B. THE BASIC FRAMEWORK

Marbury v. Madison

5 U.S. (1 Cranch) 137 (1803)

[William Marbury had been appointed a justice of the peace by the defeated incumbent Federalist President, John Adams, in the closing stages of the Adams administration. The Federalist-controlled Senate confirmed the appointments of Adams's last-minute appointees, including Marbury, on March 3, 1801. The formal commissions had not been delivered when Thomas Jefferson, the Republican President, assumed office several days later. Jefferson refused to deliver the commissions of the justices appointed by Adams. Marbury and others sought a writ of mandamus to compel Madison, Jefferson's Secretary of State

(replacing John Marshall, Adams's Secretary of State), to deliver the commissions. (The underlying controversy is set out in more detail in a historical note that follows the opinion.)]

Opinion of the Court [by MARSHALL, CHIEF JUSTICE].

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

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

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

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

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

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

The first object of inquiry is,

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

His right originates in an act of congress passed in February, 1801, concerning the district of Columbia.…

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

The last act to be done by the president is the signature of the commission: he has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed..…

It is, [decidedly] the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

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

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

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

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

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

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy? That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances, there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political: they respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived, by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts. But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot, at his discretion, sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear, than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that

duty, it seems equally clear, that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.

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 has 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. 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.

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 [and] that the appointment conferred on him a legal right to the office for the space of five years. 2d. 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.

3. It remains to be inquired whether he is entitled to the remedy for which he applies? This depends on—1st. The nature of the writ applied for; and 2d. The power of this court.

1st. The nature of the writ.…[To] render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

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

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

But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there, in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or

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shall forbid a court to listen to the claim, or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress, and the general principles of law? [Where the head of a department] is directed by law to do a certain act affecting the absolute rights of individuals, [it] is not perceived on what grounds the courts of the country are [excused] from the duty of giving judgment....[This,] then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

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

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

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

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

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

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

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

It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.…When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

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

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

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

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

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

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of

this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

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

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

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

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

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

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

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

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

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

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

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

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

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

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

This is too extravagant to be maintained.

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

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

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

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

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

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

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

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

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

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

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

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

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

The rule must be discharged.

Note: Marbury v. Madison

1. *Background*. The *Marbury* case was decided against a complex background and was in some respects the culmination of a lengthy political battle. The Federalist President, John Adams, had been defeated by the Republican candidate, Thomas Jefferson, who was to take office on March 4, 1801. The Federalist Congress responded by, among other things, attempting to retain control of the federal judiciary. On February 16, 1801, that Congress enacted the Circuit Court Act, creating sixteen new circuit judges and eliminating the circuit-riding duties of the Supreme Court. Congress also decreased the size of the Supreme Court in order to deny the incoming President Jefferson the power to appoint a successor to Justice Cushing. Two weeks later Congress enacted another statute creating forty-two positions for justices of the peace in the District of Columbia. President Adams nominated the authorized judges, who were confirmed on March 2 and 3, just one day before President Jefferson was to assume office.

At this point, John Marshall, then Secretary of State under President Adams—who had appointed Marbury and the other petitioners in the *Marbury* case—became involved in the circumstances that gave rise to the case. Although Marshall took his oath of office as Chief Justice on February 4, 1801, he continued to serve as Secretary of State at least until March 3 of that year. President Adams and Acting Secretary of State Marshall had signed the commissions of the petitioners in the *Marbury* case by March 3, but the commissions had not been delivered by the time Adams and Marshall left the executive branch. Adams's successor, Thomas Jefferson, thereafter refused to deliver the commissions, claiming that they were nullities. (Should Marshall have disqualified himself from *Marbury*?) In the next year—before *Marbury* was decided—the Circuit Court Act was repealed by the Republican Congress; the statute creating justices of the peace was left intact. But Congress also abolished the June and December terms of the Court, leaving the Court adjourned from December 1801 until February 1803—and thus

abolishing the 1802 term. The reason for Congress's actions was to avoid a constitutional challenge to the repeal of the Circuit Court Act.

A footnote: Six days after *Marbury* was decided, the Court upheld the repeal. Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803). The history is illuminatingly discussed in O'Fallon, *Marbury*, 44 Stan. L. Rev. 219 (1992).

2. *Method, antecedents*. What does the opinion in Marbury v. Madison indicate about opinion-writing method? What are the sources of the decision? What in the Constitution supports judicial review?

a. Chief Justice Marshall does not begin the opinion in *Marbury* with the question of jurisdiction, although a court's jurisdiction is usually the first problem to be examined. Why did Chief Justice Marshall fail to deal first with the jurisdictional issue?

b. The actual holding of *Marbury* is that the Supreme Court lacks power to direct the President to deliver Marbury's commission. This conclusion allowed the Court to avoid the problem of ordering President Jefferson to deliver commissions to President Adams's appointees. There was, of course, no assurance that President Jefferson would have complied with such a decree. The existence of judicial review was therefore established in a case in which the Court concluded that it had no power to do anything to remedy official illegality. Consider in this regard the suggestion that the "decision is a masterwork of indirection, a brilliant example of Chief Justice Marshall's capacity to sidestep danger while seeming to court it, to advance in one direction while his opponents are looking in another." R. McCloskey, The American Supreme Court 40 (1960).

What is the basis for Chief Justice Marshall's conclusion that the Court lacked jurisdiction? Consider the following rejoinders to his reasoning: (1) The categories of original and appellate jurisdiction are not mutually exclusive. The Constitution sets up a provisional allocation, which Congress can alter if it wishes. The power to alter is recognized in the "exceptions" clause. It is therefore constitutional for Congress to grant to the Court original jurisdiction over cases over which it had appellate jurisdiction under the Constitution's provisional allocation. (2) The Constitution defines an irreducible minimum of original jurisdiction but permits Congress to expand original jurisdiction if it chooses to do so. Is either of these views less persuasive, as a textual matter, than Chief Justice Marshall's?

Note in this regard that the reasoning of *Marbury* has been rejected insofar as it suggests that Congress may not give the lower courts jurisdiction over cases falling within the original jurisdiction of the Supreme Court. See, e.g., Illinois v. Milwaukee, 406 U.S. 91 (1972).

c. Chief Justice Marshall acknowledges 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." This acknowledgment created the category of cases involving "political questions," which are not subject to judicial review. See section E infra. What falls in this category? In Chief Justice Marshall's view, is there any case of official illegality that is not judicially cognizable? On one view, the answer is no: Political questions, as Chief Justice Marshall understands them, are questions in which there is no constitutional obstacle to the acts in question. Note also the contrast drawn by Chief Justice Marshall between cases involving "individual rights" and cases involving "discretion." What is the relationship between those two categories of cases?

d. The most important holding in the case is that the Supreme Court has the power to declare acts of Congress unconstitutional—that is, that it has the power of judicial review. It is striking to many modern readers that Chief Justice Marshall's principal arguments rely not on the text of the Constitution but instead on its structure and on the consequences of a conclusion that judicial review was unavailable.

Consider the following view:

> [The] issue of judicial review was by no means new. The Privy Council had occasionally applied the ultra vires principle to set aside legislative acts contravening municipal or colonial charters. State courts had set aside state statutes under constitutions no more explicit about judicial review than the federal. The Supreme Court itself had measured a state law against a state constitution in Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800), and had struck down another under the supremacy clause in Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796); in both cases the power of judicial review was expressly affirmed. Even Acts of Congress had been struck down by federal circuit courts, and the Supreme Court, while purporting to reserve the question of its power to do so, had reviewed the constitutionality of a federal statute in Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796). Justice James Iredell had explicitly asserted this power both in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) and in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), and Chase had acknowledged it in [*Cooper*]. In the Convention, moreover, both proponents and opponents of the proposed Council of Revision had recognized that the courts would review the validity of congressional legislation, and Alexander Hamilton had proclaimed the same doctrine in The Federalist. Yet though Marshall's principal arguments echoed those of Hamilton, he made no mention of any of this material, writing as if the question had never arisen before.

Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835, 49 U. Chi. L. Rev. 646, 655–656 (1982). For a comprehensive account, see P. Hamburger, Law and Judicial Duty (2008). In what ways was the issue in *Ware* and *Cooper* different from that in *Marbury*? Consider the proposition that Marshall's arguments for judicial review supported what has been called "departmentalism." According to one version of departmentalism, each branch has the power to determine for itself, and finally, the constitutionality of legislation affecting its own functions. How expansive would judicial review be under this version of departmentalism?

3. *The justifications for judicial review.* Consider the various arguments for judicial review.

a. *Written Constitution*. Chief Justice Marshall's first argument is that judicial review is a necessary inference from the fact of a written Constitution. "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." But this argument seems to confound two different issues. (1) Is the Constitution binding on the national government? (2) Are the courts authorized to enforce their interpretation of the Constitution against that of other branches of the national government? Even if the answer to the first question is "yes," that answer does not dictate an answer to the second question. Many countries have had written constitutions without having judicial review. Would it be plausible to respond that the

Constitution would be ineffective or merely hortatory if it were not subject to judicial enforcement?

Consider in this regard The Federalist No. 78, infra; and note that in Eastern Europe, emerging from communism, and South Africa, emerging from apartheid, nations have chosen both a written constitution and judicial review of one sort or another. Indeed, judicial review has been seen as a central part of the new constitutional orders. Consider also Currie, supra, at 657: "Surely the Framers were reasonable people, and surely they could not have meant to appoint the fox as guardian of the henhouse." But on the facts of *Marbury*, who was the fox? Note also that in some nations, certain constitutional provisions, such as those involving social and economic guarantees and environmental protection, are expressly made nonjusticiable.

b. *Notions of judicial role*. Chief Justice Marshall claims that the ordinary role of the courts is to interpret the law. That role, he claims, requires judges to construe the Constitution in the ordinary course of conducting judicial business. But it might be responded that constitutional interpretation—when it takes the form of invalidation of the outcomes reached by the more political branches—is special because of its highly intrusive and largely final character. Should this difference mean that the ordinary interpretive task is no longer appropriate? For an emphatic negative answer, grounded in history, see P. Hamburger, supra.

c. *Supremacy clause*. The supremacy clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof…shall be the supreme Law of the Land." Does this establish the existence of judicial review?

> Assuming that an act repugnant to the Constitution is not a law "in pursuance thereof" and thus must not be given effect as the supreme law of the land, who according to the Constitution, is to make the determination as to whether any given law is in fact repugnant to the Constitution itself? [Chief Justice Marshall] never confronts this question. His substitute question, whether a law repugnant to the Constitution still binds the courts, assumes that such repugnance has appropriately been determined by those granted such power under the Constitution. It is clear, however, that the supremacy clause itself cannot be the clear textual basis for a claim by the judiciary that this prerogative to determine repugnancy belongs to it.

Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1, 22.

Note also that Chief Justice Marshall gains rhetorical force for his position by referring to clauses that in his view have a "plain" meaning opposed to acts of Congress. But one might doubt whether constitutional provisions are likely to have such meanings in many cases on which Congress and Court will differ. In any event, consider the possibility that the use of these hypothetical cases is misleading in light of the more open-ended character of most constitutional interpretation—of which *Marbury* itself is an example.

d. *Grant of jurisdiction*. The Constitution extends the judicial power of the United States to all cases arising under the Constitution. Chief Justice Marshall argues that the grant of jurisdiction would be meaningless if the courts did not have authority to examine the constitutionality of acts of Congress. Consider A. Bickel, The Least Dangerous Branch 6 (1962):

> If it were impossible to conceive a case "arising under the Constitution" which would not require the Court to pass on the constitutionality of congressional

> legislation, then [Marshall might be correct, for without judicial review] this clause [would be] quite senseless. But there are such cases which may call into question the constitutional validity of judicial, administrative, or military actions without attacking legislative or even presidential acts as well, or which call upon the Court, under appropriate statutory authorization, to apply the Constitution to acts of the states. Any reading but his own was for Marshall "too extravagant to be maintained." His own, although out of line with the general scheme of Article III, may be possible; but it is optional. This is the strongest bit of textual evidence in support of Marshall's view, but it is merely a hint.

e. *Judges' oath*. Chief Justice Marshall relies on the fact that judges take an oath to uphold the Constitution. But consider the fact that 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. [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.

Eakin v. Raub, 12 Serg. & Rawle 330, 353 (Pa. 1825). In short, the oath requires judges to support the Constitution; however, if the Constitution assigns ultimate interpretive power to the legislature, or to the President, then judicial review is not contemplated by the Constitution but is in violation of it. Does this suggest that the "oath" argument is a makeweight?

Perhaps these various arguments appear more forceful in combination than they appear when separated. One might claim that while none is independently decisive, the various arguments together suggest that judicial review is a part of the constitutional structure.

4. *The view of the framers and the ratifiers*. The relevant documents at the time of the framing, and before, indicate that judicial review was generally contemplated. See also A. Bickel, supra, at 15–16:

> [It] is as clear as such matters can be that the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume a power—of whatever exact dimensions—to pass on the constitutionality of actions of the Congress and the President, as well as of the several states. Moreover, not even a colorable showing of decisive historical evidence to the contrary can be made. Nor can it be maintained that the language of the Constitution is compellingly the other way. At worst it may be said that the intentions of the Framers cannot be ascertained with finality.

Consider Hamilton's views in The Federalist No. 78:

> There is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.

> If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
>
> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental....
>
> It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.

How, if at all, do Hamilton's justifications for judicial review differ from Chief Justice Marshall's?

For a detailed treatment of some relevant historical issues, see Kramer, Foreword: We the Court, 115 Harv. L. Rev. 4 (2001). Kramer urges that for the framers the "Constitution was not ordinary law, not peculiarly the stuff of courts and judges." Instead it was "a special form of popular law, law made by the people to bind their governors." Id. at 10. For many members of the revolutionary generation, constitutional principles were subject to "popular enforcement," id. at 40, that is, public insistence on compliance with the Constitution, rather than judicial activity. "It was the legislature's delegated responsibility to decide whether a proposed law was constitutionally authorized, subject to oversight by the people. Courts simply had nothing to do with it, and they were acting as interlopers if they tried to second-guess the legislature's decision." Id. at 49. Kramer traces the controversial early growth of the practice of judicial review, with many seeing it as an "act of resistance." Id. at 54. At the founding, a "handful of participants saw a role for judicial review, though few of these imagined it as a powerful or important device, and none seemed anxious to emphasize it. Others were opposed....The vast majority of participants were still thinking in terms of popular constitutionalism and so focused on traditional political means of enforcing the new charter; the notion of judicial review simply never crossed their minds." Id. at 66.

In Kramer's account, constitutional limits would be enforced not through courts, but as a result of republican institutions and the citizenry's own commitment to its founding document. Kramer raises serious doubts about the account in Marbury v. Madison and in particular about judicial supremacy in the interpretation of the Constitution. He suggests that for some of the framers, judicial review was "a substitute for popular resistance" and to be used "only when the unconstitutionality of a law was clear beyond dispute." See also L. Kramer, The People Themselves (2004), for an expanded version of this argument.

Note, however, that many and probably most historians and historically minded lawyers disagree, and believe that Marbury v. Madison had it essentially right. See P. Hamburger, supra; R. Clinton, Marbury v. Madison and Judicial Review (1989). For valuable historical treatments, see W. Nelson, Marbury v. Madison: The Origins and Legacy of Judicial Review (2000); B. Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy (2007).

Martin v. Hunter's Lessee

14 U.S. (1 Wheat.) 304 (1816)

[This case arose out of a dispute over the ownership of land in Virginia. Hunter claimed the land pursuant to a grant from the state of Virginia in 1789, which confiscated lands owned by British subjects. Martin, a British subject, claimed that the attempted confiscation was ineffective under anticonfiscation clauses of treaties between the United States and England.

[The Virginia trial court held in favor of Martin; the Virginia Court of Appeals reversed, concluding that the state's title to the land had vested before the relevant treaties, and alternatively that Martin's claim was defeated by a 1796 Act of Compromise between the state and Martin's uncle, from whom Martin's claim derived. The Supreme Court of the United States reversed the Virginia Court of Appeals, neglecting to mention the Act of Compromise, but claiming that Virginia had not perfected its title before the relevant treaties. Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603 (1813). The Supreme Court remanded the case to the Virginia Court of Appeals with instructions to enter judgment for the appellant. But on remand the Virginia court declined. The court said that section 25 of the Judiciary Act was unconstitutional insofar as it extended the appellate jurisdiction of the Supreme Court to the Virginia court.

[In its opinion, the court emphasized that the act placed the courts of one sovereign—Virginia—under the direct control of another, an arrangement incompatible with the notion of sovereignty. "It must have been foreseen that controversies would sometimes arise as to the boundaries of the two jurisdictions. Yet the constitution has provided no umpire, has erected no tribunal by which they shall be settled. The omission proceeded, probably, from the belief, that such a tribunal would produce evils greater than those of the occasional collisions which it would be designed to remedy."

[The excerpts here deal only with the question of whether the Supreme Court has appellate jurisdiction over constitutional decisions by state courts.]

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MR. JUSTICE STORY delivered the opinion of the Court.…

[The] appellate power is not limited by the terms of the third article to any particular courts. The words are, "the judicial power (which includes appellate power) shall extend to all cases," &c., and "in all other cases before mentioned the supreme court shall have appellate jurisdiction." It is the case, then, and not the court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the constitution for any qualification as to the tribunal where it depends. [If] the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible.

If the constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all the cases enumerated in the constitution, be exclusive of state tribunals. How otherwise could the jurisdiction extend to all cases arising under the constitution, laws, and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by state tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some cases. If state tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the constitution. [This] construction would abridge the jurisdiction of such court far more than has been ever contemplated in any act of congress.…

[It] is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction. With this view the sixth article declares, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding." It is obvious that this obligation is imperative upon the state judges in their official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States—"the supreme law of the land."

A moment's consideration will show us the necessity and propriety of this provision in cases where the jurisdiction of the state courts is unquestionable. Suppose a contract for the payment of money is made between citizens of the same state, and performance thereof is sought in the courts of that state; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose at the trial the defendant sets up in his defence a tender under a state law, making paper money a good tender, or a state law, impairing the obligation of such contract, which law, if binding, would defeat the suit. The constitution of the United States has declared that no state shall make any thing but gold or silver coin a tender in payment of debts, or pass a law impairing the obligation of contracts. If congress shall not have passed a law providing for the removal of such a suit to the courts of the United States, must not the state court proceed to hear and determine it? [Suppose] an indictment for a crime in a state court, and the defendant should allege in his defence

that the crime was created by an ex post facto act of the state, must not the state court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defence? It would be extremely difficult, upon any legal principles, to give a negative answer to these inquiries. Innumerable instances of the same sort might be stated, in illustration of the position; and unless the state courts could sustain jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue.

It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before state tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States. Yet to all these cases the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the state courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all. It would seem to follow that the appellate power of the United States must, in such cases, extend to state tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the constitution.

It has been argued that such an appellate jurisdiction over state courts is inconsistent with the genius of our governments, and the spirit of the constitution. That the latter was never designed to act upon state sovereignties, but only upon the people, and that if the power exists, it will materially impair the sovereignty of the states, and the independence of their courts.…

It is a mistake that the constitution was not designed to operate upon states, in their corporate capacities. It 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. Surely, when such essential portions of state sovereignty are taken away, or prohibited to be exercised, it cannot be correctly asserted that the constitution does not act 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 states 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. The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the states, and if they are found to be contrary to the constitution, may declare them to be of no legal validity. Surely the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power.

Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute

independence of the United States. In respect to the powers granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution; and if they should unintentionally transcend their authority, or misconstrue the constitution, there is no more reason for giving their judgments an absolute and irresistible force, than for giving it to the acts of the other co-ordinate departments of state sovereignty.

The argument urged from the possibility of the abuse of the revising power, is equally unsatisfactory. It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse. It is still more difficult, by such an argument, to ingraft upon a general power a restriction which is not to be found in the terms in which it is given. From the very nature of things, the absolute right of decision, in the last resort, must rest somewhere—wherever it may be vested it is susceptible of abuse. In all questions of jurisdiction the inferior, or appellate court, must pronounce the final judgment; and common sense, as well as legal reasoning, has conferred it upon the latter.

It is further 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: first, 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; and, secondly, because congress must have an unquestionable right to remove all cases within the scope of the judicial power from the state courts to the courts of the United States, at any time before final judgment, though not after final judgment. As to the first reason—admitting that the judges of the state courts are, and always 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 proceeded upon a theory of its own, and given or withheld powers according to the judgment of the American people, by whom it was adopted. [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. Hence, in controversies between states; between citizens of different states; between citizens claiming grants under different states; between a state and its citizens, or foreigners, and between citizens and foreigners, it enables the parties, under the authority of congress, to have the controversies heard, tried, and determined before the national tribunals. No other reason than that which has been stated can be assigned, why some, at least, of those cases should not have been left to the cognizance of the state courts. In respect to the other enumerated cases—the cases arising under the constitution, laws, and treaties of the United States, cases affecting ambassadors and other public ministers, and cases of admiralty and maritime jurisdiction —reasons of a higher and more extensive nature, touching the safety, peace, and sovereignty of the nation, might well justify a grant of exclusive jurisdiction.

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 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; and it cannot be believed that they could have escaped the enlightened convention which formed the constitution. What, indeed, might then have been only prophecy, has now become fact; and the appellate jurisdiction must continue to be the only adequate remedy for such evils.

There is an additional consideration, which is entitled to great weight. The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum. Yet, if the construction contended for be correct, it will follow, that as the plaintiff may always elect the state court, the defendant may be deprived of all the security which the constitution intended in aid of his rights. Such a state of things can, in no respect, be considered as giving equal rights....

On the whole, the court are of opinion, that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one....

[Reversed.]

Note: Supreme Court Review of State Courts and State Laws

1. *Supreme Court review of state court decisions—underlying concerns*. In what ways does the issue in *Martin* differ from that in *Marbury*? Why is it important to have Supreme Court jurisdiction over the state courts? Justice Story's opinion stresses that, if there were "no revising authority," the federal system would make possible "jarring and discordant judgment." The appellate jurisdiction of the Supreme Court is, in this view, necessary to ensure the uniformity of federal law. But that raises the question why federal law must be uniform. As a general rule, legal requirements may vary from one state to another. What would be the evil in having disparate interpretations of the federal Constitution?

The Virginia judges in *Martin* made two arguments for their conclusion. First, they claimed not that the Constitution did not bind state judges, but that one sovereign could not control another; the risk of centralization thus outweighed the risk of disharmony. Second, they contended that other devices were available in order to minimize that latter risk and to bring about uniformity. Congress could, for example, allow removal to federal court of all cases involving a federal question. The position of the Virginia judges was that Congress had to take action to eliminate the risk of lack of uniformity through creating lower federal courts and expanding removal jurisdiction. The Court's view, by contrast, is that the more direct mechanism of control—appellate jurisdiction—is constitutionally permissible.

In addition to the uniformity point, note the possibility that Supreme Court review is necessary because of state hostility to, or lack of sufficient sympathy for, federal rights. The argument here is that state judges will be less likely to react sympathetically to federal claims—either because they lack the tenure and salary protections of article III, and are thus more susceptible to political influence, or because they have a natural alliance with the legislative and executive parts of state government. Perhaps, in short, state judges are insufficiently independent of the forces against which constitutional guarantees are supposed to run. Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105, 1127–1128 (1977), speaks of the difference between federal district judges and state trial judges, but the arguments are applicable to appellate judges as well:

> Federal district judges [are] as insulated from majoritarian pressures as is functionally possible, precisely to insure their ability to enforce the Constitution without fear of reprisal. State trial judges, on the other hand, generally are elected for a fixed term, rendering them vulnerable to majoritarian pressure when deciding constitutional cases. [This] insulation factor, I suggest, explains the historical preference for federal enforcement of controversial constitutional norms.

This view has often played an important role in constitutional history. But one might ask whether it might not be the federal judges who are likely to be biased.

Another justification for Supreme Court review of state court decisions stresses the comparative expertise of the federal courts in dealing with federal constitutional questions. Neuborne, supra, at 1120, suggests that "federal trial courts tend to be better equipped to analyze complex, often conflicting lines of authority and more likely to produce competently written, persuasive opinions than are state trial courts." Why should this be the case?

2. *Supreme Court review of state laws—constitutional basis*. *Martin* involved Supreme Court review of state court decisions, not of state laws; but elements of the Court's reasoning are applicable to the latter problem. Do the arguments, textual and otherwise, for the power of judicial review of state laws carry more force than those for judicial review of federal laws? Consider Justice Holmes's view: "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." O. W. Holmes, Collected Legal Papers 295–296 (1920).

3. *Justice Story and article III*. In *Martin*, Justice Story interpreted article III to require that the whole judicial power of the United States should be at all times vested, either in an original or appellate form, in some courts created under its authority. If it were accepted, this conclusion would have dramatic practical consequences. It means that, at any time, some federal court must have the power to decide any case to which the federal judicial power extends. On what does Justice Story base his conclusion?

Consider Currie, The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801–1835, 49 U. Chi. L. Rev. 646, 685–686 (1982), suggesting that Story's conclusion

> was contrary to Supreme Court precedent [as] well as to consistent congressional practice. [The] strongest argument against giving a natural reading to the ostensibly unlimited discretion of Congress to limit federal jurisdiction is *Marbury*'s principle that the courts were intended to enforce constitutional limits on legislative power.

Story's interpretation poorly comports with that principle, for it outlaws such minor caseload adjustments as the jurisdictional amount while allowing Congress to evade any substantial check by vesting sole power over important constitutional questions in a single lower court selected for the complaisance of its judges.

4. *Cohens v. Virginia*. In Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), the Court reaffirmed *Martin* in the context of review of state criminal proceedings. The case involved defendants who had been convicted of the unlawful sale of lottery tickets in Virginia. They defended on the ground that an act of Congress authorized the local government of the District of Columbia to establish a lottery. The Court, per Chief Justice Marshall, affirmed, concluding that the congressional statute did not authorize the sale outside the territorial boundaries of the District of Columbia. But the importance of the case lies in the holding that the Supreme Court could exercise jurisdiction over decisions of the state courts in criminal cases and in cases in which the state was a party. As to the fact that the state was a party, Chief Justice Marshall noted that "the judicial power, as originally given, extends to all cases arising under the constitution or a law of the United States, whoever may be the party." The language of article III, Chief Justice Marshall claimed, referred to "all" federal question cases. The same reasoning applied to the claim that the fact that a criminal case was involved made *Cohens* different from *Martin*.

5. *Federal supremacy reaffirmed*. In James v. City of Boise, 136 S. Ct. 685 (2016), the Supreme Court reaffirmed that its interpretations of federal law are supreme and binding on state courts. In Hughes v. Rowe, 449 U.S. 5 (1980) (per curiam), the Supreme Court had interpreted 42 U.S.C. §1988 to permit a prevailing defendant in a civil rights suit to recover fees only if "the plaintiff's action was frivolous, unreasonable, or without foundation." The Idaho Supreme Court concluded that it was not bound by the Court's interpretation, reasoning that "[although] the Supreme Court may have the authority to limit the discretion of lower federal courts, it does not have the authority to limit the discretion of state courts where such limitation is not contained in the statute." The Idaho Supreme Court proceeded to award attorney's fees under section 1988 without first determining whether the plaintiff's action was frivolous, unreasonable, or without foundation. In reversing, the Supreme Court stated:

"It is this Court's responsibility to say what a [federal] statute means, and once the Court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. (citations omitted)....As Justice Story explained 200 years ago, if state courts were permitted to disregard this Court's rulings on federal law, '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.' Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348 (1816)."

Note: Judicial Exclusivity in Constitutional Interpretation?

In Cooper v. Aaron, 358 U.S. 1 (1958), Arkansas had failed to comply with a district court order requiring desegregation. The school board's petition for certiorari described the situation: "[the] legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools

by enacting laws, calling out troops, making statements vilifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace."

The state argued that desegregation would lead to undue violence and disorder and that those consequences justified disobedience of the decree. The Court rejected that argument on the ground that "law and order are not here to be preserved by depriving the Negro children of their constitutional rights." But the Court went on to meet the view that "the Governor and Legislature [are] not bound by our holding in the *Brown* case":

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of Marbury v. Madison [that] "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution."

Cooper might well be thought to go beyond *Marbury*. *Marbury* established that in the course of deciding cases, courts must look to the Constitution as an enforceable source of law. When there is a conflict between the Constitution and a statute, and when the conflict is relevant to the resolution of a justiciable controversy, the courts must allow the Constitution, as they interpret it, to prevail. But this principle might not establish any special judicial authority to interpret the Constitution. On one view, *Marbury* means only that every branch of government, acting within its sphere, is authorized to interpret the Constitution.

Cooper v. Aaron suggests that the courts should see themselves as having been entrusted with a special and distinctive role as ultimate guardians of the meaning of the Constitution, and that other government officials must not interpret the Constitution for themselves but instead must look to the courts' interpretation and take it as authoritative. The result would be that judicial rulings are authoritative, even if there is no decree against the relevant officials in a litigated case. Perhaps more generally such a view would suggest that Presidents, members of Congress, and others should not think independently about what the Constitution requires, but should instead ask how the Supreme Court would be likely to decide.

If the passage from *Cooper* should be so understood, does it go too far in establishing "judicial supremacy"? What are the practical differences between *Cooper* and the narrower interpretation of *Marbury*?

1. *The view from the presidency.* Consider in this regard the responsibility of political actors, including most prominently the President, in circumstances in which (a) they believe that a statute is unconstitutional in the face of a court's conclusion that it is constitutional, or in the expectation that the court will uphold it, and (b) they believe that the statute or measure is constitutional in

the face of a judicial conclusion that it is unconstitutional, or in the expectation that the court will invalidate it. The two circumstances might seem very different.

Consider the view that in the first situation, political officials can legitimately make their own judgments about what the Constitution means, and act on the basis of those judgments. More particularly: Suppose that the Supreme Court has upheld or would uphold a statute that the President believes unconstitutional. (It might be an environmental statute, regulating private property owners and attacked as a "taking" of property, or it might be a restriction on commercial advertising, or it might be discrimination against transgender persons.) The Constitution imposes on all branches of government, not just the courts, a duty to comply with the Constitution. A necessary inference is that the President and members of Congress must make their own judgments on constitutional issues.

This responsibility might seem especially insistent in light of the fact that moral issues frequently become constitutional issues. If the courts' duty is exclusive, politics becomes drained of morality, and political actors will be making decisions on the basis of expediency alone. Thus, for example, if the President or a member of Congress believes that a statute is unconstitutional, he or she must ignore it, even if the Court would uphold it. The Constitution plainly speaks to all public officials, and it is simply too important to be left entirely to the justices. See the veto message of Andrew Jackson, 1832, on an act to recharter the Bank of the United States, 2 Messages and Papers of the Presidents 576, 581–582 (J. Richardson ed., 1900) (vetoing on constitutional grounds a measure that had been upheld by the Court: "[The] opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both").

In support of this general conclusion, consider the views expressed by Jefferson, Letter to Abigail Adams, Sept. 11, 1804, in 8 The Writings of Thomas Jefferson 310 (M. Ford ed., 1897):

> You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, any more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment, because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their sphere of action, but for the Legislature and Executive also, would make the judiciary a despotic branch.

The second situation might be a lot harder. Suppose the President, or some other public official, believes that the Supreme Court has wrongly invalidated a statute. Examples include decisions invalidating laws restricting abortions, laws forbidding the President from engaging in certain actions designed to reduce the risk of a terrorist attack, or laws requiring states to recognize same-sex marriage. What is the President's duty in the face of such laws? May he sign or propose legislation that would run afoul of the Court's decision? May he attempt to get the Court to overrule its decision through such acts and through repetitive and insistent litigation? May he campaign against the Court? See Lincoln's First

Inaugural Address, Mar. 4, 1861, in 6 Messages and Papers of the Presidents 5 (J. Richardson ed., 1900):

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding, in any case, upon the parties to a suit, as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government. And, while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned the government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.

Other Presidents, including Franklin Roosevelt and Richard Nixon, have expressed similar views. Can this position be distinguished from the refusal of Governor Faubus of Arkansas to comply with the decision in Brown v. Board of Education? See if you can draw a distinction that does not speak of the moral or legal correctness of *Brown*.

Consider the views of President Reagan's Attorney General Edwin Meese in The Law of the Constitution, 61 Tul. L. Rev. 979 (1987):

> [There] is [a] necessary distinction between the Constitution and constitutional law. The two are not synonymous....
>
> Obviously [a Supreme Court decision] does have binding quality: It binds the parties in a case and also the executive branch for whatever enforcement is necessary. But such a decision does not establish a "supreme Law of the Land" that is binding on all persons and parts of government, henceforth and forevermore....
>
> To confuse the Constitution with judicial pronouncements allows no standard by which to criticize and to seek the overruling of [cases] such as *Dred Scott*, and Plessy v. Ferguson. To do otherwise, as Lincoln said, is to submit to government by judiciary. But such a state could never be consistent with the principles of our Constitution. Indeed, it would be utterly inconsistent with the very idea of the rule of law to which we, as a people, have always subscribed.

2. *"Underenforced" constitutional norms*. It might be argued that the Constitution sometimes invalidates official action, even if the Supreme Court declines so to hold. There is, in this view, a difference between what the Constitution requires and what the Court says it requires. The Court might decide that, because of the need to defer to other branches of government or because of other limitations on its own competence, some measure does not violate the Constitution; but such a holding might not bind other officials in the process of deciding whether a proposed course of action is constitutional, since those officials are not constrained by principles of deference.

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See Sager, Fair Measure: The Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1220–1221, 1227 (1978):

> Conventional analysis does not distinguish between fully enforced and underenforced constitutional norms; as a general matter, the scope of a constitutional norm is considered to be coterminous with the scope of its judicial enforcement. [Where] a federal judicial construct is found not to extend to certain official behavior because of institutional concerns rather than analytical perceptions, it seems strange to regard the resulting decision as a statement about the meaning of the constitutional norm in question. After all, what the members of the federal tribunal have actually determined is that there are good reasons for stopping short of exhausting the content of the constitutional concept with which they are dealing; the limited judicial construct which they have fashioned or accepted is occasioned by this determination and does not derive from a judgment about the scope of the constitutional concept itself.
>
> [The] most direct consequence of adopting this revised view is the perception that government officials have a legal obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies. This obligation to obey constitutional norms at their underenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins.

On this view, branches of government other than courts act properly when they interpret the Constitution more expansively than does the Court. Perhaps, then, political branches are within their rights if they conclude (for example) that the death penalty is unconstitutional, that affirmative action programs are unconstitutional, that environmental statutes violate the takings clause, or that government must fund abortions—even if the Supreme Court disagrees.

3. *Settlement*. Consider the position that the view of judicial supremacy suggested in Cooper v. Aaron can be defended simply as a way of ensuring settlement of questions that badly need to be settled. See Alexander and Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1377 (1997). In this argument, "good institutional design requires norms that compel decision-makers to defer to the judgments of others with which they disagree." Id. at 1387. But it might be asked whether it is possible, or desirable, for the Supreme Court to have the power to "settle" constitutional questions.