

What earlier decision of the legislature does a court review and reverse when it "declares that a constitution does not authorize a statute"? Does Congress implicitly make a constitutional decision with respect to each piece of legislation it enacts?

In appraising Marshall's argument, consider that many European and South American nations have written constitutions as well as courts that perform essentially the same functions as our courts, but that their courts often do not adjudge the substantive constitutionality of legislation. Note also that, in nonconstitutional contexts, courts are sometimes required to accept as binding legal and factual determinations by other bodies, even though the courts may believe such determinations to be erroneous. See, e.g., 9 U.S.C. §10; United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

Compare Marshall's argument with Hamilton's in The Federalist, No. 78:

> 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 of 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.

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.

[54] 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.

[55] 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 lose their eyes on the constitution, and see only the law.

[56] ¶56This 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.

[57] ¶57That 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.

[58] ¶¶58-61The judicial power of the United States is extended to all cases arising under the constitution.

¶56. This paragraph implies an argument for judicial review reminiscent of Hamilton's in The Federalist, No. 78:

> By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex-post-facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing. . . .
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> 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, . . . [i]t 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. . . .
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> [The] independence of judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometsimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

¶57. Here, as in ¶¶49-50, Marshall seeks support for his argument in the fact that ours is a *written* constitution. Granting that the argument for judicial review would be more difficult to maintain if our constitution were not written, does the fact that it is written affirmatively support the argument? What purposes, other than providing guidance for the judiciary, can a written constitution serve? In any case, wouldn't you expect the authorization for judicial review, if there were any, to appear in the text of a written constitution?

¶¶58-61. Marshall here makes an argument based on the text of Article III, §2 — "The judicial Power shall extend to all Cases . . . arising under this Constitution. . . ." Outline the necessary steps of the argument, some of which may be only implicit in Marshall's discussion.

Note initially that Article III, §2, is in terms only a grant of jurisdiction. Some jurisdictional provisions — e.g., the Article III provisions relating to admiralty and suits between states — have been

[59] 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?

[60] This is too extravagant to be maintained.

[61] 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?

[62] ¶¶62-68There are many other parts of the constitution which serve to illustrate this subject.

[63] 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?

[64] The constitution declares that "no bill of attainder of ex post facto law shall be passed."

[65] 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?

[66] "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."

[67] 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?

[68] 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.

[69] ¶¶69-71Why 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

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held to confer a general lawmaking power. See Hart & Wechsler 264-267, 809-821. But jurisdiction does not entail a general lawmaking or law-interpreting authority over all or any issues in the case. For example, in cases coming within the diversity jurisdiction, federal courts must adhere to (even erroneous) state court interpretations of state statutes and constitutions as well as to state judge-made law. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938); Hart & Wechsler 667-755.

Nonetheless, wouldn't it be pointless to confer federal jurisdiction over "Cases arising under this Constitution" if no issues of constitutional interpretation were open to the courts? But if one concedes this much, does it follow that *all* issues of constitutional interpretation are open to federal judiciary, and in particular does it follow that issues of the constitutionality of acts of Congress are open? At least two other kinds of cases might arise under the Constitution. First, the argument for federal judicial review of allegedly unconstitutional acts of *state* legislatures, judges, and officials is very strong, but without the "arising under the Constitution" clause, there would be no federal jurisdiction in many such cases. Second, it might be thought that the courts should consider claims that *federal officers* have acted unconstitutionally. The colonial experience gave the framers good cause to distrust executive officials; moreover, might not one reasonably conclude that less deference is due the actions of lower-level officers than those of Congress or of the president himself?

(The question posed in the last sentence of ¶61 is the wrong one, isn't it? It is not a matter of what *parts* of the Constitution the judges may look into, but under what circumstances they may look into it.)

¶¶62-68. You will not again encounter such easy constitutional issues as these. Does the possibility that Congress might enact blatantly unconstitutional legislation entail or imply judicial authority to hold the legislation unconstitutional? To whom is each of these provisions immediately addressed? To whom is the provision involved in *Marbury* immediately addressed?

¶¶69-71. Does Marshall's "oath of office" argument prove too much? See Article VI, cl. 3, which requires all state and federal officials to swear or affirm to support the Constitution, and consider this

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!

[70] 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."

[71] 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?

[72] 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.

[73] ¶¶73-74It 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

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excerpt from Judge Gibson's dissent in Eakin v. Raub, 12 Serg. & Rawle 330 (Pa. 1825), which involved the authority of the Pennsylvania Supreme Court to review the constitutionality of acts of the state legislature. Judge Gibson's opinion refers to and counters almost every one of Marshall's arguments in *Marbury:*

> The oath to support the constitution is not peculiar to the judges, but is taken indiscriminately by every officer of the government and is designed rather as a test of the political principles of the man, than to bind the officer in the discharge of his duty: otherwise, it were difficult to determine, what operation it is to have in the case of a recorder of deeds, for instance, who, in the execution of his office, has nothing to do with the constitution. But granting it to relate to the official conduct of the judge, as well as every other officer, and not to his political principles, still, it must be understood in reference to supporting the constitution, *only as far as that may be involved in his official duty,* and consequently, if his official duty does not comprehend an inquiry into the authority of the legislature, neither does his oath.
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> . . . Granting that the object of the oath is to secure a support of the constitution in the discharge of official duty, its terms may be satisfied by restraining it to official duty in the exercise of the *ordinary* judicial powers. Thus, the constitution may furnish a rule of construction, where a particular interpretation of a law would conflict with some constitutional principle; and such interpretation, where it may, is always to be avoided. But the oath was more probably designed to secure the powers of each of the different branches from being usurped by any of the rest; for instance, to prevent the house of representatives from erecting itself into a court of judicature, or the supreme court from attempting to control the legislature: and in this view, the oath furnishes an argument equally plausible *against* the right of the judiciary. . . . The official oath, then, relates only to the official conduct of the officer, and does not prove that he ought to stray from the path of his ordinary business, to search for violations of duty in the business of others: nor does it, as supposed, define the powers of the officer.
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> But do not the judges do a *positive* act in violation of the constitution, when they give effect to an unconstitutional law? Not if the law has been passed according to the forms established in the constitution. The fallacy of the question is, in supposing that the judiciary adopts the acts of the legislature as its own; whereas, the enactment of a law and the interpretation of it are not concurrent acts, and as the judiciary is not required to concur in the enactment, neither is it in the breach of the constitution which may be the consequence of the enactment; the fault is imputable to the legislature, and on it the responsibility exclusively rests.

¶¶73-74. Chief Justice Marshall makes an almost offhand reference to the supremacy clause of Article VI of the Constitution. Consider the argument of Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959):

> . . . I must make clear why I believe the power of the courts is grounded in the language of the Constitution and is not a mere interpolation. [He quotes the Supremacy Clause. Wechsler takes issue with the argument of Judge Learned Hand that the Clause means only that, in Hand's language] "state courts would at times have to decide whether state laws and constitutions, or even a federal statute, were in conflict with the federal constitution" but [Hand denies that this supports the grant of authority to *federal* courts, including the Supreme Court, to assess the constitutionality of federal legislation].

the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.

[74] 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.

[75] ¶[75]The rule must be discharged.

Are you satisfied, however, to view the supremacy clause in this way, as a grant of jurisdiction to state courts, implying a denial of the power and the duty of all others? This certainly is not its necessary meaning; it may be construed as a mandate to all of officialdom including courts, with a special and emphatic admonition that it binds the judges of the previously independent states. That the latter is the proper reading seems to me persuasive when the other relevant provisions of the Constitution are brought into view.

Article III, section 1 declares that the federal judicial power "shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This represented, as you know, one of the major compromises of the Constitutional Convention and relegated the establishment vel non of lower federal courts to the discretion of the Congress. None might have been established, with the consequence that, as in other federalisms, judicial work of first instance would all have been remitted to state courts. Article III, section 2 goes on, however, to delineate the scope of the federal judicial power, providing that it "shall extend [inter alia] to all Cases, in Law and Equity, arising under this Constitution . . ." and, further, that the Supreme Court "shall have appellate jurisdiction" in such cases "with such Exceptions, and under such Regulations as the Congress shall make." Surely this means, as section 25 of the Judiciary Act of 1789 took it to mean, that if a state court passes on a constitutional issue, as the supremacy clause provides that it should, its judgment is reviewable, subject to congressional exceptions, by the Supreme Court, in which event that Court must have no less authority and duty to accord priority to constitutional provisions than the court that it reviews. And such state cases might have encompassed every case in which a constitutional issue could possibly arise, since, as I have said, Congress need not and might not have exerted its authority to establish "inferior" federal courts. . . .

If Wechsler is persuasive in arguing that federal judges can properly inquire into any question under the U.S. Constitution that state judges can inquire into, does it also imply that state judges can inquire into the constitutionality of congressional legislation? (Professor Wechsler assumes that it does, but does not explain why.) Note the different way that Article VI treats "laws" and "treaties" and consider Van Alstyne's suggestion that "[t]he phrase 'in pursuance' might also mean merely that only those statutes adopted by Congress *after* the re-establishment and reconstitution of Congress pursuant to the Constitution itself shall be the supreme law of the land, whereas acts of the earlier Continental Congress constituted merely under the Articles of Confederation, would not necessarily be supreme and binding upon the several states" (supra n.17, at 21).

Assuming that you find the Marshall–Wechsler argument or, for that matter, any other textual argument for judicial review, persuasive, what are the implications with regard to the scope (and therefore, in effect, the frequency) of such review? Recall Justice Chase's conclusion in *Hylton,* that even if the power of judicial review be conceded, "I will never exercise it, but in a very clear case." Was *Marbury* itself such a "clear case"? Presumably Chase thought it was inasmuch as he joined in Marshall's opinion. What follows, however, if the Constitution is less than clear? Does *Marbury* itself support the proposition that the Court should prefer its own (by definition) debatable reading to one asserted by Congress or the president? Imagine that Marshall's opinion in *Marbury* had been accompanied by a dissenting opinion attacking his interpretation of Article III. Would that mean that Article III is in fact "unclear" or, rather, that the dissenting justice(s) were inexplicably incompetent in their understanding of the English language?

Consider the approach toward judicial review sketched in Gottfried Dietze, Judicial Review in Europe, 55 Mich. L. Rev. 539, 541 (1957): "European courts have usually tested the formal constitutionality of the laws. This consists of a review of the process of enactment. If it was discovered that the procedural requirements of the constitution had not been complied with, the law in question was declared void. On the other hand, the testing of the content of a legislative act for its 'intrinsic' constitutionality was the exception rather than the rule." Is such an emphasis on procedural requirements a plausible interpretation of the language of "congruence" in Article VI?

¶75. Consider Robert McCloskey, The American Supreme Court 25-27 (4th ed. 2005):

The 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

Discussion

1. *Judicial interpretation: The first word or the last word?* Like Stuart v. Laird, the practical importance of *Marbury* in its own time was the Court's acquiescence (or capitulation) to the newly dominant Jeffersonians. However, its importance for most law professors (for better and worse) is that the Supreme Court was willing to invalidate a federal law on constitutional grounds. As previously noted, there was nothing particularly new about the abstract suggestion that the Court could do this; what was new was actually exerting the power. "Judicial review," after all, could still exist even if the Court never in fact found a law unconstitutional, so long as the Court claimed the authority, should the occasion ever arise, to act; although one might view this as merely a formal or ceremonial power if the Court never once said "No" to Congress. *Marbury* is the first instance of that "No," even if, in context, it involved, as McCloskey suggests, a far more important "Yes" to the practical ability of Thomas Jefferson to avoid giving Marbury the commission that was, ostensibly, rightfully his. Consider the possibility that one reason that we make *McCulloch* the first case that you read in this casebook is that the historical role of the Supreme Court has been far more to legitimize the actions of the national government than to invalidate them. (The Court's behavior toward state governments, as *McCulloch* itself suggests, has been very different.) Consider also whether the Court's ability to legitimate the work of the federal government is in fact enhanced by the theoretical (and practical) possibility that the Court might say "No" to any given federal activity.

2. *Does judicial review mean either judicial supremacy or judicial finality?* If one ignores the politics of *Marbury* and instead concentrates on the arguments presented in its text, it is still the case that Marshall's opinion scarcely submits to only one interpretation. Begin with a central question: How much power *does* it claim for the judiciary? Does it, for example, necessarily stand for the proposition that Supreme Court decisions must be accepted as authoritative by other branches of the national government? (Call this position judicial supremacy). Recall Andrew Jackson's Veto

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another. . . . The danger of a head-on clash with the Jeffersonians was averted by the denial of jurisdiction: but, at the same time, the declaration that the commission was illegally withheld scotched any impression that the Court condoned the administration's behavior. These negative maneuvers were artful achievements in their own right. But the touch of genius is evident when Marshall, not content with having rescued a bad situation, seizes the occasion to set forth the doctrine of judicial review. It is easy for us to see in retrospect that the occasion was golden. The attention of the Republicans was focused on the question of Marbury's commission, and they cared very little how the Court went about justifying a hands-off policy so long as that policy was followed. Moreover, the Court was in a delightful position, so common in its history but so confusing to its critics, of rejecting and assuming power in a single breath, for the Congress had tried here to give the judges an authority they could not constitutionally accept and the judges were high-mindedly refusing. The moment for immortal statement was at hand all right, but only a judge of Marshall's discernment could have recognised it.

McCloskey obviously admires Marshall's political sagacity, which allowed him to avoid the dangerous confrontation with the Jefferson Administration that would have signaled the presence of a full-fledged constitutional crisis and perhaps even threatened the stability of the still very young new political order. McCloskey, a professor of government at Harvard, was not a lawyer and, perhaps, was not "thinking like a lawyer" when praising Marshall. Can (should) a lawyer accept McCloskey's terms of analysis? What if, for example, one agrees with Marshall that Marbury was in fact entitled to his commission but disagrees with him that §13 was unconstitutional? That would mean, of course, that Marbury was entitled to the remedy — the writ of mandamus — that would rectify the wrong done him. Should an honorable judge, in that instance, have failed to give him the remedy, whatever the consequences that might ensue?

Message and his discussion of the precedential force of *McCulloch,* Chapter 1, supra. Was Jackson violating the precepts of *Marbury* or, rather, adhering to them inasmuch as he could have justified what might be termed his "independent interpretation" of the Constitution on his presidential oath? Or, even if one believes that the Court is entitled to the "last word" in a "dialogue" or "colloquy" with other political institutions, does this imply that *only* the Court is authorized to proffer understandings of the Constitution? Is it possible that the result of such a "dialogue" would (and should) be the Court's concession either that it was mistaken in a previously expressed view or that the other institution's view was at least plausible enough to merit enforcement, even if the Court, in the absence of the expression of this viewpoint, would have construed the Constitution differently? (As to the difference between "judicial supremacy" and "judicial exclusivity," see Chapter 5, infra.) Recall Marshall's reference in ¶1 of *McCulloch* to the nature and quality of the debate prior to Congress's chartering of the Bank of the United States. Why bother to refer to the debate if Congress is not a worthy partner in the enterprise of constitutional interpretation?

3. *Departmentalism.* Jackson's Veto Message is an essential document for those who take a "departmentalist" view of constitutional interpretation, i.e., the proposition that each great branch of the national government — Congress, the Executive, and the Judiciary — can engage in some measure of independent constitutional interpretation. (Walter Dellinger's memorandum, Chapter 1, supra, spells out some of the complexities in determining how the "departments" sort out inevitable conflicts.) Departmentalism, however, is, in its own way, as *institutionally* oriented as is judicial supremacy; it is simply a question of to which governmental institution(s) one wishes to give priority.

4. *Constitutional protestantism.* Consider an alternative to institutionalism, however, which might be termed "popular" — or "protestant" — constitutionalism. Sanford Levinson has analogized certain tensions in American constitutionalism to those present within historical Christianity.[18] For example, Tertullian, a third-century Catholic theologian, responded to heretics who "put forward the scriptures and by their audacity make an immediate impression on some people" by asserting that only in the institutional Church could be found "the true scriptures, the true interpretations, and all the true Christian traditions." Protestantism was, among other things, a revolt against any such claims regarding the authority of the institutional Catholic Church, an authority instantiated in the office of the Papacy. "When the attempt is made," wrote Martin Luther, "to reprove [Church authorities] out of the Scriptures, they raise the objection that the interpretation of the Scriptures belongs to no one except the pope." But if this were true, asked Luther, "where would be the need or use of the Holy Scriptures?" Recall in this context Marshall's own claim that "[t]he 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?" And then combine with Marshall's statement of the importance of a *written* Constitution Luther's assertion that "[a]n ordinary man may have true understanding: why then should we not follow him? Has not the pope erred many times? Who would help Christendom when

18. See Sanford Levinson, Constitutional Faith (1988).

the pope errs, if we were not to believe another, who had the Scriptures on his side, more than the pope?" To the traditional Catholic argument that the "keys" to the kingdom of God were given by Jesus to Peter, and, therefore, to the institutional Church, Luther responds that "it is plain enough that the keys were not given to Peter alone, but to the whole community." Indeed, Luther also makes an "oath" argument that might well be compared with Marshall's invocation of his own oath in *Marbury:* An article of the classic Christian creed is "I believe [in] one holy Christian Church." Luther interpreted this as establishing that "it is not the pope alone who is always in the right," for then the prayer "must run: 'I believe in the pope at Rome,' nothing less than a devilish error." He concluded his analysis by evoking the classic Protestant notion of the priesthood of all believers: "[I]f we are all priests . . . and all have one faith, one gospel, one sacrament, why should we not also have the power to test and judge what is correct or incorrect in matters of faith"?[19]

The constitutional analogue of such arguments is to argue that anyone inhabiting (and committed to) the "office" of citizenship in a constitutional republic has the right — even the duty — to engage in his or her own interpretation of the foundational document and to be willing in effect to resist presumably unpersuasive interpretations offered even by the Supreme Court. Consider in this context Professor Ronald Dworkin's comment that the American version of constitutionalism "does not make the decision of any court conclusive. Sometimes, even after a contrary Supreme Court decision, an individual may still reasonably believe that the law is on his side. . . . A citizen's allegiance is to the law, not to any person's view of what the law is, and he does not behave unfairly so long as he proceeds on his own considered and reasonable view of what the requires."[20]

5. *Popular constitutionalism.* Stanford Dean Larry D. Kramer has recently argued that popular constitutionalism was widely accepted at the time of the Constitution's origins.[21] Thus, he suggests, it was widely assumed that popular elections, fought in substantial part over constitutional issues, would be the forum for deliberation about constitutional meaning, and that the elections would in effect settle such controversies. To be sure, Kramer acknowledges that some courts in fact claimed powers of judicial review, but he argues that "[c]ourts exercising judicial review in the 1790s made no claims of special or exclusive responsibility for interpreting the Constitution. They justified their refusal to enforce laws as a 'political-legal' act on behalf of the people, a responsibility required by their position as the people's faithful agents. Judicial review was a substitute for popular action, a device to maintain popular sovereignty without the need for civil unrest. It was, moreover, a power to be employed cautiously, only when the unconstitutionality of a law was clear beyond doubt. . . ."[22] The ultimate guardian of the constitution, though, was not the Supreme Court (or even the judiciary in general), but rather an enlightened "public opinion" that took its constitutional duties seriously. One might be tempted to describe Kramer's position, or any other version of "popular" or "protestant" constitutionalism, as tending toward "anarchy." If you share this fear, do you believe that fixing a single determinative answer imposed by a Supreme Court is a better

19. Martin Luther, Three Treatises, quoted in Levinson, supra n.18, at 24.

20. Ronald Dworkin, Taking Rights Seriously 214-215 (1977).

21. See Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004).

22. Id. at 99.

solution than allowing constitutional meaning to be determined through the play of competing political institutions? (Recall in this context, our earlier discussion of the arguments for respecting precedents). Nevertheless, is it clear that one is faced with an either/or choice between fixed judicial interpretation and mutable popular interpretation? Throughout this course we will see how the Court's decisions, over time, have shifted in response to popular mobilizations and political pressures. That responsiveness, in turn, has helped preserve the Court's legitimacy and its acceptance by the public. Viewed over time, then, it is possible that the American constitutional order features both strong judicial review *and* robust popular constitutionalism, with the inevitable tension between them a never ending source of contention that propels the constitutional system onward into history.

C. The Precedents for Judicial Review[23]

No provision of the Constitution explicitly authorizes the federal judiciary to review the constitutionality of acts of Congress. The extent to which those who framed and adopted the Constitution assumed or intended that the courts would exercise this power has been the subject of continuing scholarly controversy.

England provided no direct precedent for judicial review. As late as the seventeenth century, the lawmaking and law-declaring (or judicial) functions of the High Court of Parliament were not sharply differentiated, so that England lacked the concept of separation of powers that underlies the American institution of judicial review. Despite the settled notion that the common law embodied principles of natural or fundamental law (see pp. 146-147, infra) and despite Lord Coke's famous dictum in Bonham's Case,[24] the common law courts never assumed the authority to review acts of Parliament. England had no written constitution, and parliamentary supremacy was firmly established at the time of the framing of the first American constitutions. "[I]f the parliament will positively enact a thing to be done which is unreasonable," wrote Blackstone in 1765, "I know of no power in the ordinary forms of the constitution that is vested with authority to control it. . . ."[25]

Some American colonists had invoked principles of natural law to contend that the colonial courts should not enforce oppressive English legislation, and the American Revolution was justified on natural-law grounds. But if the received natural-law tradition created an atmosphere in which judicial review could flourish, that innovative American institution owed still more to John Locke's Second

23. See generally Judicial Review and the Supreme Court 1-12 (Levy ed., 1967); Alan Westin, Introduction and Historical Bibliography to Charles Beard, The Supreme Court and the Constitution 1-34, 133-146 (Westin ed., 1962). Compare Charles Beard, The Supreme Court and the Constitution (1912), Raoul Berger, Congress v. The Supreme Court (1969) and Henry Hart, Professor Crosskey and Judicial Review, 67 Harv. L. Rev. 1456 (1954) (book review) with Louis Boudin, Government by Judiciary (1932), Edward Corwin, Court over Constitution: A Study of Judicial Review as an Instrument of Popular Government (1938), and 2 William Crosskey, Politics and the Constitution in the History of the United States (1953).

24. 8 Co. Rep. 107a, 77 Eng. Rep. 638 (1610): "When an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void. . . ." See Theodore Plucknett, Bonham's Case and Judicial Review, 40 Harv. L. Rev. 30 (1926); S.E. Thorne, Dr. Bonham's Case, 54 L.Q. Rev. 543 (1938).

25. Blackstone, Commentaries *91. See J.W. Gough, Fundamental Law in English Constitutional History (1955); Charles McIlwain, The High Court of Parliament and Its Supremacy (1910); Edward Corwin, The "Higher Law" Background of American Constitutional Law, 42 Harv. L. Rev. 149, 365 (1928-1929).

Treatise of Civil Government (1690). The premise of Locke's social compact was that sovereignty did not reside in any agency of government but in "the people" themselves, who (through the American invention of written constitutions) delegated limited authority to those agencies. The legislature was the direct voice of the people, and the early republicans placed a virtually unlimited, populistic faith in the representative branch. But in the years following the Revolutionary War, as state legislatures authorized the issuance of worthless paper money, enacted sweeping debtor relief legislation, and directed oppressive measures against British loyalists, the possibility of legislative abuse — of tyranny of the majority — became increasingly apparent. One remedy was bicameralism, which the states adopted in various forms. Judicial review emerged as another remedy; if the people were sovereign, and the legislature merely their agent, then (as Hamilton later put it in The Federalist, No. 78) "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. . . ."[26] Or consider a speech in which James Wilson, second only to Madison in importance at the Philadelphia Convention, told members of the Convention that laws "may be unjust, may be unwise, may be dangerous, may be destructive; and *yet not be so unconstitutional as to justify the judges in refusing to give them effect*" (emphasis added). One might be struck, of course, by how much would *not* be unconstitutional — i.e., "unjust," "unwise," "dangerous," and even "destructive" laws — but Wilson obviously concludes his comment by suggesting that there indeed exist a set of laws "so unconstitutional as to justify the judges in refusing to give them effect."

By 1787, several state courts had asserted the authority to nullify legislative enactments (almost always invoking the fundamental law of the written constitution rather than unwritten natural law). Most of these tentative ventures were met with criticism, however, and some even with threats of discipline and impeachment. Thus, it cannot be said that the institution of judicial review was "established" in the states by the time of the Philadelphia convention.[27] The "intent of the framers" is still the subject of dispute. For present purposes, it suffices to note that the general idea of judicial review was much in the air when the Constitution was framed and ratified. Whether there was a clear consensus that the federal judiciary should review the constitutionality of acts of Congress, there certainly was no consensus that it might not, and, as indicated earlier, several decisions of the 1790s seem to presuppose the authority to consider the constitutionality of acts of Congress (though none of these decisions invalidated any of the laws under consideration). The question was open, and though *Marbury* met with some criticism, it took no one by surprise. This being said, it is certainly the case that judicial review — and especially its scope — has been the subject of recurrent debate in American history. We turn now to some of the contemporary debate, though later parts of the casebook will treat some of the historically specific debates.

26. See Bernard Bailyn, The Ideological Origins of the American Revolution (1967); Carl Becker, The Declaration of Independence (1922); M.J.C. Vile, Constitutionalism and the Separation of Powers (1967); Gordon Wood, The Creation of the American Republic, 1776-1787 (1969).

27. See William Nelson, Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860, 120 U. Pa. L. Rev. 1166 (1972). See also Jack Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031 (1997).

D. Judicial Review in a Democratic Polity

1. The Countermajoritarian Difficulty

"The root difficulty," wrote Alexander Bickel in perhaps the most influential single book on the role of the Supreme Court published in the past half-century, "is that judicial review is a counter-majoritarian force in our society":

> There are various ways of sliding over this ineluctable reality. Marshall did so when he spoke of enforcing, in behalf of "the people," the limits that they have ordained for the institutions of a limited government. And it has been done ever since in much the same fashion by all too many commentators. Marshall himself followed Hamilton, who in the 78th Federalist denied that judicial review implied a superiority of the judicial over the legislative power — denied, in other words, that judicial review constituted control by an unrepresentative minority of an elected majority. "It only supposes," Hamilton went on, "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." But the word "people" so used is an abstraction . . . obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. It is an altogether different kettle of fish, and it is the reason the charge can be made that judicial review is undemocratic.
>
> Most assuredly, no democracy operates by taking continuous nose counts on the broad range of daily governmental activities. Representative democracies — that is to say, all working democracies — function by electing certain men for certain periods of time, then passing judgment periodically on their conduct of public office. . . . The elected officials, however, are expected to delegate some of their tasks to men of their own appointment, who are not directly accountable at the polls. The whole operates under public scrutiny and criticism — but not at all times or in all parts. What we mean by democracy, therefore, is much more sophisticated and complex than the making of decisions in town meeting by a show of hands. It is true also that even decisions that have been submitted to the electoral process in some fashion are not continually resubmitted, and they are certainly not continually unmade. Once run through the process, once rendered by "the people" (using the term now in its mystic sense, because the reference is to the people in the past), myriad decisions remain to govern the present and the future despite what may well be fluctuating majorities against them at any given time. A high value is put on stability, and that is also a countermajoritarian factor. Nevertheless, although democracy does not mean constant reconsideration of decisions once made, it does mean that a representative majority has the power to accomplish a reversal. This power is of the essence, and no less so because it is often merely held in reserve.
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> . . . [N]othing in the further complexities and perplexities of the system . . . can alter the essential reality that judicial review is a deviant institution in the American democracy.[28]

28. Alexander Bickel, The Least Dangerous Branch 16-18 (1962). See also Barry Friedman, The Road to Judicial Supremacy (The History of the Countermajoritarian Difficulty, Part One), 73 N.Y.U. L. Rev. 333 (1998).

Bickel's argument depends on his central assumption that "judicial review is a deviant institution in the American polity." This is, of course, an empirical question, depending for its plausibility on the complementary assumption that the American polity is generally committed to majoritarian democracy. We shall examine this assumption shortly. Nevertheless, many have agreed with Bickel's premise about its "deviant" quality, and have gone on to offer various justifications for the institution of judicial review. As we turn to them, note the extent to which they are functionalist — i.e., rooted in notions of how the Court effectively contributes to maintaining a certain kind of American polity — rather than based on analyses of the text of the Constitution or the understanding of the framing generation.

2. *Justifications for Judicial Review*

a. Supervising Inter- and Intra-governmental Relations

The federal judiciary has at times supervised two systems of governmental relations: (1) the federal system, involving relations between the national and state governments and relations among the states themselves;[29] and (2) the internal national system, involving the allocation of powers among the legislative, executive, and judicial branches.[30]

As a practical matter, the review (and invalidation) by federal courts of *state* legislation is almost certainly more important than their relatively infrequent invalidation of *federal* legislation. (In the federal context, especially in the modern era, the courts' most important function probably is giving meaning to federal statutes, a subject beyond the subject matter of this casebook.) Consider these two statements by eminent justices:

Oliver Wendell Holmes, Jr.:

> 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 that declaration as to the laws of the several states.[31]

Robert H. Jackson:

> [T]he power of the Supreme Court to declare acts of the *states* void under the federal Constitution presents an entirely separate issue in our history . . . [and] rests on quite different [and stronger] foundations than does the power to strike down *federal* legislation as unconstitutional.[32]

29. See Jenna Bednar, William N. Eskridge, Jr., and John Ferejohn, A Political Theory of Federalism, in Constitutional Culture and Democratic Rule 223 (Ferejohn, Rakove, and Riley eds., 2001) for an elegant argument that federal systems basically require a strong judicial "umpire," given that both national and state governments have strong incentives to try to renege on the federal "deal" that by definition places limits on both of these governments.

30. A third system of governmental relations, which involves the tribal governments of American Indian tribes, should at least be mentioned. See, e.g., Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and Federal Courts, 56 U. Chicago L. Rev. 671 (1989).

31. Oliver Wendell Holmes, Jr., Collected Legal Papers 295-296 (1920).

32. Robert H. Jackson, The Struggle for Judicial Supremacy 15 (1941).

Justices Holmes and Jackson appear to regard review of state legislation as essential to the realization and maintenance of the federalist vision, while expressing far more skepticism about judicial monitoring of congressional legislation, especially if the purpose is to protect the states against incursions by the national government. Why should this be so? One reason might be, as Marshall suggested in *McCulloch,* that federal courts can have greater "confidence" in Congress than in state legislatures. Needless to say, such assertions are highly controversial. The Court seemed in substantial respects to accept the Holmes–Jackson position from roughly 1937 to 1995, although more recently it seems to be redefining its role as potential protector of state autonomy. See Chapter 5, infra.

In any case, the power of the federal courts to review the judgments of state courts and the constitutionality of state legislation has not been seriously questioned since Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). The Virginia Court of Appeals had refused to obey the Supreme Court's mandate reversing the judgment in a case involving the preemption of state laws by federal treaties. The state court had held unanimously that section 25 of the Judiciary Act of 1789, conferring federal appellate jurisdiction, was unconstitutional. The Supreme Court again heard the case and again reversed (though to avoid another conflict, it bypassed the Virginia Court of Appeals and issued its mandate directly to the state trial court).[33] Justice Story wrote:

> [T]he constitution . . . is crowded with provisions which restrain or annul the sovereignty of the states in some of the highest branches of their prerogatives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the states. . . . The language of the constitution is also imperative upon the states as to the performance of many duties. It is imperative upon the state legislatures to make laws prescribing the time, places, and manner of holding elections for senators and representatives, and for electors of president and vice-president. And in these, as well as some other cases, congress have a right to revise, amend, or supercede the laws which may be passed by state legislatures. When, therefore, the states are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the legislatures of the state are, in some respects, under the control of congress, and in every case are, under the constitution, bound by the paramount authority of the United States; it is certainly difficult to support the argument that the appellate power over the decisions of state courts is contrary to the genius of our institutions. . . .
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> It is . . . argued, that no great public mischief can result from a construction which shall limit the appellate power of the United States to cases in their own courts . . . because state judges are bound by an oath to support the constitution of the United States, and must be presumed to be men of learning and integrity . . . [A]dmitting that the judges of the state courts are, and will be, of as much learning, integrity, and wisdom, as those of the courts of the United States, (which we very cheerfully admit,) it does not aid the argument. It is manifest that the constitution has . . . presumed (whether rightly or wrongly we do not inquire) that state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice. . . .
>
> This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the

33. 1 Charles Warren, The Supreme Court in United States History 450 (1926).

constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself: If there were no revising authority to control these jarring and discordant judgments, and harmonize them into uniformity, the laws, the treaties, and the constitution of the United States would be different in different States, and might perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable. . . .

The Court again addressed the constitutionality of section 25 in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), in which appellants, convicted of selling lottery tickets in violation of state law, claimed immunity under a congressional enactment permitting the District of Columbia to establish a lottery. Chief Justice Marshall rejected Virginia's argument that Article III did not confer appellate jurisdiction over state criminal cases:

With the ample powers confided to this supreme government . . . are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the States. . . . [T]he judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws. . . .

In many States the judges are dependent for office and for salary on the will of the legislature. . . . When we observe the importance which [the Constitution of the United States] attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a State shall prosecute an individual who claims the protection of an act of Congress. . . .

The mischievous consequences of the construction contended for on the part of Virginia, are also entitled to great consideration. It would prostrate, it has been said, the government and its laws at the feet of every State in the Union. And would not this be its effect? What power of the government could be executed by its own means, in any State disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the Courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a *veto* on the will of the whole. . . .

Let it be admitted, that the cases which have been put are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which might have a baneful influence on the affairs of the nation. Different States may entertain different opinions on the true construction of the constitutional powers of Congress. We know, that at one time, the assumption of the debts contracted by the several States, during the war of our revolution, was deemed unconstitutional by some of them. We know, too, that at other times, certain taxes, imposed by Congress have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. . . .

These collisions may take place in times of no extraordinary commotion. But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the

> perils it may be destined to encounter. No government ought to be so defective in its organization, as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own Courts, rather than on others.

(Upon reaching the merits, the Court held that the statute did not authorize the sale of lottery tickets beyond the city limits of Washington and affirmed the judgment of the state court.) During the century and a half since these decisions — most recently in the wake of the *School Desegregation* cases — states have sometimes attempted to thwart the orders and mandates of the federal judiciary.[34] But *Martin* and *Cohens* effectively settled the Supreme Court's authority to revise the judgments of state courts and, in effect, settled the federal judicial power to determine the constitutionality of state laws.

b. Preserving Fundamental Values

Alexander Bickel argued that the protection of fundamental values was a primary justification for judicial review. Bickel recognized that the Court's justification in *Marbury*, based on judicial competence to interpret the written text of the Constitution, did not encompass many of the Court's decisions, (consider, for example, Marshall's structural argument in part 2 of *McCulloch*) but went on to argue for institutional competence of a different sort:

> [M]any actions of government have two aspects: their immediate, necessarily intended, practical effects, and their perhaps unintended or unappreciated bearing on values we hold to have more general and permanent interest. It is a premise we deduce not merely from the fact of a written constitution but from the history of the race, and ultimately as a moral judgment of the good society, that government should serve not only what we conceive from time to time to be our immediate material needs but also certain enduring values. This in part is what is meant by government under law. But such values do not present themselves ready-made. They have a past always, to be sure, but they must be continually derived, enunciated, and seen in relevant application. And it remains to ask which institution of our government — if any single one in particular — should be the pronouncer and guardian of such values.
>
> Men in all walks of public life are able occasionally to perceive this second aspect of public questions. Sometimes they are also able to base their decisions on it; that is one of the things we like to call acting on principle. Often they do not do so, however, particularly when they sit in legislative assemblies. There, when the pressure for immediate results is strong enough and emotions ride high enough, men will ordinarily prefer to act on expediency rather than take the long view. Possibly legislators — everything else being equal — are as capable as other men of following the path of principle, where the path is clear or at any rate discernible. Our system, however, like all secular systems, calls for the evolution of principle in novel circumstances, rather than only for its mechanical application. Not merely respect for the rule of established principles but the creative establishment and renewal of a coherent body of principled rules — that is what our legislatures have proven themselves ill equipped to give us. . . .
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> [C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess: judges have, or should have, the leisure, the training, and

34. See Chapter 6, infra.

> the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. It calls for a habit of mind, and for undeviating institutional customs. Another advantage that courts have is that questions of principle never carry the same aspect for them as they did for the legislature or the executive. Statutes, after all, deal typically with abstract or dimly foreseen problems. The courts are concerned with the flesh and blood of an actual case. This tends to modify, perhaps to lengthen everyone's view. It also provides an extremely salutary proving ground for all abstractions; it is conducive, in a phrase of Holmes, to thinking things, not words, and thus to the evolution of principle by a process that tests as it creates.
>
> Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry. This is what Justice Stone called the opportunity for "the sober second thought." Hence it is that the courts . . . are also a great and highly effective educational institution. . . . The Justices in Dean Rostow's phrase, "are inevitably teachers in a vital national seminar." No other branch of the American government is nearly so well equipped [as the judiciary] to conduct one. And such a seminar can do a great deal to keep our society from becoming so riven that no court will be able to save it. . . .[35]

The plausibility of this view of the Court is the central subject of Chapter 8. For now, simply consider what may be suggested by the metaphor of the "seminar." What, for example, is the difference between a "lecture course" and a "seminar"? (Is it simply that there are usually fewer students in a seminar, or does the metaphor of a seminar include the possibility that all the participants, including the Court as "professor," will share in a collective process of discussion and education about the meaning of the Constitution?)

c. Protecting the Integrity of Democratic Processes

In Democracy and Distrust: A Theory of Judicial Review (1980), John Hart Ely rejects the vindication of fundamental values as a justification for judicial review and offers instead what he calls a "participation-oriented, representation-reinforcing" model. His theory builds on Justice Stone's suggestion in footnote 4 of United States v. Carolene Products Co., infra, p. 515 that the judiciary should scrutinize legislation (1) that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or (2) that is based on "prejudice against discrete and insular minorities, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities." Ely's thesis is that, "unlike an approach geared to the judicial imposition of 'fundamental values,' the representation reinforcing orientation . . . is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy. It [is devoted] to policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent." Ely argues that democratic "malfunction occurs when the *process* is undeserving of trust" — when "(1) the ins are choking off the channels of political changes to

35. Bickel, supra n.28, at 24-27.

ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system." Representation-reinforcing judicial review protects interests of three sorts: (1) It protects freedom of speech and freedom of the press "because they are critical to the functioning of an open and effective democratic process"; (2) it protects voting rights because the franchise is "central to a right of participation in the democratic process"; and (3) it protects minorities against defects of democratic process resulting from prejudice.[36]

3. The Countermajoritarian Difficulty Challenged

One might wonder whether "countermajoritarianism" is all that "deviant" an institution within the American political system. Consider, for example, the Senate, where Wyoming and Vermont have equal voting power with California and Texas. (Similarly, as noted in the discussion of the election of 1800, Electoral College deadlocks are broken in the House of Representatives by a one-state/one-vote process.) Moreover, the contemporary Senate includes among its working practices the filibuster, whereby three-fifths of the Senate must vote to cut off debate on any given bill. This means that 41 senators can block legislation backed by a majority of the Senate and possibly passed by the House of the Representatives. Indeed, the Senate also operates under a rule that gives any single member the right to put a "hold" on any presidential nominations and thus prevent the full Senate from exercising its constitutional duty of giving its advice and consent to such nominations.[37] Turning to the presidency, one might ask if the presidential veto, by which a single political official gets to offset majorities of both houses of Congress, is defensible on "majoritarian" grounds. One might argue that at least the president is popularly elected, though as a technical matter this is inaccurate: The president is elected by members of the Electoral College, whose composition reflects the anti-majoritarianism of the Senate inasmuch as even the smallest state gets at least three votes. Many presidents have not in fact received a majority of the popular vote; most recently, in 2000 George W. Bush came in some 500,000 votes behind Vice President Al Gore, but won the presidency nonetheless because of a majority in the Electoral College (a victory assisted at least in part by a highly controversial decision, Bush v. Gore, 531 U.S. 98 (2000), in which five Republican Justices effectively shut down the recount of the Florida vote and guaranteed Bush the election).[38]

36. Professor Ely's thesis has hardly gone unchallenged. See, e.g., Symposium on Democracy and Distrust, 77 Va. L. Rev. 631 (1991).

37. See Philip Shenon, "In Protest of Clinton Action, Senator Blocks Nominations," N.Y. Times, June 9, 1999, A20. As Shenon writes, "Customs that permit a single lawmaker to hold up the workings of the Government might seem undemocratic. But they have a long history in the clubby confines of the Senate."

38. A good collection of essays on Bush v. Gore, from various points of view, can be found in Cass R. Sunstein and Richard A. Epstein, eds., The Vote: Bush, Gore, and the Supreme Court (2001) and Bruce Ackerman, ed., Bush v. Gore: The Question of Legitimacy (2002). See also Howard Gillman, The Votes That Counted: How the Court Decided the 2000 Presidential Election (2001); Richard A. Posner, Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts (2001); Jack M. Balkin, Bush v. Gore and the Boundary Between Law and Politics, 110 Yale L.J., 1407 (2001).

Finally, consider two other distinctly "countermajoritarian" features of the constitutional text: the Treaty Clause, Article II, §2, whereby two-thirds of the Senate must concur in a treaty, and Article V, which requires first that two-thirds of each house of Congress agree to a proposed constitutional amendment and then further requires the assent of three-quarters of the states. The latter requirement means, as a practical matter, that proponents of a constitutional amendment must triumph in at least 75 state legislative houses (every state except Nebraska is bicameral, and 38 of the 50 states must agree to a proposed amendment). Opponents of an amendment can prevail simply by gaining one-third plus one of the votes in either the House or the Senate or, if unsuccessful there, by defeating the proposal in only 13 houses in separate states.[39]

The paragraph above assumes the basic legitimacy of the description of judicial review as "countermajoritarian" even as it suggests that "countermajoritarianism" is rife within the American political system. However, several political scientists have challenged the premise that judicial review presents a "countermajoritarian difficulty" at all. In a widely cited article, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, Professor Robert Dahl attacked the very assumption that "the Court's policy decisions can be interpreted sensibly in terms of a 'majority' versus a 'minority' ":[40]

> In this respect the Court is no different from the rest of the political leadership. Generally speaking, policy at the national level is the outcome of conflicts, bargaining, and agreement among minorities; the process is neither minority rule nor majority rule but what might better be called *minorities* rule, where one aggregation of minorities achieves policies opposed by another aggregation.

Conceding that judicial review would nonetheless pose a problem if the Court systematically thwarted congressional policy, Dahl suggests that the rate of change of the Court's personnel makes this unlikely:[41]

> Over the whole history of the Court, on the average one new justice has been appointed every twenty-two months. Thus a president can expect to appoint about two new justices during one term of office; and if this were not enough to tip the balance on a normally divided Court, he is almost certain to succeed in two terms. . . . The fact is, then, that the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority.[42]

39. See Sanford Levinson, The Political Implications of Amending Clauses, 12 Constitutional Commentary 107 (1996). The Equal Rights Amendment (ERA), proposed by Congress in 1972, was ratified by two-thirds of the states, with a majority of the population. Nonetheless, it failed because it did not achieve the approval of the additional states required to bring it up to three-fourths. Assume that the Supreme Court simply interprets the Constitution as including the values instantiated in the ERA. Whatever one would think of that move, could it necessarily be described as "countermajoritarian"? See also Chapter 7.

40. 6 J. Pub. L. 279, 294 (1957).

41. Id. at 284-285.

42. From 1952 to 1975, 13 new justices were appointed (an average interval of 21 months). President Eisenhower appointed five justices during his two terms: Kennedy, two: Johnson, two; and Nixon four in one term. Ford appointed one justice in his two years in office. Since then, however, presidents have gotten fewer average appointments in large part because justices have remained on the Court for significantly longer terms than previously. Jimmy Carter became the first president since Franklin Roosevelt

Dahl goes on to examine instances in which the Court has struck down significant congressional legislation: In all but a few cases, either the Court reflected an actual or nascent consensus (e.g., the post-Reconstruction compromise of 1877 with the South that rested on shelving legislation passed by the precompromise Congress), or else its decisions were quickly reversed or overcome. The Court substantially delayed the implementation of national policy in only three areas — the income tax, child labor laws, and worker's compensation for longshoremen and harbor workers. Dahl concludes:[43]

> Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions, the Supreme Court is inevitably part of the dominant national alliance. As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance. By itself the Court is almost powerless to affect the course of national policy. . . .
>
> The Supreme Court is not, however, simply an *agent* of the alliance. It is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution. This legitimacy the Court jeopardizes if it flagrantly opposes the major policies of the dominant alliance; such a course of action, as we have seen, is one in which the Court will not normally be tempted to engage.
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> It follows that within the somewhat narrow limits set by the basic policy goals of the dominant alliance, the Court *can* . . . often determine important questions of timing, effectiveness, and subordinate policy. . . .
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> [T]he Court is least likely to be successful in blocking a determined and persistent lawmaking majority on a major policy and most likely to succeed against a "weak" majority; e.g., a dead one, a transient one, a fragile one, or one weakly united upon a policy of subordinate importance.

In Freedom of Speech: The Supreme Court and Judicial Review (1966), Martin Shapiro builds on Dahl's observations to make a different defense of judicial review. Whether or not the Court's policies generally mirror those of the "political branches" of the national government, the political branches are far from the paradigms of democracy our civics textbooks make them out to be; by compensating for defects elsewhere in the system, the Court may actually contribute to the overall representativeness of the government. Shapiro surveys the congressional committee system, the role of seniority, the power of lobbyists, the presidential nominating

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to go through an entire term without the opportunity to make an appointment. (Roosevelt, of course, made up for that first-term deficit by making nine appointments between 1937 and his death in 1945.) In his eight years in office, Reagan appointed only three new justices to the Court, as well as raising then Associate Justice Rehnquist to the office of Chief Justice. George H.W. Bush was able to make two appointments in four years, but Bill Clinton could make only two while serving eight years, and both of those vacancies occurred relatively early in his first term. His successor, George W. Bush, was given no opportunity to make an appointment in his first term. Thus the Supreme Court had a stable membership between 1994, with the arrival of Stephen Breyer, and the 2005 death of 80-year-old Chief Justice Rehnquist after 33 years on the Court and the resignation of 75-year-old Sandra Day O'Connor after 24 years of service. This 11-year period is the longest in more than 175 years (when no appointments were made between 1811 and 1823). Does this change in the average frequency of new appointments alter the strength of Dahl's argument? Does it suggest that Congress should take steps to ensure that appointments are made more often, for example, by specifying that the president makes an appointment every other year? Would this require a constitutional amendment imposing term limits or could it be achieved by other means? See the discussion of lifetime tenure, infra.

43. Dahl at 286, 293-294 (the last paragraph is taken from earlier in the article).

conventions, the Electoral College, the myriad federal agencies, and the relations among those agencies, their parallel congressional committees, and the industries subject to agency regulation, to conclude:

> Now, the lawmaker, whom the modest [i.e., those favoring judicial restraint] so reverently endow with democracy's banner, is none other than precisely this combination of bureaucracy, President, and Congress, for quite obviously, all three are major participants in the shaping of our laws. In short, the lawmaker to whom the nasty old undemocratic Supreme Court is supposed to yield so reverently because of his greater democratic virtues is the entire mass of majoritarian-anti-majoritarian, elected-appointed, special interest-general interest, responsible-irresponsible elements that make up American national politics. If we are off on a democratic quest, the dragon begins to look better and St. George worse and worse. . . . In fact there are not three branches of government but many centers of decision-making which range from more to less "democratic" and from greater to lesser power, depending on the particular issue involved. . . .

Finally, Professor Mark Graber, in The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary, 7 Studies in American Political Development 35 (1993), argues that legislators often prefer to send political hot potatoes (like abortion or affirmative action in the present, the expansion of slavery into the territories in the past) to the courts rather than pay the political costs of making inevitably politically costly decisions themselves. Like most political scientists, Graber is skeptical that the Court has often, if at all, made decisions that it perceived as strongly opposed by the political majority.

How persuasive do you find these critiques of the countermajoritarian difficulty?

Excursus on lifetime tenure. One explanation for such "countermajoritarianism" as the Court may display is the long tenure of federal judges. For example, one important explanation for John Marshall's influence is his 31-year length of service, from 1803 to 1834. This "life tenure" is thought to follow from Article III, §1, which conditions judicial tenure only on "good Behaviour." Had the United States followed the practices of many modern countries, which limit the tenure of the members of so-called "constitutional courts" (i.e., courts charged with assessing the constitutionality of parliamentary legislation) to 10, 12, or even 20 years, Marshall would not have had the opportunity to write some of his most significant decisions and to help shape the Court through the force of his considerable personality. Life tenure has not gone unchallenged by contemporary scholars. Lucas Powe, for example, writes that it

> creates the real possibility of imitating a society like China, where power is wielded by the oldest among it. Even if their minds are every bit as good as when they were appointed, there is no good reason in a democracy to vest so much power in people whose formative experiences are from an age decidedly different from that of most of the current populace. . . . It is one thing to elect such individuals to govern; it is another to have them govern because elected officials approved of them twenty or thirty years earlier.
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> If life tenure is the problem and an independent judiciary the goal, then any number of solutions are possible, but the one that immediately suggests itself is a nonrenewable 18-year term (salary continuing on retirement), with vacancies occurring every two years. The turnover would remain roughly the previous average (2.2 years), but would be less random. A two-term president would get four appointments, and the

Court could not be packed with appointees of a single party unless that party were able to win three consecutive presidencies.[44]

Lewis H. LaRue offers a somewhat different objection to lifetime tenure.[45] "[N]one of us," he asserts, any longer shares the belief, pressed by Hamilton in the 78th Federalist, that judges are "bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them." Instead, says LaRue, our contemporary asumptions are that

1. We have a strong and independent judiciary;
2. our judges have the power to change the law, both common law and constitutional law;
3. our judges will exercise their power to change the law based upon their judgments about justice and utility;
4. this power to change the law is not unlimited, since there are political, institutional, and moral restraints that all judges feel;
5. this power has been used in the past sometimes for the good, sometimes for the bad.

If you grant these assumptions, then the question arises, Should we grant these judges, especially those who sit on the Supreme Court, life tenure? No.

It is, of course, too early in the course for most of you to have a considered opinion on LaRue's (as distinguished from Powe's) critique of life tenure, though, as you go through the materials of this course, you should determine how much you agree with LaRue's central argument that Hamilton's assumptions no longer are persuasive. To the extent that the Court indeed bases its decisions on factors other than "strict rules and precedents which serve to define and point out their duty in every particular case," what justifies its power to set aside as unconstitutional the decisions of presumably more politically accountable legislatures or executives?

IV. The "Marshall Court"

References to the "_____ Court," filling in the blank with the name of a Chief Justice, are sometimes simply a shorthand for periods of years and should not be taken to imply either that the Chief Justice was especially influential or that the period differed strikingly from the one that preceded or followed it. Whatever the problems of identifying a complex, multimember court with its Chief Justice, though, it is hard to resist designating the Court of 1803-1834 as the Marshall Court, for he was clearly the dominant figure of that period, particularly during the first two decades of his tenure, and under his leadership the Supreme Court asserted its own role in the federal polity.[46]

44. L.A. Powe, Jr., Old People and Good Behavior, in Constitutional Stupidities/Constitutional Tragedies 77-79 (William Eskridge and Sanford Levinson eds., 1998).

45. L.H. LaRue, "Neither Force Nor Will," in id. at 57-60 (1998).

46. Two volumes of the Holmes Devise History of the Supreme Court are devoted to the Marshall years. See George L. Haskins and Herbert A. Johnson, 2 History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801-15 (1981); G. Edward White, 3 History of the