The first page of the syllabus is reproduced below; the assignments for the first and second classes are available on Blackboard and on the Law School website, under Curriculum, in Course Web Pages. You should definitely do this reading and come to class prepared. As I will explain in class, I’ve reorganized the course somewhat, and under this reorganization we jump right into substance.

As you know, the course is full. My experience is that there typically is movement out of, and into, the course during the first week. If you are interested in taking the course and have not as yet obtained a seat, my recommendation is that you attend the first classes. In that way you will not have fallen behind should a seat become available.

I’m looking forward to meeting with all of you on Monday, January 9.

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**SYLLABUS**

The textbook for the course is Fallon, Meltzer & Shapiro, *Hart & Wechsler’s The Federal Courts and the Federal System* (5th ed.), as well as the text’s accompanying (2005) supplement. In addition, I have prepared supplementary materials, also available from the Bookstore. Page references below are to the textbook (____-____), the supplement (Supp. ____-____), or to the additional supplementary materials (Friedman Supp. ____-____). Finally, I have asked the bookstore to order several copies of the Chemerinsky treatise, *Federal Jurisdiction*. It is not required. I will discuss with you in class the utility of acquiring it.

Assignments will be subject to constant revision depending upon our progress in class. Assignments include (despite the omission of specific citation) any relevant constitutional or statutory provisions. In particular, from the outset you should cast your eye upon article III of the Constitution, which is reproduced at Friedman Supp. 1.

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CHAPTER II

THE NATURE OF THE FEDERAL JUDICIAL FUNCTION: CASES AND CONTROVERSIES

SECTION 1. GENERAL CONSIDERATIONS

Marbury v. Madison

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

On Petition for Mandamus.

* * * [The following opinion of the Court was delivered by the CHIEF JUSTICE.]

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

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

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

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

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

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

* * * [The Court here addressed the first question and concluded that the withholding of the commission was "violative of a vested legal right."]

This brings us to the second enquiry; which is,

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

The very essence of civil liberty 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.

[The Court next found that Marbury’s case was not “one of *damnnum absque injuria*; a loss without an injury.”]

* * * Is the act of delivering or withholding a commission to be considered 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 concerning which the injured individual has no remedy.

That there 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.

* * * [T]he question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act * * *.

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

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

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

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

[Mr. Marbury’s right having been established,] it remains to be inquired whether,

3d. 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.

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

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

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

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

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

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden;
as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department. * * *

This, then, is a plain case 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

1. [Ed.] Although the Supreme Court opinion failed to quote Section 13 of the 1789 Judiciary Act, its full text—as reproduced in the 1845 version of the Statutes at Large—was as follows (emphasis added): “That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have 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 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.”

Although commentators have generally supposed that this was the version of the statute considered by the Court, Pfander, Marbury, Original Jurisdiction, and the Supreme Court’s Revisory Powers, 101 Colum.L.Rev. 1515, 1535–39 (2001), argues that Marshall was more likely to have relied on a 1796 edition of the officially authorized but privately published Laws of the United States, which substituted a colon for the semicolon in the italicized sentence and capitalized the “And” that immediately follows it. According to Pfander, the difference is significant, because it highlights the independence of the grant of mandamus authority from the reference to “appellate jurisdiction” in the crucial sentence’s initial clause and thus supports the Court’s conclusion that the conferment of mandamus jurisdiction was “freestanding”, rather than being limited to cases otherwise within the Court’s “appellate jurisdiction”. See id. at 1540–46.
exercised over the present case; because the right claimed is given by a law of the United States.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The rule must be discharged.

NOTE ON MARBURY V. MADISON

(1) Historical Background. Control of the national government passed from Federalist to Republican hands for the first time in the national elections of 1800. The lines of political division were sharp. The Federalists generally favored a strong national government, a sound currency, and domestic and foreign policies promoting mercantile interests. The Republicans, by contrast, were the party of states’ rights and political and economic democracy.

Before the Republican Thomas Jefferson assumed office as President, the outgoing Federalists took a variety of measures to preserve their party’s influence through the life-tenured federal judiciary. First, President John Adams appointed his Secretary of State, John Marshall, as Chief Justice of the United States, and the Senate quickly confirmed him. Marshall, while continuing to serve as Secretary of State, took office as Chief Justice on February 4, 1801. Second, a new Circuit Court Act of February 13, 1801, relieved Supreme Court Justices of their circuit-riding duties and created sixteen new circuit court judgeships. With only two weeks remaining in his term, Adams hurried to nominate Federalists to the newly created positions, and the Senate confirmed the “midnight judges” with equal alacrity. Finally, on February 27, Congress enacted legislation authorizing the President to appoint justices of the peace for the District of Columbia. Adams nominated forty-two justices on March 2, and the Senate confirmed them on March 3, the day before the conclusion of Adams’ term. Adams signed the commissions, and John Marshall, as Secretary of State, affixed the great seal of the United States. Nonetheless, some of the commissions, including that of William Marbury, were not delivered before Adams’ term expired, and the new President refused to honor those appointments.

While Marbury’s suit was pending in the Supreme Court, the newly installed Republicans worked on a number of fronts to frustrate the outgoing Federalists’ designs for the federal judiciary. Congress repealed the Circuit Court Act of 1801 and abolished the sixteen judgeships that it had created. By statute, Congress also abolished the Supreme Court’s previously scheduled June and December Terms and provided that there be only one Term, in February. As a result, the Supreme Court did not meet at all in 1802. Having received Marbury’s petition in December 1801, it could not hear his case until February 1803. Even more menacingly, the Jeffersonians embarked on a program of judicial impeachments. The House voted articles of impeachment.

against the Federalist district judge John Pickering of New Hampshire, an
apparently insane drunkard, early in 1802. On the day after Pickering’s
conviction by the Senate in March 1804, the House impeached Supreme Court
Justice Samuel Chase. The case against Chase failed in the Senate. Had it
succeeded, the impeachment of John Marshall was widely expected to follow.

In this charged political climate, it seems doubtful, at least, that James
Madison, Thomas Jefferson’s Secretary of State, would have obeyed a judicial
order to deliver Marbury’s commission as a justice of the peace. Might this
consideration have influenced Marshall’s decision of the case? Should it have?
In light of his involvement in the events leading up to the case, should Marshall
have recused himself?

(2) A Political Masterstroke? The Marbury opinion is widely regarded as a
political masterstroke by John Marshall. Marshall seized the occasion to uphold
the institution of judicial review, but he did so in the course of reaching a
judgment that his political opponents could neither defy nor protest.

Is it ironic if Marbury, which authorizes the courts to hold some issues
outside the bounds of permissible political decision-making, was itself a political
decision? See generally Fallon, Marbury and the Constitutional Mind: A Bicen-

2. Commentators have overwhelmingly thought that Marshall’s decision was moti-
vated by political considerations. See Pland-
er, Marbury, Original Jurisdiction, and the
Supreme Court’s Revisory Powers, 101 Co-
um.L.Rev. 1515, 1515-18 (2001) (summa-
ing views and collecting citations). Among
the corroborating evidence is the Court’s de-
cision the week after Marbury in Stuart v.
Laird, 5 U.S. (1 Cranch) 299 (1800), decling to
consider the constitutionality of the Repeal
Act of 1802, which abolished the sixteen cir-
cuit court judgeships created by the Circuit
Court Act of 1801. See, e.g., Alfange. Marbur-
v. Madison and Original Understandings of
Judicial Review: In Defense of Traditional
Wisdom, 1993 Sup.Ct.Rev. 329, 362-68, 409-
10 (treating Stuart v. Laird as strongly pro-
bative of the Court’s awareness of the politi-
cal sensitivity of its situation and its willing-
ness to shape its decisions accordingly). For
the contrary view that Marshall’s Marbury
opinion was essentially innocent of political

3. The issue, however, was “by no
means new”, according to Currio, The Con-
stitution and the Supreme Court: The Powers of
the Federal Courts, 1801–1835, 49 U.Chi.
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 ex-
pressly affirmed. Even acts of Congress had
been struck down by federal circuit courts as
in Hayburn’s Case, p. 91, infra, and the
Supreme Court, while purporting to reserve
the question of its power to do as, had re-
viewed the constitutionality of a federal stat-
ute in Hylton v. United States, 3 U.S. (3 Dall.)
171 (1796). Justice James Iredell had explic-
tely asserted this power both in Chis-
holm 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. * * * Yet though Marshall’s principal
arguments echoed those of Hamilton [in
Federalist No. 76,] he made no mention of
any of this material, writing as if the question
had never arisen before.”

On the understanding of the Convention,
see Chap. I, pp. 11-12, supra. See also Klar-
man, How Great Were the “Great” Marshall
Court Decisions?, 87 Va.L.Rev. 1111, 1114–15
(2001) (observing that judicial review “be-
came far less controversial” during the peri-
od between the Convention and the decision
in Marbury); cf. Trenor, The Case of the
Prisoners and the Origins of Judicial Review,
143 U.Pa.L.Rev. 491, 509–70 (1994) suggest-
ing that judicial review had previously won
uncontroversial acceptance in Marshall’s home state of Virginia, perhaps uniquely
among the states, and that “Marshall’s com-
mmitment to judicial review can be understated
as having been shaped by [this] fact”).
the answer depend on sorting out various possible senses of “political” and determining in which sense, if any, Marbury should be so characterized?  

(3) Marbury’s Jurisdictional Holdings. Marbury ultimately holds that the Supreme Court lacked jurisdiction to decide the case before it.

The jurisdictional analysis proceeds in two steps. First, Marshall concludes that section 13 of the 1789 Judiciary Act confers original Supreme Court jurisdiction in actions for mandamus. Is this holding necessary? Plausible? See Amar, Marbury, Section 13, and the Original Jurisdiction of the Supreme Court, 56 U.Chi.L.Rev. 443, 456 (1989)(arguing that “the mandamus clause is best read as simply giving the Court remedial authority—for both original and appellate cases after jurisdiction * * * has been independently established”). See also Van Alstyne, supra note 1, at 15. But see Pfander, note 2, supra, at 1535 (arguing that “supreme” courts traditionally possessed a supervisory authority over lower courts and governmental officers, exercised through writs of mandamus and prohibition, and that against this background “section 13 appears to confer precisely the sort of freestanding power on the Court that Marshall attributed to it in Marbury”). Should the Court have adopted Amar’s construction under the principle favoring interpretations that render statutes constitutional?

Second, Marshall finds that the second paragraph of Article III, § 2 restricts the permissible scope of the Supreme Court’s original jurisdiction to cases “affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party.” Is this the best interpretation? According to Van Alstyne, supra note 1, at 31, this clause “readily supports the interpretation that the Court’s original jurisdiction may not be reduced by Congress, but that it may be supplemented”. Cf: Amar, supra, at 469–76 (arguing that the Court’s original jurisdiction was limited partly to spare parties from needing to travel to the seat of government to litigate their disputes). For further discussion of the Supreme Court’s original jurisdiction, see Chap. III, Sec. 3, infra.

Why didn’t Marshall decide the jurisdictional question first?

(4) Marbury’s Arguments for Judicial Review. What arguments does Marshall offer to support the power of judicial review? Are those arguments persuasive?

Consider the validity of the following criticism, suggested by Bickel, The Least Dangerous Branch—The Supreme Court at the Bar of Politics 2–14 (1962): Everyone accepted the proposition that the Constitution was binding on the national government. Dispute centered on the quite separate proposition that the courts were authorized to enforce their interpretations of the Constitution against the conflicting interpretations of Congress and the President. Marshall’s arguments prove the first, undisputed proposition, but furnish no support for the second. In sum, Marshall’s arguments beg the only question really in issue.

In support of this criticism, note that there are issues on which, without further inquiry, courts accept a formally correct determination of the legislative

4. See generally Dworkin, A Matter of Principle 162 (1985)arguing that interpretation in law characteristically requires judges to choose among eligible interpretations on grounds of substantive preferability and that much if not all legal interpretation is therefore “essentially political”.

5. For discussion of that principle, see Note on Constitutional Avoidance, p. 35, infra.
or executive branches—e.g., a statement that a certain statute has in fact been enacted in accordance with the prescribed procedure or an executive determination that a certain government is the established government of a country. See, further, Sec. 6, infra (discussing "political questions"). Would it not be possible for courts, in all cases, similarly to accept the determination of Congress and the President (or in the case of a veto, of a special majority of Congress) that a statute is duly authorized by the Constitution?

On the other hand, does Congress in voting to enact a bill, or the President in approving it, typically make or purport to make such a determination? With respect to the validity of the statute as applied in particular situations, how could they? ²⁸

(5) Historical and Functional Perspectives. Recent historical studies have argued that the founding generation initially distinguished between fundamental or constitutional law (embodiing basic terms of the social compact) and ordinary law (interpreted and enforced by courts through ordinary legal means). See, e.g., Snowiss, Judicial Review and the Law of the Constitution 13-44 (1990); Kramer, Putting the Politics Back Into the Political Safeguards of Federalism, 100 Colum.L.Rev. 215, 237-40 (2000); Wood, The Origin of Judicial Review Revisited, or How the Marshall Court Made More Out of Less, 56 Wash. & Lee L.Rev. 787, 796-99 (1999). Within the conceptual framework advanced by such commentators, interpretation of the fundamental law was an inherently political act, and courts could justifiably invalidate legislation on constitutional grounds only in cases of such relatively clear legislative or executive overreaching that little or no "interpretation" was required. ²⁷ According to Snowiss, supra, at 3-4, "Marshall’s key innovations did not come in Marbury," in which he said little about how the Constitution should be interpreted, but in opinions of the 1810s and 1820s in which he subjected the Constitution to "rules of statutory interpretation" and "transformed explicit fundamental law, different in kind from ordinary law, into supreme written law, different only in degree" and enforceable by the courts in all cases. For a more traditional account of the development of judicial review, in which the distinction between fundamental and ordinary law is not emphasized, see Corwin, The Establishment of Judicial Review, 9 Mich.L.Rev. 102-25, 283-316 (1910-11).

Suppose it were true that "Marshall’s willingness and capacity to push constitutional law beyond the strict limits of the doubtful case rule" gradually effectuated "the legalization of fundamental law" and brought about "judicial guardianship of the constitution" far in excess of anything contemplated at the Constitutional Convention or during the ratifying debates. Snowiss, supra, at 173-75. What contemporary consequences, if any, ought to follow?

Consider the following two paragraphs from the first edition of this book:

6. For an attempt to "provide a clear and persuasive derivation of Marbury's conclusion from the constitutional text", see Harrison, The Constitutional Origins and Implications of Judicial Review, 84 Va.L.Rev. 333 (1998).

7. With respect to the circumstances under which courts would hold statutes unconstitutional, see also Alfange, note 2, supra, at 342-49 (noting the expectation of the founding generation that judicial invalidation of statutes would occur only in cases of clear mistake); Casto, James Iredell and the American Origins of Judicial Review, 27 Conn. L.Rev. 329, 341-48 (1995) (same); Klarman, note 3, supra, at 1120-21.
"Both Congress and the President can obviously contribute to the sound interpretation of the Constitution. But are they, or can they be, so organized and manned as to be able, without aid from the courts, to build up a body of coherent and intelligible constitutional principle, and to carry public conviction that these principles are being observed?"  

"How important is it that such a body of constitutional principle should be developed? That people believe that the principles guide decision? Is this equally important with respect to all constitutional provisions? Is it equally important with respect to all kinds of official decisions? Or specially important with respect to decisions authoritatively applying the law to specific individuals?"

Do the considerations supporting judicial review help to indicate how much deference, if any, courts should accord to other branches' judgments concerning the constitutionality of their acts?

NOTE ON MARBURY V. MADISON AND THE FUNCTION OF ADJUDICATION

(1) The Derivation of Judicial Review. In Marbury, an important strand of Marshall's reasoning derives the Court's power to declare acts of Congress unconstitutional, and hence its power to make authoritative determinations of constitutional law, solely from its function of deciding cases: "[T]he province of the Court is, solely, to decide on the rights of individuals." Insofar as Marshall's arguments rest on this foundation, are there necessary implications for contemporary constitutional adjudication?

(2) The "Dispute Resolution" or "Private Rights" Model. In contemporary debate, insistence that the power of judicial review exists only as a necessary incident of the power to decide cases tends to cluster with a number of other views in what might be called a "dispute resolution" or "private rights" model of constitutional adjudication. Among the familiarly associated ideas are these: (a) The power of judicial review is anomalous under a substantially democratic Constitution and is tolerable only insofar as necessary to the resolution of cases; (b) The definition of justiciable "cases" should be restricted to the kinds of disputes historically viewed as appropriate for judicial resolution—paradigmatically, those in which a defendant's violation of a legal duty to the plaintiff has caused a distinct and palpable injury to an economic or other legally protected interest; (c) Courts should avoid any role as a general overseer of government conduct, and should especially avoid the award of remedies that invade traditional legislative and executive prerogatives.

The dispute resolution or private rights model draws support from a variety of sources. First, this model coheres well with a number of familiar axioms about constitutional adjudication, including the following: (a) Courts should avoid unnecessary decisions of constitutional law. (b) Courts sit only to adjudicate claims of legal rights, not to pronounce on generalized grievances. (c) A litigant may not assert the rights of third parties. For further discussion of these asserted axioms and their validity, see Section 3 of this Chapter.

Second, the Framers plainly contemplated that the jurisdiction of the courts would be "limited to cases of a Judiciary nature." 2 Farrand, The Records of the Federal Convention 430 (1911). See Chap. I, p. 11, supra. They
Section 13 of the Judiciary Act of 1789

And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where the 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 of fact in the Supreme Court, in all actions at law against citizens of the United States, shall be by jury. The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts in admiralty and maritime jurisdiction, and writs of mandamus, in cases warranted by the principles and usages of law, to any court appointed, or persons holding office, under the authority of the United States.
CHAPTER I

THE DEVELOPMENT AND STRUCTURE OF THE FEDERAL JUDICIAL SYSTEM

INTRODUCTORY NOTE: THE JUDICIARY ARTICLE IN THE CONSTITUTIONAL CONVENTION AND THE RATIFICATION DEBATES

Article III, the judiciary article of the Constitution, emerged from the Convention that met in Philadelphia during the summer of 1787.\(^1\) In the words of a leading scholar, however, to “one who is especially interested in the judiciary, there is surprisingly little on the subject to be found in the records of the convention.”\(^2\) For most of the delegates, the judiciary was a secondary or even a tertiary concern. To understand the Convention’s deliberations about Article III, attention to context is therefore vital.

A. Background of the Convention

On the whole, the period from the end of the Revolution to the ratification of the Constitution was one of economic growth.\(^3\) Nonetheless, a downturn in the middle of the 1780s caused significant dislocations, especially for debtors. For this among other reasons, “the Critical Period”, as it has been called,\(^4\) was a time of frustration, tension, and anxiety.\(^5\)


Professors Kurland and Lerner have assembled a five volume anthology, The Founders’ Constitution (1987), which presents views expressed on constitutional problems before, during, and after the Convention, through 1838. The volumes are keyed to the provisions of the Constitution and the first twelve amendments.

2. Farrand, Framing, note 1, supra, at 154.


By all accounts, the prevailing structure of "national" government, the Articles of Confederation, had proved inadequate to the challenges confronting the new nation. The Articles provided no executive branch and no system of courts. Each state had equal representation in Congress, and the concurrence of nine was needed for most important matters, including the appropriation of money. To levy a tariff required unanimous consent, which was never forthcoming. Perhaps the most basic problem, however, was that Congress lacked mechanisms to enforce its mandates. It could pass resolutions and make recommendations, but had to rely on the states to implement them. The states proved increasingly unwilling to do so.

Efforts to enforce the Treaty with Great Britain illustrated the difficulty. The treaty guaranteed the integrity of some of the private debts owed to British subjects, provided for post-war return of certain British property interests acquired before the war, and limited private causes of action against British subjects arising out of legitimate war activities. Yet nearly all the states enacted statutes that violated these and other provisions of the treaty. Even when states formally allowed suits by aliens, the cherished right to trial by jury often functioned as an instrument of nullification, as it sometimes did in other debtor-creditor actions.6

Under the circumstances, the nation suffered a series of humiliations in foreign affairs. And the need for a national power to tax and to regulate commerce was increasingly obvious. "By 1787 almost every political leader in the country, including most of the later Antifederalists, wanted something done to strengthen the Articles of Confederation."7

Related to the problems issuing from national weakness, but also possessing a dynamic of their own, were anxieties about emerging political currents in the state legislatures and elsewhere. By the 1780s, a burgeoning commercialism had broadly expanded networks of credit and debt, and resentments accumulated around debtor-creditor relations, including those between the states—most of which had borrowed heavily during the Revolution—and their debt holders. At least six states responded by authorizing paper money, which was widely expected to yield inflation.8 Some feared that it would spawn a broad-based financial instability. In the state legislatures, movements were afoot to pass debtor relief laws. In Massachusetts, Shays's Rebellion—a revolt of western debtors—broke out.

To many of those who came to be called Federalists, "the rage for paper money, for an abolition of debts",9 and similar proposals under discussion reflected not only bad policy but a form of political immorality—a breach of honor, if not of natural right, and one that threatened to spawn both financial and political turmoil.10 From this perspective, a new, national constitution was necessary to restore a regime of virtuous government—or, failing that, a


8. See, e.g., Reisman, Money, Credit, and Federalist Political Economy, in Beeman et al., Beyond Confederation, note 7, supra, at 125, 150-51; Jensen, note 3, supra, at 313-26.

9. The Federalist, No. 10 (Madison).

10. See Wood, note 7, supra.
scheme that would protect individual rights and the public good by ensuring that faction would be checked by faction and ambition set against ambition.

When the Constitutional Convention met in Philadelphia with a charge to amend the Articles of Confederation, it agreed immediately to ignore the limits on its mandate and instead to draft an entirely new constitution. With the agenda thus framed, the principal questions involved the extent to which a new Constitution should create and empower a truly national government to replace the existing confederation. At one pole stood the nationalists. At the other were those who preferred more minor departures from the existing confederated structure, with authority concentrated in the sovereign states and delegated to a federal government by the states for limited purposes only.

As historical studies of “republican” ideology have emphasized, this division tended to correlate with, and at least partly reflected, a more profound disagreement about the foundations of legitimate government. The nationalists—or “Federalists”, as they came to be called—generally favored representative institutions in which enlightened leaders would be at least partly insulated from, and reasonably asked to rise above, the play of passions and factional interests that often characterized state and local politics. By contrast, those

11. See The Federalist, No. 10 (Madison).
12. See The Federalist, No. 51 (Madison).
13. On the relationships among formal legality and illegality, popular sovereignty, and the theory of political legitimacy reflected in the framing and ratification of the Constitution, and on the implications of the implicit constitutional theory of the founding for subsequent American constitutional history, see Ackerman, 1 We the People: Foundations (1991); Ackerman & Katyal, Our Unconventional Founding, 62 U. Chi. L. Rev. 475 (1995); Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. Chi. L. Rev. 1043 (1988); Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457 (1994). Professor Ackerman generally sees the founders as breaking sharply with existing legal forms, in the name of higher law or “We the People”, whereas Professor Amar asserts the availability of legal justifications for the course of action followed at the Convention and after.
14. Crosskey, Politics and the Constitution in the History of the United States (1953), makes especially strong claims about the nationalism of the Constitution that emerged from the Convention. For sharp criticism, see, e.g., the reviews by Professors Brown and Hart, 67 Harv. L. Rev. 1439, 1456 (1954), and Goebel, Ex Parte Clio, 54 Colum. L. Rev. 459 (1954). On the general dismissal of Crosskey’s work by a later generation of historians, see Beeman, Introduction, in Beeman, Botein & Carter, note 7, supra, at 6–8.

Legal scholars have been interested in republicanism largely as a theory that might inform legal, and especially constitutional, interpretation. The leading works see a republican foundation for judicial contributions to reasoned governmental deliberation, see, e.g., Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29 (1985); Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988), or to political freedom, see, e.g., Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4 (1986); Michelman, Law’s Republic, 97 Yale L.J. 1493 (1988). For a critical assessment, see Fallon, What Is Republicanism, and Is It Worth Reviving?, 102 Harv. L. Rev. 1695 (1989).
wishing to retain the centrality of more local institutions tended to be suspicious of political elitism and supportive of democratic egalitarianism.\textsuperscript{16}

Against this backdrop, perhaps the most crucial decision of the Constitutional Convention was that a federal government should be established with powers to act directly on individuals, not just on the member states. The most important implementing decisions were those dividing power between state and national government and devising representative institutions in which the influence of passion and faction would be filtered if not eliminated. Almost without exception, decisions regarding the judiciary were ancillary, and reflected settlements and divisions concerning more centrally controverted issues.

\section*{B. The Convention}

The Convention’s principal decisions concerning the federal courts may be grouped under five headings:

\textit{First}, that there should be a federal judicial power operating, like the legislative and executive powers, upon both states and individuals;

\textit{Second}, that the power should be vested in a Supreme Court and in such inferior federal courts as Congress might establish;

\textit{Third}, that the federal judiciary should be as “independent as the lot of humanity will admit”\textsuperscript{17} and that its power should be judicial only but should include the power to pass upon the constitutionality of both state and federal legislation;

\textit{Fourth}, that the power should extend to nine specified classes of cases; and

\textit{Fifth}, that in certain cases the Supreme Court should have original jurisdiction and in the remainder “appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

To understand the judicial structure chosen at the Convention, however, it is necessary to have a general picture of the way the Convention worked. Its deliberations divided into three main phases.

\textit{The settlement of general principles (May 30 to July 26).} Although the Convention was scheduled to convene on May 14, no quorum was present until May 25, and the Convention did not begin its substantive business until four days later. On May 29, Governor Edmund Randolph of Virginia presented fifteen resolutions, variously referred to as the “Virginia Plan” or the “Randolph Plan”, that as amended and expanded ultimately became the Constitution of the United States.\textsuperscript{18}

Jointly drafted by the Virginia delegation but with Madison exerting a heavy influence,\textsuperscript{19} the Randolph Plan called for a national government consisting of legislative, executive, and judicial branches. It provided national legislative authority “in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by individual

\textsuperscript{16} See generally Wood, note 3, supra, at 393-395; Wood, note 7, supra.

\textsuperscript{17} Article XXIX of the Declaration of Rights of the Massachusetts Constitution of 1780.

\textsuperscript{18} I Farrand 20-23.

\textsuperscript{19} See Banning, The Practical Sphere of a Republic: James Madison, the Constitutional Convention, and the Emergence of Revolutionary Federalism, in Beeman, Botein, & Carter, note 7, supra, at 162-87.
legislation"; and it conferred a legislative veto over state legislation. The national legislature was to consist of two houses, each apportioned according to the states' free population or their contributions to the national treasury. The Randolph Plan contemplated a national executive and a judiciary "to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the national legislature".

Randolph's resolutions became the order of business when, on May 30, the Convention resolved itself into a Committee of the Whole to begin serious deliberation. On the same day Charles Pinckney of South Carolina proposed a draft constitution that was also referred to the committee. 29 As discussed and amended through two weeks of debate, the Randolph Plan provided the substance of the first report of the Committee of the Whole to the Convention on June 13.

Randolph's plan had a distinctly nationalist thrust, and, unsurprisingly, it precipitated a counter-proposal by William Paterson of New Jersey, 31 which would have retained the existing unicameral Congress, with each state continuing to possess an equal vote. Even the Paterson Plan, however, would have created a national executive and a national judiciary. During this period, Alexander Hamilton of New York presented the fourth and last of the complete plans before the Convention. 22 As a final contribution to the mix, the Convention probably had before it a draft, of a judiciary article only, in the handwriting of John Blair of Virginia. 23

But it was the Randolph Plan, and to a lesser extent the Paterson alternative, on which the delegates principally focused. Upon the introduction of the Paterson Plan, both it and the Randolph Plan were returned to the Committee of the Whole. Following four days of debate, the Committee voted on June 19, seven states to three with Maryland divided, 24 to adhere to its original report of the Randolph resolutions.

There followed the second major round of debate, in the Convention proper, on the report of the Committee of the Whole. At the outset, progress stalled for nearly a month, as—amid threats that delegates from the small states would pull out—the Convention wrestled with the divisive issue of proportional versus equal representation of the states. Finally, on July 18, a compromise was voted, under which representation would be proportional in the House but equal in the Senate. Remaining disagreements were worked out, frequently by compromise, over the next ten days.

The elaboration of detail (July 27 to September 10). 25 The Convention adjourned from July 27 to August 6 while a Committee of Detail, chaired by John Rutledge, prepared the first definite draft of the Constitution. 26 The Committee built upon the votes of the Convention adopting or modifying Randolph's Virginia Plan, but it drew also on the other plans that had been submitted, on the provisions of various state constitutions, and on a report drafted in 1781 by a committee of the Continental Congress that had sought to

20. 3 Farrand 595-609 (Appendix D).
21. 1 id. 242-45, 3 id. 611-16 (Appendix E).
22. 1 id. 291-93, 3 id. 617-30 (Appendix F).
23. Blair's draft was later found in the papers of George Mason. 2 id. 432-33.
24. 1 id. 313, 322.
25. This phrase is described in Farrand, Framing, note 1, supra, at 124-73, and Warren note 1, supra, at 568-665.
26. 2 Farrand 177-80.
revise the Articles of Confederation. The report of the Committee of Detail
introduced the third major round of debate, during which the Convention
finally came to agreement on all remaining problems of general principle.

Final settlement and polishing (September 10 to 15). A Committee on
Style, which made more than stylistic changes, reported to the Convention on
September 12. There ensued a final review, which produced minor ame-
ments and culminated in the signing of the engrossed Constitution on Monday,
September 17.

C. The Judiciary Article

1. A Federal Judicial Power

On the first day of substantive debate (May 30), the Committee of the
Whole accepted Randolph’s resolution “that a national government ought to be
established consisting of a supreme Legislative, Judiciary, and Executive”.29
Again on June 4, Madison records in his notes, the first clause of Randolph’s
ninth resolution—“Resolved that a national Judiciary be established”—passed
unanimously.30

What was thus agreed to, without discussion or further question, was a
substantial innovation in American experience. The new states had tried to
settle border disputes by the device of ad hoc tribunals.31 In addition, Congress
had possessed the power to “appoint” state courts for the trial of “piracies and
felonies on the high seas”,32 and it had even established a distinctively national
court to handle appeals in cases of capture.33 But what was now proposed was

27. For this final phase, see Farrand,
Framing, note 1, supra, at 176–95, and War-
ren, note 1, supra, at 686–721.
29. Connecticut alone opposed, with
New York divided. 1 id. 30–32.
30. Madison’s Journal 168 (Scott ed.
1895). (Madison’s Notes of Debates in the
Federal Convention of 1787 are also available
in a paperback edition (Koch ed., Norton,
1969).) See also 1 Farrand 104.
31. The Articles of Confederation pro-
vided a cumbersome machinery for resolving
disputes between states, under which the dis-
puting states selected seven judges by joint
consent, any five of whom constituted a quor-
num. If judges could not be agreed upon,
Congress was to select three candidates from
each state, and the court would be arrived at
by alternate striking of names. The judgment
of the court was to be final. Articles of Con-
federation, Art. IX.
32. Articles of Confederation, Art. IX.
Congress exercised the power by providing
for trial of such offenses by designated state
judges in 1781. As early as 1775, Congress
had suggested that the several states set up
courts to determine all cases of capture in the
first instance, or confer such jurisdiction on
their existing courts. See Carson, note 31,
supra, at 42–43. In all such cases an appeal
was to lie to Congress, or such person or
persons as Congress should appoint. All the
states but New York complied, and even New
York ultimately appears to have come into
partial compliance. See id. at 45.
33. The first appeal from a state tribu-
nal came up in August of 1775, and Congress
appointed a special committee to hear it. The
practice of appointing special committees
continued until January, 1777, when a five-
much more than a specialized tribunal. It was a national judicial power joined with executive and legislative powers as part of a national government.

The Convention's unhesitating initial agreement about the need for a national judiciary was only a prelude to serious disagreements about the kinds of tribunals that should exercise the judicial power and about the scope of the jurisdiction that these tribunals should possess. Nonetheless, the unanimity bespoke a general understanding that a sound and efficacious government requires courts.

2. The Tribunals Exercising the Power

Having agreed to the establishment of a national judiciary, the Convention proceeded swiftly to vote that the judicial branch should "consist of one supreme tribunal, and of one or more inferior tribunals."\(^4\) The vote of June 4, reiterated on June 5, reflected an uncontroversial agreement, never to be reconsidered, that there should be one Supreme Court.\(^3\) The decision concerning inferior federal courts proved less stable.\(^36\)

On June 5, after an inconclusive discussion about where the power to appoint inferior tribunals should lie, Rutledge moved to reconsider the provision for their establishment at all. He urged that "the State tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights & uniformity of Judgments: that it was making an unnecessary encroachment on the jurisdiction of the States, and creating unnecessary obstacles to their adoption of the new system".\(^37\) Sherman, supporting him, dwelled on the

member Standing Committee was appointed. At length, however, in January, 1780, Congress resolved "that a Court be established for trial of all appeals from the Courts of Admiralty in these United States, in cases of capture, to consist of 3 Judges appointed and commissioned by Congress".\(^4\) The court was called "The Court of Appeals in Cases of Capture". See Carson, note 31, supra, at 41-64.

Although this was the first national court, several needed powers were stricken from its authorizing provisions, including those of fining and imprisoning for contempt and disobedience and directing that the state admiralty courts should execute its decrees.\(^1\) Id. at 56. Indeed, the court was never really independent of its creator. In the case of the brig "Susannah", involving a delicate question of national power arising out of conflict between a New Hampshire statute and the act of Congress creating the Court of Appeals, Congress ordered that all proceedings upon the sentence of the court be stayed, and attempted to determine the dispute itself. Congress never took any final action in the case, but it defeated a motion, made during the debate, stating that it was improper for Congress in any manner to reverse or control the court's decisions. In December, 1784, business had dwindled; the court had cleared its docket; and after a few more occasional sessions, the Court ceased to function on May 16, 1787.\(^1\) Id. at 58-60.

Nonetheless, "some 118 cases were disposed of by the congressional committees and the Court of Appeals, and the idea became well fixed that admiralty and maritime cases pertained to federal jurisdiction". Hockett, The Constitutional History of the United States 157 (1939). See also Jameson, The Predecessor of the Supreme Court, in Essays in the Constitutional History of the United States 1-45 (1889).

34. 1 Farrand 104-05 (June 4), 119 (June 5).

35. All the plans submitted to the Convention provided for a Supreme Court. See id. 21, 244, 292; 2 id. 432; 3 id. 600.

36. Although the Randolph and Pinckney plans called for mandatory establishment of inferior federal courts, the Paterson plan did not provide for any such courts at all. Hamilton's plan empowered Congress to create them for the determination of all matters of general concern. John Blair's plan provided only for lower courts of admiralty.

37. 1 Farrand 124.
expense of an additional set of courts. 38

Madison strongly opposed the motion. He argued that “unless inferior federal tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree.” 39 Besides, he maintained, “an appeal would not in many cases be a remedy.” “What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up witnesses, tho’ ever so distant from the seat of the Court. An effective Judiciary establishment commensurate to the legislative authority, was essential.” 40 Wilson and Dickinson spoke in the same vein, with the former emphasizing the special need for an admiralty jurisdiction. 41

Despite these appeals, Rutledge’s motion to strike out “inferior tribunals” carried, five states to four with two divided. 42 This, however, was not the end of the matter. Picking up on a suggestion by Dickinson, Wilson and Madison moved a compromise resolution, which provided that “the National Legislature [should] be empowered” to “institute”—the verb recorded in Madison’s notes 43—or “appoint”—the word in the Convention Journal 44 and another set of contemporary notes 45—“inferior tribunals”. According to Madison, he and Wilson “observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them”.

Pierce Butler objected even to this compromise proposal: “The people will not bear such innovations. The States will revolt at such encroachments.” Despite this protest, “the Madisonian Compromise”, as it has come to be called, was agreed to, eight states to two with one divided. 46

38. Id. 125.
39. Id. 124.
40. Id.
41. Id. 124 (Wilson), 125 (Dickinson).
42. Id. 125.
43. Id.
44. Id. 119.
45. Id. 127 (Yates).
46. Id. 124–25 (June 5). Professor Collins sees a puzzle in the sequence of the Convention’s actions on June 4–5: Why, within so short a span, did the Convention swing from unanimous approval of constitutionally mandated lower federal courts, to preclusion of lower federal courts altogether, to approval of a compromise apparently authorizing Congress to “appoint” or “establish” lower federal courts? See Collins, Article III Cases, State Court Duties, and the Madisonian Compromise 1995 Wis.L.Rev. 35, 116–19. During the interval between the vote to approve mandatory federal courts and adoption of Rutledge’s motion to reconsider, the Convention voted to delete the provision of the Randolph Plan that the national judiciary should be elected by the national legislature and to leave open for the time being the question of judicial selection. Emphasizing this background, Collins speculates that Rutledge’s motion to reconsider may have been motivated by the intervening debate on the selection of the federal judiciary; if the power did not lie with the legislature, the Convention might have considered it too dangerous to be vested elsewhere. See id.

A related suggestion ascribes significance to the contested wording of Madison’s and Wilson’s compromise resolution: if the congressional power was one to “appoint” inferior tribunals, this formulation may harbor back to the practice under the Articles of Confederation by which Congress “appointed” existing state courts, rather than creating independent federal courts, to conduct certain forms of judicial business. See Goebel, note 1, supra, at 211–12. On the subsequent alteration of the language to its final form, see infra.
Opposition to a system of inferior federal courts was renewed when the report of the Committee of the Whole came before the Convention on July 18. But it was milder, with Sherman saying that he “was willing to give the power to the Legislature but wished them to make use of the State Tribunals whenever it could be done with safety to the general interest”. This time the vote accepting the compromise was unanimous, and the decision stood without further question. The Committee of Detail reported a draft prescribing that the judicial power “shall be vested in one Supreme Court and in such inferior Courts as shall, when necessary, from time to time, be constituted by the Legislature of the United States.” The Committee of Style further altered the language to its current form.

3. Separation and Independence of the Judicial Power

a. Appointment of Judges

The method of appointing federal judges occasioned significant controversy. The Randolph Plan called for appointment by the legislature, but Madison objected that many legislators would be incompetent to assess judicial qualifications and proposed appointment by the “less numerous & more select” Senate. The Committee of the Whole agreed to Madison’s suggested amendment on June 13. The Convention adhered to this decision on July 21, when it rejected another proposal by Madison, who now feared that senatorial appointment would confer too much power on the states, and instead urged appointment by the national executive, with or without the approval of the Senate. In the closing days the issue was reopened yet again and finally resolved, as part of a general settlement on appointments, in favor of appointment by the executive with the advice and consent of the Senate.

b. Tenure and Salary

The provisions protecting the tenure and salary of judges received almost complete assent. There was minor controversy over whether to prevent the temptation of pay increases. The Committee of the Whole first accepted language barring increase as well as diminution in salary during tenure in office, but the prohibition against increases was rejected in the subsequent debate in the Convention and again in the debate on the report of the thereafter. See 1 id. 128, 224, 232–33; 2 id. 80–83; Warren, note 1, supra, at 327–29.

52. Appointment by the Senate was retained in the draft reported by the Committee of Detail. 2 Farrand 132, 155, 199, 183. The final compromise was worked out between August 25 and September 7. See id. 198, 533–40; Warren, note 1, supra, at 639–42. For Hamilton’s comments on the matter, see The Federalist, Nos. 76, 77.

53. All four of the principal plans provided that the judges should hold office during good behavior, and the Randolph, Pinckney, and Paterson plans forbade either a decrease or an increase in salary during continuance in office.

54. 1 Farrand 121.
Committee of Detail. The rejection rested largely on the practical ground that the cost of living might rise.

The lone assault on the principle of tenure during good behavior occurred in the debate on the report of the Committee of Detail, when Dickinson of Delaware, seconded by Gerry and Sherman, moved that the judges “may be removed by the Executive on the application by the Senate and House of Representatives”. The motion drew strong opposition, however, and only Connecticut ultimately supported it.

c. Extra-Judicial Functions

Randolph’s eighth resolution proposed to create a council of revision composed of “the Executive and a convenient number of the National Judiciary” with authority, first, “to examine every act of the National Legislature before it shall operate”, and, second, to review every negative exercised by the National Legislature upon an act of a state legislature, pursuant to a power proposed in the sixth resolution, before it “shall be final”. The dissent of the council was to “amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [blank] of the members of each branch.”

In an early vote of 8–2, the Committee of the Whole rejected this plan to mingle executive and judicial functions, and substituted a purely executive veto of national legislation. Madison and Wilson renewed the proposal for a council of revision on three subsequent occasions, but it was defeated each time.

In the view of Madison and Wilson, judicial participation in a council of revision would have furnished a necessary check upon legislative aggrandizement and provided an assurance of wiser laws. The arguments that prevailed against it were concisely stated by Gerry and King:

“Mr. Gerry doubts whether the Judiciary ought to form a part of [the council of revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being agst. the Constitution. This was done too with general approbation. It was quite foreign from the nature of ye. office to make them judges of the policy of public measures.”

King added “that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its


57. 1 Farrand 21.

58. Id. 97–104, 108–110 (June 4).

59. The Committee of the Whole adhered to the rejection, eight votes to three, on June 6. Id. 138–140 (June 6). The Convention did likewise in the later debate on the report of the Committee of the Whole, this time by four votes to three with two states divided. 2 id. 73–80 (July 21). Madison and Wilson made their final attempt in the debate on the report of the Committee of Detail, but their proposal, which this time took a somewhat different form, again failed. Id. 298 (August 15).
formation”.

The last important reference to extra-judicial functions occurred near the close of the Convention, when Dr. Johnson moved to extend the judicial power to cases arising under the Constitution of the United States, as well as under its laws and treaties. Madison, responding, "doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution, & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department." Madison's concern notwithstanding, "The motion of Docr. Johnson was agreed to [without opposition]: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.”

4. The Power to Declare Statutes Unconstitutional
At no time did the Constitutional Convention systematically discuss the availability or scope of judicial review, but the subject drew recurrent mention in debates over related issues. As in Madison's comment on Dr. Johnson's motion, the existence of a power of judicial review appears to have been taken for granted by most if not all delegates. The point became perhaps most explicit in a debate over the proposed congressional negative of state laws, during which the existence of a power in the federal courts to invalidate unconstitutional state laws was common ground. The crux of the controversy was whether this was a sufficient safeguard. Resolution came through acceptance of Luther Martin's proposal of the Supremacy Clause, which strengthened the judicial check by express statement of the parallel power and responsibility of state judges.

60. 1 id. 97–98, 109 (June 4).

61. The Convention permitted two other plans for using judges non-judicially to die without coming to votes. The first was a suggestion advanced by Ellsworth and put in more elaborate form by Gouverneur Morris to make the Chief Justice a member of the projected Privy Council of the President. See Warren, note 1, supra, at 643–50. The second was a proposal by Charles Pinckney that "each branch of the Legislature, as well as the Supreme Executive shall have authority to require the opinions of the supreme Judicial Court upon important questions of law, and upon solemn occasions". 2 Farrand 340–41 (August 20). Pinckney's proposal went to the Committee of Detail, but was never reported out.

62. 2 Farrand 430 (August 27). On whether the limitation of judicial authority to cases of a judicial nature clearly precluded advisory opinions, see Chap. II, Sec. 1, infra.

63. Berger, Congress v. The Supreme Court (1969), marshals the supporting evidence. Snowiss, Judicial Review and the Law of the Constitution 40 (1990), which deals much more broadly with shifting historical understandings concerning the Constitution's nature and judicial enforceability, concludes that "[w]here was more support than opposition for judicial authority over legislation in the convention, and this was probably an accurate reflection of the strength of the contending sides outside the convention."

64. Wilson summarized the proponents' case: "The power of self-defence had been urged as necessary for the State Governments—it was equally necessary for the General Government. The firmness of Judges is not of itself sufficient. Something further is requisite—it will be better to prevent the passage of an improper law, than to declare it void when passed." 2 Farrand 391 (August 23).

65. The proposal of a legislative negative, first advanced and vigorously supported throughout by Madison, was embodied in Randolph's sixth resolution, which authorized a negative only of state laws "contravening in the opinion of the National Legislature the articles of Union". 1 Farrand 21. In this form it was initially approved by the Committee of the Whole on May 31 without debate or dissent. Id. 54. The plan was first
The existence of a judicial safeguard against unconstitutional federal laws was similarly recognized on both sides in the debates over the proposal for a council of revision of acts of the national legislature. Gerry's statement presupposing a power of judicial review, already quoted, was substantially echoed at least eight times.66

The only note of challenge came in the fourth and last debate on the proposal when Mercer, a recently arrived delegate, speaking in support of the alternative plan of judicial participation in the veto, said that he “disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void”. Dickinson then observed that he was impressed with Mr. Mercer’s remark and “thought no such power ought to exist” but “he was at the same time at a loss what expedient to substitute”. Gouverneur Morris at once said that he could not agree that the judiciary “should be bound to say that a direct violation of the Constitution was law”, and there the discussion ended.67

Meanwhile, the final version of the Supremacy Clause had been approved. The Convention’s matter-of-course approval of the express grant of jurisdiction in cases arising under the Constitution gives further indication that some form of judicial review was contemplated.68

There was no exchange of views, even indirectly, concerning appropriate judicial methodology in constitutional interpretation.69

5. The Scope of Jurisdiction

As initially formulated, the Randolph Plan contemplated apparently mandatory federal jurisdiction of “all piracies & felonies on the high seas, captures from an enemy; cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the discussed on June 6, when the Committee rejected Charles Pinckney’s motion to extend the negative to “all laws which they shd. judge to be improper”. Id. 171. Rumbles of opposition then appeared and culminated in a debate in the Convention of July 17, when the plan was rejected. 2 id. 21-22.

Madison, in support, urged that states “can pass laws which will accomplish their injurious objects before they can be repealed by the Genl Legislate, or be set aside by the National Tribunals”. Sherman and Gouverneur Morris, in opposition, relied upon the courts to set aside unconstitutional laws, with Sherman saying that the proposal “involves a wrong principle, to wit, that a law of a State contrary to the articles of the Union, would if not, negatod, be valid and operative”. None doubted the judicial power. When the negative was defeated, Luther Martin at once proposed the first version of the Supremacy Clause, “which was agreed to” without opposition. Id. 27-29. See also id. 390-91.

66. See Rufus King, 1 Farrand 109 (June 4); Wilson, 2 id. 73 (July 21); Madison, id. 74 (July 21); 92-93 (July 23); Martin, id. 76 (July 21); Mason, id. 78 (July 21); Pinckney, id. 298 (August 15); G. Morris, id. 299 (August 15). See also Williamson, id. 376 (August 22). Cf. Snowiss, supra note 63, at 39-40: “It was not always clear, however, whether speakers endorsing judicial review were supporting a general power over legislation or one limited to defense of the courts’ constitutional sphere. Gerry’s observation was immediately preceded by the remark that the judiciary ‘will have a sufficient check against encroachments on their own department.’”

67. 2 Farrand 298-99 (August 15).

68. See text at note 62, supra.

69. Several prominent scholars have argued that it was widely understood during the 1780s and 1790s that judicial nullification should occur only in cases of plain unconstitutionality. See, e.g., Snowiss, supra note 63, at 13-44; Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 109 Colum. L. Rev. 215, 240 (2000); Wood, The Origin of Judicial Review Revisited, or How the Marshall Court Made More out of Less, 56 Wash. & Lee L. Rev. 787, 788-99 (1999).
Ames lists 173 amendments proposed in the first session of the first Congress, although this figure includes many repetitions. Of the total, 48 were primarily concerned with courts and court proceedings; most had to do with trial by jury and various rights of defendants in criminal proceedings. The Fourth, Fifth, Sixth, Seventh, and Eighth Amendments respond to the central concerns. The House approved a proposal to exclude appeals to the Supreme Court "where the value in controversy shall not amount to one thousand dollars", but it failed in the Senate.

EXCERPTS FROM THE FEDERALIST PAPERS

In the eighty-five Federalist papers, which provide easily the most influential contemporary exposition of the Constitution and its underlying premises, references to the courts and the judiciary are woven into the argument throughout. Five of the papers (Nos. 78 to 82) deal directly with the judiciary. The papers are well worth reading in their entirety. Excerpts from Nos. 78, 80, 81, and 82 are particularly illuminating with respect to issues of federal judicial power and the judicial role.

No. 78, Hamilton

We proceed now to an examination of the judiciary department of the proposed government.

* * * 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.


122. Ames, note 118, supra, at 316 (No. 225, drawn from Nos. 141, 181, 182); Senate Journal, p. 130.

1. Noting that the Federalist Papers had little circulation outside of New York, historians have questioned their influence either on the outcome of state ratification debates or on surrounding public understandings of the Constitution. See, e.g., Kramer, Madison's Audience, 112 Harv. L. Rev. 611, 664-65 (1999). Professor Kramer offers the further argument that the "Madisonian theory" often attributed to the Constitution (largely on the basis of Federalist No. 10) actually had little impact even on the framers of the Constitution. Yet the influence of the Papers on subsequent interpreters can hardly be doubted, nor can the insight that they offer into the understandings of their influential authors, Jay, Hamilton, and Madison.
The complete independence of the courts of justice is peculiarly essential in a limited Constitution. 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.

Some perplexity respecting the rights of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

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 pretense 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 proved anything, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty. * * *

No. 80, Hamilton

To judge with accuracy of the proper extent of the federal judicature, it will be necessary to consider, in the first place, what are its proper objects.

It seems scarcely to admit of controversy, that the judiciary authority of the union ought to extend to these several descriptions of cases: 1st. To all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2nd. To all those which concern the execution of the provisions expressly contained in the articles of union; 3rd. To all those in which the United States are a party; 4th. To all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th. To all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and lastly, to all those in which the state tribunals cannot be supposed to be impartial and unbiased.

The first point depends upon this obvious consideration, that there ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the state legislatures, without some constitutional mode of enforcing the observance of them? The states, by the plan of the convention, are prohibited from doing a variety of things; some of which are incompatible with the interests of the union, others, with the principles of good government. The imposition of duties on imported articles, and the emission of paper money, are specimens of each kind. No man of sense will believe that such prohibitions would be scrupulously regarded, without some effectual power in the government to restrain or correct the infractions of them. * * *

As to the second point, it is impossible, by any argument or comment, to make it clearer than it is in itself. If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question. Thirteen independent courts of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.

Still less need be said in regard to the third point. Controversies between the nation and its members or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum.

The fourth point rests on this plain proposition, that the peace of the WHOLE ought not to be left at the disposal of a PART. The union will
"Both Congress and the President can obviously contribute to the sound interpretation of the Constitution. But are they, or can they be, so organized and manned as to be able, without aid from the courts, to build up a body of coherent and intelligible constitutional principle, and to carry public conviction that these principles are being observed? * * *

"How important is it that such a body of constitutional principle should be developed? That people believe that the principles guide decision? Is this equally important with respect to all constitutional provisions? * * * Is it equally important with respect to all kinds of official decisions? Or specially important with respect to decisions authoritatively applying the law to specific individuals?"

Do the considerations supporting judicial review help to indicate how much deference, if any, courts should accord to other branches’ judgments concerning the constitutionality of their acts?

NOTE ON MARBURY V. MADISON AND THE FUNCTION OF ADJUDICATION

(1) The Derivation of Judicial Review. In Marbury, an important strand of Marshall’s reasoning derives the Court’s power to declare acts of Congress unconstitutional, and hence its power to make authoritative determinations of constitutional law, solely from its function of deciding cases: “[T]he province of the Court is, solely, to decide on the rights of individuals.” Insofar as Marshall’s arguments rest on this foundation, are there necessary implications for contemporary constitutional adjudication?

(2) The “Dispute Resolution” or “Private Rights” Model. In contemporary debate, insistence that the power of judicial review exists only as a necessary incident of the power to decide cases tends to cluster with a number of other views in what might be called a “dispute resolution” or “private rights” model of constitutional adjudication. Among the familiarly associated ideas are these: (a) The power of judicial review is anomalous under a substantially democratic Constitution and is tolerable only insofar as necessary to the resolution of cases; (b) The definition of justiciable “cases” should be restricted to the kinds of disputes historically viewed as appropriate for judicial resolution—paradigmatically, those in which a defendant’s violation of a legal duty to the plaintiff has caused a distinct and palpable injury to an economic or other legally protected interest; (c) Courts should avoid any role as a general overseer of government conduct, and should especially avoid the award of remedies that invade traditional legislative and executive prerogatives.

The dispute resolution or private rights model draws support from a variety of sources. First, this model coheres well with a number of familiar axioms about constitutional adjudication, including the following: (a) Courts should avoid unnecessary decisions of constitutional law. (b) Courts sit only to adjudicate claims of legal rights, not to pronounce on generalized grievances. (c) A litigant may not assert the rights of third parties. For further discussion of these asserted axioms and their validity, see Section 3 of this Chapter.

Second, the Framers plainly contemplated that the jurisdiction of the courts would be “limited to cases of a Judiciary nature.” 2 Farrand, The Records of the Federal Convention 430 (1911). See Chap. I, p. 11, supra. They
also decisively rejected a proposal to establish a Council of Revision with the power to pronounce on the wisdom of proposed legislation. See 1 Farrand at 21, 94. According to Justice Harlan, "unrestricted public actions might well alter the [historic] allocation of authority among the three branches of the Federal Government" and thereby "go far toward" transforming the federal courts into "the Council of Revision which, despite Madison's support, was rejected by the Constitutional Convention." Flast v. Cohen, 392 U.S. 83, 130 (1968)(Harlan, J., dissenting).1

Third, the dispute resolution or private law model reflects a conception of the separation of powers, which many have found attractive, in which the courts should accord deference to the democratic legitimacy and practical competencies of the legislative and executive branches. See, e.g., Allen v. Wright, 468 U.S. 737 (1984), p. 114, infra, and the following Note.

Structures by which courts limit the availability and scope of constitutional adjudication are supported from a somewhat different perspective by Brilmayer, The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement, 93 Harv.L.Rev. 297 (1979). Her theory rests on "three interrelated policies of Article III: the smooth allocation of power among courts over time; the unfairness of holding later litigants to an adverse judgment in which they may not have been properly represented; and the importance of placing control over political processes in the hands of the people most closely involved" (p. 302).

(3) The Public Rights Model. In contrast with the dispute resolution or private rights model, a more diffused conception of the function of courts in public law matters has emerged in the past half century (sometimes explicitly, sometimes assumed). This conception, which depicts constitutional (and sometimes statutory) interpretation by the courts as other than an incident of the power to resolve particular disputes between identified litigants, has at least three aspects. The first questions the importance of requiring that the plaintiff have a personal stake in the outcome of a lawsuit; in its purest form, it would permit any citizen to bring a "public action" to challenge allegedly unlawful government conduct. The second argues that the judiciary should not be viewed as a mere settler of disputes, but rather as an institution with a distinctive capacity to declare and explicate public values—norms that transcend individual controversies. The third defends the exercise by courts of broad remedial

1. The historical pedigree of the private rights or dispute resolution model has not gone undisputed. See, e.g., Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816 (1969)arguing that the British legal traditions that informed the Framers' intentions in Article III included numerous provisions for parties without a personal interest in the outcome to bring judicial challenges to unlawful government actions; Winter, The Metaphor of Standing and the Problem of Self-Governance, 40 Stan.L.Rev. 1371 (1988)arguing that from colonial times through the twentieth century, courts did not view a personal stake as an element of the case or controversy requirement, but instead granted relief when authorized by the forms of action; Pushaw, Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts, 69 Notre Dame L.Rev. 447 (1994)arguing that the framers intended Article III "cases" and "controversies" to be distinct, and that in the former, which were not intended to require suit by an injured party in an adversary proceeding, the principal judicial function was to be norm articulation.

For the view that eighteenth-century English practice required that plaintiffs establish a personal stake in litigation and was generally consistent with a "private rights" approach, see Clanton, Standing and the English Prerogative Writs: The Original Understanding, 63 Brook.L.Rev. 1001 (1997).
powers in cases challenging the operation of such public institutions as schools, prisons, and mental hospitals; it argues that relief cannot and should not be limited to undoing particular violations, but should involve judges (and their nominees) in the management and reshaping of those institutions.\textsuperscript{3}

Support for the public rights approach, particularly in constitutional adjudication, is found by some commentators in Marbury itself. See, e.g., Monaghan, \textit{Constitutional Adjudication: The Who and When}, 82 Yale L.J. 1363 (1973); Fallon, \textit{Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension}, 91 Calif.L.Rev. 1 (2003). According to Professor Monaghan, Marbury's "repeated emphasis that a written constitution imposes limits on every organ of the state * * * welded judicial review to the political axiom of limited government" (82 Yale L.J. at 1370). At least three other historical phenomena have contributed to the emergence of the public rights model.

The first involves the vast increase in governmental regulation, especially when implemented by administrative agencies, that has created diffuse rights shared by large groups and new legal relationships that are hard to capture in traditional, private law terms. At the same time, a need has arisen for judicial control of administrative power.\textsuperscript{4} Encouraged by statutes authorizing judicial review of administrative action, leading administrative law decisions gradually departed from the private rights model and accorded "standing" to persons asserting interests not protected at common law to represent the "public interest" in statutory enforcement. See, e.g., FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942). For further discussion, see pp. 149-50, infra.

A second factor has been the substantive expansion of constitutional rights, especially under the Warren Court in the 1960s. For example, the broadly shared interests of voters in challenging a malapportioned legislative district, see Baker v. Carr, 369 U.S. 186 (1962), p. 257, infra, or of public school pupils in challenging school prayer, see School Dist. v. Schempp, 374 U.S. 203 (1963), differ markedly from the liberty and economic interests recognized at common law.

Third, there has emerged an increasingly pervasive conception of constitutional rights not as shields against governmental coercion, but as swords authorizing the award of affirmative relief to redress injury to constitutionally protected interests. That development, the origins of which trace in part to the landmark decisions in \textit{Ex parte Young}, 209 U.S. 123 (1908), p. 982, infra (recognizing a judicially created equitable cause of action for violation of the Fourteenth Amendment's Due Process Clause), and \textit{Bivens v. Six Unknown


Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), p. 804, infra (recognizing a judicially created cause of action for damages for violation of the Fourth Amendment), also finds expression in the institutional reform litigation following Brown v. Board of Education, 347 U.S. 483 (1954). After the recognition of such rights as those to school desegregation, courts inevitably found themselves awarding remedies of a kind hard to square with at least some of the premises of the private rights or dispute resolution model.

(4) Overlap of the Dispute Resolution and Public Rights Models. The distinction between the somewhat simplistically depicted “dispute resolution” (or “private rights”) and “public rights” models4 is not watertight. School desegregation cases, for example, have their origin in individual grievances that may be assimilated to the dispute resolution or private rights model, but seemingly require the reshaping of institutions if the rights infringed are to be enforced. Conversely, an action seeking injunctive or declaratory relief against the future administration of a government policy (such as a police department’s alleged policy of needlessly subjecting detainees to life-threatening chokeholds) implicates the kind of publicly shared interests associated with the public rights model, but would not necessarily call for a broad or intrusive remedy. A prohibitory injunction or declaratory judgment would suffice. See Fallon, Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons, 59 N.Y.U.L.Rev. 1, 3–9 (1984). The devices of the class action, as well as other techniques for broadening the scope of litigation, frequently reflect efforts to meld the private rights and public rights models, and many of the tensions about the proper role of the courts have been felt in the resulting cases and doctrines.5

4. For valuable discussion of similar models from a comparative perspective, see Damaska, The Faces of Justice and State Authority (1986). Professor Damaska develops the relationship between what he calls the “conflict solving” and “policy implementing” approaches to adjudication and visions of the state as “reactive” and “activist.”

5. In an essay on institutional reform litigation, Professor Horowitz notes the difficulties of casting the issues in such cases in terms of legal rights; the dangers of attempting to treat class plaintiffs and governmental defendants as if each side were always homogeneous and adverse to the other; the hazards of delegating authority to masters and of compromising judicial neutrality; and the inevitability of unintended consequences when judges necessarily “act on a piece, and neglect the rest.” Horowitz, Decreasing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265. See also Fletcher, The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy, 91 Yale L.J. 635 (1982); Stewart, note 3, supra, at 1802–65.

Professor Fuller sounds similar themes in his well-known essay, The Forms and Limits of Adjudication, 92 Harv. L.Rev. 333 (1978), which asserts the inappropriateness of adjudication for the resolution of “polycentric” disputes, which he claims have too many ramifications, too many interdependent aspects, to yield to rational, properly judicial solution; they are far more suited to disposition by processes of negotiation and managerial intuition. According to Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 Harv. L.Rev. 410, 430 (1978): “The underlying message of [Fuller’s] Forms and Limits cannot be lightly disregarded: adjudication has a moral force, and this force is in major part a function of those elements that distinguish adjudication from all other forms of ordering. In the long run, the cost of departing from those elements may be a forfeiture of the moral force of the judicial role.” Cf. Bone, Lon Fuller’s Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation, 75 B.U.L.Rev. 1273 (1995) (arguing that, contrary to common understanding, Fuller’s theory did not categorically reject judicial resolution of polycentric disputes or institutional reform suits, and commending Fuller’s nuanced approach).
The distinction between the private and public rights models blurs, moreover, because the public rights model, sensibly construed, cannot be understood to license judicial review at the behest of any would-be litigant on the basis of any hypothesized set of facts or indeed no facts whatsoever. For there to be a constitutionally justicable case under the public rights approach, "the functional requisites of effective adjudication" must be satisfied. See Fallon, supra, at 51. These requisites cannot be reduced to a determinate list, but involve such considerations as:

(a) The importance, in the judicial development of law, of a concrete set of facts as an aid to the accurate formulation of the legal issue to be decided;

(b) The importance of an adversary presentation of evidence as an aid to the accurate determination of the facts out of which the legal issue arises;

(c) The importance of an adversary presentation in the formulation and decision of the legal issue; and

(d) The importance of a concrete set of facts in limiting the scope and implications of the legal determination, and as an aid to its accurate interpretation.

(5) A Testing Case. Suppose that a state employee, claiming that she is threatened with discharge in violation of her constitutional rights, brings a federal court action to enjoin her discharge and to require her state employer to institute certain procedures for dealing with cases like hers in the future. Two days after the complaint is filed, the plaintiff dies of unrelated causes, and her lawyer resists a motion to dismiss on the ground that the case raises important constitutional questions about the procedures and structure of the state employer. The lawyer seeks to substitute her client's husband, who is not a state employee, as plaintiff.

Of the functional requisites of adjudication cited above, some do not seem to be affected by the death of the original plaintiff, while others plainly are. But since only prospective relief was sought, the original plaintiff's death surely eliminates any ongoing dispute that the court's judgment and decree might resolve. Nor is there any indication in the character of the lawsuit that other employees of this agency confront similar problems, or, if they do, that they wish to press any claim they might have. Would a judicial decision passing on the constitutional question under these circumstances, and issuing an injunction requiring the agency to change its operations, be a legitimate exercise of judicial power? If you think so, would it matter if no evidence could be adduced that the original plaintiff had been threatened with discharge? If she had never been a public employee but had simply been seeking to determine whether the agency could discharge someone under certain conditions?

(6) The Supreme Court and the Models. The Supreme Court has never explicitly embraced the public rights model of the judicial role or disavowed the dispute resolution model. Indeed, its formal pronouncements have been consistently to the contrary.6 There are, however, some holdings that may be seen as

6. But cf. Chief Justice Rehnquist's dissenting opinion in Honig v. Doe, 484 U.S. 365, 329 (1988), a case in which the dispute had become moot only after the Supreme Court's grant of certiorari. The Chief Justice argued that the live controversy requirement is not an Article III command, but was originally a matter of judicial discretion, and that the Court should override the prohibition against deciding moot cases when there are good reasons to do so. He based his argument in part on the "unique and valuable ability"
reflecting, though not in explicit terms, a shift in conception of the judicial role. See, e.g., the developments discussed in the Note on Constitutional Avoidance, p. 85, infra, and in the Note on the Scope of the Issue in First Amendment Cases and Related Problems Involving "Facial Challenges", p. 187, infra. See also Fallon & Meltzer, New Law, Non-Retroactivity, and Constitutional Remedies, 104 Harv. L. Rev. 1731, 1779-1800 (1991) (citing, inter alia, harmless error practice, the practice of providing alternative grounds for decision, and the exception to mootness doctrine for cases "capable of repetition, yet evading review" in support of the conclusion that "there exists a substantial body of case law, rising almost to the level of a general tradition, in which adjudication functions more as a vehicle for the pronouncement of norms than for the resolution of particular disputes").

Note further that as the Supreme Court's appellate jurisdiction has become essentially discretionary, the Court has promulgated rules indicating that it will exercise its certiorari power based largely on the importance of the questions presented. See Sup.Ct.Rule 10; see generally Chap. XV, sec. 4, infra. However subtly, doesn't the Court's approach recognize the independent significance of norm-articulation as a judicial function?

(7) Discretion, Prudence, and the Judicial Function. Does the power of judicial review upheld in Marbury carry with it a correlative duty to decide any claims of unconstitutionality in a properly presented case, or is there some measure of discretion to abstain from such decisions? In Cohens v. Virginia, 19 U.S. 6 Wheat.) 264, 404 (1821), Chief Justice Marshall said: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution".

Shapiro, Jurisdiction and Discretion, 60 N.Y.U.L.Rev. 543 (1985), argues forcefully (in discussing a wide range of traditional and contemporary doctrines, including equitable discretion, abstention doctrines, prudential components of justiciability doctrines, forum non conveniens, and others) that Marshall's dictum cannot be taken at face value: On many issues, courts have exercised a "principled discretion" (p. 578) in refusing to exercise jurisdiction seemingly granted by Congress. The discretion of which Shapiro approves is not ad hoc, but rather constitutes a fine-tuning of legislative enactments in accordance with criteria that are openly applied and that are "drawn from the relevant statutory * * * grant of jurisdiction or from the tradition within which the grant arose" (ibid.). Compare Redish, The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory 47-74 (1991)(arguing that federal judicial jurisdiction is mandatory and that failure to exercise jurisdiction conferred is an illegitimate usurpation of Congress' lawmaking power).

Beyond the "principled discretion" defended by Professor Shapiro, is there a further judicial power to decline to exercise jurisdiction on a more ad hoc basis, for what might loosely be termed "prudential" reasons? Compare Bickel, The Least Dangerous Branch--The Supreme Court at the Bar of Politics 111-98 (1962) (so arguing) with Gunther, The Subtle Vices of the "Passive Virtues"--A of the Supreme Court to "decide a federal question in such a way as to bind all other courts" (p. 332).
Comment on Principle and Expediency in Judicial Review, 64 Colum.L.Rev. 1 (1964).\(^7\)

According to Fallon, *Marbury*, Paragraph (3), supra, at p. 18, a prudential tradition in constitutional adjudication traces to Marbury itself: "In Marbury, the Court reached the only prudent conclusion: It could not, indeed must not, issue a quixotic order to Madison to deliver Marbury's commission." Moreover, Fallon writes, "[e]ven if the face of prudence is typically one of judicial self-abnegation, there may be occasions when prudence counsels an otherwise constitutionally dubious assertion of judicial power. In Marbury itself, for example, the Court arguably invented a non-existent statutory jurisdiction in order to be able to hold * * * that Congress had overstepped constitutional bounds" and thereby establish what the Justices believed to be a functionally desirable tradition of judicial review. *Id.* at 19.

(8) *Marbury's Legacy.* Consider the suggestion of Fallon, supra, that Marbury has a political or prudential "face", reflecting its historical context and the Court's apparent motivation not to issue an order that would be defied, as well as private and public rights faces (or strands of analysis). According to Fallon, each of these faces continues to influence and indeed generate constitutional doctrine and thought,\(^6\) even though they are in obvious tension with one another: "[R]ichness and diversity are the glory of the constitutional culture that Marbury helps to structure. Apparent contradiction and methodological disagreement are also, perhaps inevitably, endemic to Marbury's legacy." *Id.* at 55. Do you agree?

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**NOTE ON THE RETROACTIVITY AND PROSPECTIVITY OF JUDICIAL DECISIONS**

(1) **Introduction.** Among the issues of judicial power that have been considered in terms of the functions of adjudication articulated in Marbury and implicit in Article III are issues concerning the retroactivity, non-retroactivity, and prospectivity of judicial decisions. For example, when the Supreme Court overrules a past decision or departs significantly from settled understandings and establishes rights and obligations not previously recognized, to which cases should (or must) the newly announced rule of decision be applied?\(^1\)

7. For further discussion, see *Note on Constitutional Avoidance*, p. 85, infra.

8. As examples of doctrines in the prudential tradition—in addition to the discretionary doctrines cited by Professor Shapiro—Fallon cites the Supreme Court's expressly "prudential" calculations in applying the doctrine of stare decisis, see, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 834 (1992); a strand of analysis under the political question doctrine, see pp. 256-57, infra; and a diffuse category of cases in which the Court, without expressly saying so, appears to have "shaped particular rulings (rather than entire doctrines) to avert public hostility" (p. 29).


Once it is recognized that judicial decisions can establish what are experienced as new rights and obligations, questions also...
CHAPTER II FEDERAL JUDICIAL FUNCTION

CORRESPONDENCE OF THE JUSTICES (1793)

Letter from Thomas Jefferson, Secretary of State, to Chief Justice Jay and Associate Justices:

Philadelphia, July 18, 1793.

Gentlemen:

The war which has taken place among the powers of Europe produces frequent transactions within our ports and limits, on which questions arise of considerable difficulty, and of greater importance to the peace of the United States. These questions depend for their solution on the construction of our treaties, on the laws of nature and nations, and on the laws of the land, and are often presented under circumstances which do not give a cognizance of them to the tribunals of the country. Yet their decision is so little analogous to the ordinary functions of the executive, as to occasion much embarrassment and difficulty to them. The President therefore would be much relieved if he found himself free to refer questions of this description to the opinions of the judges of the Supreme Court of the United States, whose knowledge of the subject would secure us against errors dangerous to the peace of the United States, and their authority insure the respect of all parties. He has therefore asked the attendance of such of the judges as could be collected in time for the occasion, to know, in the first place, their opinion, whether the public may, with propriety, be availed of their advice on these questions? And if they may, to present, for their advice, the abstract questions which have already occurred, or may soon occur, from which they will themselves strike out such as any circumstances might, in their opinion, forbid them to pronounce on. I have the honour to be with sentiments of the most perfect respect, gentlemen,

Your most obedient and humble servant,


Anticipating that the Justices would agree to proffer their "advice", the President’s Cabinet agreed to address no fewer than twenty-nine specific questions to the Court. It is unclear whether those questions were appended to Jefferson’s letter, but the Justices were surely aware of the questions’ “general content”. Jay, Most Humble Servants: The Advisory Role of Early Judges 136–37 (1997). The following are some of the questions prepared by the President and his Cabinet for submission to the Justices:

1. Do the treaties between the United States and France give to France or her citizens a right, when at war with a power with whom the United States are at peace, to fit out originally in and from the ports of the United States vessels armed for war, with or without commission?

2. If they give such a right, does it extend to all manner of armed vessels, or to particular kinds only? If the latter, to what kinds does it extend?

1. The letters are respectively taken from 3 Correspondence and Public Papers of John Jay 486-89 (Johnston ed. 1891) and 15 The Papers of Alexander Hamilton 111 n. 1 (H. Syrett ed. 1969), and the questions from 10 Sparks, Writings of Washington 542-45 (1836).
3. Do they give to France or her citizens, in the case supposed, a right to
refit or arm anew vessels, which, before their coming within any port of the
United States, were armed for war, with or without commission?

4. If they give such a right, does it extend to all manner of armed vessels,
or to particular kinds only? If the latter, to what kinds does it extend? Does it
include an augmentation of force, or does it only extend to replacing the vessel
in statu quo?

17. Do the laws of neutrality, considered as aforesaid, authorize the
United States to permit France, her subjects, or citizens, the sale within their
ports of prizes made of the subjects or property of a power at war with France,
before they have been carried into some port of France and there condemned,
refusing the like privilege to her enemy?

18. Do those laws authorize the United States to permit to France the
erection of courts within their territory and jurisdiction for the trial and
condemnation of prizes, refusing that privilege to a power at war with France?

20. To what distance, by the laws and usages of nations, may the United
States exercise the right of prohibiting the hostilities of foreign powers at war
with each other within rivers, bays, and arms of the sea, and upon the sea
along the coasts of the United States?

22. What are the articles, by name, to be prohibited to both or either
party?

25. May we, within our own ports, sell ships to both parties, prepared
merely for merchandise? May they be pierced for guns?

29. May an armed vessel belonging to any of the belligerent powers follow
immediately merchant vessels, enemies, departing from our ports, for the
purpose of making prizes of them? If not, how long ought the former to remain,
after the latter have sailed? And what shall be considered as the place of
departure from which the time is to be counted? And how are the facts to be
ascertained?

On July 20, 1793, Chief Justice Jay and the Associate Justices wrote to
President Washington expressing their wish to postpone the answer to Jeff-
erson's letter until the sitting of the Court. On August 8, 1793, they wrote to the
President as follows:

Sir:

We have considered the previous question stated in a letter written to us
by your direction by the Secretary of State on the 18th of last month. The lines
of separation drawn by the Constitution between the three departments of the
government—their being in certain respects checks upon each other—and our
being judges of a court in the last resort—are considerations which afford
strong arguments against the propriety of our extrajudicially deciding the
questions alluded to; especially as the power given by the Constitution to the
President of calling on the heads of departments for opinions, seems to have
been purposely as well as expressly limited to the executive departments.

NOTE ON ADVISORY OPINIONS

(1) Consistent Practice. The prohibition against advisory opinions has been
termed "the oldest and most consistent thread in the federal law of justiciabi-
ty.” Wright & Kane, Law of Federal Courts 65 (6th ed. 2002). But what makes a judicial opinion “advisory” in the constitutional sense? Would it be fair to describe the parts of Marbury v. Madison dealing with Marbury’s right to the commission and the propriety of the remedy of mandamus as advisory?

(2) Foundations. To what extent was the Justices’ decision controlled by the language and history of the Constitution? According to Jay, p. 78 n. 1, supra, 18th century English judges possessed a well established power to render advisory opinions (pp. 10–50); neither the constitutional text nor the discussions at the Constitutional Convention reflected any clear prohibition against advisory opinions (pp. 57–76); and Chief Justice Jay himself regularly gave informal legal advice to the Washington Administration (pp. 91–101). Against this background, Professor Jay argues that the explanation of the Correspondence of the Justices lies in a peculiar set of historical considerations, including (i) a sense that answers to some of the questions would shortly emerge in ordinary lawsuits, whereas answers to others might be inefficacious in affecting governmental action; (ii) the belief of the Chief Justice and other leading Federalists that the Executive, not Congress or the courts, should render controlling interpretations of treaties and of international law; and (iii) the desire of the Justices, who wished to be relieved of circuit riding responsibilities, to avoid entanglement in a potentially divisive political controversy (pp. 149–70). But see Pushaw, Why the Supreme Court Never Gets Any “Dear John” Letters: Advisory Opinions in Historical Perspective, 67 Geo.L.J. 473 (1988) (book review) (arguing that the Correspondence of the Justices is best explained by constitutional considerations unrelated to the immediate political context).

Perhaps due to the background of English practice, Felix Frankfurter concluded that the prohibition against advisory opinions must rest on policies implicit in Article III, rather than on historical pedigree. Frankfurter, Advisory Opinions, 1 Encyc. of the Social Sciences 475, 476 (1937). What are these policies? Are they the policies underlying the private rights or dispute resolution model of adjudication sketched on pp. 67–68, supra? Those associated with the “functional requisites” of effective adjudication acknowledged by the competing “public rights” model on pp. 70–71, supra?

To what extent would the objections to advisory opinions be met if the Court restricted itself to giving advisory rulings on definite states of fact, real or assumed?

Suppose the Justices had answered the questions presented to them. Would their answers have been authoritative in subsequent litigation? How might the Supreme Court’s role have been altered? Would the Court’s prestige, and the acceptability of its decisions, have been enhanced or diminished? Is there value in having courts function exclusively as organs of sober second thought, appraising action already taken, rather than as advisers at the stage of initial decision?

(3) Identifying Advisory Opinions. (a) Would a purely prospective overruling of a past decision by the Supreme Court, which did not apply the newly

(9) **Constitutional Interpretation by Non-Judicial Officials.** From Chief Justice Marshall's reasoning that courts must interpret the Constitution as a necessary incident of their function of deciding cases, does it follow that other public officials have a similar responsibility to interpret the Constitution in discharging their functions? If so, won't serious conflicts inevitably result? These questions are far more complex and various than their grammatical form might suggest. In assessing the following expressions of views, try to identify the precise question of constitutional responsibility that triggered their utterance.

(a) President Franklin D. Roosevelt began a much-quoted letter of July 6, 1935, to Congressman Samuel B. Hill concerning constitutional questions surrounding a bill to regulate the bituminous coal mining industry with a brief argument that the measure was in fact constitutional. See 4 Public Papers and Addresses of Franklin D. Roosevelt 297-98 (1938). The letter concluded:

"Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests, for the simple fact that you can get not ten but a thousand differing legal opinions on the subject. But the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality. A decision by the Supreme Court relative to this measure would be helpful as indicating, with increasing clarity, the constitutional limits within which this Government must operate. * * * * I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation."


(b) In justifying his veto of a bill to continue the Bank of the United States, President Andrew Jackson maintained that the Bank was unconstitutional, despite Supreme Court decisions favorable to its constitutionality: Richardson, Messages and Papers of the Presidents 576, 582 (1896). In his message of July 10, 1832, Jackson said:

"If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the coordinate authorities of this Government. * * * Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. 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. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

(c) In his first inaugural address, Abraham Lincoln rejected the position that the Dred Scott decision conclusively deprived the federal government of power to prohibit expansion of slavery into federal territories (6 id.; at 5, 9):

"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 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 their 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 decision to political purposes."

Following the Supreme Court's decision in Roe v. Wade, 410 U.S. 113 (1973), a number of state legislatures enacted abortion-restricting measures, at least some of which seemed intended to provoke a reconsideration of Roe. Was it acceptable for legislators to act on the premise that Roe was constitutionally mistaken? See Wellington, Interpreting the Constitution 142-58 (1990). For public officials to resist school desegregation after Brown v. Board of Education, 347 U.S. 483 (1954)? For Lincoln to treat Dred Scott as binding on the parties but not as authoritatively resolving all of the constitutional issues that the decision addressed? What are the relevant differences, if any, among these cases?

See Wechsler, The Court and the Constitution, 65 Colum.L.Rev. 1001, 1008 (1965), building on the excerpt from Lincoln's First Inaugural quoted above: "[N]ote the purpose of the limitation [there] stated: to allow for the 'chance' that the decision 'may be overruled and never become a precedent for other cases.' When that chance has been exploited and has run its course, with reaffirmation rather than reversal of decision, has not the time arrived when its acceptance is demanded, without insisting on repeated litigation? The answer here, it seems to me, must be affirmative, both as the necessary implication of our constitutional tradition and to avoid the greater evils that will otherwise ensue." See also Bickel, supra, at 254-72, and especially at 261.

(d) In Cooper v. Aaron, 358 U.S. 1 (1958), the Supreme Court was asked to postpone the implementation of a court-approved desegregation program for Little Rock, Arkansas, because of extreme public hostility. Previously, the Governor had called out the National Guard to prevent black students from entering Little Rock Central High School and, though these troops were later withdrawn in response to a federal injunction against the Governor, black students were thereafter able to attend only under federal military protection. Though the School Board had been actively seeking to implement desegregation, it sought a two and one-half year postponement of the court-approved program. The District Court granted relief, but the Court of Appeals reversed. The Supreme Court affirmed, insisting that "[t]he constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature" (p. 16).

The opinion of the Court, captioned in an extraordinary fashion with the names of all nine justices individually, continued (pp. 17-19):

"What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the Brown case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

"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, 1 Cranch 137, 177, 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.'

Chief Justice Marshall spoke for a unanimous Court in saying that: If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery * * *.' United States v. Peters, 5 Cranch 115, 136. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, 'it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases * * *.' Sterling v. Constantin, 287 U.S. 378, 397–398."

Cooper v. Aaron involved the integrity of a court order, and the Court's language and result are therefore consistent with President Lincoln's position, Paragraph (c), supra. Does Marbury support any broader position concerning the pre-eminence of the Court's power of constitutional exposition? Are any broader assertions warranted?

(e) In United States v. Nixon, 418 U.S. 683 (1974)(the "Watergate" tapes case, in which a subpoena directed to the President was upheld), the Court dealt with the contention that the President's claim of privilege was not subject to judicial review by saying (p. 703): "In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel * * * reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of Marbury v. Madison * * * that '[i]t is emphatically the province and duty of the judicial department to say what the law is.'" The opinion then referred to a number of cases—admittedly none directly on point—"in which the power of judicial review had been exercised, and concluded this part of its discussion (p. 705): "We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case. Marbury v. Madison * * * "

Was Marbury a sufficient response to the contention? Would it have been inconsistent with Marbury for the Court to hold that a President's determination that certain material was privileged had to be accepted as conclusive by the courts? Recall that sometimes the Court accepts determinations by other branches as to compliance with procedures for the enactment of a statute or as to the identity of the "established" government of a foreign country.

12. The references included the steel seizure case, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Powell v. McCormack, 396 U.S. 486 (1969); and a series of cases interpreting congressional mem-
SUPREME COURT APPELLATE JURISDICTION -- NEW

PUBLIC LAW 100-352 (S. 952); June 27, 1988

REVIEW OF CASES BY THE SUPREME COURT

For Legislative History of Act, see Report for P.L. 100-352 in U.S.C.C. & A.N. Legislative History Section.

An Act to improve the administration of justice by providing greater discretion to the Supreme Court in selecting the cases it will review, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. Section 1252 of title 28, United States code, and the item relating to that section in the section analysis of chapter 81 of such title, are repealed.

REVIEW OF DECISIONS INVALIDATING STATE STATUTES

SEC. 2. (a) Section 1254 of title 28, United States Code, is amended by striking out paragraph (2) and redesignating paragraph (3) as paragraph (2).

(b) The section heading for section 1254 of such title is amended by striking out "appeal;".

(c) The item relating to section 1254 in the section analysis of chapter 81 of title 28, United States Code, is amended by striking out "appeal;".

REVIEW OF STATE COURT DECISIONS INVOLVING VALIDITY OF STATUTES

SEC. 3. Section 1257 of title 28, United States Code, is amended to read as follows:

"§ 1257. State courts; certiorari

"(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by a writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

"(b) For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."
§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented.

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

REVISION NOTES


Section consolidates sections 346 and 347 of title 28, U.S.C., 1940 ed.

Words “or in the United States Court of Appeals for the District of Columbia” and “or of the United States Court of Appeals for the District of Columbia” in sections 346 and 347 of title 28, U.S.C., 1940 ed., were omitted. (See section 41 of this title.)

The prefatory words of this section preceding paragraph (1) were substituted for subsection (c) of said section 347.

The revised section omits the words of section 347 of title 28, U.S.C., 1940 ed., “and with like effect as if the case had been brought there with unrestricted review”, and the words of section 346 of such title “in the same manner as if it had been brought there by appeal”.

The effect of subsections (1) and (3) of the revised section is to preserve existing law and retain the power of unrestricted review of cases certified or brought up on certiorari. Only in subsection (2) is review restricted.

Changes were made in phrasingology and arrangement.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term “highest court of a State” includes the District of Columbia Court of Appeals.


REVISION NOTES


The revised section applies in both civil and criminal cases. In Twitchell v. Philadelphia, 1868, 7 Wall. 321, 19 L.Ed. 223, it was expressly held that the provisions of section 25 of the Judiciary Act of 1789, 1 Stat. 85, on which title 28, U.S.C., 1940 ed., § 344, is based, applied to criminal cases, and many other Supreme Court decisions impliedly involve the same holding inasmuch as the Court has taken jurisdiction of criminal cases on appeal from State courts. See, for example, Herndon v. Georgia, 1935, 35 S.Ct. 794, 295 U.S. 441, 79 L.Ed. 1530 and Ashcroft v. Tennessee, 1944, 64 S.Ct. 921, 322 U.S. 143, 88 L.Ed. 1192.

Provision, in section 344(b) of title 28, U.S.C., 1940 ed., for review and determination on certiorari “with the same power and authority and with like effect as if it had been brought up by appeal” was omitted as unnecessary. The scope of review under this section is unrestricted.

Words “and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied,” in said section 344(b), were omitted as surplusage.

The last sentence in said section 344(b) relating to the right to relief under both subsections of said section 344, was omitted as unnecessary.

Changes were made in phrasingology.